UK SUPREME COURT HIGHLIGHTS PAROCHIAL ROADBLOCKS TO COOPERATIVE CROSS-BORDER INSOLVENCY IN *RUBIN V. EUROFINANCE SA*

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ABSTRACT

This article examines the recent UK Supreme Court case that struck a blow to bankruptcy trustees and plaintiffs seeking to recover ill-gotten and fraudulently transferred funds held abroad. The case effectively barred UK courts from recognizing foreign bankruptcy judgments, and will prove persuasive to similarly situated courts around the globe. In its ruling, the brand new court narrowly interpreted both British common law and the UK enactment of the "cooperative" Model Law on Cross-Border Insolvency to maximize its own authority relative to foreign judiciaries and domestic political institutions.

The decision in Rubin v. Eurofinance SA was litigated over a small matter, but the decision guides strategic decisions in multi-billion-dollar insolvency cases. The case was partly financed on appeal by litigants of the remnants of the infamous Madoff ponzi scheme. The goal was to test the boundaries of the highly influential British common law, as well as the Model Law, in furthering international cooperation that could streamline complex bankruptcy proceedings. In a blow to the Madoff trustee and victims, the decision effectively foreclosed the possibility of centralizing the proceedings.

This article argues that the decision provides a highly effective precedent as well as an important signpost of "territorialist" policy at the forefront of cross-border insolvency jurisprudence. The UK Supreme Court's careful reasoning and its implicit political motives provide an excellent example of the practical limits to the high-minded goals of the international cross-border insolvency regime.

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INTRODUCTION

In late 2008, when Bernard Madoff's ponzi scheme collapsed, over sixty billion dollars in investor holdings disappeared.[2] Much of that money had never existed in the first place: only $17.3 billion was ever invested; as investigators quickly discovered, the twenty years of balance

[2] Diana B. Henriques, *Top Courts in U.S. and Great Britain Enter the Madoff Fray*, N.Y. TIMES (Jun. 21, 2012), http://dealbook.nytimes.com/2012/06/20/top-courts-in-u-s-and-britain-enter-the-madoff-fray/?_php=true&_type=blogs&_r=0.

sheets showing incredibly high returns were nothing but lies.[3] Federal agents arrested Madoff and began court proceedings to liquidate what remained of the scheme and salvage what remained for the defrauded investors.[4]

Irving Picard, the court-appointed trustee tasked with representing the defrauded investors in the proceedings, needed to return as much money as possible to his constituents.[5] Fortunately, there was a procedure in place: the "avoidance" power that allowed a bankruptcy court to nullify fraudulent transactions or those granting an unfair preference to certain creditors, clients, etc.[6] Using the avoidance power and other legal options, Picard and the US government have so far "clawed back" about eleven billion dollars held by Madoff associates and their "feeder" funds that had assisted in the scheme.[7]

As Picard discovered more and more funds hidden beyond the reach of US law, however, the legal complexities grew.[8] Madoff and his associates had given funds to citizens and entities based all over the world.[9] It was not clear that the British government, for instance, would allow huge sums of money, regardless of its provenance, to be taken from British citizens and removed from British territory without some interjection by the British legal system.[10]

However, bankruptcy laws did exist to facilitate such transactions.[11] Years earlier, both the US and UK passed versions of the Model Law on Cross-Border Insolvency (the "Model Law"), a UN document meant to encourage cooperation in this type of situation.[12] The Model Law enacted in the UK, however, would not force UK courts to accept a

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3 Andrew Ross Sorkin, *Madoff Case is Paying Off for Trustee ($850 an Hour)*, N.Y. TIMES (May 29, 2012), http://dealbook.nytimes.com/2012/05/28/madoff-case-is-paying-off-for-trustee-850-an-hour/.

4 *See* Henriques, *supra* note 1.

5 Sorkin, *supra* note 2.

6 *See* 11 U.S.C. §§ 544, 547–48 (2006) (articulating avoidance powers); *see also* 11 U.S.C. § 323(b) (2006) (allowing the trustee to sue and be sued for damages). In this Article, "bankruptcy" will refer to any type of formal insolvency proceeding in any country.

7 *See* Henriques, *supra* note 2.

8 *See id.*

9 *Id.*

10 *See id.*

11 *See* Cross-Border Insolvency Regulations, 2006, c. 1 (U.K.) [hereinafter CBIR] (documenting procedures and policy for coordination of bankruptcy cases with foreign courts); 11 U.S.C. §§ 1501–1532 (2006) (same).

12 *See* Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, G.A. Res. 52/158, Annex, U.N. Doc. A/RES/52/158 (Jan. 30, 1998) [hereinafter Model Law]; *infra* note 50 and accompanying text (describing enactment history).

US avoidance judgment or even recognize US litigation meant to establish the legitimacy of that judgment.[13]

Ideally, Picard could sue the Madoff associates and feeder funds in the US, and hope for recognition of the US judgments in the UK and elsewhere.[14] This would save substantial sums of money.[15] A less appealing option was to go to the home nation of each entity holding Madoff funds and litigate there, exponentially increasing the costs, changing the legal playing field, and foregoing home-field advantage.[16] In order to make his decision, Picard needed to know if foreign courts would look favorably upon judgments from US courts enforcing avoidance actions and other provisions facilitating "claw-back" of funds for victims.[17]

Fortunately, at this time an important case was winding its way through the British legal system.[18] This case, *Rubin v. Eurofinance SA,* was similar enough to the Madoff cases to provide a binding precedent.[19] In an added twist, *Rubin* would be the first case of its kind to be decided by the UK's brand new Supreme Court, only recently divorced from the parliamentary House of Lords.[20] Picard intervened in the *Rubin* litigation, and pushed it to the UK Supreme Court in search of a precedent that would guide his planning efforts.[21]

Rubin was argued over a matter of some tens of millions of dollars, but much more was at stake.[22] The *Rubin* decision created a binding precedent that will alter the flow of billions of dollars back to Madoff victims.[23] Moreover, the decision had the potential to influence courts all over the world as they chose whether or not to cooperate in the Madoff

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13 *See* CBIR, *supra* note 10, art. 25. Critically, the U.K. adopted the article with "may" replacing the Model Law's "shall." *See infra* notes 1717 and accompanying text.

14 *See generally* Henriques, *supra* note 2.

15 *See* Sorkin, *supra* note 3. Importantly, Picard's fees are paid by the Securities Investor Protection Corporation, a federally mandated securities oversight body, not by Madoff victims themselves. *Id.*

16 *See generally* Henriques, *supra* note 2. By "home-field advantage" I refer simply to the parties' familiarity with the relevant legal system, not to any statistical advantage in litigating in a given country.

17 *See id.*

18 *See id.*

19 *See id.*

20 *See id.*

21 *See id.*

22 *See* Rubin v. Eurofinance SA, [2012] UKSC 46, [57] (noting ten million dollars in trustee holdings when defendants' scheme folded); *infra* notes 23–25 and accompanying text. *But see* Henriques, *supra* note 2 (noting creditor claims totaling $160 million).

23 *See* Henriques, *supra* note 2.

bankruptcies-and future cases.[24] The case also helped to forge a new path for UK courts at home and abroad.[25]

Rubin was decided in favor of the defendant British corporation.[26] As such, it was a setback to Picard, likely forcing the Madoff trustee to build legal teams and litigate avoidance actions in numerous locations abroad instead of containing the cluster of lawsuits to a single US bankruptcy court.[27] This Article argues that *Rubin* was nonetheless valuable to Picard and other bankruptcy practitioners for its transparent analysis of British common law, which will be easily translatable to the legal systems of several world financial centers.[28] The UK Supreme Court's opinion identifies clear political and legal goals which will be followed by lower courts in the UK and British common law countries.[29] Furthermore, the nascence of the Court and its recent history help to explain the Court's motives and the unlikelihood that *Rubin* will be reversed by common law or statute.[30]

Part I of this Article provides background information on the global cross-border insolvency regime,[31] the importance of *Rubin* within that regime,[32] and the facts and history of *Rubin*.[33] Part II analyzes the UK Supreme Court's interpretation of statutory and common law in *Rubin*.[34] Part III discusses the practical implications of the Court's opinion.[35]

I. *RUBIN* AND THE NEW INTERNATIONAL REGIME

A. INTERNATIONAL INSOLVENCY AND THE MODEL LAW

Over the past thirty years, businesses have become increasingly multinational.[36] As of 2011, the 100 largest transnational corporations

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[24] *See id.*

[25] *See infra* notes 228–267 and accompanying text.

[26] *Rubin*, [2012] UKSC 46, [177].

[27] *See supra* notes 14–17 and accompanying text.

[28] *See infra* Part III.

[29] *See infra* Parts III.A, III.B.

[30] *See infra* Part III.B.

[31] *See infra* Part I.A.

[32] *See infra* Part I.B.

[33] *See infra* Part I.C.

[34] *See infra* Part II.

[35] *See infra* Part III.

[36] *Developments in the Law — Extraterritoriality*, *Chapter 15 and Cross-Border Bankruptcy*, 124 HARV. L. REV. 1226, 1292 (2011) (detailing expansion of corporate holdings in countries other than those where the corporations are headquartered); Megan R. O'Flynn, *The Scorecard So*

("TNCs") earned revenue representing over ten percent of the world's gross domestic product ("GDP").[37] By comparison, in 1982, all TNCs combined produced a mere $600 billion of output or about five percent of GDP.[38]

The international political community observed and encouraged the trend towards business globalization.[39] In the 1960s, the United Nations began encouraging cross-border trade with the founding of UNCITRAL, a legislative body meant to reform international commercial law.[40] By the 1990s, UNCITRAL faced the inevitability of insolvencies resulting from the increasing multinationalism of business.[41] Without a consistent procedure for coordinating these insolvencies, important property protections granted by bankruptcy courts in one country might

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Far: Emerging Issues in Cross-Border Insolvencies Under Chapter 15 of the U.S. Bankruptcy Code, 32 NW. J. INT'L L. & BUS. 391, 394 (2012).

[37] *See World Factbook* (2013), CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html (last visited Apr. 5, 2013); United Nations Conference on Trade and Development, *World Investment Report 2012*, U. N., 25 (June 2012) (table I.9), *available at* http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf . "Foreign" means any country other than that in which the business is headquartered. *Id.*

[38] United Nations Conference on Trade and Development, *World Investment Report 2009*, U. N., 18 (July 2009) (table I.6) [hereinafter World Investment Report], http://unctad.org/en/docs/wir2009_en.pdf; *see Developments in the Law*, *supra* note 36, at 1292.

[39] *See Facts About UNCITRAL*, U.N. COMM. ON INTERNATIONAL TRADE LAW, http://www.uncitral.org/pdf/english/uncitral-leaflet-e.pdf; s*ee, e.g.,* Model Law, *supra* note 11, at 1 (noting that fair and internationally harmonized legislation on cross-border insolvency would contribute to the development of international trade and investment).

[40] *See Facts About UNCITRAL*, *supra* note 38.

