INSOL International

Impact of *Rubin v Eurofinance* on Cross-border Insolvency Recognition and Enforcement

August 2017

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INSOL International
6-7 Queen Street, London, EC4N 1SP
Tel: +44 (0) 20 7248 3333 Fax: +44 (0) 20 7248 3384

Foreword

INSOL International is very pleased to present a survey report titled "Impact of *Rubin v Eurofinance* on Cross-border Insolvency Recognition and Enforcement by Fredric Sosnick, Alastair Goldrein and Ronni Arnold of Shearman & Sterling LLP, USA.

The decision by the UK Supreme court in the conjoined appeals *of Rubin & Anor v. Eurofinance SA & Ors; New Cap Reinsurance (In Liquidation) & Another v. AE Grant & Ors* was eagerly awaited by the UK's restructuring and insolvency community. It was expected that the Supreme court would uphold the principle of universality whereby – to the extent consistent with justice and public policy the court would recognise and give effect to valid foreign judgements issued by foreign courts.

In the course of the proceedings, the claimants relied heavily upon *HIH* and another earlier case, *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings* both of which lend significant support to the universalist approach. As Lord Hoffman in the HIH case stated –

> *"...the principle of (modified) universalism ... has been the golden thread running through English cross-border insolvency law since the eighteenth century"*

In this case however the Supreme Court over ruled the lower courts decisions and explained in detail the reasons for its reluctance to broaden the existing common law rules on universality but many restructuring professionals found the decision to be disappointing and a missed opportunity.

INSOL International was keen to explore what the global restructuring community thought of this decision and with the assistance of the project leaders carried out a survey. This report discusses the survey results and highlights the mixed reactions from some of the non-UK insolvency professionals.

INSOL International sincerely thanks Fredric Sosnick, Alastair Goldrein and Ronni Arnold of Shearman & Sterling LLP, USA for writing this excellent survey report which provides valuable insights into this landmark insolvency decision.

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Impact of *Rubin v Eurofinance* on Cross-border Insolvency Recognition and Enforcement

By
Fredric Sosnick[3*], Practice Group Leader, Financial Restructuring & Insolvency Group
and
Alastair Goldrein, Associate, Financial Restructuring & Insolvency Group
and
Ronni Arnold, Knowledge Management Attorney, Financial Restructuring & Insolvency Group,
Shearman & Sterling LLP

1. Introduction

The principle of "universality" (or "universalism") is the theory under which there would be a single insolvency / bankruptcy proceeding in one local jurisdiction that has universal effect so that creditors effectively can be treated on a *pari passu* basis regardless of their location. A fundamental component of universality is that courts outside of the local jurisdiction that follow the principle should actively work to ensure that the local jurisdiction's decisions are given worldwide effect. The opposite concept is that of "territoriality," in which the home jurisdiction determines what is in its best interest without regard to creditors in other jurisdictions.

2. Rubin & Anor v. Eurofinance SA & Ors; New Cap Reinsurance (In Liquidation) & Another v. AE Grant & Ors (Conjoined Appeals) [2012] UKSC 46 (24 October 2012)

The decision by the Supreme Court of the United Kingdom in *Rubin v. Eurofinance SA*[1] ("*Rubin*") in 2012 sent tremors throughout the international restructuring community, as it signaled an end -- at least in the United Kingdom -- to the principle of "modified universalism" that was described as the "golden thread running through English cross-border insolvency law since the eighteenth century[2]". Under this principle, to the extent consistent with justice and public policy, courts were expected to cooperate with the courts in the country in which a main insolvency proceeding was pending to ensure that all creditors' rights are fairly and equitably established in a single forum, and thus to recognize valid judgments entered by those courts. *Rubin* changed this fundamental premise by declaring that, unless a statutory method of recognition applies[3], the judgment of a foreign court will be capable of enforcement in England only where the elements of English common law are met. The Supreme Court declined to give special treatment to judgments entered in a foreign insolvency proceeding, and held that the usual common law requirements applicable to *in personam* jurisdiction must apply.

