A NEW ECONOMIC APPROACH TO CROSS-BORDER RESTRUCTURING LAW

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DECLARATION

I, Ioannis Bazinas confirm that the work presented in my thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

ABSTRACT

This thesis proposes an economic theory of cross-border restructuring law as a field that is dogmatically and functionally autonomous from cross-border insolvency. On that premise, the analysis counters the traditional perspective, which views restructurings as ancillary instances of conventional insolvency proceedings and considers cross-border insolvency instruments as sufficient to deal with the issues presented in cross-border restructurings. By relying on the tools and methods of economic analysis, the thesis argues that restructuring and insolvency law deal with different economic problems in the context of financial distress, which suggests a fundamentally different role for legal rules in the sphere of private international law. This novel view has two main implications that are advanced by this thesis. First of all, it can offer significant insights into many of the contemporary controversies surrounding the application of cross-border insolvency instruments, especially the various enactments of the UNCITRAL Model Law on Cross-Border Insolvency, on the recognition of the effects of foreign restructuring plans, as reflected in case law from the United Kingdom and the United States. Secondly, and more importantly, the basic economic insights of this thesis can assist in the development of an original and efficiency oriented normative approach for the private international law of restructurings, in the form of specialized judgment recognition rules. Such a framework has the potential of reforming the current view of English law on the matter, not only by leading to more efficient outcomes in cross-border restructuring practice but also by improving its doctrinal coherence and ensuring a greater degree of consistency with overarching principles of English private international law.

IMPACT STATEMENT

This thesis argues in favour of a novel understanding of cross-border restructuring law as an autonomous legal field from cross-border insolvency. The analysis thus invites scholars and academics to reconsider the traditional notion that restructurings are ancillary to insolvency and reframe their understanding of the role of legal rules in the restructuring, and by extension, the cross-border restructuring context. In that vein, the arguments presented in this thesis challenge the conventional understanding of contemporary controversies arising out of the application of cross-border insolvency instruments, especially the UNCITRAL Model Law on Cross-Border Insolvency, on the recognition of foreign restructuring plans, in the United States and the United Kingdom. The position advanced by the analysis of this thesis is therefore expected to have an impact on the constituents of the academic community in the field of insolvency and restructuring law, by advancing a new theoretical framework that can adequately and convincingly explain the current state of affairs.

In addition to fostering a new understanding of this field, this thesis also engages in normative arguments, by advancing a proposal for a judgment recognition framework to achieve the cross-border recognition of restructuring plans. The relevance of this proposal is not limited to academia but also extends to policy makers both at the level of UNCITRAL and more specifically the UK, given the recent initiatives by the UK Insolvency Service to enact the UNCITRAL Model Law on the Recognition and Enforcement of Insolvency Related Foreign Judgments. Against this background, it is reasonably expected that the arguments advanced here will contribute to future policy discussions on how to reform the prevailing English approach on the issue of recognition of foreign restructuring plans.

ACKNOWLEDGEMENTS

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ABBREVIATIONS

Model Law	UNCITRAL Model Law on Cross-Border Insolvency (1997)
MLJ	UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018)
CBIR	Cross Border Insolvency Regulations 2006, SI 2006/1030
Chapter 15	11 U.S. Code Chapter XV (§ 1501-1531)
EIR	Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ 2 141/19
Preventive Restructuring Directive	Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132

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CHAPTER I: INTRODUCTION

1. Articulating the problem

In one of his most famous essays, the philosopher Isaiah Berlin, quoting an excerpt from the Greek lyrical poet Archilochus, begins with the statement that, 'The fox knows many things, but the hedgehog knows one big thing.'[1] Much of the analysis that follows this powerful introduction is preoccupied with the perplexing, though highly intriguing, question of Tolstoy's view of history in his masterpiece, 'War and Peace'. Still, this obscure adage has since been immortalized as reflecting a broader, indeed archetypal, distinction between two different types of thinkers and, more generally, modes of thought; on the one hand, hedgehogs, who view and present the world through a single uniform vision and, on the other hand, foxes, who, drawing on a variety of diverse experiences, pursue multiple unrelated and at times even contradictory ideas. From an abstract point of view, this dichotomy can be considered to be making a more general point, as distinguishing between a generalist/unifying and a specialist/fragmentary knowledge of things and suggesting, impliedly (though clearly, if we trust the style of the original text) that there is a superiority in the intellectual force of the former view of reality.[2] Although it may well be argued that this duality is simplistic or artificial, it can nevertheless be useful as an analytical tool and as a starting point for an intellectual inquiry. By contemplating and assessing the degree of our knowledge of a particular subject on the basis of this distinction, it is possible to uncover the aspects that are underdeveloped and thus require further attention and elaboration. In that sense, we may consider, before venturing into an analysis of a given field of study, whether our understanding of it is more akin to a fox, namely practical, piecemeal and applied, or to a hedgehog, namely theoretical, uniform and principled.

The subject of cross-border insolvency law is, as far as one can tell, far removed from the literary and philosophical issues that concerned Berlin in his essay. Nevertheless, our understanding of the problems that are presented in this field seems to be informed

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[1] [Πολλ' οίδ' ἀλώπηξ, ἐχῖνος δέ έν, μέγα]: Isaiah Berlin, *The Hedgehog and the Fox: An Essay on Tolstoy's View of History* (2nd edn, Weidenfeld and Nicholson 2022).

[2] Although it must be pointed out that Berlin does not deny that true genius can exist in the perspective of a fox, as he illustrates in his analysis of Tolstoy: ibid 44–45.

by well-articulated theoretical principles. The main conceptual question posed in the context of cross-border insolvencies is whether the assets of the debtor, which may be located in multiple jurisdictions, should, in principle, be administrated in a single insolvency proceeding, having universal effect, or in multiple territorial proceedings, each applying a different law to questions of liquidation and distribution of assets in that respective territory.[3] This debate between universalism and territorialism, as these approaches were aptly labelled, has now been settled and crystallized into a compromise under the norm of 'modified universalism', which recognizes both the greater efficiencies of universalism as well as the practical obstacles to its full implementation. According to this approach, the basic tenets of universalism namely that a single insolvency proceeding should in principle administrate, liquidate and distribute under a single law the debtor's assets, wherever they may be located, are adhered to; however, foreign jurisdictions, where assets may be located, retain a discretion to refuse to provide assistance to the main insolvency proceedings, if the interests of local creditors are not adequately protected.[4] In that context, universalism, even in its modified variant, constitutes the main theoretical principle underpinning our understanding of cross-border insolvency issues.

This regime is best reflected in the Model Law, which has been enacted in a number of jurisdictions, most notably the United States and the United Kingdom, and constitutes the international best practice in managing cross-border insolvency.[5] Since its introduction, the Model Law framework, in its various domestic enactments, is generally considered to have provided a workable and efficient framework to address the challenges posed in cross-border insolvency cases, by enabling the straightforward recognition of a foreign insolvency proceeding and the provision of relief to a foreign insolvency representative.[6] This does not of course mean that all

[3] For an overview of these two opposing views: see Jay Lawrence Westbrook, 'A Global Solution to Multinational Default' (2000) 98 Michigan Law Review 2276; Lynn M LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (1998) 84 Cornell Law Review 696.
[4] A very good illustration of these views and their evolution can be found in: Irit Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (1st edn, Oxford University Press 2018) 1–27.
[5] This can be seen from the fact that the UNCITRAL Legislative Guide on Insolvency Law explicitly recommends the adoption of the Model Law, as part of an effective insolvency regime: United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law* (Parts One and Two, UN Publication 2005) 14.
[6] Irit Mevorach, 'On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency' (2011) 12 European Business Organization Law Review 517.

conceivable problems have been resolved, as there are still divergences in the approaches adopted by different enacting jurisdictions on several important issues.[7] Nevertheless, the field of cross-border insolvency can be said to benefit from a coherent theoretical framework that provides the necessary principles, by which practical issues may be resolved, and offers an overarching vision, the ideal of universalism, that can be adequately relied upon to address new challenges. If we had to characterize our academic view of cross-border insolvency on the basis of the aforementioned distinction, we would probably conclude that our understanding is very much like that of a hedgehog.

There is however an element of modern practice that seems to evade our seemingly coherent and unitary understanding of the field. When an insolvency proceeding does not lead to the liquidation of the debtor's worldwide assets but rather results in a restructuring, namely a collective rearrangement of the debtor firm's obligations to its creditors so that the firm can be rescued and continue operating,[8] several different, yet equally complex, issues arise. The most important and consequential of such problems refers to the recognition of the effects of a restructuring plan in foreign jurisdictions, especially as far as it modifies or discharges the claims of creditors that may be situated in such jurisdictions. Although a cursory consideration of the problem through the lens of the prevailing norms of cross-border insolvency would seem to support a principle of universal recognition of foreign restructuring plans, there is in reality a stark divergence as to how various jurisdictions, though nominally adhering to the doctrine of (modified) universalism, approach these issues.

Nothing illustrates the existing state of affairs better than the contrast in approaches between the United States and the United Kingdom.[9] On the one hand, US bankruptcy courts routinely recognize the conclusive effect of foreign restructuring plans by seemingly applying the provisions of the Model Law,[10] whereas, on the other hand,

[7] Adrian Walters, 'Modified Universalisms & The Role of Local Legal Culture in the Making of Cross-Border Insolvency Law' (2019) 93 American Bankruptcy Law Journal 47.
[8] This definition traces the definition provided by the UNCITRAL Legislative Guide on Insolvency, which defines restructurings as 'the legal procedures by which the financial well-being and viability of a firm in financial distress can be restored and the business can continue to operate': UNCITRAL, *Legislative Guide on Insolvency Law* (n 5) 7.
[9] Adrian Walters, 'Giving Effect to Foreign Restructuring Plans in Anglo-US Private International Law' (2015) 3 Nottingham Insolvency and Business Law eJournal 20.
[10] See for instance: *In re Rede Energia SA* 515 BR 69 (2014) (Bankr SDNY).

English courts, relying on the so-called '*Gibbs'* rule (as typified by the 19th century judgment that introduced this approach),[11] refuse such recognition, to the extent that a foreign restructuring affects obligations governed by English law.[12] This fundamental difference in viewpoints is not merely academic but has stark practical implications for the conduct and management of cross-border restructuring cases.[13] More conceptually however it suggests that our principled conception of cross-border insolvency law breaks down, when issues of cross-border restructurings are introduced.

These inconsistencies are well noted in contemporary academic commentary.[14] The majority of criticisms are directed against the English approach, focusing on the inefficiencies that result from the continued application of *Gibbs* and the costs that this approach entails for cross-border restructuring practice. Notwithstanding the persuasiveness of these views, a standing feature of these contemporary criticisms seems to be an insistence that the fundamental questions of cross-border restructurings can be adequately addressed by resorting to the overarching principles that have been developed in the context of cross-border insolvency, especially as such principles are reflected in the statutory provisions of the Model Law.[15] According to this position, the stance of English law on this matter appears to be attributed either to the institutional rigidity of the English framework in general or the temperamental obstinacy of English judges, which leads to a wilful refusal to apply the shared and indubitable principles of modified universalism.[16] Nevertheless, these discussions have not managed to advance the discourse in any meaningful way or to offer any solutions to overcome the English approach. As a result, the debate on the question of recognition of foreign restructuring plans appears to have reached a stalemate; whereas there is a general understanding that the current English approach is

[11] *Antony Gibbs And Sons v Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399.
[12] *Re OJSC International Bank of Azerbaijan* [2019] Bus LR 1130.
[13] Some of these problems were vividly illustrated by US Bankruptcy Judge Martin Glenn in a well-publicized cross-border restructuring case: *In re Agrokor dd* 591 BR 163 (2018) 167 (Bankr SDNY).
[14] Ian Fletcher, *Insolvency in Private International Law* (2nd edn, Oxford University Press 2005) 130; Kannan Ramesh, 'The Gibbs Principle: A Tether on the Feet of Good Forum Shopping' (2017) 29 Singapore Academy of Law Journal 42.
[15] Look Chan Ho, 'Recognising Foreign Insolvency Discharge and Stare Decisis' [2011] Journal of International Banking Law and Regulation 266.
[16] Varoon Sachdev, 'Choice of Law in Insolvency Proceedings: How English Courts' Continued Reliance on the Gibbs Principle Threatens Universalism' (2019) 93 American Bankruptcy Law Journal 343.

inefficient, there seems to be no consensus on the appropriate normative approach to the challenges that are presented in the cross-border restructuring context.

Yet, conventional criticisms of the English approach fail to grasp a fundamental element of the problem. If examined closely, the position adopted by English courts is more reflective of inertia as opposed to conceptual disagreement. As a matter of fact, the English perspective does not appear to constitute a coherent and principled rejection of modified universalist norms, which nevertheless apply to cross-border insolvency matters,[17] but rather implies that the overarching norms in the cross-border insolvency sphere are unable to adequately address the issues that are presented in the cross-border restructuring context. In that sense, the central problem of cross-border restructuring law is not the refusal of some jurisdictions to apply a theoretical framework, which by definition contains the necessary principles to address the complex issues presented by the problem of recognition of foreign restructuring plans. Rather, it is the absence of any such coherent normative principles, capable of informing our understanding and normative response, which lies at the heart of the controversies being generated in cross-border restructuring law. If we had to refer back to our introductory statements, we would thus conclude that our understanding of the field is similar to the fox, namely fragmented and focused on dealing with practical problems, lacking any solid basis on comprehensive normative principles. What we are missing is the overarching framework that can offer a convincing account of existing inconsistencies as well as a credible way forward, the perspective of the hedgehog.

2. Aims and contributions of the thesis

The purpose of this thesis is to fill in this gap, by developing a new normative theory of cross-border restructuring law as distinct from the field of cross-border insolvency, using the tools of economic analysis. Although the two fields have long been considered as inseparable, economic analysis suggests that they actually deal with different problems of creditor cooperation and coordination in the context of financial distress. On the one hand, insolvency law is fundamentally preoccupied with

[17] In Lord Hoffman's famous dictum, universalism is considered the 'golden thread running through English cross-border insolvency law, since the 18th century': *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, 861.

addressing collective action concerns between various creditors that have a claim on the common pool of the debtor's assets. Restructuring law on the other hand seeks to enable efficient bargaining, by addressing strategic behaviour in the context of multi-party contractual renegotiation. Whereas insolvency law provides clear legal sanctions to solve a collective action problem that lies at the heart of the insolvency situation, restructuring law attempts to provide parties with the necessary legal tools to bargain efficiently and avoid bargaining breakdowns. This analysis suggests that there are two main constituent components of restructuring frameworks. First, restructuring law provides a majoritarian decision-making rule, which enables the debtor to agree a collective restructuring with a qualified majority of its creditors, thereby resolving the problem of creditor holdout. Secondly, restructuring rules also provide certain substantive and procedural limitations to majority rule, which function as protections of creditor rights against abusive debtor tactics and thereby address the countervailing problem of creditor holdup. In that sense, restructuring law can be conceptualized as a balancing exercise between two opposing forms of strategic behaviour in the distressed bargaining scenario.

The fundamental game theoretical concepts that underpin the main argument of this thesis, namely the distinct economic concerns raised by restructurings, are not completely unknown to legal scholarship.[18] Nevertheless, their application on issues of insolvency and restructuring law has to date been only sporadic[19] and has primarily been utilized to offer limited insights to specific problems.[20] The thesis will develop these points into additional detail in order to construct a richer and more comprehensive understanding of restructuring law, as a self-standing legal field that is related to, yet functionally separate from insolvency law. In particular, whereas

[18] Richard H McAdams, 'Beyond the Prisoner's Dilemma: Coordination, Game Theory, And Law' (2009) 82 Southern California Law Review 209; Michael A Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111 Harvard Law Review 621.

[19] Rolef J de Weijs, 'Harmonisation of European Insolvency Law and the Need to Tackle Two Common Problems: Common Pool and Anticommons' (2012) 21 International Insolvency Review 67; Anthony J Casey, 'Chapter 11's Renegotiations Framework and the Purpose of Corporate Bankruptcy' (2020) 120 Columbia Law Review 1709.

[20] Rolef de Weijs, 'Too Big to Fail as a Game of Chicken with the State: What Insolvency Law Theory Has to Say About TBTF and Vice Versa' (2013) 14 European Business Organization Law Review 201. One exception is Stephan Madaus, who appears to have been the first to venture into a systematic consideration of restructuring law, as a self-standing field: Stephan Madaus, 'Leaving the Shadows of US Bankruptcy Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law' (2018) 19 European Business Organization Law Review 615.

existing scholarship seems to view restructuring law almost exclusively as a holdout resolution tool,[21] the analysis will also highlight holdup resolution and the protection of dissenting creditors against expropriation as an essential and equally important component of restructuring frameworks. In that regard, the thesis will articulate a comprehensive and original argument in favour of the dogmatic autonomy of restructuring law.

Once this basic distinction is established, it will be developed into an argument in favour of a distinct conceptualization of cross-border insolvency and restructuring law. Efficiency considerations underpin many of the arguments that have traditionally been advanced in favour of modified universalism in cross-border insolvency,[22] but there has been to date little analysis of the economic problems presented in cross-border restructurings.[23] The thesis however will attempt to draw a more direct link between substantive and private international law on the basis of economic analysis. The fundamental premise of this analysis will be the notion that the introduction of foreign elements in insolvency or restructuring cases compromises the ability of substantive rules to fulfil their primary function. This has long been acknowledged, though implicitly, in the field of cross-border insolvency and also reflected in the provisions of the Model Law, which deal primarily with the cross-border manifestation of the collective action problem, when the assets of a distressed debtor are dispersed in different jurisdictions.

The application of the same line of thinking to the restructuring context leads however to a different role for private international law rules. When a distressed debtor wants to renegotiate with creditors located in different jurisdictions, especially when the debtor also has assets in such jurisdictions, the holdout problem is reintroduced. In particular, if the collective arrangement cannot be made effective against such creditors, they would essentially have an enforceable exit option from the collective bargaining process and therefore severely compromise consensual solutions. At the

[21] de Weijs (n 19); Madaus (n 20).
[22] Lucian Arye Bebchuk and Andrw T Guzman, ‘An Economic Analysis of Transnational Bankruptcies’ (1999) 42 The Journal of Law and Economics 775; Robert K Rasmussen, ‘Resolving Transnational Insolvencies Through Private Ordering’ (2000) 98 Michigan Law Review 2252.
[23] Stephan Madaus, ‘The Cross-Border Effects of Restructurings’ SSRN Working Paper <https://www.ssrn.com/abstract=4045334> accessed 19 March 2024.

same time, a principle of unqualified universal recognition would create the risk of prejudice and abuse against dissenting creditors, thus raising holdup concerns. From that perspective, an economically efficient norm in cross-border restructurings is a rule that would enable the recognition of foreign restructuring plans, yet also introduce certain limitations and conditions, in order to ensure that the risk of creditor holdup is adequately managed. In that sense, the distinct objectives of insolvency and restructuring law should not only be reflected in different substantive legal rules but also in a different structure of private international law rules, the former being concerned with the recognition of foreign proceedings and the provision of assistance to foreign practitioners, and the latter being preoccupied with the recognition of the outcomes of such proceedings, namely foreign restructuring plans, as well as the limitations to such recognition.

These theoretical foundations, once set out, can illuminate our understanding of some of the most pressing issues and questions surrounding the current debate on cross-border restructurings. In fact, the analysis can provide a novel conceptualization of one of the more controversial aspects of contemporary discourse, namely the application of the Model Law to the issue of recognition of foreign restructuring plans. As will be illustrated, the conceptual distinction between cross-border insolvency and restructuring law can provide a forceful and convincing argument in favour of a restrictive interpretation of the Model Law. Under that light, English courts appear correct in holding that the application of the traditional '*Gibbs'* rule was not affected by the introduction of Model Law, since the Model Law is limited to issues of cross-border insolvency and does not contain any rules or guidance on matters of cross-border restructuring law. Although economic analysis suggests that the *Gibbs* rule is correctly viewed as being inefficient, a conceptualization of restructurings as distinct from insolvency proceedings lends credence to the view that the Model Law does not contain the necessary rules to deal with the recognition of foreign restructuring plans.

In addition to providing an original and convincing account of the current state of affairs, the conclusions of economic analysis can also be utilized to lay the basic building blocks for constructing a normatively efficient framework for cross-border restructurings. The main insight of this thesis is that the main function of cross-border restructuring rules is to address the problems of strategic behaviour in the context of

contractual renegotiation under the threat of financial distress. On that basis, the analysis will advance the argument that the dual problems of holdout and holdup can be addressed through a specialized private international law framework. In particular, the approach will first suggest a conceptualization of restructuring plans as judgments, since judgment recognition rules are more appropriate, in structural terms, than choice of law rules to accommodate the dual considerations of holdout and holdup, by including both requirements as well as defences to recognition. In that respect, and following up on this basic conceptualization, the analysis will propose a judgment recognition rule, which defines the requirements for recognition (especially jurisdictional requirements) broadly, and also includes, certain cogent defences that can preclude the recognition of foreign plans that are the result of advantage taking against dissenting creditors. As a result, the thesis will advance an original proposal for addressing the main problem of cross-border restructuring law, in a way that serves the field's underlying economic objectives.

This analysis comes at an especially opportune moment. As a matter of fact, the potential reform of *Gibbs* is currently at the epicentre of policy discussions in the UK, following the recent consultations of the UK Insolvency Service[24] on the adoption of the new UNCITRAL MLJ. The MLJ is an instrument that has the potential of introducing a judgment recognition approach to cross-border restructurings, considering that judgments approving restructuring plans are explicitly included in its scope. However, the recommendations of the Insolvency Service do not envisage the full introduction of the MLJ and thus do not aim at displacing *Gibbs.* Nevertheless, as evidenced by the responses to the consultation, the debate surrounding the application of *Gibbs* and the possible avenue for its reform is likely to continue in the foreseeable future.

In that context, the thesis will also consider, if and to what extent, a paradigm shift from *Gibbs* to a judgment recognition framework, as suggested, is feasible. This will include a thorough and detailed examination of the development of *Gibbs,* which will

[24] UK Insolvency Service, 'Implementation of Two UNCITRAL Model Laws on Insolvency Summary of Consultation Responses and Government Response' (10 July 2023) < https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency/outcome/implementation-of-two-uncitral-model-laws-on-insolvency-summary-of-consultation-responses-and-government-response#the-model-law-on-insolvency-related-judgments > accessed 19 March 2024.

reveal its underlying inconsistencies as a matter of legal doctrine. In addition, the thesis will examine *Gibbs* through the lens of overarching principles of English private international law, such as the foreign act of state doctrine, and demonstrate that the rule rests on an erroneous understanding of the problem, as an issue of choice of law as opposed to judgment recognition. On that basis, the analysis will articulate an original examination of the doctrinal fallacies of *Gibbs* and develop a practical roadmap for its reform along the lines of a judgment recognition framework. Furthermore, the analysis will also consider whether the full introduction of the MLJ would institute an efficient framework for cross-border restructurings, concluding that, whereas the MLJ is, in many respects, deficient it can serve as an impetus towards a reform, along the lines suggested by this thesis' normative analysis. In that sense, the thesis will not be limited to formulating a normatively efficient proposal for the recognition of foreign restructuring plans but also assess its potential application on one of the most controversial and topical issues in cross-border restructuring practice.

3. Outline and scope of the analysis

In terms of structure, the thesis will broadly follow the basic flow of the argument, as set out above. Chapter II will provide the basic elements of the economic analysis and draw the main distinction between insolvency and restructuring law, extrapolating these conclusions to an argument for a different approach as regards their private international law aspects. Chapter III will provide an overview of the US and English case law, both in matters of cross-border insolvency and cross-border restructuring law in order to illustrate the contemporary controversies surrounding the application of the Model Law to the recognition of foreign restructuring plans. Chapter IV will consider the question of whether the Model Law can address the issues that are presented in the cross-border restructuring context and offer a new, and more balanced, assessment of the English approach on the matter. Chapter V will feature this thesis' most original contribution, namely a normatively efficient framework for the recognition of foreign restructuring plans, which meets the economic objectives of cross-border restructuring law. Chapter VI will then offer a doctrinal consideration of *Gibbs*, highlighting its internal inconsistencies as well as its contradictions with other principles of English private international law and also consider the feasibility of the

adoption of a judgment recognition approach, and in particular the MLJ, to achieve a reform of the rule.

A few clarifications need to be made at the outset about the scope of the research. As a general matter, the analysis is limited in two main respects. First, the scope of the thesis is limited to the treatment of cross-border restructurings in Model Law jurisdictions, primarily the United States and the United Kingdom.[25] The reasons for this choice are relatively straightforward. First of all, these jurisdictions have jointly produced the vast majority of case law on the Model Law[26] and, as a result, have shaped much of our understanding of the application of the existing cross-border insolvency framework. In that sense, they should constitute the focal point of any analysis of the field. As far as the problem of cross-border restructurings is concerned, these jurisdictions also constitute two of the most prominent international restructuring fora and thus have also produced a significant amount of case law in the field. In addition, the fact that New York and English law are the laws of choice in most international financing arrangements and bond indentures suggests that most of the issues relating to the recognition of foreign plans, in the context of cross-border restructurings, are likely to arise before either US bankruptcy courts or English courts and implicate considerations of the effect of such plans on creditors holding claims that are governed by New York or English law. This does not mean that any reference to other jurisdictions will be avoided altogether. In fact, the analysis will, in several instances, consider case law from other Model Law jurisdictions to highlight issues arising from the application of the existing framework and further emphasize certain points and conclusions. That being said however, the bulk of the analysis will be premised on the enactment and application of the Model Law in the US and the UK, as the two most important jurisdictions to have adopted it.

The second, and related, limitation is that the thesis will not consider the question of cross-border restructuring law from the perspective of the EIR. There are several

[25] Although the Model Law has been enacted in the UK as a whole, under the CBIR, the analysis will rely almost entirely on the decisions of English courts, since they have produced the overwhelming majority of the case law on the Model Law.
[26] An overview of the UNCITRAL CLOUT database, which gathers all reported case law that has been produced under the UNCITRAL texts, reveals that the US and UK have produced over 60% of the judgments on the Model Law (103 out of 165 reported).

reasons behind this choice. The first and most important one is that the EIR, being primarily concerned with systemic considerations of the internal market, creates a framework that is significantly more detailed and closely integrated than the Model Law and can potentially accommodate the recognition of restructuring plans across Member States. In essence, the theoretical background of EU cross-border insolvency law is sufficiently broad, as also reflected in its specific provisions,[27] to adequately accommodate the question of recognition of foreign restructuring plans. In addition, the fact that the EIR is subject to the interpretation of the ECJ ensures that major sources of dispute are resolved, thereby guaranteeing, to a large extent, the uniform application of the framework in every Member State. As a result, the EU framework is not characterized by the same degree of uncertainty or the indeterminacy that the Model Law exhibits on the issue. Finally, the ongoing debate about the reform of *Gibbs,* which is not a pertinent consideration in the EU context, suggests that the normative discussion of cross-border restructurings may be more relevant, topical and valuable in a non-EU context. That being said, the analysis will not be completely devoid of any consideration of the EIR. In fact, the provisions of the EIR will be considered and mentioned by way of juxtaposition to the respective provisions of the Model Law, especially in order to illustrate the feasibility of a judgment recognition approach on the recognition of foreign restructuring plans and therefore the practicality of the proposed normative approach. That being said, the normative analysis of the thesis will be developed with the Model Law in mind and will concern itself primarily with its potential introduction in England, as a means to overturn *Gibbs,* thus falling outside the scope of the EIR.

A final, yet important clarification, concerns the issue of terminology. Historically, the term 'bankruptcy' in English law has referred to collective procedures relating to insolvent natural persons.[28] The more generic term 'insolvency' on the other hand has been primarily used as an umbrella term to describe the various procedures that relate

[27] Most notably, under art. 32 EIR, judgments approving compositions in a Member State, shall be recognized automatically in all other Member States: see Paul Oberhammer and Florian Scholz-Berger, 'Recognition and Enforceability of Other Judgments' in Reinhard Bork and Kristin van Zwieten (eds), *Commentary on the European Insolvency Regulation* (Oxford University Press 2022) 410.

[28] Louis Edward Levinthal, 'The Early History of English Bankruptcy' (1919) 67 University of Pennsylvania Law Review 1. Until the introduction of the Insolvency Act 1986, the insolvency of individuals was governed by a separate piece of legislation, the Bankruptcy Act 1914 (4 & 5 Geo. 5. c. 59).

to insolvent companies.[29] This dichotomy, which is not only terminological, persists to this day, despite the fact that both sets of rules have been consolidated in the Insolvency Act 1986.[30] In the United States on the other hand, the term 'bankruptcy' has traditionally been used to refer to insolvency procedures relating both to natural as well as legal persons,[31] whereas 'insolvency' is used to describe the situation of a debtor, as being unable to pay its debts.[32] This thesis will use both terms interchangeably in order to describe any type of procedure, whether applicable to natural or legal persons, whose primary purpose is the liquidation of the debtor's business, either as a whole or as a going concern, and the distribution of the resulting proceeds to its creditors. Conversely, procedures leading to the rescue of the debtor and its business have been primarily known as 'arrangements' in the UK[33] or 'reorganizations' in the US.[34] This thesis will however use the more neutral term 'restructuring', as it emphasizes and better reflects the function of the process of renegotiation between the debtor and its creditors, in the interest of preserving the business' going concern value. In conceptual terms, the analysis will be premised on a distinction between procedures that aim to preserve a distressed business' going concern value, namely restructurings, and procedures that aim at the liquidation of the assets of a distressed business, when no such going concern value exists, generally termed as insolvencies.[35]

4. The argument in perspective: from foxes to hedgehogs

Although the issues presented by cross-border restructurings have admittedly been subject to heated debate, there has been, until now, no clear conceptual framework, by which to approach them. This thesis is one of the first attempts to consider cross-

[29] These provisions were originally included in company law statutes, such as the Companies Winding Up Act 1844: Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn, Cambridge University Press 2017) 12.
[30] Ian Fletcher, *The Law of Insolvency* (5th edn, Sweet & Maxwell 2017) para 1–025.
[31] This term can be found in the US constitution (Article I, Section 8, Clause 4), which authorizes Congress to enact 'uniform Laws on the subject of Bankruptcies'. All legislation that has been enacted under this clause has used the term 'bankruptcy': see David A Skeel, *Debt's Dominion: A History of Bankruptcy Law in America* (2nd edn, Princeton University Press 2004).
[32] 11 U.S. Code § 101 (32).
[33] To this date, one of the main restructuring tools under English law is the scheme of arrangement provided under Part 26 of the Companies Act 2006.
[34] Under Chapter 11 of the US Bankruptcy Code an insolvent debtor can conclude a reorganization plan with its creditors: 11 U.S. Code Chapter XI.
[35] This broadly tracks the analytical divide proposed by Sarah Paterson in: Sarah Paterson, 'Rethinking Corporate Bankruptcy Theory in the Twenty-First Century' (2016) 36 Oxford J Legal Studies 697.

border restructurings as an autonomous legal field, raising particular economic concerns and requiring specific legal rules to address them. In that sense, the view advanced by this thesis offers a more coherent method of conceptually understanding and making sense of contemporary restructuring practice. One of the benefits of the suggested approach is that it provides an analytical framework that can offer important insights on the existing state of academic discourse on the subject. Even more importantly, it can support ambitious, yet workable, proposals to transition from the existing state of inconsistency to a uniformly acceptable and normatively efficient solution. All in all, the basic objective of the thesis will be to contribute to the ongoing dialogue on the proper treatment of cross-border restructurings by proposing an original framework, by virtue of which these matters should be considered and approached and develop specific and practical proposals to address the problems arising from the existing state of affairs.

It is important to understand that this plea for dogmatic autonomy does not aim at a new systematization of existing knowledge for the sake of merely satisfying some abstract intellectual compulsion. Rather, the conceptual framework that will be advocated in the following chapters tracks developments and changes in firm capital structures and the operation of capital markets more generally,[36] that have transformed restructuring practice by decoupling restructurings from traditional insolvency proceedings. Many of the problems and controversies that characterize contemporary academic discourse stem precisely from the inability of existing theoretical constructions, which are premised on a unitary understanding of restructuring and insolvency, to account for and explain these changes. The cross-border context, where these unitary notions have crystallized into uniform instruments, such as the Model Law, offers an even more pronounced manifestation of this tension. In that sense, the theoretical framework offered by the present thesis will attempt to reconcile the gap between theory and practice.

There are of course difficulties in moving from a fragmentary knowledge of a field to new unifying vision. Such conceptual changes usually take time to materialize, and they often do so after considerable debate and disagreement. As a result, one should

[36] For an overview of these trends: see Sarah Paterson, *Corporate Reorganization Law and Forces of Change* (1st edn, Oxford University Press 2020).

be under no illusions about the difficulty of this task, especially considering the significant entrenchment of a unitary view of insolvency and restructuring law in contemporary scholarship. At the same time however, legal scholarship in the field has matured to the point that the problems of cross-border restructurings are well appreciated, and a solution is sought after, even though methods and approaches may differ. Within this broader context, it is hoped that the main contribution of this thesis will be to prompt a wider debate about the development of distinct overarching principles for cross-border restructurings. We will then be able to start thinking about these matters less like foxes and more like hedgehogs.

CHAPTER II: AN ECONOMIC DISTINCTION BETWEEN CROSS-BORDER INSOLVENCY AND RESTRUCTURING LAW

1. Introduction

The terms insolvency and restructuring are frequently used in colloquial conjunction to denote a single field of law that deals with the problem of financial distress and, in particular, the relationship between a debtor and its creditors. Within that broader context however, restructurings have long been considered to function as a mere ancillary to insolvency by enabling, in a situation of financial distress, the rescue of the firm's business as opposed to the liquidation of its assets, through a collective rearrangement of the firm's relationships with its creditors. Viewed from this perspective, restructuring law has traditionally lacked any doctrinal autonomy. International best practices seem to affirm this view. For instance the UNCITRAL Legislative Guide on Insolvency, in its recommendations, considers the existence of mechanisms aimed at the restructuring of the debtor's business as merely one out of many necessary features of efficient insolvency systems.[1] Further illustration of this one-sided interrelation can be found in international instruments for cross-border insolvency, such as the Model Law and the EIR, which consider restructuring frameworks to fall under the umbrella of insolvency proceedings, for the purposes of recognizing their effects in foreign jurisdictions.[2] As a result, the conventional understanding of restructuring law is that of a field related to insolvency law, which merely enables the debtor, once insolvent, to resolve its financial difficulties in a different, though potentially more efficient, manner.

This view of restructuring mechanisms can perhaps be explained, at least to some extent, by the trajectory of their historical development. Indeed, the ability of a distressed debtor to reach an arrangement or a so-called 'composition' with its creditors (or a majority thereof) in order to rescue its business and continue trading,

[1] United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law* (Parts One and Two, UN Publication 2005) 14.
[2] Under the Model Law, a foreign proceeding includes any 'judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for *the purpose of reorganization or liquidation*' (art. 2). Similarly, the EIR applies apply to 'public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the *purpose of rescue, adjustment of debt, reorganisation or liquidation'* (art. 1 par. 1).

originally developed as an alternative to the liquidation of the debtor's assets in personal bankruptcy.[3] Still, whereas such a unitary understanding of restructuring and insolvency law may have appeared justified, when originally propagated, contemporary developments have begun to seriously challenge this perspective. Restructuring frameworks nowadays frequently enable debtors to come to an arrangement with their creditors before the actual manifestation of financial distress, thus severing the traditional tie between insolvency and restructuring.[4] In addition, firms regularly restructure, by choosing to engage only a subset of their creditors[5] and such restructurings are frequently negotiated and agreed to before the onset of formal proceedings, through reliance on contractual mechanisms, such as restructuring support agreements.[6] These arrangements are thus distinguished from conventional insolvency proceedings, which are traditionally characterized by formality and collectivity. This has in turn created significant controversy on whether cross-border insolvency instruments should be applicable to these novel restructuring arrangements.[7] As a result, restructurings appear to become steadily decoupled from insolvency proceedings, whereas the original conception of restructuring frameworks as ancillary to insolvency is beginning to lose its descriptive as well as normative value.

This Chapter will attempt to account for these developments by offering a reconceptualization of the normative understanding of insolvency and restructuring

[3] The advent of restructuring mechanisms can be traced back to the Roman law of bankruptcy, which enabled, in the case of insolvent decedents, a qualified majority of creditors to agree to a partial release of debts with their debtor's heirs: Roland Obenchain, 'Roman Law of Bankruptcy' (1928) 3 Notre Dame Law Review 169, 186-187. From the Middle Ages onwards, continental European jurisdictions, starting with the commercial statutes of Italian merchant cities, began adopting mechanisms that assisted debtors in reaching an arrangement with their creditors, as a means to avert or terminate bankruptcy. These tools were thereafter introduced in personal bankruptcy proceedings in England and the United States: Stefan A Riesenfeld, 'The Evolution of Modern Bankruptcy Law' (1947) 31 Minnesota Law Review 401, 439–50.

[4] A clear illustration of this direction is the introduction, at the EU level, of the Preventive Restructuring Directive. In England, restructuring tools, in the form of schemes of arrangement are available even when a debtor is not insolvent: Jennifer Payne, *Schemes of Arrangement: Theory, Structure and Operation* (Cambridge University Press 2014) 232. The introduction in 2020 of an additional tool, the Restructuring Plan procedure (Companies Act 2006 s. 901A(2)), which is available to companies that have encountered, or are likely to encounter, financial difficulties that are affecting, or will or may affect, their ability to carry on business as a going concern further evidences this trend: Irit Mevorach and Adrian Walters, 'The Characterization of Pre-Insolvency Proceedings in Private International Law' (2020) 21 European Business Organization Law Review 855, 860–67.

[5] Sarah Paterson and Adrian Walters, 'Selective Corporate Restructuring Strategy' (2023) 86 The Modern Law Review 436, 442–59.

[6] Douglas G Baird, 'Bankruptcy's Quiet Revolution' (2017) 91 American Bankruptcy Law Journal 593.

[7] Horst Eidenmüller, 'What is an Insolvency Proceeding?' (2018) 92 American Bankruptcy Law Journal 53; Mevorach and Walters (n 4), 874-884.

law. In particular, it will propose a conceptual distinction between these two fields using the tools of economic analysis to highlight the functional differences of legal rules. As will be argued, insolvency and restructuring law are related, yet different, sets of rules, each serving a different function and addressing different economic problems within the broader context of financial distress. This analysis has important implications for the design of an efficient cross-border framework for each of these fields. In fact, if applied to rules of private international law, this theoretical distinction between insolvency and restructuring suggests that these fields should be governed by different rules, each of which should be concerned about managing a different set of economic issues, as they emerge in the cross-border context. As a result, once articulated, the basic proposition offered by this Chapter can serve as a valuable analytical tool in considering many of the controversies that have recently arisen in the field of cross-border insolvency and restructuring and also for developing a viable way to overcome these contemporary challenges.

2. Uncovering the distinction between insolvency and restructuring

a. Insolvency law, the problem of collective action and the hypothetical bargain

The conventional economic justification for the existence of insolvency law begins with a consideration of the counterfactual scenario: if the legal framework already supplies creditors with the necessary enforcement tools to satisfy their claims against their debtors (as most legal frameworks indeed do), what purpose does insolvency law serve?[8] The key insight of economic theory is that, when a debtor with multiple creditors enters into the state of insolvency,[9] individual remedies are not only ineffective but may in fact make a bad situation worse and prove detrimental to the creditors as a group.[10] Conceptually, when a debtor encounters financial distress, its creditors are presented with a binary choice: either enforce their claims against the debtor's assets or wait, whether as a means of providing the debtor with breathing space, in the hope that financial difficulties may be eventually overcome, or in the

[8] Douglas G Baird, 'A World Without Bankruptcy' (1987) 50 Law and Contemporary Problems 173.
[9] This can refer either to balance sheet insolvency, where the debtor's existing liabilities exceed the value of its assets, or cash-flow insolvency, where the debtor cannot pay its debts as they come due: cf. Insolvency Act 1986 s. 123 (1) and (2).
[10] Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (1st edn, Beard Books 2001) 10.

interest of reaching a consensual arrangement to divide the assets of the debtor between them and recover at least a portion of what is due to them. As a general matter, the individual enforcement scenario is more costly for the creditors as a group; they expend valuable resources, as each attempt to enforce their individual claims in parallel to one another, whereas the piecemeal liquidation of the debtor's business generally results in the realization of a lower aggregate value for the debtor's assets. Both of these direct and indirect costs represent a net loss to the creditor constituency. From a value maximizing perspective, it would therefore be more efficient for all creditors to collectively abstain from exercising their individual enforcement remedies and reach some form of orderly and negotiated arrangement with the debtor for the collective satisfaction of their claims.

It is however very unlikely that creditors will choose to act in that particular direction. If an individual creditor manages to move quickly in enforcing its individual claim, it may end up capturing all or the majority of the debtor's assets for its own benefit. Conversely, since any assets that may be claimed by any one creditor are deprived from others, late-movers are unlikely to be successful in achieving any return at all. Individual enforcement is a zero sum game. As a result, each creditor has an incentive to proceed with enforcement for fear that, in the alternative, other creditors will be able to capture the debtor's assets for their own benefit. In fact, the optimal strategy for each individual creditor is to proceed with enforcement, irrespective of the actions of other creditors, since an enforcing creditor will always have the chance of recovering something against its individual claim.[11] Creditors in the insolvency setting are thus locked in a proverbial prisoners' dilemma.[12] Even though a strategy of collective abstention is 'Pareto efficient' (meaning that no creditor can be made better off without making another creditor worse off) individual incentives and the threat of opportunism push creditors to engage in behaviour that is detrimental for them as a group.[13] In

[11] In game theoretical parlance, individual enforcement is a dominant strategy: see Eric Rasmussen, *Games and Information* (Blackwell Publishing 2007) 21.
[12] Anatol Rapoport and others, *Prisoner's Dilemma: A Study in Conflict and Cooperation* (University of Michigan Press 1965).
[13] The basic structure of a game can be illustrated in a payoff matrix, as follows:

Creditor B	Creditor A		
		Enforce	Wait
	Enforce	1,1	0,3
	Wait	3,0	2,2

(Creditor A, Creditor B)

short, the insolvency scenario creates a collective action problem between a debtor's creditors, where each creditor's individual incentives to enforce can lead to the destruction of value for the creditors as a whole.

Collective action problems, such as the one described above, are not limited to the insolvency setting. In fact, most of the economic literature on addressing problems of collective action covers the field of property rights, where similar collective action concerns are generally described by the term 'tragedy of the commons'.[14] These problems exhibit a similar pattern to the one that is described above; multiple individuals, claiming non-exclusive rights over an open-access resource, scramble to expend the resource in order to claim as big a share as possible, eventually leading to its depletion, as each individual pursues their own self-interest. Similarly, once a firm finds itself in financial distress, it is unable to repay its creditors in full and as a result, the creditors, as a whole, become the residual owners of the firm's assets. In that sense, a debtor's assets are rendered common property, to which all claimants have open and equal access, as each creditor remains free to enforce its claim. This configuration of common resource between several different individual claimants creates the problems of cooperation that render the insolvency scenario similar to the tragedy of the commons.

One of the benefits in conceptualizing the insolvency scenario as a prisoners' dilemma is that this enables an accurate prediction of the outcome of the game: a race against the debtor's assets will always ensue. Nevertheless, such an outcome is dependent on a number of assumptions, the most fundamental of which is the inability of creditors to communicate and make binding promises to each other. Such barriers to cooperation introduce the concept of transactions costs, which are implicit in the structure of the game and can explain the dominance of the Pareto inefficient

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The matrix illustrates the payoffs, in monetary units, arising from different combinations of the strategies (or strategy profiles) of the players in the game, in this case two unsecured creditors of a distressed debtor. The upper left quadrant represents the optimal set of strategies, or strategy profiles, for both players. This concept is denoted as the 'Nash equilibrium', where no party can increase its payoff by unilaterally switching strategies: Rasmussen, *Games and Information* (n 11) 26. However, this outcome is also Pareto inefficient, when compared to the bottom right quadrant, since both creditors can be made better off by choosing to abstain collectively, generating a total value of four monetary units, with each creditor receiving two.

[14] Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243.

outcome.[15] However, if transaction costs are low enough, namely lower than the difference between the payoffs in the equilibrium and the payoffs in the Pareto efficient outcome, creditors should be able to opt for the cooperative solution by voluntarily agreeing on a strategy of collective abstention. After all, there is ample evidence to suggest that similar common pool problems in relation to property can be effectively addressed by voluntary and even informal arrangements.[16]

The insolvency scenario however poses two important challenges to consensual solutions. First, voluntary arrangements in common pool situations can best operate within the narrow confines of a small integrated group.[17] In the case of the insolvency of a large corporate debtor, creditors are likely to be numerous and unlikely to be particularly tight knit. Secondly, in most real world situations, creditors have diverse ownership interests over the debtor's assets, which can include security interests of a different nature and priority. These divergent interests alter the creditors' payoffs from potential cooperation, making individual enforcement even more attractive for certain categories of creditors, such as secured creditors.[18] As a result, the range of potential voluntary agreements appears, at least prima facie, limited, thereby making it harder for parties to agree on a consensual efficient solution.[19]

Another important assumption underlying the prisoners' dilemma is that the game is only played once, or at least a finite number of times. In an infinitely repeated game on the other hand, the optimal strategy for each individual player is different. The main idea behind this proposition is that repeated interaction can allow parties to overcome

[15] It has often been pointed out that the prisoners' dilemma is misleading since, in quantifying the payoffs in the Pareto optimal state, it does not account for the costs of cooperation that would need to be incurred for such an outcome to be reached and enforced: see Li Junhui, 'Transaction Cost and the Theory of Games: The "Prisoners' Dilemma" as an Example' (2020) 7 Man and the Economy 1, 5.
[16] Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (1st edn, Cambridge University Press 1990).
[17] Robert Ellickson, 'Property in Land' (1993) 102 The Yale Law Journal 1315.
[18] Jeremy I Bulow and John B Shoven, 'The Bankruptcy Decision' (1978) 9 The Bell Journal of Economics 437, 448.
[19] Douglas G Baird and Thomas H Jackson, 'Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy' (1984) 51 The University of Chicago Law Review 97, 101-109. It has been argued that sophisticated creditors may be able to formulate an ex ante voluntary agreement by putting in place a capital structure that can unwind in cases of financial distress: see Barry Adler, 'The Creditors' Bargain Revisited' (2018) 166 University of Pennsylvania Law Review 1853. That being said, there is evidence that collective action concerns can nowadays be effectively addressed by contractual mechanisms, even in the case of large corporate debtors, as a result of changes in financial markets and firm capital structure: see infra Section 2.c.

detrimental or opportunistic behaviour.[20] Since a detrimental or inefficient strategy by a player in one round of the game may be punished in subsequent rounds, players that are habitually opportunistic can be deleted over the long run and the Pareto efficient outcome may end up being the equilibrium of the game.[21]

The insolvency situation can, to a certain extent, be conceptualized as an infinitely repeated game. Most financial creditors, especially institutional creditors extend financing to several firms that will eventually fail and are therefore repeat players, who cannot know in advance how many times they will interact with other creditors in future insolvency scenarios.[22] If a creditor engages in self-interested behaviour in one particular insolvency case, by seizing the majority of the debtor's assets for its own benefit, its reputation among other creditors may therefore suffer and it may face difficulties in doing business or cooperating with other creditors in the future. Although these circumstances suggest that there may be stronger incentives to act cooperatively in an infinitely repeated game, such cooperative solutions may still face obstacles that render them ineffective in certain categories of cases. For instance, in today's global capital markets, the effects on reputation may not be particularly strong for sophisticated creditors, who routinely invest in distressed firms. From the perspective of such creditors, returns from opportunism may outweigh the long term effects on reputation.[23] At the same time, selection mechanisms for punishing detrimental behaviour may also be less effective in decentralized competitive markets, further diminishing the incentives for cooperation.[24] As a result, even if the collective action problem in insolvency can be conceptualized as an infinitely repeated game, voluntary arrangements may still be insufficient to enable parties to reach an efficient outcome.

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[20] Pedro Dal Bó and Guillaume R Fréchette, 'Strategy Choice In The Infinitely Repeated Prisoners Dilemma' (2019) 109 American Economic Review 3929.
[21] Charles WL Hill, 'Cooperation, Opportunism, and the Invisible Hand: Implications for Transaction Cost Theory' (1990) 15 The Academy of Management Review 500, 505-506.
[22] ibid 505.
[23] ibid 510.
[24] For instance, until the 1970s the English banking system was primarily comprised of five large banks, (the Big Five), which operated as a virtual oligopoly. In such a concentrated credit market, banks had strong incentives to agree on cooperative solutions, as a way of dealing with insolvent debtors, for fear that, if they acted opportunistically, they would not be invited to join syndicates when new loans would be arranged: see Sarah Paterson, *Corporate Reorganization Law and Forces of Change* (1st edn, Oxford University Press 2020) 181.

In the face of these constraints, legal rules can assist parties in overcoming the problems of collective action, by emulating the hypothetical bargain that the creditors would reach in order to address the collective action problem at the heart of the insolvency situation.[25] In the realm of property law, legal intervention to address similar problems has traditionally taken two forms, the purpose of which is to remove the element of competition between multiple claimants over the common asset pool: the first is the creation of private property rights, such as the parcelling out of land in open grazing pastures,[26] whereas the second is the establishment of some form of unitization of the common resource, namely an arrangement, by which individual claimants exchange their private rights for shares in the proceeds of the common pool.[27] The latter solution is especially useful in cases, where the common resource cannot, by its nature, be effectively separated into parcels, such as oil reserves. The concept of unitization essentially involves the transformation of common property to collective property, in the interest of ensuring the orderly satisfaction of all claimants.