[41] *See* Model Law, *supra* note 11, at 1. Cross-border insolvencies were not of themselves a new phenomenon. *See Rubin*, [2012] UKSC 46, [14] (noting international insolvencies dating back to the 1930s). However, the growing acceptance of bankruptcy in mainstream business and consumer life hastened the need for statutory reform. *See* Ed Flynn & Phil Crewson, *Chapter 11 Filing Trends in History and Today*, 28 ABI J. 14 (2009) (noting the roughly 1,500% increase in annual bankruptcy filings between 1979 and 1992). For instance, the Bankruptcy Act of 1978, which replaced decades of American common law, instituted an efficient and reliable regime governing liquidation and reorganization of a wide range of entities. *See* George W. Gekas, *Statement to the Dickinson Law Review Bankruptcy Symposium*, 102 DICK. L. REV 859, 861–62 (1998) (noting the widespread use of bankruptcy as a stigma-free planning tool). As a result, bankruptcy became a more important component of business strategy in the United States and abroad. *See, e.g.,* Flynn & Crewson, *supra,* at *1; *see also Company Liquidations in England and Wales, 1960 to Present,* INSOLVENCY SERV. (2011), http://www.insolvencydirect.bis.gov.uk/otherinformation/statistices/201101 (noting tenfold increase in business liquidations in England). In particular, large corporations began to use the reorganization provisions of modern bankruptcy codes to increase efficiency, settle debts, and preemptively compartmentalize potentially crushing liabilities. *See, e.g.,* Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 Duke L.J. 1405, 1414–25 (2000) (discussing the strategic value of the notorious 1987 bankruptcy filing that allowed Texaco to settle its liability to Pennzoil).

not be recognized by courts of another country.[42] As a result, if a debtor failed to file for bankruptcy protection in each country where it held assets, assets in those countries would be subject to seizure by the first creditor to file suit—a state of affairs reviled by debtors and creditors alike for its unfairness, and known colloquially as the "grab rule."[43] Likewise, a discharge of debts by the courts of one country would not be particularly meaningful in a different country where the debtor held debts and assets.[44]

There was a clear need for international cooperation.[45] At first, bankruptcy courts of various countries confronted with a multinational proceeding coordinated on an ad hoc basis in accordance with the needs of parties.[46] To the extent statutory assistance or approval was needed, legislatures adopted code provisions granting courts enormous flexibility.[47]

In 1997 UNCITRAL passed the Model Law following five years of drafting and consultation with the scholarly and judicial communities.[48] The United Nations General Assembly then passed a resolution approving the Model Law and an accompanying Guide to Enactment (the "Guide").[49] Several nations have since enacted versions of the Model Law, including the US in 2005, and the UK in 2006.[50]

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[42] Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 460 (1991).

[43] Evelyn H. Biery et al., *A Look at Transnational Insolvencies and Chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 47 B.C. L. Rev. 23, 25–26 (2005); Westbrook, *supra* note 41, at 460.

[44] *See* Jay Lawrence Westbrook, *Chapter 15 and Discharge*, 13 AM. BANKR. INST. L. REV. 503, 507 (2005).

[45] *See* Model Law, *supra* note 11, at 1.

[46] *See, e.g.*, Canadian S. Ry. Co. v. Gebhard, 109 U.S. 527, 539 (1883) (noting that an entity's activities in a foreign state may give rise to validity of cooperation with courts of that state, and that such is particularly necessary in bankruptcy cases); *see also* 11 U.S.C. § 304 (2000), *repealed by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 802, 119 Stat. 23, 146 (2005).

[47] *See, e.g.,* 11 U.S.C. § 304 (repealed 2005).

[48] O'Flynn, *supra* note 36, at 394–95.

[49] Model Law, *supra* note 11, at 1.

[50] *Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)*, U.N. COMM'N ON INT'L TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited Mar 14, 2014).

B. HISTORY AND POLICY OF THE MODEL LAW

i. Policy Goals of the Model Law

The Model Law developed over a decade of negotiations and discussions of policy concerns.[51] When UNCITRAL began deliberations on a potential model insolvency law, it faced barriers to the development of a unified international process.[52] Many local insolvency regimes at the time remained inadequate to process the complex insolvencies already arising.[53] In those countries with sophisticated bankruptcy regimes, the degree of access to be granted to foreign representatives to local proceedings became a prominent issue.[54] In even the most advanced regimes, insufficient development of judicial and legislative infrastructure led to unpredictability, delays, and high transaction costs of international proceedings.[55]

Given these concerns, UNCITRAL enacted the Model Law, which favors consistency and efficiency by granting administrative powers over the debtor's estate to a central authority.[56] The Model Law encourages debtors and creditors to then file ancillary proceedings in foreign countries.[57] Issues in these ancillary proceedings can be litigated and assets can be administrated in a manner consistent with the laws of the debtor's "centre of main interests" ("COMI").[58]

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[51] *See infra* Part I.B.

[52] O'Flynn, *supra* note 36, at 395.

[53] *Id.*

[54] *Id.*

[55] Westbrook, *supra* note 41, at 458 (noting that the "deplorable situation increases the costs of all transnational business activity").

[56] *See* Model Law, *supra* note 11, at 1–3. The language of the Resolution includes exhortations for an "internationally harmonized model" and "cooperation between the courts and other competent authorities of this State and foreign States," as well as definitions of "[f]oreign main proceeding[s]" as opposed to "[f]oreign non-main proceeding[s]." *Id.* The structure of the system described by the Model Law is thus one of centralized administration. *See id.*; *see also Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, UNCITRAL, 30th Sess., U.N. Doc. A/CN.9/442, at 5–7 (Dec. 19, 1997) [hereinafter *Guide to Enactment*] (describing the purpose of the Model Law). "Debtor's estate" refers to the legal entity created under most insolvency regimes that collects the bankrupt party's property for distribution to creditors. *See, e.g.*, 11 U.S.C. 541(a) (2006) (Establishing a debtor's estate upon commencement of a bankruptcy case under United States law).

[57] *See* Model Law, *supra* note 11, arts. 15–27.

[58] *See id.* art. 2.

Scholars describe the Model Law as approaching the ideal of "universalism."[59] A truly universalist regime would require equal distribution of the debtor's assets to creditors, without regard to any territorial borders.[60] Universalism is antithetical to "territorialism," the view that courts in different jurisdictions should litigate claims and administrate estates in accordance with local law.[61] Territorialism is potentially attractive when substantive law differs between jurisdictions—as it very often does.[62] Proponents of territorialism point to the practical difficulties of figuring out the location of a debtor's COMI and obtaining cooperation between sovereign nations.[63] Furthermore, courts are notoriously wary of "forum shopping" that produces inconsistent results depending on the jurisdiction in which parties litigate their claims.[64]

At least until recently, scholarly consensus held that the ideological battles of universalist and territorialist scholars had yielded in practice to "modified universalism."[65] Modified universalism describes the compromise by which courts applying the Model Law seek to cooperate

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[59] *See, e.g.*, Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 716 n.23 (noting that the Model Law, as enacted in 11 U.S.C. §§ 1501–32, "represents an embrace of universalism") [hereinafter *Chapter 15 at Last*].

[60] *See id.* at 715–16.

[61] *See id.* Westbrook states that territorialism is "the traditional approach by which each court in a country in which assets are found seizes them (the 'grab rule') and uses them to pay local creditors." *Id.* at 715.

[62] *See, e.g.,* Adrian Walters & Anton Smith, *'Bankruptcy Tourism' under the EC Regulation on Insolvency Proceedings: A view from England and Wales*, 19 INT'L INSOLVENCY REV. 181, *12 (2010) (describing the phenomenon of forum shopping for favorable bankruptcy law in the UK); *see also* Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2216–17 (2000) (stating that universalism can work only in a world with essentially uniform laws governing bankruptcy and priority among creditors, and that such a world does not exist).

[63] LoPucki, *supra* note 61, at 2217.

[64] *See* John A. E. Pottow, *The Myth (and Realities) of Forum Shopping in Transnational Insolvency*, 32 BROOK. J. INT'L L. 785, 786 nn.9–11 (2007) (citing 9th Circuit Bankruptcy Judge Samuel Bufford as an authority on forum shopping problems and potential doctrinal responses). It is unclear to what extent courts, as opposed to scholars, struggle with the forum shopping issue. *See id.* Forum shopping concerns are not unique to a universalist regime, however; some scholars argue that territorialism exacerbates the problem. *See id.* at 787.

[65] *Compare Chapter 15 at Last*, *supra* note 8, at 716 (stating that "[u]niversalism is now characterized as modified universalism, a pragmatic approach . . ."), *with* LoPucki, *supra* note 62, at 2219 (stating that territorialism is the status quo of international bankruptcy). LoPucki writes that "[i]n a territorial system . . . 'parallel' bankruptcy proceedings are initiated in each country in which the corporate group has substantial assets. Each court appoints a 'representative' for the estate of each entity filing in its jurisdiction. Those representatives then negotiate a solution." LoPucki, *supra* note 62, at 2219. LoPucki's description accords with the Model Law. *See id.*; Model Law, *supra* note 11, arts. 9–32. In other words, Westbrook describes the current regime as motion towards universalism, and LoPucki describes it as motion away from territorialism. *See* LoPucki, *supra* note 62, at 2219; *Chapter 15 at Last*, *supra* note 58, at 716.

with foreign jurisdictions without disregarding the legal rules meant to safeguard their sovereignty and the essential rights of their own citizens.[66] In other words, it is a pragmatic, step-by-step approach to universalism that employs the principles and structure demarcated in the Model Law.[67]

ii. Language, Proceedings, and Judgments

The Model Law is a guideline that requires widespread enactment and interpretation for the development of an effective cross-border insolvency regime.[68] Article 6 of the Model Law allows courts to deviate from the Model Law if an action governed by the law would be "manifestly contrary to the public policy" of the state.[69] Article 7 specifically denies any limitations on courts to provide assistance to foreign courts beyond that recommended by the Model Law.[70] Interpreted liberally, Articles 6 and 7 give courts free reign to cooperate or not cooperate with foreign jurisdictions as they see fit.[71]

The Model Law also guides courts' interpretations with regard to the promotion of "uniformity in its application and the observance of good faith."[72] The seeds of conflict, however, are apparent in such a statement.[73] Article 8 reminds courts that conflicts may arise between the good faith duty to uphold the public policy of the state and the duty to the international community to provide predictable and cooperative adjudication on international insolvency matters.[74]

The Model Law speaks little to the particularities of such conflicts.[75] Proponents of universalism tend to point to three articles in particular that might be applied: Articles 21, 25, and 27.[76] Read together, these three articles, described below, seem to give courts the authority

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66 *See Chapter 15 at Last*, *supra* note 58, at 716.

67 *Id.*

68 *See* Model Law, *supra* note 11, arts. 6–7 (noting that courts have carte blanche to contradict the Model Law as necessary for public policy); *cf.* Pirates of the Caribbean: the Curse of the Black Pearl (Walt Disney Studios Motion Pictures 2003).

69 Model Law, *supra* note 11, art. 6.

70 *Id.* art. 7.

71 *See id.* arts. 6–7.

72 *Id.* art. 8.

73 *See id.* arts. 6, 8.

74 *See id.* art. 8.

75 *See id.* arts. 6–8, 21, 25, 27.