In the 2012 Rubin decision[4], the United Kingdom Supreme Court held that the principle of "universality" in the insolvency / bankruptcy context did not permit the courts of the UK to recognize and enforce[5] judgments entered in foreign insolvency or bankruptcy proceedings if such judgments would not be recognized under traditional principles of English common law. In Rubin, joint receivers appointed in the UK obtained a default summary judgment in the US Bankruptcy Court (which was administering the Chapter 11 proceedings) against individuals resident in England, who had no presence in the United States and had not submitted to jurisdiction in the United States. The receivers subsequently sought recognition and enforcement of the default judgment in the English courts. The United Kingdom Supreme Court ultimately held that because the defendants in Rubin did not submit to the jurisdiction of the United States courts, the default judgment rendered in the United States would not be enforced by the English Courts.

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* The views expressed in this report are the views of the authors and not of INSOL International, London.

1 *Rubin & Anor v. Eurofinance SA & Ors; New Cap Reinsurance (In Liquidation) & Another v. AE Grant & Ors (Conjoined Appeals)* [2012] UKSC 46 (24 October 2012).

2 *In re HIH Casualty and General Insurance Ltd.; McGrath v. Riddell (Conjoined Appeals)* (2008) UKHL 21 (Lord Hoffmann).

3 Although various statutory schemes can sometimes govern the ability of the courts of England and Wales to assist in foreign insolvency proceedings, they were found by *Rubin* to be inapplicable. Notably, the *Rubin* court found that the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law") that has been implemented in English law via the Cross-Border Insolvency Regulations 2006 neither expressly nor impliedly was intended to deal with the enforcement of judgments in an insolvency situation. *See Rubin*, at paras. 142-44).

4 *Rubin & Anor v. Eurofinance SA & Ors; New Case Reinsurance Corporation (In Liquidation) & Anor v. AE Grant &* Ors (Conjoined Appeals) (2012) UKSC 46 (October 24, 2012) ("*Rubin*").

5 Although recognition is required in order to enforce an insolvency-related judgment, not all recognized judgments will require enforcement to be effective. The term "enforcement" goes beyond what might be required to make the judgment effective in the recognizing State, and focuses on compelling compliance with, or observance of, the judgment by the judgment debtor.

The United Kingdom Supreme Court's determination was based on English common law (commonly referred to as the "Dicey Rule"), which permits enforcement of a foreign judgment in England only if the person against whom the foreign judgment has been entered: (i) was present in the foreign jurisdiction when the proceedings are commenced; (ii) submitted claims or counterclaims in the foreign proceedings; (iii) submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings, or (iv) otherwise agreed to the jurisdiction of the foreign court.

The Court noted that if the Dicey Rule had been satisfied, the judgment would have been enforced. While recognizing that many courts treat insolvency / bankruptcy judgments more liberally than other types of judgments for purposes of recognition and enforcement, the United Kingdom Supreme Court held that a more liberal rule for avoidance judgments should not be applied in the interests of the universality of bankruptcy and similar procedures. The court concluded that unless the Dicey Rule was satisfied, any change in the settled law relating to the recognition and enforcement of foreign judgments in the insolvency context would have to be implemented through legislation. In so ruling, the Court held the UNCITRAL Model Law is not designed to provide for enforcement of judgments and that there was no ability under the Cross Border Insolvency Regulations 2006 to recognise judgments given in the course of foreign insolvency proceedings

Cutting the golden thread, however, poses a threat, not only to the ability of English courts to recognize the validity of foreign judgments that do not comport with English common law principles, but also the very real risk that other countries will follow suit and thereby diminish the level of international cooperation in enforcing foreign judgments in the insolvency arena. Moreover, whether the constraints placed upon the English courts by *Rubin* are limited to the enforcement of foreign judgments or will have an even greater impact on English courts' ability to lend assistance to foreign insolvency proceedings more generally is not yet clear[6].

3. INSOL International Survey

INSOL International carried out a global survey to solicit information regarding the effects, if any, in the members' jurisdictions with respect to the 2012 decision of the Supreme Court of the United Kingdom in the Rubin decision.