Considering that the parcelling out of the firm's assets will most likely be a very costly and ineffective exercise, it is not surprising that the most fundamental rules of insolvency law represent the functional equivalent of unitization arrangements. In particular, virtually every insolvency system around the world provides that the creditors' private remedies are suspended and the firm's assets are vested with a third party, an insolvency trustee, who is entrusted with liquidating the assets and distributing their proceeds to the various creditors, under a pre-determined order of priority. In functional terms, creditors are forced to exchange their individual claim and enforcement right with a claim on the proceeds of collective enforcement. In addition, the equal treatment of creditors, which, as a general rule, is the basis of distribution,[28]

[25] Thomas H Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91 The Yale Law Journal 857. However, the excessive focus on the bargain being premised on implicit consent has been criticized as unpersuasive and lacking any clear normative force: see Rizwaan Jameel Mokal, *Corporate Insolvency Law: Theory and Application* (1st edn, Oxford University Press 2005) 40–56.
[26] Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57 The American Economic Review 347.
[27] Gary D. Libecap and James L. Smith, 'The Economic Evolution of Petroleum Property Rights in the United States' (2002) 31 The Journal of Legal Studies S589
[28] The degree to which the principle of equal treatment of creditors is actually reflected in insolvency law is significantly doubted, given that certain categories of creditors are routinely provided with priority over others: see (among others) Rizwaan Jameel Mokal, 'Priority as Pathology: The Pari Passu Myth' (2001) 60 The Cambridge Law Journal 581.

ensures that collective enforcement is in the interests of creditors as a whole. The combination of these different rules eliminates any incentive for the destructive self-interested behaviour that causes the problem of collective action in the first place.[29]

In particular, the replacement of individual enforcement by a single orderly process of collective enforcement has the effect of minimizing both the ex post as well as the ex ante costs of insolvency. For one thing, by establishing a collective enforcement framework, insolvency law minimizes the direct costs stemming from multiple and parallel enforcement procedures. An orderly liquidation process also reduces the indirect costs of insolvency by increasing the value that can be obtained from a sale of the firm's assets as opposed to a disorganized and piecemeal enforcement. At the same time however, a collective process spreads the losses of a firm's default between the creditors, at least between creditors of the same priority.[30] As a result, creditors face a lower risk of ending up with nothing and are thus more likely to extend credit ex ante. In principle, insolvency law's primary function is to address the collective action problem, by minimizing the costs resulting from the operation of a system of private enforcement of creditor rights in the context of financial distress. Thus, it should come as no surprise that the principle of collectivity of insolvency proceedings has been considered perhaps the most fundamental principle of insolvency law across jurisdictions.[31]

At this point, it is necessary to make an important clarification. Whereas the aforementioned analysis suggests that the most fundamental objective of insolvency law is the elimination of the collective action problem, this does not necessarily have to be the sole objective of insolvency law. This argument has in fact been advanced by many proponents of the economic approach to insolvency, who have consistently argued that the elimination of the collective action problem should be considered not only as the foundation but also as the normative limit of insolvency law. For instance, such scholars have consistently argued against unduly interfering with creditor rights,

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[29]Jackson, *The Logic and Limits of Bankruptcy Law* (n 10) 14.
[30] ibid 15.
[31] Indeed, the fact that insolvency law exists primarily for the benefit of a debtor's creditors has been acknowledged since the early days of English bankruptcy and has since remained an enduring feature of the legal framework both in England and the United States: Louis Edward Levinthal, 'The Early History of English Bankruptcy' (1919) 67 University of Pennsylvania Law Review 1; Max Radin, 'The Nature of Bankruptcy' (1940) 89 University of Pennsylvania Law Review 1.

as they exist outside insolvency,[32] in order to pursue social policy objectives (e.g. by creating preferred classes of unsecured creditors) as this would fall outside the creditors' hypothetical consensus and reintroduce individual motivations and incentives in the collective procedure.[33] These views have elicited significant pushback, on the premise that it is appropriate as well as normatively desirable for insolvency law to pursue wider social policy objectives.[34] A thorough examination or commentary of each side of this debate is beyond the scope of the present analysis. Still, as far as the aforementioned arguments are concerned, it must be noted that the core economic foundation of insolvency law, especially the maximization of value resulting from the replacement of individual by a collective enforcement mechanism, has never been seriously challenged.[35] Thus, regardless of the side of the debate one takes, it remains a feature of general consensus that insolvency law exists, in its most elementary form, as a means to address collective action concerns in a financial distress scenario.[36]

b. Restructuring law and the problem of creditor coordination in actual bargaining settings

Thinking of the basic principles of insolvency law as the product of a hypothetical bargain between creditors cannot however account for any type of problem that may arise in the context of financial distress. Consider for instance the case of a firm that, while unable to repay its creditors, is still viable in operational terms. In that scenario, a collective enforcement process leading to the liquidation of its assets would not be the most efficient outcome, as the firm's going concern value would be effectively squandered.[37] One alternative conception of an efficient bargain would involve the

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[32] Douglas G Baird, 'Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren' (1987) 54 The University of Chicago Law Review 815, 822-824.

[33] Jackson, *The Logic and Limits of Bankruptcy Law* (n 10) 21; Baird and Jackson (n 19).

[34] Elizabeth Warren, 'Bankruptcy Policy' (1987) 54 The University of Chicago Law Review 775; Donald R Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 Columbia Law Review 717.

[35] The maximization of value and thus distributions to creditors has been described as a 'consensus goal': see Jay Lawrence Westbrook, 'The Control of Wealth in Bankruptcy' (2004) 82 Texas Law Review 798, 821.

[36] As argued by Mokal, insolvency law aims to promote the procedural goal of efficiency to achieve the substantive goal of fairness: Mokal (n 25) 25.

[37] It has been argued however that nowadays, the modern structure of firms suggests that their assets are easier to reassemble outside of insolvency so that, even in the case of piecemeal liquidations, no going concern value is effectively lost: see Robert K Rasmussen, 'The End of Bankruptcy Revisited' in

sale of the business as a going concern to a third party. As a matter of fact, there is evidence that insolvency systems in some jurisdictions are increasingly being used to sell distressed (especially larger and public) firms on the market.[38] This trend has been particularly aided by the rise of highly leveraged and complex capital structures, which often rely greatly on secured financing. In this context, secured creditors, often specialized players, who have acquired the debt in the secondary market, possess the necessary control rights as well as the incentives to opt for a sale of the firm in the open market, as this provides them with significant benefits both in terms of speed of execution as well as higher returns.[39] By ensuring that the business continues to operate, a sale thus has the potential of maximizing value for the creditors as a whole.

Nevertheless, the feasibility of going concern sales depends on a number of factors. For instance, such outcomes presuppose the existence of a market for distressed acquisitions, and, in particular, the availability of financing as well as the accessibility of accurate and reliable information about the firm's operational and financial condition. However, a market for distressed acquisitions may not be properly functioning in periods of systemic financial downturn or in jurisdictions, where capital markets are thinner. At the same time, accurate and sufficient information is likely to be available only in the case of larger and publicly traded firms.[40] As a result, although a sale can potentially constitute an efficient resolution of financial distress, where a firm has going concern value, the necessary structural, institutional or macroeconomic circumstances to achieve such an outcome are frequently not present.

If a sale to a third party is not an option, the only other alternative to a liquidation is the sale of the business to its creditors. This outcome is practically achieved through a financial restructuring:[41] creditors effectively contribute a certain amount of resources

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Barry Adler (ed), *Research Handbook on Corporate Bankruptcy Law* (Edward Elgar Publishing 2020) 40.

[38] Mark J Roe, 'Three Ages of Bankruptcy' (2019) 7 Harvard Business Law Review 187, 205; Douglas G Baird and Robert K Rasmussen, 'The End of Bankruptcy' (2002) 55 Stanford Law Review 751.

[39] How such changes in the structure and operation of financial markets, such as the rise of leverage, debt trading and secured credit have influenced the practice of corporate reorganization is highlighted in detail in Paterson, *Corporate Reorganization Law and Forces of Change* (n 24).

[40] In addition, publicly traded firms are more likely to exhibit a separation of ownership and control, thereby making the displacement of existing shareholders in the context of a sale less detrimental for the future value of the firm, than in the case of a closely held firm: Jackson, *The Logic and Limits of Bankruptcy Law* (n 10) 222.

[41] The distinction between operational and financial restructurings is premised on the idea that it is possible to clearly distinguish between financial and economic distress, even though, at least in some

to a distressed firm, by virtue of debt write-offs, reduction in interest rates, exchange of debt for equity or other measures, in exchange for an interest in that firm's going concern value.[42] Such a process, although functionally similar to a going concern sale, in that the firm continues to operate as a business entity, also differs materially in certain important respects. For one thing, as the firm is not actually sold, there is no market valuation of its assets but rather a hypothetical valuation conducted by the court.[43] In addition, the bidders, in this case the creditors, do not necessarily become the actual owners of the firm, since their interest may come either in the form of debt or equity. Still, for all intents and purposes, the business is rescued and creditors are satisfied by retaining a share in the firm's future value. This reasoning suggests that, when a distressed firm is viable, the hypothetical creditors' bargain would be radically different than suggested in the previous section.

Nevertheless, this scenario presents a potentially more complicated question: how can such a hypothetical bargain be realized? In theory, creditors could agree ex ante on the specific steps that they would be required to take (such as the amount of haircut they would be willing to suffer) in order to rescue the business in the event that the debtor faced financial problems.[44] This exercise would however face insurmountable informational obstacles, since it would be impossible to determine in advance the exact conditions and circumstances of future financial distress, let alone identify the specific remedies that would be necessary in every such conceivable scenario.[45] As a result, and rather inevitably, the contracts between the debtor and its creditors would be incomplete.[46]

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cases, a financially distressed firm will also be economically non-viable: Horst Eidenmüller, 'Contracting for a European Insolvency Regime' (2017) 18 European Business Organization Law Review 273, 284-285.

[42] Jackson, *The Logic and Limits of Bankruptcy Law* (n 10) 204.

[43] Douglas G Baird, 'The Uneasy Case for Corporate Reorganizations' (1986) 15 The Journal of Legal Studies 127, 128.

[44] For a contractarian proposal, see (among others) Adler's proposal for the firm to issue a hybrid form of debt: Barry Adler, 'Financial and Political Theories of American Corporate Bankruptcy' (1993) 45 Stanford Law Review 311. For a more detailed and recent proposal: see Noam Sher, 'Reorganization without Bankruptcy: Untying the Gordian Knot That Destroys Firm Value' (2021) 17 NYU Journal of Law and Business 613.

[45] Anthony J Casey, 'Chapter 11's Renegotiations Framework and the Purpose of Corporate Bankruptcy' (2020) 120 Columbia Law Review 1709. 1738.

[46] On the definition of incomplete contracts: see Ian Ayres and Robert Gertner, 'Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules' (1992) 101 The Yale Law Journal 729, 730.

Statutory intervention, in the form of legal rules specifically designating the steps that would be required to rescue the business, faces similar informational constraints. Since the most efficient solution will likely be dependent on the financial condition of each particular firm as well as a myriad of other factors, such as macroeconomic and market conditions, legal rules would be unable to accurately predict all these future contingencies and predetermine the steps that would need to be taken, in order to rescue the debtor's business. Judicial gap-filling, the standard manner of dealing with incomplete contracts,[47] where a court could in theory examine the firm's financial position and order the necessary remedies to realize its going concern value would likely prove as impractical, due to similarly high information costs. At the same time, the courts' lack of expertise in business planning would also most likely to lead to inefficient outcomes, whereas their general inability to reach complicated decisions in expedited timeframes may prove fatal to the prospects of success, considering that a restructuring is a time sensitive exercise, where firm value can dissipate rapidly, even in a matter of days, once funds start to run out.[48] In short, there seems to be no way of effectively predetermining such a hypothetical bargain or assigning its determination to a third-party entity, such as a court.

These difficulties leave only one alternative route open, namely actual bargaining between the debtor and its creditors. In that sense, a restructuring can be conceptualized as a process of contractual renegotiation. In a world of zero transaction costs and perfect information, a debtor and a creditor would in theory be able to negotiate the efficient solution and keep the firm operating as a going concern without needing specific legal rules to facilitate this outcome.[49] However, under more realistic assumptions, legal rules may have an important role to play in shaping the parties' exit options. As a general matter, parties bargain 'in the shadow of the law', namely against a baseline of legal rights and entitlements.[50] Their exit options, namely their bargaining

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[47] ibid 731.

[48] Lucian Ayre Bebchuk and Howard F Chang, 'Bargaining and the Division of Value in Corporate Reorganization' (1992) 8 Journal of Law, Economics, and Organization 253, 257; Casey (n 45) 1744.

[49] Rules enabling the enforcement of contracts would still be needed; however, in such a world, the debtor could write complete contracts ex ante with creditors, eliminating the need for renegotiation: see Michael Bradley and Michael Rosenzweig, 'The Untenable Case for Chapter 11' (1992) 101 The Yale Law Journal 1043.

[50] Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 The Yale Law Journal 950.

alternatives,[51] are in turn determined by their substantive legal entitlements. Thus, a modification of the parties' legal rights can significantly affect the parties' behaviour at the bargaining table. Consider for instance the stay on creditor enforcement actions. As has been analysed in the preceding section, this rule serves as one of the primary means to address the collective action problem. However, in the context of bargaining, the stay performs an additional function in eliminating the creditor's exit option.[52] Unable to enforce its claim, the creditor is forced to remain at the negotiating table and seek a consensual solution. Therefore, whilst not regulating the bargaining process itself, the content of substantive legal rules may affect the bargaining outcome even in a simple model with only one creditor.

Still, efficient bargaining faces additional constraints once multiple creditors with diverse ownership interests are introduced in the model. In such a scenario, the debtor's going concern value can be conceptualized as a common good, the production of which requires the contribution of resources from the creditor group as a whole. Yet, how precisely that burden will be shared between creditors is left to be determined in bilateral negotiations between each individual creditor and the debtor. The existence of multiple parallel bargaining streams essentially requires individual creditors to coordinate; coordination refers to the process of combination of the actions of multiple parties to reach a mutually desired outcome, where more than one such combination exists.[53] However, the exact manner of coordination also has distributional implications, as the choice between multiple potential restructuring outcomes can have different financial consequences for each individual creditor. If these differences are pronounced, each creditor has a conflicting individual incentive to avoid contributing to the firm's rescue and thus retain the full value of its own claim, while letting other creditors bear the costs of realizing the debtor's going concern value.[54] These conditions illustrate the so-called 'free rider' problem.

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[51] Douglas G Baird and others, *Game Theory and the Law* (1st edn, Harvard University Press 1994) 224.

[52] Douglas G Baird and Randal C Picker, 'A Simple Noncooperative Bargaining Model of Corporate Reorganizations' (1991) 20 The Journal of Legal Studies 311, 322.

[53] Richard H McAdams, 'Beyond the Prisoner's Dilemma: Coordination, Game Theory, And Law' (2009) 82 Southern California Law Review 209, 215.

[54] Mark J Roe, 'The Voting Prohibition in Bond Workouts' (1987) 97 The Yale Law Journal 232, 236-237. Roe however labels the problem, erroneously, as a prisoner's dilemma.

In game theoretical terms, the free rider problem can be conceptualized as a game of chicken.[55] Unlike a prisoner's dilemma, a game of chicken is characterized by multiple 'pure strategy' equilibria, namely several best strategies for each player, depending on the actions of the other player.[56] In practice, this means that there are various combinations of individual creditor contributions that can suffice to rescue the debtor.[57] However, each equilibrium may lead to radically different distributional consequences for creditors. These distributional discrepancies are not necessarily a problem from an efficiency perspective, at least of a first order.[58] Still, in this type of bargaining scenario, rational actors do not adopt pure strategies, by always opting for a particular action depending on the actions of the other player, as they would in a prisoners' dilemma. Instead, they opt for mixed strategies, meaning that they rely on a probability distribution to choose between the actions available to them.[59] In a nutshell, a game theoretical view of bargaining suggests that creditors in the restructuring scenario will sometimes choose to agree and sometimes refuse to commit to a restructuring, based on their expected payoffs under a particular probability distribution.[60] As a result, the outcome of the game will often be a non-(pure) equilibrium scenario such as when a collective restructuring collapses, due to lack of proper coordination between

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[55] The most famous example of 'game of chicken' involves two teenagers, who drive their cars directly at each other, where the winner is the person, who does not swerve to avert a collision: McAdams (n 53) 224.

[56] Rasmussen, *Games and Information* (n 11) 66.

[57] The game can be mapped out on a matrix, as follows:

Creditor B	Creditor A		
		Accept	Refuse
	Accept	7.5, 7.5	10, 5
	Refuse	5, 10	2.5, 2.5

(Creditor A, Creditor B)

This matrix illustrates a game of chicken between two creditors, each having a claim of 10 monetary units against the debtor, whose assets are only worth 5. If any single creditor agrees to reduce its claim by 5 units, the firm will be able to undertake a profitable project that will restore its profitability, so that it will be worth 15 monetary units (in present value terms). If, on the other hand, no creditor agrees, the firm is liquidated, and the creditors receive a return of 2.5 monetary units in liquidation. Creditors have to decide simultaneously, under complete information. The lower left and the upper right quadrants represent the two (pure strategy) equilibria of the game.

[58] In the above matrix for instance, the two equilibria of the game, as well as the non-equilibrium scenario in the upper left quadrant, are Pareto efficient but involve different distributions of value between creditors.

[59] On the definition of mixed strategies: see Mark Walker and John Wooders, 'Mixed Strategy Equilibrium', *The New Palgrave Dictionary of Economics* (London, Palgrave Macmillan 2008).

[60] The difference between pure and mixed strategies can be conceptualized as follows: 'A pure strategy constitutes a rule that tells the player what action to choose, while a mixed strategy constitutes a rule that tells him what dice to throw in order to choose an action': Rasmussen, *Games and Information* (n 11) 73–74.

creditors.[61] Although the likelihood of such an outcome will depend on a number of factors, including the gains and losses from each strategy, there is evidence that the larger the number of parties the more conflicted negotiations become, leading by extension to a more amplified risk of coordination failures.[62] From that perspective, contractual renegotiation encounters significantly more complex problems in a multilateral as opposed to a bilateral setting.

The potential for bargaining breakdowns increases even further, if one introduces incomplete or asymmetric information in a sequential bargaining setting.[63] In such a scenario, the creditor, who first agrees to contribute to a restructuring, disseminates information about the debtor's financial condition to other creditors. If the firm's financial condition is private information, each creditor has an incentive to hold out until another creditor contributes and then bargain with the debtor for a better deal.[64] In that sense, participating creditors effectively divert value to holdout creditors by providing them with a bargaining advantage and placing them in a better position to negotiate with the debtor bilaterally. In that context, individual creditors have a strategic incentive to hold out, which in turn increases the risk of a breakdown of the bargaining process. This 'holdout problem' is merely a different manifestation of the game of chicken that has been illustrated above; once again, the distributional conflicts that are built into the problem of creditor coordination will, in some cases, point parties away from coordination and towards a Pareto inefficient scenario. As a result, free-riders and holdouts are the symptoms of the coordination problems that underline the issue of contractual renegotiation between a debtor and the creditor group under the looming threat of financial distress.[65]

[61] In the above example, each player will refuse to commit with a probability of 0.5, which would lead to a (Refuse,Refuse) scenario 25% of the time.

[62] Gary Bornstein and others, 'Cooperation in Intergroup, N-Person, and Two-Person Games of Chicken' (1997) 41 Journal of Conflict Resolution 384.

[63] On the definition of incomplete and asymmetric information: Rasmussen, *Games and Information* (n 11) 44.

[64] The holdout problem in sequential bargaining settings has been examined in the context of land assembly: TJ Miceli and K Segerson, 'Land Assembly and the Holdout Problem Under Sequential Bargaining' (2012) 14 American Law and Economics Review 372.

[65] In the field of restructuring law, the terms 'free rider' and 'holdout' are used almost interchangeably, however their relationship has been the subject of extensive analysis in the field of property law: Lloyd Cohen, 'Holdouts and Free Riders' (1991) 20 The Journal of Legal Studies 351.

In the field of property law, similar coordination failures, have traditionally been described as the 'tragedy of the anticommons'[66] in order to juxtapose them to the more conventional 'tragedy of the commons' that has been analysed previously. In the anticommons, the existence of multiple and diverse ownership interests over common property, where no single owner has the privilege of single use, can lead to the underuse of the common resource, as a result of the lack of coordination between the multiple owners. The restructuring scenario can be considered to generate a situation that is similar to the tragedy of the anticommons,[67] where the common resource that remains underused, or rather unrealized, is the debtor's going concern value.

Against this background, statutory intervention can facilitate efficient bargaining by assisting the debtor in overcoming free-riders and holdouts, through the replacement of the various bilateral debtor-creditor bargaining relations with a single collective bargaining process. This can be achieved through the introduction of a majoritarian decision making rule that enables a debtor to agree with a qualified majority of its creditors on a restructuring plan that is binding on the entire creditor constituency. Majority decision making with a continuum of creditors is equivalent to a bilateral bargaining game between the debtor and the marginal creditor at the voting threshold.[68] At the same time, since the marginal creditor is not normally aware of its status on the margin of the majority, its payoffs from holding out are significantly diminished. This element reflects the inherent reality that, even if a creditor refuses to contribute, it may nonetheless be forced to accede to the collective arrangement by operation of the majority rule. Since there is a lower expected value from refusing to agree to a restructuring, the probability that each creditor will hold out is lower and as a result bargaining breakdowns are rendered less likely.[69] In addition, by lowering the payoffs associated with holding out, a majoritarian decision making rule also makes consensual restructurings more likely, which can lead to more efficient outcomes, if more going concern value is generated, when creditors do not adopt adversarial

[66] Michael A Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111 Harvard Law Review 621.
[67] Rolef de Weijs, 'Too Big to Fail as a Game of Chicken with the State: What Insolvency Law Theory Has to Say About TBTF and Vice Versa' (2013) 14 European Business Organization Law Review 201, 211.
[68] Andrew G Haldane and others, 'Analytics of Sovereign Debt Restructuring' (2005) 65 Journal of International Economics 315, 325.
[69] If the payoffs from the (Refuse, Accept) or the (Accept, Refuse) scenario are lowered for the refusing party, there is a lower probability that the (Refuse, Refuse) outcome will materialize.

strategies.[70] In that sense, a majority voting rule effectively eliminates the pitfalls of parallel and sequential bargaining with multiple creditors.

Although, as already discussed, a debtor may not be in a position to write a complete contract with its creditors, there seems to be no prima facie reason, why such a majoritarian decision making rule cannot be reflected in contractual arrangements. In the context of public debt for instance, the holdout problem between various bondholders has traditionally been addressed through the inclusion of collective action clauses in bond documentation.[71] These clauses eliminate the unanimity requirement for modifying the contractual terms of bonds and allow a debtor to effectively renegotiate by concluding an agreement with a super-majority of its bondholders.[72] The success of such clauses has been significant, as evidenced in the field of sovereign debt restructuring, where majoritarian voting structures have been relied upon to significantly limit creditor holdouts.[73]

Yet, this approach can only be effective, if all creditors have contractually submitted to such clauses. This may not be the case for a large number of creditors, most notably trade creditors or credit institutions, whose contractual arrangements do not normally include such provisions. Even for debtors, whose debt is concentrated in the hands of bondholders, the bonds will usually be governed by a number of separate indentures, each one of which will contain its own separate collective action clause. Holdouts across issuances may thus still emerge. As a result, out-of-court workouts that rely solely on contractual mechanisms encounter a number of obstacles, which may diminish their probability of success, even in the presence of majoritarian decision making provisions.

[70] In addition to the above, the (Accept, Accept) scenario becomes more likely, which may be consequential when this outcome generates more aggregate value for all creditors, or is Kaldor-Hicks efficient (e.g. if the payoffs in the above matrix were 9,9).

[71] These clauses began appearing in the 1870s in bond documentation under English law: Lee C Buchheit and G Mitu Gulati, 'Sovereign Bonds and the Collective Will' (2002) 51 Emory Law Journal 1317, 1324.

[72] There is evidence that the structure and content of the debtor's offer can considerably incentivize creditor cooperation: see Robert Gertner and David Scharfstein, 'A Theory of Workouts and the Effects of Reorganization Law' (1991) 46 The Journal of Finance 1189, 1202; Roe (n 54) 247.

[73] Jeromin Zettelmeyer and others, 'The Greek Debt Restructuring: An Autopsy' (2013) 28 Economic Policy 513, 525.

Notwithstanding the limited relevance of contractual provisions, majoritarian decision making is for all intents and purposes a central component of restructuring law. Yet, such a rule simultaneously exposes minority creditors to hold up risk. The concept of hold-up denotes the ability of a contracting party to strategically forfeit its contractual obligations and thereby deprive its counterparty of transaction-specific investments.[74] In the restructuring setting, the same option is afforded to a debtor in a bargaining setting under the application of majority rule. Relying on the decision of the majority, the debtor can effectively direct value away from minority creditors and deprive them of their contractual entitlements.[75]

In one sense, such value diversion is not by itself something undesirable, considering that adverse distributional consequences for certain parties do not necessarily have direct efficiency implications for the creditor constituency as a whole. Nevertheless, although the efficiency gains of business rescue may outweigh the costs of disadvantaging minority creditors,[76] there is reason to believe that, after a certain point, the risk of an ex post redistribution of value may have effects that far exceed any short term efficiency gains, if one takes a dynamic view across time. In particular, if a majority of creditors could deprive a dissenting minority of certain minimum entitlements, creditors would have to price in the risk of future expropriation in their investment decisions, at the time that financing is extended.[77] It would be extremely difficult, even for sophisticated creditors, to price in the risk of this kind of advantage taking in their investments decisions,[78] since they would face significant informational obstacles in determining ex ante, whether at some point in the future, they would be

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[74] The hold-up problem is essentially the reverse of the holdout problem: see Thomas J Miceli and Kathleen Segerson, 'Holdups and Holdouts: What Do They Have in Common?' (2012) 117 Economics Letters 330.

[75] The classic example of holdup is the US case of *Alaska Packers Association v. Demenico, 117 F. 99 (9th Cir. 1902),* where a group of Alaska fishermen renegotiated their wages once they had already sailed to their fishing location, thus managing to extract concessions from their employer: Richard Holden and Anup Malani, *Can Blockchain Solve the Hold-up Problem in Contracts?* (1st edn, Cambridge University Press 2021) 2.

[76] This would mean that the outcome is 'Kaldor-Hicks' efficient: see Jules L Coleman, 'Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law' (1980) 68 California Law Review 221, 239.

[77] Thomas J Miceli and Kathleen Segerson, 'Opportunism in Sequential Investment Settings: On Holdups and Holdouts' (2014) University of Connecticut, Department of Economics Working Paper 2014-08 https://media.economics.uconn.edu/working/2014-08.pdf accessed 19 March 2024, 8-10.

[78] Sarah Paterson, 'Debt Restructuring and Notions of Fairness' (2017) 80 The Modern Law Review 600, 617.

part of the majority or the minority in a restructuring context.[79] In that sense, majoritarian decision making is a tool that, though useful in deterring holdouts and free-riders, overcorrects the bargaining process in favour of the debtor and can thus be utilized abusively against creditors.[80]

As a result, in addition to holdout resolution, restructuring law also has to deter hold up behaviour and maintain a balance in the bargaining setting, in order to avoid substituting one problem of strategic behaviour with another. In that regard, legal rules traditionally set out certain procedural elements that constrain the effect of majority decision making. One such requirement is that voting be conducted in classes of creditors, based on the similarity of their rights.[81] This ensures that the debtor is not able to discriminate between members of the same class but instead needs to gather the consent of the marginal creditor in every voting class. More conceptually, the allocation of creditors into distinct groups that have to separately consent (in majority terms) consolidates bargaining power[82] and creates negotiating coalitions,[83] between creditors holding the same rights against the debtor.[84] As a result, the debtor has a more difficult task of manipulating majority decision making in order to disadvantage the dissenting creditor constituency.

In addition to structural rules of voting and decision making, restructuring law can also solve the problem of asymmetric information. The presence of private information on both sides of the bargaining table can create adverse selection problems. For instance, a creditor who does not possess accurate information on the debtor's financial condition may distrust the debtor's offer, considering it intentionally low, while

[79] In theory, creditors could closely monitor the debtor's financial condition as well as the composition of the creditor constituency to accurately price the risk that their minimum entitlements would be infringed, but this would lead them to expend an inefficient level of resources on monitoring. Alternatively, they could rely on contractual covenants to address the risk of expropriation; yet, as already noted, negotiating and agreeing on such covenants involves transaction costs as well as significant information costs: see for instance the examples provided in Jared A Ellias and Robert Stark, 'Bankruptcy Hardball' (2020) 108 California Law Review 745, 762.
[80] Vincent SJ Buccola, 'Bankruptcy's Cathedral: Property Rules, Liability Rules and Distress' (2019) 114 Northwestern University Law Review 705, 731.
[81] UNCITRAL, *Legislative Guide on Insolvency Law* (n 1) 217.
[82] Casey (n 45) 1752.
[83] Baird and Picker (n 52) 321.
[84] Differently put, it reduces the transaction costs, especially information costs, for the marginal creditor to determine its position on the margin of the majority and also increases the payoffs from refusing to accede to a restructuring.

in reality the offer may reflect the true nature of the debtor's financial condition.[85] Restructuring law addresses this problem by requiring debtors to disclose information to creditors, thereby reducing information asymmetries.[86] This in turn assists the creditors in distinguishing between proposals that aim to address genuine holdout concerns and proposals that are motivated by opportunism.

Finally, restructuring law also places certain substantive limits on the content of the restructuring plan that may be agreed between the parties. The formalized version of the benchmark naturally differs between jurisdictions. Under the US Bankruptcy Code for instance, the court may approve a plan if it meets the 'best interests of creditors test', namely provides dissenting creditors at least with the liquidation value of their claims and respects their statutory priority.[87] Under English law, a court will consider whether the majority has been acting *bona fide* in deciding whether to exercise its jurisdiction to sanction a scheme.[88] These substantive limitations are even more far-reaching when restructuring law also provides a cram-down option, allowing the plan to become binding on all creditors, even if an entire creditor class has dissented.[89] While the specific form of protection may differ, the common function of such requirements is to enable the court to assess, on a case by case basis, whether majoritarian decision making addresses a genuine holdout problem or whether it simply holds minority creditors up.[90]

It should be obvious from the foregoing analysis that, in the corporate restructuring setting, the operation of a majoritarian decision making rule would ordinarily work to the advantage of shareholders. In its most straightforward manifestation, holdup

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[85] Enrica Detragiache, 'Adverse Selection and the Costs of Financial Distress' (1995) 1 Journal of Corporate Finance 347, 353-356

[86] Michael Schillig, 'Corporate Insolvency Law in the Twenty-First Century: State Imposed or Market Based?' (2014) 14 Journal of Corporate Law Studies 1, 9.

[87] 11 U.S. Code § 1129(a)(7)(A)(2).

[88] Payne (n 4) 68.

[89] The cramdown has long been a feature of the US Bankruptcy Code; in that context, a plan must not discriminate unfairly between similarly situated creditors as well as be fair and equitable: 11 U.S. Code § 1129(b)(1). The latter requirement embodies the absolute priority rule, which mandates that each dissenting class must receive full payment of its claims before any junior class receives any distribution under the plan. In the UK, the cramdown option was introduced in the new restructuring plan procedure in Part 26A of the Companies Act. In order for the tool to be applied, the dissenting creditor class must receive at least what it would receive in the relevant alternative: Companies Act 2006 s. 901G(3).

[90] Stephan Madaus, 'Leaving the Shadows of US Bankruptcy Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law' (2018) 19 European Business Organization Law Review 615, 636; Eidenmüller (n 41) 286.

behaviour would involve the debtor firm, through its managers, concluding a restructuring arrangement with the requisite creditor majorities that diverts value away from minority creditors. However, shareholders may also be the victims of holdup behaviour, especially when the restructuring plan includes a debt-equity swap or some other form of debt capitalization. Whereas shareholders will need to be bound to take steps in order to give effect to a restructuring plan that includes such terms, they also face the risk that management concludes a restructuring with creditors that deprives them of their original, firm-specific investment in the debtor's business.[91]

This risk however is a relevant consideration not only when there is a sufficient degree of separation between ownership and control in the firm but more importantly when shareholders have a residual claim against the debtor's assets. Unless the debtor engages in an early (possibly solvent) restructuring, this will likely not be the case, since the firm will ordinarily be in financial distress, meaning that there will be no residual value left for shareholders. Even when such a residual claim exists however, shareholders can utilize their corporate law rights to protect themselves against abusive and collusive strategies between management and creditors. In that sense, shareholders, as a whole, seem more likely to be the perpetrators than the victims of holdup. At the same time, the need to minimize the detrimental effects of ex-post value redistribution on ex-ante incentives may be less pressing in the case of equity investments, given that shareholders are in a better position compared to creditors to engage in monitoring during the term of their investment and thus protect themselves against the risk of future expropriation.

That being said, the trade-off between shareholder holdout and holdup resolution in the restructuring context is unclear. Although it may be necessary, in some cases, to include shareholders in the restructuring process in order to ensure that they are bound by, and thus can give effect to, the restructuring, their involvement, as parties that are required to separately consent, under the safeguards that ordinarily apply to creditors may create complications. It is thus not surprising that, whereas some jurisdictions view shareholders as potentially affected parties and enable them to participate in the restructuring process under the same terms and protections that

[91] A characteristic example of the holdup concerns that may affect shareholders is the case of *Re Hurricane Energy Plc* [2021] EWHC 1759 (Ch).

apply to creditors (i.e. the right to vote on the plan in a separate class),[92] other jurisdictions prefer to leave shareholders to their corporate law devices and even provide mechanisms to ensure that the exercise of such rights cannot jeopardize the adoption of a restructuring plan.[93] Overall, it appears that, whereas the rights of shareholders may sometimes be relevant in the restructuring context, the core elements of restructuring law are preoccupied with ensuring the adequate protection of creditors, as the main residual claimants of the firm's value, and thus, as the key constituency that faces the risk of hold up by majority decision making.

In general, the previous analysis suggests that restructuring law aims at resolving the holdout problem that characterizes collective contractual renegotiation between a debtor and its creditors by instituting majority rule, while also putting in place 'guardrails that give the parties room to bargain but keep them from taking positions that veer toward extreme hold up.'[94] In that context, the court is assigned with the oversight of the bargaining process and is required to approve the collective agreement, as a means to ensure that these limits have not been breached.[95] This balancing function of restructuring rules is not controversial but has implicitly been acknowledged by the limitations, placed by many jurisdictions, on the ability of the debtor to bargain with the majority and coerce the minority into an arrangement, as part of an out-of-court workout. For instance, collective action clauses, as they have been described above, are prohibited altogether in the United States, to the extent that they impair a bondholder's monetary claims (i.e. the right to receive payment of principal and interest).[96] US issuers have traditionally managed to circumvent this

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[92] Chapter 11 for instance refers interchangeably to holders of 'claims' and 'interests', alluding to both creditors and equityholders: 11 U.S. Code § 1122. Similarly, a scheme of arrangement may be proposed between a company and 'its creditors, or any class of them,' or 'its members, or any class of them,': s. 895 (1) Companies Act 2006.

[93] For instance, under the recent EU Preventive Restructuring Directive, Member States may exclude equity holders from the operation of the rules on the adoption of a restructuring plan and are required to ensure that 'those equity holders are not allowed to unreasonably prevent or create obstacles to the adoption and confirmation of a restructuring plan': art. 12 PRD.

[94] Casey (n 45) 1716.

[95] This function cannot, in most cases, be assigned to arbitral tribunals, since, unlike insolvency and restructuring, which are centralized/multipolar processes, arbitration is a decentralized/bilateral process: Dr Reinhard Bork, 'Arbitration in Insolvency' [2023] European Insolvency and Restructuring Journal, 2.

[96] The rationale of this prohibition was to protect small bondholders from backroom deals between the debtor and large creditors: Mark J. Roe, 'The Trust Indenture Act of 1939 in Congress and the Courts in 2016: Bringing the SEC to the Table' (2016) Harvard Law Review Forum < https://ssrn.com/abstract=2757344 > , accessed 19 March 2024.

prohibition by employing a technique known as the exit consent, where the monetary terms of the indenture are not affected but creditors, who refuse an exchange offer, are left with bonds that are stripped of their protective covenants.[97] However, such coercive tactics have also suffered significant criticism, as exposing creditors to the risk of advantage taking.[98] In England, although majoritarian decision making clauses are permitted, the High Court's decision in *Assenagon Asset Management v Irish Bank Resolution Corporation Ltd*[99] imposed significant limits on the use of coercive exit consents. This scepticism towards the effect of majority decision making seems to be premised on an assumption that, even if the creditors have contractually agreed on such a mechanism, their rights can still be abused outside the framework of restructuring law and the oversight of a court.[100] This approach serves as an implicit acknowledgement that in addition to providing for majority rule, a restructuring framework must also consider the protection of dissenting minorities.[101] This is achieved not by prescribing the actual content of the collective agreement but by entrusting the court with the task of ensuring that such arrangement is concluded in a fair process and does not disadvantage dissenting creditors beyond certain limits.[102]

c. Understanding the relationship between insolvency and restructuring law

So far, it has been possible to sketch out the fundamental difference between insolvency and restructuring law. Whereas the former is concerned with the problem of collective action over a scarce asset pool, the latter is specifically targeted at solving, in a balanced way, the related holdout and hold-up problems that arise in the context

[97] Keegan Drake, 'The Fall and Rise of the Exit Consent' (2014) 63 Duke Law Journal 1589.
[98] For instance, the decision in *Marblegate Asset Management, LLC v. Education Management Corp.* 75 F. Supp.3d 592 (S.D.N.Y. 2014) created significant uncertainty about the permissibility of exit consents. This decision was eventually overturned on appeal in *Marblegate Asset Management, LLC v. Education Management Corp.* 846 F.3d 1 (Ct. App. 2nd Cir. 2017).
[99] [2012] EWHC 2090 (Ch); Matthew Padian and Jonathan Porteous, 'Carrots and Sticks: Limits on Majority Creditors' Rights to Bind a Minority' (2017) 1 Butterworths Journal of International Banking and Financial Law 22.
[100] Harold Groendyke, 'A Renewed Need for Collective Action: The Trust Indenture Act of 1939 and Out-of-Court Restructurings' (2016) 94 Temple Law Review 1239.
[101] For instance, it has been argued that the concept of classification and voting in separate classes can explain why voting in Chapter 11 reorganization encourages more efficient investment, as opposed to bond exchange offers: Gertner and Scharfstein (n 72) 1211.
[102] Michelle J White, 'Corporate Bankruptcy as a Filtering Device: Chapter 11 Reorganizations and Out-of-Court Debt Restructurings' (1994) 10 Journal of Law, Economics, and Organization 268.

of contract renegotiation under circumstances of financial distress.[103] Based on the previous analysis however, one would think that this division is absolute and that a distressed firm would encounter one of either scenarios at different stages of its lifetime. Yet this is not necessarily the case, when we consider insolvency and restructuring law. As a matter of fact, a debtor's financial distress can create situations that resemble both economic problems; the conflict of interests between creditors may lead to the overuse of existing resources, namely the debtor's existing assets in the insolvency scenario, or the underuse (i.e. non generation) of future resources, namely the debtor's going concern value, in the restructuring scenario. Indeed, many distressed firms that are seeking to restructure often face both the need to protect their assets against creditor enforcement actions as well as the need to bind holdout creditors to a collective restructuring arrangement simultaneously. It would thus be simplistic and misleading to overlook the potential points of overlap between insolvency and restructuring, despite their conceptual differences, as they have been set out above.

Yet, for a long time, the conventional understanding of restructurings had supposed that a firm, wishing to restructure, would necessarily encounter both collective action problems as well as creditor coordination problems simultaneously.[104] In that context, the need to safeguard's the debtor's existing assets, being the most pressing, would frequently subsume the problem of how a collective restructuring arrangement can be reached and implemented. Modern developments however have proven that, in certain cases, creditors may be able to contractually address collective action concerns. In particular, financial creditors nowadays often conclude intercreditor agreements that govern the relationship between them in detail in case financial distress hits. Such agreements, for instance, include provisions that establish payment waterfalls in insolvency, subordinate junior creditor claims, provide senior creditors with control rights in distress scenarios, such as the right to sell assets and release guarantees, and even establish contractual moratoria against individual enforcement

[103] Casey (n 45) 1733.

[104] This approach is evident in the recent EU Preventive Restructuring Directive, which contains provisions both on the stay on creditor enforcement action that should be put in place, once a restructuring proceeding is initiated (arts. 6-7), as well as on voting rules and the requirements for approval and confirmation of a restructuring plan (art. 8-16): see Gerard McCormack, *The European Restructuring Directive* (Elgar Corporate and Insolvency Law and Practice series, Edward Elgar Publishing 2021).

in order to avoid a value-destructive race against the debtor's assets.[105] Whereas there may be cases when resort to formal insolvency proceedings may still be necessary as an asset preservation measure, the fact that creditors may be able to contractually transact for such remedies, implies that, at least in the case of large corporate debtors, common pool problems may not represent the most pressing concern in a distress scenario.

Instead, contemporary practice illustrates that problems of coalition building are at the heart of most complex corporate restructurings. Innovative coercive tactics employed by debtors, such as restructuring support agreements, which promise consenting creditors a better treatment than dissenters, have created significant controversies about the proper balance between majority rule and minority protection.[106] Whether these strategies lead to efficient outcomes and should be permitted is still an open question.[107] Nevertheless, it is obvious that these developments pose a series of different problems and questions than those presented in the traditional insolvency context. Even more conceptually, they suggest that creditor coordination issues have largely become autonomous from collective action problems and, though possibly present simultaneously, necessitate a different set of legal remedies.[108]

As far as the nature of legal remedies is concerned, it is important to make an additional clarification. The conceptualization of the economic problems that insolvency and restructuring respectively present in the form of different types of games suggests a different role for legal rules in each of these fields. As already noted, the collective action problem in insolvency can be modelled as a prisoners' dilemma; in such a game there is only a single 'pure strategy' equilibrium, namely a single optimal strategy set for all players involved, and the parties' payoffs are sufficient to

[105] Paterson, *Corporate Reorganization Law and Forces of Change* (n 24) 130–35.
[106] Stephen Lubben, 'Holdout Panic' (2022) 96 American Bankruptcy Law Journal 1. From a game theoretical perspective, these mechanisms seem to call into question the main assumptions of a bargaining game as being non-cooperative, since the debtor seeks to make a binding commitment to consenting creditors about offering them a higher payoff: see Rasmussen, *Games and Information* (n 11) 21.
[107] David A Skeel, 'Distorted Choice in Corporate Bankruptcy' (2020) 130 Yale Law Journal 62; Edward J Janger and Adam J Levitin, 'The Proceduralist Inversion–A Response to Skeel' (2020) 130 The Yale Law Journal 335.
[108] In that sense, there is a different role for legal rules, when the market identifies a restructuring surplus than when it does not: see Sarah Paterson, 'Rethinking Corporate Bankruptcy Theory in the Twenty-First Century' (2016) 36 Oxford J Legal Studies 697, 716.

predict the outcome of the game.[109] Given a clear prediction of the outcome, the problem is amenable to a clear legal sanction that can direct the parties to the efficient solution.[110] For instance, in the insolvency scenario, the introduction of a collective proceeding, which supersedes individual enforcement, leads to a Pareto-efficient outcome, making the creditors, as a whole, better off. On the restructuring front however, things are more complicated. If we conceptualize bargaining in a restructuring scenario as a game of chicken or more broadly as a coordination game, there are multiple 'pure strategy' equilibria but a single 'mixed strategy' equilibrium; this is a set of strategies that are defined as a probability distribution over the actions that are available to players. In that sense, it is not possible to make firm predictions about the outcome of the game solely on the basis of payoffs.[111] Instead, every potential outcome has a different probability of materializing, meaning that, in a percentage of cases, the outcome will be a non-equilibrium scenario.

Considering this added nuance, it is obvious that there is no clear way that legal intervention can cut across in order to achieve the efficient outcome. If there are multiple ways that a firm can be rescued (e.g. by different creditor constituencies sharing the burden of contribution between them in different ways), legal sanctions will need to rank preferences as well as consider distributional concerns in order to choose between the alternative ways of coordination that can lead to the same outcome. At best, legal rules can merely incentivize parties to choose the efficient outcomes by reducing the payoffs associated with inefficient behaviour. In short, unlike the insolvency scenario, which is amenable to a clear legal solution, the restructuring scenario raises more complex normative issues for the case of legal intervention.

That being said, although the picture is considerably messier, there are still important insights that a conceptualization of restructuring as a coordination game can provide about the nature as well as the function of restructuring law. For one thing, legal rules can assist in making the realization of the worst possible scenario as challenging as possible. The majoritarian decision making rule that restructuring law adopts serves precisely this purpose, by enabling the majority to bind the minority to a collective

[109] Rasmussen, *Games and Information* (n 11) 18.
[110] McAdams (n 53) 212.
[111] Roger B Myerson, 'Justice, Institutions, and Multiple Equilibria' (2004) 5 Chicago Journal of International Law 91, 92.

agreement, it makes holdouts more costly (as they would require parties to incur transaction costs to build blocking coalitions) and by extension more unlikely. However, this does not answer the question of how parties should choose between the multiple alternative rescue solutions. As a general matter, parties are left to their own devices to coordinate, as they best see fit. Still, considering payoffs alone do not determine the outcome, the law can influence other factors that may assist the parties in reaching an efficient bargain.[112] In the restructuring setting, such factors include the method of voting and decision making as well as the availability of adequate information. In addition, legal rules can provide a mechanism that filters outcomes that are too one-sided in favour of the minority by placing certain limitations on what the parties can agree to. Such limitations frequently have distributional implications. For instance a rule that mandates that a restructuring plan respect the order of priority in insolvency, would lead to a particular distribution of going concern value under the plan. Still, restructuring law, in principle, does not take a firm position on a particular distribution but merely incentivizes parties to veer away from clearly inefficient outcomes. In that sense, the limitations of the content of a restructuring plan operate as focal points that guide the parties to a particular range of outcomes by placing certain features of potential agreements off the limits of majoritarian choice.[113] In guiding the parties towards these focal points, legal rules lead parties away from concluding agreements that are, in principle, more likely to produce detrimental ex ante consequences than short term efficiency gains.

Overall, insolvency and restructuring law are related fields that broadly deal with issues of debtor-creditor relations, albeit with two primarily different economic problems that develop in the context of financial distress. As a result of these underlying differences, legal rules have a different role to play in the restructuring than in the insolvency setting. Rather than directly mandating the efficient solution, restructuring rules provide parties with the necessary tools to decide between multiple efficient solutions, while empowering the court to review the process of decision making and filter outcomes that are clearly inefficient. Conceptually, whereas insolvency law seeks to impose a hypothetical bargain, restructuring law aims at facilitating actual bargaining. Although this dogmatic distinction has been conceded by

[112] McAdams (n 53) 231.
[113] ibid 233.

some,[114] it still does not constitute a widely accepted element of the academic comprehension of restructurings. In light of contemporary developments in modern restructuring practice however, it would be fair to say that the bargaining element has gained autonomy vis-à-vis collective action considerations and now represents an important and independent aspect of restructuring frameworks, often leading to significant controversies in contemporary practice and discourse.

3. Translating the distinction: lessons for private international law

a. Should substantive law analysis be relevant for private international law?

One set of issues that can be elucidated by the distinction developed above and the basic economic arguments, upon which it relies, are the problems of cross-border insolvency and restructuring law. At this point however, one encounters an apparent difficulty. Despite its ubiquity as an analytical tool as far as substantive insolvency and restructuring law is concerned,[115] economic analysis does not appear to feature as prominently, at least as a standalone analytical framework, in the debate concerning cross-border insolvency and restructuring.[116] This is surprising. Considering that the emergence of globalization and the development of international commerce has given an international dimension to many corporate insolvency and restructuring cases,[117] one would expect that both disciplines would benefit from an economic outlook that is, in principle, neutral and supersedes doctrinal differences between jurisdictions. Yet, this feature of cross-border scholarship actually raises an issue of broader relevance, namely whether and to what extent economic analysis of substantive law can be relied upon for the formulation of rules and norms of private international law. Thus, before

[114] Madaus (n 90); de Weijs (n 67); Schillig (n 86).
[115] To be fair this approach has been more relevant in the United States than in Europe: see Thomas H Jackson, 'A Retrospective Look at Bankruptcy's New Frontiers' (2018) 166 University of Pennsylvania Law Review 1867. Still, even in Europe, economic considerations are a key element of the analysis of insolvency and restructuring frameworks: see Sarah Paterson, 'Bargaining in Financial Restructuring: Market Norms, Legal Rights and Regulatory Standards' (2014) 14 Journal of Corporate Law Studies 333; Eidenmüller (n 41).
[116] A notable exception are the contributions of Robert Rasmussen, which adopt a contractarian approach to cross-border insolvency: see Robert K Rasmussen, 'Resolving Transnational Insolvencies Through Private Ordering' (2000) 98 Michigan Law Review 2252; Robert K Rasmussen, 'A New Approach to Transnational Insolvencies' (1997) 19 Michigan Journal of International Law 1.
[117] The "internationalization" of insolvency law was first noted by Nadelmann: Kurt H Nadelmann, 'International Bankruptcy Law Its Present Status' (1944) 5 The University of Toronto Law Journal 324.

considering the conclusions of the preceding section and their potential relevance to the private international law of insolvency and restructuring, it is first necessary to consider an antecedent question: is it reasonable to analyse rules of private international law by referring to the function of substantive legal rules?

This question, though straightforward, appears to be raising broader conceptual questions regarding the nature of private international law and its status along the public-private law continuum. Nevertheless, regardless of the position one takes on these contested issues, it would be fair to say that, as a general matter, private international law is, at the very least, not indifferent to the content and nature of the rules of substantive law. In fact, contemporary approaches, which view private international law as performing the allocation of regulatory authority between different states in the context of global or regional governance,[118] imply a symbiotic relationship between substantive and private international law. After all, the resolution of conflicts between competing authorities,[119] presupposes a consideration of the policies that the exercise of such regulatory authority pursues.[120] From that perspective, private international law rules must be scrutinized as regards the appropriateness of the underlying principles according to which they perform the ordering of the regulatory authority of states.[121] Since such policies cannot be found within the discipline of private international law itself,[122] their identification involves, rather inevitably, a consideration of the respective rules of substantive law.

[118] Horatia Muir Watt, 'Private International Law Beyond the Schism' (2011) 2 Transnational Legal Theory 347; Alex Mills, *The Confluence of Public and Private International Law* (Cambridge University Press 2009) 18; Robert Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization' (2002) 40 Columbia Journal of Transnational Law 209; Ralf Michaels, 'The New European Choice-Of-Law Revolution' (2008) 82 Tulane Law Review 1607. The development of these approaches is reflected in several parallel trends in the field such as the transition from rigid to flexible rules, the progressive narrowing of legal categories in the process of characterization as well as the emergence of material justice as a prevalent concern in the outcome of private international law disputes: see Symeon C Symeonides, *Private International Law: Idealism, Pragmatism, Eclecticism* (Brill | Nijhoff 2021) 346.

[119] 'The central issue in conflict of laws and within private international law, however, is a fundamental issue of state authority; namely, which state will be allocated the legal power to regulate the matter?': Joel P Trachtman, 'The International Economic Law Revolution' (1996) 17 University of Pennsylvania Journal of International Economic Law 33, 40.

[120] Symeonides (n 118) 60.

[121] Mills (n 118) 23.

[122] Ralf Michaels, 'Private International Law and the Question of Universal Values' in Franco Ferrari and Diego P Fernández Arroyo (eds), *Private International Law: Contemporary Challenges and Continuing Relevance* (Elgar Monographs in Private International Law, Edward Elgar Publishing 2019).