76 *See, e.g.*, In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 333 (S.D.N.Y. 2008); *Rubin*, [2012] UKSC 46, [133]-[144].

and obligation to enforce universalist principles.[77] It is unclear whether the Model Law endows courts with new powers to enforce an international universalist insolvency regime, but if it does, such powers are conferred in the following articles.[78]

Article 21 of the Model Law provides that "upon recognition of a foreign proceeding . . . the court may . . . grant any *appropriate relief*" such as assistance to another court, recognition of judgments, etc.[79] The article provides a non-exhaustive list of such instances.[80] This discretionary relief is also subject to Article 22, which grants the court the power to modify or terminate requested relief in the interests of propriety or equity.[81]

Article 25(1) states that a court "*shall* cooperate to the maximum extent possible with foreign courts or foreign representatives."[82] The word "shall" implies that the Model Law has teeth: this seems to be an exhortation to enforce foreign directives.[83] Some countries, however, have effectively neutralized "shall" either by enacting the law with different language or by using Article 8 to override any perceived mandate.[84] Without the encouragement implied by "shall," Article 25 in practice merely reinforces the Model Law's grant of authority to courts in the home state to communicate and cooperate with foreign courts.[85]

Article 27 provides that the cooperation referred to in Article 25 may be implemented by "any appropriate means," including a non-exhaustive list of means.[86] Article 27 implies a power to take affirmative action.[87] It is joined by text from the Guide stating that the Model Law gives enacting states the right to align relief in the home state with that

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77 *Rubin*, [2012] UKSC 46, [133]-[144].

78 *See id.*

79 Model Law, *supra* note 11, art. 21(1) (emphasis added).

80 *See id.* (listing instances of appropriate relief including a stay of actions and proceedings against the debtor and its assets, examination of witnesses, and entrusting of the estate to a foreign representative); *see also Guide to Enactment*, *supra* note 56, at ¶¶ 154, 156.

81 *See* Model Law, *supra* note 11, art. 22.

82 *See id.* art. 25 (emphasis added). *But see* CBIR, *supra* note 10, sch. 1, art. 25; *infra* notes 170, 228-230 and accompanying text.

83 *See* Model Law, *supra* note 11, art. 25 (emphasis added). *But see* CBIR, sch. 1, art. 25; *infra* notes 170, 228–230 and accompanying text.

84 *See infra* notes 170, 228–230 and accompanying text.

85 *See* Model Law, *supra* note 11, art. 25. Prior to passage of the Model Law and enactment by legislatures, most bankruptcy courts viewed themselves as already possessing such authority. *See, e.g.*, 11 U.S.C. § 304 (repealed 2005) (granting U.S. courts authority to cooperate with foreign courts on cross-border insolvency matters).

86 Model Law, *supra* note 11, art. 27.

87 *See id.*

granted in the recognized foreign proceeding.[88] Nevertheless, the text of the article makes no mandate and states no actual powers of enforcement.[89]

Before 2012, only a few courts and scholars broached the issue of enforcement of foreign judgments in an insolvency context.[90] Those in favor of enhanced cooperation pointed to the goal of uniformity stated by the Model Law.[91] Those opposed pointed to the lack of specific language in the Model Law and the document's procedural focus.[92] The argument was largely theoretical until the financial crisis of 2008-09, after which billions of dollars in cross-border insolvency litigation orders would require international enforcement cooperation.

Prior to the financial crisis the UK enacted a version of the Model Law—the Cross-Border Insolvency Regulations of 2006 (CBIR)—but like the US, the UK continued to rely on the common law for conflict of law issues in bankruptcy.[93] After the crisis, the common law in the cross-border insolvency context evolved rapidly.[94] Appellate cases seemed to

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88 *Guide to Enactment*, *supra* note 55, at ch. 4, ¶ 20(b).

89 *See* Model Law, *supra* note 11, arts. 1–32.

90 *See, e.g.*, Susan Power Johnston & Martin Beeler, *Solvent Insurance Schemes Should Not Be Recognized [Reprised]*, 17 J. BANKR. L. & PRAC. 6 Art. 5 (2008) (discussing a spate of insolvency cases arising in the U.K. that were being recognized by U.S. courts despite arguable violations of U.S. bankruptcy and contract law policies); Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK J. INT'L. L. 499, 499-500 (1991) (noting the legal difficulties of avoidance actions in cross-border context). The scope of the background section of this Article, for reasons of space, will be limited to the U.S. and U.K.

91 *See, e.g., Rubin*, [2012] UKSC 46, [141] (mentioning that the respondents argued that "recognition and enforcement of the judgments of a foreign court is the paradigm means of co-operation with that court").

92 *See, e.g., id.* [142]-[143] (noting that the Model Law as enacted in the U.K. fails to mention enforcement of foreign judgments, and that the UN had tried and failed to address the topic separately).

93 *See infra* note 1773 and accompanying text. In the United States, courts have noted that the key component of "comity"—meaning, in general, deference to the actions of a foreign jurisdiction—is whether a grant of comity would meet fundamental concerns of fairness. *See* In re Metcalfe & Mansfield Alternative Investments, 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010). Bankruptcy courts in international actions governed by the Model Law, enacted as Chapter 15 of the Bankruptcy Code, therefore apply non-bankruptcy U.S. jurisprudence for conflict of laws. *See id.* at 698–700. In other words, American courts, bankruptcy or otherwise, defer to foreign rules of civil procedure in determining the enforceability of judgments within the United States. Hilton v. Guyot, 159 U.S. 113, 202–03 (1895); *Metcalfe*, 421 B.R. at 698–700; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 96 (1971) (stating the common law rule corresponding to *Hilton*). This practice comports with the principles of cooperation espoused in the Model Law and its enacted version. *See Metcalfe*, 421 B.R. at 698–700. It should not be viewed, however, as an application of the Model Law to enforce foreign judgments. *See Rubin*, [2012] UKSC 46, [144].

94 *See Rubin*, [2012] UKSC 46, [35] (noting that *Cambridge Gas Transportation Corp. v. Official Committee of Unsecured Creditors of Navigator Holdings, plc* and *In re HIH Casualty and Gen-*

establish a new category of jurisdictional consideration, neither *in rem* nor *in personam*, to be applied only to insolvency cases.[95] The UK courts' reasoning suggested a desire to act in accordance with principles of universalism.[96]

In *Cambridge Gas Transportation Corp. v. Official Committee of Unsecured Creditors of Navigator Holdings, plc*, the UK Privy Council held that a US Chapter 11 reorganization plan could be carried into effect in the Isle of Man because the new bankruptcy jurisdiction category gave the Manx courts power to recognize it.[97] The court noted that unlike judgments *in rem* and *in personam*, which are "judicial determinations of the existence of rights," the purpose of bankruptcy proceedings "is to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established."[98] Furthermore, the court noted explicitly that principles of universality underlay common law principles of judicial assistance in international insolvency.[99]

In *In re HIH Casualty and General Insurance Ltd*, the Law Lords held that assets of insurance companies liquidated in Australia should be remitted from England.[100] Speaking for the House of Lords, renowned bankruptcy adjudicator Lord Hoffman delivered an eloquent speech in favor of universalism.[101] Lord Hoffman argued not only for universalism as the goal of the international insolvency regime, but also that English judges already viewed universalism as an operating princi-

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eral Insurance Ltd "have played such a major role in the decisions of the Court of Appeal"); *Cambridge Gas*, [2006] UKPC 26, [2007] 1 AC 508, [13]–[14] (appeal taken from Eng.); *HIH*, [2008] UKHL 21, [2008] 1 WLR 852, [49].

95 *See Rubin*, [2012] UKSC 46, [43]. "In rem" jurisdiction is limited to a particular piece of property. Black's Law Dictionary 929 (9th ed. 2009). "In personam" cases are those in which a court has jurisdiction over a particular party. *Id.* at 930. In essence, this line of cases created a third category, bankruptcy jurisdiction, wholly separate from either previous category. *See Rubin*, [2012] UKSC 46, [43].

96 *See Rubin*, [2012] UKSC 46, [19], [44].

97 *Id.* [43]. The Judicial Committee of the Privy Council is the court of final appeal for U.K. overseas territories and crown dependencies such as the Isle of Man. JUDICIAL COMM. OF THE PRIVY COUNCIL, http://www.jcpc.gov.uk/ (last visited May 5, 2013).

98 *Cambridge Gas*, [2006] UKPC 26, [13]–[14].

99 *Id.* [21]–[22].

100 *HIH*, [2008] UKHL 21, [82.

101 *Id.* [6] (noting that "English judges have . . . regarded as a general principle . . . that bankruptcy . . . should be unitary and universal. There should be a unitary bankruptcy proceeding . . . which receives worldwide recognition and it should apply universally to all the bankrupt's assets").

ple at common law.[102] Following *Cambridge Gas* and *HIH*, it seemed that bankruptcy cases in the UK had been accorded special status for purposes of enforcement of foreign orders.[103] Although some courts of the British Commonwealth disagreed with the holdings, most scholars and judges viewed the two cases as part of a trend towards universalism in UK bankruptcy jurisprudence.[104]

Despite their apparent similarities, a crucial difference existed between the two cases based on the national identity of the debtors.[105] While *HIH* concerned assets of debtor companies held in England, *Cambridge Gas* involved a dispute over shares of stock owned by a Bahamas-based subsidiary of a British Virgin Islands-based debtor company.[106] The debtor wholly owned the subsidiary through a third intermediate Bahamian holding company.[107] Because of that entity separation, the subsidiary was technically a third party to the US bankruptcy proceedings.[108] Thus, unlike *HIH*, the party at issue in *Cambridge Gas* never formally submitted to jurisdiction in the forum state such that a judgment would be enforceable under then-existing UK law.[109]

This distinction highlighted a major inconsistency in UK international bankruptcy jurisprudence.[110] Courts accepted that debtors based in a British Commonwealth nation could have their assets distributed equitably through a central administrative proceeding.[111] It was entirely different, however, for a third party to have its property confiscated due to actions in a foreign country which it had never entered and to whose jurisdiction it had not submitted.[112]

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[102] *Id.*

[103] *See Rubin*, [2012] UKSC 46, [35]–[53].

[104] *Id.* [53] (noting Irish Supreme Court decision not to adopt *Cambridge Gas*); *see id.* [16]–[19]; Rebecca R. Zubaty, *Rubin v. Eurofinance: Universal Bankruptcy Jurisdiction or a Comity of Errors?*, 111 COLUM. L. REV. SIDEBAR 38, 44–45 (2011) (noting the *Rubin* Appeals Court's uncertainty regarding subject matter jurisdiction in bankruptcy, and its ensuing deferral to principles of universalism).

[105] *See Rubin*, [2012] UKSC 46, [49].

[106] *See id.* [36]–[38], [49].

[107] *Id.* [36]–[37].

[108] *Id.* [47].

[109] *Id.*

[110] *See Rubin*, [2012] UKSC 46, [49].

[111] *See, e.g.*, *Rubin*, [2012] UKSC 46, [49]–[52].

[112] *See Rubin*, [2012] UKSC 46, [53], [132]; Zubaty, *supra* note 103, at 47 (asserting that if *Rubin* had been upheld by the U.K. Supreme Court, any defendant sued in a foreign bankruptcy court would have to make a personal appearance to defend itself, regardless of that court's basis for personal jurisdiction; furthermore, Zubaty asserts that this would expand bankruptcy court jurisdiction to include property belonging to third parties).