The questions were asked in a manner intended to gain further insight into how various jurisdictions enforce foreign judgments in an insolvency / bankruptcy context.

The questionnaire also intended to solicit information regarding the effects, if any, in the various jurisdiction, and to ascertain the extent, if any, to which *Rubin* has affected international practice.

4. Areas of Interest and overall results

The survey sought to collect information with respect to the following:

- Prior to the Rubin decision, did a particular jurisdiction follow the principle of universality (or a similar principle) for insolvency proceeding?
- Reactions to the Rubin decision;
- Whether the property in question must be subject to a court's *in rem* jurisdiction in order for that court to recognise and enforce a foreign *in rem* judgment;
- What are the general requirements for recognition and enforcement of a foreign in *personam* judgment; and
- In an insolvency / bankruptcy context, would a foreign judgment obtained by default against a defendant who did not appear in the action ordinarily be recognized and enforced by the

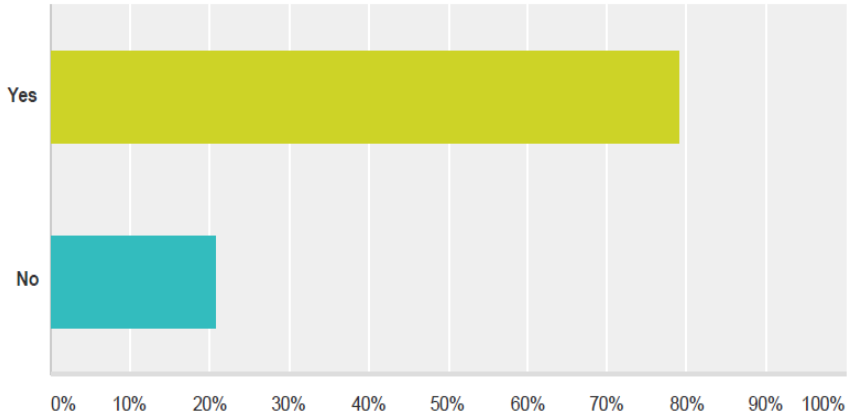
[6] Some of these concerns were expressed in a Technical Series piece published by INSOL International in July 2013 entitled The Snipping of the Golden Thread and the Sacking of the Temple of Universalism.

courts in a jurisdiction if such judgment otherwise was obtained in accordance with all applicable procedural requirements?

5. The Survey Results

72 members from around the world responded to the survey, either in whole or in part. Responses were received from participants practising in 25 legal systems worldwide, including: The United States; England; Australia; Bahamian Law; BVI; Canada; Cayman Islands; Cyprus; the Czech Republic; Germany; Guernsey; Hong Kong; Hungary; India; Italy; Japan; Jersey; Mexico; The Netherlands; New Zealand; Romanian; South Africa; Spain; UAE; and Wales.

5.1 Question: Prior to the Rubin decision, did your jurisdiction follow the principle of universality (or a similar principle) for insolvency proceeding?

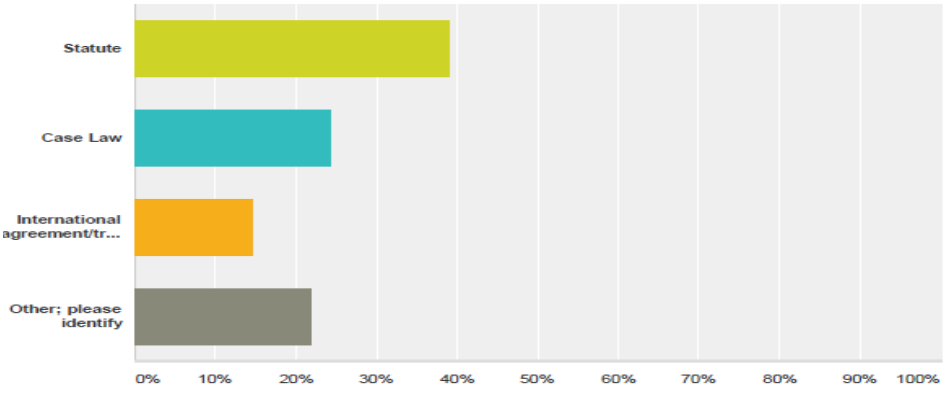


Of the 62 participants who responded to this question, 79% said that their jurisdiction followed the principle of universality prior to Rubin, while 21% of respondents said they did not.