Even if one moves away from such theorizing and instead considers the field of private international law from a more pragmatic perspective, as a means of providing appropriate solutions and achieving justice and fairness in cross-border disputes,[123] the content of substantive legal rules also appears relevant. In many instances, justice and fairness in the cross-border context need to be contextualized by reference to certain fundamental principles that underpin a particular field of substantive law, such as party autonomy in contract law or the protection of weaker parties in consumer protection law. Private international law rules are often framed as favouring particular substantive results that are considered a priori desirable, such as rules favouring the validity of certain juridical acts or a certain status.[124] The desirability of these outcomes can however only be contextualized by reference to the objectives that legal rules pursue in fully domestic situations. Viewed from this perspective, the function of substantive law reflects greatly on the structure of private international law rules.

Historically however, the role of economic analysis in identifying the underlying policies of substantive law for the purposes of informing the design of the private international law framework has been limited. In fact, to the extent that economic analysis features within the discipline of private international law, it seems to be confined to technical issues. In fact, most commentators merely adopt the method or the terminology of economics to approach formal issues that lie within the discipline of private international law, such as the appropriateness of deference to party autonomy in choice of law, the choice between rules and standards in the formulation of choice of law rules etc.[125] Economic modes of analysis are thus introduced, not as a means of incorporating the conclusions of substantive law analysis but rather as an analytical tool to approach a narrow set of rather technical questions. The preference for such an approach can be explained as providing a clear separation between substantive and private international law analysis and thus avoiding collapsing the two disciplines

[123] Alex Mills, 'The Identities of Private International Law: Lessons from the U.S. and EU Revolutions' (2013) 23 Duke Journal of Comparative and International Law 445, 462.

[124] Symeonides offers several examples to support the proposition that private international law's traditional normative objective, the pursuit of conflicts justice, has been progressively tampered by material justice considerations: see Symeonides (n 118) 213–51.

[125] Giesela Ruhl, 'Methods and Approaches in Choice of Law: An Economic Perspective' (2006) 24 Berkeley Journal of International Law 801; Erin A O'Hara and Larry E Ribstein, 'Conflict of Laws and Choice of Law' in Gerrit De Geest (ed), *Encyclopedia of Law and Economics*, vol 8th (2nd edn, Edward Elgar Publishing 2024).

into one.[126] Whatever the case may be, however, these approaches call into question the issue of whether a general reliance on the economic underpinnings of substantive law is appropriate or even possible in private international law.

Still, there may be reason to believe that certain fields of law are more amenable than others to such an economic mode of analysis. In the field of insolvency for instance, Savigny had noted, as early as the 19th century, that before examining the private international law of insolvency 'it is necessary to understand the peculiar nature of bankruptcy'.[127] From a first glance, this allusion to the nature of bankruptcy as a prerequisite for an inquiry into cross-border insolvency law seems peculiar, especially if one considers that under the traditional Savignian approach, substantive interests and policies were viewed as largely irrelevant for the purposes of private international law.[128] Nevertheless, in Savigny's view, the nature of bankruptcy had a direct bearing on the field of cross-border insolvency. His understanding of bankruptcy was consistent with that of the later Roman law as a mechanism of collective distribution for the benefit of creditors.[129] An appreciation of this function thus logically led to the conclusion that 'as the bankruptcy has in view the adjustment of claims of a number of creditors, it is possible only at one place'.[130] In short, the collectivity of proceedings, as a (normative) feature of substantive insolvency law, logically necessitated the application of a single law, the law of the debtor's domicile, by a single court over the entire insolvency process.

The argument that a link exists between the structure of private international law rules and the operation or effect of primary rules is not entirely novel. For instance, it is generally acknowledged in matters relating to status, where the principle of recognition aims at ensuring that the values embodied in substantive law are not compromised as a result of the international nature of the dispute or the relationship.[131] In the field of

[126] Ralf Michaels, 'Economics of Law as Choice of Law' (2008) 71 Law and Contemporary Problems 73, 98.
[127] Friedrich Karl von Savigny, *A Treatise on the Coflict of Laws and the Limits of Their Operation in Respect of Place and Time* (T&T Clark 1869) 209. It is interesting how Savigny's 'konkurs' is translated into 'bankruptcy' in English, illustrating the terminological differences one faces in considering these issues across jurisdictions: see Chapter I, Section 3.
[128] Ralf Michaels, 'Post-Critical Private International Law' in Horatia Muir Watt and Diego P Fernández Arroyo (eds), *Private International Law and Global Governance* (Oxford University Press 2014), 57-58.
[129] Especially the 'cessio bonorum': see Obenchain (n 3) 187.
[130] von Savigny (n 127).
[131] Michaels, 'Private international law and the question of universal values' (n 122) 165.

insolvency and restructuring law however, the introduction of international elements poses an even more profound risk to the function and operation of substantive legal rules. As already mentioned, insolvency and restructuring law address certain cooperation and coordination problems between debtors and creditors after the onset of financial distress. In this context, both sets of rules have a centralizing or collectivizing function: either to 'collectivize' the debtor's assets in order to ensure their preservation and their orderly distribution or to provide a framework for efficient collective bargaining in order to realize the business' going concern value. This collectivizing function is however under threat, once foreign elements are introduced. If creditors and assets are located across national borders, the potential of the concurrent jurisdiction of multiple courts or the application of different laws to various aspects of the collective process can lead to fragmentation and by extension compromise the ability of substantive legal rules to address collective action problems (in the case of insolvency) or to properly balance holdout and holdup risks (in the case of restructuring law). In that sense, internationalization of an insolvency or restructuring case can seriously jeopardize the ability of substantive legal rules to fulfil their primary function.

The foregoing analysis thus serves to make an important point about the relevance of the economic analysis that has been expounded so far. As far as insolvency and restructuring law is concerned, the content of private international law rules (by choosing the competent court or the applicable law) does not determine only the outcome of the insolvency or restructuring process but rather whether such a process will operate effectively in the first place. This proposition is merely a different way of expressing the more general idea that, at least in these fields, the proper consideration of the economic function of substantive legal rules, is indeed necessary for the design of private international law rules.[132] This position affirms the contemporary view of private international law as a regulatory tool and acknowledges that its rules play an important role in the regulation of international transactions, not unlike that of substantive law.[133] Although by linking substantive with private international law

[132] Michael Whincop and Mary Keyes, *Policy and Pragmatism in the Conflict of Laws* (1st edn, Routledge 2001) 3.
[133] Ralf Michaels, 'Two Economists, Three Opinions? Economic Models for Private International Law - Cross Border Torts as Example' in Jurgen Basedow and Toshiyuki Kono (eds), *An economic analysis of private international law* (Mohr Siebeck 2006) 183.

analysis, the suggested approach may be viewed as creating a difficulty of demarcation between them, the notion that private international law should, as a residual rule, espouse the values of substantive law and give effect to them does not appear to raise any material doctrinal concerns.[134] Even more importantly, a consideration of the conclusions of economic analysis can provide a valuable heuristic in favour of a particular normative approach of private international law rules to the problems posed by in the field of cross-border insolvency and restructuring law.

b. Universalism as a solution to cross-border collective action problems

The challenges in dealing with the insolvency of a firm, having creditors and assets across several jurisdictions, are by no means novel or modern. As a matter of fact, the first known international insolvency cases occurred during the Middle Ages and involved the only type of firms, which, at the time, had commercial activities of a truly international scale, namely the Italian merchant banks. These firms would traditionally operate as partnerships, through agents located in various countries and kingdoms of Medieval Europe.[135] When these firms encountered financial difficulties (which were often the result of the political upheavals of the time), they would cease trading, often under fraudulent circumstances,[136] leaving assets scattered in the various jurisdictions, where they were doing business. What followed, in most cases, were multiple liquidation proceedings, whereby the assets of each branch would be liquidated by the respective public officials of each kingdom for the benefit of local creditors, which primarily included the creditors that had transacted with the branch in question. As expected, this approach produced divergent returns depending on the value of the assets that each branch possessed at the time that the banking firm ceased business. In the bankruptcy of the Scali bank of Florence for instance, one of the most well-documented cases of the day, several foreign creditors appear to have

[134] Konrad Zweigert, 'Some Reflections on the Sociological Dimensions of Private International Law or What Is Justice in Conflict Of Laws?' (1973) 44 University of Colorado Law Review 283, 295.
[135] David Graham, 'The Insolvent Italian Banks of Medieval London: Part I' (2000) 9 International Insolvency Review 147, 149.
[136] The absence of limited liability often prompted the partners to abscond in order to avoid imprisonment for the partnership's debts: David Graham, 'The Insolvent Italian Banks of Medieval London: Part II' (2000) 9 International Insolvency Law Review 213, 219.

fared significantly better than the English creditors of the bank's London branch.[137] Such outcomes were, to some degree, unavoidable due to the absence of any effective method of communication or coordination between the various local proceedings.

Still, there was one notable exception that illustrated the viability as well as the benefits of a more centralized approach. When the Ammanati Bank of Pistoia fell insolvent, the large debts that were due to the Holy See in Rome prompted the Papacy to undertake an active coordinating role in the management of proceedings, by preventing the piecemeal liquidation of the owners' assets, offering safe conduct of the partners to Rome and collecting all funds to be distributed under a single order of distribution.[138] Although this paradigm does not seem to have been followed in subsequent cases,[139] the involvement of the Holy See in the case of the Ammanati demonstrated not only the possibility of a coordinated approach to international insolvencies but also its benefits for the creditor group as a whole.

These historical examples illustrate vividly the central problem presented in the field of cross-border insolvency: when a debtor has assets and creditors in multiple jurisdictions, should an insolvency proceeding taking place at the jurisdiction of the debtor's domicile have universal effect or should, alternatively, the debtor be subject to multiple proceedings in every jurisdiction, where assets may be located? If we consider the question through the lens of the economic arguments that have already been developed, it is evident that the latter alternative would lead to several inefficiencies. For one thing, if an insolvency proceeding in the debtor's home jurisdiction were not effective abroad, foreign creditors would have free rein to enforce their claims against any of the debtor's assets that they would be able to locate. In that sense, the collective action problem would be reintroduced, as foreign creditors would

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[137] Edmund Fryde, 'The Bankruptcy of the Scali of Florence in England, 1326–1328' in Richard Britnell and John Hatcher (eds), *Progress and Problems in Medieval England* (1st edn, Cambridge University Press 1996).
[138] Eugenio Vaccari, 'The Ammanati Affair: Seven Centuries Old, and Not Feeling the Age' (2018) 93 Chicago-Kent Law Review 831, 860.
[139] It is unclear why this was the case. Some sources suggest that the Holy See was particularly exposed to the Ammanati, when their Roman branch was forced to close and so were particularly incentivized to ensure a coordinated approach in respect of that particular firm: Kurt H Nadelmann, 'Bankruptcy Treaties' (1944) 93 University of Pennsylvania Law Review and American Law Register 58, 58.

be effectively exempted from the collective proceeding. At the same time, even if foreign creditors were subject to a local insolvency proceeding, inefficiencies would still arise; the size of the asset pool in each jurisdiction would most likely differ, thus granting certain creditors an advantage, whereas the cost of multiple parallel proceedings would also constitute a net loss for the creditor group as a whole. Perhaps more importantly, the inability of creditors to predict ex ante, whether the assets left over in their jurisdiction would be sufficient to cover the claims of local creditors (in essence their expected return), would increase the aggregate credit risk of the borrower and by extension negatively affect creditor incentives to extend financing in the first place.

From that perspective, the main argument in favour of a single universal proceeding governing the debtor's worldwide insolvency, a solution conveniently dubbed universalism, is, first and foremost, seems to be actually based on an efficiency claim. A universalist solution avoids a destructive race against the debtor's assets located abroad as well as the cost of parallel proceedings, thereby reducing the total costs associated with resolving financial distress.[140] Equally importantly, by providing a single forum and a single law solution, universalism increases predictability for creditor returns and thereby promotes efficient ex-ante allocation of capital.[141] A globally collective procedure and a single set of applicable rules in cross-border insolvencies can thus address the inefficiencies that would inevitably arise, if the financial distress of a multinational firm were resolved in an uncoordinated manner.[142] These arguments implicitly appear in contemporary scholarship, often clothed in a political economy vernacular, which emphasizes the globalization of trade and the need for market symmetry.[143] In reality universalism offers a clear solution to the cross-border

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[140] Jay Lawrence Westbrook, 'Theory And Pragmatism In Global Insolvencies: Choice Of Law And Choice Of Forum' (1991) 65 American Bankruptcy Law Journal 457, 464-466.

[141] Lucian Arye Bebchuk and Andrew T Guzman, 'An Economic Analysis of Transnational Bankruptcies' (1999) 42 The Journal of Law and Economics 775; Andrew T Guzman, 'In Defense of Universalism' (2000) 98 University of Michigan Law Review 2177, 2186.

[142] Jay Lawrence Westbrook, 'A Global Solution to Multinational Default' (2000) 98 Michigan Law Review 2276.

[143] Kurt H Nadelmann, 'An International Bankruptcy Code: New Thoughts on an Old Idea' (1961) 10 International and Comparative Law Quarterly 70, 78; Westbrook, 'A Global Solution to Multinational Default' (n 142) 2283-2288.

manifestation of the collective action problem, which has already been identified as the main problem that substantive insolvency law seeks to address.[144]

Nevertheless, although the efficiency benefits of a universalist system seem relatively straightforward, the application of a single law to the entire process, including distributions,[145] irrespective of the location of assets or creditors has encountered significant opposition. These critiques have come primarily from two fronts. First, from a practical perspective, it has been argued that the establishment of a purely universalist approach to cross-border insolvencies would be unfeasible since jurisdictions would be essentially required to defer to the law of the foreign universal insolvency proceeding to govern wholly domestic relationships.[146] In that regard, the biggest concern was that the application of foreign insolvency law, and especially rules governing the order of distribution would effectively serve to export foreign social policy objectives on domestic creditors and frustrate their legitimate expectations.[147] Secondly, although conceding the primacy of efficiency considerations in shaping the cross-border insolvency framework, it was sometimes contended that the economic benefits of universalism were only hypothetical. Although a universalist approach had long argued that the location of the universal insolvency proceeding should be determined by reference to the debtor's principal place of business,[148] which progressively morphed into the debtor's Centre of Main Interests or COMI, critics argued that such a concept would inevitably be indeterminate and lead to inefficiencies by encouraging forum shopping.[149] In response, an alternative territorialist system was

[144] Westbrook, 'Theory And Pragmatism In Global Insolvencies: Choice Of Law And Choice Of Forum' (n 140) 466.

[145] Jay Lawrence Westbrook, 'Breaking Away: Local Priorities and Global Assets' (2011) 46 Texas International Law Journal 601.

[146] Lynn M LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (1998) 84 Cornell Law Review 696.

[147] Frederick Tung, 'Fear of Commitment in International Bankruptcy' (2001) 33 The George Washington International Law Review 555, 573-576; Frederick Tung, 'Is International Bankruptcy Possible?' (2001) 23 Michigan Journal of International Law 1, 17-18.

[148] Westbrook, 'Theory And Pragmatism In Global Insolvencies: Choice Of Law And Choice Of Forum' (n 140) 469.

[149] Lynn M LoPucki, 'Global and Out of Control?' (2005) 79 American Bankruptcy Law Journal 79. For a response to such arguments see: Samuel Bufford, 'Global Venue Controls Are Coming: A Reply to Professor LoPucki' (2005) 79 American Bankruptcy Law Journal 105. However, it has been argued that the choice of insolvency forum may actually lead to more efficient outcomes and that COMI may even be too stringent a standard: Letter sent to the Secretariat of UNCITRAL Working Group V (Insolvency) from Anthony J Casey and others, 'Towards a New Approach for the Choice of Insolvency Forum' (14 September 2023) < https://ccla.smu.edu.sg/sgri/blog/2023/09/15/towards-new-approach-choice-insolvency-forum > accessed 19 March 2024.

proposed, where each country would have jurisdiction over the portion of the debtor's estate within its borders and would apply its own rules on the distribution of those assets, while at the same time allowing office holders and courts to coordinate on an ad hoc basis.[150] Whatever the merits of such an approach, it nonetheless presupposed that the collectivity of the insolvency process mandates a certain degree of cooperation in cross-border cases, even in the form of informal cooperation duties,[151] thus illustrating the implicit ubiquity of economic arguments in the cross-border insolvency debate.

In its strictest and purest form, a universalist cross-border insolvency framework would see the establishment of a single uniform international insolvency law, to be administered by a single international insolvency court.[152] Yet, despite its obvious economic benefits, the introduction of such a system would in all likelihood prove practically unfeasible. In response, a more practical alternative has been developed, which although cognizant of the benefits of a universalist approach, recognizes the reality of step-by-step progress through cooperation.[153] This concept, labelled 'modified universalism' replaces the 'must' of the application of one state's insolvency law with a 'may'.[154] In principle, modified universalism accepts that assets should be collected and distributed on a worldwide basis, yet, at the same time, provides local courts with a discretion (instead of an obligation) to refer to the court of the main proceedings and thus enables them to evaluate the fairness of such proceedings and to protect the interests of local creditors.[155] As will be further developed in later Chapters, the modified universalist framework is perhaps best reflected in the main international instruments for cross-border insolvency, especially the Model Law.[156] In

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[150] LoPucki (n 146) 742. An intermediate proposal was made by Janger, who argued for a strict choice-of-forum rule that would harmonize procedural aspects of the insolvency process but more relaxed and decentralized choice-of-law rules that would allow the parallel application of different laws: Edward J Janger, 'Virtual Territoriality' (2010) 48 Columbia Journal of Transnational Law 401.
[151] It has thus been said that these approaches 'differ less in practice, than in theory': see LoPucki (n 146) 750.
[152] Westbrook, 'A Global Solution to Multinational Default' (n 142) 2292.
[153] Jay Lawrence Westbrook, 'Chapter 15 at Last' (2005) 79 American Bankruptcy Law Journal 713, 715.
[154] John AE Pottow, 'Procedural Incrementalism: A Model for International Bankruptcy' (2005) 45 Virginia Journal of International Law 936, 952.
[155] Jay Lawrence Westbrook, 'Choice of Avoidance Law in Global Insolvencies' (1991) 16 Brooklyn Journal of International Law 499, 517.
[156] Andre Berends, 'The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview' (1998) 6 Tulane Journal of International and Comparative Law 309.

any case, and as a general matter, modified universalism seems to attempt to balance the benefits of universalism, while validating the practical concerns of territorialists regarding the practical obstacles of realizing such a framework.[157]

Today, the normative debate surrounding cross-border insolvencies seems to have been settled in favour of modified universalism.[158] Although often thought of as a compromise, the modified universalist approach actually weighs heavily in favour of the universalist conception,[159] by accepting the primacy of the insolvency proceeding taking place in the debtor's home jurisdiction and providing an avenue to recognize the effects of insolvency in foreign jurisdictions. When considered from this perspective, it becomes obvious that the development of the modified universalist paradigm as well as its crystallization into existing instruments, particularly the Model Law, has been greatly shaped by an appreciation of the economic function of insolvency law in the domestic context. In fact, both competing approaches, universalism and territorialism, have sought, to a large extent, to formulate a workable and practical framework to address the inefficiencies that would otherwise result from the uncoordinated insolvency of a firm across national borders. This of course does not suggest that regulatory and public policy arguments have also not featured in the normative discourse of cross-border insolvency law and have not influenced prevailing norms.[160] Still, it would not be an overstatement to suggest that the fundamental features of the modified universalist framework serve an economic function, by addressing collective action concerns and the resulting inefficiencies in cross-border insolvency cases. As a matter of fact, one of the main benefits of the Model Law framework, as will be illustrated in the next Chapter, is its ability to deal with precisely these economic problems.[161]

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[157] Edward S Adams and Jason K Finche, ''Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism' (2008) 15 Columbia Journal of European Law 43.
[158] Irit Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (1st edn, Oxford University Press 2018) 52.
[159] For many commentators the current framework as an intermediate solution until a fully universalist framework becomes politically feasible: see Westbrook, 'A Global Solution to Multinational Default' (n 142) 2302; John AE Pottow, 'Beyond Carve-Outs and Toward Reliance: A Normative Framework for Cross-Border Insolvency Choice of Law' (2014) 9 Brooklyn Journal of Corporate, Financial and Commercial Law 197, 198.
[160] See for instance, among many others: John J Chung, 'The New Chapter 15 of the Bankruptcy Code: A Step Toward Erosion of National Sovereignty' (2007) 27 Northwestern Journal of International Law and Business 89.
[161] See Chapter III, Section 2.c.

c. Cross-border restructuring law and the facilitation of efficient bargaining

The question of whether the approach on the issues of cross-border restructurings is equally informed by the economic considerations of substantive law is more complicated. For one thing, though not completely neglected, the field does not seem to have been the subject of as extensive an analysis as the field of cross-border insolvency. As with substantive restructuring law, the problems of cross-border restructuring law seem to have often been subsumed under the broader problematic of cross-border insolvency. In that context, the asset preservation features of a modified universalist framework have traditionally been considered sufficient to deal with the challenges posed by cross-border restructurings. By addressing collective action concerns, modified universalism has the potential of safeguarding the debtor's going concern value and thereby increase the chances of a successful restructuring.[162] Viewed from this perspective, the merits of a modified universalist approach are not limited to cases leading to the liquidation of the debtor's assets but also extend to restructuring scenarios. This approach is, to a great extent, also reflected in the provisions of the Model Law, which often refer to liquidation and reorganization in conjunction with one another. By defining a foreign proceeding as a proceeding 'for the purposes of either reorganization or liquidation',[163] the Model Law implies that the benefits of recognition of a foreign proceeding are not limited to safeguarding value for the purposes of liquidation and distributions to creditors but can also be utilized to provide the debtor with the necessary breathing space to enable a reorganization of its business.[164] Through that lens, a modified universalist framework appears to be considered capable of addressing all matters relating to cross-border insolvency and restructuring law alike.

As a general matter, these arguments are premised on the assumption that cross-border restructurings do not raise autonomous policy concerns but only raise issues that are ancillary to the general problems of cross-border insolvency. Yet such a view

[162] Westbrook, 'Theory And Pragmatism In Global Insolvencies: Choice Of Law And Choice Of Forum' (n 140) 461; Mevorach (n 158) 34.
[163] Art. 2(a) Model Law.
[164] United Nations Commission on International Trade Law, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency*' (UN Publication 2014) para 37.

seems to conflate two separate sets of problems. As has already been argued, although asset preservation mechanisms can indeed enable restructurings by safeguarding a distressed firm's going concern value in the face of collective action problems, the central function of restructuring law does not revolve around asset preservation. Instead, the rules of restructuring law are geared towards enabling parties to reach an efficient arrangement, by addressing strategic behaviour in a collective and sequential bargaining setting. This fundamental distinction suggests that, though there may be certain points of intersection between the cross-border insolvency framework and the facilitation of cross-border restructurings, the framework of cross-border restructuring law should concern itself with a different set of challenges, namely addressing bargaining failures, as they arise in the cross-border context. In light of this, a simplified view that reduces the problems of cross-border restructurings to the preservation of going concern value seems to ignore to the separate economic function of restructuring law.

Starting from that premise, one quickly realizes that many of the strategic bargaining problems that are addressed by restructuring law in the domestic context, can re-emerge in the cross-border setting, when a multinational firm wishes to restructure. For instance, and as already noted, the existence of a majoritarian decision making rule enables the debtor to conclude a binding restructuring arrangement with a qualified majority of its creditors and thereby reduce creditor incentives to either free-ride or hold-out. However, when creditors are located in different jurisdictions, the resulting restructuring plan will have to be recognized abroad to be binding against such foreign creditors. Otherwise, they may be tempted to disregard the restructuring and sue the debtor for the full amount of their claims, especially if the debtor also has assets in their respective jurisdictions. In that case, foreign creditors would have a valid and enforceable exit option from the bargaining process. Anticipating this outcome, all of the debtor's foreign creditors would engage in a similar behaviour and the entire restructuring would unravel. Even if the number of foreign creditors were not large enough to sabotage the entire restructuring, the substantial transfer of value to dissenting foreign creditors would significantly diminish domestic creditors' incentives to extend credit or engage in business with the debtor ex ante. The inability to recognize the effects of the restructuring arrangement would therefore lead to a number of inefficiencies. In order to address these negative effects, the debtor would

need to commence a parallel restructuring proceeding, and therefore parallel bargaining, in every foreign jurisdiction, where creditors and assets would be located. This would however significantly increase costs and further undermine the prospects of business rescue. As a result, the potential for fragmentation of collective bargaining in the cross-border setting can substantially jeopardize the objectives of restructuring law.

Considering the above, it seems incontrovertible that the private international law of restructurings should facilitate the recognition of restructuring plans in jurisdictions, where creditors or assets may be located.[165] A basic rule of recognition would reinstate the collective bargaining process and restore the function of restructuring law as a means of addressing the holdout problem, even in the presence of foreign creditors.[166] Nevertheless, while this approach is correct as a matter of general orientation, it is incomplete. As already noted, restructuring law tries to balance two countervailing considerations: on the one hand to facilitate business rescue by combating strategic holdout behaviour, while on the other hand protecting minority creditors against the risk of holdup. This latter aspect is even more important in a cross-border setting, where the possibility of hold-up is amplified not only because restructuring laws differ materially across jurisdictions but also due to the fact that courts in different jurisdictions may have varying degrees of institutional capacity to police hold-up behaviour.[167] Rescue procedures are a novel feature in the legal framework of a number of jurisdictions and the intricacies of judicial decision making in this context can prove challenging. As a result, creditors may be exposed to a greater risk of being

[165] Where the restructuring does not take place in the debtor's home jurisdiction, it may also be necessary to recognize the effect of the restructuring plan against shareholders in the debtor's jurisdiction of incorporation, especially if the plan provides for a reconfiguration of the debtor's equity, such as share capital increases or debt-equity swaps. In that case, the debtor faces a different variant of the holdout problem that may need to be addressed by recognition. Regardless, even in such cases, the same rationale for recognition is equally applicable, as evidenced in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc and others* [2007] 1 AC 508: see Chapter IV, Section 2.b.

[166] Professor Westbrook, an ardent supporter of universalism, had expressed, from a very early point, an appreciation of the need to make a restructuring plan binding on all creditors as a central component of universalism: see Westbrook, 'A Global Solution to Multinational Default' (n 142) 2285. That being said, and as will be argued in further detail in the following Chapters, this does not seem to have been clearly reflected in the enactments of the Model Law, neither in the US nor in the UK.

[167] Müge Adalet McGowan and Dan Andrews, 'Design of Insolvency Regimes Across Countries' OECD Economics Department Working Papers No. 1504 <https://www.oecd-ilibrary.org/economics/design-of-insolvency-regimes-across-countries_d44dc56f-en>, accessed 19 March 2024, 33; Catherine Bridge, 'Insolvency – a second chance?; (2013) EBRD Law in Transition Journal 23.

strong-armed into an expropriatory plan than in a purely domestic framework. The potential for hold-up may in turn create significant uncertainty for foreign creditors and may thereby interfere significantly with the debtor's ability to raise financing in the international debt markets. As a result, whilst the fundamental element of a cross-border restructuring framework is a rule enabling the universal recognition of restructuring plans, without any distinction between domestic and foreign creditors, an equally important consideration should be the formulation of certain limitations to the basic rule of recognition, in order to account for the risk of cross-border holdup.

The above analysis therefore supports the following preliminary conclusion for conceptualizing an efficient framework for cross-border restructurings: on the one hand, a rule enabling the recognition of foreign restructuring plans, as a means to address holdout problems, and, on the other hand, certain exceptions to this basic rule in order to manage the countervailing risk of holdup. The specifics of such a framework and a proposed formulation of its constituent rules will be sketched out in detail in later Chapters.[168] Still, for the purposes of the present discussion, it is important to note the difference in approaches between cross-border insolvency and restructuring law. As already mentioned, the nature of the economic problems presented in the insolvency context suggests they can be addressed by clear and simple legal intervention. In the case of cross-border insolvency, this comes in the form of a rule enabling the recognition of the effects of the commencement of an insolvency proceeding, especially the stay on creditor enforcement actions, in jurisdictions where the debtor may have assets. Whereas this is not the end of the road and, as will be illustrated in the next Chapter, there are still a lot of issues that would normally need to be worked out post-recognition (some of which have created significant controversy under the Model Law), the most elementary function of insolvency, namely addressing collective action concerns, can be fulfilled with relative ease.

In the field of cross-border restructuring on the other hand, the situation is more complicated. The rules of private international law that can support efficient bargaining and address the risk of strategic decision making, when assets and creditors, are scattered across national borders are not so straightforward or easy to conceptualize.

[168] See Chapter V, Sections 3-4.

It is clear that a certain balance must be achieved between the recognition of the outcomes of restructuring processes, namely the ensuing restructuring plans, and the limitations to such recognition. Overly narrow grounds for refusing recognition may encourage abusive behaviour on the part of debtors, whereas excessively wide grounds can result in the unnecessary fragmentation of the bargaining process and thus reintroduce the risk of holdout. All in all, an efficient solution is harder to conceptualize. Still, the basic components of such a cross-border restructuring framework are informed by the economic role of substantive restructuring law in addressing the dual challenges of holdout and holdup.

One final remark is important at this point. The divergence in the nature and content of legal rules for cross-border insolvency and restructuring respectively does not necessitate that such rules should be placed in different legal instruments. The EIR is a good illustration of a single framework containing both; on the one hand, rules providing for the automatic recognition of the effects of insolvency proceedings across the EU and on the other hand, a rule mandating the same automatic recognition for all judgments issued in connection to such proceedings, including judgments confirming restructuring plans.[169] As will be argued in the next Chapter, it remains highly contested whether the Model Law actually includes a similar rule, allowing for the recognition of foreign restructuring plans.[170] Still, the potential co-existence of these rules in the same legal instruments should not obscure their fundamental differences. As a general matter, the different function of insolvency and restructuring law translates into a different formulation of their respective private international law rules.

4. Conclusion

Normative frameworks change over time primarily because of changes in the underlying practices.[171] Over the past several decades, modern restructuring practices

[169] Art. 32 EIR. It must be pointed however that the only limitation to the recognition of such judgments is public policy. This can be justified, if one considers that the Regulation is based upon the principle of mutual trust, the equivalence of the courts of all Member States, and on the general presumption that judgments opening insolvency proceedings handed down by courts in other Member States are valid: Reinhard Bork and Kristin van Zwieten (eds), *Commentary on the European Insolvency Regulation* (Oxford University Press 2016) 312. This lax framework of recognition is however kept in place, due to the interpretative role of the CJEU, which ensures uniformity between the courts of different Member States.
[170] See Chapter IV, Section 2.b.
[171] Jackson, 'A Retrospective Look at Bankruptcy's New Frontiers' (n 115) 1868.

have changed significantly, as a result of important developments in corporate structures and the operation of financial markets. These trends have in turn revealed a fundamental conceptual difference between the role of insolvency and restructuring law in a modern market economy. Whereas this development has been identified in contemporary scholarship, it has not been fully appreciated. The preceding analysis attempts to fill this gap by formalizing the normative distinction between insolvency and restructuring, on the basis of their economic function, while also noting potential points of intersection. More importantly, it utilizes this distinction to identify the basic components of an efficient cross-border insolvency and restructuring framework respectively.

In a more fundamental sense, the foregoing analysis relies on an economic approach to set out the basic benchmark, by which the effectiveness of existing frameworks should be measured. By doing so, it serves as a starting point for several different, yet related, inquiries that will be pursued in later Chapters. Still, the one question that emerges naturally from this analysis is to what extent the existing law and practice of cross-border insolvencies and restructurings is reflective of the economic considerations that have been set out above. The following Chapter will address these issues by linking theory with practice and considering whether the existing framework of the Model Law, as applied in the major jurisdictions that have adopted it, can be considered to live up to the theoretical benchmarks that have been developed.

CHAPTER III: THE PRACTICE OF CROSS BORDER INSOLVENCIES AND RESTRUCTURINGS IN COMPARATIVE PERSPECTIVE

1. Introduction

The field of cross-border insolvency and restructuring law had, for decades, been characterized by only modest development. As a matter of fact, for the better part of the last century, most jurisdictions around the world were devoid of any specialized rules of private international law that could address the issues presented in international cases. In many jurisdictions, the recognition of foreign insolvency proceedings, enabling a foreign insolvency representative to claim assets located in other jurisdictions, would frequently be either refused altogether[1] or be made subject to such stringent conditions[2] that would in practice leave domestic creditors free rein to enforce against local assets. In some instances, statutory provisions would enable the commencement, in parallel to the foreign proceeding, of a domestic insolvency, if the debtor had a branch, an establishment, or more generally assets within the jurisdiction but would also give domestic creditors priority over the proceeds of the liquidation of local assets, which in practice defeated the collectivity of the insolvency proceeding at the debtor's home jurisdiction.[3] Further evidence of the erstwhile lack of any coherent approach can be found in the treatment of discharges, where discharges of claims provided under foreign schemes or other arrangements would routinely be refused recognition against domestic creditors.[4] The inadequacy of domestic rules of private international law was accompanied by only minimal international cooperation in the field, since the few international treaties that existed only dealt with issues in a piecemeal fashion and bound a limited number of jurisdictions.[5] All in all, these fragmented, incoherent and largely inefficient rules were, for a long time, characteristic of the state of affairs of cross-border insolvency and restructuring law.

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[1] Kurt H Nadelmann, 'Legal Treatment of Foreign and Domestic Creditors' (1946) 11 Law and Contemporary Problems 696, 698, citing the prewar German law on the subject.
[2] Stefan A Riesenfeld, 'The Status of Foreign Administrators of Insolvent Estates: A Comparative Survey' (1976) 24 The American Journal of Comparative Law 288, 300-305.
[3] Kurt H Nadelmann, 'Concurrent Bankruptcies and Creditor Equality in the Americas' (1947) 96 University of Pennsylvania Law Review 171.
[4] Kurt H Nadelmann, 'The Recognition of American Arrangements Abroad' (1942) 90 University of Pennsylvania Law Review and American Law Register 780.
[5] Kurt H Nadelmann, 'Bankruptcy Treaties' (1944) 93 University of Pennsylvania Law Review and American Law Register 58.

In recent years however, there has been significant progress in the convergence of international insolvency and restructuring frameworks toward a more efficient model. A key driver of this trend has been the Model Law.[6] Though not a directly binding instrument but rather a uniform text that can be freely implemented, as domestic legislation, in any enacting jurisdiction,[7] the Model Law has been adopted in a considerable number of jurisdictions,[8] including the two most prominent international insolvency and restructuring hubs, England[9] and the United States.[10] In rudimentary terms, the Model Law provides a framework enabling the recognition of foreign insolvency proceedings and the provision of assistance by national courts to foreign insolvency representatives. It formally maintains a balance between universalist principles and territorialist considerations,[11] by enabling on the one hand the recognition of the effects of a foreign proceeding over assets located in other jurisdictions, while at the same time providing local courts with the discretion to withhold or condition their cooperation to the foreign proceeding. Nevertheless, despite its apparent 'modified' universalist character, the Model Law is widely regarded as a framework that can foster outcomes that are heavily skewed towards the universalist conception and thus achieve the efficient resolution of cross-border insolvency and restructuring cases.[12]

This Chapter will examine the veracity of this view. In particular, it will consider if, and to what extent, the introduction and application of the Model Law in England and the

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[6] Another even more important driver of this trend, albeit operating in a more regional context, has been the European Insolvency Regulation. On the history of the development of the EIR: see Kristin van Zwieten, 'An Introduction to the European Insolvency Regulation, as Made and as Recast' in Reinhard Bork and Kristin van Zwieten (eds), *Commentary on the European Insolvency Regulation* (Oxford University Press 2022).

[7] The model law format was preferred as a more feasible step in achieving international uniformity as opposed to a traditional convention: see Andre Berends, 'The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview' (1998) 6 Tulane Journal of International and Comparative Law 309, 319.

[8] To date the Model Law has been adopted in in 59 States in a total of 62 jurisdictions: see United Nations Commission on International Trade Law, 'Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)' <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status> accessed 19 March 2024.

[9] The Model Law has been enacted, by way of the Cross Border Insolvency Regulations 2006, SI 2006/1030 (CBIR) in the entirety of United Kingdom, including Scotland.

[10] In the US, the Model Law was enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act, as a new Chapter 15 in the US Bankruptcy Code (11 U.S. Code § 1501-1531)

[11] Edward S Adams and Jason K Finche, ''Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism' (2008) 15 Columbia Journal of European Law 43, 60-61.

[12] John AE Pottow, 'Procedural Incrementalism: A Model for International Bankruptcy' (2005) 45 Virginia Journal of International Law 936, 960.

United States has fostered an efficient approach in the field of cross-border insolvency and restructuring law, as conceptualized by the economic analysis of the previous Chapter. In attempting to answer this question, this Chapter will consider the respective regimes for cross-border insolvency and restructuring law in the United Kingdom and the United States prior to the Model Law's introduction and track the development and evolution of legal norms, such as universalism. This analysis reveals an interesting paradox; whereas the application of the Model Law has indeed attained a significant degree of convergence and fostered efficient outcomes in cross-border insolvency matters, this achievement is not replicated in the field of cross-border restructuring law, which is still characterized by significant divergence as far as the proper approach is concerned. This Chapter will thus provide a diagnosis of the current state of affairs, identifying the treatment of cross-border restructurings as one of the most important questions that remain unresolved after the introduction of the Model Law. Even more conceptually, the analysis will clear the road and set the stage for the development of the arguments of the following chapters, as regards the proper and efficient manner of approaching the issues raised by cross-border restructurings.

2. The effect of the Model Law on cross-border insolvency norms

a. The English approach: universalism between the common law and statute

An inquiry into the traditional approach of the English common law reveals that the oft-cited dictum, namely that the principle of modified universalism is the 'golden thread running through English cross-border insolvency law, since the 18th century'[13] reflects a certain degree of exaggeration. In truth, although English courts have, for a long time, appreciated the challenges presented by cross-border insolvency cases, the solutions offered have been neither consistent nor unchallenged and have been significantly influenced by the legal and institutional background, against which they have been developed. The common law approach in the field first emerged as a response to the problem presented by the personal bankruptcies of foreign domiciliaries, who had assets in England. In one of the earliest cases to consider these

[13] *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, 861.

issues, *Solomons v Ross,*[14] the English courts recognized the effect of foreign bankruptcy order in England thus enabling the foreign trustee to defeat the attachments made in the interim by English creditors. Yet, oddly enough, this approach was originally framed not as a conscious policy decision but rather as the result of the straightforward application of choice of law rules, which, at the time, intimated that the disposition of moveable property was to be governed by the law of the owner's domicile.[15] A bankruptcy order at the debtor's domicile was thus sufficient to vest the debtor's moveable assets in England to the foreign trustee. Regardless of the basis of legal reasoning however, the English common law reflected, from a very early point, a general amenability to the recognition of the effects of a foreign insolvency proceeding.

Subsequent authorities provided additional rationalization for this approach, identifying the principle of equality of creditors, as the key notion underlying the recognition of foreign bankruptcies. This logically entailed that all assets of the debtor, wherever situated, be under the trustee's control to avoid any single creditor acquiring an undue preference in their distribution, by means of individual enforcement.[16] In that sense, the nature of insolvency as a collective process necessitated the universal recognition of insolvency proceedings. However, whereas universality emerged as a largely uncontroversial principle, the question of unity in insolvency, namely whether a single or multiple proceedings should take place, proved more complicated. English courts often concluded that, notwithstanding the existence of a foreign bankruptcy, the interests of creditors would, in some cases, be better served by a parallel English proceeding,[17] especially when there were significant assets in England.[18] This raised the additional question of coordination between the concurrent English and foreign

[14] (1764) 1 H Bl 131n. For an analysis of this case: see KH Nadelmann, 'Solomons v Ross and International Bankruptcy Law' (1946) 9 The Modern Law Review 154.
[15] This maxim was expressed in the Latin phrase 'mobilia sequuntur personam' and resembled the applicable rule in matters of succession: see Walter Raeburn, 'Application of the Maxim Mobilia Sequuntur Personam to Bankruptcy in Private International Law' (1949) 26 British Yearbook of International Law 177. Progressively however, English courts began recognizing foreign bankruptcies by relying on other jurisdictional bases, including submission of the creditor to the foreign proceeding: see *Re Davidsons Settlement Trusts* (1872-73) LR 15 Eq 383; *Re Anderson (A Bankrupt)* [1911] 1 KB 896.
[16] *Philips v Hunter* (1795) 2 Blackstone (H) 402.
[17] *Re McCulloch* (1880) 14 Ch D 716; cf. *Friedrich Goetze and Sohn and Others v Aders Preyer and Company* (1874) 2 R 150.
[18] Especially immovables, since their disposition was governed by the lex situs, meaning that the recognition of the foreign order would not vest their title to the foreign trustee. Alternatively, the foreign trustee would have to make an application to an English court to be appointed as a receiver of such assets, although it seems unlikely that this is possible after *Kireeva v Bedzhamov* [2022] EWCA Civ 35.

proceedings and, although the early cases seemingly avoided a conclusive answer, they implied that the English proceeding could be utilized as an accessory to and in aid of the proceeding in the debtor's domicile.[19] In any case and notwithstanding the precise form of such coordination, the original approach of the common law on the matter of cross-border insolvency was composed of two complementary, yet at the same time opposing elements; on the one hand, a general willingness to recognize the effects of foreign proceedings and, on the other hand, an insistence on the appropriateness of a concurrent English adjudication.

The latter aspect, being the more problematic, became a standing feature of the English approach in the context of corporate insolvencies. Whereas English courts would recognize the authority of a liquidator appointed in a foreign proceeding or the dissolution of a foreign company in such a proceeding,[20] corporate winding ups presented a marginally different set of challenges, since a liquidator in a corporate winding up, unlike a trustee in personal bankruptcy, would not be considered to have been vested with the company's property at the time of commencement of proceedings.[21] As a result, the commencement of a parallel liquidation in England was the only obvious way of protecting the English assets of an insolvent foreign firm from the actions of domestic creditors. This option was readily available since, from a jurisdictional perspective, English courts had the benefit of being able to rely on wide grounds of jurisdiction[22] to wind up 'unregistered', namely foreign, companies. Even more, although the exercise of jurisdiction was, in principle discretionary, and required a determination of England being the appropriate forum,[23] English courts would commence winding up proceedings against foreign companies as a matter of course,

[19] *Re Artola Hermanos* (1890) LR 24 QBD 640, 648 (Fry LJ).

[20] Since matters of internal management of a company generally fall to be governed by the law of the country of incorporation: *Bank of Ethiopia v National Bank of Egypt and Liguori* [1937] Ch 513.

[21] The liquidator would take control of the insolvent company but the company would continue to be owner of its property, holding it in trust for the creditors: see *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc and others* [2007] 1 AC 508, 517–18.

[22] These grounds have remained virtually unaltered since the Companies Act 1862, allowing an English court to wind up an unregistered company, if the company is dissolved or has ceased to do business, is unable to pay its debts or if it is just and equitable to do so: cf. Insolvency Act 1986, s. 221(5)).

[23] *International Westminster v Okeanos* [1987] 3 WLR 339.

especially when there were assets or creditors in England,[24] even when rival proceedings in the jurisdiction of incorporation were already in progress.[25]

This approach however generated seemingly inexorable conflicts between the English and the foreign proceeding, especially considering that an English winding up order purported (as it does nowadays) to apply to all assets of the debtor, wherever located.[26] In this context English courts developed, as a matter of judicial practice, an approach whereby the English proceeding would only operate as an ancillary to a foreign winding up, meaning that the duties of the English liquidator would in practice be limited to compiling a list of the English creditors, collecting the debtor's English assets and remitting such assets to the foreign liquidator.[27] The English response to the problem of cross-border insolvencies has therefore historically been a pragmatic one, making concessions on certain matters of principle (such as the universal effect of an English winding up order) in order to achieve results that are in accordance with common sense and fairness for all concerned parties.[28]

Often however, the relationship between the foreign (main) proceeding and the English (ancillary) proceeding could prove anything but straightforward. In the case of the *Bank of Credit and Commerce International*, the High Court noted that the mere fact of the English proceeding being ancillary does not relieve the English court of the obligation to apply English insolvency law to the resolution of any issue arising in the context of winding up;[29] accordingly, remission of assets to the foreign proceeding was made subject to the application of the mandatory set-off rule that ordinarily applies in an English winding up.[30] Similarly, in *Re HIH Casualty and General Insurance Ltd,* the

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[24] In particular, there has to be a sufficient connection between the company and England, which however does not necessarily require the existence of assets or the conduct of business within the jurisdiction, that there is a potential benefit to creditors and that such creditors are subject to the jurisdiction of the court: see *Stocznia Gdanska SA v Latreefers Inc* [2001] BCC 174.
[25] *Re Matheson Bros Ltd* (1884) LR 27 Ch D 225.
[26] Including, as Lord Hofmann noted in *HIH* (n 13) 856, 'the full panoply of powers and duties under the Insolvency Act', such as the court's power to restrain parties from pursuing or continuing proceedings abroad or to oblige them to account for any monies received in a foreign proceeding: see *Cleaver v Delta American Reinsurance Co (In Liquidation)* [2001] 2 AC 328.
[27] *Re Commercial Bank of South Australia* (1886) 33 Ch D 174.
[28] Ian Fletcher, *The Law of Insolvency* (5th edn, Sweet & Maxwell 2017) para 28–012.
[29] *Re Bank of Credit and Commerce International SA (In Liquidation) (No10)* [1997] Ch 213, 246.
[30] In an English insolvency proceeding, the creditors claim is automatically set off against any debts owed by the creditor to the insolvent estate: s. 323 Insolvency Act 1986 (applicable to personal bankruptcy), ss. 14.24, 14.25 Insolvency Rules 2016 (applicable to administration and winding up).

House of Lords remained split on the issue of whether the common law concept of ancillary winding ups could be reconciled with the remittal of assets to a foreign proceeding, whose insolvency scheme is not in accordance with English law.[31] Though pragmatic, the English approach would thus lead to frictions in the coordination of parallel proceedings, centring primarily on the question of the degree of deference that the English proceeding should exhibit to the foreign insolvency.

One question that has remained open in English cross-border insolvency law is whether it is possible to provide assistance to a foreign insolvency proceeding outside the context of a parallel English winding up. There is some sparse guidance that this is indeed possible. In the early colonial case of *African Farms,*[32] the liquidator of an English company requested the court of the colony of Transvaal to stay a claim by a domestic creditor, as a means to protect the company's substantial assets in the colony. Innes CJ recognized the authority of the English liquidator, noting that such recognition also carries with it the active assistance of the court, thus entitling the liquidator to deal with the company's assets in the Transvaal.[33] Although *African Farms* has been frequently cited by English courts, the exercise of the common law power of assistance to foreign insolvency proceedings has in practice been sparse.[34] As a matter of fact, English courts have proven rather intransigent to recognize the effect of a foreign insolvency proceeding in staying claims commenced before the English courts, in the absence of a domestic winding up.[35] A characteristic example has been the case of *Singularis Holdings Ltd v PricewaterhouseCoopers,* where the Privy Council, while noting that English courts have an inherent power at common law to assist in the conduct of a foreign insolvency proceeding, such as by ordering the production of information, concluded that such assistance cannot extend beyond the existing statutory powers of the court under English law.[36] As a result, the scope and

[31] *HIH* (n 13) 855–63 (Lord Hofmann).
[32] *In re African Farms Ltd* [1906] TS 373.
[33] ibid at 377.
[34] Perhaps the most controversial has been the case of *Cambridge Gas* (n 21) 518. For more details on this case see Chapter IV, Section 2.b.
[35] *Felixstowe Dock And Railway Co v United States Lines Inc* [1989] QB 360; *AWB (Geneva) SA v North America Steamships Ltd* [2007] EWCA Civ 739.
[36] *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675.

extent of the concept of assistance remains ill-defined and English courts have exhibited considerable wariness in extending it.

Notwithstanding the above limitations however, these common law powers have been greatly complemented by the introduction of a statutory provision in Section 426 of the Insolvency Act 1986 enabling English courts to cooperate and provide assistance in matters relating to insolvency to courts of any other part of the UK or any other 'relevant country or territory'.[37] Although in practice the scope of this provision is limited to a narrow group of jurisdictions,[38] it constitutes a useful avenue, operating in parallel to the English courts' common law powers, to address the problems presented in the context of cross-border insolvency cases. In particular, Section 426 provides that, upon receiving a letter of request by the courts of a designated jurisdiction, an English court may provide assistance, in the form of any substantive or procedural measure[39] provided, either under foreign or under English insolvency law. Unsurprisingly, Section 426 has thus been utilized to provide a wide range of assistance to foreign insolvency proceedings.[40] Equally importantly, though in principle the provision of assistance is discretionary under Section 426, English courts will in practice comply with the request, unless there are compelling reasons not to.[41] In that sense, despite its narrow scope of application, Section 426 has formalized the common law duty of assistance to foreign insolvency proceedings and has thus further strengthened modified universalist norms in English cross-border insolvency.[42]

The above exposition suggests that the English approach to cross-border insolvency, prior to the introduction of the Model Law, was composed of a patchwork of common law powers, duties, practices and statutory provisions, which enabled English courts, in various shapes and forms, to deal with the challenges presented by cross-border insolvency cases. As far as the efficiency of the adopted solutions was concerned

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[37] Insolvency Act 1986 s. 426 (4)-(5).
[38] In practice, only former Commonwealth countries have been designated as relevant countries for the purposes of s. 426: see The Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 (SI 1986/2123).
[39] *Re Bank of Credit and Commerce International SA* [1993] BCC 787.
[40] These include the remittal of assets to foreign proceedings, the examination of officers of the debtor company, the bringing of fraudulent trading proceedings under foreign law as well as the remittal of assets to a foreign proceeding: see *HIH* (n 13); *England v Smith* [2001] Ch 419; *Fourie v Le Roux* [2005] EWHC 922 (Ch); *Hughes v Hannover Ruckversicherungs AG* [1997] BCC 921.
[41] *Re Dallhold Estates (UK) Pty Ltd* [1992] BCC 394, 398.
[42] Roy Goode, *Principles of Corporate Insolvency Law* (1st edn, Sweet & Maxwell 2005) para 16–58.

however, the English framework was, to a considerable degree, insufficient. The practice of ancillary winding ups for instance, while generally appropriate for safeguarding the debtor's assets in England and ensuring that no single creditor would enjoy a preference to the detriment of the creditor group as a whole, also entailed significant costs as a result of the parallel administration of two separate proceedings. English courts would frequently express their cognizance of this issue and would state their eagerness to control the costs of English proceedings in order to avoid unnecessary expense.[43] Regardless, such direct costs could in practice be a severe impediment to the efficient resolution of cross-border cases. In addition, the fact that coordination between the concurrent proceedings was entrusted to the, otherwise unmitigated, discretion of the English courts created some uncertainty in the outcome of the collective process, notwithstanding their general willingness to adopt a cooperative and deferential attitude to the foreign proceeding, as evidenced in the case of *HIH.* At the same time, the practical application of the common law duty of assistance to a foreign insolvency proceeding rarely proved especially helpful in staying the claims of English creditors and thus addressing collective action concerns. Finally, the provision of assistance under Section 426, while broad and comprehensive, has only been made applicable to a limited number of jurisdictions. As a result, although generally exhibiting a consonance with universalist principles, the traditional English approach was in many respects deficient in the effective administration of cross-border insolvencies.

b. The US approach: from territorialism to universalism under the influence of comity

One of the standout, yet curious, features of the early US approach on cross-border insolvency is that, unlike the English tradition, it developed in an almost complete legal vacuum. As a matter of fact, until the advent of the 20th century, the US did not have a permanent and comprehensive bankruptcy law.[44] During that period, the various state insolvency laws or collection statutes that were in force locally lacked any provisions

[43] *Re Commercial Bank of South Australia* (n 27) 178.