Cambridge Gas and *HIH*, which lower UK courts followed, set the stage for Supreme Court litigation on the issue of conflict of laws in cross-border insolvency.[113] In what would become a test-case for Madoff litigation a technically distinct entity would use its third-party status to challenge the enforceability in the UK of an order of a US court.[114] The UK Supreme Court would be forced either to accept a distinct new policy of comity in bankruptcy jurisprudence or take a leap backwards into pre-Model Law territorialism.[115]

C. RUBIN V. EUROFINANCE SA

i. The Facts

Eurofinance SA is a company incorporated in the British Virgin Islands and owned by Adrian Roman, a UK citizen.[116] In 2002, Eurofinance SA created a trust called "The Consumers Trust ("TCT").[117] TCT perpetrated a sales promotion scheme in the United States and Canada.[118] Under the scheme, TCT induced consumers to buy products and services by guaranteeing a voucher for 100% of the purchase price.[119] In order to cash the vouchers, customers were required to complete certain memory and comprehension tests administrated by TCT.[120] Completion of the tests was highly unlikely, and TCT retained cash sufficient to pay only six percent of the voucher purchasers.[121]

Numerous states filed suit against TCT based on consumer protection laws, and TCT ceased business operations after suffering an adverse judgment that reached into the millions of dollars.[122] By that time, TCT still retained nearly ten million dollars in US and Canadian bank

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[113] *See Rubin*, [2012] UKSC 46, [35].
[114] *Id.* [54]–[55].
[115] *Id.* [128] (noting that the lower court holding was "a radical departure from substantially settled law").
[116] *Rubin*, [2012] UKSC 46, [54].
[117] *Id.*
[118] *Id.* [55].
[119] *Id.*
[120] *Id.*
[121] *Id.* [56]–[57].
[122] *Id.* [58].

accounts.[123] TCT decided to file a bankruptcy proceeding under Chapter 11 of the US Bankruptcy Code.[124]

TCT applied to UK courts for the appointment of receivers to represent TCT in the American bankruptcy courts.[125] The UK courts granted the application, and in November 2005 the High Court appointed David Rubin and Henry Lan as receivers.[126] Rubin, Lan, and the trustees of TCT immediately filed for Chapter 11 bankruptcy protection in the Southern District of New York.[127] The US court approved a reorganization plan in late 2007 and ordered the receivers to apply in the UK for recognition of the proceedings as ancillary to the US Chapter 11 filing.[128] The receivers applied for such recognition in November 2008.[129]

Under the plan, the receivers had the power to prosecute causes of action against potential defendants.[130] After gaining approval of the plan in the US, but before applying for UK ancillary recognition, the receivers filed a complaint in the US bankruptcy court seeking to recover damages and avoid payments made by TCT to Eurofinance SA and others in premeditation of its bankruptcy filing.[131] The complaint asserted American federal and state law as well as Canadian law claims of breach of fiduciary duty, negligence, unjust enrichment, restitution, veil piercing, and fraud.[132] The defendants declined to defend themselves or par-

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123 *Rubin*, [2012] UKSC 46, [57].

124 *Id.* [60]. Chapter 11 allows an entity to reorganize itself and limit its liability to certain creditors, subject to creditors' approval of the plan of reorganization. *See* 11 U.S.C. §§ 1101–74 (2006). Theoretically, the plan of reorganization could apply to affect assets and debts in multiple jurisdictions, as was the case in *Cambridge Gas*. *See Rubin*, [2012] UKSC 46, [36]–[38]. Litigation over what assets and debts legally exist and could be subject to the plan, however, is also possible in U.S. bankruptcy proceedings. *See* FED. R. BANKR. P. 7001. This type of litigation could also require application in a foreign jurisdiction; such was the case in *Rubin*. *See Rubin*, [2012] UKSC 46, [36]–[38].

125 *Rubin*, [2012] UKSC 46, [59].

126 *Id.*

127 *Id.* [60].

128 *Rubin*, [2012] UKSC 46, [61]. Recognition of the proceedings was the functional basis for coordination between the two countries so that TCT's assets could be pooled and distributed evenly to creditors. *See id.*

129 *Id.* [65].

130 *See id.*

131 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].

132 *See id.* The fraudulent conveyance was independently sufficient to justify an avoidance action under the Bankruptcy Code. *See* 11 U.S.C. § 548(a)(1)(A) (2006). The other claims were simply for damages due to creditors as a result of the estate's misdeeds. *See* Complaint, *supra* note 130131, at 15–25.

ticipate in the action.[133] The US court granted default and summary judgment for the plaintiffs.[134]

ii.Procedural History and UK Supreme Court Holding

Following the default judgment, the receivers applied to the UK Chancery Division for recognition of the US Chapter 11 proceeding as a "foreign main proceeding" to grant the US COMI status, and also for enforcement of the US default judgment.[135] The Chancery Division recognized the proceedings—a formal process facilitating future cooperation—but declined to enforce the judgment on the grounds that the special category of bankruptcy jurisdiction recognized in *Cambridge Gas* and *HIH* was invalid.[136]

In 2011, the court of appeals overturned the Chancery Division.[137] In so doing, it reinforced the categorical bankruptcy exception to traditional English rules regarding private international law enforcement of *in personam* judgments articulated in *Cambridge Gas* and *HIH*.[138] In 2012, the UK Supreme Court found no grounds for enforcement of the US judgment through either (1) the common law[139] or (2) the Model Law.[140]

1.UK Common Law

a. The Dicey Rule

In its common law analysis, the Court adopted the "*Dicey* rule;" a UK common law rule stating four circumstances under which a non-UK court is considered to have valid jurisdiction to give a judgment *in personam* capable of enforcement in the UK.[141] Accordingly, UK courts

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133 *Id.*

134 *Id.* [64].

135 *Id.* [65].

136 *See Rubin*, [2012] UKSC 46, [66].

137 *See id.* [68].

138 *See Rubin*, [2012] UKSC 46, [89].

139 *See infra* notes 140–165 and accompanying text.

140 *See infra* notes 166–180 and accompanying text.

141 *Rubin*, [2012] UKSC 46, [7]. Lord Collins, who authored the *Rubin* majority opinion, edited the *Dicey* treatise and wrote the present version of the *Dicey* rule in 1993. *Id.* [8]. Note that because *Dicey* has never been expressly approved by the House of Lords or UKSC, it is not a rule per se; however, it has been espoused by those bodies in several cases and is considered highly persuasive. *Id.* [108].

will not enforce foreign judgments unless the defendant was either present in the forum when proceedings were instituted or voluntarily submitted to that forum's jurisdiction either prior to or during the proceedings.[142]

While the Court in *Rubin* saw convincing reasons that Eurofinance SA had submitted to US jurisdiction,[143] the Court nevertheless held that as a matter of law Eurofinance SA had not appeared in or submitted to jurisdiction in the adversary proceedings.[144] Because the parties had not argued the matter in the UK Supreme Court proceeding, the Court found it unnecessary to consider any other view.[145] The Court declined to extend Eurofinance SA's submission to Chapter 11 proceedings as a general submission to actions in the US bankruptcy court.[146] The question was thus whether a new common law rule should apply to cross-border insolvencies.[147]

b. A New Rule for Bankruptcy?

The UK Supreme Court answered the question in the negative, and declined to follow the Court of Appeals in carving out a new common law category of jurisdiction for insolvency cases.[148] To do so, the Court declared, would be "a radical departure from substantially settled law."[149] In arriving at its decision, the Court agreed with the receivers on

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[142] *See Rubin*, [2012] UKSC 46, [7].

[143] Eurofinance SA had applied to the High Court for the appointment of receivers for the explicit purpose of causing TCT to obtain protection under Chapter 11 of the US Bankruptcy Code. By the plan of reorganization proposed by Eurofinance SA and approved in both U.K. and U.S. courts, those receivers were granted authority to pursue claims, even against third parties. Eurofinance SA also filed a notice of appearance in the Chapter 11 proceedings. Finally, Eurofinance SA had notice that by doing business in the United States, it would be subject to US jurisdiction with regard to such business, under the US "minimum contacts" jurisprudence of personal jurisdiction. The Court also noted that Mr. Adrian Roman controlled Eurofinance SA. *Id.* [168]–[169].

In U.S. common law, personal jurisdiction is granted when a non-claimant party meets certain requirements of "minimum contacts" such that they could reasonably expect to be haled into court in the given jurisdiction. World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 291–92 (1980).

[144] *Rubin*, [2012] UKSC 46, [169].

[145] *Id.*; *see also* Zubaty, *supra* note 103, at 50 (noting that the *Rubin* appeals court could have expanded the "voluntary submission" option of the *Dicey* rule to include a range of activities, similar to the "minimum contacts" requirement under U.S. law).

[146] *Rubin*, [2012] UKSC 46, [169].

[147] *See id.* [88]–[144].

[148] *Id.* [128], [132].

[149] *Id.* [128].

several crucial points.[150] Notably, the Court held that if there were a per se difference between insolvency orders and other judgments then it would be appropriate to formulate criteria for differing enforcement policies.[151]

The Court declined, however, to hold that insolvency judgments were per se different.[152] Instead, the Court held that at common law the adversary proceeding in question should be treated as an ordinary *in personam* judgment subject to the *Dicey* rule.[153] In so holding, the Court pointed to recent rulings of European courts distinguishing between claims that do and do not derive directly from the bankruptcy.[154] Those pertaining solely to the distribution of a debtor's assets were deemed to derive directly from bankruptcy, whereas those determining the existence of rights and obligations did not so derive.[155] Thus the court was able to hold that the judgment at issue was *in personam*, as it pertained to a determination of rights made in the US court.

The Court could have left the possibility of *sui generis* insolvency judgments alone following its determination; instead, it declared that public and legal policy failed to support differentiation of insolvency proceedings in a bankruptcy context.[156] In effect, the court decided that limiting liability for creditors outweighed the efficiency benefits of a universalist international business paradigm.[157]

Furthermore, the Court employed its conception of the role of the judiciary as an explicit rationale for this narrowing of judicial authority.[158] It noted that expanding recognition powers would force courts to formulate new rules to ascertain a nexus between (a) the insolvency and

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[150] *Id.* [93].

[151] *Id.*

[152] *Id.* [115].

[153] *See id.* [105].

[154] *Id.* [101]. The distinction appears to lie between claims as to debts owed and claims as to the nature of property holdings subject to debts. *See id.*

[155] *Rubin*, [2012] UKSC 46, [99]–[101].

[156] *See id.* [106]–[132].