The majority of survey respondents (39%) said that statutes prescribed the standards for recognising a foreign judgment prior to Rubin. Of the remainder, approximately 24% said that case law prescribed the standard for recognition of a foreign judgment, approximately 15% said international agreement / treaty / regulation, and 22% said "other," which category included mixes of statutes and case law[7].

One respondent practicing under UK law said that the UK has a mixed, as opposed to a uniform, approach, noting the following: Foreign judgment issued in EFTA countries and Denmark (which has opted out of the Judgments Regulation and Insolvency Regulation) are governed by the Lugano Convention. Some foreign judgments from designated non-EU countries with whom the UK has reciprocal arrangements are governed by statute. Foreign judgments in non-EU countries with which the UK does not have reciprocal arrangements (including the United States) are governed by common law. The survey was conducted prior to the United Kingdom's "BREXIT" decision.

5.2 Question: Following the Rubin decision, did the law in your jurisdiction change with respect to the recognition and enforcement of foreign proceedings in the insolvency / bankruptcy context?

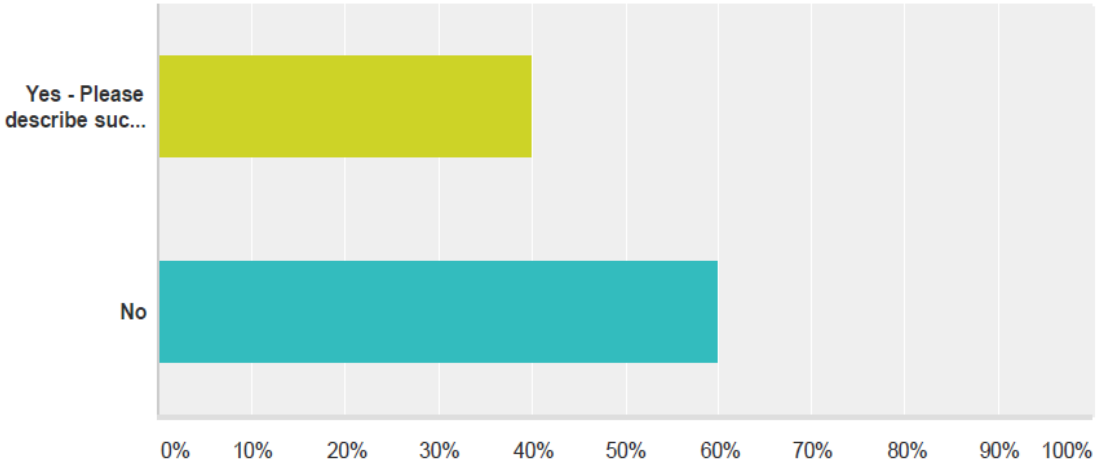


[7] Depending upon the terms under which the United Kingdom exits the European Union, its approach with European Union countries may further evolve.

Amongst those surveyed, the principle of universality was perceived to be followed less in the aftermath of Rubin than it was prior to Rubin. The majority of the 20 respondents (30%) said that changes were effectuated through case law, while 25% said statute. 10% said international agreement / treaty / regulation, and 35% said "other" (though the responses received did not reflect other means of effectuating such change).

One respondent disputed the notion that Rubin abandons modified universalism, stating that: "The main problem in Rubin was that there is no international system for recognition and enforcement of money judgments in which both the US and UK participate. The UK Supreme Court was not prepared to reform (our) common law rules on judgment recognition and enforcement through what it (whether rightly or wrongly) regarded as the back door of insolvency."

5.3 Question: Have commentators in your jurisdictions reacted to the Rubin Decision?



Approximately 40.5% of the survey respondents said that commentators had not reacted to Rubin, and 59.5% said they had reacted in some manner. The consensus was mixed as to whether or not the decision has or will result in the erosion of the concept of universalism.