[44] Even though the US Constitution empowered Congress to enact uniform laws on the subject of bankruptcies, the various bankruptcy acts that had been promulgated lasted at most a few years, until the introduction of the Bankruptcy Act 1898: see David A Skeel, *Debt's Dominion: A History of Bankruptcy Law in America* (2nd edn, Princeton University Press 2004) 24.

on the treatment of cross-border cases.[45] When US courts first encountered the question of whether a foreign proceeding should be recognized as affecting the US assets of a foreign debtor, their approach was dismissive of the need to ensure a centralized administration of cross-border insolvencies. In the most characteristic illustration of this view, the US Supreme Court in the case of *Harrison v Sterry* articulated the principle that 'the bankrupt[cy] law of a foreign country is incapable of operating a legal transfer of property in the United States',[46] meaning that any attachments of US assets by domestic creditors of a foreign debtor were valid, notwithstanding a foreign declaration of insolvency. These early authorities considered the question of recognition of a foreign insolvency order through the lens of comity,[47] which generally governed the question of recognition of foreign laws and judicial acts, but conditioned such recognition on the absence of prejudice to domestic interests.[48] From that perspective, a foreign judgment, purporting to assign assets located in the US to a foreign trustee, could not be recognized, to the extent that it deprived domestic creditors of the fruits of their diligence under the law and procedures of their own jurisdiction.[49]

As a matter of principle however, this approach did not suggest that foreign proceedings could never benefit from recognition. In keeping with the comity foundations of this approach, US courts would recognize a foreign insolvency, if the rights of the foreign trustee, did not conflict with domestic creditors as no injustice would be done to US citizens.[50] In that sense, the US approach was not characterized by an outright rejection of universalism on principled grounds but was rather an underhanded effort to assist domestic creditors, by refusing, to interfere in aid of foreign proceedings, in cases where such creditors had been diligent enough to attach the debtor's assets.[51]

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[45] Charles Booth, 'A History of the Transnational Aspects of United States Bankruptcy Law Prior to the Bankruptcy Reform Act of 1978' (1991) 9 Boston University International Law Journal 1, 6.
[46] *Harrison v Sterry* 5 Cranch 289 (1809) 301 (US Supreme Court).
[47] *Milne v Moreton* 6 Binn 353 (1814) (Penn. Supreme Court).
[48] *Hilton v Guyot* 159 US 113 (1895) (US Supreme Court); Joseph Story, *Commentaries on the Conflict of Laws: Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (A Maxwell 1841) para 28.
[49] Story (n 48) para 414.
[50] *In re Waite* 54 Sickels 433 (1885) 443 (NY Ct App).
[51] John Lowell, 'Conflict of Laws as Applied to Assignments for Creditors' (1888) 1 Harvard Law Review 259, 261.

A good illustration of this practice was the case of *Disconto Gesselschaft v. Umbreit,* where the US Supreme Court ruled that comity could not lead to the recognition of a German insolvency proceeding, which would serve to deprive a US creditor from a subsequent garnishment of the debtor's US bank account, as this would 'prejudice the superior claims of such creditors to assert and enforce demands against property within the local jurisdiction'.[52] Such a territorialist view thus went hand-in-hand with a relatively narrow understanding of comity that considered any form of interference with the established rights of domestic creditors as an intolerable injustice, even when the local attachments were made after the commencement of foreign proceedings, as in the case of *Umbreit.* In practical terms however, this stance had important consequences for the administration of cross-border cases, as it incentivized domestic creditors to attach assets of a foreign debtor, as soon as financial difficulty arose. This inevitably initiated a race against the debtor's assets, which often led to the swiftest creditor receiving a preferential return. Despite these inefficiencies however, courts were hesitant to allow foreign proceedings to be recognized and interfere with creditor rights, as provided under state law, in the absence of statutory authority.[53]

A timid, yet notable, shift towards a more universalist approach followed the introduction, in 1898, of the country's first permanent federal bankruptcy legislation, the National Bankruptcy Act.[54] One of the most significant novelties of the new framework was that it provided, for the first time, a statutory basis for the commencement of bankruptcy proceedings over non-resident debtors, solely on the basis of presence of assets within the US.[55] This alternative allowed an insolvent foreign debtor to safeguard its US assets from individual creditor attachments but also benefitted US creditors, who could now all share in the distribution of the debtor's

[52] *Disconto Gesellschaft v Umbreit* 208 US 570 (1908) 573 (US Supreme Court).

[53] In the case of *Clark v Williard* 294 US 211 (1935) (US Supreme Court) the Supreme Court upheld a state law that gave local creditors priority, notwithstanding a collective proceeding in another state, noting that it is a matter of policy choice, whether a state will uphold the principle of equal treatment of creditors.

[54] For an insight into the impact of the 1898 Act on the development of US bankruptcy law: see David A Skeel, 'The Genius of the 1898 Bankruptcy Act' (1999) 15 Bankruptcy Developments Journal 321.

[55] Kurt H Nadelmann, 'The National Bankruptcy Act and the Conflict of Laws' (1946) 59 Harvard Law Review 1025, 1035-1040. The exercise of such jurisdiction was, in principle, discretionary, yet, in practice, US courts would ordinarily commence bankruptcy proceedings in the vast majority of cases involving foreign debtors with assets in the US: ibid 1042.

domestic assets in a collective proceeding, as opposed to engaging in a race to enforce their claims individually.

Still, much like the English example, the relationship between the parallel US and foreign proceedings was an issue that inevitably had to be clarified in practice. In the case of *Aktiebolaget Kreuger & Toll*,[56] US courts first articulated, though in rather rudimentary terms, the notion that a US bankruptcy proceeding could be utilized in aid of the foreign insolvency proceeding and premised the concept of cooperation between proceedings on a rejection of the preferential treatment of local creditors.[57] These principles were further elaborated in a number of subsequent cases that highlighted the principle of equality of creditors as underpinning the opening of US proceedings over a debtor that had already been declared insolvent abroad.[58] In all these cases, the courts emphasized the collectivity of proceedings as the overarching principle justifying the opening of domestic proceedings over foreign debtors, echoing an understanding that a territorialist outlook would jeopardize the function of insolvency law in the cross-border context. At the same time, although the question of whether foreign proceedings could be recognized in the US was still approached through the principle of comity, the understanding of prejudice to US interests became progressively narrower. As a result, US courts became more amenable to recognizing the effect of foreign insolvency proceedings in the US, unless US creditors could prove that they would suffer some discrimination or unfairness in such foreign proceeding.[59]

Despite these positive developments however, the US approach was, in many respects, problematic. Although individual cases had been successfully resolved, there was no statutory footing for the coherent treatment of cross-border insolvencies and the coordination between US and foreign proceedings.[60] As the introduction of the

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[56] *In re Aktiebolaget Kreuger & Toll* FSupp 964 (1937) (SDNY). That case had been preceded by *In re Stoddard* 242 NY 148 (1926) (NY Ct App), which reached a similar result but involved the insolvency of a foreign insurance company and thereby fell outside the scope of US bankruptcy law.
[57] Booth (n 45) 15.
[58] *Israel-British Bank (London) Ltd v Federal Deposit Ins Corp* 536 F2d 509, 511–13 (2d Cir); *Banque de Financement S A v First Nat Bank of Boston* 568 F2d 911 (2d Cir).
[59] *Clarkson Co Ltd v Shaheen* 544 F2d 624 (1976) (2d Cir).
[60] One of the most significant controversies was whether the Bankruptcy Act's exclusion of banks and insurance companies also covered foreign institutions that had never conducted business in the US. In one case, involving the liquidation of a West German bank, this uncertainty eventually led to case being settled out of court: see Joseph Becker, 'International Insolvency: The Case of Herstatt' (1976) 62 ABA Journal 1290; Kurt H Nadelmann, 'Rehabilitating International Bankruptcy Law: Lessons Taught by Herstatt And Company' (1977) 52 NYU Law Review 1.

US Bankruptcy Code in 1978 ushered a wave of reforms, the provisions dealing with foreign insolvency proceedings and foreign representatives were also significantly expanded and revamped.[61] The most important contribution of the new Bankruptcy Code in the field of cross-border insolvency was the introduction of Section 304,[62] which enabled a foreign representative, appointed in a foreign proceeding, to commence an ancillary bankruptcy proceeding in the United States.[63] In the context of such an ancillary proceeding, a US bankruptcy court was empowered to provide various forms of assistance to a foreign representative, in particular by staying the commencement or continuation of creditor enforcement actions, ordering the turnover of assets to the foreign representative or providing any other appropriate relief.[64] In deciding on the provision of such assistance, courts were also explicitly instructed to consider a variety of listed factors, namely (1) the just treatment of all claim holders, (2) the protection of domestic claim holders against prejudice and inconvenience in the processing of claims in the foreign proceedings, (3) the prevention of preferential or fraudulent dispositions of the debtor's property, (4) the distribution of proceeds substantially in accordance with U.S. bankruptcy law, (5) comity, as well as (6) the provision for the debtor's fresh start.[65] In that sense, Section 304 formalized the role of US proceedings in a cross-border case as well as the type of assistance that could be provided to a foreign representative, while at the same time clearly stipulating the conditions, which govern the provision of such assistance.

On the one hand, Section 304 improved on the pre-existing framework by providing clarity as well as flexibility in the handling of cross-border cases. In the context of an ancillary proceeding, a US court could thus effectively mould relief in a near blank check fashion,[66] provided that the considerations set out by the statutory provision were not violated. The problem however on the other hand was that none of the factors enumerated in Section 304 was made dispositive.[67] In addition, several of these

[61] Barbara Unger, 'United States Recognition of Foreign Bankruptcies' (1985) 19 International Lawyer 1153, 1167.
[62] 11 U.S. Code § 304.
[63] 11 U.S. Code § 304 (a).
[64] 11 U.S. Code § 304 (b). This catch all provision has been utilized to provide various forms of relief, such as the filing of discovery suits or avoidance claims: see *Angulo v Kedzep Ltd* 29 BR 417 (1983) (District Court); *In re Metzeler* 78 BR 674 (1987) (Bankr SDNY).
[65] 11 U.S. Code § 304 (c)(1)-(6).
[66] *In re Culmer* 25 BR 621 (1982) 624 (Bankr SDNY).
[67] Jennifer Greene, 'Bankruptcy Beyond Borders: Recognizing Foreign Proceedings in Cross-Border Insolvencies' (2005) 30 Brooklyn Journal of International Law 685, 687.

factors reflected conflicting policies, with some favouring a universalist approach and a degree of deference to the foreign proceeding (such as the just treatment of all creditors), while others reflected territorialist tendencies (such as the protection of US creditors). As a result, Section 304 jurisprudence developed along two main but conflicting lines, each emphasizing the pre-eminence of a different set of factors, especially on the crucial question of whether US assets should be turned over to a foreign representative.[68] In a number of cases for instance, US courts expressed their willingness to turn over assets to a foreign representative even if they were to be distributed under rules that differed materially from the applicable order of distribution in a US bankruptcy proceeding, if the foreign proceeding comported with the basic ideas of justice and due process.[69] In other cases however, US courts recognized any minor divergence between the ranking of creditors under foreign law and US law as a sufficient reason to refuse assistance, by emphasizing the need to protect the interests of domestic creditors.[70] It is interesting however that, in both strands of cases, courts emphasized comity as the most significant factor and the ultimate consideration governing the provision of assistance to a foreign proceeding,[71] although they eventually adopted different interpretations of the demands of comity in each particular case.

Despite the inconsistencies in its application, the introduction of Section 304 fostered a more coherently universalist approach in transnational insolvencies. Courts now had clear statutory guidelines in the conduct and function of an ancillary bankruptcy proceeding and could benefit from codified principles governing the exercise of their discretion in providing assistance to a foreign representative.[72] The US framework thus managed to develop a modified universalist approach that centred around the idea of ancillary proceedings and utilized comity, in its various specific expressions, as a means to ensure the distribution of the debtor's worldwide assets in a collective proceeding, within certain limitations. There were certain cases that evidenced the

[68] Charles Booth, 'Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of United States Courts' (1992) 66 American Bankruptcy Law Journal 135, 172.
[69] *Culmer* (n 66) 628; *In re Koreag Controle et Revision SA* 130 BR 705 (1991) 713 (Bankr SDNY).
[70] *In re Toga Mfg Ltd* 28 BR 165 (1983) (Bankruptcy Court); *In re Treco* 240 F3d 148 (2001) (2d Cir).
[71] *Culmer* (n 66) 629; *Treco* (n 70) 156. The factors listed in Section 304(c) were viewed as merely a codification of existing common law principles of comity: see *Toga* (n 70) 170.
[72] John D Honsberger, 'Conflict of Laws and the Bankruptcy Reform Act of 1978' (1980) 30 Case Western Law Review 631, 671.

willingness of US courts to recognize the effects of a foreign insolvency proceeding, even without the commencement of an ancillary proceeding in the US. In *Cunard S.S. Co., Ltd. v. Salen Reefer Services* for instance, the court vacated attachments made by creditors of an insolvent Swedish corporation and referred US creditors to claim in the Swedish liquidation, noting that this would 'facilitat[e] the orderly and systematic distribution of the assets',[73] even though no ancillary proceeding had been opened. Still, these instances were sparse. As a general matter, and although the US approach could prove effective in ensuring that collective action concerns across jurisdictions were addressed, the need to commence a parallel proceeding in the US[74] entailed significant costs, even when US courts were amenable in granting the relief pleaded by a foreign representative.[75] The unpredictability in outcomes was also viewed as an intractable weakness of Section 304.[76] In that sense, while generally evident of a practical approach, the US framework left much to be desired in the efficient resolution of cross-border insolvencies.

c. The Model Law and the convergence to an efficient paradigm

As has been established by the foregoing analysis, both the English and the US approach have historically exhibited, albeit in different measure, a general appreciation of the objectives that the rules of cross-border insolvency should be pursuing. In fact, the concept of ancillary proceedings was, in both jurisdictions, developed as a matter of judicial practice, in order to ensure that all creditors, wherever located, would be treated equally and the assets of the debtor would be distributed in a collective proceeding rather than in a race of diligence between competing individual creditors. These early universalist norms, which clearly but impliedly recognized the imperative of addressing collective action concerns in cross-border insolvencies, were however heavily rooted in judicial discretion. Thus, despite the universalist orientation

[73] *Cunard SS Co Ltd v Salen Reefer Services AB* 49 BR 614 (1985) 618 (2d Cir).
[74] A foreign representative retained the option to commence a full-fledged bankruptcy case under Chapter 7 or Chapter 11 of the US Bankruptcy Code (11 U.S. Code § 306). This was necessary, if the debtor's assets were scattered throughout various states due to the venue requirements of Section 304 that required the commencement of an ancillary proceeding in every such state: Douglass G Boshkoff, 'United States Judicial Assistance in Cross-Border Insolvencies' (1987) 36 International and Comparative Law Quarterly 729, 735.
[75] For instance, *In re Axona Intern Credit And Commerce Ltd* 88 BR 597 (1988) (Bankr SDNY) the court applied the criteria set out in Section 304(c) to order the turnover of assets to a foreign representative, in the context of a voluntary bankruptcy proceeding under Chapter 7 of the Bankruptcy Code.
[76] Greene (n 67) 712.

of the approach in both jurisdictions, there were still significant disparities in the treatment of individual cases, which often led to inefficient outcomes. Both jurisdictions thus resorted to some form of statutory intervention, as a means to increase legal certainty and bolster universalism. While generally positive, these interventions eventually proved inadequate in fostering a reliable and coherent universalist approach in cross-border insolvency matters. Against this background, the introduction of the Model Law and its enactment in both England[77] and the US[78] marked a turning point towards a system capable of effectively addressing the gaps and inefficiencies of preexisting legal norms.

In terms of its main provisions, the Model Law, though to some degree tracking the English and US approaches that predated it, moves in a different direction. Conceptually, the Model Law's provisions revolve around four key concepts: access of foreign insolvency representatives, recognition of orders of foreign courts, relief to foreign proceedings and finally, cooperation between different courts and coordination of concurrent proceedings.[79] Nevertheless, the Model Law's most fundamental rule relates to recognition, enabling a foreign insolvency representative to apply for and obtain the recognition of a foreign insolvency proceeding in the enacting jurisdiction.[80] The requirements for recognition are kept to a minimum, requiring only that the foreign representative and the foreign proceeding qualify as such under the provisions of the Model Law.[81] If such requirements are met, the foreign proceeding is recognized as a foreign main proceeding, if it takes place at the debtor's Centre of Main Interests, or

[77] In England, the prior common law rules as well as Section 426 of the Insolvency Act 1986 continue to apply in parallel to the CBIR, which enacts the Model Law: see Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (1st Edition, Sweet & Maxwell 2016) para. 3–014.

[78] Chapter 15 replaced Section 304 and is now the only framework governing cross-border insolvencies in the US: see Jay Lawrence Westbrook, 'Chapter 15 at Last' (2005) 79 American Bankruptcy Law Journal 713.

[79] United Nations Commission on International Trade Law, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* (UN Publication 2014) 26–27.

[80] Art. 15 Model Law. The insolvency representative is only required to provide minimal information in its application for recognition, namely a copy of the foreign judgment commencing proceedings as well as a certificate from the originating court, affirming the existence of a foreign proceeding.

[81] A foreign representative is defined as 'a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding': see art. 2(d) Model Law. A foreign proceeding is defined as 'a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation': see art. 2(a) Model Law.

COMI,[82] or as a foreign non-main proceeding, if it originates from an establishment of the debtor.[83]

The former alternative is, in practice, the most important, since upon recognition of a foreign main proceeding, a basic bundle of automatic consequences follow. The most important of these consequences is a stay on creditor enforcement actions and the suspension of the debtor's right to transfer or encumber its assets. A foreign insolvency representative is also entitled to request additional discretionary relief following recognition,[84] provided that the interests of creditors and other interested parties are adequately protected.[85] This relief includes additional stays on creditor enforcement actions,[86] the taking of evidence within the jurisdiction,[87] the assignment of the administration or realization of assets[88] to the foreign representative, as well as any other 'additional relief' that may be provided to such a representative under the laws of the enacting jurisdiction.[89] Although, the commencement of parallel domestic proceedings is not precluded by the recognition of a foreign proceeding,[90] the Model Law clearly prioritizes the recognition of a foreign proceeding and, by extension of the effects of such proceedings over assets and creditors located in the enacting jurisdiction, as the main vehicle for addressing the challenges of cross-border insolvencies.

In principle, each jurisdiction is free to enact the Model Law either in its entirety or with modifications. Despite the potential for divergences however, both the English and US enactment are, in broad terms, sufficiently similar to have enabled a consistent

[82] COMI is not directly defined in the Model Law; however since the term was first coined by the EIR, its definition as the place, where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties is generally considered persuasive authority: see Ho (n 77) para 3–023.
[83] An establishment is defined as a place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services: art. 2(f) Model Law.
[84] Art. 20 (1) Model Law. In the case of a foreign non-main proceeding, the provision of any relief, such as a stay on creditor enforcement actions is discretionary: see art. 21 Model Law.
[85] Art. 22 Model Law.
[86] Art. 21 (1)(a) Model Law.
[87] Art. 21 (1)(d) Model Law.
[88] Art. 21 (1)(e) Model Law, as well as possibly the distribution of such assets: see Art. 21 (2) Model Law.
[89] Art. 21 (1)(g) Model Law.
[90] As a matter of fact, the Model Law clarifies that any domestic proceeding has only limited scope [Art. 20(4) Model Law] and includes detailed rules on coordination between the concurrent proceedings, as a means to ensure the consistency of relief and the equal treatment of creditors (Arts. 28, 29, 32 Model Law).

application of the Model Law's principles.[91] As far as the question of recognition is concerned, reliance on the concept of COMI has generally proven effective in enabling the straightforward recognition of foreign main proceedings; though not directly defined in the Model Law,[92] the presumption that the debtor's COMI is located in the country of its registered office[93] has assisted courts in its identification and has greatly simplified the procedure for the recognition of foreign insolvency proceedings.[94] The only potential obstacle to recognition is public policy, which, in theory, permits a court to refuse to take an action under the Model Law, if this is manifestly contrary to public policy of the enacting jurisdiction. Nevertheless, the scope of this exception has been interpreted narrowly to only apply to cases, where the recognition of a foreign proceeding would be contrary to the most fundamental policies of the recognizing state.[95] All things considered, this framework has led to the vast majority of recognition applications being granted without any complications.[96] Thus, on a first level of analysis, the Model Law manages to address the recognition problem that is at the heart of cross-border insolvency, by providing a rule that facilitates the protection of a debtor's assets following the commencement of insolvency. In fact, the recognition of insolvency proceedings is, to a great extent, mechanical.[97] As long as the foreign insolvency representative furnishes the necessary documents and manages to prove that the foreign proceeding takes place in the debtor's COMI (which often involves merely relying on the registered office presumption), they can obtain an order that

[91] As a general matter, most jurisdiction have remained relatively loyal to the text of the Model Law. On the different enactments of the Model Law: see Neil Hannan, *Cross-Border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law* (1st edn, Springer 2017).

[92] The rationale was to avoid tying the courts down to an overly prescriptive definition: Fletcher (n 28) 32–013.

[93] Art. 16(3) Model Law.

[94] That being said, there have been certain controversies surrounding the meaning of this presumption, in cases where the debtor's registered office and its principal place of business are located in different jurisdictions. In general, US courts have proven more willing to rebut this presumption than English courts: see *Re Stanford International Bank Ltd (In Receivership)* [2010] EWCA Civ 137; *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* 389 BR 325 (2008) (Bankr SDNY).

[95] Art. 6 Model Law. These do not include, for instance, differences in the priorities of distribution under the law of a foreign proceeding: see *In re Ernst And Young Inc* 383 BR 773 (Bankr. D. Col.).

[96] Irit Mevorach, 'On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency' (2011) 12 European Business Organization Law Review 517, 533.

[97] Courts traditionally engage in a very detailed and step by step approach to consider whether the recognition application meets the Model Law's eligibility requirements: see *Re Industria de Alimentos Nilza SA* [2021] BCC 383; *In re Agro Santino OOD* 653 BR 79 (2023) (Bankr SDNY).

stays domestic creditor enforcement actions,[98] thereby addressing any potential collective action concerns.[99]

The question of post-recognition relief, and in particular of the type of discretionary relief that may be granted to a foreign insolvency representative, has proven more controversial.[100] The rationale behind the Model Law's reliance on the concept of relief is that the recognition of a foreign insolvency proceeding, and the concomitant protection of the debtor's assets from individual enforcement, does not exhaust the problems of cross-border insolvency. Insolvency is procedure;[101] as such, it is characterized by continuity and involves several steps until the collective satisfaction of creditors is achieved.[102] There would be little sense in establishing a system that provides an avenue to stay individual creditor actions against the debtor's assets, if that system could not further facilitate the centralized administration of the insolvency proceeding at the debtor's home jurisdiction. In the vast majority of cases, a foreign insolvency representative will require additional assistance post-recognition in order to ensure that the collective proceeding can meet its objective of addressing the collective action problems that emerge in the insolvency context.[103] This type of assistance will typically involve collecting or otherwise administering the assets located in the foreign jurisdiction but may include any other form of assistance to serve the goals and objectives of the collective proceeding. In that sense, the provisions of relief are a fundamental component of an efficient approach to cross-border insolvency.

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[98] The Model Law also provides for the possibility of interim relief, from the time of the filing of the application to the time of recognition if it is urgently needed to protect the assets of the debtor or the interests of the creditors: see art. 19 Model Law.

[99] The exact scope of the stay is however subject to any qualifications or exceptions that are potentially applicable to a stay that would be available in the context of domestic proceedings: Art. 20(2) Model Law. As a result, the recognition of a foreign insolvency proceeding in England leads to a stay that has the same scope and effect as a stay in a domestic winding up order [Art. 20(2)(a) CBIR], whereas in the US, recognition results in the application of the provisions of the Bankruptcy Code that stipulate the automatic stay that normally takes effect after the commencement of a bankruptcy proceeding [11 U.S. Code § 1520(a)]; see also *Cosco Bulk Carrier Co Ltd v Armada Shipping SA* [2011] EWHC 216 (Ch); *In re Containership Co (TCC) AS* 466 BR 219 (Bankr SDNY).

[100] Mevorach (n 96) 543.

[101] Charles W Mooney, 'A Normative Theory of Bankruptcy Law: Bankruptcy as (is) Civil Procedure' (2004) 61 Washington and Lee Law Review 931.

[102] As pointed out by Lord Sumption in *Singularis* winding up proceedings have several distinct legal consequences, to which different considerations may apply: see *Singularis* (n 36) 1687.

[103] As pointed out in *African Farms*, the recognition of foreign insolvencies has to be accompanied, conceptually, by the active assistance of the court: *African Farms* (n 32) 377.

Unlike the recognition of a foreign insolvency proceeding however, which is an uncomplicated process that is governed by relatively clear and rigid rules, the issue of relief depends, to a great extent, on how local courts exercise their discretionary powers. Still, to the extent that such requests have fallen within the scope of the enumerated examples set forth in Art. 21 of the Model Law, courts have generally been amenable in acceding to them by ordering additional stays or moratoria that go beyond the stays that normally follow recognition,[104] the examination of witnesses or the taking of evidence.[105] On the question of turnover of assets a relatively stable jurisprudence has emerged, whereby assets are turned over to a foreign representative to be realized[106] as well as to be distributed in a foreign proceeding,[107] although often subject to conditions ensuring the adequate protection of creditors.[108] This however does not suggest that the provision of relief is always unproblematic. Discretion can cut both ways and this can lead to unpredictability, especially as regards the Model Law's provision enabling a court to provide any 'additional relief that would have been available under the law of the enacting jurisdiction'.[109] Although this has been relied upon to achieve results that are broadly in line with the universalist conception,[110] it has also created controversies potentially undermining certain aspects of the collective administration of cross-border cases.[111] Still, the Model Law's provisions on relief, though heavily reliant on the local courts' discretion, have generally been applied in such a way as to promote universalist outcomes in the treatment of cross-border insolvencies.

Overall, the Model Law can be considered as introducing a conceptual shift in the proper approach to cross-border insolvency cases. Although the option to provide assistance to a foreign insolvency representative by virtue of the commencement of concurrent domestic proceedings, the staple of the traditional English and US

[104] Such as an administration moratorium in England: *Re 19 Entertainment Ltd* [2017] BCC 347.
[105] *Re Bernard L Madoff Investment Securities LLC* [2010] EWHC 1299 (Ch). In the US this may also include discovery: see *In re Comair Ltd* 2021 WL 5312988 (Bankr SDNY).
[106] *In re Tri-Continental Exchange Ltd* 349 BR 627 (2006) (Bankr ED Cal).
[107] *Re SwissAir Schweizerische Luftverkehr-Aktiengesellschaft* [2010] BCC 667; *In re Atlas Shipping AS* 404 BR 726 (2009) (Bankr SDNY).
[108] Cf. *In re International Banking Corp BSC* 439 BR 614 (2010) (Bankr SDNY).
[109] Art. 21 (1)(g) Model Law.
[110] *In re Daebo International Shipping Co Ltd* 543 BR 47 (2015) (Bankr SDNY).
[111] See Chapter IV, Section 2.b.

approach, is retained,[112] the Model Law's logic is fundamentally different. By introducing a rule that enables the recognition of the effects of a foreign insolvency proceeding, taking place at the debtor's COMI, the Model Law implicitly, yet definitively, defers to the rules of the foreign proceeding as governing all aspects of the debtor's worldwide insolvency. Domestic courts are in principle entitled to refuse to defer to the main proceeding and withhold the provision of assistance, yet such instances have, in practice, been sparse. An important aid to that effect is the Model Law's internationalist principle of interpretation, which obliges courts to take into consideration the Model Law's international origin and the need to promote uniformity.[113] While seemingly balancing between the economic benefits of universalism and the practical impediments of territorialism, the Model Law in truth promotes, though primarily by implication, the universalist agenda through the primacy of the foreign main proceeding at the debtor's COMI. As is evident from the case law that has been generated in the US and England, the main normative objectives of cross-border insolvency law, in particular the orderly distribution of the debtor's assets in a collective proceeding, even when assets are located in different jurisdictions, have to a large extent been achieved under the Model Law.

3. The uncertain status of cross-border restructuring law

a. *Gibbs* and the origins of the contractual approach

Unlike the field of cross-border insolvency, the impact of the Model Law on cross-border restructuring norms has been more ambiguous. One thing that becomes immediately apparent from a cursory examination of this field is that, prior to the Model Law's introduction, the rules governing the recognition of foreign restructurings were considerably more divergent between England and the United States. The English approach in particular has traditionally proven particularly resistant to recognizing the effects of foreign restructuring plans. This position can be traced back to the seminal

[112] In fact, concurrent proceedings may be especially relevant for the purposes of transaction avoidance in the US, since Chapter 15 of the US Bankruptcy Code requires the commencement of a parallel US proceeding for the foreign representative to pursue avoidance proceedings under US law: see *Fairfield Sentry Limited (In Liquidation) by and through Krys v Citibank NA London* 2022 WL 4391023 (SDNY).
[113] Art. 8 Model Law.

decision of the Court of Appeal in *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux*.[114]

The case concerned a dispute between an English partnership, as seller, and a French trading company, as buyer, regarding a contract for the sale of copper. The contract had been concluded through an English broker and made subject to the rules and regulations of the London Metal Exchange. Under its terms, the copper was to be delivered to the buyer in Liverpool against payment to the sellers' bank in London. However, before the full amount of copper could be delivered, the buyer was declared insolvent in France. The sellers claimed damages and submitted proof of their claim to the liquidator, as required by the rules applicable to the French insolvency proceeding. When this claim was rejected, as inadmissible under French law, the sellers brought proceedings in the English courts seeking the recovery of the full amount of damages, allegedly due to them under the contract. The French liquidator, appearing on behalf of the buyer, naturally pleaded as a defence that the sellers' claims had been discharged under French insolvency law. The Court of Appeal however disagreed. In a forceful opinion delivered by Lord Escher, the court ruled in favour of the plaintiff, arguing that a discharge of the contract by virtue of a law other than the law of the place, where the contract was made or was to be performed, could not be considered a discharge in any other country. The premise of the judgment was that the law invoked by the liquidator was not the law of the country, to which the contract belonged or one, which the parties could be taken to have agreed to be bound.[115] As a result, French insolvency law could not discharge or otherwise affect the sellers' claims, who were entitled to maintain their action under the English contract.[116]

There are several issues that become immediately apparent from this judgment. For one thing, and as has been pointed out repeatedly, the rule in *Gibbs* is completely asymmetrical, when compared to the effect that English law traditionally reserves for English bankruptcy discharges, insofar as the latter extend to all debts, irrespective of their governing law.[117] In addition, *Gibbs* seems logically indefensible, when

[114] *Antony Gibbs And Sons v Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399.
[115] ibid at 406.
[116] ibid at 408.
[117] *Ellis v McHenry* (1870-71) LR 6 CP 228.

considered in light of English law's long-standing principle of recognition of the effects of a foreign bankruptcy order over the debtor's movable assets in England. This leads to the curious result that, even though the debtor's property has been vested to the foreign trustee by virtue of the foreign bankruptcy, the debtor remains liable to be sued in England in respect of the debts that are covered by the same bankruptcy proceedings.[118] These issues are a symptom of the origins of *Gibbs* in the field of foreign insolvency discharges, a topic that will be revisited in further detail in subsequent Chapters.[119] Nevertheless, as far as cross-border restructurings are concerned, *Gibbs* was eventually also made applicable to discharges provided under foreign restructuring arrangements. In the case of *New Zealand Loan & Mercantile Agency Co Ltd v Morrison*, the Privy Council affirmed, through explicit reliance on *Gibbs,* that a discharge provided under a scheme of arrangement in England could not operate as a defence to a claim brought by a creditor in the Colony of Victoria.[120] As a result, a creditor, who had concluded a contract in the colonies was free to pursue its claims in the colonial courts, notwithstanding a discharge provided under a scheme of arrangement in England.[121] *New Zealand* thus definitively extended the scope of the *Gibbs* rule and made it one of the most enduring and defining features of English cross-border restructuring law.

As a matter of fact, the relevance of *Gibbs,* as a rule of cross-border restructuring law, transcends the English jurisdiction, as the rule remains applicable in a number of common law jurisdictions, including Canada, Australia,[122] Hong Kong,[123] Singapore as well as several offshore jurisdictions.[124] Courts in these jurisdictions have however rarely encountered the 'inbound' question of whether a foreign plan should be recognized vis-à-vis debts governed by domestic law. Instead, they have, for the most

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[118] Ian Fletcher, *Insolvency in Private International Law* (2nd edn, Oxford University Press 2005) 108.
[119] See Chapter VI, Section 2.a.
[120] *New Zealand Loan and Mercantile Agency Co Ltd v Morrison* [1898] AC 349, 359.
[121] Lord Davey, delivering the court's judgment, also stated that the application of *Gibbs* to corporate arrangements removed any inconsistency between the rule and English law's treatment of insolvency discharges, since the question of whether a creditor maintained a claim against the debtor company was irrelevant as to how a foreign liquidator could access the debtor's English assets: ibid at 358.
[122] Fletcher (n 118) 107.
[123] *Re Rare Earth Magnesium Technology Group Holdings Limited* [2022] HKCFI 1686 (Hong Kong Court of First Instance).
[124] Jayson Wood and others, 'Cayman Islands Restructuring of Foreign-Law Governed Debt: The Rule in Gibbs Revisited' (*Harney's Offshore Litigation Blog*, 3 March 2020) <https://www.harneys.com/our-blogs/offshore-litigation/cayman-islands-restructuring-of-foreign-law-governed-debt-the-rule-in-gibbs-revisited/> accessed 19 March 2024.

part considered *Gibbs* in the context of 'outbound' cases, involving the exercise of jurisdiction to sanction a local scheme, purporting to affect debts governed by foreign law.[125] In that sense, even though there have been several cases, where courts in several common law jurisdictions have expressed their disapproval of *Gibbs* and have exercised jurisdiction to sanction a local plan even when such plan would purport to affect claims governed by foreign law,[126] this outcome does not, as a matter of principle, contradict *Gibbs*. After all, even under English law, the effect of a domestic scheme is not limited to English debts but covers all debts, irrespective of their governing law.[127] As a result, *Gibbs* remains applicable outside English law and constitutes a pertinent consideration in cross-border restructurings, even though courts in other jurisdictions have been quicker than English courts to judge and disapprove the rule.

Conceptually, *Gibbs* and its progeny approach the effect of a foreign restructuring as a contractual matter and by extension as a question that has to be answered by reference to choice of law rules. The crucial issue is therefore to identify the law that governs the claim that the foreign restructuring purports to affect. References to 'an English claim' or a claim in respect of a contract 'made in' or 'to be performed in England' are essentially nothing more than allusions to the issue of applicable law. In practical terms, if a claim is subject to English law, *Gibbs* stands for the proposition that such claim cannot be discharged by virtue of a foreign restructuring plan or other type of arrangement. This however creates obvious holdout concerns, since the inability to make the collective agreement binding on English creditors, increases the payoffs from holding out, especially when the debtor has assets in England. The only way for a foreign debtor to address this risk is undertaking a parallel restructuring in England, as a means to bind English creditors. This option has traditionally been available to foreign companies, as a result of the wide grounds of jurisdiction that English courts can rely on in sanctioning schemes of arrangement, which covers 'any company liable to be wound up under the Insolvency Act 1986',[128] which includes

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[125] *Re Bulong Nickel Pty Ltd* [2002] WASC 226 (Western Australia Supreme Court); *Hong Kong Institute of Education v Aoki Group (No 2)* [2004] 2 HKLRD 760 (Hong Kong Court of First Instance); *Re Pacific Andes Resources Development Ltd* [2016] SGHC 210 (Singapore High Court).
[126] *Hong Kong Institute of Education* (n 135) 802–06; *Pacific Andes* (n 125) paras 47–48.
[127] *Re Indah Kiat International Finance Co BV* [2016] BCC 418.
[128] s. 895(2)(b) Companies Act 2006. The same definition applies in respect of the new Restructuring Plan procedure [s. 901A(4) Companies Act 2006].

companies registered in England as well as unregistered, namely foreign, companies.[129] In fact, in cases where a foreign debtor has issued debt governed by English law, parallel restructuring plans between a debtor's home jurisdiction and England have long been a consistent feature of cross-border restructuring practice.[130]

Nevertheless, there is one, though rather limited, way of sidestepping *Gibbs* and recognizing the effects of a foreign plan on English law governed claims. As already mentioned, Section 426 of the Insolvency Act enables an English court to provide assistance in insolvency matters to a foreign court in a relevant country or territory, exercising jurisdiction in relation to insolvency. In practice however, English courts have confirmed that such assistance, can also encompass the recognition of the effects of a foreign restructuring plan on claims governed by English law. In fact, the two cases, where such powers have been utilized, have involved the recognition of the effects of Irish schemes of arrangements (Ireland being a 'relevant country' for the purposes of Section 426) on the claims of English creditors.[131] Perhaps more importantly, both schemes had been approved in the context of Irish examinership proceedings, which is formally not an insolvency proceeding but rather a restructuring process, whereby the protection of the Court is obtained to assist in the rescue of a company.[132] These cases suggest that the reference of Section 426 to insolvency is a red herring and that provision can be conceptualized as sufficiently broad to enable the provision of assistance not only in the context of insolvency proceedings but also in a restructuring, in the form of the recognition of the effects of a foreign plan on debts governed by English law.

That being said, and as already pointed out, the scope of Section 426 is limited to a small number of jurisdictions, indicating that, for the vast number of foreign

[129] s. 221 Insolvency Act 1986. In the case of foreign companies, English courts will only exercise their discretion to sanction a scheme, if the foreign company, to which the scheme pertains, has a sufficient connection to England: *Re Rodenstock GmbH* [2011] Bus LR 1245; Jennifer Payne, *Schemes of Arrangement: Theory, Structure and Operation* (Cambridge University Press 2014) 290. This connection can however be very tenuous and this requirement can be satisfied by the presence of operations or assets in England or the mere fact that the debts to be compromised by the scheme are governed by English law: see *Re Drax Holdings Ltd* [2004] 1 WLR 1049; *Primacom Holdings GmbH v Credit Agricole* [2011] EWHC 3746 (Ch).

[130] Robin Dicker and Nick Segal, 'Cross-border Insolvencies and Rescues: The English Perspective' (1999) 8 International Insolvency Review 127.

[131] *Re Business City Express Ltd* [1997] BCC 826; *Re Silverpail Dairy (Ireland) Unlimited Co* [2023] EWHC 895 (Ch).

[132] The examinership procedure is regulated in ss. 508-558 of the Irish Companies Act 2014.

restructuring plans, their recognition in England will be subject to the conditions set out in *Gibbs.* From that perspective, the English framework governing cross-border restructurings prior to the Model Law's introduction was, as a whole, severely inadequate to address the problems that characterized the field and in fact intensified them.

b. US exceptionalism and the recognition of foreign restructuring plans

The US approach to the recognition of foreign insolvency discharges initially followed in the footsteps of the English approach. In *Ogden v Saunders,* the US Supreme Court ruled that a state statute, which provided for the discharge of debts of insolvent debtors, could not discharge debts due to the citizens of another state.[133] However, unlike the English approach in *Gibbs,* this outcome was not originally justified on the basis of a difference between the law, under which the discharge operated, and the law governing the creditor's contractual claim. Instead, it was framed as stemming from the 'conflict of sovereign power' that resulted from a state statute purporting to exercise authority over citizens of other states.[134] This position reflects the sovereignty-based approach of early American jurisprudence, which also had constitutional underpinnings and intimated that the law of a state cannot regulate behaviour or persons outside its territory.[135] Nevertheless, this case was thereafter cited as reflecting the broader principle that the law, where a contract was made, must govern the construction of the contract, including the question of the discharge of any obligations due under it. According to Story's analysis, this principle was not founded on some allegiance that citizens owe to their government but rather on the presumption that the parties are presumed to have been 'cognisant of the laws of the country, where the contract was made'.[136] This view, much like *Gibbs,* essentially premised the question of recognition of foreign discharges on notions of implied submission to the law providing such discharge.

[133] *Ogden v Saunders* 25 US 213 (1827) (US Supreme Court).
[134] ibid at 369.
[135] Story (n 48) para 17.
[136] ibid para 340.

Nevertheless, when US courts encountered the question of recognition of foreign restructuring plans specifically, they broke sharply with the precedent that applied to foreign insolvency discharges. In the seminal case of *Canada Southern Ry. Co. v. Gebhard*,[137] the US Supreme Court considered, whether an arrangement of a Canadian corporation in Canada could discharge the company's debts to US creditors. The company in question, operated railroads in the province of Ontario in Canada. Due to the public nature of its business, it had been declared a 'dominion corporation' by virtue of Canadian law and was thus subject to the legislative authority of the Canadian parliament. When the company faced financial difficulties, it pursued a scheme of arrangement to restructure its obligations, which consisted primarily of negotiable bonds, issued and payable in New York. The scheme, which provided for the issuance of new bonds to be exchanged against the original bonds, was approved by the supermajority of shareholders and bondholders, and then ratified by an Act of the Canadian Parliament, becoming binding on all creditors and shareholders of the company. Several US creditors refused to participate in the scheme and attempted to pursue their remedies under the original bonds in the US courts, where the company pleaded that these claims had been extinguished by the scheme. The Supreme Court held that the Canadian scheme had validly extinguished the claims of US bondholders, on the grounds that 'every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts'.[138] The fact that the bonds were payable in New York was therefore irrelevant considering that by acquiring the bonds, the US bondholders had impliedly submitted themselves to the law governing the foreign corporation.

The approach in *Gebhard,* though constituting a radical departure from *Ogden* in terms of outcome, nevertheless continued to frame the question of recognition of foreign discharges as a matter of (implied) submission to foreign law, only this time to the law of the corporate constitution as opposed to the law of the place of contracting.[139] This

[137] *Canada Southern Ry Co v Gebhard* 109 US 527 (1883) (US Supreme Court).
[138] ibid at 537.
[139] Interestingly, that same argument had been rejected by the English courts in *New Zealand,* where Lord Davey had pointed that an English court may discharge the obligations of an English company but only 'so far as the jurisdiction of that court extends': see *New Zealand* (n 120) 359. This point will be revisited in more detail in Chapter VI.

shift in characterization was not justified on doctrinal terms but rather by reference to the economic considerations underpinning cross-border restructuring rules. In the words of Chief Justice Waite, '[u]nless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized, the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries.'[140] This suggested that the question of recognition of a foreign plan actually implicated comity considerations. Reliance on comity is also reflected in the dissenting opinion of Justice Harlan, who, in addition to underlining the lack of any actual consent on the part of the US creditors, viewed the plan as being prejudicial to their interests, as it was not concluded in a judicial process nor were creditors invited to express any objections against the arrangement.[141]

These notions of prejudice however were not premised on the absence of consent but rather, more broadly, on the fact that the process, by which the foreign plan was agreed to, did not provide creditors with similarly adequate safeguards as a US proceeding. In a later case, US courts further elaborated on that point by refusing to recognize the effect of German legislation that purported to affect the rights of US bondholders through the mandatory assignment of all debts due by German companies to the German state; such a law clearly discriminated against non-resident creditors and could not be afforded comity in the US.[142] In that sense, the US approach to the recognition of foreign restructurings was, much like the treatment of foreign insolvency proceedings, premised on the doctrine of comity.

Nevertheless, and despite the resonance of *Gebhard,* the law remained unsettled, as the courts in several states viewed *Gebhard* not as dislodging but as complementing the traditional rule of non-recognition foreign discharges.[143] The introduction of Section 304 in the US Bankruptcy Code provided the opportunity to address this state of affairs, by further elaborating the parameters of the comity doctrine in the recognition

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[140] *Gebhard* (n 137) 539.
[141] ibid at 543.
[142] *Central Hanover Bank and Trust Co v Siemens And Halske Aktiengesellschaft* 15 FSupp 927 (1936) 930 (SDNY).
[143] Nadelmann, 'The Recognition of American Arrangements Abroad' (n 4) 787.

of foreign restructuring plans. This was illustrated in the case of *Multicanal,* which involved the recognition of a restructuring of an Argentine company that would, among other things, affect the claims of US noteholders under a bond indenture governed by New York law. Once the Argentine arrangement had been approved by the competent courts in Argentina, the US creditors filed suit in New York seeking payment of principal and interest under the terms of the original notes. In response, the debtor commenced an ancillary proceeding in the US under Section 304, in order to block the creditors' actions. Creditors moved to dismiss the proceeding on the ground that the foreign plan violated the creditors' rights under New York law.[144] Relying on *Gebhard,* the New York bankruptcy court ruled that a foreign restructuring plan could in principle be afforded comity so as to recognize its effect in the US, namely the alteration and discharge of the rights of creditors under US law.[145]

After this preliminary decision, the court considered, in a subsequent judgment, whether recognition could be afforded to the Argentine proceeding in order to make the plan effective in the US.[146] In coming to a decision, the court referred once again to the principle of comity, which, as Judge Gropper noted, should be determined in light of the list of factors laid out in Section 304,[147] including the absence of discrimination against US citizens. From that perspective, a foreign proceeding need not be identical, in terms of procedure to the US, but the key factor in determining recognition is due process and public policy.[148] Eventually, the court ruled that the plan discriminated against US retail noteholders, because, although most noteholders had a right to elect between receiving securities and receiving cash, such option was not extended to retail investors, due to more restrictive US securities law requirement.[149] In essence, the court relied on the factors that underpin relief in the context of insolvency proceedings, under Section 304 in order to delineate the conditions for the

[144] The creditors' position was premised on the argument that under the provisions of the Trust Indenture Act, their rights under the bonds could not be impaired without their consent, unless in a US bankruptcy proceeding: see Chapter II, Section 2.b.
[145] *In re Board of Directors of Multicanal SA* 307 BR 384 (2004) (Bankr SDNY).
[146] *In re Board of Directors of Multicanal SA* 314 BR 486 (2004) (Bankr SDNY).
[147] ibid at 502.
[148] ibid at 503.
[149] As a result, the plan was ordered to be amended accordingly before it could receive recognition in the US: see ibid at 517.

recognition of a foreign plan and confirmed that recognition would be granted, unless one of the factors of Section 304 was violated.

The role of Section 304 in developing the concept of comity in the context of recognition of foreign restructuring plans was further elaborated in the case of *Telecom Argentina.* Much like *Multicanal,* this case involved the recognition of an Argentine restructuring plan, which would affect the rights of US bondholders. The debtor, an Argentine telecommunications company, commenced an ancillary proceeding under Section 304 in the US and requested relief from the US bankruptcy court in the form of an order giving full force an effect to the Argentine judgment that had approved the restructuring plan. In coming to a decision, the court considered the procedure before the Argentine court as well as the terms of the plan, in light of the conditions for relief that were stipulated in Section 304 and in particular, the just treatment of all creditors, the absence of any discrimination against US creditors, the substantial accordance of the order of distribution with US law as well as the overarching principle of comity.[150] After careful and minute consideration of each single factor, Judge Gropper ruled that comity should be afforded to the Argentine judgment approving the restructuring plan and this decision was subsequently affirmed on appeal on substantially the same terms.[151] In conceptual terms, *Telecom Argentina* confirmed that the recognition of a foreign restructuring plan could be approached as an ancillary question within the broader framework for the recognition and provision of assistance to foreign insolvency proceedings under Section 304.

At the same time, Section 304 was not the only way to achieve recognition of a foreign plan in the US. As a matter of fact, in an earlier case, a US court had concluded that the effects of a foreign restructuring plan could be recognized, under ordinary rules of judgment recognition, namely through the application of the principles of comity, in the context of an adversarial claim brought by the creditor against the debtor.[152] A plan was thus capable of recognition as a foreign judgment, having preclusive effect against the claim of a creditor that was bound by its terms. In any case, regardless of the

[150] *In re Board of Directors of Telecom Argentina SA* 2006 WL 686867, 23–28 (Bankr SDNY).
[151] *In re Board of Directors of Telecom Argentina SA* 2006 WL 3378687 (Bankr SDNY).
[152] *Overseas Inns SA PA v US* 911 F2d 1146 (1990) (5th Cir). In that case, the foreign plan was not recognized as being contrary to US public policy by prejudicing the rights of the Internal Revenue Service to pursue its claims against the foreign debtor: see ibid at 1149.

particular avenue that a debtor utilized in recognizing the effects of a foreign restructuring, comity played the preeminent role in deciding the issue. Equally importantly, the interpretation of comity in light of Section 304 enabled US courts to develop a relatively stable approach that balanced the need to recognize a foreign plan against US creditors with the opposite need to ensure that such creditors were treated fairly in the foreign proceeding and under the plan.

c. Mapping out the current state of divergence

Considering the divergence that characterized the traditional English and US approaches, one would expect that the enactment of the Model Law, as a uniform framework in both jurisdictions, would lead to convergence, as it did in the field of insolvency. However, the introduction of the Model Law has had a much more ambiguous effect as far as legal convergence in cross-border restructuring law is concerned. For one thing, the US approach appears to have been significantly buttressed by the Model Law's introduction. As a general matter, the Model Law provides that none of its provisions should be construed as limiting the powers of a court to provide additional assistance under other provisions of domestic law.[153] In the US, this clause is reflected in Section 1507 of Chapter 15, which states that, if recognition is granted, a US court may provide additional assistance to a foreign representative either under the Model Law or under other laws of the United States.[154] More importantly, Section 1507 includes an additional stipulation that, in the provision of such additional assistance, the court should consider, whether such assistance, consistent with the principle of comity, will reasonably assure the conditions and requirements that were previously set out in Section 304.[155]

This provision was expressly relied upon in the case of *Metcalfe & Mansfield Alternative Investments*,[156] where a US bankruptcy court recognized a Canadian proceeding and gave full force and effect to a Canadian order, which approved a

[153] Art. 7 Model Law.
[154] 11 U.S. Code § 1507(a).
[155] All the factors that were previously included in Section 304, such as the just treatment of all claim holders, the protection of domestic claim holders and the distribution of proceeds substantially in accordance with US law are repeated almost verbatim, the one exception being comity, which is elevated to the introductory paragraph: see *Atlas Shipping* (n 107) 740.
[156] *In re Metcalfe and Mansfield Alternative Investments* 421 BR 685 (2010) (Bankr SDNY).

reorganization plan that included third party releases.[157] In approaching the question of recognition of the foreign plan, the court relied on the laundry list of conditions embodied in Section 1507, noting that the Canadian plan had received near unanimous support and that the procedure before the Canadian court met the fundamental standards of fairness. As a result, principles of comity supported the enforcement of the Canadian orders in the United States whether or not the same relief could be ordered in a US bankruptcy proceeding.[158] Effectively, *Metcalfe* confirmed that Chapter 15 has supplied US courts with the necessary statutory footing to maintain the approach that they had developed in the treatment of cross-border restructurings prior to the introduction of the Model Law.