[157] *Id.* [106]–[132]. The court worried that expansion of recognition powers might simply favor debtors over creditors, not the greater good of the international system. *See id.* [116]. Broader recognition powers would allow debtors to litigate at home, thereby forcing creditors to accept liability in any jurisdiction where they undertook business activities. *See id.* Narrower powers would, conversely, limit a creditor's litigation vulnerability to its place of business or incorporation. *See id.*

[158] *See supra* notes 151–155 and accompanying text. Conversely, however, the decision expanded the power of the UK Supreme Court in domestic and international affairs. *See infra* notes 234–264 and accompanying text.

the foreign court and (b) the debtor and the foreign court.[159] The Court lamented that such formulations would rely too heavily on trial court discretion instead of black letter law.[160] It noted that although some precedent and logic suggested this might be acceptable, the receivers' argument relied on notions of goodwill and international reciprocity that had no basis in the common law.[161] The Court stated that there was no expectation of reciprocity from other countries and no UK case or statutory law in its favor.[162] In the Court's view, such a departure from settled law was the provenance of the legislature, not the judiciary.[163]

Finally, the Court noted that certain dangers were inherent to a nexus test because such a test involved the possibility that third parties could become involuntary and unwilling parties to bankruptcy proceedings in foreign countries.[164] The Court suggested that this had occurred in *Rubin*.[165] It noted that no harm would likely result from the holding as applied to the parties in *Rubin* specifically because the receivers had been free to litigate their claims in the UK where the defendants resided.[166]

2.Analysis of the Model Law

The Court also considered whether specific provisions of the Model Law, enacted in the UK as the CBIR, should be employed to enforce the US judgment.[167] In fact, both the receivers and defendants argued that the Court should recognize the adversary proceedings against Eurofinance SA in the US bankruptcy courts.[168] The parties disagreed, however, as to whether such recognition required enforcement of the judgment.[169]

On review of Articles 21, 25, and 27 of the CBIR, as well as the Guide, the Court found no reason to enforce the judgment by operation

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159 *Rubin*, [2012] UKSC 46, [117].
160 *Id.* [122].
161 *See id.* [124–[127].
162 *Id.* [126]–[127].
163 *Id.* [129].
164 *Id.* [130]–[131].
165 *See id.* [131].
166 *Rubin*, [2012] UKSC 46, [131].
167 *Id.* [133]–[144].
168 *Id.* [134].
169 *Id.* [135].

of statute.[170] The Court relied on the CBIR's directive that the court "may" cooperate with foreign courts, as opposed to the word "shall" employed by the Model Law.[171] Nevertheless, the Court noted that the Model Law encourages cooperation and provides a non-exhaustive list of means by which courts may implement such cooperation, which could include enforcement of judgments.[172] The Court distinguished such reasoning from *Rubin* on the basis that foreign judgments against third parties, even in a bankruptcy context, had more in common with civil and commercial matters than insolvency matters.[173] The Court noted that such ordinary civil and commercial claims were not covered by international treaty, specifically because negotiations aimed at resolving the issue had failed.[174]

US case law, which seemed to suggest the Model Law as grounds for enforcement, proved no help to the receivers.[175] The receivers had presented some US cases administrated under Chapter 15 that had resulted in orders of enforcement of foreign judgments.[176] The Court found that although the Model Law provided a procedural framework for those cases, as it did in *Rubin*, the reasoning of the US courts in approving enforcement of the foreign judgment stemmed from non-bankruptcy rules.[177] Thus, the Court concluded that no case law suggested the Model Law provided separate rules of decision for actions to enforce foreign judgments.[178]

In sum, the Court held that Eurofinance SA could not be held accountable in the UK for the decisions of US courts regarding the economic activities of a Eurofinance SA subsidiary in the US.[179] This decision was not foreordained by UK statutory or common law; to the contrary, each point of the court's analysis had been finely tuned and coordinated to produce the desired result.[180] Analysis of the court's reason-

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[170] *See id.* [141]–[144].

[171] *Id.* [139].

[172] *See Rubin*, [2012] UKSC 46, [142]–[43].

[173] *See id.* [142]–[143].

[174] *Id.* [142]. The Court noted the failure of negotiations on the subject at the Hague Conference on Private International Law. *Id.*

[175] *Id.* [144] (analyzing In re Metcalfe & Mansfield Alternative Investments, 421 B.R. 685 (Bankr. S.D.N.Y. 2010)).

[176] *Id.*

[177] *Rubin*, [2012] UKSC 46, [144].

[178] *See id.* (noting that "the Model Law is not designed to provide for the reciprocal enforcement of judgments").

[179] *See id.* [177].

[180] *See infra* Part II.

ing suggests that the Court could easily have held for the receivers on any number of bases.[181]

II. THE COMMON LAW VS. THE NEW REGIME

Part II scrutinizes the UK Supreme Court's reasoning in *Rubin v. Eurofinance SA*, which emphasized particular points of common law in opposition to applicable parliamentary legislation.[182] Section A analyzes the UK Supreme Court's interpretations of common law.[183] Section B analyzes the court's interpretation of the CBIR and Model Law.[184]

A. COMMON LAW CHOICES AND UK POLICY

In allowing the appeal in *Rubin*, the UK Supreme Court interpreted British common law in a number of ways that favored the defendant.[185] This section discusses the common law interpretations made by the Court and the policy goals behind those interpretations.[186]

i.The Special Case of Avoidance Claims

The Court in *Rubin* saw itself as declining to expand British common law regarding recognition of foreign orders.[187] Furthermore, it made a political decision to consider avoidance actions as either *in personam* or *in rem*.[188] In so doing, the Court overruled the *Cambridge Gas* precedent.[189]

There was substantial common law support, however, for the separation of avoidance orders from non-bankruptcy *Dicey* jurisprudence.[190] The appellate court in *Cambridge Gas* stated the idea that modi-

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[181] *See infra* Part II.

[182] *See infra* Part II.

[183] *See infra* Part II.

[184] *See infra* Part II.

[185] *See supra* notes 140–165 and accompanying text.

[186] *See infra* notes Part II.

[187] *See Rubin*, [2012] UKSC 46, [128].

[188] *See id.* [115] (stating that "[t]he question, therefore, is one of policy. Should there be a more liberal rule for avoidance judgments in the interests of the universality of bankruptcy and similar procedures?").

[189] *Id.* [132].

[190] *See id.* [192]–[197] (Lord Clarke, dissenting); *Cambridge Gas*, [2006] UKPC 26, [13]–[14] (distinguishing the purpose of bankruptcy from ordinary civil proceedings).

fied universalism was not only the operating principle in earlier cross-border insolvency cases, but had been the golden thread running through English cross-border insolvency law since the eighteen century.[191] Although neither that court nor the *Rubin* majority cited numerous cases to support their contrary views, the precedential holdings and the dicta of *Cambridge Gas* and *HIH* suggest that ample justification was present for a decision contrary to that arrived upon.[192]

The greatest—or perhaps the only—expansion of common law suggested in the *Rubin* deliberations was the addition of a fifth category to the *Dicey* rule.[193] By proposing a jurisdictional allowance for avoidance actions, the dissent sought to minimize the perceived threat of a blanket allowance for insolvency proceedings abroad.[194] Moreover, the dissent proposed basic fairness and derivation requirements that would have aligned British common law more closely to both the EU Council Regulation on Insolvency Proceedings No. 1346/2000 ("ECIR") and the intentions behind the Model Law.[195]

Both *Cambridge Gas* and *Rubin* illuminate the various and potentially narrow manners in which the Court could have otherwise decided on the nature of avoidance.[196] The court's majority opinion thus represents a deliberate decision to favor traditionalist common law of

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[191] *Cambridge Gas*, [2006] UKPC 26, [16].

[192] *See Rubin*, [2012] UKSC 46, [191]–[204] (Lord Clarke, dissenting).

[193] *See id.* [203].

[194] *See id.* [202]–[203] (noting limited agreement with the majority but requesting expansion of *Dicey*). The language Lord Clarke employed, however, would have in practice exploded *Dicey* to equivalence with U.S. recognition rules. *Compare id.* [203] (noting that the *Dicey* rule should include "a fifth case in which a foreign court has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it is given") *with* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 96 (1971) (stating that in such a case, "the local law of the State where the judgment was rendered determines, subject to constitutional limitations, whether the parties are precluded from attacking the judgment collaterally on the ground that the court had no jurisdiction over the defendant").

[195] *See Rubin*, [2012] UKSC 46, [200] (noting the court's discretion to decline enforcement based on its sense of justice and U.K. public policy); *cf.* Model Law, *supra* note 11, art. 6 (giving the court the power to refuse to take action prescribed by the Model Law on grounds of domestic policy); Council Regulation on Insolvency Proceedings 1346/2000, art. 26, 2000 O.J. (L160) 1 (EC) (noting court power to disregard ECIR directives manifestly contrary to public policy). The ECIR governs European Union member state insolvency proceedings, and thus was not applicable to *Rubin*. *See id.* art. 3. Notably, Lord Clarke found that enforcing the U.S. bankruptcy court order would not have offended the Court's sense of justice. *Rubin*, [2012] UKSC 46, [200].

[196] *See supra* Part II.A.iii.

jurisdictional propriety over the common law-espoused policy goals of modified universalism.[197]

ii. Voluntary Submission to a Jurisdiction

Even without expanding *Dicey*, the UK Supreme Court could have found that Eurofinance SA had satisfied the requirements for recognition of a foreign order.[198] If the Court had found that Eurofinance SA had voluntarily submitted to US bankruptcy court jurisdiction, the US avoidance would likely have been recognized in the UK.[199] The UK Supreme Court enumerated substantial arguments that Eurofinance had so appeared.[200]

However, the court's holding to the contrary represents a political view that adversary proceedings are wholly separate from general insolvency proceedings under US law.[201] Eurofinance SA had appeared in the TCT insolvency in US court; it had merely declined to appear as a party in the adversary proceeding as a defendant.[202] By US law, Eurofinance SA had not made an appearance in the adversary proceeding such that it could be considered acquiescent to US jurisdiction in that proceeding.[203] As the Court in *Rubin* made clear, however, the *Dicey* rule ignores the jurisdictional determinations of the foreign states whose orders are submitted for recognition in the UK.[204] Thus, were the Court in

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[197] *See Rubin*, [2012] UKSC 46, [128]–[132] (noting that regardless of Hoffman's ideological soundness, enactment of modified universalism in practice would expand black-letter law beyond boundaries acceptable to the court).

[198] *See infra* Part I.B. The Court declined to address this argument because the parties did not make it in the proceedings. *Rubin*, [2012] UKSC 46, [169]. Nevertheless, the Court has the power to determine any issue as necessary for the purpose of justice. Constitutional Reform Act, 2005, c. 4 § 40(5).

[199] *See Rubin*, [2012] UKSC 46, [7] (listing voluntary submission as the third of four cases in which the *Dicey* rule may be satisfied such that a foreign order will be recognized by U.K. courts).

[200] *See id.* [168] (listing reasons why the Court could find Eurofinance had voluntarily submitted).

[201] *See id.*; *see also supra* note 197 and accompanying text (explaining the Court's decision not to consider this avenue of reasoning despite its discretion to do so).

[202] *See Rubin*, [2012] UKSC 46, [63].

[203] *See* FED. R. CIV. P. 55(a) (stating that the clerk must enter default judgment if the defendant fails to plead or otherwise defend); *Rubin*, [2012] UKSC 46, [64] (noting the entry of default judgment by the U.S. bankruptcy court). Of course, in U.S. courts, Eurofinance SA's acquiescence would be considered irrelevant to the court's ability to levy a judgment. *See World-Wide Volkswagon*, 444 U.S. 286, 291–92 (1980).

[204] *Compare Rubin*, [2012] UKSC 46, [7] (listing four exclusive circumstances in which foreign courts have jurisdiction over U.K. citizens), *with id.* [203] (Lord Clarke, dissenting) (suggesting a fifth circumstance that would account for the jurisdictional determinations of the foreign courts).