The general consensus amongst respondents was that the Rubin opinion was a setback for international insolvency procedure.

5.5.1 Views expressed where Rubin Decision had not damaged universality

- One respondent observed that the reaction in the UK is polarized. The decision is clearly unhelpful from the perspective of worldwide asset recovery in transnational insolvency cases and, for that reason, it has detractors. Similarly, insolvency lawyers who are frustrated at the pace of progress towards universality, object to both the result and the tone of the Rubin opinions. However, many international commercial lawyers, including some insolvency lawyers of which he is one, consider that the decision on its facts is correct, albeit unfortunate.

- From the perspective of offshore jurisdictions a member from the BVI said that this decision does not adversely affect foreign IPs in getting disclosure orders against registered agents of BVI companies – which is often the sole reason for a foreign IP to come to the BVI. The Rubin decision has not changed the landscape in the BVI.

- Whether and how Guernsey's courts will modify their approach in light of the Rubin decision remains to be established. General opinion is that Rubin is likely to be followed.

- This decision is helpful to hedge fund clients of our firm in that it assures them that their assets in a foreign forum are safe from bankruptcy judgments of courts that do not have jurisdiction over them.

- This decision has no effects for Germany. Our statute remains unaffected and did not need to be changed.

5.5.2 Views expressed where Rubin Decision had damaged universally

- One respondent said that "Rubin does nothing to affect co-operation across a wide range of matters (e.g. access for foreign representatives to local courts, a local stay, turnover of assets, etc.). It arguably reflects:

  - the lack of international harmonization outside the EU as regards judgments recognition and enforcement;

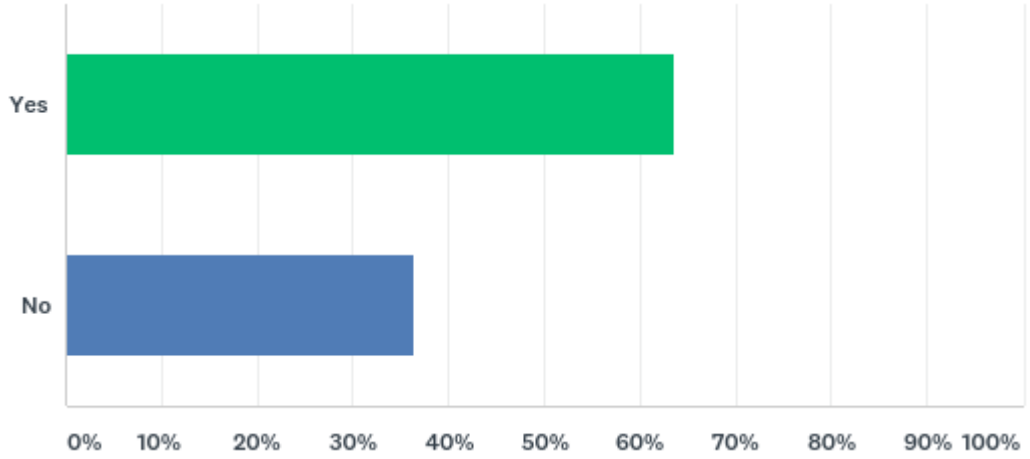
  - the difficulty (certainly from a UK perspective) of characterizing money judgments in insolvency cases as somehow 'special' or 'distinctive' especially where, as in Rubin, the statutory avoidance cause of action has a common law analogue that would result in a judgment falling squarely within the common law rules (e.g. why should a money judgment in a fraudulent conveyance action under an insolvent statute be treated differently from a fraudulent conveyance action outside of bankruptcy or an action on the same factual predicates in unjust enrichment)?

  - the lack of any consensus on what a principle of modified universalism entails."

  According to this same respondent, the US view of universalism perhaps reflects domestic experience in the US where "one case under one law" is the default in the federal bankruptcy system; the UK common law default, on the other hand, is an ancillary insolvency proceeding in which the court provides assistance under UK law. It follows that the UK version of modified universalism starts from a different premise."