At the same time however, it was unclear whether the Model Law merely maintained the previous approach or even enabled the recognition of foreign plans under more permissive terms than the preexisting framework. This question was first approached in the case of *Vitro S.A.B. de CV,* where US courts encountered, much like *Metcalfe*, a request for post-recognition relief in the form of an order giving effect to a Mexican restructuring plan, which also included third-party releases.[159] The court considered the interplay between the provisions of Section 1507 and Art. 21 of the Model Law (as enacted in Section 1521), the main vehicle for the provision of post-recognition relief to a foreign insolvency representative. As argued by Judge King, both provisions provide for expansive relief, but under different standards:[160] the provision of relief under Section 1521 requires the court to ensure that the interests of creditors are adequately protected, whereas Section 1507 calls for a consideration of a number of factors under the overarching influence of comity. When faced with a question for the provision of assistance or relief, such as the recognition of a foreign plan, the court should, as a first step, consider whether the relief sought falls under the term of 'any appropriate relief' under Section 1521 and, if not, approach the matter as a question of additional assistance under Section 1507.[161] In that sense, the provision of

[157] Third-party releases, namely a provision in a restructuring plan, whereby a third party, other than the debtor (usually the guarantor) is discharged of its liability, are a controversial element of US restructuring practice and case law remains split over their permissibility: see Dorothy Coco, 'Third-Party Bankruptcy Releases: An Analysis of Consent Through the Lenses of Due Process and Contract Law' (2019) 88 Fordham Law Review 231.
[158] *Metcalfe* (n 156) 700.
[159] *In re Vitro SAB de CV* 701 F3d 1031 (2012) (5th Cir).
[160] ibid at 1056.
[161] ibid at 1054.

assistance as a matter of comity under Section 1507 would serve as the residual avenue for relief, when relief could not be granted under Section 1521. Though noting that the recognition of a foreign reorganization plan conceptually fell within the scope of both provisions, it noted that the discharge of third party obligations fell outside the scope of Section 1521, as it was generally prohibited by US bankruptcy law. In examining the issue under the lens of Section 1507, the Court concluded that the Mexican plan 'did not conform to the order of distribution under US law' and that Vitro did not show that 'there existed truly unusual circumstances that necessitated the release'.[162] As a result, recognition of the Mexican plan was refused.

Although, in terms of its conclusions, *Vitro* has not been replicated in subsequent judgments,[163] it provides a useful roadmap as to the approach that US courts should follow in the recognition of foreign restructuring plans. This roadmap was subsequently elaborated in the case of *Rede Energia S.A.*[164] *Rede* involved the recognition of the restructuring of a Brazilian company and its affiliates. After the Brazilian proceeding had been recognized in the US under Chapter 15, the foreign representative requested additional relief in the form of the recognition and enforcement of the terms of the Brazilian restructuring plan against certain US noteholders, who held monetary claims against the debtor under a bond indenture governed by New York law. An Ad-Hoc Group, representing certain US noteholders, objected to the relief on a number of grounds, arguing, among others that the plan extracted value from creditors for the benefit of shareholders, did not treat similarly situated creditors equally and discriminated against US creditors. The court, citing *Vitro,* considered the application under both Section 1521 as well as Section 1507 and found that the conditions for granting the request were met under both headings. In the opinion of Judge Chapman, the interests of creditors were sufficiently protected since the recognition of the foreign plan would lead to distributions to creditors, whereas a denial of relief would merely afford an opportunity to the Ad-Hoc Group to renegotiate.[165] In addition, the recognition of the plan would not violate any of the conditions set out in Section 1507, as it did not

[162] ibid at 1065–67.
[163] In several cases, US courts have recognized Canadian plans as well as English schemes of arrangement that have included third-party releases: see *In re Sino-Forest Corporation* 501 BR 655 (2013) (Bankr SDNY); *In re Mood Media Corporation* 569 BR 556 (2017); *In re Avanti Communications Group PLC* 582 BR 603 (2018) (Bankr SDNY).)
[164] *In re Rede Energia SA* 515 BR 69 (2014) (Bankr SDNY).
[165] ibid at 93–94.

discriminate against US creditors nor did it treat them unjustly, whereas the distributions envisaged under the plan were substantially in accordance with US law.[166] Relying on both statutory provisions, the court thus granted the petition and provided the requested relief, in the form of recognizing the Brazilian plan.

The staggered dual approach delineated by the court in *Rede* has been followed in a number of recent high-profile cases, involving the recognition of foreign plans or schemes,[167] and can be considered to reflect the prevailing approach of US courts to this date. In conceptual terms, it can thus be said that US courts have managed to incorporate the traditional approach on the recognition of foreign plans, tracing back to *Gebhard,* in the Model Law framework. At the same time, they have relied on the provisions of the domestic enactment of the Model Law, referring to the overarching concept of comity, in order to develop a series of conditions constraining such recognition, in cases where foreign plans violate certain fundamental principles or requirements. By relying interchangeably on the provisions of Section 1507 and 1521, US courts have thus developed a stable and predictable framework that, on the one hand, provides a ready avenue for the recognition of foreign plans and, on the other hand, limits such recognition on the basis of comity-centred considerations.

This consistent and largely effective approach has not however been replicated in England. The resilience of the traditional English position can be illustrated in the case of *Distressed Alpha Fund 1 Ltd Partnership v PT Bakrie Investindo*,[168] which raised the question of whether an Indonesian restructuring plan could be recognized as discharging the debtor’s liability to a creditor, under a contract of guaranty governed by English law. In proceedings commenced by the creditor, claiming the full amount due under the guarantee, the guarantor pleaded that the debt had been extinguished as a result of the Indonesian restructuring. *Gibbs* was an obvious obstacle to this proposition. Although there was no application to recognize or provide relief to the Indonesian proceeding under the English enactment of the Model Law, the CBIR, the

[166] ibid at 95–98. In addition, the court also concluded that recognition would not violate public policy, as the Brazilian proceeding met the fundamental standards of fairness: see ibid at 98.
[167] *In re Cell C Proprietary Limited* 571 BR 542 (2017) (Bankr SDNY); *In re Oi SA* 587 BR 253 (2018); *In re Lupatech SA* 611 BR 496 (2020) (Bankr SDNY); *In re PT Bakrie Telecom Tbk* 628 BR 859 (2021) (Bankr SDNY).
[168] *Global Distressed Alpha Fund 1 Ltd Partnership v PT Bakrie Investindo* [2011] EWHC 256 (Comm).

guarantor nonetheless argued that the court should nonetheless depart from *Gibbs.* Relying on a series of English cases affirming the principle of modified universalism in English law,[169] the debtor argued that *Gibbs* had been superseded by the development of cross-border insolvency norms along the lines of modified universalism, as reflected in statutory instruments, such as the CBIR. Teare J, though conceding that there was much to be said about developing English law in the manner suggested, nevertheless considered that *Gibbs* constituted a binding precedent that had not been nullified by subsequent developments. As a result, he viewed the course advocated by the guarantor as not being open to the court.[170]

The Model Law was forced to yield even more decidedly to *Gibbs* in the more recent and highly publicized case of *OJSC International Bank of Azerbaijan*.[171] The International Bank of Azerbaijan (IBA) was an Azeri bank that, in the face of financial difficulties, had been placed in a collective proceeding in Azerbaijan for the purposes of reorganization. Among its creditors was Sberbank, a Russian bank that had extended credit to IBA under a term facility agreement, and a number of US funds, managed by Franklin Templeton, who were the beneficial owners of notes issued by IBA. Both the facility agreement and the notes were governed by English law. After the commencement of the Azeri proceedings, IBA's representative applied for their recognition as foreign main proceedings, under the CBIR. The application was granted, along with additional relief, in the form of a wide ranging moratorium, that effectively enjoined both Sberbank and Franklin Templeton from commencing proceedings against IBA in England. Soon thereafter, a restructuring plan was approved by the overwhelming majority of IBA's creditors and made binding on all creditors by a decision of the Azeri courts. Neither Sberbank nor Franklin Templeton participated in the Azeri proceedings. After the approval and confirmation of the plan however IBA faced the risk that, upon the conclusion of the Azeri proceeding, the moratorium in England would lapse, leaving IBA exposed against its creditors. To avoid this, IBA filed a new application for post-recognition relief, asking the English court to

[169] ibid at 2043 citing *Cambridge Gas* (n 21).
[170] *Bakrie Investindo* (n 168) 2045.
[171] *Re OJSC International Bank of Azerbaijan* [2019] Bus LR 1130.

extend the duration of the moratorium so that Sberbank and Franklin Templeton would be effectively barred indefinitely from pursuing their claims before the English courts.

In making this application, IBA conceded that, under the *Gibbs* rule, as affirmed in *PT Bakrie,* the Azeri restructuring could not discharge the claims of Sberbank and Frankin Templeton. Still, IBA argued, the extension of the moratorium was a different matter not precluded by *Gibbs.* Effectively, IBA contended that it was not asking the court to discharge English law governed claims but merely to take procedural steps to prevent the exercise or enforcement of these claims, a proposition that would admittedly negate the effect of *Gibbs* but not formally violate it.[172] Hildyard J however saw through this ploy. In his view, although the Model Law provides a procedural framework to facilitate the efficient disposition of cases, where the debtor has assets in multiple jurisdictions, the relief requested by the foreign representative would not be limited to procedural aspects but would effectively determine the creditors' substantive rights.[173] In that sense, an application to continue the moratorium, so as to preclude the enforcement of creditor rights could not be distinguished from the discharge of the right itself without elevating form over substance.[174] As a result, he refused to give effect to the foreign representative's attempt to procedurally outflank *Gibbs* on the argument that the Model Law does not empower the English court, in purported appliance of English law, to vary or discharge substantive rights conferred under English law by the expedient of procedural relief.[175] On appeal, this decision was affirmed by Henderson LJ, who similarly recognized that the effect of the stay would not be procedural but would rather constitute a substantive remedy, barring the English creditors from relying on their rights under English law.[176] As the Model Law was limited to procedural aspects of cross-border insolvencies, its provisions could not be

[172] *Re OJSC International Bank of Azerbaijan* [2018] Bus LR 1270, 1282. This 'trick' was first proposed by Philip Smart in Philip Smart, 'Cross-Border Restructurings and English Debts' (2009) 6 International Corporate Rescue 4.
[173] *IBA (High Court)* (n 172) 1296.
[174] ibid at 1302.
[175] ibid at 1304. This issue has not been squarely encountered by US courts under the provisions of Chapter 15. However, in the earlier case of *In re Board of Directors of Hopewell Intern Ins Ltd* 238 BR 25 (1999) (Bankr SDNY), a US court had granted procedural relief, in the form of a permanent injunction against any action brought by a creditor in contravention to a foreign restructuring plan, under the provisions of Section 304.
[176] *IBA (Appeal)* (n 171) 1136.

relied upon to circumvent the English law rights of English creditors under the *Gibbs* rule.[177]

Both the first instance and the appellate judgment in *IBA* case rely on a narrow understanding of the Model Law. As both judgments underlined, the Model Law and the granting of relief under its provisions should be construed as being limited to procedural matters. This includes primarily issues of cross-border insolvency, such as the imposition of a stay, precluding the enforcement of creditor claims, in order to provide the debtor with the necessary breathing space to decide between liquidation and reorganization.[178] However, the variation or discharge of individual creditor rights in the context of a proceeding that does not lead to the distribution of the debtor's assets among creditors was viewed as an issue that lay outside the scope of the Model Law.[179] This view was confirmed most recently, albeit in even more pronounced fashion, in the Scottish case of *Chang v Cosco Shipping (Qidong) Offshore Ltd,*[180] which involved an application to recognize two Singaporean moratorium proceedings in Scotland, under the CBIR.[181] The debtor, a company registered in Norway, and one of its Singaporean subsidiaries, were pursuing schemes of arrangement in Singapore. In this context, the debtors obtained moratoria in Singapore, in order to protect their assets during the course of negotiations on the schemes and applied to recognize such moratoria in England as foreign proceedings under the CBIR. Cosco, a creditor of both companies, under a credit note and a guarantee respectively, both of which were governed by English law, opposed the application; it argued that, by virtue of *Gibbs,* it could not affected by the Singaporean schemes, of which the moratoria were an integral part and thus should not be constrained from pursuing its remedies against the debtors' assets in Scotland. Relying on *IBA,* the Court of Session concluded that the moratoria, though formally separate from the schemes, were an integral part of the

[177] ibid at 1163. However, some common law jurisdictions have taken a more amenable view of similar arguments. The Singapore High Court for instance, in the case of China Fisheries, recognized a US reorganization plan not directly, by recognizing the discharge of claims governed by Singaporean law but by recognizing the stay imposed under the provisions of the US plan and the authority of the foreign representative to bring such plan into effect, by causing the company to pursue a scheme of arrangement in Singapore: see *Re CFG Peru Investments PTE Ltd* Unreported (Singapore High Court).
[178] *IBA (High Court)* (n 172) 1305; *IBA (Appeal)* (n 171) 1161.
[179] *IBA (Appeal)* (n 171) 1162.
[180] *Chang v Cosco Shipping (Qidong) Offshore Ltd* [2022] BCC 176.
[181] As already noted, the CBIR also applies in Scotland, the only difference being that certain procedural matters are regulated separately for Scotland and England and Wales: see CBIR Schedule 3.

overall restructuring.[182] Since, according to *Gibbs,* Cosco would stand outside the scope of the schemes, it was entitled to enforce its claims against the debtors, as this would not disrupt the implementation of the restructuring.

As these cases illustrate, English courts consider that that the Model Law provides an inadequate statutory basis to displace *Gibbs* and recognize the discharge of English law governed obligations under a foreign restructuring plan. As a result debtors, whose debts are governed by English law, are forced to undergo a restructuring in England in order to achieve the discharge or modification of such debts, if creditors do not consensually agree. In fact, *Gibbs* is often cited as the main reason underpinning the pursuit of a strategy of a parallel restructuring in England.[183] In some instances, foreign companies, especially those having issued or taken on considerable sums of English law governed debt, may find it more beneficial to conduct a single restructuring in England, through a scheme of arrangement, in order to restructure in a manner that would be binding on all creditors but also avoid the costs of running and administering two parallel proceedings.[184]

The practical difficulties associated with this divergence were profoundly illustrated in the cross-border restructuring of Agrokor. Agrokor was a Croatian conglomerate that commenced a restructuring proceeding in Croatia in order to restructure its financial obligations, comprised primarily of credit agreements, governed by English law, as well as notes, issued under an indenture governed by New York law. Once the Croatian courts approved a restructuring plan, that purported to modify and partially discharge both the claims governed by English and New York law, the difference in the treatment of such plan became evident. Whereas US courts recognized the Croatian proceedings and provided relief by recognizing the Croatian restructuring plan under the provisions of Chapter 15,[185] the same outcome could not be achieved in England, as a result of *Gibbs*. In fact, although Agrokor managed to recognize the Croatian

[182] *Chang v Cosco Shipping* (n 193) 195.
[183] *Re West African Gas Pipeline Co Ltd* [2021] EWHC 3360 (Ch); *Re Smile Telecoms Holdings Ltd* [2021] EWHC 685 (Ch); *Re Hong Kong Airlines Ltd* [2022] EWHC 3210 (Ch); *Re Cimolai SpA* [2023] EWHC 1819 (Ch).
[184] See for instance *Drax* (n 129).
[185] *In re Agrokor dd* 591 BR 163 (2018) (Bankr SDNY). The fact that a US court can recognize a foreign plan, even to the effect that it modifies or discharges debts governed by foreign (not just US) law was most recently affirmed in *In re Modern Land (China) Co Ltd* 641 BR 768 (2022) (Bankr SDNY).

proceedings as foreign main proceedings in England, under the provisions of the CBIR,[186] it was forced to pursue a parallel scheme of arrangement in England in order to bind its English creditors. As a result, Agrokor convened scheme meetings in England[187] and managed to obtain the sanction of an English scheme of arrangement that effectively implemented the provisions of its global restructuring vis-à-vis English creditors.[188] The dissatisfaction with this state of affairs and the impediment that *Gibbs* poses to the efficient handling of cross-border restructuring cases was highlighted in a lengthy exposition by Judge Martin Glenn in the context of the US judgment on the Agrokor plan.[189] As this case illustrates, even after the introduction of the Model Law *Gibbs* significantly influences contemporary cross-border insolvency practice.

4. Conclusion

The fields of cross-border insolvency and restructuring law have historically been characterised by a different trajectory of development. On the one hand, cross-border insolvency norms (at least in the jurisdictions that have been surveyed) appear to have always evidenced an appreciation of the economic challenges that are central to the cross-border insolvency situation. Cross-border restructuring norms, on the other hand, have traditionally been defined by a lack of consensus on matters of underlying principle. The introduction of the Model Law seems to have accentuated these differences. For one thing, the Model Law has managed, as a general matter, to address the economic problems of cross-border insolvency cases and has led to outcomes that are firmly within the universalist model in both the US and the UK. At the same time however, the divergence between the US and English approaches in cross-border restructuring matters that predated the Model Law has persisted even after its introduction, creating pressing and obvious issues in contemporary practice. Overall, the Model Law thus appears to have had a disparate effect in each of these two fields.

[186] *Re Agrokor DD* [2018] Bus LR 64.
[187] As a matter of jurisdiction, the English courts had jurisdiction to sanction a scheme in respect of Agrokor due to English law governing the underlying debts: see *Re Agrokor DD* [2019] EWHC 445 (Ch).
[188] *Re Agrokor DD* [2019] EWHC 2269 (Ch).
[189] *In re Agrokor dd* (n 185) 192.

Yet, the observation of this glaring divergence raises a further important question: what can adequately explain or account for the current state of affairs? There are in fact various possible explanations. Perhaps, the persistence of *Gibbs* is merely a symptom of the erroneous interpretation of the Model Law or a limited understanding of its principles by English judges. Or maybe, the Model Law is indeed limited in its scope and as a result, pre-existing legal norms, like *Gibbs,* continue to remain relevant even after its introduction. Whichever answer one may be instinctively drawn to, it is clear that the main question that naturally develops from the observations and analysis of this Chapter is whether the Model Law should be considered a sufficient or rather the proper vehicle for moving cross-border restructuring norms towards a uniform and efficient paradigm. This question will be considered in the next Chapter.

CHAPTER IV: SETTING OUT THE LIMITS OF THE MODEL LAW IN CROSS-BORDER RESTRUCTURINGS

1. Introduction

At the heart of the controversy surrounding the application of the Model Law to cross-border restructurings lies the question of whether the Model Law's relief provisions can be construed as providing an adequate statutory basis for recognizing foreign restructuring plans. This is fundamentally a question of interpretation, on which, as already illustrated, English and US authorities appear to arrive at opposite conclusions. Within this broader context however, the English courts' insistence that *Gibbs* remains applicable has been the subject of ardent criticism. The main thrust of such critiques is that the English approach should be viewed as incompatible with the Model Law's universalist principles, which purportedly mandate the recognition of foreign restructuring plans, in similar fashion to the recognition of foreign insolvency proceedings. Starting from this premise, the refusal of English courts to admit that *Gibbs* has been superseded by the introduction of the Model Law is portrayed as reflecting a disregard of its overarching principles and a parochial and narrow understanding of the issues of cross-border restructuring law in general. In a sense, the conventional understanding of the English approach considers the intransigence of the English courts on the recognition of foreign restructuring plans not only as normatively inefficient but also as erroneous as a matter of positive law.

That being said, the, almost single-minded, insistence of scholarship on brandishing *Gibbs* as indefensible and calling for its abandonment has so far failed to provide a clear way of overcoming existing problems. In fact, the traditional critiques of *Gibbs* seem negatively predisposed to consider any legitimate arguments that the English approach may be advancing. This singlemindedness has deprived the existing debate from any constructive arguments that could potentially stimulate a change in the existing outlook of English jurisprudence towards a particular normative direction. In the absence of any guidance, the existing state of affairs in the field of cross-border restructurings is characterized by a stalemate, where the English courts refuse to budge from *Gibbs,* despite the obvious inefficiencies to which its application leads. Thus, to the extent that the criticisms of the English approach narrowly focus on its inconsistency with the Model Law, they fail to provide the discipline with any sense of

direction as to how to approach the matter and address the inefficiencies that are inherent in modern cross-border restructuring practice.

This Chapter will attempt to offer a novel dimension to the conventional criticisms of *Gibbs*. In particular, it will contend that the English court's insistence that *Gibbs* continues to apply even after the introduction of the Model Law reflects a legitimate position that the Model Law framework is not open-ended but is subject to the limitations that are inherent to its function in the cross-border insolvency context. Although English courts have relied primarily on formalist arguments to support this position, their view can be more comprehensively justified through reliance on the economic distinction between cross-border insolvency and restructuring law, as previously developed. Such an approach suggests that the Model Law, being limited to issues of cross-border insolvency, conceptually lacks the necessary mechanisms and tools to address the considerations posed by cross-border restructurings, especially on the defences or qualifications that should apply to the recognition of foreign restructuring plans. From that perspective, although *Gibbs* undoubtedly leads to inefficient outcomes in the recognition of foreign plans, the English position that *Gibbs* should not be considered to have been superseded by the Model Law rests on a sound distinction between cross-border insolvency and restructuring law. In advancing this position, the present Chapter will seek to resolve the confusion surrounding the continuous application of *Gibbs* within the Model Law framework and thereby prepare the normative discussion that will follow in the next Chapter.

2. The problem of recognition of foreign restructuring plans under the Model Law

a. The conventional criticisms of *Gibbs*

It should probably come as no surprise that the inefficiencies resulting from the continued application of *Gibbs* in matters of cross-border restructurings have elicited significant criticisms of the rule.[1] These critiques have come from several fronts but

[1] As already noted, and as will be analysed later (see Chapter VI, Section 2.a.) *Gibbs* was originally formulated in the context of foreign insolvency discharges and continues to apply to such matters. In this Chapter, references to *Gibbs* designate the rule, as it applies to the effect of discharges provided under foreign restructuring plans.

can broadly be grouped into three main categories: normative, doctrinal and positive. Normative critiques broadly follow the analysis and the conclusions of the previous Chapter, by emphasizing the inefficiencies that result from the application of *Gibbs* in practice. From that perspective, and as already argued, *Gibbs* is a bad rule, as it provides holders of English law-governed claims with a de facto holdout position, the resolution of which requires a debtor that has issued or obtained English law-governed debt to undertake a restructuring in England.[2] *Gibbs* thus encourages rent-seeking and generates unnecessary costs, making a collective arrangement more difficult to reach and frequently leading to different treatment between similarly situated creditors.[3] A related line of argumentation has also pointed out that *Gibbs* impedes debtors from making efficient choices about where to restructure, since, by operation of the rule, any resulting arrangement will not be afforded recognition in England and will therefore be ineffective against holders of English law-governed claims.[4] *Gibbs* thus results in a gravitational pull towards England as a parallel, or even the sole, restructuring forum, leaving little room for efficient individual choice. Overall, these arguments suggest that *Gibbs* is normatively deficient, given that it increases the marginal costs of cross-border restructurings.

Another strand of criticism leaves questions of efficiency aside and instead points out the errors and inconsistencies of *Gibbs* as a matter of legal doctrine. These doctrinal critiques have attacked *Gibbs* on the ground that it rests on a fundamentally erroneous characterization of the question of discharge as a contractual issue. According to these views, the discharge of a debt in an insolvency or a restructuring differs markedly from other forms of contractual discharge, since it does not take effect because the parties have agreed to it, but rather because of the policies underpinning the collective proceeding.[5] In that sense, Lord Escher's dictum in *Gibbs* that creditors should not be bound by a law to which they have not contracted rings hollow. If anything, the law that governs the underlying contract should be considered irrelevant to the effect of an

[2] See Chapter III, Section 3.c.
[3] Varoon Sachdev, 'Choice of Law in Insolvency Proceedings: How English Courts' Continued Reliance on the Gibbs Principle Threatens Universalism' (2019) 93 American Bankruptcy Law Journal 343, 368-369.
[4] Kannan Ramesh, 'The Gibbs Principle: A Tether on the Feet of Good Forum Shopping' (2017) 29 Singapore Academy of Law Journal 42, 55. The question of forum shopping and its desirability in the restructuring context will be considered in detail in Chapter V, Section 3.a.
[5] ibid 49–51.

insolvency discharge, which, not being a contractual issue, should be left to be determined by the law that governs the insolvency proceedings, the lex fori.[6] Thus, from a doctrinal perspective, the 'original sin' behind the formulation of *Gibbs* is the mischaracterization of an insolvency issue as a contractual issue.

A similar point that is often advanced in this context is that, even if emphasis is placed on whether the parties have agreed to be bound by the law providing the discharge, this does not necessarily point to the law governing the underlying contract.[7] Such a view disregards the fact that, in contracting with a foreign counterparty, creditors should be considered to have accepted the possibility of their rights being compromised by a foreign law,[8] including a law affecting the status of their counterparty, such as insolvency, or providing for a comprehensive reconfiguration of its contractual and non-contractual relationships, such as restructuring. After all, insolvency and restructuring law are generally recognized as having an overriding effect on contractual rights in the domestic context and there seems to be no reason why such effect should not be extended in the cross-border scenario. A more doctrinally sound approach would thus consider insolvency and restructuring law to form part of the parties' legitimate expectations, when entering into a contractual relationship, thus justifying and legitimising any discharge that may be provided as a result. In that sense, even if the discharge of a claim under a foreign restructuring plan were viewed as a contractual issue, *Gibbs* remains doctrinally incoherent.

In addition to the above, *Gibbs* has also been criticized as leading to wildly inconsistent outcomes between the treatment of foreign plans in England and the treatment of English plans abroad. Whereas an English scheme of arrangement or plan would, as far as an English court is concerned, discharge all debts regardless of whether they arose under a contract governed by a foreign law,[9] the in-bound effect of a discharge under a foreign plan is, by virtue of *Gibbs,* significantly more limited. Such dual

[6] As stated by Look Chan Ho, 'whereas the claimants' pre-insolvency entitlements arising from contracts may be subject to party autonomy, the treatment of such entitlements after the commencement of insolvency cannot be exclusively the subject-matter of party autonomy': Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (1st edn, Sweet & Maxwell 2016) para 4–098.
[7] Ramesh (n 4) 52.
[8] This argument was utilized by the US Supreme Court in *Canada Southern Ry Co v Gebhard* 109 US 527 (1883) 537 (US Supreme Court): Chapter III, Section 3.b.
[9] Philip Smart, 'Cross-Border Restructurings and English Debts' (2009) 6 International Corporate Rescue 4, 4.

standards between the outbound and inbound effect of restructurings cannot be reconciled on the basis of principle or legal doctrine. Rather, the existing state of affairs is reflective of a systemic schizophrenia,[10] which can only be justified by public choice arguments, as intending to favour English restructurings, and by extension the domestic legal industry. Whatever the reasons behind this inconsistency may be, *Gibbs'* 'Anglocentric' approach to these issues[11] appears to have no foundation in logic or doctrine.

The aforementioned normative and doctrinal criticisms have been recognized as valid not just in academic commentary but even at the judicial level in many jurisdictions.[12] Viewed in principled terms, they have considerable merit and serve to accurately illustrate the deficiencies, errors and perils of *Gibbs.* Nevertheless, none of these critiques challenges the validity of *Gibbs* as a matter of positive law. As a result, they cannot provide ready or immediate solutions to practical problems; at most, they can inform and channel future legislative reform towards a normatively efficient and doctrinally coherent paradigm. As already mentioned however, *Gibbs* creates pressing problems in cross-border restructuring practice. This has led much of existing commentary to pursue even more forceful critiques that can justify an immediate departure from *Gibbs* as a matter of positive law, in order to address the inefficiencies resulting from its application. As a whole, the debate surrounding *Gibbs*, while including normative or doctrinal arguments, has thus been primarily shaped and affected by positive criticisms, resting on the primary argument that the Model Law should be construed as including a rule that can achieve the recognition of foreign restructuring plans on English-law governed claims and, as a result, as overriding *Gibbs.*

The crux of these positive criticisms is that, even if *Gibbs* was efficient or doctrinally correct at the time it was promulgated, it has effectively been rendered a dead letter by the development of English cross-border insolvency law towards a universalist

[10] Ian Fletcher, *Insolvency in Private International Law* (2nd edn, Oxford University Press 2005) 129.
[11] ibid 109.
[12] *Global Distressed Alpha Fund 1 Ltd Partnership v PT Bakrie Investindo* [2011] EWHC 256 (Comm) 2042; *In re Agrokor dd* 591 BR 163 (2018) 192–97 (Bankr SDNY); *Hong Kong Institute of Education v Aoki Group (No 2)* [2004] 2 HKLRD 760, 804–06 (Hong Kong Court of First Instance); *Re Pacific Andes Resources Development Ltd* [2016] SGHC 210, paras 47–50 (Singapore High Court).

paradigm, most notably with the introduction of the Model Law. This inconsistency is premised on the view that, as a matter of principle, *Gibbs* should be considered as reflecting the principle of territoriality.[13] Some support in favour of such view can be garnered from Lindley LJ's judgment in *Gibbs,* where he explicitly stated that by refusing to recognize the French discharge on claimants under an English contract, the Court of Appeals intended to protect the right of English creditors to enforce against the debtor's English assets.[14] However, it is obvious that such protection of domestic interests is no longer available under a modified universalist approach, providing for the recognition of foreign insolvency proceedings over the debtor's assets in England. In that sense, *Gibbs* is merely a relic of an era when insolvency law not only embraced a different philosophy but also operated in a different commercial paradigm[15] and as a result is difficult to reconcile with the operation of modified universalist principles. This inconsistency is reflected in the obvious paradox resulting from the application of *Gibbs,* whereby the claims of English creditors are protected and are not discharged by a foreign restructuring even though these same creditors are unable to enforce their claims against the debtor's English assets.[16] Under that lens, *Gibbs* appears philosophically incompatible and practically irreconcilable with the Model Law.[17] Given this tension, the argument that *Gibbs* should be considered to have been superseded by the development of modified universalism and not to constitute good law anymore appears persuasive.

In the end, this criticism boils down to a call to English courts to discard the rule immediately, by relying on the Model Law's provisions on relief to recognize the effect of foreign restructuring plans in England.[18] The successful application of the Model Law to similar problems by US courts only serves to intensify the arguments in favour of the repeal of *Gibbs*; after all, how could US courts utilize the Model Law's provisions to reach fundamentally opposite results? However, these arguments, in every

[13] Look Chan Ho, 'Recognising Foreign Insolvency Discharge and Stare Decisis' [2011] Journal of International Banking Law and Regulation 266, 271; Ramesh (n 4) 43.
[14] *Antony Gibbs And Sons v Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399, 410.
[15] Ramesh (n 4) 55.
[16] As has been pointed out, if the Model Law had been around at the time Gibbs was decided, the French liquidator would be able to recognize the French insolvency proceeding, which would result in an automatic stay on enforcement, and the issue would not have arisen in the first place: see Ho, *Cross-Border Insolvency: Principles and Practice* (n 6) para 4–031.
[17] ibid 4–028.
[18] Ho, 'Recognising Foreign Insolvency Discharge and Stare Decisis' (n 13) 275; Ramesh (n 4) 74.

conceivable shape or form, have now been explicitly put to rest by English courts, most recently by the Court of Appeal's ruling in *IBA*.[19] From the perspective of these positive criticisms, the English courts' intransigence to overcome *Gibbs* can only be explained as reflecting a conservative and narrow-minded way of thinking[20] that gives preference to territorialist considerations as opposed to universalist principles.[21] Notwithstanding the intransigence of English courts on this matter, these criticisms have attracted considerable support in contemporary commentary and are, to a great extent, characteristic of the current status of the academic debate.

b. Universalism and the limits of relief

One of the main implications of the positive criticisms of *Gibbs* is that it is indeed possible to achieve the recognition of a foreign restructuring plan through reliance on the Model Law's provisions on relief.[22] This conclusion however is not as self-evident as is often portrayed. In fact, the provision of post-recognition relief, being a discretionary exercise, constitutes somewhat of a grey area in the broader Model Law architecture. As already illustrated, the difficulties that stem from the existence of such discretion are, to some extent, ameliorated by the explicit enumeration in the Model Law of several basic types of relief, which cover the majority of requests that are normally presented by foreign insolvency representatives.[23] However, to the extent that the Model Law empowers a court to provide any additional relief that may be provided under domestic law, the issue becomes more complicated.

One important source of complication refers to the choice-of-law implications that requests for post-recognition relief often raise.[24] Given that the Model Law is

[19] Katharina Crinson and Adam Gallagher, 'Fighting on: The Rule in Gibbs Survives Another Day' (2019) 12 Corporate Rescue and Insolvency 47.
[20] Graham Lane and others, 'Can't Touch This: UK Supreme Court Declines Invitation to Overturn Archaic English Restructuring Law' (*Willkie Farr and Gallagher LLP*, 9 July 2019) < https://www.willkie.com/-/media/files/publications/2019/07/cant_touch_this_uk_supreme_court_refuses_invitation_to_overturn_archaic_english_restructuring_law.pdf.> accessed 19 March 2024.
[21] Sachdev (n 3) 365.
[22] Smart (n 9) 10.
[23] See Chapter III, Section 2.c.
[24] Jenny Clift, 'Choice of Law and the UNCITRAL Harmonization Process' (2014) 9 Brooklyn Journal of Corporate, Financial and Commercial Law 20, 26-28.

completely devoid of (explicit) choice-of-law rules,[25] courts lack the necessary guidance as to whether they may, in the provision of additional or non-enumerated relief, apply foreign insolvency law themselves or even recognize the effect of the application of foreign insolvency law by the courts of the foreign forum.[26] As a matter of purely textual interpretation it is therefore prima facie unclear whether the concept of relief may be utilized to give effect to a discharge of English law governed obligations under a restructuring plan that has been approved by a foreign court.

Still, and despite the absence of an explicit textual footing, the overarching principle of universalism is often considered to provide the necessary normative impetus to construe relief as enabling, or even mandating, the application of or deferral to foreign law.[27] This view, though not phrased in these precise terms, has received some judicial endorsement. In the case of *Qimonda,*[28] a US bankruptcy court was faced with a request for relief, in the form of disapplying a particular provision of the US Bankruptcy Code, which prohibited the termination of certain licensing agreements on US patents. Such termination was valid under the provisions of German insolvency law and so the main question was whether the concept of 'additional relief' allows the derogation from US bankruptcy rules, in favour of the law of a recognized foreign proceeding. The court noted that, although such relief was theoretically available under the heading of 'additional relief', it would be denied in that case, as contrary to US public policy.[29] In *Qimonda,* US courts thus underlined the 'modified' aspect of universalism, indicating

[25] However, it has been correctly pointed out that despite the Model Law's apparent neutrality, COMI acts as a covert choice of law rule in cross-border cases: see Adrian Walters, 'Modified Universalisms & The Role of Local Legal Culture in the Making of Cross-Border Insolvency Law' (2019) 93 American Bankruptcy Law Journal 47, 60-65. The EIR on the other hand includes detailed choice of law rules in arts. 7-18: see Reinhard Bork and Renato Mangano, 'Law Applicable' in *European Cross-Border Insolvency Law* (Oxford University Press 2016) 115. Recently UNCITRAL undertook a new initiative to adopt choice of law rules for cross-border insolvency proceedings, which is currently under deliberation: see A/CN.9/WG.V/WP.188 - Annotated provisional agenda for the 63rd session of Working Group V: Insolvency Law, 11-15 December 2023, Vienna available online at https://uncitral.un.org/en/content/working-group-v-insolvency-law.
[26] This is not surprising considering that, traditionally, choice of law in cross-border insolvency had been subsumed under the question of jurisdiction: Jay Lawrence Westbrook, 'Theory And Pragmatism In Global Insolvencies: Choice Of Law And Choice Of Forum' (1991) 65 American Bankruptcy Law Journal 457, 462; Hannah Buxbaum, 'Rethinking International Insolvency: The Neglected Role of Choice of Law Rules' (2000) 36 Stanford Journal of International Law 23, 32.
[27] Look Chan Ho, 'Applying Foreign Law- Realising the Model Law's Potential' [2010] Journal of International Banking Law and Regulation 552.
[28] *In re Qimonda AG* 462 BR 165 (2011) (Bankr ED Va).
[29] John J Chung, 'In Re Qimonda AG: The Conflict Between Comity and the Public Policy Exception in Chapter 15 of the Bankruptcy Code' (2014) 32 Boston University International Law Journal 89, 110-116.

that the concept of relief was, in principle, wide enough to enable a court to apply foreign insolvency law, subject however to the limits of public policy and adequate protection of the interests of all affected parties. In a similar case, the English High Court also deferred to the law of the foreign proceeding, providing additional relief to a Danish insolvency representative by means of restricting an English counterparty from exercising its contractual set-off rights, under a contract governed by English law, on the ground that such exercise would be contrary to Danish insolvency law.[30] Finally, in *Condor,*[31] perhaps the seminal case involving the application of foreign law, the Fifth Circuit Court of Appeals ruled that the Model Law's provisions on relief enable a foreign insolvency representative to pursue avoidance actions in the US under foreign insolvency law.[32] These judgments suggested that, if the Model Law were interpreted in accordance with the principle of universalism, the concept of additional relief could be construed in sufficiently wide terms to enable a court to defer to the law of the foreign proceeding, even in the absence of explicit choice-of-law provisions.

Notwithstanding the above inferences, the specific question of whether universalism can be relied upon to recognize the effect of a foreign restructuring plan on domestic legal relations was most famously considered in the case of *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc and others*.[33] The case concerned the insolvency of a shipping business, whose assets, mainly ships, were held through an elaborate corporate structure that involved, among others, two offshore companies; Navigator Holdings Plc, a Manx company that held the shares of all management companies of the business' vessels and Cambridge Gas Transport Corporation that held a majority of Navigator's shares.

[30] *Larsen v Navios International Inc* [2012] Bus LR 1124. The situation in *Larsen* however was a bit more nuanced, given that the exercise of set-off would also have been invalid under English insolvency law, if there had been an English insolvency proceeding and so the High Court was not asked to prejudice the rights of English parties by overriding domestic insolvency law.
[31] *In re Condor Ins Ltd* 601 F3d 319 (2010) (5th Cir).
[32] *Condor* has to be qualified however due to the special circumstances of the case. Unlike art. 23 of the Model Law, which enables a foreign insolvency practitioner to commence avoidance actions in the jurisdiction of recognition, Chapter 15 allows a foreign representative to pursue avoidance actions in the US only in the context of a full plenary bankruptcy proceeding (11 U.S. Code § 1523). Condor however, as an insurance company, could not be subject to bankruptcy proceedings. In enabling the foreign representative to file an avoidance action under foreign law, the court thus provided a practical solution to a special problem. Admittedly however, *Condor* does not fit well within the structure of Chapter 15: see Gerard McCormack, 'US Exceptionalism and UK Localism? Cross-Border Insolvency Law in Comparative Perspective' (2016) 36 Legal stud 136, 153.
[33] [2007] 1 AC 508.

Navigator had commenced Chapter 11 proceedings in New York and the bankruptcy court, after rejecting Navigator's reorganization plan, had approved a plan proposed by the business' bondholders. Under the plan, the shares in Navigator would vest in a creditor committee, which would enable the creditors to take over the company and implement the remaining provisions of the plan. The NY Bankruptcy Court sent a letter of request to the High Court of Justice of the Isle of Man seeking the latter's assistance to give effect to the plan and the bondholders then petitioned the High Court for an order vesting the shares in their representatives. However, the shareholder, Cambridge Gas, objected, arguing that it had never submitted to the New York court and as a result the New York order, which gave effect to the Chapter 11 plan, could not affect its property rights in the shares of a Manx company.

After conflicting decisions in the High Court and the Court of Appeal of the Isle of Man, the case eventually reached the Privy Council. The central issue was whether the New York order could be recognized and enforced in the Isle of Man under the common law rules. Lord Hoffmann noted that, if the New York order were classified as an in rem or an in personam judgment, this would not be possible; if the judgment was in rem, it would be unenforceable, as dealing with property outside the jurisdiction of New York, whereas if it was a judgment in personam, it could not bind the existing shareholders, since they had not submitted to the New York proceedings. Nevertheless, in Lord Hoffmann's view, none of these traditional classifications was relevant in this case. As he famously stated, in one the most frequently quoted paragraphs in cross-border insolvency law,[34] '[j]udgments in rem and in personam are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. (…) The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established'.[35]

The crux of Lord Hoffmann's argument was that an insolvency judgment does not establish substantive rights and causes of action, as most other types of judgments,

[34] Sandeep Gopalan and Michael Guihot, 'Recognition and Enforcement in Cross-Border Insolvency Law: A Proposal for Judicial Gap-Filling' (2015) 48 Vanderbilt Journal of Transnational Law 1225, 1261.
[35] *Cambridge Gas* (n 33) [13]–[14].

but merely affects the manner, in which such rights are exercised.[36] In that sense, such a judgment cannot really be classified as in rem or in personam under the common law*,* which in turn means that the traditional common law rules of judgment recognition cannot apply. The logical consequence of this elimination was to consider the effect of the New York order through resort to the principle of assistance, which the common law had developed to govern cross-border insolvencies prior to the introduction of statutory frameworks, such as the Model Law.[37] Considering there was no suggestion of prejudice against a local creditor and thus no reason to withhold the requested assistance, the Privy Council concluded that the New York order could be recognized and enforced in the Isle of Man.[38]

The main conclusion of *Cambridge Gas* was that the principle of universalism, no matter how general or abstract, had sufficient normative force to enable the court to sidestep traditional common law rules and recognize the effect of a foreign restructuring plan over domestic legal relations. Although the case did not involve the application of the Model Law, the recognition of the normativity of universalism in the common law context implied that the same outcome could be achieved under the Model Law's provisions on relief, which admittedly reflect universalism (even in its modified variant). From this perspective, *Cambridge Gas* can be viewed as a judicial attempt to address the indeterminacy of the existing legal framework and utilize overarching principles to achieve efficient outcomes in individual cases. At the same time however, such an approach stretched the limits of existing legal rules, bordering on judicial activism. The tension between a narrow and an open-ended understanding of universalism and, by extension, of the Model Law's provisions on relief, eventually came to a head in the UK Supreme Court's judgment in *Rubin v Eurofinance SA.*[39]

The case involved a BVI company, which had settled a trust under English law in order to operate a sales promotion scheme in New York. The scheme however turned out to be a scam and as it began to unravel, the receivers, who were appointed over the

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[36] For completeness however he noted that it may incidentally be necessary in the course of insolvency to establish rights which are challenged, such as the existence of creditor claims or the inclusion of assets within the insolvent estate, underling however that these are incidental questions and do not affect the basic proposition: ibid [15].
[37] ibid para 20 citing *In re African Farms Ltd* [1906] TS 373. See Chapter III, Section 2.a.
[38] *Cambridge Gas* (n 33) [21].
[39] *Rubin v Eurofinance SA* [2012] UKSC 46.

trust, initiated bankruptcy proceedings in New York. Soon thereafter, the receivers commenced adversary proceedings in the New York Bankruptcy Court against the settlor of the trust and several other individuals, all resident in the UK, in order to claw-back payments that the defendants had obtained from the trust before it was placed in bankruptcy. The defendants did not appear before the US court and, as a result, summary default judgments were entered against them. The receivers then applied to the English court to recognize the US proceedings as 'foreign main proceedings', and also recognize and enforce the adversary judgments against the defendants. The main question raised was whether the Model Law's relief provisions could be utilized, in a fashion similar to *Cambridge Gas,* to sidestep the common law requirements to recognition and enforcement and enable the recognition in England of a foreign avoidance judgment.

At first instance, Strauss (QC) recognized the US proceedings as 'foreign' main proceedings but refused to recognize the adversary judgment under the relief or cooperation provisions of the Model Law. He noted that the only way an adversary judgment, being a judgment in personam, could be enforced in England was by an action at common law, which however could only succeed, if the defendant in the action was present in the foreign country at the time the proceedings were instituted, counterclaimed in the proceedings, voluntarily appeared or agreed to submit to the jurisdiction.[40] As none of these conditions applied in this case, there was, in the judge's mind, no ground for recognizing or enforcing the judgments at common law. Distinguishing the case from *Cambridge Gas,*[41] he argued that there was no 'suggestion anywhere that the Model Law is intended to replace the rules of private international law of any enacting State'.[42] On appeal however, the Court of Appeal reversed the decision, arguing that, as established in *Cambridge Gas,* the ordinary rules for the recognition and enforcement of judgments do not apply to judgments issued in the context of insolvency proceedings and thus that the avoidance judgment may be given effect, as a form of assistance to the foreign insolvency proceeding.[43]

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[40] *Rubin v Eurofinance SA* [2009] EWHC 2129 (Ch) [50].
[41] In fact, Strauss QC correctly pointed out that the judgment in question in *Cambridge Gas* was a plan that had to be recognized by preventing 'one shareholder securing an unfair advantage by unreasonably claiming not to be bound by it': ibid [57].
[42] *Rubin v Eurofinance SA* (n 40) [64].
[43] *Rubin v Eurofinance SA* [2010] EWCA Civ 895 [61]–[62].

Although the appellate judgment did not implicate the Model Law,[44] it reaffirmed the notion that the principle of universalism mandates a different treatment for judgments that are issued in the context of insolvency or restructuring proceedings.

Eventually, the question reached the UK Supreme Court, which was called upon to resolve the controversy. In a seminal decision, Lord Collins JSC addressed both the common law as well as the Model Law aspect of the issue. On the former issue, he considered whether there should be a more liberal rule for avoidance judgments in the interests of the universality of bankruptcy and similar procedures.[45] He eventually viewed this as undesirable, as this 'would not be an incremental development of existing principles, but a radical departure from substantially settled law,' and thereby a matter for the legislature and not judicial innovation.[46] Since the recognition of the foreign judgment was not possible through some specially crafted exception to the common law rules on judgment recognition, the court had to consider whether the CBIR provided the necessary statutory basis to reach such an outcome. The respondents argued that under the relief provisions of the CBIR it was possible to grant any type of relief that is available under the law of the UK, and the mere fact that recognition and enforcement of foreign judgments is not specifically mentioned in the Model Law as one of the forms of relief available does not entail that such relief is unavailable.[47] Lord Collins JSC however disagreed. Considering the significance of judgment recognition in international cases, he thought that 'it would be surprising, if the Model Law was intended to deal with judgments in international cases by implication'.[48] As a result, he concluded that the Model Law was not designed to provide for the reciprocal enforcement of judgments and as a result effectively staked out the boundaries of the English law of judicial assistance in cross-border insolvency.[49]

The main argument against the development of the law in the direction signified by *Cambridge Gas* was a formalist one. In the Supreme Court's view, *Cambridge Gas*

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[44] ibid [63].
[45] *Rubin (Supreme Court)* (n 39) [115].
[46] ibid [128]–[129].
[47] ibid [141].
[48] ibid [143].
[49] Walters (n 25) 96.

was wrongly decided, since there was no basis to recognize and enforce the New York order on terms different than those mandated under the common law rules on judgment recognition.[50] Furthermore, an expansive interpretation of the Model Law's provisions on relief was equally impossible, since 'the CBIR (and the Model Law) say nothing about the enforcement of foreign judgments against third parties.'[51] In fact, Lord Collins JSC further added, in support of this contention, that 'Article[s] 21, 25 and 27 are concerned with procedural matters'[52] and therefore should not be construed to provide for the recognition and enforcement of judgments against third parties.[53] This reference to the familiar dichotomy between substance and procedure enabled the court to distinguish between the type of relief that affected substantive rights, such as the recognition of a foreign in personam judgment, as opposed to relief that affected the way in which those rights are enforced.[54] Thus, *Rubin* managed to justify a restrictive interpretation of the Model Law's provisions on the basis of a definitive and (seemingly) undisputed conceptual dichotomy. Whereas it did not explicitly dismiss purposive arguments, the UK Supreme Court nonetheless concluded that such an expansive interpretation could not go as far as permitting a type of relief that was outside the scope of the Model Law. As a result, reliance on the principle of universalism was clearly insufficient to lead to the provision of substantive relief, in the form of recognizing the determination of a foreign court, under a foreign law, on more permissive grounds than the traditional rules of judgment recognition and enforcement.