Rubin to find that the avoidance proceeding was intrinsic to TCT's Chapter 11 case in the US courts, it could find that Eurofinance's appearance in that case would suffice for voluntary submission to US jurisdiction in adversary proceedings.[205]

Furthermore, a substantial argument existed that Eurofinance had voluntarily submitted to US jurisdiction on the grounds that it was not functionally separate from TCT.[206] In fact, the receivers' original complaint in the US court included accusations of veil piercing.[207] If the Court in *Rubin* had also considered TCT's ownership structure, it could have found that Eurofinance submitted to US jurisdiction as a primary claimant through its control of TCT in filing for bankruptcy protection in US courts.[208]

The fact that the UK Supreme Court declined to consider a possible voluntary submission opens a loophole in the UK's cross-border insolvency regime. A party in a US bankruptcy proceeding might claim in a US court that the defendant's parent entity is functionally indistinct from the defendant, but a US order to that effect may be useless in the UK.[209] The plaintiff would be forced, as the TCT receivers are now, to litigate its claim in the UK.[210] The intention of a veil piercing claim is in fact the opposite: the *Rubin* receivers had hoped to show that because Eurofinance SA was functionally indistinct from TCT, Eurofinance SA

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[205] *See id.* [7], [168].

[206] *See* Complaint, *supra* note 130, at 21–22.

[207] *Id.*

[208] *See* VTB Capital plc v. Nutritek Int'l Corp., [2012] EWCA (Civ) 808, [48]–[49] (U.K.) (affirming the veil-piercing principle in U.K. law and describing its history). Veil piercing refers to the "veil" separating shareholders from corporations for purpose of liability; the veil may be pierced in cases of fraud or some other exceptional circumstances. *See* Dole Food Co. v. Patrickson, 538 U.S. 468, 475–76 (2003); *VTB Capital*, [2012] EWCA Civ 808, [49]. The practical result of a veil piercing holding is that controlling parties can be considered indistinct from controlled parties for purpose of civil law. *See VTB Capital*, [2012] EWCA Civ 808, [49]. By U.K. law, a corporate veil may be pierced if circumstances exist indicating that the veil is a mere facade concealing the true facts of corporate control. *Id.* [48]–[49]. If the U.K. Court were to pierce the veil between TCT and Eurofinance, the Court would likely find that both entities satisfied the *Dicey* rule by agreeing, via the filing of a bankruptcy petition, to submit to the jurisdiction of U.S. courts. *See Rubin*, [2012] UKSC 46, [7].

[209] *See, e.g., Rubin*, [2012] UKSC 46, [168]–[169]; *supra* note 205 and accompanying text. The Court did not consider this avenue of reasoning because the parties did not pursue it. *Rubin*, [2012] UKSC 46, [67], [169] (noting the receivers' decision not to seek enforcement on the veil piercing claim and the court's desire not to consider arguments not advanced by the receivers); *cf. supra* note 205 and accompanying text (noting the court's discretion to consider arguments not advanced by the parties).

[210] *See VTB Capital*, [2012] EWCA Civ 808, [49].

should be liable for TCT's actions in the US.[211] Thus, the UK Supreme Court's decision ensured that a UK entity wishing to do business in the US without risking litigation in US courts could insulate itself with a tiered corporate ownership structure as simple as that employed by Eurofinance. This drastically reduces the ability of US courts to protect US citizens and property from the malfeasance of UK actors.[212]

iii.The Choice between Debtors and Creditors

The UK Supreme Court noted in the *Rubin* decision that one of the factors behind its analysis of common law was a desire not to preference the interests of debtors over those of creditors.[213] This view is a veiled common law argument in favor of territorialism.[214] In a universalist international regime, logic would hold that a debtor has the luxury of administrating and litigating as necessary in the state home to its COMI.[215] Under such a regime, however, creditors based in any location could be forced to appear in proceedings in the COMI state simply because they engaged in some business with the debtor in that state.[216] The *Rubin* majority viewed such an imbalance as unfairly favoring debtors.[217]

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[211] *See* Complaint, *supra* note 130, at 21–22.

[212] Henriques, *supra* note 2.

[213] *See Rubin*, [2012] UKSC 46, [116] (asking "why should the seller/creditor be in a worse position than a buyer/debtor?"). Note that in this case Eurofinance was a third party transferee that had received funds as proceeds of its investment in TCT. *See id.* [56].

[214] *Compare Rubin*, [2012] UKSC 46, [116] (noting that a situation in which sellers in foreign states accept the risk of insolvency legislation in the place of incorporation benefits buyer/debtors), *with* LoPucki, *supra* note 61, at 2216 (noting that universalism "would give each multinational company a choice of countries in which to file. By its choice, the company could choose not only the procedure for its bankruptcy, but also the substantive rights its creditors would have").

[215] *See* Samuel L. Bufford, *Global Venue Controls are Coming: A Reply to Professor LoPucki*, 79 AM. BANKR. L. J. 105, 108 (2005).

[216] *See* LoPucki, *supra* note 61, at 2216. Professor LoPucki expresses concern that in a pure universalist regime, creditors might be forced to participate in insolvency proceedings in countries entirely foreign to any transactions with the debtor, simply because of the debtor's choice of COMI. *See id.* at 2218. While this is true, it illustrates the difference between pure and modified universalism. *See id.; World-Wide Volkswagon*, 444 U.S. at 291–92. While, for instance, a Japanese corporation could buy a widget on credit in Egypt and reincorporate in the United States, the Egyptian seller could object to U.S. jurisdiction on the grounds that it lacked "minimum contacts" with the U.S. *See World-Wide Volkswagon*, 444 U.S. at 291–92. This insistence on jurisdictional propriety has resulted in modified universalism, in which a secondary proceeding may be opened to supplement the home country dominant case for a debtor. *See* Bufford, *supra* note 214, at 108–109. There is no question that the receivers in *Rubin* could have litigated their case via a secondary proceeding in U.K. court. *See Rubin*, [2012] UKSC 46, [131] (noting this option and the court's view that such would not be a serious injustice to the parties). The question is

The majority's view is susceptible to a number of counter-arguments articulated by other British courts.[218] In brief, the majority could have reversed its course for any of three reasons: first, the majority view runs counter to the understanding of modified universalism as the traditional ideology of British courts in insolvency matters.[219] Second, the majority view differs from the common law jurisdiction jurisprudence of many prominent legal traditions,[220] and even from British in at least one area of jurisprudence.[221] Third, the majority opinion defies the fundamental precepts of equal distribution to creditors and rehabilitation of the debtor in bankruptcy.[222]

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simply the extent of comity between the main and secondary proceedings. *See* Zubaty, *supra* note 103, at 39 (arguing that the lower court ruling in *Rubin* granted a dangerous overextension).

[217] *See Rubin*, [2012] UKSC 46, [116]. The Court also expressed concern over the potential for overly complex jurisdiction litigation. *See id.* [117].

[218] *Compare Rubin*, [2012] UKSC 46, [116] (noting the potential unfairness of a universalist system), *with Rubin*, [2012] UKSC 46, [197]–[200] (Lord Clarke, dissenting) (arguing in favor of the ideal of modified universalism tempered by court discretion in matters of public policy); *see supra* notes 58–66 and accompanying text.

[219] *See Rubin*, [2012] UKSC 46, [197]–[200] (Lord Clarke, dissenting).

[220] *See, e.g. World-Wide Volkswagon*, 444 U.S. at 291–92 (1980) (describing the U.S. doctrine of "minimum contacts" requisite to justify jurisdiction); Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, 1080 (Can.) (describing Canada's requirement of a "real and substantial connection" between the defendant and the forum); Jason Farber, *NAFTA and Personal Jurisdiction: A Look at the Requirements for Obtaining Personal Jurisdiction in the Three Signatory Nations*, 19 LOY. L.A. INT'L & COMP. L. J. 449, 458 (1997) (describing Mexico's statutory personal jurisdiction laws as requiring connections to the forum state that may include business ties or tortious action).

[221] *See Rubin*, [2012] UKSC 46, [110].

[222] *See* Veryl Victoria Miles, *Fairness, Responsibility, and Efficiency in the Bankruptcy Discharge: Are the Commission's Recommendations Enough?*, 102 DICK. L. REV. 795, 799–800 (1998). Without equal distribution to similarly situated creditors, bankruptcy has little value to creditors. *See, e.g.,* Nathanson v. N.L.R.B., 344 U.S. 25, 29 (1952) (noting that equality of distribution to creditors of similar classes is the dominant theme of U.S. bankruptcy law); James W. Bowers, *Groping and Coping in the Shadow of Murphy's Law: Bankruptcy Theory and the Elementary Economics of Failure*, 88 MICH. L. REV. 2097, 2101–02 (1990) (describing bankruptcy as a collective remedy defined by equal treatment of creditors of similar classes). Creditors thus have little incentive to participate fairly. *See Nathanson*, 344 U.S. at 29. Likewise, without the possibility of reorganization and discharge of debts, debtors have no incentive to participate. *See* Tristan Axelrod, Comment, *Seventh Circuit Court of Appeals in* Sunbeam Products, Inc. v. Chicago American Mfg., LLC *Sets a New Course for Trademark License Rejection in Bankruptcy*, 40 RUTGERS L. REC. 118, 122 n.37 (2013) (amalgamating Supreme Court language describing the importance of the fresh start to debtor and creditor participation). Moreover, the general population may be discouraged from productive commercial risk-taking due to fear of failure. *See* Grogan v. Garner, 498 U.S. 279, 286–87 (1991) (noting the primary purpose of bankruptcy to unburden honest debtors from pressures of financial failure); *cf.* Stephen Byers MP, Secretary of State for Trade and Industry, *Bankruptcy: A Fresh Start*, THE INSOLVENCY SERVICE § 7.2 (March 2000), http://webarchive.nationalarchives.gov.uk (accessed by searching for "bankruptcy fresh start" in UK national archives collection) (stating that a morality-based rehabilitation policy would aid the public perception of bankruptcy and encourage productive behavior). The majori-

B. INTERPRETING THE MODEL LAW

In *Rubin*, the UK Supreme Court employed textual arguments in its decision not to employ the CBIR as grounds for recognition of the US bankruptcy court's avoidance order.[223] The Court was otherwise at liberty to interpret Articles 21, 25, and 27 of the CBIR as including a mandate of cooperation with foreign courts.[224] Nevertheless, substantial evidence suggests that the intent of the Model Law to strongly encourage cooperation and uniformity should have survived the document's enactment as the CBIR in 2006.[225]

The Court was not bound to any particular interpretation of the Model Law.[226] The UK, however, isolates itself among the world's more prominent legal cultures in its refusal to recognize the independent validity of other states' jurisdictional rules.[227] Thus, one could argue that the proposed fifth category of the *Dicey* rule, or similarly some variation on the US "minimum contacts" rule, would have been more in keeping with the intent of the CBIR to promote uniformity.[228]

Despite the policy intentions articulated in the CBIR, the Court found a solid argument against recognition in the specific wording of

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ty's view that modified universalist ideology would enforce an unfair common law preference in favor of debtors arguably violates both these fundamental aims of bankruptcy law. In fact, one of the primary arguments in favor of universalism is that it ideally results in a single debtor's estate that can be proportionally distributed to all creditors. *See* Bufford, *supra* note 214, at 111 (noting that the collective ideal of universalism allows for orderly and economical administration). Thus, creditors are repaid without regard to the debtor's decisions to hold certain assets in different jurisdictions. *See id.* at 114 (noting that uneven distribution of debtor assets results in inefficient allocation of capital to creditors in a territorialist system). Likewise, universalism furthers the debtor's post-bankruptcy aims by reducing administrative costs and ensuring that its right to a discharge is assured no matter where it chooses to operate after completion of bankruptcy proceedings. *See id.* at 111 (noting the decreased transaction costs in a universalist system but also the impracticalities given variance in languages, legal systems, etc. across national boundaries). The UK Supreme Court's opinion in *Rubin* ignores these goals. *See Rubin*, [2012] UKSC 46, [131] (noting the justice of the Court's decision with respect to the parties).