- Another commented that the English Supreme Court and Privy Council decisions are highly persuasive in Jersey. Jersey commentators thought Rubin had damaged the cause of universality.

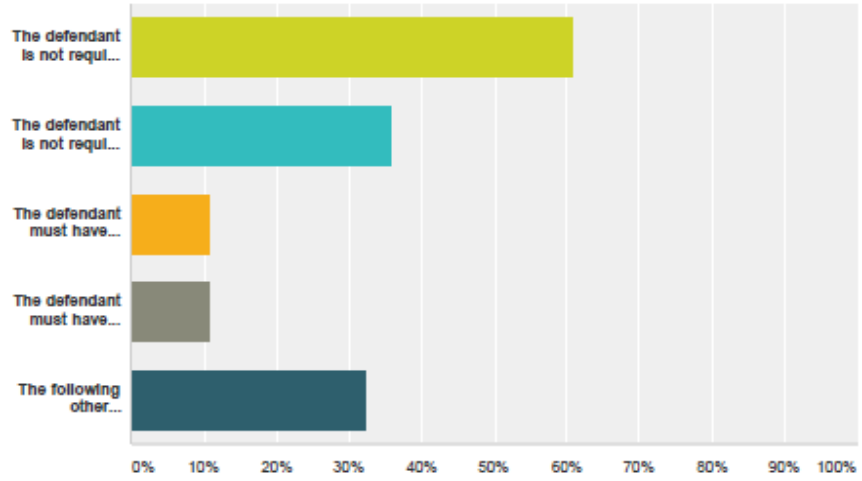
5.4 Question: In order to recognize and enforce a foreign *in rem* judgment in an insolvency / bankruptcy context, must the property in question be subject to the *in rem* jurisdiction of the court in your legal system?



Of the 33 respondents, approximately 64% said that the property must be subject to the *in rem* jurisdiction of the court in order to recognize and enforce a foreign *in rem* judgment within an insolvency context, while the remaining 36% said that was not the case.

One survey respondent said: "U.S. bankruptcy law purports to address *in rem* judgments wherever a debtor's property exists. As a practical matter, it is extremely difficult to enforce *in rem* decisions in foreign jurisdictions."

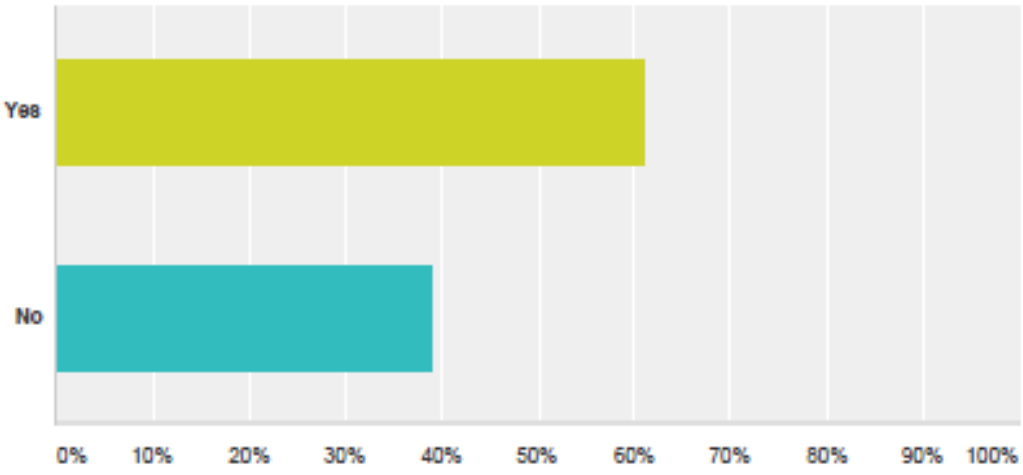
5.5 Question: What are the general requirements for recognition and enforcement of a foreign *in personam* judgment?