Unsurprisingly, *Rubin* sent shock waves around the international insolvency world.[55] Though the decision was lamented as enabling English creditors to be rendered 'judgment proof' against avoidance actions in a foreign jurisdiction, by refusing to appear and submit before the courts of the foreign insolvency forum,[56] most of the reactions to *Rubin* focused on its apparent rejection of universalism. Under these

[50] *Rubin (Supreme Court)* (n 39) [132].
[51] ibid [142].
[52] ibid [143].
[53] The High Court, which had expressed the same argument, had found some support for this approach in the Model Law's Guide to Enactment, which states that the scope of the Model Law 'was limited to some procedural aspects of cross-border insolvency cases: see *Rubin v Eurofinance SA* (n 40) [64].
[54] *Allen v DePuy International Ltd* [2015] EWHC 926 (QB) [29].
[55] Gopalan and Guihot (n 34) 1263.
[56] Jodie Kirshner, 'The (False) Conflict Between Due Process Rights and Universalism in Cross-Border Insolvency' (2013) 72 The Cambridge Law Journal 27, 31.

views, the judicial attitude expressed by the UK Supreme Court hovered between hostility and indifference to the Model Law and to internationalism in general.[57] The argument that relief under Article 21 had to be construed as being strictly limited to procedural matters seemed to undermine the principles underlying the Model Law[58] and to be logically inconsistent with prior jurisprudence; after all, how could it be valid to assume that the restrain of the exercise of contractual set-off[59] or the turnover of assets to a foreign representative to be distributed under foreign law[60] (both routinely ordered by the English courts) were a more procedural form of relief than the mere recognition of a foreign judgment?[61] Even more importantly, *Rubin* seemed to run counter to several US judgments that apparently supported an expansive interpretation of relief, such as *Condor,* which had explicitly been cited by the respondents.[62] From that point of view, the UK Supreme Court had apparently bristled at the idea that 'Americans do it differently'[63] and had evidenced an inability to understand what its US counterparts were doing.[64]

Subsequent English judgments have followed *Rubin's* approach. In *Pan Ocean*[65] for instance, a Korean debtor, who had been placed under insolvency proceedings in Korea, requested post-recognition relief in the form of restraining a counterparty from terminating a freight agreement, which, though prohibited under Korean insolvency law, would be valid under the law that governed the contract, namely English law. The court however refused to grant the requested relief, referring to *Rubin* and arguing that 'this difference goes well beyond matters of procedure and affects the substance of the parties' rights and obligations under the contract'.[66] Even more notably, the distinction between substantive and procedural relief, as argued by the UK Supreme Court in *Rubin,* was explicitly relied upon by the Court of Appeals in *IBA* to justify

[57] Jay Lawrence Westbrook, 'Interpretation Internationale' (2015) 87 Temple Law Review 739, 746.
[58] Gopalan and Guihot (n 34) 1280.
[59] *Larsen v Navios International Inc* (n 30).
[60] *Re SwissAir Schweizerische Luftverkehr-Aktiengesellschaft* [2010] BCC 667.
[61] Ho, *Cross-Border Insolvency: Principles and Practice* (n 6) 165.
[62] *Rubin (Supreme Court)* (n 39) 245.
[63] John AE Pottow, 'The Dialogic Aspect of Soft Law in International Insolvency: Discord, Digression, and Development' (2019) 40 Michigan Journal of International Law 479, 485.
[64] Mark Philips QC, 'International Insolvency at a Crossroads...' [2014] South Square Digest 6.
[65] *Re Pan Ocean Co Ltd* [2014] Bus LR 1041.
[66] ibid [1072].

upholding *Gibbs* despite the Model Law's introduction.[67] After all, this was the underlying reason why the claimants in *IBA* took great pains to argue that they were not truly requesting relief that would involve the modification of substantive rights, in the form of direct recognition of the foreign plan, but were rather seeking procedural relief, in the form of the extension of the moratorium provided under the foreign proceeding. Still, both Hildyard J at first instance and Henderson LJ on appeal saw this as a ruse and, once the claimants' request was exposed for what it truly was, both courts had little difficulty in concluding that the requested relief, being substantive, was precluded by the procedural nature of the Model Law, as confirmed in *Rubin*.[68]

In general terms, *Rubin* constitutes the main stumbling block against which judicial attempts to introduce a purposive and universalism-oriented interpretation of the Model Law have faltered. Before *Rubin,* and as a result of prior case law, universalism had been presumed as having sufficient normative force to enable the provision of substantive relief, despite the apparent silence of the relevant statutory provisions. These arguments emphasized the need to interpret the Model Law with an internationalist outlook[69] in order to promote uniformity and bring the ideal of universalism closer into being.[70] *Rubin* and its progeny however view the Model Law as a much more limited endeavour, aimed at regulating the procedural aspects of cross-border insolvencies. In the absence of statutory guidance, these views militate against the extension of the scope of Model Law relief to non-procedural issues, as this would effectively resolve rather consequential issues through the back door of vaguely principled judicial construction,[71] when in fact these questions are best suited for legislative determination.[72] Such a narrow view, which should now be considered established as a matter of English law, implies that the Model Law is incapable of

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[67] See Chapter III, Section 3.c. The fact that *Rubin* may be utilized to entrench *Gibbs* was a noted concern in the aftermath of the Supreme Court's judgment: see Jay Westbrook, 'Ian Fletcher and the Internationalist Principle' (2015) 3 Nottingham Insolvency and Business Law e-Journal 565, 568-571.
[68] *Re OJSC International Bank of Azerbaijan* [2019] Bus LR 1130 [92]; *Re OJSC International Bank of Azerbaijan* [2018] Bus LR 1270, 1303.
[69] Westbrook, 'Interpretation Internationale' (n 57) 754. On the use of conventional methods of interpretation in cross-border insolvency: see Andrew B Dawson, 'The Problem of Local Methods in Cross-Border Insolvencies' (2015) 12 Berkeley Business Law Journal 45.
[70] Irit Mevorach, 'On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency' (2011) 12 European Business Organization Law Review 517, 545; Jay Lawrence Westbrook, 'An Empirical Study of the Implementation in the United States of the Model Law on Cross Border Insolvency' (2013) 87 American Bankruptcy Law Journal 247, 259.
[71] Lynn M LoPucki, 'Universalism Unravels' (2005) 79 American Bankruptcy Law Journal 143, 166.
[72] Walters (n 25) 55.

dislodging *Gibbs* and lead to a change of the English approach in cross-border restructurings.

3. The new Model Law on Judgments: fixing *Rubin*?

a. Gaps in the Model Law and the question of judgment recognition

Notwithstanding the negative reactions to *Rubin,* even its critics admitted that the UK Supreme Court's arguments had revealed certain important gaps in the Model Law architecture. Given the absence of specific choice-of-law rules, *Rubin* had highlighted that the Model Law operates on a sub-stratum of domestic private international law provisions that come to the surface, when issues of relief are presented.[73] In fact, when encountering the question of whether a non-enumerated type of relief, such as the recognition of a foreign judgment, may be provided to a foreign insolvency representative, courts are often locked in a dilemma, as they have to choose between giving effect to vague international norms, such as universalism, and the need to apply concrete rules on choice-of-law or judgment recognition.[74] From the perspective of judicial decision making however, courts can be expected to rely on abstract principles, only if such principles are also adequately reflected in applicable rules.[75] As evidenced in *Rubin,* in the absence of any concrete textual guidance, a reference to a normative principle, such as universalism, cannot decide real cases. Courts can therefore only turn to domestic rules of private international law to deal with the choice-of-law issues that are often subsumed in the question of relief. The problem with these domestic rules however is that they do not necessarily align with the same universalist outlook of the Model Law, which can explain why courts, as the UK Supreme Court did in *Rubin,* often generate inconsistent outcomes.[76] Under that light, *Rubin* thus constituted an invitation to consider and address the gaps of the Model Law framework.

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[73] Adrian Walters, 'Giving Effect to Foreign Restructuring Plans in Anglo-US Private International Law' (2015) 3 Nottingham Insolvency and Business Law eJournal 20, 386–89.
[74] Walters (n 25) 53.
[75] The Model Law can perhaps be juxtaposed with s. 426, which contains an explicit, and in fact dual, choice of law rule, enabling an English court to order any substantive or procedural measure provided, either under foreign or under English insolvency law. This has been interpreted to include the recognition of a foreign restructuring plan, over claims governed by English law: see Chapter III, Section 3.a.
[76] Walters (n 25) 53.

Recognizing these concerns, UNCITRAL began working, in the aftermath of *Rubin,* on a new framework that would offer clear rules on the recognition and enforcement of judgments issued by the insolvency court of a foreign forum. Eventually this new instrument was promulgated in 2018 as the MLJ.[77] One of the declared intentions of the new MLJ is to 'fix' Rubin;[78] as its Preamble notes, '(t)he work on this topic had its origin, in part, in certain judicial decisions that led to uncertainty concerning the ability of some courts, in the context of recognition proceedings under the MLCBI (i.e. Model Law), to recognize and enforce judgments given in the course of foreign insolvency proceedings, such as judgments issued in avoidance proceedings, on the basis that neither article 7 nor 21 of the Model Law explicitly provided the necessary authority'.[79] Taking the cue from *Rubin*, the MLJ thus focuses on 'insolvency-related judgments', namely judgments that are issued after the commencement of insolvency proceedings and arise as a consequence of or are materially associated with such an insolvency proceeding.[80] Conceptually, this covers a wide range of judicial decisions, including avoidance judgments as well as judgments confirming a plan of reorganization or a restructuring plan. Overall, the MLJ attempts to address the consequences of *Rubin* by providing a supplementary framework to ensure that the recognition of such judgments benefits from clear and predictable rules and that similar outcomes are avoided in the future.

In terms of its basic provisions,[81] the MLJ generally imposes minimal requirements for recognition and enforcement. In principle, as long as a judgment has effect and is enforceable in its jurisdiction of origin, it shall be recognized and enforced, as long as no grounds of refusal apply.[82] As far as the jurisdiction of the court of origin is concerned, the MLJ stipulates that a judgment may be refused recognition or

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[77] United Nations Commission on International Trade Law, UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments as adopted in 2018 (New York: United Nations, 2014), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml_recognition_gte_e.pdf.

[78] Irit Mevorach, 'Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism?' (2021) 22 European Business Organization Law Review 283, 293.

[79] United Nations Commission on International Trade Law, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments* (UN Publication 2019) para 2.

[80] Excluding however the judgment commencing an insolvency proceeding: Art. 2(d) MLJ.

[81] The provisions of the MLJ, especially as the relate to the recognition of foreign plans, will be analysed in more detail in Chapter VI, Section 3.b.

[82] Art. 9 MLJ.

enforcement, if jurisdiction was not based on one of the acceptable grounds; these include consent or submission of the party, against whom enforcement is sought or alternatively any other ground, on which the recognizing court could have exercised jurisdiction or which is not incompatible with the law of the recognizing state.[83] Despite this strange double negative phrasing of the applicable jurisdictional requirements, such grounds are formulated widely, in the interest of limiting those instances, where recognition may be refused. Additional grounds of refusal are also conceptualized restrictively, covering familiar defences to judgment recognition such as public policy,[84] violation of due process,[85] fraud,[86] inconsistency with other judgments,[87] as well as other grounds of refusal for specific types of judgments.[88] As a result, the MLJ introduces a complete and coherent framework of judgment recognition that not only provides clarity but actually favours the recognition of insolvency-related judgments.[89]

In addition to detailed rules on judgment recognition, the MLJ also includes a final provision in Article X, aimed at those jurisdictions that have also enacted the Model Law. Article X effectively clarifies that, notwithstanding any interpretation to the contrary, the relief available under Article 21 of the Model Law also includes the recognition and enforcement of a foreign judgment.[90] This provision suggests that the MLJ provides two parallel avenues for recognizing foreign insolvency-related judgments, either under the MLJ's specific judgment recognition provisions or under an expanded conception of relief under the Model Law, as interpreted by Article X.[91] The conventional justification of Article X is that it helps to clarify the differing interpretations that have arisen in various Model Law jurisdictions about whether the

[83] Art. 14(g) MLJ.
[84] Art. 7 MLJ.
[85] Art. 14(a) MLJ.
[86] Art. 14(b) MLJ.
[87] Art. 14(c)(d) MLJ.
[88] These include for instance the refusal of recognition, when such recognition would interfere with the administration of the debtor's insolvency proceedings, such as a stay (art. 14(e) MLJ), when such judgment originates from a jurisdiction, whose insolvency proceedings could not have been recognized under the Model Law (art. 14(h) MLJ) or when a judgment approving a plan of reorganization does not adequately protect the interests of creditors and other interested persons (art. 14(f) MLJ).
[89] Mevorach, 'Overlapping International Instruments for Enforcement of Insolvency Judgments' (n 78) 299.
[90] Art. X MLJ. The absence of any definitive numbering of this provision can be explained by the fact that it is not intended to form part of the legislation enacting the MLJ but rather the domestic enactment of the Model Law: see UNCITRAL, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments* (n 79) 126.
[91] Douglas Hawthorn and Martin Young, 'Remodelling the Model Law: The Model Law on Recognition and Enforcement of Insolvency-Related Judgments' [2018] Corporate Rescue and Insolvency 195, 196.

Model Law applies to foreign judgments.[92] Under that lens, the existence of multiple overlapping instruments is not problematic but rather a desirable feature of the overall framework, as it strengthens the regime for the recognition of foreign judgments in the context of insolvency and restructuring. In addition, the MLJ can be considered to complement and even expand on the Model Law, given that, unlike discretionary post-recognition relief, recognition of a judgment under the MLJ is conceived as mandatory.[93] As a result, in addition to instituting a standalone and complementary framework, the MLJ also introduces a 'correction' to the Model Law in order to more comprehensively deal with the gaps highlighted by *Rubin.*

This eagerness to correct *Rubin* as a question of Model Law interpretation reflects an innate concern that its underlying rationale, its distinction between substantive and procedural forms of relief, may be relied upon in other Model Law jurisdictions to reach similar results. However, it must be pointed out that the specific problem that the UK Supreme Court encountered in *Rubin,* namely the recognition of a foreign judgment, other than a judgment approving a foreign restructuring plan, under the Model Law provisions on relief, does not seem to have arisen with any particularly noted prevalence in other Model Law jurisdictions.[94] Even more importantly, the specific outcome in *Rubin* owed less to a procedural interpretation of the Model Law and more on the content of the fallback common law rules on the recognition and enforcement of foreign judgments.

A recent judgment from Greece,[95] another (though less well-known) Model Law jurisdiction, illustrates this point. The case involved a factual pattern that was broadly similar to *Rubin.* In the context of the Florida bankruptcy of an individual debtor, the US bankruptcy court had issued a series of US judgments that avoided certain antecedent transactions, whereby the debtor had transferred real estate in Greece to

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[92] Mevorach, 'Overlapping International Instruments for Enforcement of Insolvency Judgments' (n 78) 291.
[93] ibid 300.
[94] As already noted, under the Model Law, a foreign insolvency representative has standing, upon recognition, to commence avoidance actions before the courts of the recognizing state (Art. 23 Model Law). This usually addresses the issue of avoidance without requiring a foreign representative to pursue avoidance actions in the jurisdiction of origin: see also *Wild v Coin Co International plc* [2015] FCA 354 (Federal Court of Australia).
[95] Judgment 183/2021 First Instance Court of Athens, Epitheorisi tou Emporikou Dikaiou (Review of Commercial Law) 2021/3.

some of its family members. Upon recognition of the US proceeding in Greece as a foreign main proceeding, the US trustee applied to the Greek court to request that the judgments be recognized and enforced in Greece against the beneficiaries of the unlawful dispositions, as additional relief under the Greek enactment of the Model Law or alternatively under the Greek rules of judgment recognition. The Greek court concluded, in similar fashion to *Rubin,* that the Model Law does not include specific provisions on judgment recognition and so the traditional rules would have to be applied. Unlike the common law however, Greek judgment recognition rules enabled the recognition and enforcement of the foreign avoidance judgments, as long as the foreign court has applied the correct substantive law to the dispute, according to Greek choice-of-law rules and had jurisdiction, according to such applicable law. Since the US bankruptcy court had jurisdiction and had correctly applied US bankruptcy law to the avoidance dispute, the judgments were capable of recognition and enforcement. As this judgment highlights, the need to correct *Rubin* may be less of an imperative for other Model Law jurisdictions given that the actual problems manifested in that case are unlikely to surface in jurisdictions that do not feature similarly restrictive rules on judgment recognition and enforcement as the common law rules.

Whatever the rationale behind this multi-tiered approach may be, the MLJ presents an important milestone in the development of cross-border insolvency and restructuring law. Its potential impact transcends the relatively narrow and ancillary field of transaction avoidance, where *Rubin* originated, and encompasses the much more consequential issue of the recognition of foreign restructuring plans. In principle, the MLJ looks capable of correcting *Gibbs*: after all, it explicitly includes judgments approving restructuring plans within the scope of 'insolvency-related judgments' and also sets out specific defences against their recognition. At the same time however, it appears to offer limited normative guidance as to whether the issue of cross-border restructurings should be approached through the wholesale adoption of the MLJ or through the introduction of the corrective provision of Article X. Although the absence of clear demarcation between overlapping instruments could result in confusion and potentially undermine the relevance of the MLJ's remaining provisions,[96] the existence of several parallel options also allows jurisdictions to utilize the avenue that is better

[96] Gabriel Moss QC, 'UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments' (2019) 32 Insolvency Intelligence 21, 22.

suited to their domestic legal framework. In conceptual terms, the MLJ thus constitutes an important initiative to address the gaps of the Model Law, as highlighted by judicial authorities, and potentially to develop the cross-border restructuring framework on a more coherent footing.

b. The UK Insolvency Service's consultation and the survival of *Gibbs*

The potential usefulness and effectiveness of the MLJ in the incremental development of cross-border insolvency and restructuring norms has recently been acknowledged by the UK Insolvency Service. As a matter of fact, on 7 July 2022, a consultation was published on the proposed implementation of the MLJ in the UK, together with another UNCITRAL instrument, the Model Law on Enterprise Group Insolvency (MLEG), which relates to the cross-border management of enterprise group insolvencies.[97] The stated objective of these proposals is to fill in the gaps that have been identified in the application of the Model Law and, as far as the MLJ is concerned, address the issue of recognition of judgments issued in the context of insolvency proceedings, which has been left open following *Rubin.* At the same time however, the proposals also touch upon issues of cross-border restructuring law and consider the effect that the proposed implementation of the MLJ would have on *Gibbs*. All in all, the Insolvency Service's proposals are an important landmark for the MLJ, since the UK is the first jurisdiction to actively consider its implementation.

As far as the topic of judgment recognition is concerned, the UK government's proposals are limited to the introduction of 'Article X' rather than an enactment of the full framework of the MLJ. Under the proposals, this provision would be implemented by modifying Regulation 2(2) of the CBIR and including Article X among the list of documents that English courts may turn to in order to ascertain the meaning of the Model Law.[98] The effect of this inclusion would be to enable English courts to consider Article X in interpreting the Model Law, and thereby to conclude, overriding the

[97] UK Insolvency Service, 'Implementation of Two UNCITRAL Model Laws on Insolvency Consultation' (7 July 2022) https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency/implementation-of-two-uncitral-model-laws-on-insolvency-consultation accessed 19 March 2024.

[98] In its current form, Regulation 2(2) includes a reference to the Model Law, any preparatory documents of UNCITRAL as well as the Model Law Guide to Enactment: CBIR Regulation 2(2).

Supreme Court's interpretation in *Rubin,* that is possible to recognize and enforce a foreign insolvency-related judgment in England under the Model Law's provisions on relief.

According to the proposals, the decision to avoid a complete adoption of the MLJ seems to be informed by a concern that the implementation of Article X alongside the full text of the MLJ would effectively create two different systems for recognition and enforcement of insolvency-related judgments, leading to confusion and duplication. In choosing between these two alternatives, the UK government considered that, whereas recognition of judgments under the MLJ is envisaged as mandatory, if the relevant requirements to recognition are met, the provision of relief under the Model Law remains discretionary. This latter alternative was deemed preferable, as it would avoid fettering the traditional discretion of English courts on the issue of recognition of foreign judgments. At the same time, acknowledging that, as currently framed, Article X does not spell out specific requirements or criteria for recognition,[99] the consultation proposes to set out an illustrative and non-exhaustive list of factors to assist the English courts in their determination. Such factors, which would be based upon the defences to recognition under Art. 14 MLJ, would have the effect of reducing the uncertainty arising from the application of Article X, while retaining the English courts' discretion in deciding the question of recognition. Overall, the decision to channel the recognition of insolvency-related judgments through the Model Law's relief provisions is evidence of the Insolvency Service's wariness to avoid any direct clash with or potential disruption of the traditional judgment recognition framework of English law.

By retaining the recognition of judgments within the scope of the English courts' discretion, the Insolvency Service's proposals would have two additional practical effects. First, since judgment recognition would constitute a form of relief to a foreign insolvency proceeding, the judgment in question would have to be issued either by the courts of the debtor's COMI or its establishment, as defined under the Model Law.[100] In that sense, the jurisdictional requirements of a foreign insolvency-related judgment would overlap with the jurisdictional requirements for recognizing foreign insolvency

[99] This had been pointed out at a very early stage by the late Gabriel Moss in Moss QC (n 96) 22.
[100] If the foreign insolvency proceeding were recognized as a foreign non-main proceeding under art. 17(2)(b) Model Law.

proceedings. Furthermore, since an application for relief under the Model Law has to be made by a foreign officeholder, it follows that an application for recognition or enforcement of an insolvency-related judgment, under the consultation's proposals, could only be submitted by an insolvency practitioner appointed in the foreign proceeding. Consequently, third parties, such as creditors, would have no standing in applying for the recognition or enforcement of an insolvency-related judgment. Despite these constraints, the UK Insolvency Service is confident that implementation of Article X, as advocated by its proposals, would suffice to overturn *Rubin* and dispel any remaining uncertainty about the ability to achieve the recognition and enforcement of insolvency-related judgments under the Model Law.

One notable aspect of the Insolvency Service's proposals is that, though conceding the benefits that would result from the UK's participation in systems of international cooperation in the field of insolvency, it is explicit that its proposals do not aim to affect the application of *Gibbs*. The desire to maintain *Gibbs* seems to have been yet another reason behind the decision not to implement the MLJ in its entirety, as this would provide English courts with a definitive and comprehensive statutory footing to depart from the rule. On the contrary, the introduction of Article X would not create any substantial legal uncertainty, since, given the stated aims of the consultation, it is most likely that an English court would readily conclude that *Gibbs* continues to govern the question of recognition of a foreign restructuring plan.

The proposals justify this cautious approach by arguing that a modification of *Gibbs* would have 'as yet unanticipated effects upon domestic contract law'. Although *Gibbs* does not really form part of English contract law, the proposals are particularly concerned with the effect that such a change would have on the attractiveness of English law as the law applicable to cross-border commercial contracts, especially financing arrangements and financial instruments. Yet, it should be underlined that the consultation is under no illusions on the merits of *Gibbs,* as it admits that there are significant drawbacks to the rule's continued application. Still, it notes that contracts governed by English law benefit from widespread use in international commercial transactions partly because of the certainty that *Gibbs* provides to contracting parties

that their rights will not be affected by a foreign restructuring.[101] For these reasons, the Insolvency Service implies that any reform of the rule would have further negative consequences to the UK legal system and thus carves out the recognition of foreign plans from the proposals.

The responses to the Consultation have been generally supportive of the government's initiatives.[102] Several respondents indicated that they favoured the introduction of Article X, as opposed to the full implementation of the MLJ, highlighting the potential overlap with the Model Law. At the same time, respondents appeared to not have been persuaded that the suggested approach, namely the inclusion of Article X in the list of documents to which English courts can have regard when deciding questions of relief, would provide courts with sufficient direction to recognize foreign judgments and not apply *Rubin*, arguing that a more explicit transposition would be necessary. In a similar vein, concern was expressed about the breadth of discretion afforded to courts in light of the government's proposals, which could potentially undermine legal certainty and predictability.[103] In response, the Insolvency Service expressed its satisfaction for the degree of support of its proposals, while also recognizing the wider issue highlighted by respondents regarding the need to ensure legal certainty. In terms of next steps, the government indicated its intention to proceed with implementing the proposals, subject to the necessary changes and modification to ensure that concerns of practitioners are alleviated; for instance, one of the government's reactions to the points made about legal certainty was to change its original proposal and recommend the adoption of Article X as an explicit provision to the CBIR. In general terms however, the Insolvency Service appears determined to proceed with the introduction of Article X, at the earliest opportunity' in the manner suggested in the original proposals, as a means to overturn *Rubin* and ensure that

[101] As has been pointed by English courts, 'looking to the proper law on questions of discharge would give effect to the expectations of the parties': *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147 [12].
[102] UK Insolvency Service, 'Implementation of Two UNCITRAL Model Laws on Insolvency Summary of Consultation Responses and Government Response' (10 July 2023) https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency/outcome/implementation-of-two-uncitral-model-laws-on-insolvency-summary-of-consultation-responses-and-government-response#the-model-law-on-insolvency-related-judgments accessed 19 March 2024.
[103] This was particularly noted in the response of the Financial Markets Law Committee, which noted that English courts should not have the discretion to recognize a foreign judgment that applies foreign insolvency law, in the absence of clear choice of law rules to that effect: see ibid.

foreign insolvency related judgments may benefit from recognition in England under the Model Law's provisions.

That being said, it is evident that the government's proposals still have no aspiration to overturn or otherwise modify *Gibbs.* In fact, the government's reactions to the consultation responses highlighted once again that its intention is to enable the recognition of foreign judgments 'in a way that will support – rather than overrule – other principles of UK law'.[104] At the same time however, several respondents, most notably the Insolvency Lawyers' Association, expressed their wish to see a more comprehensive discussion about the desirability of *Gibbs* before the government proceeds with implementing the proposals. In particular they noted that 'whether or not to overrule Gibbs is [an] important policy decision which is implicated in implementing Art[icle] X'.[105] Although the government's responses indicate a willingness to foster a debate on these issues in order to make the implementation of Article X clear and effective, it seems that a broader consideration of whether *Gibbs* should be overruled is, for the time being, not immediately forthcoming. The recent consultations thus suggest that, whereas the MLJ could in theory lead to a reconsideration of *Gibbs,* its relevance in the eyes of the UK government appears to be limited to the narrower question of overturning *Rubin* and providing an avenue for the recognition of foreign insolvency-related judgments in England.

4. A reconsideration of the current state of affairs

a. Rationalizing the intransigence of *Gibbs* through economic arguments

The foregoing analysis paints a rather disheartening picture of the current status of the debate in cross-border restructuring law. Despite the obvious inefficiencies to which *Gibbs* leads, judicial efforts to overcome the rule have been largely unsuccessful, whereas existing legislative initiatives appear hesitant of introducing a new approach. The field thus seems to be characterized by a stalemate. This inertia is however the logical consequence of the particular form that the debate in this field has progressively adopted and especially the pre-eminence of formalist arguments against

[104] ibid.
[105] ibid.

an expansive reading of the Model Law. Such arguments have traditionally justified a restrictive interpretation of the Model Law on the basis of a rational dogmatic distinction between substance and procedure, whereby the effect of the Model Law's provisions of relief is limited to the latter types of remedies.[106] From that vantage point, the conclusion that the recognition of a restructuring plan, whose key function is to discharge creditor rights, constitutes a substantive form of relief that is unavailable under the Model Law appears unassailable.

Yet, this type of argumentation, while convincing as a matter of statutory interpretation, fails to provide a normative benchmark for assessing the desirability of different substantive outcomes. As a result, it does not allow us to develop any further argument, as to the proper way of approaching the issue. In that sense, formalist objections to the Model Law are self-limiting; whereas they point out that the Model Law may lack the necessary statutory basis to achieve the recognition of foreign plans they cannot provide any insight as to whether and under what terms recognition may actually be a desirable outcome. The absence of any normative discussion on these issues was explicitly underlined by responses to the Insolvency Service's consultations and can explain why the Insolvency Service does not appear to have been persuaded that a reform of *Gibbs* was necessary or warranted. In short, the limited and narrow scope of the existing argumentation framework undermines the development of a feasible and sound normative approach.

These limitations of formalist arguments were clearly illustrated in *Cambridge Gas*. In his judgment, Lord Hoffman attempted to draw a principled and doctrinally sound distinction between insolvency and other types of judgments in order to argue that the New York order should be recognized and enforced in the Isle of Man. It seems that he recognized how, in the case at hand, the application of traditional judgment recognition rules would do little to discourage the holdout behaviour that the ultimate owners of Cambridge Gas had adopted and so his deviation was considerably

[106] In *IBA,* Henderson LJ distinguished between a procedural 'remedy', in the form of barring a creditor from enforcing its rights against the debtor's assets, and a substantive 'remedy', barring a creditor from relying on its rights under English law: see *Re OJSC International Bank of Azerbaijan [2019] Bus LR 1130* [9]. The use of the term 'remedy' as opposed to 'relief' however imbues the analysis with some confusion. On this general issue: see Peter Birks, 'Rights, Wrongs, and Remedies' (2000) 20 Oxford Journal of Legal Studies 1.

motivated by the need to reach a normatively efficient outcome. It is telling that he attempted to explain how the recognition of insolvency judgments differs from the recognition of in rem or in personam judgments by stating that in cross-border insolvency '[t]he purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum'.[107] In that sense, Lord Hoffmann did not really apply existing legal doctrine but actually attempted to develop the law in a normatively desirable direction, only implicitly, by clothing his arguments in a formalist garb. The problem with his approach however was that the formalist distinction, on which his argument was seemingly predicated, was actually pointing in the opposite direction. As later pointed out by Lord Collins JSC in *Rubin,* the New York order was in reality an in rem judgment,[108] purporting to transfer property from one party to another and thus not a judgment dealing with the enforcement of rights but one establishing such rights erga omnes. In his attempt to reach a normatively desirable outcome Lord Hoffman thus appears to have engaged in a logical leap by fundamentally mischaracterizing the judgment that was subject to enforcement.[109] Regardless of their ultimate failure, Lord Hoffman's attempts to approach cross-border restructuring issues in a purposive manner illustrate the imperative of moving past formalist arguments in order to articulate a vision for the development of existing legal norms.

Given the existing state of the debate, the first step to reaching this objective requires the formulation of a conceptual counterargument to an expansive interpretation of the Model Law that is predicated on something more than an abstract dichotomy between substance and procedure. In that regard, economic analysis can play a central role. As has already been established, cross-border insolvency and restructuring law are different fields, each containing a different set of rules and pursuing different objectives.[110] The main objective of a cross-border insolvency framework is to address collective action concerns, where the insolvent debtor has assets in multiple

[107] *Cambridge Gas* (n 33) [22].
[108] *Rubin (Supreme Court)* (n 39) [103].
[109] Adrian Briggs, 'Decisions of British Courts During 2006 Involving Questions of Public or Private International Law B. Private International Law', 578 in *British Yearbook of International Law* (Oxford University Press 2006) vol 77, 549.
[110] See Chapter II, Section 2.c.

jurisdictions.[111] This necessitates not only a recognition rule that recognizes the effects of the commencement of a foreign proceeding, as a means to protect the debtor's assets from creditor enforcement but also a framework enabling the provision of ongoing support and assistance to the foreign representative, in the form of collecting or realizing assets of the insolvent estate. In cross-border restructurings on the other hand, legal rules are called to address holdout and holdup concerns as they emerge in the context of multi-party contractual renegotiation. A cross-border restructuring framework has to fundamentally provide a recognition rule, to the effect that the substantive determination or modification of creditor rights in the plan is made binding on all creditors, in order to address holdout, subject to certain minimum requirements to avoid advantage taking, as a means to deal with holdup. The main conclusion of economic analysis is therefore that different rules are required to respond to the problems of each of these fields.

If one tries to consider the Model Law framework through the lens of this analysis, it immediately becomes apparent that its provisions are specifically geared towards addressing the specific issues that are presented in the context of cross-border insolvency. As already pointed out, the existence of a straightforward rule of recognition on the basis of COMI as well as the concept of relief, especially discretionary relief, evidence that the Model Law is fundamentally preoccupied with maintaining the collectivity of proceedings in the face of collective action concerns.[112] At the same time, there seems to be no reference or allusion to the distinct problems posed by cross-border restructurings, namely the recognition of foreign plans under certain predetermined conditions nor any legal rule that can achieve that outcome. In addition, the manner in which restructuring is referred to and conceptualized in the Model Law's Guide to Enactment, is also indicative of the absence of any consideration of the particular problems of cross-border restructurings. Even though the Guide refers on several points to reorganization, it is always as an ancillary or an alternative to liquidation, as opposed to a separate concept, presenting distinct problems and considerations. For instance, most of the attention, as regards reorganization, is placed on the need to provide the debtor with the necessary 'breathing space', until appropriate measures can be taken for the liquidation or

[111] *Cambridge Gas* (n 33) 518.
[112] See Chapter III, Section 2.c.

reorganization of its business.[113] However, this reference does not in any way engage with the question of how a reorganization will be implemented across different jurisdictions. Instead it continues to allude to the collective action problem and the need to protect the debtor's assets against creditor enforcement, a central component of cross-border insolvency. The absence of any relevant reference suggests that the recognition of restructuring plans has not been considered nor can it be accommodated within the existing Model Law framework for discretionary relief.

The above analysis can provide significant insight as to the current approach to the recognition of foreign restructuring plans in Model Law jurisdictions. As already noted, the Court of Appeal in *IBA* relied on *Rubin* to argue that, since the Model Law does not enable the provision of substantive relief, it cannot be utilized to recognize the substantive determination or modification of rights, by virtue of a foreign restructuring plan. The economic approach adds an additional dimension to this analysis, by moving beyond the superficial distinction between substantive and procedural relief. In doing so, it reveals that rules of cross-border insolvency and cross-border restructuring law differ fundamentally, both in terms of function as well as structure and thus underlines that a new set of rules, governing the recognition of foreign restructuring plans as well as the limitations to such recognition,[114] is necessary.

The economic approach can therefore offer a more nuanced and balanced account of the English approach than conventional critiques, which view the English courts' insistence to apply *Gibbs* as evidence of a parochial approach to cross-border restructurings that upholds bygone conventional wisdom as opposed to economic reality.[115] Whereas it can (and indeed will) be argued that *Gibbs* is an inefficient rule that needs to be abandoned in the context of future legislative reform, this is a different matter than its incompatibility with the Model Law. Though much can be said about the inefficiencies of *Gibbs* or its doctrinal errors, its application appears to be resting on a sound interpretation of the Model Law that accounts for the conceptual distinction

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[113] United Nations Committee on International Trade Law, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* (UN Publication 2014), 30.
[114] Stephan Madaus, 'The Rule in Gibbs, or How to Protect Local Debt from a Foreign Discharge' (Oxford Law Business Blog, 19 December 2018) <https://www.law.ox.ac.uk/business-law-blog/blog/2018/12/rule-gibbs-or-how-protect-local-debt-foreign-discharge> accessed 19 March 2024.
[115] Sachdev (n 3).

between insolvency and restructuring law. The proposed approach can therefore justify the intransigence of *Gibbs* without making concessions about the rule's normative efficiency, while at the same time providing the necessary direction for a potential reform.

Does that mean then that universalism, as a guiding principle, has no normative force whatsoever in cross-border restructurings? One of the most characteristic features of much of the contemporary commentary on the Model Law is that universalism functions like a constant mantra, purportedly offering guidance on any conceivable issue that may implicate the application of the Model Law framework. At the same time, the manner, in which contemporary scholarship has approached the subject has made it nearly impossible for anyone to defend *Gibbs*, without appearing as a detractor of universalism per se. However it must be pointed out that universalism was developed, as a theoretical paradigm, in the field of cross-border insolvency and, as such, has for years applied in parallel to often conflicting rules in the field of cross-border restructurings;[116] for instance, the application of *Gibbs* to foreign restructuring plans dates almost as far back as the origins of the 'golden thread of universalism' in English cross-border insolvency law.[117] In that sense, it is not clear what universalism means in the context of cross-border restructurings.

If universalism indeed means something (and it is by no means certain that it does) it can only be construed to stand for the general proposition that some form of centralization of a collective arrangement, by means of recognizing its effects on creditors, wherever they may be located, is indeed the proper approach. This however offers minimal guidance on how issues of cross-border restructuring law should specifically be approached. For instance, though it is generally conceded that the recognition of a foreign plan should be made conditional to some basic safeguards of fairness and equitable treatment,[118] it is unclear how reference to the principle of universalism will assist in the development of these standards. As a result, an argument that seeks to fit restructurings within the existing framework of the Model

[116] For example it was accepted that *Cambridge Gas* though exemplifying more than any other contemporary case the general principle of universalism in insolvency did not negate or otherwise override *Gibbs*: Smart (n 9) 8.
[117] *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, 861.
[118] Ramesh (n 4) 72; Smart (n 9); Fletcher (n 10) 108–09.

Law, while laudable for its intentions to provide immediate solutions to the problems of commercial practice, is the surest way to avoid a normative discussion about the proper design of the basic components of a cross-border restructuring framework. On the contrary, an economic approach to cross-border insolvency and restructuring law can justify the restrictive interpretation of the Model Law, in line with the English courts' approach in *Rubin* and *IBA* and argue in favour of the development of specialized rules for the recognition of foreign restructuring plans.

b. A reconceptualization of the US approach

Nevertheless, the correctness of this conclusion seems to be undermined by the approach adopted on the other side of the Atlantic. As already examined, US courts frequently rely on the Model Law in order to recognize and give effect to foreign restructuring plans. Cases such as *Metcalfe*[119] and *Rede*[120] are frequently cited to support the argument that, contrary to what English courts have argued, it is indeed possible to construe the relevant provisions of the Model Law as encompassing the recognition of a foreign plan, without having to distinguish between substantive and procedural types of relief.[121] In the face of this tension, much of the preceding analysis is instinctively cast into doubt; short of labelling the US approach as wrong or misguided, it is unclear how it can be reconciled with the suggested interpretation of the Model Law that distinguishes between insolvency and restructuring law on the basis of economic arguments.

This disagreement however may be less pronounced than it seemingly appears. As a point of first order, it must always be borne in mind that, whereas the Model Law is in principle a uniform framework, its provisions are often enacted with some, often considerable, textual divergences between different jurisdictions. The potential of different patterns of adoption was not unknown to UNCITRAL, when it decided to proceed with a soft law instrument as opposed to an international convention. As a matter of fact, the ability of adopting jurisdictions to modify their enacting legislation was considered one of the Model Law's primary selling points, encouraging

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[119] *In re Metcalfe and Mansfield Alternative Investments* 421 BR 685 (2010) (Bankr SDNY).
[120] *In re Rede Energia SA* 515 BR 69 (2014) (Bankr SDNY).
[121] Ho, *Cross-Border Insolvency: Principles and Practice* (n 6) 167; Westbrook, 'Ian Fletcher and the Internationalist Principle' (n 67) 569.

adoption.[122] The Model Law experience so far has thus exhibited both features; on the one hand, widespread adoption of the uniform framework by several, including prominent, jurisdictions and on the other hand some variance in the specific provisions of the respective enactments.[123] These divergences are, for the most part, not radical; as illustrated for instance, the respective enactments in the US and the UK generally evidence uniformity in their basic provisions.[124] That being said, it is generally recognized that whereas the CBIR have strived to remain faithful to the original text of the Model Law,[125] Chapter 15 has engaged in several modifications of the original language, in order to make the Model Law's provisions consistent with the framework of the US Bankruptcy Code.[126] It is therefore important to note that frequently the interpretation of the Model Law across jurisdictions may actually involve the application of marginally different statutory provisions, which are often linked to even more different provisions in each jurisdiction's domestic legislation.

As has already been pointed out, Chapter 15 contains, in Section 1507, an important provision, whose precise content is not reflected in the Model Law.[127] In particular, Section 1507 purportedly incorporates Art. 7 of the Model Law, which merely clarifies that nothing in the Model Law should limit the ability of a domestic court to provide additional assistance to a foreign representative, under domestic law. According to this provision, the purpose of the Model Law is not to displace but rather to complement provisions of the domestic law of the enacting state that may enable the provision of assistance that is additional to or different from the assistance contemplated under the Model Law.[128] While Art. 7 is enacted without modifications in the UK, the US enactment in section 1507 bolsters its content significantly, by stipulating that the court may 'if recognition is granted' provide additional assistance

[122] Irit Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (1st edn, Oxford University Press 2018) 145–48.
[123] For more detail on the differences between enactments in different jurisdictions: see Neil Hannan, *Cross-Border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law* (1st edn, Springer 2017).
[124] See Chapter III, Section 2.c.
[125] Explanatory Memorandum to Cross Border Insolvency Regulations 2006, para 7.18; McCormack (n 32) 143.
[126] Hannan (n 123) 20. One example is section 1502, which significantly modifies art. 2 of the Model Law, in order to ensure that the prescribed definitions are consistent with the definitions used in Bankruptcy Code.
[127] See Chapter III, Section 3.b.
[128] UNCITRAL, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* (n 113) 53.

to a foreign representative 'under this title or under other laws of the United States', taking into account a series of factors, most notably the principle comity.[129] This provision is unique to the US enactment, as it not only clarifies that assistance under other domestic pieces of legislation is available but also sets out the conditions, under which such assistance may be provided.

This feature of Chapter 15 suggests that US courts are able to rely, in addition to the Model Law's standard provisions on relief, as enacted in Section 1521, on the stipulations of section 1507, and especially on the prime consideration of comity.[130] As a matter of fact, comity is a permeating feature of the US approach in cross-border restructurings under the Model Law. In *Metcalfe* for instance, the court noted that 'Chapter 15 specifically contemplates that the court should be guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post recognition relief'.[131] *Vitro* further stated that 'Chapter 15 provides courts with broad, flexible rules to fashion relief appropriate for effectuating its objectives in accordance with comity'.[132] Similarly, the court in *Rede* underlined that, 'while the interplay between the relief available under sections 1507 and 1521 is far from clear, it is evident that recognition assistance of the types available under those sections is largely discretionary and turns on subjective factors that embody principles of comity'.[133] Even *Agrokor*, which is touted as containing the most unequivocal reproach of *Gibbs*, confirmed that Chapter 15's principal criterion in recognizing and enforcing foreign plans is a comity analysis.[134] As a matter of fact, the vast majority of US judgments involving the recognition of foreign restructuring plans,

[129] In particular, section 1507(b) requires a US court to consider, in the provision of assistance, whether such assistance, consistent with the principles of comity, will reasonably assure (1) just treatment of all holders of claims against or interests in the debtor's property; (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; (3) prevention of preferential or fraudulent dispositions of property of the debtor; (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns: 11 U.S. Code § 1507 (b). Such factors were originally reflected in the erstwhile section 304 prior to the enactment of the Model Law: see Jay Lawrence Westbrook, 'Chapter 15 at Last' (2005) 79 American Bankruptcy Law Journal 713, 720.
[130] *In re Board of Directors of Telecom Argentina SA* 2006 WL 686867, [196] (Bankr SDNY).
[131] ibid at 696 citing *In re Atlas Shipping AS* 404 BR 726 (2009) (Bankr SDNY).
[132] *In re Vitro SAB de CV* 701 F3d 1031 (2012) 1053 (5th Cir).
[133] *Rede* (n 120) 91.
[134] *In re Agrokor dd* (n 12) 192.

have considered the issue by engaging in a comity analysis, through reliance on both sections 1521 and 1507.[135]

Comity is of course a rather vague concept in the field of private international law.[136] Still, it is a long standing and fundamental principle of judgment recognition under US law,[137] dating back to the seminal case of *Hilton v Guyot*[138] and importantly, one which is still relevant today, to the extent that other statutory provisions do not apply.[139] In fact, if US cases are examined closely, it looks as if US courts engage in a private international law analysis, much as they would outside the context of the Model Law. It is telling that in *Metcalfe* the court recognized the Canadian plan by engaging in a judgment recognition analysis without relying on section 1521 and the Model Law's provisions on relief; in fact, in considering whether to recognize the Canadian plan, the bankruptcy court applied the principle of comity, as articulated in *Hilton v Guyot,* as a basis for the recognition and enforcement of a foreign judgment.[140] This is probably the reason that, although *Metcalfe* was cited in argument by the respondents before the UK Supreme Court in *Rubin,* Collins LJ noted that this was of no benefit to them, since 'the US Bankruptcy Court applied the normal rules in non-bankruptcy cases for enforcement of foreign judgments in the United States'.[141] In the more recent case of *Oui Financing,* a US court recognized the preclusive effect of a French restructuring plan as a defence to a civil claim brought by a creditor against the debtor, relying exclusively on principles of comity.[142] This illustrates that US courts rely on traditional norms of judgment recognition in order to recognize foreign plans and do not consider

[135] *In re Avanti Communications Group PLC* 582 BR 603 (2018) (Bankr SDNY); *In re Cell C Proprietary Limited* 571 BR 542 (2017) (Bankr SDNY); *Rede* (n 120).
[136] Alex Mills, *The Confluence of Public and Private International Law* (Cambridge University Press 2009) 2.
[137] On the different applications and manifestations of the comity doctrine in US law: see William S Dodge, 'International Comity in American Law' (2015) 115 Columbia Law Review 2071.
[138] *Hilton v Guyot* 159 US 113 (1895) (US Supreme Court).
[139] As a general matter, foreign money judgments in the US are largely recognized under the rules of two uniform acts, to the extent that they have been adopted by individual US States. These Uniform Acts are considered to be codifications of the principle of comity but comity, as a self-standing principle, continues to apply to the recognition of judgments outside the scope of such Acts: see Dodge (n 137) 2107.
[140] *Metcalfe* (n 119) 698.
[141] *Rubin (Supreme Court)* (n 39) 280.
[142] *Oui Financing LLC v Dellar* 2013 WL 5568732 (SDNY).

that the Model Law in any way affects the scope of relief that was previously available under such rules.[143]

In addition, by relying on the principle of comity, US courts have managed to develop specific benchmarks in their assessment of foreign proceedings in the context of the recognition question. As already noted, one of the deficiencies of the Model Law framework is that it provides little guidance to courts as to what types of defences they may raise to the recognition of a foreign plan and in particular what minimum requirements the foreign proceeding must meet, so that relief may be provided to the foreign representative. In the US, the specific enumeration of a number of factors in section 1507 ameliorates this problem, as US courts often examine the proceedings, under which the foreign plan was consummated, by considering for instance whether the foreign proceeding provides the just treatment of all creditors or whether US creditors are prejudiced.[144] In any case, comity, at least in the context of judgment recognition, is a sufficiently flexible concept that has enabled US courts to develop, starting from *Hilton v Guyot,* a number of factors they take into account in determining, whether comity should be granted to a foreign plan, such as a procedural fairness in the foreign proceeding, the violation of interests of US creditors or issues of fraud.[145] Courts in some circuits have even sought to rely on earlier cross-border insolvency cases to further analyse general concepts, such as procedural fairness into an array of specific elements.[146] Regardless of the outcome of these exercises, this approach shows that the flexibility of comity has enabled US courts to develop a relatively complete framework for the recognition of restructuring plans, thereby addressing the gaps of the Model Law framework.

It should be evident from this analysis that US courts do not apply the Model Law any differently than their English counterparts. The fact that foreign plans are frequently recognized in the US should not be attributed to some perceived tendency to favour universalist results or a friendlier approach to international cooperation but rather to the specific features of US Chapter 15 and the flexibility of fallback rules on judgment

[143] *In re Vitro SAB de CV* (n 132) 1057.
[144] *In re Oi SA* 587 BR 253 (2018) (Bankr SDNY).
[145] *In re PT Bakrie Telecom Tbk* 628 BR 859 (2021) 878 (Bankr SDNY).
[146] *In re Agrokor dd* 591 BR 163 (2018) (Bankr SDNY,) citing *Finanz AG Zurich v Banco Economico SA* 192 F3d 240 (1999) (2nd Cir).

recognition. Section 1507 provides a gateway to a comity-based approach in cross-border restructurings, which in turn allows US courts to draw on centuries of jurisprudence in the application of comity in the field of judgment recognition.[147] As a matter of fact and as illustrated in the previous Chapter, US courts had already utilized comity to recognize the effect of foreign restructuring plans way before they had subscribed to universalist notions in cross-border insolvencies.[148]

Even more fundamentally, comity itself, despite its murkiness, is a mouldable instrument that can address, at least superficially, many of the intricacies of foreign plan recognition. It is therefore obvious that, although US judgments are frequently cited as evidence of an expansive or universalist approach to the Model Law, they are in reality less authoritative than they are sometimes presented to be. More than anything, US authorities are significantly dependent on preexisting legal norms that have been kept alive and relevant as a result of the particular way that the Model Law has been implanted into the US Bankruptcy Code.[149] Contrary to common suggestions, US case law, if read carefully, can actually reinforce the validity of the English approach and a limited view of the Model Law as not extending to issues of cross-border restructurings.

5. Conclusion

In an article written after the Court of Appeal's decision in *Rubin,* Professor Adrian Briggs had criticized the recognition of the avoidance judgment in contravention to the traditional common law rules by arguing that 'if insolvency is different, its boundaries need to be mapped'.[150] In keeping with this admonition, the present Chapter has attempted to fill this gap by utilizing economic arguments to map the limits of the Model Law and weigh in on the debate about the validity of the English courts' interpretation

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[147] Unlike the US, comity has had limited relevance in England, as a self-standing principle of private international law: Adrian Briggs, 'The Principle of Comity in Private International Law', *Recueil des cours, Collected Courses of the Hague Academy of International Law* (Brill | Nijhoff 2012) vol 354.

[148] In fact, in the early commentaries on the Gebhard ruling, Joseph H. Beale, the preeminent American scholar in the field of conflicts of laws pointed out that 'though the corporation is thus freed from its obligations, the creditors may be allowed to follow the assets of the corporation in other states if the law of those states so provides': Joseph H. Beale, *Conflict Of Laws,* (2nd Vol. New York: Baker, Voorhis & Co I935) 1278.

[149] McCormack (n 32) 161.

[150] Adrian Briggs, 'Recognition: Foreign Judgments or Insolvency Proceedings?' [2010] Lloyd's Maritime and Commercial Law Quarterly 523, 528.

of its relief provisions. As suggested by economic analysis, insolvency law presents distinct and specific private international law issues. The Model Law addresses the collective action problem that may arise in cross-border cases by instituting a framework that is predicated on the recognition of the commencement of proceeding in the debtor's COMI and the continuous assistance or relief to the main proceeding. Cross-border restructurings however raise fundamentally different problems. This suggests that, despite arguments to the contrary, the Model Law should not be construed to apply to the recognition of foreign plans and such issues should be dealt through specialized private international law rules.[151] Unlike purely formalist arguments, an economic approach has the potential of accurately mapping the boundaries between insolvency and restructuring law and therefore the outer limits of application of the Model Law framework.

If the Model Law is indeed limited, there is clearly a gap in existing international instruments that has to be addressed. As a result, the approach developed in this Chapter inevitably paves the way for an autonomous normative venture into the field of cross-border restructuring law. The MLJ suggests that the recognition of foreign plans can be fundamentally reduced to a problem of judgment recognition. As *Cambridge Gas* has made obvious however, traditional judgment recognition rules are not always appropriate to deal with the issues that are presented in this context. Against this background, the next normative issue for consideration is whether specialized rules are needed to ensure that both holdout and holdup concerns are addressed in the cross-border restructuring context, and, if so, what their basic features should be, placing particular emphasis on the availability of adequate defences against the risk of holdup. The next Chapter will develop these basic components of a normatively efficient cross-border restructuring framework and construct a basic paradigm, on the basis of the economic analysis of restructuring law that has already been laid out in Chapter II. This framework will then serve as the starting point to consider a workable and practical way to reform *Gibbs*.

[151] The inadequacy of existing provisions is implicitly conceded by Ho in: Look Chan Ho, 'Navigating the Common Law Approach to Cross-Border Insolvency' (2006) 22 Insolvency Law and Practice 217.

CHAPTER V: AN EFFICIENT JUDGMENT RECOGNITION FRAMEWORK FOR CROSS-BORDER RESTRUCTURINGS

1. Introduction

If we place restructurings outside the scope and the reach of the Model Law, as the preceding analysis has established, we immediately find ourselves stranded in the 'terra incognita' of traditional private international law. This is not to suggest that the field of private international law is an inhospitable or unnavigable environment let alone a field that has not been properly mapped out or developed in general. However, this characterization implies that any venture in that field immediately encounters several issues, for which there seems to be no clear answer in existing literature; the proper characterization of restructuring plans as judgments or contractual arrangements, the relevance and definition of the jurisdictional competence of the foreign court as well as the limits that should be placed on recognition by virtue of public policy or other defences. As already noted, the absence of any settled scholarly view on these cases can be attributed to the prevailing conception of restructuring law as an ancillary to insolvency, which has led to the obfuscation of cross-border restructuring issues within the broader statutory frameworks for cross-border insolvency, as illustrated in the preceding Chapters.[1] Nevertheless, any analysis that views cross-border restructurings as removed from the field of cross-border insolvency inevitably involves a novel and innovative conceptualization of the ensuing problems through the lens of private international law.