223 *See Rubin*, [2012] UKSC 46, [143] (noting, based on the text of articles 21, 25, and 27, that it "would be surprising if the Model Law was intended to deal with judgments in insolvency matters by implication"). Lord Collins equates the CBIR with the Model Law in this passage. *See Rubin*, [2012] UKSC 46, [138]–[143].

224 *See* CBIR art. 25 (declaring that a U.K. court "may" cooperate with foreign courts); *see also* Look Chan Ho, *Conflict of Laws in Insolvency Transaction Avoidance*, 20 SACLJ 343, 349 (describing the CBIR as "conflicts neutral" regarding avoidance orders from foreign courts).

225 *See Rubin*, [2012] UKSC 46, [142]–[143]; Model Law, *supra* note 11.

226 *See* CBIR sch. 2, pt. 4, reg 14(e); *see also* CBIR reg 2(1) (noting that the Model Law as set forth in the CBIR has been adapted for application in Great Britain).

227 *See supra* note 219 and accompanying text.

228 *See supra* note 219 and accompanying text.

CBIR Article 25.[229] Ultimately, in changing "shall cooperate" to "may cooperate" in its adoption of the Model Law, it appears that legislators deliberately afforded the courts discretion to disregard the broader purpose of the bill as necessary to protect domestic interests.[230] The Court's use of such discretion signals a conservative attitude towards both policy-based reasoning and international cooperation in insolvency proceedings.[231]

III. THE REGIME REGRESSES TO TERRITORIALISM

The UK Supreme Court's *Rubin v. Eurofinance SA* decision indicates a jurisprudential tendency towards territorialism.[232] Furthermore, because the case is highly representative both in terms of the facts presented and the motivations of the judiciary, the case is likely to have a strong impact on the international regime.[233] With that in mind, this Part argues that the case will encourage international jurisprudence toward a more territorialist regime.

A. IS RUBIN A TYPICAL CASE?

The *Rubin* fact pattern was susceptible to territorialist policy arguments because it involved an avoidance order of an international money transfer and a complex interrelationship of business entities.[234] Both of those grounds are common to cross-border insolvencies; thus, the court's decision will likely impact a large number of cases. The most controversial implications of *Rubin* concern only one type of avoidable transfer: that between the debtor and its legal or *de facto* parent or subsidiary.[235]

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[229] *See Rubin*, [2012] UKSC 46, [139]–[143].

[230] *See* CBIR art. 25.

[231] *See Rubin*, [2012] UKSC 46, [143] (noting that policy concerns do not suggest use of discretionary authority where such use is not explicitly urged by the CBIR).

[232] *See supra* notes 184–230 and accompanying text.

[233] *See infra* notes 233–266 and accompanying text.

[234] *See supra* notes 184–230; *Rubin*, [2012] UKSC 46, [54]–[68]. By complex I mean that the debtor was controlled by a legally distinct entity.

[235] *See infra* notes 236–247 and accompanying text. More generally, the facts of *Rubin* show why avoidance and tort litigation is particularly likely in a cross-border insolvency case. Such cases involve multiple legal proceedings in multiple legal systems. *See supra* notes 36–49 and accompanying text. Administrative and legal costs to the debtor's estate are thus very high. *See* Westbrook, *supra* note 41, at 458. For the process to be worth such costs to the debtor's creditors, the debtor's estate must cross a certain size threshold. *See* Stephen P. Ferris & Robert M. Lawless, *The Expenses of Financial Distress: The Direct Costs of Chapter 11*, 61 U. PITT. L. REV. 629,

By contrast, transfers between accounts held by the debtor in separate countries are not subject to avoidance, as avoidance requires a disposition of property between separate legal entities.[236]

The ownership/control relationship gives rise to special concerns over the fairness of pre-bankruptcy transfers. For instance, in *Rubin*, if TCT had not been wholly controlled by Eurofinance SA and the two entities had been completely estranged, the fact that Eurofinance SA received a transfer from TCT would not necessarily imply that Eurofinance had purposefully engaged in "minimum contacts" such that it could expect to be haled into court in the US.[237] Thus, litigation in a non-COMI state, in this case Eurofinance SA's homestead in the UK, would be the receivers' only option.[238] Eurofinance SA's creation of TCT and reception of the bulk of its US profits, however, strongly implied both control

654–55 (2000) (describing the high fixed cost of preparing a bankruptcy case). Otherwise, creditors would be content to feed off the debtor's scraps in respective countries of operation without entering into the legal and financial complexities of insolvency proceedings. *See id.* Thus, not only are cross-border cases large, but they also introduce a high likelihood of litigation-prone activities. *See Choice of Avoidance Law in Global Insolvencies*, *supra*, note 99, at 537 (noting the "crisis" created by general defaults of multinationals). The flurry of cross-border cases filed since 2008 is testament to: the "Madoff feeder-fund" cases alone have increased U.S. chapter 15 filings by a significant degree due to the necessity of coordinating proceedings with the various nations in which Ponzi scheme participants transferred funds for purposes of obfuscation, secrecy, and tax sheltering. *See Chapter 15 Quarterly Filings (2005–Present*), AMERICAN BANKR. INST. (as of Q3 2011), http://www.abiworld. org/statcharts/Chapter15Filings.pdf. It thus stands to reason that, given the size of cross-border cases and the type of transfers likely to be involved, the fact pattern of *Rubin* will occur frequently in cross-border cases. *See, e.g.,* Jonathan Weisman, *Romney's Returns Revive Scrutiny of Lawful Offshore Tax Shelters*, N.Y. TIMES, Feb. 8, 2012, at A17, *available at* http://www.nytimes.com/2012/02/08/us/politics/romneys-returns-revive-scrutiny-of-offshore-tax-shelters.html?pagewanted=all&_r=0 (noting the prevalence of offshore holdings by wealthy entities); Niels Johanssen & Gabriel Zucman, *The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown*, PARIS SCH. OF ECON. (Oct. 31, 2012), http://www.parisschoolofeconomics.eu/docs/zucman-gabriel/revised_october12.pdf (noting that an estimated $2.7 trillion remains deposited illegally in tax havens, despite a recent international crackdown). In fact, the amount at stake in *Rubin* is probably towards the low end of the spectrum in this context. *See* Henriques, *supra* note 2 (noting $11 billion already clawed back for Madoff victims); *supra* note 22 and accompanying text (estimating amount of funds available to creditors).

[236] *See, e.g.,* 11 U.S.C. § 541 (2006) (declaring that assets held by the debtor are already property of the bankruptcy estate). There is no need to avoid transactions in which the debtor retains ownership of an asset. *See id.* In fact, the Model Law is arguably better equipped to handle such a situation, which merely requires the imposition of the bankruptcy stay via an ancillary proceeding. *See* Model Law, *supra* note 11, arts. 21, 25, 27. Such a stay, in effect a freezing of the debtor's assets, usually does not invoke a conflict of laws issue. *See id.*

[237] *See World-Wide Volkswagon*, 444 U.S. at 291–92 (articulating the notion that under U.S. law, a party must engage in activities in or directed to the forum state in order to be haled into court there).

[238] *See id.*

and a practical intent to engage in business in the US.[239] This control and intent prompted arguments of veil piercing in US litigation as well as the *Rubin* minority's finding that Eurofinance SA had implicitly submitted to US jurisdiction, and that the UK courts should therefore recognize the US avoidance order under the *Dicey* rule.[240]

The question of *Rubin*'s impact with regard to complex litigation thus comes down to the size of the potential business entity loophole that would allow UK entities to insulate themselves from litigation of their related entities' wrongful acts abroad.[241] Ostensibly, this question is not specific to bankruptcy. The UK Supreme Court was thus correct in noting that recognition of the US order would be an expansion of UK conflict of laws jurisprudence, solely for purpose of cross-border insolvency policy. In declining such an expansion, the Court simply ensured that to the extent a loophole exists, it remains the same size as before.

Logic suggests the loophole may be large; moreover, the explicit connections between *Rubin* and ongoing US bankruptcy litigation related to the Madoff debacle highlight the case's importance. An entity seeking to abuse the bankruptcy system by hiding its cash abroad while discharging debts and limiting liability at home is increasingly unlikely to simply set up a secret offshore banking account.[242] Insulation via separate business entities such as trusts and shell corporations is a much more effective way to gain home-field advantage in future litigation.[243] In a matter as small-scale as *Rubin* it is easy to see why this is the case: having already administered TCT's estate in the US, the receivers would now be forced to assemble a new legal team in the UK and litigate the damages and avoidance claims in a court foreign to the rules of decision on which

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239 *See* Complaint, *supra* note 130, at 21–22.

240 *See id.*; *Rubin*, [2012] UKSC 46, [191]–[204] (Lord Clarke, dissenting).

241 *See* Henriques, *supra* note 2; Jane Croft, *Court Spotlight on Cross-border Insolvency Rules*, FIN. TIMES, May 21, 2012, at 23 (noting that Madoff trustee Irving Picard intervened in *Rubin* with the explicit goal of ensuring and promoting future cooperation in the Madoff and Lehman Brothers bankruptcies).

242 *See, e.g.,* David Kestenbaum, *He Won't Tell You His Name, But He'll Help You Hide Your Money*, NAT'L PUB. RADIO (Sept. 28, 2012), http://www.npr.org/blogs/money/2012/09/28/161913466/they-wont-tell-you-their-names-but-theyll-help-you-hide-your-money (describing the complicated "asset protection" schemes that investors currently favor); Weisman, *supra* note 234 (noting increasing notoriety and scrutiny of simpler forms of offshore money sheltering). The increasing scrutiny of simple offshore banking and the openness of the market for entity structure money hiding suggest a movement towards more secretive measures. Kestenbaum, *supra*; Weisman, *supra* note 234.

243 *See Rubin*, [2012] UKSC 46, [131]; Kestenbaum, *supra* note 241.

the claims are based.[244] Such an advantage for Eurofinance SA might render the receivers reluctant to litigate at all, and would certainly decrease the predictability of the result.[245]

B. A SIGNPOST FROM THE UK SUPREME COURT

The desire of the new UK Supreme Court to assert its independence on the domestic and international scenes played an important role in *Rubin* and illustrates an institutional worldview that will inform cross-border insolvency litigation decisions worldwide.

i. One Explanation of Rubin: Domestic Political Maneuvering

Rubin illustrates a preference in UK law to minimize use of the discretionary powers enumerated in the Model Law.[246] The opinion demonstrates the reluctance of the UK judiciary to decide choice of law issues by statutory declarations of policy, broad principles of jurisprudence, or anything but the narrowest common law rules of decision.[247] With *Rubin*, the UK Supreme Court interpreted both the common law and statutory law in order to minimize comity in the bankruptcy context.[248] This territorialist interpretation of UK law will likely remain in place, barring a fundamental shift in UK legal or economic policy. The UK Supreme Court's decision remains binding unless, or until, contradicted by an act of parliament or a later Supreme Court opinion.[249]

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[244] *See Rubin*, [2012] UKSC 46, [131] (noting this option and the court's view that such would not be a serious injustice to the parties).