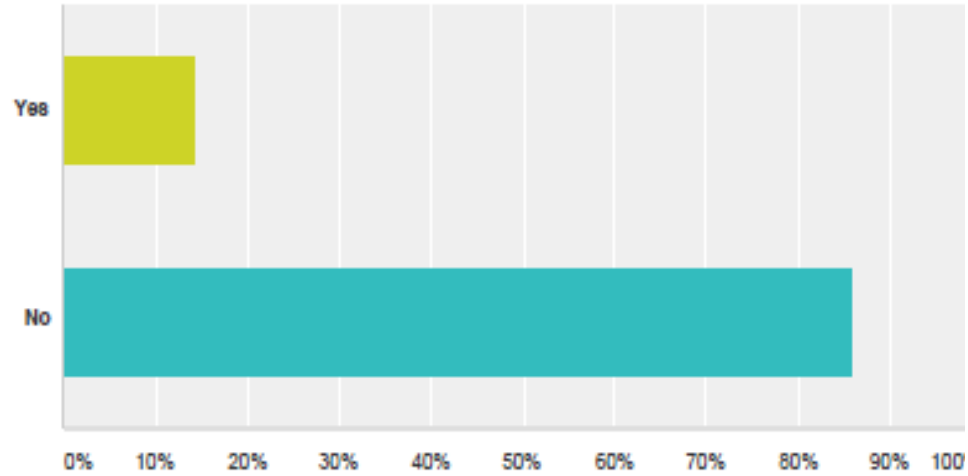
The majority of respondents, approximately 61%, answered that, for recognition and enforcement of a foreign in *personam* judgment, the defendant is not required to have appeared in the litigation, either actually (through a personal appearance or through counsel) or "constructively" (through a defendant's actions), but the foreign court must have had proper jurisdiction over the defendant, and the defendant must have been afforded the rights necessary for entry of a judgment under the foreign court's judicial system. 35% had the same answer except that the defendant must have been afforded the rights necessary for entry of a judgment under the respondent's country's judicial system.

The Supreme Court in Rubin concluded that the Model Law does not relate to the recognition or enforcement of foreign judgment against third parties. As a result, the Model Law, as implemented in the United Kingdom, cannot be used to enforce a foreign judgment in *personam*. Two respondents noted that participation in the insolvency case itself, e.g. by filing a proof of claim, is the key factor in establishing jurisdiction.

5.6 Question: In an insolvency / bankruptcy context, would a foreign judgment obtained by default against a defendant who did not appear in the action ordinarily be recognized and enforced by the courts in your jurisdiction if such judgment otherwise was obtained in accordance with all applicable procedural requirements?



5.7 Question: Is the answer to the above questions different outside of the insolvency / bankruptcy context?



In response to this question, within the bankruptcy / insolvency context, approximately 61% of respondents answered "yes," and the remainder answered "no." In contrast, outside of the bankruptcy / insolvency context, a stronger majority (almost 86%) answered "no." This evidences an inclination for courts to enforce default judgments in the insolvency context (at least amongst those surveyed).

6. Conclusion

While our modern global economy has, in many ways, crossed sovereign borders with relative ease, international insolvency law has struggled to keep pace. In a world where assets easily can move across borders, parties may seek transnational legal certainty to avoid repeated litigation in the wake of conflicting decisions. Unfortunately, such certainty may be difficult to obtain as a result of legal regimes that often vary across jurisdictions.

Recognition of a foreign judgment requires that the rendering court have jurisdiction. Whether jurisdiction exists under the rendering court's own law typically is decided by the rendering court. One state's rules on jurisdiction, however, are not binding on another state's decision to recognize the judgment, as the question of whether the assertion of jurisdiction is sufficient for purposes of recognition may be addressed independently by the enforcing court. Most enforcement treaties contain rules on indirect jurisdiction, and many lay out relatively detailed lists of required bases for enforcement.

As with any legal regime, each country's bankruptcy laws reflect local public policy choices and, therefore, can be very different from one another. There has, however, been a recent global trend towards adopting insolvency laws that facilitate reorganizations instead of solely liquidations. One of the theoretical benefits of the Rubin decision was the retention of predictable rules on the enforcement of foreign judgments. Despite Rubin's retreat from the theory of universalism, as a general matter, conflicting insolvency regimes among key developed economies are yielding to a more unified, efficient and effective cross-border law.

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