The objective of this Chapter is to provide some fundamental normative guidance in how best to navigate the problems of cross-border restructurings. In doing so it will rely on the economic analysis that has already been developed in the present thesis[2] and consider the matter from the perspective of maximizing efficiency in cross-border cases. Such an approach advocates a conceptualization of restructuring plans as judgments and the development of a specialized judgment recognition framework that revolves around two main pillars; on the one hand, a requirement of jurisdictional competence of the court sanctioning the restructuring plan, and, on the other hand,

[1] See Chapter III, Section 3.c.
[2] See Chapter II, Section 2.c.

defences to recognition that can act as a safeguard to minority creditors. The practical outcomes of such an approach would not diverge radically from the universalist view. Jurisdictional requirements can be defined broadly in order to ensure that a collective arrangement in one jurisdiction can be made effective internationally. At the same time however, recognition would be conditioned on specific defences, which can ensure that a generous rule of recognition would not lead to the advantage-taking of the dissenting minority in another jurisdiction. In short, such a proposal would ensure, in a principled and effective manner, that inefficient plans, which disregard (what would be classified as) the legitimate interests of minority creditors, do not enjoy universal recognition. In a more general sense, this Chapter will resituate cross-border restructurings within the realm of private international law and attempt to sketch out and develop the basis components of a normatively efficient judgment recognition framework for foreign restructuring plans.

2. Framing the problem: contracts or judgments?

a. The pervasiveness of the contractual approach in cross-border restructuring law

A prerequisite of any normative discussion of cross-border restructurings is the proper characterization and framing of the problem of recognition. This requires an answer to a rather fundamental question: what is a court being asked to recognize, when a foreign restructuring has taken place? Though there seems to be little doubt that a court, in sanctioning a restructuring plan, produces a decision, it is also evident that the nature of such decision differs considerably from the traditional conception of a judgment. Court judgments are, in their most elementary form, understood as pronouncements that a legal duty or a liability does or does not exist, as a result of a proceeding instituted by one party against another.[3] Judgments thus presuppose, in principle, a dispute between two opposing parties, the existence of (at least) a plaintiff and a defendant, whose disagreement as regards their respective rights and obligations necessitates the involvement of the court as an arbiter to resolve a conflict.

[3] Bryan A Garner and Henry Campbell Black, *Black's Law Dictionary* (9th edn, West 2009).

Nevertheless, judgments confirming a restructuring plan differ considerably from this example. First, they seem to lack the adversarial element that characterizes conventional judgments. They are issued, not in order to resolve a dispute, but rather as validation that the plan has been the result of certain fundamental processes and meets certain basic requirements. Even more importantly, the core component of the court's judgment is a contractual agreement between the debtor and (at least a majority of) its creditors, which is subsequently incorporated in a judicial decision. The contracting parties thus determine the rights and obligations between the debtor and its creditors and the court is only called upon, at a later stage, to confirm the outcome of private ordering. Both of these elements suggest that judgments approving a restructuring plan have a quasi-contractual nature, which seems distinguishable from what is conventionally understood as a judgment.

This apparent difficulty of classification is best exemplified in a well-published 2009 judgment of the Oberlandesgericht of Celle, Germany.[4] The case involved an insurance dispute, and in particular a lawsuit brought by a German policyholder against Equitable Life, an English insurance company, claiming damages for breach of the latter's pre-contractual duty of disclosure in the context of the sale of a life insurance policy.[5] The defendant argued that the claims of policyholders, including the plaintiff, under its life insurance policies had been discharged by virtue of a scheme of arrangement, which the company had undergone in England. Under the terms of the scheme, policyholders would receive a fixed sum that would be slightly higher than the policies' then-present value in exchange for waiving any and all claims against the insurer. Although the claimant had not participated in the proceedings, the scheme had been approved by the required majorities of creditors and had been sanctioned by an English court order, which had the effect of binding all affected creditors under the Companies Act 2006. The insurer thus argued that the sanctioning order had an estoppel effect against the policyholder's claim, as it constituted a judgment that should be recognized in Germany, either under art. 33(1) Brussels I Regulation[6] or

[4] OLG Celle, 8 U 46/09.

[5] For details on this case: see Jennifer Payne, 'Cross-Border Schemes of Arrangement and Forum Shopping' (2013) 14 European Business Organization Law Review 563, 584-586.

[6] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1. Under the recognition provisions of the Brussels I Regulation, a judgment from an EU

alternatively the judgment recognition provisions of the German Code of Civil Procedure. The court however disagreed, holding that the order sanctioning the scheme of arrangement was not a judgment, as it did not resolve a dispute, but rather a settlement between the insurance company and its creditors.[7] According to this reasoning, the court, in sanctioning the scheme of arrangement, was not the decision-making body but was merely exercising a supervising function, with the process being primarily controlled and influenced by the parties.[8] As a result, the rules on judgment recognition could not apply and the sanctioning order could not be recognized.

This case demonstrates how the quasi-contractual nature of restructuring plans creates practical difficulties in their classification as judgments. But if restructuring plans are not judgments, then what are they? One strand of literature has consistently argued that it would be possible to consider them creatures of contract law.[9] Restructurings can thus be viewed as contractual modifications of the debtor's existing liabilities against its creditors. The most important corollary of this contractual approach is that the effect of restructuring plans in a foreign jurisdiction can be determined by reference to choice of law rules. Indeed, if a restructuring is viewed as a contractual settlement between consenting parties, there is no 'judgment' that needs to be recognized. Instead, its effect should be determined by reference to the contractual terms, as far the 'contracting creditors' are concerned. As far as the non-contracting creditors are concerned however, the effect of the restructuring on their claims is premised on foreign restructuring law declaring that they are also bound to the collective arrangement. Simply put, it is the direct result of the law that is applicable to the 'contract'. From that perspective, when a creditor seeks to pursue a claim that has been modified or discharged by virtue of a foreign restructuring plan, the court should merely engage in a choice-of-law analysis and, after identifying the law applicable to the underlying claim, consider whether there has been a valid modification of such claim under the *lex causae.*

Member State is automatically recognized and rendered enforceable in all other Member States: see art. 36 Brussels I Recast.

[7] OLG Celle, 8 U 46/09, [66].

[8] ibid, [67-69].

[9] Stephan Madaus, 'Leaving the Shadows of US Bankruptcy Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law' (2018) 19 European Business Organization Law Review 615, 630-632.

This, of course, is not a novel idea. In fact, the *Gibbs* rule, as was later applied in the case of *New Zealand*[10] stood for the proposition that a composition between a debtor and its creditors gives rise to an issue of contractual discharge. As a matter of fact, although *Gibbs* is frequently condemned as parochial and anachronistic,[11] the underlying rationale of treating restructurings as contractual arrangements retains significant relevance. This is illustrated in the proposed approaches to the problem of recognition of English schemes of arrangement in EU jurisdictions, which lay at the heart of the controversy caused by the OLG Celle judgment. The problem with schemes of arrangement is that they seemingly fall outside the scope of the EIR[12] as well as similar instruments on the recognition and enforcement of civil and commercial judgments.[13] Rather than subjecting scheme recognition to the national rules of judgment recognition, it has been argued that they can be recognized in EU jurisdictions by virtue of art. 12(1)(d) of Rome I Regulation,[14] to the extent that they discharge or modify English-law governed debts.[15] This position has also received some judicial support by English courts, which have, in several cases, exercised scheme jurisdiction over EU-registered companies, after being convinced that the scheme, if approved, would be effective in the EU under the Rome I Regulation.[16] Post-Brexit this view has gained even more popularity, as providing the only certain alternative to ensure that English schemes of arrangements and restructuring plans will receive uniform recognition throughout the EU.[17] It is therefore evident that, far from constituting a minority view, the contractual approach is a pervasive element of the contemporary discourse on cross-border restructurings.

[10] *New Zealand Loan and Mercantile Agency Co Ltd v Morrison* [1898] AC 349.
[11] See Chapter IV, Section 2.a.
[12] Schemes of arrangement are not included in Annex I of the European Insolvency Regulation and thus fall outside its scope: see Reinhard Bork and Renato Mangano, 'Scope of The EIR' in *European Cross-Border Insolvency Law* (Oxford University Press 2016) 41.
[13] Schemes are sometimes considered to fall under the so-called bankruptcy exception in art. 1(2)(b) of the Brussels I Regulation, even though they are not formally bankruptcy tools: Jennifer Payne, *Schemes of Arrangement: Theory, Structure and Operation* (Cambridge University Press 2014) 294.
[14] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.
[15] Joe Windsor and Paul Sidle, 'International Recognition of Schemes of Arrangement' (2010) 10 Butterworths Journal of International Banking and Financial Law 523, 525.
[16] *Re Rodenstock GmbH* [2011] Bus LR 1245; Payne 'Cross-border schemes of arrangement' (n 5) 582-583.
[17] Kate Stephenson, 'Addressing Post-Brexit Limitations of Cross-Border Recognition of Restructuring and Insolvency Proceedings in Europe' (2021) 18 International Corporate Rescue 1, 3.

As a first point, it must be conceded that the contractual approach is inherently attractive. After all, restructuring law is premised on the assumption that business rescue can best be achieved by private ordering as opposed to statutory prescription or direct judicial determination. The bargain struck between the parties therefore forms the basis of any restructuring plan, suggesting that the application of choice-of-law principles has, at least some preliminary, bearing. In addition, and perhaps more importantly, the contractual approach can better accommodate party autonomy. Where there has been an explicit choice of law between the debtor and its creditors, for instance as a result of a choice of law clause in a bond indenture, the application of choice-of-law principles to the recognition of foreign plans appears to validate the original choice made by the parties. If we assume that parties can contract efficiently with one another under conditions of informational symmetry, there is no prima facie reason why the original choice of law should not be given effect.

These arguments become even more persuasive in the context of contemporary restructuring practice, which frequently involves debtors, especially large corporate firms, engaging in a strategy of selective restructuring, involving only a subset of their creditors.[18] Since these restructurings do not involve the entire creditor constituency, holdout and holdup problems can often be less pronounced. Although it would be misleading to consider these restructurings as purely contractual, since court involvement is still needed to bind dissenting creditors, the manner, in which these selective restructurings are negotiated and implemented, resembles more an out-of-court workout as opposed to a formal (and often contentious) restructuring. In this context, the lines between restructuring law and contract law become even more blurry further strengthening the legitimacy of the contractual approach.

The pervasiveness of the contractual approach illustrates the conundrum of cross-border restructuring law. To the extent that cross-border restructurings are not deemed to be covered by existing instruments on cross-border insolvency, there seems to be an almost reflexive tendency to classify them as contracts.[19] In certain respects, this

[18] Sarah Paterson and Adrian Walters, 'Selective Corporate Restructuring Strategy' (2023) 86 The Modern Law Review 436.
[19] Irit Mevorach and Adrian Walters, 'The Characterization of Pre-Insolvency Proceedings in Private International Law' (2020) 21 European Business Organization Law Review 855, 876. Although the

reflex is understandable, not only because of the seeming attractiveness of the contractual approach but also in light of the need to address practical problems and reduce legal uncertainty in a field with incontrovertible commercial significance. At the same time however, these considerations have impeded the development of an autonomous approach to the recognition of foreign restructuring plans, which may be able to better fulfil the objectives of restructuring law. It is telling that, even when it is conceded that restructuring plans can be recognized trough other private international law instruments, such as judgment recognition rules, this is not considered to negate the contractual approach, but rather to operate as a parallel route of recognizing the effects of foreign restructuring plans.[20] Given the prevalence of this view, any attempt to sketch out a normative framework for cross-border restructurings must first encounter and confront the arguments propagated by the proponents of the contractual approach.

b. Uncovering the inefficiencies of the contractual approach

Perhaps the single most important deficiency of the contractual approach is its propensity to lead to inefficient outcomes in individual cases. If a restructuring plan is viewed as a contractual modification or discharge of obligations, then its effect cannot be assessed universally, namely for the entire creditor constituency, but will rather have to be determined separately for each individual claim. Under the contractual approach, a restructuring plan will thus be effective, if the creditor has consented or if the *lex causae* of the underlying claim is identical to the *lex fori concursus.* If, on the other hand, the *lex causae* is different, the plan will not modify or discharge the underlying claim, unless the affected creditor has explicitly consented. From an economic perspective, this leads to an apparent inefficiency, as creditors, whose claims are governed by a law other than the law, according to which the restructuring is conducted, enjoy a de facto holdout position. Such holdouts can only be resolved, if the debtor undertakes a parallel restructuring in the jurisdiction, whose law governs the holdout claim. Where the debtor's obligations are governed by various separate applicable laws, the contractual approach has the propensity of leading to multiple

authors do not argue in favour of the classification of pre-insolvency proceedings as contractual arrangements, they consider the problem through the lens of this binary choice.

[20] Stephan Madaus, 'The Cross-Border Effects of Restructurings' SSRN Working Paper <https://www.ssrn.com/abstract=4045334> accessed 19 March 2024.

parallel restructuring proceedings. As has already been noted, this raises the marginal cost of restructurings, meaning that some, otherwise viable, firms will be unable to restructure and instead fail. As a result, the most important flaw of the contractual approach is the subversion of the fundamental objective of restructuring law, namely its ability to address holdouts.

Nevertheless, these flaws may be overstated. As a matter of fact, the aforementioned problems presuppose a distressed firm with numerous creditors, whose claims are all (or to a large extent) governed by different laws, and most importantly, all of which will need to be modified by the restructuring plan. But, as already pointed out, in the majority of financial restructurings with a cross-border element, a distressed firm is only interested in modifying the claims of one or at most a few key creditor constituencies, most commonly bondholders or financial institutions.[21] Creditors holding smaller claims, such as vendors or employees, are very frequently paid in full and thus remain outside the restructuring.[22] The multiplicity of affected creditors is thereby reduced and so are the jurisdictions, where the creditor may need to pursue a restructuring.

In addition, creditors, especially large bondholder issuances, may be willing to amend the law governing their claims in order to ensure that a restructuring plan will be effective against them; this is not surprising considering the fact that in contemporary financial restructurings, key creditors are frequently involved in the planning and execution of the restructuring process. As a result, even if a debtor needs to conduct parallel restructurings at all, these will most likely be limited to certain key jurisdictions, with the intention of being effective only against some major creditors. While these outcomes are not entirely costless and may still thwart restructurings that would

[21] The existence of tort claimants can complicate the picture. Nevertheless, in financial restructurings, the vast majority of claims are contractual and the restructuring is likely to centre around the exchange of claims for equity: see Sarah Paterson, 'Rethinking Corporate Bankruptcy Theory in the Twenty-First Century' (2016) 36 Oxford J Legal Studies 697, 721. Still, restructurings as a means to settle mass tort litigation has gained considerable importance in the last several years and has created a number of separate issues, see Sergio J Campos and Samir D Parikh, 'Due Process Alignment in Mass Restructurings' (2022) 91 Fordham Law Review 325.

[22] Paterson and Walters (n 18), 446 (describing the *Virgin Active* restructuring).

otherwise be successful, they indicate that the perceived inadequacies of the choice of law approach in addressing holdout concerns are very much context dependent.

Although this assessment suggests that the choice of law approach does not always lead to inefficient outcomes, from the perspective of holdout resolution, the picture is incomplete. In fact, one should remember that restructurings involve a balancing exercise between holdout and holdup risk, by ensuring that majoritarian decision making does not lead to the expropriation of the dissenting minority. Yet, the holdup question is rarely considered in the context of the choice of law approach. The issue may be put like this: if a restructuring plan takes effect in a foreign jurisdiction, on the basis that the *lex causae* of the affected claims is identical to the *lex fori concursus,* is there any room for dissenting creditors to argue that their rights in the foreign proceeding were not adequately protected? If restructuring law is viewed as forming part, whether explicitly or implicitly, of the contractual bargain that creditors have concluded with the debtor, there seems to be no option for them to argue, after the fact, that such modification unduly violated their rights or entitlements. As a result, the choice of law approach seems to deal exclusively with holdout resolution and thus to be unable to account for the risk of holdup.[23]

This suboptimal outcome can be attributed to the nature of the choice of law inquiry. Choice of law rules are fundamentally structured in a prescriptive manner. By designating the law that is applicable to a legal relationship or issue in unequivocal terms they leave little room for nuance in the ensuing outcome. This is evident in the contractual approach to cross-border restructurings. By referring to the law that is applicable to the underlying claim, a restructuring plan either benefits from unlimited recognition, when the *lex causae* and the *lex fori concursus* coincide, or is absolutely denied recognition, when they do not. Yet, this binary dilemma between absolute recognition and non-recognition of the effects of a foreign restructuring plan disregards the overarching function of restructuring law as a balancing mechanism between majoritarian decision making and minority protection. The core problem of cross-border restructuring law is not simply whether a foreign plan must be recognized or not but rather, what conditions a foreign plan must meet, especially as regards the

[23] Madaus (n 20), 8-9.

protection of dissenting minorities, to be able to benefit from recognition in a foreign jurisdiction. By failing to accommodate these qualifications, the contractual approach appears inflexible and leads to one-sided outcomes.

One aspect of choice-of-law analysis that could in theory provide some nuance is the public policy defence. Public policy operates as an exception to choice of law rules that provide for the application of a foreign law to any given dispute. In conceptual terms, it represents the limits of the tolerance of difference, which is an overarching rationale of choice of law rules.[24] However, the concept of public policy may be unfit to lead to efficient results, as far as holdup resolution is concerned. Setting aside its inherent indeterminacy and fluidity,[25] one limitation of the public policy defence is that it is ordinarily framed as a relative concept.[26] In particular, the question of whether the application of foreign law breaches the limits of the tolerance of difference depends on the weight or the importance of the policy in question. Universally shared policies or very strong domestic policies can generally provide valid grounds for the invocation of the public policy defence. On the other hand, the less universally shared or the less important the policy in question, the less likely is it that public policy can be relied upon as a defence. As a general matter however, it is very doubtful whether rules providing for the protection of minority creditors in the context of restructurings, taken as a whole, meet this high threshold. Although many restructuring frameworks impose limits on majority power, this aspect of restructuring law has not yet been subject to sufficient development to constitute a truly universal public policy or even to attract the necessary importance in a regional or domestic context.[27] In that sense, the concept of public policy may end up being too narrow or inconsistent to accommodate the efficiency concerns that justify the protection of minority interests in restructurings.

[24] Alex Mills, *The Confluence of Public and Private International Law* (Cambridge University Press 2009) 6.
[25] Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 Journal of Private International Law 201, 202.
[26] Ioanna Thoma, 'Public Policy (Ordre Public)', *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017) 1453.
[27] The recent Preventive Restructuring Directive can be considered a first step in this direction by specifying certain minimum standards for the approval of a plan in a preventive restructuring setting: see arts. 8-18 Preventive Restructuring Directive.

Furthermore, an additional problem, stemming from the exceptional nature of the public policy defence, is that it generally operates within the constraints of proximity.[28] Thus, public policy is activated only when the dispute has some proximity or connection to the forum, which evidences an interest of the forum to regulate the outcome of the dispute in question.[29] In cross-border restructuring cases however, the connection that an affected creditor may have to the forum, where the restructuring plan is brought to be recognized, may be weak. For instance, a dissenting creditor, whose claims have been compromised by a restructuring plan in the debtor's home jurisdiction, may choose to bring a claim in a third forum, such as a jurisdiction, where the debtor has assets. The courts of such third forum however may not have a strong interest in determining the outcome of the dispute, when the creditor is not domiciled in that forum or where the law of that forum does not govern its claim. Even though holdup may be present in economic terms, thus justifying the refusal of recognition, the lack of proximity of the issue to the forum in question may present an obstacle to the application of the public policy defence. Thus, the public policy defence may fail to successfully filter out instances of holdup that may not be sufficiently proximate to the forum.

As a result, despite the fact that the contractual approach is predicated on party autonomy and gives effect to private ordering, it may inadvertently lead to inefficient outcomes in cases that present legitimate holdup concerns. Under the contractual approach, not only is the de facto holdout position of claimants, whose claims are governed by foreign law affirmed (an aspect that is frequently acknowledged), but holdup problems are also intensified due to the lack of an appropriate mechanism in choice of law rules to effectively condition recognition on certain minimum principles of minority protection. As a result, some restructuring plans that should be recognized in foreign jurisdictions, in order to resolve existing holdouts, escape recognition, whereas other restructuring plans that should not be recognized, as they raise holdup concerns, benefit from recognition nonetheless. An economic analysis of restructuring law thus reveals that, approaching the problems of cross-border restructurings through

[28] Mills, 'The Dimensions of Public Policy in Private International law' (n 25) 205.
[29] Mills cites an illustrative quote by Kahn-Freund, according to which 'The strength of a public policy argument must in each case be directly proportional to the intensity of the link which connects the facts of the case with this country': ibid 211.

the lens of choice-of-law, negatively affects both sides of the holdout-holdup equation. These inadequacies in turn underline the need to develop a viable alternative cross-border restructuring framework that can better address holdout and holdup concerns.

c. Conceptualizing restructuring plans as judgments

Considering the above, it is now possible to offer a justification of treating restructuring plans as judgments for the purposes of private international law that does not rest on mere intuition. An efficient rule for the recognition of foreign plans, which can balance the cross-border manifestation of holdout and holdup problems does not involve a binary choice between unqualified recognition and absolute rejection of recognition. Such an approach would unavoidably err on one side of the holdout-holdup equilibrium. Instead, cross-border restructuring law can best fulfil its objective, if expressed as a norm of conditional recognition of foreign plans, consisting of a general rule providing for recognition and a set of specified exceptions to that rule. On the one hand, a general rule of recognition would serve to address holdout and thus bind all creditors to the collective arrangement, whereas on the other hand, the conditions or limitations placed upon recognition would serve as an exceptional safety valve to ensure that the majority does not unduly infringe the rights of the minority.

Both of these objectives may be best achievable within the context of a judgment recognition framework. Judgment recognition rules are generally more flexible and less prescriptive than choice-of law rules. In their most basic form, they require the recognizing court to establish that the foreign judgment meets certain basic requirements, such as jurisdictional competence or finality, while at the same time conditioning eventual recognition on the absence of a series of defences, which usually cover issues such as fraud, natural justice or public policy. This fundamental structure of judgment recognition rules suggests that they can be shaped and fine-tuned accordingly to holistically address the dual considerations of holdout and holdup.

In addition to leading to more efficient outcomes, a view that considers restructuring plans as judgments offers a more convincing account, in doctrinal terms, of the nature of jurisdiction that is exercised in the context of restructuring plans. The contractual approach rests on the primacy of private ordering and uses proxies, such as the law

applicable to the underlying claim, as a connecting factor to determine the application of the substantive provisions of restructuring law on creditor claims. By focusing on the reach of substantive law provisions, the contractual approach thus implicates the concept of prescriptive jurisdiction.[30] Such view however cannot properly illustrate the nature of regulatory authority that is exercised in a restructuring. Even where the debtor engages in selective restructuring, dissenting creditors within the affected creditor constituency are bound against their will to the collective agreement. Although the court does not resolve a pending dispute, in the strict sense of the word, its role is not limited to rubber-stamping the parties' agreement, but actually involves the binding determination of the rights and obligations of the parties, especially dissenting and non-participating parties.[31] This point was made by a number of German courts, in the wake of the judgment of OLG Celle, noting that the presence of adversarial proceedings is not necessary for the characterization of a plan as a judgment. Instead, it suffices that parties may appear before the court and submit objections to confirmation.[32] Thus, even though a dispute may not have yet arisen, the court, in sanctioning or approving a restructuring plan, is the body that exercises the authority, by virtue of which the arrangement is made binding on all parties, whether they have consented to the plan or not. This coercive aspect of restructurings can only be justified and explained, if a court is viewed as exercising adjudicatory authority over the parties.

A similar point is frequently made in English law, as regards the nature of consent judgments, namely judgments that embody a settlement between the parties. The crucial factor that is traditionally relied upon to differentiate such judgments from mere contractual settlements is the degree and extent of court involvement; where the court is involved in the settlement and is not merely a disinterested third party, the resulting determination of rights and obligations may be classified as a judgment (as opposed to a mere contractual settlement) for the purposes of recognition and enforcement.[33]

[30] A Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 British Yearbook of International Law 187, 195.

[31] This is best reflected in the mantra of English courts that the sanctioning of a scheme of arrangement is not merely a 'rubber-stamping' exercise: see *Re BTR Plc* [2000] 1 BCLC 740 (Parker J).

[32] Arthur Swierczok, 'Recognition of English Solvent Schemes of Arrangement in Germany' (2014) 5 King's Student Law Review 78, 85; Payne (n 5) 586. The same approach seems to be supported by Eidenmüller: Horst Eidenmüller, 'The Rise and Fall of Regulatory Competition in Corporate Insolvency Law in the European Union' (2019) 20 European Business Organization Law Review 547, 562.

[33] *Landhurst Leasing Plc v Marcq* [1998] ILPr 822; *Case C-414/92 Solo Kleinmotoren GmbH v Boch* [1994] ECR I-2237 and the relevant commentary in Adrian Briggs, 'The Brussels Convention' (1994) 14 Yearbook of European Law 557, 568.

A judgment in consent is thus a judgment, as it is still made in the authority of a judge.[34] Along a similar vein, a restructuring plan should be classified as a judgment for the purposes of recognition and enforcement, considering that it constitutes a settlement between a debtor and a qualified majority of its creditors, which is ratified by the court in the exercise of its own authority and subject to specific requirements. In that sense, moving towards a conception of restructuring law that involves the exercise of adjudicatory, as opposed to prescriptive, jurisdiction is easier to reconcile with the function actually performed by the court in this context.

In addition, classifying restructuring plans as judgments has the important benefit of restoring the logical consistency of cross-border restructuring law. For instance, if restructurings indeed raise contractual issues, why do courts insist on applying the *lex fori concursus,* when confirming plans that modify claims governed by a different *lex causae*? The logical consequence of the characterization of restructurings as creatures of contract law would require the court, in such a scenario, to engage in a choice of law analysis, which could potentially lead to the application of a foreign substantive restructuring law. After all, if the court is merely giving effect to private bargaining, it should also be in a position to apply the law that the parties intended. Still, courts insist on treating the restructuring law of the forum as having an overriding effect over the law governing the underlying contractual relationship. Again, this implies that the court, in unequivocally applying its own law on substantive restructuring issues, is exercising some form of adjudicatory authority, when it decides to ratify or sanction the plan, and is not merely recognizing the effects of private bargaining. This aspect of the court's role in approaching restructuring matters inadvertently exposes the inability of the choice of law approach to reconcile its basic premise with the nature and logic of restructuring law.

As a result, the suggestion that restructuring plans are indeed judgments and should be treated as such for the purposes of private international law is more persuasive than the choice of law approach and fits much more neatly with the overarching objective and nature of restructuring law. Contrary to what is sometimes suggested, there is, in reality, no conceptual difficulty in classifying restructuring plans as

[34] Adrian Briggs, 'Foreign Judgments' in *The Conflict of Laws* (Oxford University Press 2019) 157.

judgments.[35] This has long been acknowledged in a number of civil law jurisdictions,[36] and is also reflected in international instruments.[37]. Interestingly enough, a similar position has been adopted by Canadian courts in *Re Cavell Insurance Co,* where the Ontario Superior Court did not have any difficulty in concluding that an order approving a scheme of arrangement constituted a judgment, even though it differed from conventional in personam judgments.[38] In any case, a judgment-centred conception of restructuring plans leads our inquiry into an entirely divergent path than the choice of law approach would suggest. Instead of questioning the adequacy of choice of law rules, the objective of the analysis now has to focus on judgment recognition rules. In this context, the most important question to consider, from a normative perspective, is the form that such rules should take in order to ensure the efficient operation of cross-border restructurings from the perspective of balancing holdout and holdup concerns.

3. The definition of appropriate jurisdictional requirements

a. Indirect jurisdiction as a solution to the holdout problem

The first step in approaching these issues is to consider the basic structure of judgment recognition rules. As has already been alluded to, international instruments on the recognition of judgments frequently distinguish between two related, yet separate, elements of a judgment recognition framework: on the one hand, requirements or prerequisites, which determine whether a foreign judgment is in principle entitled to be recognized and enforced and, on the other hand, objections or defences, which may be raised by interested parties (usually the judgment debtor) to deny recognition and enforcement.[39] Such distinction is not however dogmatic and domestic rules frequently

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[35] As matter of fact, most of the difficulties on the classification of schemes as judgments can be traced back to the incomplete or unclear dovetailing between the EIR and the Brussels I Regulation: Reinhard Bork and Kristin van Zwieten (eds), *Commentary on the European Insolvency Regulation* (Oxford University Press 2016) 87.

[36] Kurt H Nadelmann, 'The Recognition of American Arrangements Abroad' (1942) 90 University of Pennsylvania Law Review and American Law Register 780, 794.

[37] The Model Hague Convention of 1925 considered compositions to be judgments that had to be subject to an exequatur procedure: see Nadelmann, 'The Recognition of American Arrangements Abroad' (n 36) 800; K Lipstein, 'One Hundred Years of Hague Conferences on Private International Law' (1993) 42 International and Comparative Law Quarterly 553, 574. The MLJ refers to 'judgments materially affecting the rights of creditors, such as by determining whether a plan of reorganization should be confirmed' (art 14(f)).

[38] *Re Cavell Insurance Co* [2005] OJ No 645 (Ontario Superior Court).

[39] Adrian Briggs, 'Recognition and Enforcement of Judgments (Common Law)', *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017) 1479.

treat both elements as equal conditions to recognition and enforcement. Nevertheless, the adoption of this fundamental dichotomy is helpful for the purposes of the present analysis for two reasons. On the one hand, it has practical utility, as it enables a broad distinction between the different categories of conditions that may be utilized in recognizing and enforcing a foreign judgment and therefore provides a preliminary structure to the analytical inquiry. On the other hand, this approach, having international origins, is more fitting with the scope of the present analysis, to the extent that the latter seeks to develop a universal judgment recognition framework for foreign restructuring plans, as opposed to viewing this matter from the perspective of a particular jurisdiction. As a result, it is desirable to consider each of these aspects, requirements and defences, separately and in turn.

Starting from the requirements, there are various elements of and related to a foreign judgment that can be classified in such a way. For instance, most jurisdictions around the world, require that a foreign judgment have some element of finality,[40] whereas other jurisdictions also place restrictions on the content of its legal pronouncements.[41] In almost all jurisdictions however, the most fundamental requirement of a foreign judgment refers to the jurisdiction of the foreign court. After all, the adjudicatory authority of the foreign body is a delegated sovereign power, which has (at least prima facie) coercive force only within the territory of the country, in which it was made.[42] The recognition of such authority in a foreign jurisdiction unavoidably presupposes that it exists in the first place. It should therefore not be surprising that most judgment recognition frameworks[43] envision some degree of review as to the adequacy of the jurisdiction of the court of origin.[44] In that sense, two of the most fundamental aspects of private international law, namely jurisdiction and recognition of judgments are in fact

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[40] Tanja Domej, 'Recognition and Enforcement of Judgments (Civil Law)', *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017) 1472, 1474.This is also the case in England: *Colt Industries Inc v Sarlie (No2)* [1966] 1 WLR 1287.

[41] For instance, under the common law, only judgments for a fixed sum of money are entitled to enforcement; foreign injunctions cannot be enforced: *Airbus Industrie GIE v Patel* [1999] 1 AC 119.

[42] Briggs, 'Recognition and enforcement of judgments (common law)' (n 39) 1479.

[43] Perhaps the most notable exception in that regards is the framework of the Brussels I Recast Regulation, under which the jurisdiction of the court of origin may not be reviewed: art. 45(3) Brussels I Recast. This is a reflection of the principle of mutual trust: Recital 26 Brussels I Recast.

[44] Briggs, 'Recognition and enforcement of judgments (common law)' (n 39) 1480.

logically entailed.[45] Since jurisdiction is not only a relevant concept, when the court of origin decides, directly, whether it has jurisdiction over a certain dispute, but also, indirectly, when a foreign court determines whether it will recognize or enforce a foreign judgment, judgment recognition rules rely on so-called rules of 'indirect' jurisdiction.[46]

The formulation of such indirect rules of jurisdiction is however a complex task. For one thing, it is not self-evident that the same considerations that inform the determination of direct jurisdiction should also determine indirect jurisdiction.[47] In fact, a court may be justified in accepting an assertion of jurisdiction by a foreign court that it would not be prepared to assert itself or vice versa. In addition, a mechanical reflection of direct jurisdiction rules in the jurisdictional requirements for judgment recognition may be problematic when the recognition framework is to operate between states, which (unlike sister-states in federal or quasi-federal systems) have not harmonized, at least to some extent, their rules on direct jurisdiction.[48] In such a context, the divergence between the rules of direct jurisdiction will most likely lead to divergent outcomes in the recognition and enforcement of foreign judgments.

This concern applies particularly to the field of cross-border restructuring law, which is characterized by the absence of any universally accepted basis of direct jurisdiction for the judicial confirmation of a restructuring plan. As has already been pointed out, English courts have jurisdiction to sanction a scheme of arrangement or a restructuring plan in respect of foreign companies on rather tenuous connections, including the mere fact that the debts to be compromised by the scheme are governed by English law.[49] In the United States by contrast, a Chapter 11 proceeding, which may lead to a confirmation of a reorganization plan, may be commenced against any person that 'resides or has a domicile, a place of business, or property in the United States'.[50] All

[45] Arthur Taylor von Mehren, 'Recognition and Enforcement of Foreign Judgments —General Theory and the Role of Jurisdictional Requirements', *Recueil des cours, Collected Courses of the Hague Academy of International Law* (Brill | Nijhoff 1980) vol 167, 50-55.
[46] Ralf Michaels, 'Jurisdiction, Foundations', *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017) 1042, 1043.
[47] Ralf Michaels, 'Some Jurisdictional Conceptions as Applied in Judgment Conventions' in *Conflict of Laws in a Globalized World* (1st edn, Cambridge University Press 2007) 9; von Mehren (n 45) 58.
[48] Michaels (n 47).
[49] See Chapter III, Section 2.a.
[50] 28 U.S. Code § 1408(a).

of these requirements are formal and there is no need for the debtor to satisfy any minimum threshold of a sufficient connection to the US.[51] In addition, US courts have jurisdiction, if an affiliate of the debtor already has a pending bankruptcy case.[52] Given this divergence, it is obvious that the optimal rules of indirect jurisdiction have to defined independently of the rules of direct jurisdiction.

If we reject the mechanical application of rules of direct jurisdiction to judgment recognition, it is important to first consider the policy that should underlie the definition of indirect jurisdiction in cross-border restructuring law. As already analysed, the main objective of a judgment recognition framework for foreign restructuring plans is to ensure efficiency in cross-border cases. Considering that jurisdiction involves the exercise of authority over certain legal relations,[53] the question of its recognition can be formulated systemically, as the efficient global ordering of adjudicatory authority.[54] Thus, the underlying policy determining the jurisdictional requirements of a judgment recognition rule can be defined as the efficient allocation of regulatory authority between different states. The first tenet of such efficiency in the restructuring context is the resolution of potential holdouts. In that sense, indirect jurisdiction must be defined, in such a way as to enable a foreign plan to take effect against potential holdout creditors in different jurisdictions. As a matter of principle, jurisdictional requirements should therefore not be defined too restrictively, lest they impede the recognition of the foreign plan in different jurisdictions.

b. Reconsidering the exclusivity of COMI

Considering the above, the focal point for defining indirect jurisdiction should, first and foremost, be the debtor. In fact, if restructuring law is to be able to achieve the outcome, for which it is designed, the cross-border effect of a restructuring plan must not differentiate between individual creditors but should extend to all of them horizontally. However, jurisdictional links that are defined by reference to individual creditors, such as their domicile, their consent or the law governing their claims

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[51] In practice, even a few dollars deposited as a retainer in a US bank account of the debtor's legal advisors suffice to establish the jurisdiction to open restructuring proceedings in the US: *In re Globo Comunicacoes e Participacoes SA* 317 BR 235 (2004) (Bankr SDNY).
[52] 28 U.S. Code § 1408(b).
[53] Mills, 'Rethinking Jurisdiction in International Law' (n 30) 194.
[54] Mills, *The Confluence of Public and Private International Law* (n 24) 3.

(whether as default rules or as a result of party autonomy), would inevitably discriminate between different members of the creditor constituency. This would in turn lead to the fragmentation of the restructuring process, as the debtor would need to pursue separate restructurings to address holdouts. In contrast, a link that is defined by reference to the debtor's unique home jurisdiction, however this may be defined, can ensure that the effect of the plan extends to all creditors, irrespective of their individual circumstances. Since only a plan from the debtor's home jurisdiction would merit recognition, there would be no incentive to pursue parallel plans elsewhere. From that perspective, a debtor-centred definition of indirect jurisdiction seems to be the only way to ensure the unity of the restructuring process and the appropriate resolution of potential holdouts across the creditor constituency.

Starting from this premise, there are various ways that the debtor's home jurisdiction can be defined and specified. For instance it would be possible to refer to a rigid jurisdictional link, such as the debtor's place of incorporation or to a more flexible concept, such as its principal place of business.[55] An alternative concept, balancing rigidity with flexibility, is the concept of the debtor's centre of main interests or COMI, which has been developed in the context of cross-border insolvency. COMI, defined as the place 'where the debtor conducts the administration of its interests on a regular basis, and which is ascertainable by third parties',[56] was first introduced by the EIR's predecessor to serve as a novel and autonomous link to determine jurisdiction in international insolvency cases[57] and was then replicated in the Model Law as the jurisdictional requirement for the recognition of foreign insolvency proceedings. Given its long-standing application in the context of the Model Law,[58] COMI is a useful and tested concept that can be utilized to determine indirect jurisdiction in the context of a recognition rule for cross-border restructurings.

[55] The latter had for quite some time received considerable academic support as the appropriate jurisdictional link for cross-border insolvencies: Donald T Trautman and others, 'Four Models for International Bankruptcy' (1993) 41 The American Journal of Comparative Law 573, 580.
[56] Art. 3(1) EIR.
[57] Reinhard Bork and Renato Mangano, 'International Jurisdiction' in *European Cross-Border Insolvency Law* (Oxford University Press 2016) 77.
[58] See Chapter III, Section 2.c.

It has been argued however that COMI is an unsuitable jurisdictional standard (both in its direct and indirect formulation) for cross-border restructurings.[59] According to this view, there is an important distinction between insolvency proceedings, which are asset-centred, and restructuring proceedings, which are debt-centred. Whereas COMI may be useful, when it is necessary to locate the place, where the debtor's assets are managed and administered (such as in an insolvency proceeding), it fails to reflect the expectations of the parties in a contractual relationship that is liable to modification (such as in a restructuring proceeding).[60] From that perspective, the centre of gravity in cross-border restructurings is not the debtor's home jurisdiction but rather the jurisdiction, whose law governs the underlying debt relationship.

Such an approach however misconstrues both the nature of the COMI test as well as the objective of jurisdictional standards in the cross-border restructuring context. First, although the location of assets may be relevant for the COMI inquiry, it is not decisive.[61] COMI actually reflects much more than the mere existence of assets, as it constitutes the single identifiable jurisdiction, where the debtor operates and conducts its economic activity. In addition, the appropriateness of COMI in the restructuring context should not be assessed by reference to the parties' expectations but rather depends on whether it can be utilized to make the restructuring plan effective against all creditors, without the need to examine the law applicable to their individual claims. As a result, COMI is not only relevant in cases where the creditors fight over who is entitled to the debtor's assets but can serve as an objective jurisdictional focal point in cross-border restructurings that enables the recognition of a plan across the entire creditor constituency.

However, the objections to COMI, as analysed above, raise an important issue about its exclusivity as a ground of indirect jurisdiction. Indeed, there may be situations, in which the determination of indirect jurisdiction by virtue of debtor-centred jurisdictional links may not be strictly necessary to address holdout concerns. It has already been noted that many contemporary financial restructurings frequently involve a selective

[59] Madaus (n 20) 8.
[60] ibid.
[61] As a matter of fact, under the Model Law, the existence of assets allows the commencement of proceedings concurrent to a foreign main proceeding at the debtor's COMI (Art. 28 Model Law) or to a foreign non-main proceeding at the debtor's 'establishment [Art. 2(f) Model Law].

restructuring strategy that purports to affect the claims of a certain subset of creditors. In these circumstances, holdout problems are likely to be limited within the affected creditor constituency. As a result the need to bind the entire creditor group horizontally may not be a concern. In these circumstances, an exclusive COMI-centred jurisdictional requirement is unlikely to increase the efficiency of the cross-border restructuring process. As a matter of fact, a rigid COMI rule is likely to lead to inefficiencies, since there may be costs savings in conducting a selective restructuring in an alternative jurisdiction. For instance, it is no secret that many foreign companies prefer to undergo a restructuring in England or the United States because the respective restructuring processes are more flexible and can lead to a successful rescue quicker than their home jurisdictions.[62] In many cases, this outcome has been possible through the strategy of COMI-shifting, where the debtor migrates to its jurisdiction of choice before undergoing a restructuring. While these instances illustrate that COMI remains sufficiently flexible to enable selective restructurings to take place effectively, it is obvious that, in such scenarios, the case for a single, debtor-centred jurisdictional link in the determination of indirect jurisdiction is weaker than originally supposed.

The question that emerges from this analysis is whether COMI should be supplemented by additional jurisdictional requirements in order to better accommodate private ordering, of the type reflected in selective restructuring strategies.[63] If holdout concerns only arise within specifically defined classes, there seems to be no reason to reject the ability of parties, comprising these classes, to pursue a restructuring in a forum other than COMI. One cannot of course overlook the fact that the choice of a particular restructuring forum may end up being detrimental to individual creditors, especially those dissenting.[64] But this issue can also arise, if the restructuring is pursued in the debtor's, original or shifted, COMI. In any case, issues

[62] Anthony Casey and Joshua Macey, 'Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars' (2021) 37 Emory Bankruptcy Developments Journal 101, 124-128.

[63] A similar argument has been made by Casey, Martinez and Rasmussen, who argue however that COMI should be completely replaced as a jurisdictional standard: Letter sent to the Secretariat of UNCITRAL Working Group V (Insolvency) from Anthony J Casey and others, 'Towards a New Approach for the Choice of Insolvency Forum' (14 September 2023) <https://ccla.smu.edu.sg/sgri/blog/2023/09/15/towards-new-approach-choice-insolvency-forum> accessed 19 March 2024.

[64] Concerns for forum shopping are often expressed in the context of foreign companies utilizing a scheme of arrangement in England: see Susan Block-Lieb, 'Reaching to Restructure Across Borders (Without Over-Reaching), Even After Brexit' (2018) 92 American Bankruptcy Law Journal 1, 23-27.

of holdup resolution and minority protection can best be addressed at the stage of defences. As far as indirect jurisdiction is concerned, jurisdictional grounds that reflect private ordering can in fact enhance efficiencies in a selective restructuring scenario. These grounds can, in theory take a variety of forms; they may for instance allow the recognition of a restructuring plan, when original jurisdiction was based on the law governing the affected underlying claims, like the English approach,[65] or when the parties have submitted to the restructuring forum, through their voluntary participation in the restructuring proceeding.[66] In addition, party autonomy also has a role to play in the determination of indirect jurisdiction, either through a choice-of-law or a choice-of-forum clause included in the original contractual agreement between the debtor and its creditors, such as a bond indenture or a facility agreement. In such a context, the designation of indirect jurisdiction on the basis of private ordering would not lead to intensification of holdout concerns but could actually achieve an efficient debt restructuring.

The above analysis illustrates that a flexible approach is required to develop a viable judgment recognition framework for restructuring plans. Depending on whether they involve the entire creditor constituency or whether they are targeted at specific creditor groups, whose rights are affected, restructuring plans can take different forms. On the one hand, truly collective restructurings result in plans that can best be conceptualized as having an *erga omnes* effect, since they involve a thorough and full-fledged modification of the debtor's relationships with its creditors, affecting the debtor's status and its estate against the world.[67] On the other hand, selective restructuring plans have an *inter partes* effect, limited between the debtor and the creditors (or shareholders), whose respective rights and obligations are compromised. The difference between these two paradigms illustrates the complexity and fluidity of the issues presented, in the context of cross-border restructuring law and makes any

[65] Under English rules of jurisdiction, the law applicable to a contractual claim constitutes a gateway for the establishment of English jurisdiction in contractual disputes over parties not present in England: see Pippa Rogerson, 'Problems of the Applicable Law of the Contract in the English Common Law Jurisdiction Rules: The Good Arguable Case' (2013) 9 Journal of Private International Law 387.
[66] Although the extent, to which the principle of submission is based on the parties' consent under the common law is unclear: see Andrew Dickinson, 'Foreign Submission' (2019) 135 Law Quarterly Review 294. In any case, creditor submission in the restructuring context would probably not be able to be construed from the mere existence of a contractual relationship with the debtor: see *Vizcaya Partners Ltd v Picard* [2016] Bus LR 413 [32]–[61].
[67] *Mulkerrins v PricewaterhouseCoopers* [2001] BPIR 106 [67].

unequivocal categorization from a judgment recognition perspective especially challenging. Even more importantly it demonstrates, as did Lord Hoffman's judgment in *Cambridge Gas,* the conceptual difficulties that can arise in approaching questions of cross-border restructuring law through the lens of conventional classifications.[68]

Recognizing these difficulties, the proposed approach does not offer an overly dogmatic stance on the above issues. On the contrary, it recognizes that restructuring plans, as judgments, may take different forms. As a result, the concept of indirect jurisdiction has to be defined expansively to encompass both a debtor-centred connection, namely COMI, as well as additional creditor- (or rather claim-) centred connections. As far as the latter are concerned, multiple jurisdictional links can be utilized. As has already been illustrated, many jurisdictions rely on the law applicable to the underlying claim(s) as a sufficient connection in restructuring matters; there seems to be no reason why such an assertion of jurisdiction should not be given effect at the judgment recognition stage, considering that it reflects the private ordering aspect of restructuring law.

In addition, party autonomy, especially in the form of a choice-of-law clause, can provide a sufficient jurisdictional link. Unlike choice-of-law clauses in common law jurisdictions, choice-of-forum clauses have rarely been relied upon as an acceptable basis of jurisdiction in restructuring matters.[69] Nevertheless, there is no conceptual difficulty in validating the parties' choice to submit to a restructuring jurisdiction through a jurisdiction agreement.[70] As a result, forum selection clauses would need to be drafted more expansively. Regardless, the key takeaway is that an efficient approach to the recognition of foreign restructuring plans requires reliance on debtor-centred as well as creditor-centred jurisdictional links. A debtor-centred link can indicate an

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[68] Look Chan Ho, 'Navigating the Common Law Approach to Cross-Border Insolvency' (2006) 22 Insolvency Law and Practice 227.

[69] One characteristic example is the carveout of 'insolvency, composition and other analogous matters' from the scope of the 2005 Hague Choice of Court Convention (art. 2(2)(e)).

[70] However, it should be pointed out that that the existence of an agreement between the debtor and a creditor to submit all disputes arising from an underlying contractual dispute to a particular forum is generally not considered sufficiently broad to encompass collective proceedings, such as insolvency proceedings: see *AWB (Geneva) SA v North America Steamships Ltd* [2007] EWCA Civ 739. This suggests that forum selection clauses would need to be drafted more in order to specifically include restructuring matters within their scope. On whether private ordering for insolvency and restructuring matters could be achieved by a choice of forum in a company's corporate charter: see Robert K Rasmussen, 'A New Approach to Transnational Insolvencies' (1997) 19 Michigan Journal of International Law 1.

efficient exercise of jurisdictional competence by a foreign court in cases of an all-encompassing arrangement, whereas creditor-centred jurisdictional links can be efficient, in cases where the restructuring process only purports to affect the claims of a certain subset of creditors, who have submitted to the restructuring forum.[71] Such a broad definition of jurisdictional grounds can offer an effective solution to the problem of cross-border holdout.

4. Defences to recognition and minority protection

a. The influence of jurisdictional requirements on the formulation of defences

Defences to the recognition and enforcement of foreign judgments traditionally develop, in a counterbalancing fashion, alongside specific rules of indirect jurisdiction. Their main function is to place outer limits on the recognition of foreign adjudicatory authority, by filtering out judgments, whose recognition or enforcement would lead to undesirable outcomes. Defences thus operate as exceptions, which are called into application when the general rule of recognition 'misfires'. Viewing defences to recognition as exceptions has two main implications. First (and rather self-evidently), an exception has to be formulated strictly to avoid upsetting the application of the rule. Defences cannot invalidate the recognition of foreign adjudicatory authority entirely; at most, they may be allowed to temper it, within certain predetermined limits. Therein lies the origin of the general maxim that a foreign judgment shall not be reviewable on the merits for a mistake of fact or law, as this would negate the very existence of a judgment recognition framework.[72] This observation leads to a second important conclusion, namely that the concepts of jurisdiction and defences have to be treated as indissociable.[73] Given that defences do not operate in a vacuum, they should be formulated with the intent of mitigating the consequences of the operation of certain *a*

[71] In that sense, the proposed approach can be distinguished from judgment recognition proposals that are influenced by a contractual conception of restructuring law: cf. Madaus (n 20) 10.
[72] *Castrique v Imrie* (1869-70) LR 4 HL 414, 448; *Robinson v Fenner* [1913] 3 KB 835; *Carl Zeiss Stiftung v Rayner and Keeler Ltd* [1967] 1 AC 853. The same principle is recognized in international instruments on judgment recognition such as the Brussels I Recast Regulation and the 2005 Hague Convention.
[73] Adrian Briggs, 'Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments' (2004) 8 Singapore Year Book of International Law 1, 22.

priori defined jurisdictional requirements.[74] Given this close interrelation, the question of developing appropriate defences to the recognition of foreign restructuring plans must therefore begin with a consideration of the inefficient outcomes that may result from the application of the aforementioned rules of indirect jurisdiction as part of a judgment recognition rule.

The question of whether indirect jurisdiction rules are structured appropriately often brings forth the question of forum shopping. To be fair, the strategic choice of a particular forum (and the concomitant recognition of a judgment produced in such a strategically selected forum) is not necessarily a practice that should be discouraged.[75] In fact, forum shopping can lead to efficiency gains, such as cost reductions, when the resolution of the dispute can be pursued more efficiently in the 'shopped-for' forum.[76] As has already been pointed out, forum shopping may be especially beneficial as a restructuring strategy, since it may enable the debtor to restructure in a jurisdiction that allows a speedy and cost-effective reorganization of its business.[77] In that context, rules of indirect jurisdiction that facilitate forum shopping strategies present no discernible problem but actually encourage efficient private ordering.

However, strategic forum choice can also enable one litigant party to shift costs to the other, either as a result of the circumstances surrounding the resolution of the dispute, the applicable procedures or the application of a more favourable substantive law. In the restructuring context, abusive forum shopping ties into the concept of hold up, which designates the ability of the debtor to select a forum that allows, by virtue of the application of an attractive substantive law,[78] the externalization of costs and the

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[74] Briggs has also suggested that any change to the jurisdictional requirements for the recognition of foreign judgments, unavoidably requires a reconsideration of available defences*:* see ibid 15, citing the dissenting opinion of LeBel J in the Supreme Court of Canada Judgment in *Beals v Saldanha* [2003] 3 SCR (Supreme Court of Canada).