[245] *See* Henriques, *supra* note 2 (supporting the notion that *Rubin* was litigated not so much for its intrinsic value to the parties as its future value in the larger Madoff and Lehman cases).

[246] *See supra* notes 184–230 and accompanying text.

[247] *See supra* notes 184–230 and accompanying text.

[248] *See supra* notes 184–230 and accompanying text.

[249] *See* Constitutional Reform Act 2005, c. 4, § 41(2). Note that the court's decision would not, by force of statute, bind parliament. *See* Monica A. Fennell, *Emergent Identity: A Comparative Analysis of the New Supreme Court of the United Kingdom and the Supreme Court of the United States*, 22 TEM. INT'L & COMP. L. J. 279, 295–96 (2008) (noting that "[t]he general principle in the United Kingdom is that Parliament can make or unmake any law, and judges are powerless to override or set aside legislation"). Furthermore, the Court has no stated power of judicial review and Parliament has never acknowledged any judicial power to limit actions of Parliament. Peter L. Fitzgerald, *Constitutional Crisis Over the Proposed Supreme Court for the United Kingdom*, 18 TEM. INT'L & COMP. L. J. 233, 239–40 (2004). It is thus unlikely that the U.K. Supreme Court could ever contradict Parliament if the latter were to overturn *Rubin* by legislative means. *See* Fitzgerald, *supra* at 239–40, 267 (noting that U.K. law has heretofore failed to confer any powers of judicial review, but that such powers may develop over time; nevertheless, that judicial review is limited to constitutional issues). Therefore, the most likely alteration of U.K. cross-border in-

Since its inception and by its design, the UK Supreme Court has opposed infringement on its sovereignty.[250] Thus, the idea of overturning long-established, narrow common law in favor of a broad, toothless model law passed through Parliament with the vague goal of international "cooperation," and which would require judicial subordination to foreign trial courts, is abhorrent to the Court's institutional motives.[251] Furthermore, the UK appellate judiciary tends to look disfavorably upon judicial activism in general.[252] Although UK courts can highlight contradictions between statutory and common law and make interpretative decisions as applicable, the UK has historically reserved to Parliament all powers perceived to create law.[253] As a result, the Court sees its role as defined by non-involvement in political matters, and with a high degree of respect for precedent relative to US courts.[254]

The Court has compromised its conflicting desires for institutional independence and ostensible abstention from political matters by insisting on narrow, conservative opinions that privilege common law over statute. In such a case as *Rubin*, in which specific common law rules seem to conflict with general principles espoused by statutory law, the Court best demonstrates its distinct authority by allowing the specific to limit the general.[255] At first glance, such a decision seems a worthy employment of *generalia specialibus non derogant*, the interpretive princi-

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solvency law would be through parliamentary means. *See id.* Whether such is likely is beyond the scope of this article.

[250] *See* Alyssa King, *A Supreme Court, Supreme Parliament, and Transnational National Rights*, 35 YALE J. INT'L L. 245, 248–49 (2010) (noting that the U.K. Supreme Court was created as part of a reaction against growing influence of European law in U.K. courts, and that the institutional interests of the Court are defined by its enforcement mechanisms against European law and Parliament); *See* Fennell, *supra* note 248, at 279–80 (describing the historic separation of the UK Supreme Court from the parliamentary House of Lords in 2009). The high court was, however, functionally distinct from parliament prior to its 2009 rebirth. *Id.* at 280. The "Law Lords," members of the House of Lords serving in an appellate judicial capacity, refrained from speaking in legislative debates except those specific to the judiciary. *Id*.

[251] *See* King, *supra* note 249250, at 248–49; Fennell, *supra* note 248, at 280.

[252] Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 283 (2005).

[253] Fennell, *supra* note 248, at 295–96. In fact, the rules of the UK. Supreme Court deliberately minimize political influence in the selection of judges both to the Court itself and to appellate panels for particular cases. *See* Constitutional Reform Act 2005, c. 4, §§ 25–31, 42–43. Rules for judicial selection are in flux; however, selections tend to be private and judges are not well known to the public. *See* Fennell, *supra* note 248, at 291–92. Panels are selected from current and retired judges, without input from the parties or other political entities. *See id.*

[254] *See* Fennell, *supra* note 248, at 295–96; Merrill, *supra* note 251, at 283.

[255] *See supra* notes 184–230 and accompanying text (describing the Court's preferences for certain arguments at common law that resulted in an outcome consistent with its institutional motivations).

ple that general provisions enacted in later legislation do not detract from specific provisions of earlier laws.[256] The principle, however, applies only to general and specific laws of equivalent dignity.[257] The Court's decision in *Rubin* thus exalts the newly independent judiciary's power to affect political change through common law discourse to a status equivaequivalent to Parliament's authority to write new law. This is a bold statement of perspective, particularly given the UK's historic emphasis on parliamentary sovereignty.[258]

The political implications allow *Rubin* to be read in a new light, nonetheless informative for bankruptcy practitioners. Intrinsic to the global cross-border insolvency regime, particularly as directed by the Model Law, is the idea that courts must cooperate to further the interests of debtors and creditors.[259] *Rubin* highlights the fact that such cooperation may run contrary to the institutional interests of courts to maintain sovereignty in the face of international political maneuvering and incursions into judicial power by domestic law-making bodies. If powerful judicial bodies such as the UK Supreme Court—and, arguably, its US counterpart[260]—are unwilling to concede authority in the interest of cooperation, it is unclear why courts of smaller countries, with greater desires to assert economic authority, would be willing to do so.

ii.An International Precedent?

Rubin's precedential value is clear in the UK and in certain British-influenced common law countries. For instance, Bermuda, the Bahamas, and the British Virgin Islands are all canny destinations for tax-sheltering schemes likely to be targeted by Picard and other bankruptcy practitioners, and all defer to the UK for judicial appeals and international law policy.[261] Additionally, numerous former British colonies, includ-

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[256] *See, e.g.,* 44(1) Halsbury's Laws of England ¶ 1300 (4th ed, 2008).

[257] *See id.*; *see also* Nitro-Lift Technologies, L.L.C. v. Howard, 133 S. Ct. 500, 504 (2012).

[258] *See* David Jenkins, *From Unwritten to Written: Transformation in the British Common Law Constitution*, 36 VAND. J. TRANSNAT'L L. 863, 867–68 (2003). Despite the U.K. emphasis on parliamentary sovereignty, however, it is possible to see *Rubin* as one of a string of U.K. cases forging a de facto power of judicial review. *See* Sandra Day O'Connor, *Reflections on Preclusion of Judicial Review in England and the United States*, 27 WM. & MARY L. REV. 643, 645–46 (1986) (describing the emerging implications of Anisminic Ltd. v. Foreign Compensation Comm'n., [1969] 2 A.C. 147 (1968)).

[259] Model Law, *supra* note 11.

[260] *See supra* note 92 and accompanying text.

[261] *See* Johanssen & Zucman, *supra* note 234, at 9 (listing noteworthy tax shelter nations); *see, e.g.*, Martin S. Kenney et al., *Utilizing Cross-Border Insolvency Laws to Attack Fraud: An Analysis of*

ing the United States, respect the tenets of British common law and cite recent British case law in domestic matters of first impression.[262] Almost all semi-autonomous British protectorates defer to the UK Privy Council on legal appeal.[263] Furthermore, some non-colonial states simply defer to British law or allow domestic cases to be appealed to UK high courts.[264]

Because the Court seems clear and consistent in its approach to conflict of laws, however, the most important precedent set by *Rubin* may be in the UK Supreme Court's views on the Model Law itself.[265] In his decision, Lord Collins stated that "the Model Law is not designed to provide for the reciprocal enforcement of judgments."[266] This interpretation is among the first to be made by a national high court regarding the Model Law itself, as opposed to an enacted version such as the UK's CBIR or the US's Chapter 15.[267] Thus, if only by default, it is a highly persuasive precedent to courts of other nations not only as an interpretation of the document itself, but as a statement of policy and expectation.

In finding for its own reasons that the unstated goal of reciprocity did not exist in the Model Law, the UK Supreme Court struck a damaging blow to the Model Law's explicitly stated goal of voluntary cooperation between courts of different countries. Other courts facing conflict of law issues in an insolvency context, whether or not the facts or law of *Rubin* apply, will see *Rubin* as a prominent guide to interpretation of the Model Law. Furthermore, such courts will know that were UK courts in a comparable position, no reciprocity would be granted.

How It Could Work in the British Virgin Islands, the United States, and Germany, 13 L. & BUS. REV. AM. 569, 572–73 (2007) (noting the influence of British common law in the British Virgin Islands); Dianna P. Kempe, *The Role of Offshore Jurisdictions in International Finance*, ABA Ctr. for Continuing Legal Educ., Feb. 8-10, 1998, at *D-23, *available at* N98DBW ABALGLED D-1 (noting Bermuda's employment of British common law).

[262] *See* Livingston v. Jefferson, 15 F. CAS. 660, 664 (Vir. Cir. 1811) (Marshall, J.) (noting respect due to British courts); *but see* Adam Liptak, *U.S. Court Is Now Guiding Fewer Nations*, N.Y. TIMES (Sept. 17, 2008), http://www.nytimes.com/2008/09/18/us/18legal.html?pagewanted=all&_r=0 (noting recent reluctance of U.S. Supreme Court to cite foreign high courts).

[263] *See supra* note 97 and accompanying text.

[264] *See, e.g.*, Owen Bowcott & Maya Wolfe-Robinson, *Honduras May Appeal to London Courts*, THE GUARDIAN (Jul. 22, 2012), http://www.theguardian.com/law/2012/jul/22/honduras-london-courts (noting Honduras deference to U.K. appeals courts due to domestic judicial instability).

[265] *See supra* notes 240, 247–255 and accompanying text (articulating the Court's motivations and noting the specific goal of the *Rubin* litigation to create such a precedent).

[266] *Rubin*, [2012] UKSC 46, [144].

[267] *See supra* notes 89–91 and accompanying text.

IV. CONCLUSION

In the past few decades, national boundaries have become less important to the world's most powerful economic entities. When those entities fail, as in the case of Bernard Madoff's investment scheme, they often leave debts and assets scattered around the globe. In the interest of fairness to creditors—or victims, depending on perspective—and debtors alike, the courts of various nations must then cooperate to administrate the estates of the bankrupt parties. The courts' decisions regarding the extent of such cooperation, or "comity," inform the litigation strategies of the parties and controls their ability to fairly distribute assets to creditors and protect rehabilitated debtors.

Rubin provides a powerful persuasive precedent. The case illustrates the fact that courts worldwide have both the tools and the motivation to eschew cooperative measures. Courts have no desire to cede authority either to their foreign counterparts or to the domestic legislatures that have passed insolvency regulations meant to encourage international trade. By insisting on adherence to narrow common law principles, courts can maintain parochial authority while ostensibly protecting the home country against harassment by foreign courts that would seize citizens' assets without valid jurisdiction.

As a result of *Rubin*, attorneys may suffer the inconvenience of having to file claims in courts of opposing parties' home states, regardless of opposing parties' actions in other states. This "territorialist" approach will be less efficient and effective than centralized, "universalist" claim administration. It may thus be more difficult to achieve the primary bankruptcy goals of a debtor's "fresh start" and equal distribution among equally situated creditors. Although this was not the outcome desired by practitioners generally, the *Rubin* case nevertheless brought about a careful and meaningful articulation of an important legal perspective.