[75] Franco Ferrari, 'Forum (and Law) Shopping', *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017) 789, 794 (noting that any definition of forum shopping must be value neutral).

[76] Michael Whincop, 'The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments' (1999) 23 Melbourne University Law Review 416, 425.

[77] Payne (n 5) 588. As noted by Newey J in *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch) [18], 'in cases such as the present, however, what is being attempted is [..] not in order to evade debts but rather with a view to achieving the best possible outcome for creditors. If in those circumstances it is appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping'.

[78] John AE Pottow, 'The Myth (and Realities) of Forum Shopping in Transnational Insolvencies' (2007) 32 Brooklyn Journal of International Law 785, 788-790.

diversion of value to majority creditors or rather the debtor itself (and, in the corporate context, its shareholders). As a matter of fact, cross-border restructurings are especially susceptible to both 'good' and 'bad' forum shopping. Since the *lex fori* applies to restructuring matters, a debtor may assess the costs and benefits of selecting a particular jurisdiction with relative ease,[79] thus increasing its incentives to engage in forum shopping, including of the abusive kind. As a result, the possibility that a debtor may leverage the predictability of applicable substantive law to select a forum that disadvantages creditors is a pertinent consideration in cross-border restructuring law.[80]

In addition to the aforementioned general observations, the risk of forum shopping may be even more pronounced under the proposed formulation of indirect jurisdiction rules for restructuring plans. First of all, under the suggested approach, the debtor would have a choice between relying, alternatively, on COMI and choice-of-law/forum respectively. The existence of several bases of jurisdiction affords, by definition, a wider margin of choice, compared to the operation of a single jurisdictional requirement and can thus encourage forum shopping. In addition, COMI and choice of law or forum, while generally rigid as jurisdictional standards, remain sufficiently malleable to enable the debtor to engineer the choice of a particular forum.[81] Although COMI is, in principle, a more inflexible concept than the mere place of incorporation, the facts underpinning it can be manipulated to enable strategic forum choice. This is evidenced by a number of cases before the English courts, in which foreign companies have shifted their COMI to England, in order to avail themselves of the English courts' scheme jurisdiction, either directly (by moving operations, especially management functions, to England)[82] or indirectly (by establishing an English subsidiary, which thereafter assumes all of the debtor's obligations).[83] The law governing the underlying claims or the choice of the forum can also be modified, through a subsequent choice,

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[79] Normally, a plaintiff, by choosing a forum to litigate its dispute, does not choose a particular substantive law to apply; the applicable choice of law rules may actually lead to the application of a different substantive law than the *lex fori*: Ferrari (n 75) 797.

[80] In the recent restructuring and widely publicized restructuring of the Adler Group, the pursuit of a Restructuring Plan procedure under Part 26A of the Companies Act was enabled by the substitution of the original debtor, a German company, by an English subsidiary, under a process that was stipulated in the terms of the notes. The Court of Appeal did not however express a view on the permissibility of this tactic, as it was not raised on appeal: *Re AGPS Bondco Plc* [2024] EWCA Civ 24 [34].

[81] Pottow (n 78) 796.

[82] *Re Magyar Telecom BV* [2014] BCC 448.

[83] *Re Codere Finance (UK) Ltd* (n 77); *Re AGPS Bondco Plc* (n 80).

which can serve to establish jurisdiction. Whereas this is admittedly a more difficult exercise, there are workarounds that can work to the debtor's benefit; collective action clauses in bond indentures, for instance, allow a creditor majority to amend the law governing the entire bond issuance (or the respective forum) and such mechanisms have been utilized in practice to forum shop in favour of the English courts.[84] Judging from current practice, the proposed jurisdictional links in a judgment recognition approach are likely to maintain the 'forum shopping system',[85] already existing in jurisdictions, such as the US and England, thereby creating a risk for the dissenting creditor constituency.

It is sometimes asserted that the risks of forum shopping may be overstated, since creditors may employ contractual mechanisms to prevent detrimental value shifting. For one thing, it is often submitted that creditors, especially sophisticated institutions, can adjust their interest rate to compensate for any marginal increase in their risk of return.[86] This would mean that the costs resulting from potential holdup behaviour will have already been internalized by the creditors at the time of contracting. Alternatively, such 'fully adjusting creditors' may be able to contract for enhanced monitoring rights, through the inclusion of clauses, which preclude COMI-shifting without their consent. These arguments presuppose that, at least some, creditors should be able to predict and fully price the risk of abusive forum shopping, at the time that credit is provided.[87] This is however unlikely even for sophisticated, 'fully adjusting' creditors. The circumstances surrounding a debtor's COMI shift, such as the jurisdiction of choice or the exact substantive framework that will apply, are unlikely to be ascertainable at the time that financing is extended. As a result, in most cases, the risk of holdup will inevitably be under-priced or over-priced, both outcomes being inefficient. In addition, the ability to contract for restrictive covenants may be impeded by external factors, such as prevailing market conditions,[88] whereas such contractual terms may also

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[84] *Re DTEK Finance BV* [2015] EWHC 1164 (Ch).

[85] Block-Lieb (n 64) 25.

[86] Robert K Rasmussen, 'Resolving Transnational Insolvencies Through Private Ordering' (2000) 98 Michigan Law Review 2252, 2264-2265.

[87] ibid. Rasmussen's dismissal of forum shopping as a valid concern relates to his proposal that a company's bankruptcy forum be designated in the corporate charter, at the time the company is constituted. In this scenario, a creditor (at least a voluntary one) can evaluate the risk at the time of contracting.

[88] Sarah Paterson, 'The Rise of Covenant-Lite Lending and Implications for the UK's Corporate Insolvency Law Toolbox' (2019) 39 Oxford Journal of Legal Studies 654, 659-664.

entail higher monitoring and enforcement costs. As a result, the risk of forum shopping under the proposed judgment recognition approach persists.

How likely is that such 'debtor havens' will emerge? Admittedly, there are certain factors that practically limit the willingness of jurisdictions to compete in facilitating abusive behaviour, by reforming their legal framework to accommodate the debtor's choice.[89] A jurisdiction that favours abusive debtors disadvantages foreign and domestic creditors alike and as a result, the cost of holdup, cannot be fully externalized.[90] However, a 'race to the bottom' between jurisdictions is not necessary for hold up behaviour to emerge. Even marginal differences between jurisdictions or indeterminacies in the interpretation of legal provisions can enable debtors to engage in holdup behaviour in individual cases. As a matter of fact, 'many of the principles of bargaining for reorganization are unwritten'.[91] Abusive parties may thus be able to take advantage of gaps in the application or the interpretation of the law in order to engage in holdup behaviour against dissenting creditors.[92] In the absence of a truly uniform substantive restructuring law, any forum selection margin afforded to the debtor creates options as well as incentives for abusive forum shopping. The risk of abusive forum shopping thus seems, to a certain extent, unavoidable, necessitating the formulation of appropriate defences as a means to temper the effect of indirect jurisdiction rules and address the risk of holdup.

b. The economics of efficient bargaining as the normative basis of defences

The need to develop defences that qualify the recognition of foreign restructuring plans is an issue that has been frequently cited but rarely investigated in depth. As early as

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[89] Perhaps the most famous exposition of such concerns can be found in the views of Professor Lynn LoPucki, who argues that broad rules on venue jurisdiction in US bankruptcy proceedings have encouraged forum shopping and competition between different bankruptcy districts, which have in turn led to lower standards for creditor protection: see Lynn M. LoPucki, *Courting Failure* (2006 University of Michigan Press).

[90] Whincop (n 76) 426.

[91] Douglas Baird, *The Unwritten Law of Corporate Reorganizations* (1st edn, Cambridge University Press 2022) ix-xiv.

[92] There is significant evidence that forum shopping takes place in the US bankruptcy practice even though bankruptcy law is federal law and thus uniform across states. In that context, it has been established that debtors generally shop for different or rather more predictable outcomes: see Jared A Ellias, 'What Drives Bankruptcy Forum Shopping? Evidence from Market Data' (2018) 47 Journal of Legal Studies 119.

the 19th century, Harlan J, in his dissent in *Gebhard,* had pointed out that the fact that US creditors were not afforded their 'day in court' was sufficient reason to deny the recognition of the Canadian arrangement in the US.[93] Since then, US courts have consistently relied on a laundry list of factors that have been developed in the context of insolvency proceedings, in order to assess whether the procedure before the foreign restructuring forum has been procedurally fair.[94] At the same time, calls to discard the *Gibbs* rule in England have also pointed out that the recognition of foreign plans in the UK should not be unqualified. On the contrary, it has frequently been pointed out that regard should be given to whether the plaintiff had adequate notice of the foreign proceedings and a reasonable opportunity to participate in them in accordance with acceptable standards of fair and equal treatment.[95]

Yet, the question of what exactly constitutes fair or equitable treatment in the context of a restructuring proceeding has rarely been the subject of sustained scholarly analysis. From that perspective, existing views, through properly identifying a crucial issue of the normative framework of cross-border restructuring law, appear to lack the necessary insight as to how this aspect should be conceptualized in practice. If however the objective of defences is to address strategic behaviour by averting the recognition of foreign restructuring plans that raise holdup concerns, it follows that their normative underpinnings must be economically oriented. In that respect, the economics of efficient bargaining[96] can provide the basic cornerstones for the development of appropriate defences in the cross-border restructuring context.

The first, and perhaps most self-evident, element of minority protection that one can distil from the economic approach is participation. The fact that those creditors that are affected by the plan must participate in the bargaining process, including the decision of whether a proposed plan must be approved or not, is not only a fundamental protection against abuse but also a prerequisite for conceptualizing bargaining as a game. A bargaining game involves at least two players interacting in

[93] *Canada Southern Ry Co v Gebhard* 109 US 527 (1883) 540–49 (US Supreme Court).
[94] This list of factors was developed in the case of *Finanz AG Zurich v Banco Economico SA* 192 F3d 240 (1999) (2nd Cir).
[95] Ian Fletcher, *Insolvency in Private International Law* (2nd edn, Oxford University Press 2005) 109; Kannan Ramesh, 'The Gibbs Principle: A Tether on the Feet of Good Forum Shopping' (2017) 29 Singapore Academy of Law Journal 42, 73.
[96] See Chapter II, Section 2.b.

the decision-making process, each of which prefers a different outcome.[97] The same logic applies to multi-party bargaining games, which can be conceptualized as a series of multiple interrelated two-party games, where one party is a standard player. If creditor participation is removed, there would be no bargaining per se and no interaction between decision-makers; instead the outcome would be determined by the debtor, acting as a sole decision maker, on the basis of its own expected utility.[98] This conceptual shift would not only necessitate a completely new set of methodological tools to analyse and predict the parties' choices but would also, in practical terms, leave creditors exposed and vulnerable to the risk of advantage taking. If the debtor's choice were not influenced by the interaction with other decision makers but was solely predicated on its own calculations about its expected utility, nothing would limit its ability to deprive creditors of their rights and entitlements in the pursuit of its own self-interest. As a result, the participation of each individual affected creditor in the bargaining and decision-making process places some elementary, yet fundamental, constraints on unlimited debtor choice and, as such, constitutes an important protection against holdup.

In addition to participation, the second fundamental element of efficient bargaining is the possession of adequate information by the decision-making parties. As has already been noted, many bargaining failures result from incomplete information.[99] In the context of restructuring however, information is not merely incomplete but often asymmetric; the debtor, or more generally insiders, possess private information, such as information about the financial condition of the firm, its prospects, its operations etc., to which creditors or outsiders are likely to not be privy (at least to its full extent).[100] This informational asymmetry precludes bargaining parties from arriving at an objectively acceptable value of the firm and by extension creates disagreement as to

[97] Michael Maschler and others, *Game Theory* (Cambridge University Press 2013) 622.
[98] This aspect denotes the difference between decision theory in general and game theory: see Christina Bicchieri, 'Decision and Game Theory' in *Routledge Encyclopedia of Philosophy* (Taylor and Francis 1998).
[99] See Chapter II, Section 1.b.
[100] In the case of financial creditors, the informational asymmetry can in theory be balanced by contracting for financial covenants that enhance a creditor's monitoring rights during the term of the loan. However, as market trends have shifted from hold-to-maturity to active trading of corporate debt, this has diminished the incentives of financial creditors, especially hedge funds or private equity firms, to engage in debtor monitoring: see Paterson, 'The Rise of Covenant-lite Lending and Implications for the UK's Corporate Insolvency Law Toolbox' (n 88).

how going concern value will be generated and distributed.[101] As a result, asymmetric information creates conditions that may preclude the attainment of mutually beneficial agreement.[102] Perhaps more importantly, the fact that the debtor has control over the informational flow, as it can choose whether to share crucial information with the creditors, creates incentives for strategic (non-)dissemination of important information, thus increasing the risk of holdup behaviour. In this context, the provision of information about the financial condition of the debtor's firm, including the effect of any proposed restructuring measures is a very important safeguard for creditors, as it enables them to value their entitlements accurately and, by extension, engage in informed decision making.[103] The provision of appropriate and adequate information to ensure informational symmetry between the parties thus constitutes a fundamental safeguard against abuse.[104]

If bargaining in the restructuring context was merely bilateral, the above elements would suffice to ensure efficient outcomes. Yet, as has already been illustrated, the bargaining dynamics that emerge between multiple parties necessitate the introduction of a majoritarian decision-making rule, as a means to resolve potential holdouts. One way to view majority decision making is as a relaxation of the participation requirement. Majority rule dismisses the need for the participation and consent of every individual creditor in the collective agreement. As has already been noted, this element transforms a multi-party bargaining game into a two-person game, where the debtor negotiates with the creditor on the margin of the majority threshold.[105] Naturally, this rule, while necessary to address holdouts and free riders in a multi-party

[101] The difficulties in valuing distressed firms are discussed in: Stuart C Gilson and others, 'Valuation of Bankrupt Firms' (2000) 13 The Review of Financial Studies 43. Parties in financial restructuring may also have additional incentives to take very adversarial positions as far as valuation is concerned: see Sarah Paterson, *Corporate Reorganization Law and Forces of Change* (1st edn, Oxford University Press 2020) 189–213.

[102] William Samuelson, 'Bargaining under Asymmetric Information' (1984) 52 Econometrica 995, 1004.

[103] The importance of the provision of information is also recognized the context of a reorganization plan under the US Bankruptcy Code, which stipulates that 'any solicitation of acceptance or rejection of a plan be preceded by the transmission to any creditor or equity holder of the debtor of a written disclosure statement, which must be approved by the court following a hearing' (11 U.S. Code § 1125). Similarly in the context of an English scheme of arrangement, every notice circulated summoning the meetings, whether sent out to individual creditors or advertised, be accompanied by an explanatory statement under s. 897(1) Companies Act 2006.

[104] United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law* (Parts One and Two, UN Publication 2005) 216.

[105] Andrew G Haldane and others, 'Analytics of Sovereign Debt Restructuring' (2005) 65 Journal of International Economics 315, 325.

bargaining setting also exposes individual creditors to a significant risk, by allowing a debtor to discriminate between the various individual creditors, favouring those that are necessary to obtain the qualified majority and disadvantaging the rest.[106] In that scenario, the debtor can leverage majority voting to deprive dissenting creditors of their firm-specific investments, thereby engaging in holdup behaviour.

Accordingly, the introduction of majoritarian decision making necessitates additional safeguards to balance the scales and protect dissenting creditor minorities. One such element of creditor protection are structural rules of voting and decision-making that take the form of the assignment of creditors in different classes, the members of which receive the same treatment under the plan. In particular, classification groups together creditors, based on the similarity of their rights, and thus ensures that the debtor is not able to discriminate between members of the same class and thereby abuse majority voting.[107] Even more conceptually, the allocation of creditors into distinct groups that have to separately consent (in majority terms) consolidates bargaining power and enables the formation of coalition blocks between creditors holding the same rights against the debtor.[108] These coalitions, which are not arbitrary but rather rooted in the nature of the creditor rights against the debtor, serve as a check against manipulation of the voting rules and make any discrimination against potential dissenters a significantly harder proposition. As has eloquently been put, the question of whether the affected creditors should constitute separate classes is of fundamental importance to potential dissenters as it prevents the process of 'being so worked as to result in confiscation and injustice'.[109] Classification, where appropriate, thus constitutes yet another fundamental procedural protection for individual dissenting creditors.[110]

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[106] In fact, it is precisely this fear that the debtor would manipulate the creditor constituency by playing the various parties against one another, including by enabling insider deals that informed the design of §316(b) of the Trust Indenture Act in the US, which prohibits the impairment of a bondholder's monetary claims by virtue of majority vote: see Mark J Roe, 'The Voting Prohibition in Bond Workouts' (1987) 97 The Yale Law Journal 232, 250-252.

[107] Gertner and Scharfstein underline this aspect of classification as explaining why voting in Chapter 11 reorganization encourages more efficient investment, as opposed to bond exchange offers: Robert Gertner and David Scharfstein, 'A Theory of Workouts and the Effects of Reorganization Law' (1991) 46 The Journal of Finance 1189, 1211.

[108] See Chapter II, Section 2.b.

[109] *Sovereign Life Assurance Co (In Liquidation) v Dodd* [1892] 2 QB 573, 583.

[110] Scott F Norberg, 'Classification of Claims under Chapter 11 of the Bankruptcy Code: The Fallacy of Interest Based Classification' [1995] American Bankruptcy Law Journal 119, 123.

Although the aforementioned procedural safeguards can go a long way in addressing the effects of potential holdup behaviour, they sometimes do not suffice. For one thing, whereas class formation precludes advantage taking between the different creditor constituencies, hold up is still theoretically possible within the context of the same class.[111] In this setting, the debtor can still possess sufficient bargaining power to disadvantage the dissenting creditor constituency, even when the procedural and structural bargaining requirements are adhered to. Although the efficiencies of business rescue may outweigh the costs borne by individual creditors, there are several reasons to suggest that this outcome should be discouraged. Creditors have a difficulty to accurately assess at the time that financing is extended, whether, at some point in the future, they would be the victim of advantage taking by a future (and abusive) creditor majority. In order to address this risk, they would either have to expend considerable resources in monitoring during the duration of their investment or, in the absence of such resources, face reduced incentives to advance financing in the first place. As a result, if one takes into account the effect of expropriation on ex ante incentives, it is evident that the potential for intra-class holdup should be discouraged.[112] This can be achieved through the imposition of certain substantive limits on the content of the plan that restrain the ability of the majority to deprive the minority of certain minimum entitlements. The minimum entitlements thus define the creditors' stake in the value of the firm that is not 'in play', namely that may not be deprived by majority decision. This in turn provides a basic measure comfort to individual creditors, who are thus not required to price in the risk of future expropriation below this benchmark in their investment decisions.

The more complex question however is how this benchmark should be defined. It should be obvious that, if defined too broadly, this substantive limitation may undermine or even negate the application of majority rule, whereas, if defined too narrowly, it may expose dissenting creditors to the risk of expropriation. Yet, how exactly the balance between these two countervailing considerations should be struck

[111] A related consideration arises in legal frameworks that enable the adoption of a restructuring plan, over the objections of a single creditor class. In that case, the circumvention of class voting reintroduces the problem of holdup at the class level. This cram-down option, as this scenario is commonly referred to in restructuring law jargon, is possible under the US Bankruptcy Code, (11 U.S. Code § 1129(b)), as well as in the context of an English Restructuring Plan Procedure (s. 901G Companies Act 2006).
[112] Chapter II, Section 2.b.

appears arbitrary. One consideration that may prove helpful is the concept of information costs; this suggests that the minimum entitlement must be defined in such a manner, so as to be easily ascertainable both by creditors, at the time that they decide whether to participate in the restructuring, as well as by the court, at the time that it rules on the confirmation of the plan. The most objective approximation of the present value of the creditors' firm specific investments is the liquidation value of their claims against the debtor.[113] This suggests that restructuring law must ensure that creditors receive, under the plan, at least what they would have received if the firm were to be liquidated. This appears preferrable to other more favourable formulations for creditors,[114] at least in the cross-border context, considering that it provides a generally acceptable and easily ascertainable[115] benchmark that must be respected by a restructuring plan.

An economic approach to efficient bargaining can thus identify four main pillars of minority protection in the restructuring context: participation, information, class voting and non-infringement of liquidation value. The relevance of these elements is not merely theoretical. As has already been suggested, many legal frameworks include first-order rules that correspond to each of the aforementioned segments of minority protection, whilst their importance is also highlighted in international legislative texts.[116] For the purposes of the present inquiry, these four basic pillars can constitute the starting point in the formulation of the appropriate defences against the recognition of foreign plans. Taking these observations into account, it is necessary to consider how these economic features can be fashioned into second-order rules of private

[113] This is the case under the US Bankruptcy Code (11 U.S. Code § 1129(7)(A)(2)): see *In re Lason Inc* 300 BR 227 (2003) (Bankr D Del). In an English scheme of arrangement as well as a consensual restructuring plan there is no explicit substantive limitations as regards the content of the restructuring plan. Still, such issues are normally examined in the context of the court's discretion to sanction a scheme (or a plan) especially when this is pursued in combination with administration: see *Re Bluebrook Ltd* [2010] BCC 209.

[114] For instance, under an English restructuring plan, creditors, in a cramdown scenario, must receive, at least, the dividend that they would receive in the relevant alternative. The "relevant alternative" is whatever the court considers most likely to occur in relation to the company if the plan were not sanctioned: s. 901G(3)-(4) Companies Act 2006; Riz Mokal, 'The Two Conditions for the Pt 26A Cram Down' (2020) 37 Butterworths Journal of International Banking and Financial Law 730.

[115] This does not suggest that the application of this criterion is completely unproblematic: see Jonathan Hicks, 'Foxes Guarding the Henhouse: The Modern Best Interests of Creditors Test in Chapter 11 Reorganizations' (2005) 5 Nevada Law Journal 820, 832-837.

[116] UNCITRAL *Legislative Guide on Insolvency Law* (n 104).

international law and, perhaps more importantly, whether existing concepts are sufficiently broad to accommodate them.

c. Holdup resolution between public policy and natural justice

It has previously been pointed out that public policy is not a suitable concept to accommodate the holdup resolution function of a cross-border restructuring framework, at least within the context of choice-of-law rules. This conclusion now has to be elaborated, in view of the role of public policy in a judgment recognition framework. As a defence to the recognition of foreign judgments, public policy has traditionally been considered to enable a review of the substance, or rather the substantive effects of a foreign judgment.[117] Public policy effectively operates as an exception to the general principle that foreign judgments cannot be impeached on their merits. It can thus be conceptualized as the only truly substantive defence,[118] capable of precluding the recognition or enforcement of a foreign judgment on the basis that the substantive result reached by the foreign court oversteps the boundaries of tolerance of the forum.[119] In addition to its substantive aspect, public policy is also recognized as containing a procedural component and can therefore be relied upon to refuse recognition of a foreign judgment, where the procedure before the foreign court was, in some way, defective.[120] Considering that the fundamental elements of minority protection, as outlined above, touch upon both procedural and substantive considerations, public policy could in theory prove useful in comprehensively addressing holdup in a cross-border restructuring context.

As a matter of fact, public policy has been utilized, as a judgment recognition defence, to give effect to minimum protections for dissenting creditors in restructurings, as illustrated in the case of the Portuguese Railroads, an early French case from the 1940s.[121] In that case, a Portuguese company had issued several series of bonds in the French market, which were governed by French law and were held primarily by

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[117] Horatia Muir Watt, 'Evidence of an Emergent European Legal Culture: Public Policy Requirements of Procedural Fairness Under the Brussels and Lugano Conventions' (2001) 36 Texas International Law Journal 539, 548.
[118] Briggs, 'Recognition and enforcement of judgments (common law)' (n 39) 1480.
[119] Mills, *The Confluence of Public and Private International Law* (n 24) 6.
[120] Watt (n 117).
[121] The case is described in detail in Kurt H Nadelmann, 'Compositions: Reorganizations and Arrangements: In the Conflict of Laws' (1948) 61 Harvard Law Review 804, 805.

individuals, resident in France. When the company encountered difficulties, it decided to undergo a restructuring in its home jurisdiction, as provided by the Portuguese Railroad Arrangements Act. Under the terms of the proposed plan, the company would issue new securities to its bondholders in exchange for the old bonds. The plan was eventually approved by 91% of bondholders, voting in a single class, and later confirmed by the court of Lisbon. However, certain dissenting bondholders had already commenced proceedings before the French courts, demanding payment of monies due under the old bonds. It therefore became necessary to recognize the effects of the Portuguese restructuring plan in France. Under French law, a restructuring plan was considered a foreign judgment and therefore had to be recognized and declared enforceable in France under an *exequatur* procedure. The French Supreme Court (where the dispute eventually culminated) refused to recognize and give effect the Portuguese plan, ruling that the voting procedures under Portuguese law, which provided that all affected creditors vote in a single class, contravened French public policy, as expressed in the respective French legislation for company arrangements. As echoed in the Court's opinion, 'we hold that the circumstances, under which the will of the majority was ascertained, do not fulfil the requirements of French public policy, as affirmed by the protective provisions in the decree-law of October 30, 1935 (i.e. the respective French legislation on the subject).'[122]

The Portuguese Railroads case illustrates the potential usefulness of public policy in addressing holdup concerns in the context of cross-border restructurings. In sidestepping the issue of whether the decision of the majority better served the common interests of creditors,[123] the French Supreme Court recognized that majority power must be placed under certain limits. Even though the plan was presented in good faith and had been approved by the vast majority of creditors, the way that this majority was formed was, in the view of the Court, suspect. Nevertheless, it must be pointed out that the limitations of public policy, as they have already been analysed, remain pertinent and continue to apply, even in the face of Portuguese Railroads. For one thing, it must be pointed out that it was rather helpful to the court that all the dissenting bondholders were resident in France or were French citizens. Viewed from this perspective, the judgment can be considered as supporting the proposition that

[122] ibid 806.
[123] ibid.

recognition of a foreign plan can take place with proper safeguards to local interests.[124] But, what if the interests of the creditors involved were not local, e.g. involving bondholders not resident in France? It is not clear that the French court would have reached the same conclusion, if the case lacked the necessary proximity to France, even though the holdup concerns presented would have been identical. The constraint of proximity can therefore significantly limit the efficiency of the public policy defence.

In addition, the French court identified majority voting in separate classes as a French domestic public policy, by referring to voting requirements under French law. However, since public policy is generally considered to be a relative concept,[125] it is not straightforward that a similar court today (almost a century later) would reach the same result. A violation of a purely domestic public policy may well be considered insufficient to refuse recognition of a foreign plan. Nor is it reasonable to assume that voting requirements could be classified as part of 'international public policy', especially considering the absence of any international instruments elevating these requirements to the status of universally shared norms. Even more importantly, the judgment leaves unanswered the question of which other elements of a domestic restructuring procedure should be 'clothed with the garb' of public policy. Such conclusion is not straightforward, not even when the important substantive limitations, such as the non-infringement of liquidation value, are concerned. In that sense, the relativity of public policy presents creates uncertainties in the context of reviewing the procedures as well as the substance of a judgment produced in a foreign forum.

The foregoing analysis suggests that, in order to formulate an appropriate defence in cross-border restructuring law that can encompass the procedural and structural elements of minority protection, it is necessary to look elsewhere. It may be possible to draw some inspiration by looking at another defence that is relied upon by English courts to refuse the recognition of foreign judgments, namely the defence of natural justice.[126] The concept of natural or substantial justice, as developed in English case law, is associated with certain minimum requirements of procedural justice that must

[124] ibid 807.
[125] Mills, 'The Dimensions of Public Policy in Private International law' (n 25) 213.
[126] *Pemberton v Hughes* [1899] 1 Ch 781.

be adhered to by the foreign court in the issuance of the foreign judgment.[127] These requirements are primarily envisioned as procedural and include, first and foremost the issue of notice to the parties and the opportunity to be heard.[128] That being said, the concept of substantial justice may also be offended by other rules employed by the foreign court; in *Adams v Cape*[129] for instance, a default judgment was considered to violate English notions of substantial justice, on the grounds that the damages awarded to the plaintiffs were not the result of judicial assessment but were computed on an average-per-claimant basis, without an actual evidentiary hearing. In essence, the natural justice defence enables the party against whom the judgment is invoked to 'impeach the justice of the judgment' by showing it to be irregularly, or unduly, obtained.[130] The same principle is also reflected in a number of statutory provisions, both domestic as well as international, which provide for the refusal of recognition or enforcement of foreign judgments, especially default judgments, if certain fundamental procedures as regards notice of proceedings to the parties have not been followed.[131] Although, the exact formulation of this defence naturally differs between jurisdictions,[132] the concept of natural justice is almost universally recognized as a specialized defence and, in any case, a distinguishable concept from public policy.

There are several reasons to suggest that the natural justice defence could in theory operate more efficiently as a filter against holdup behaviour in cross-border restructurings, especially as regards procedural elements. One important consideration is that, unlike public policy, natural justice does not necessarily operate

[127] Celia Wasserstein Fassberg, 'Rule and Reason in the Common Law of Foreign Judgments' (1999) 12 Canadian Journal of Law & Jurisprudence 193, 205.
[128] *Buchanan v Rucker* (1808) 9 East 192; *Jacobson v Frachon* (1927) 138 LT Rep 386.
[129] *Adams v Cape Industries Plc* [1990] Ch 433.
[130] Andrew Dickinson, 'Schibsby v Westenholz and the Recognition and Enforcement of Judgments in England' (2018) 134 Law Quarterly Review 426.
[131] In the UK, such requirements are included in s. 9(2)(c) Administration of Justice Act 1920 and s.4(1)(a)(iii) Foreign Judgments (Reciprocal Enforcement) Act 1933. Perhaps the best exposition of these principles can be found in art. 45(1)(b) of the Brussels I Recast Regulation (Regulation (EU) No 1215/2012), which provides that the recognition of a judgment given in default of appearance, shall be refused, 'if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so'. The 2005 Hague Convention on Choice of Court Agreements includes similar stipulations in art. 9(b).
[132] In the United States for instance, where judgment recognition is regulated at the state level, the concept of natural justice is encapsulated in the requirement that the proceeding, leading to the foreign judgment was compatible with the requirements of 'due process of law' (s. 4(c)(8) Uniform Foreign-Country Money Judgments Recognition Act 2005): *Osorio v Dole Food Co* 665 FSupp2d 1307 (S.D. Fla.).

within the same constraints of proximity or relativity. As a matter of fact, it is possible to view this defence as some form of protection of international procedural rights.[133] In that sense, there seems to be a close link between the concept of natural justice and human rights, especially the right to fair trial,[134] even though, traditionally, the natural justice defence has been considered as operating in isolation to human rights considerations.[135] In any case, the fact that the principles underpinning natural justice are considered fundamental, even to the extent that they are universally recognized, suggests that natural justice can generally be invoked in any case that these principles are violated, even when the party, whose rights have been infringed, has a weak connection to the forum. In short, natural justice, while in principle limited to procedural aspects of foreign proceedings,[136] can potentially be applied to a broader set of circumstances than the public policy defence, in a similar scenario.

At the same time, the natural justice defence may operate in a more targeted way compared to public policy. Whereas public policy implicates (as the term itself suggests) the public interests of the forum,[137] the concept of natural justice revolves around the rights of private parties. A corollary of this, more private, nature is that it its availability may be affected by the conduct of the parties in foreign proceedings, especially the potential failure to object to the violation of their procedural rights. Thus, it is accepted that the failure of the affected party to avail itself of a remedy that would be available in the foreign forum cannot be disregarded as far as the application of the natural justice defence is concerned;[138] although whether such failure would create an estoppel effect to raise the defence in a particular case would have to be assessed on the basis of the broader merits.[139] By placing the interests of private parties at the

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[133] Mills, *The Confluence of Public and Private International Law* (n 24) 264.

[134] Art. 14 United Nations International Covenant on Civil and Political Rights; Art. 6 European Convention of Human Rights.

[135] JJ Fawcett, 'The Impact of Article 6(1) of the ECHR on Private International Law' (2007) 56 International and Comparative Law Quarterly 1, 21-23.

[136] Although *Adams has* been criticized as stretching the scope of the defence to include substantive, in addition to procedural matters and thus directly disparaging foreign procedures: Fassberg (n 127) 208.

[137] Mills, *The Confluence of Public and Private International Law* (n 24) 191; Mills, 'The Dimensions of Public Policy in Private International law' (n 25).

[138] *Adams v Cape Industries Plc* (n 129) 569.

[139] AV Dicey and others, *Dicey, Morris & Collins on the Conflict of Laws*, vol 1 (16th Ed., Sweet & Maxwell 2019) para 14–167. Statutory instruments that include specific formulations of the natural justice defence also frequently make the defence conditional on the affected party not having failed to raise it in foreign proceedings: see art. 45(1)(b) Brussels I Recast Regulation; art. 9(1)(b) 2005 Hague Convention on Choice of Court Agreements.

epicentre of the inquiry, the natural justice defence can be more easily reconciled with the economic underpinnings of minority protection and thus ensure a more efficient balance of competing interests.

Still, the fact that natural justice may, in some respects, be superior to public policy should not distract us from the inherent limitations of the concept, especially when applied to the recognition of foreign restructuring plans. For instance, it should be borne in mind that the natural justice defence has been developed with adversarial proceedings in mind.[140] It is therefore doubtful whether the basic tenets of minority protection, as identified above, could all fit within the scope of the defence's current form. This concern is especially pertinent for the substantive limitation of no-infringement of the liquidation value of creditors' claims, which, being substantive, would be difficult to conceptually fit within the procedural contours of natural justice. Whereas natural justice is frequently conceptualized as flexible, with courts noting that '[t]he notion of substantial justice must be governed in a particular case by the nature of the proceedings under consideration',[141] such flexibility is not unlimited. In the absence of any statutory guidance, it would be very challenging for courts to formulate a restructuring-centred notion of natural justice and even more importantly one that could, in theory, accommodate all the basic tenets of minority protection. As a result, it would be preferable to move away from natural justice and develop an alternative defence that can adequately accommodate all safeguards against holdup that have been identified by the preceding economic analysis.

d. Formulating the defence: adequate protection and minimum requirements of foreign proceedings

In conceptualizing a specialized defence to the recognition of foreign restructuring plans, it is first necessary to consider the optimal way of formulating the required legal norm. As the previous analysis has illustrated, there are many alternative ways, in which defences to judgment recognition may be expressed. In broad terms, they can take the form either of a general standard, such as natural justice or due process, or

[140] This is true both for the general concept of 'natural justice' as applied by the courts as well as its various statutory pronouncements, which are included in instruments that specifically exclude insolvency and restructuring law from their scope of application: see Block-Lieb (n 64) 19-20.
[141] *Adams v Cape Industries Plc* (n 129) 566 [Slade LJ].

a specific rule, such as the designation of particular procedural requirements (i.e. notification to the litigating parties) that have to be met in a foreign proceeding. On a conceptual level, the choice between a specific rule and a general standard involves a trade-off between different types of costs and benefits. Rules for instance can encourage more effective compliance and have lower costs of adjudication than standards.[142] At the same time however, they also have higher costs of being promulgated[143] and may therefore end up being too narrow.[144] Still, these costs may be ameliorated, if the regulated behaviour arises frequently and is relatively homogeneous.[145] As a general matter, the optimal way of expressing a particular legal command depends largely on the type of conduct that is the subject of regulation and, as a result, the structure of legal norms naturally differs from one area of law to the other.

As far as the field of private international law is concerned, rules are generally considered preferrable to standards, both in matters of choice of law as well as in matters of jurisdiction and judgment recognition. Although standards may more easily reach a just outcome in individual cases, the fact that the problems presented in the context of jurisdiction or judgment recognition are iterative[146] suggests that the risk of under-inclusivity, as noted above, is reduced. In addition, rules will have low specification costs and courts will be more likely to reach consistent outcomes in their application across a large number of individual cases.[147] Nevertheless, the development of a specific holdup-oriented defence for foreign restructuring plans may not be adequately expressed in the form of a rule. Unlike violations of natural justice, which are typically manifested in an iterative manner, as the infringement of specific procedural rights, holdup instances can take a variety of different forms. As has been

[142] Giesela Ruhl, 'Methods and Approaches in Choice of Law: An Economic Perspective' (2006) 24 Berkeley Journal of International Law 801, 833.
[143] Louis Kaplow, 'Rules versus Standards: An Economic Analysis' (1992) 42 Duke Law Journal 557, 572-573.
[144] This risk is frequently referred to as underinclusion: Isaac Ehrlich and Richard Posner, 'An Economic Analysis of Legal Rulemaking' (1974) 3 The Journal of Legal Studies 257, 267.
[145] ibid, 273.
[146] Ruhl (n 142) 835.
[147] Whincop (n 76) 433. This can also explain why, in the field of judgment recognition, standards have evolved and have transformed into rules over time, as a result of their application by the courts and this has made them commands; for instance, the natural justice defence, while beginning as a general standard, has over the years crystallized into specific procedural requirements, such as adequate notice etc: cf. Kaplow (n 143) 612-614.

noted, every firm is distressed in its own particular way[148] and every restructuring raises its own distinctive holdup concerns. In addition, advantage-taking against dissenting minorities is constantly being shaped by practice. A look at modern restructurings illustrates many novel, potentially abusive, strategies that have created significant controversies as to their legitimacy, even within the context of a single jurisdiction.[149] This further suggests that the holdup phenomenon is likely to be non-homogeneous. As a result, if a holdup-oriented defence were to be expressed as a rigid rule, it is likely that it would end up being under-inclusive.

In general, the problem of under-inclusivity of legal rules can be addressed by combining or 'backing up' the rule with a standard.[150] Whereas this approach can provide courts with some flexibility to apply the norm to a potentially wider scope of cases, it necessarily sacrifices some of the benefits of a rule-based formulation, such as certainty and predictability, which may end up undermining the framework's overall efficiency. Still, the combination of a rule with a standard does not lead to unfettered discretion: rather the existence of specific rules alongside a general standard would limit, as necessary, the scope of the standard and thereby also provide some certainty and predictability in the cross-border recognition of restructuring plans.[151] Considering the characteristics of cross-border restructuring law and the peculiar problems that it presents, it would therefore be desirable to articulate a defence in the form of a general standard of protection, which would then be specified, albeit non-exclusively, by specific procedural rights that have to be afforded to the dissenting minority.

Accordingly, the first issue that needs to be tackled is the identification of the appropriate standard of protection that would form the basis of the defence. As a matter of first order, it is generally preferable to resort to terms and concepts that are familiar in the field of cross-border insolvency and restructuring, as this would avoid the need to define a novel term from scratch and minimize the risk of misconstruction. At the same time, a concept that has already been identified as constituting part of a

[148] Anthony J Casey, 'Chapter 11's Renegotiations Framework and the Purpose of Corporate Bankruptcy' (2020) 120 Columbia Law Review 1709, 1738-1739.
[149] Edward J Janger and Adam J Levitin, 'The Proceduralist Inversion–A Response to Skeel' (9 February 2024) <https://www.yalelawjournal.org/forum/the-proceduralist-inversion-a-response-to-skeel> accessed 19 March 2024.
[150] Ehrlich and Posner (n 144) 268.
[151] In that sense, the backing up of a standard by a rule also addresses the risk of over-inclusivity: ibid.

cross-border framework carries a lower risk of inconsistent interpretations between courts of different jurisdictions. One such term is the concept of 'adequate protection'. This term is familiar in cross-border insolvency and restructuring law, featuring both in the Model Law[152] as well as the MLJ.[153] However, several issues must be pointed out. First of all, 'adequate protection' has so far been utilized only as a factor conditioning the provision of discretionary relief to foreign insolvency proceedings, under the Model Law. In considering whether the rights of domestic creditors are adequately protected in a foreign proceeding, courts engage in a comparison between the actual treatment of affected creditors under foreign and domestic insolvency law.[154] The application of adequate protection, in its present form, thus involves substantive determinations by the court of recognition. Furthermore, the standard, as currently articulated, is too broad as it considers the rights, not just of creditors, but all other interested persons, including the debtor. Whereas this wide-ranging formulation may have some utility in the context of discretionary relief, it seems misplaced in cross-border restructurings, since holdup concerns arise primarily in respect of creditors and do not implicate the interests of the debtor.

It is therefore necessary to introduce some modifications to this standard in order to ensure that it can properly function as a defence against the recognition of foreign plans. First of all, the personal scope of adequate protection must be limited to refer to creditors, as the primary constituents, who are vulnerable to abusive behaviour and thus merit protection against the risk of holdup. In regard to its material scope, adequate protection must also be slightly tweaked in order to minimize, as far as possible, a review of the substantive determinations of the court of recognition. This would ensure that the overarching principle of judgment recognition, namely that the court of recognition should not be able to review the merits of the foreign judgment, is respected. Such reconceptualization can be achieved through the inclusion of a list of certain fundamental requirements, which must be met in a foreign proceeding and

[152] Art. 22 Model Law states that a court may grant additional relief to a foreign insolvency practitioner, if it is 'satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

[153] Art. 14(f) MLJ stipulates that that in cases of foreign judgments materially affecting the rights of creditors, such as by determining whether a plan of reorganization should be confirmed, recognition may be refused, if the interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued.

[154] See Chapter III, Section 2.c: c.f. *In re Sivec SRL* 476 BR 310 (2012) (Bankr ED Okla); *In re International Banking Corp BSC* 439 BR 614 (2010) (Bankr SDNY).

whose violation would trigger an infringement of the adequate protection standard. Although the list will be non-exclusive, the enumeration of these elements can serve to indirectly restrict the scope of the standard so that it does not lead to a substantive relitigation of cross-border restructuring cases. At the same time, reliance on certain enumerated factors is already the practice of US courts in relation to foreign restructuring plans; in applying the general standard of comity, US jurisprudence also refers to specific factors influencing the comity determination, as enumerated in statute or in prior jurisprudence, in order to reach a conclusion on recognition or non-recognition of plans in individual cases.[155] As a result, narrowing down the scope of adequate protection through the parallel enumeration of certain fundamental procedural requirements is both beneficial and workable within the framework of cross-border restructuring law.

The economics of efficient bargaining can provide a ready list of the basic procedural and structural elements that can serve as focal points as well as guidance in the application of the adequate protection defence, as follows:

(i) The right of all affected creditors to vote on the plan

The participation of creditors in the decision-making process constitutes, as already noted, an elementary, yet fundamental protection against advantage taking. Participation necessitates that all creditors, whose legal rights are impaired or otherwise affected by the plan, are provided with an opportunity to vote or otherwise express their opinion whether the collective arrangement is desirable or not. Naturally, the requirement of participation does not extend to parties, whose rights are not affected by the plan, since such parties are not vulnerable to holdup risk. As a result, the requirement of adequate protection will not be considered to have been violated, if the voting rights of 'non-affected' creditors have been restricted in the foreign proceedings,[156] or if there exists a presumption that such 'non-affected' creditors are

[155] *In re Vitro SAB de CV* 701 F3d 1031 (2012) (5th Cir); *In re Rede Energia SA* 515 BR 69 (2014) (Bankr SDNY); *In re Oi SA* 587 BR 253 (2018) (Bankr SDNY).

[156] In the UK, a debtor may propose a scheme only to a certain group or class of creditors, 'as the case may be': see *Re British And Commonwealth Holdings Plc (No3)* [1992] 1 WLR 672. As a result, it is not necessary for the company to consult any class of creditors, who are not affected by the scheme: *Re Bluebrook Ltd* (n 113) (Mann J).

deemed to vote in favour of the plan.[157] In addition, the participation requirement should be construed strictly and not be read to cover other aspects of the voting process. For instance the fact that, under the foreign restructuring proceeding, the necessary voting thresholds are defined differently, either as different percentages or by reference to a different measure (the number of creditors as opposed to the value of claims) compared to domestic restructuring law, cannot constitute a valid reason for refusing to recognize a foreign restructuring plan. As long as all affected creditors have been provided with an opportunity to vote on the sanctioned plan, the rights of creditors should be deemed to have been adequately protected.

(ii) The provision of adequate information to creditors before voting on the plan

It has already been pointed out that the provision of necessary information to creditors, in the form of a disclosure or explanatory statement is an important safeguard against abuse. Thus, failure to provide creditors with adequate information should be considered a violation of the principle of adequate protection and therefore a legitimate ground to refuse the recognition of a foreign plan. The measure of adequacy of the provided information will have to be determined by the court of recognition. It should therefore be within the court's discretion to consider the information provided in a foreign proceeding inadequate and thereby find a violation of adequate protection. In making that determination, courts are likely to refer to their domestic requirements for information disclosure. It must be underlined however that full equivalence of disclosure requirements is not necessary for a foreign plan to be recognized. Rather, the court of recognition should generally interpret this rule strictly and determine the inadequacy of information, by considering whether the information provided was such as not to enable the dissenting creditors to make an informed decision on the approval of the plan.

(iii) The assignment of creditors into separate classes based on the similarity of their rights and non-discrimination

[157] Under the US Bankruptcy Code, if a class is unimpaired, it is considered to have accepted the plan (11 U.S. Code § 1129(a)(8)). A class is considered impaired, unless the plan leaves class members' rights unaltered, cures any default, and compensates for any damage (11 US Code §1126).

The constitution of separate classes of creditors is an important protection against advantage taking. In the absence of this requirement, an abusive debtor would be able to discriminate between creditors in order to secure endorsement of the necessary majorities to approve the plan. This manifestation of abuse is especially pronounced in the case of underinclusion, where dissenting creditors are placed in a single class with other more amenable creditors, in order to mute their dissent and thus secure the approval of the plan by that class.[158] As a result, adequate protection in the context of a foreign proceeding, involves the formation of the appropriate number of creditor classes, on the basis of the similarity of creditor rights. A necessary corollary of the constitution of separate creditor classes is the principle that all creditors within the same class should receive the same treatment under the plan, so that the debtor may not discriminate between similarly situated creditors in order to manipulate the majoritarian requirement. These principles ensure the integrity of the structure of collective bargaining and decision making[159] and therefore any violation thereof, as may be determined by the court of recognition, should lead to the refusal of recognition of a foreign plan.

(iv) The determination by the court, on the basis of evidence submitted by the parties, that dissenting creditors are not deprived of the liquidation value of their claims under the plan

The liquidation value of a dissenting creditor's claim is the minimum substantive entitlement that cannot be infringed by majority vote. However, the degree, to which these aspects of a foreign plan may be reviewed by the court of recognition creates conceptual difficulties, since a proper consideration of these issues unavoidably involves an examination of the substantive determinations of the foreign court, especially on the issue of valuation. As a matter of principle however, these questions constitute part of the merits of the judgment confirming a restructuring plan. If dissenting creditors could reopen the valuation question at the stage of recognition, then the entire case would be effectively relitigated, which would in turn undermine the

[158] The reverse problem of overinclusion, namely when similarly situated creditors are split in different classes, poses a risk to the application of cramdown provisions, which usually require that at least an impaired class approve the plan: see Norberg (n 108) 122. This risk however is not covered by the adequate protection standard.
[159] UNCITRAL, *Legislative Guide on Insolvency Law* (n 104) 222.

effectiveness of the original restructuring. For that reason, the substantive determinations of the foreign court have to be placed outside the purview of the court of recognition and this ground should not be construed as enabling a reopening of the valuation question at the recognition stage. It should merely suffice that the foreign court has determined, on the basis of the evidence submitted by the parties, that the plan does not infringe the liquidation value of their claims. This formulation would not necessarily require the foreign court to positively ascertain, at the time that the plan is sanctioned, that the liquidation value of the dissenting creditors' claims is respected.[160] Rather, the substantive determinations on issues, such as valuation, would be treated as a factual issue, which, upon determination by the foreign court, would not be reviewable at the stage of recognition. In that sense, review would be limited to the procedural aspects; the standard of adequate protection would be violated, if creditors raised issues of infringement of their minimum entitlement and the foreign court did not determine, on the basis of valuation evidence, that they receive at least the liquidation value of their claims. This formulation balances the requirement of respecting the substantive determinations of the foreign court with the need to ensure that all manifestations of holdup are addressed at the stage of recognition.

(v) The right of creditors to appear at the confirmation hearing and express objections to confirmation

In considering whether to confirm or sanction a restructuring plan that has been approved by the requisite creditor majorities, the court will normally evaluate a number of issues, as may be provided under the applicable restructuring law. These issues may include whether the aforementioned procedural requirements have been abided by but will normally also extend to more substantive aspects of the plan, such as whether the plan is feasible,[161] proposed in good faith[162] or whether certain substantive entitlements have been respected. One important procedural safeguard for creditors, who have been disadvantaged by the plan is that they be afforded the opportunity to

[160] In that sense, a scheme of arrangement would merit recognition, even though the non-violation of the creditors' liquidation entitlement is not an explicit condition to the sanctioning of the scheme, but can be examined, in the exercise of the court's discretion, if any dissenting creditor raises such an objection: see *Re Bluebrook Ltd* (n 113).
[161] 11 U.S.C. §1129 (a)(11).
[162] 11 U.S.C. § 1129(a)(3).

appear at the confirmation hearing and voice their objections regarding the applicable confirmation requirements, before the court.[163] This requirement is more similar to the traditional conception of the natural justice defence, as formulated in the context of bilateral dispute; all creditors have to be notified of the hearing and must be given the opportunity to attend and submit any challenges against confirmation. By allowing creditors to voice their objections before the confirmation of the plan, the potential for advantage-taking or abuse is significantly reduced. It should thus be considered a grave violation of adequate protection, if interested parties were not given the opportunity to express their disagreements on the question of ratification.

The aforementioned requirements provide an indicative list of the main safeguards that have to be met in the foreign proceeding to ensure that the rights of dissenting creditors are adequately protected. It should be emphasized once more however that the above list does not offer a ready solution for every conceivable procedural deficiency that may ensue in the context of a foreign restructuring proceeding. As a matter of fact, the court of recognition would still retain a discretion to refuse recognition in any other instance, where dissenting creditors would not have been afforded adequate protection, such as for instance when the approval of the plan has been the result of votes by insiders. As a result, the exact scope of the adequate protection defence will need to be shaped by judicial practice.

Previous experience in the field of cross-border insolvency, especially on the issue of discretionary relief, as previously examined, has demonstrated that courts are able to exercise their discretion in a way that promotes the objectives of the cross-border framework. In any case, when exercising their discretion in the context of the adequate protection defence, courts should always be cognizant that the application of the defence has to operate as a high bar to avoid upsetting the operation of the rule. This may mean that most foreign plans will be able to pass muster under the test, provided that they meet the predefined requirements and do not present any other visible holdup concerns. This is however not an undesirable outcome per se. As a matter of fact, the effectiveness of a defence to recognition is not measured by how often it is

[163] In the context of an English scheme or restructuring plan, there are no statutory provisions restricting those who can oppose a scheme, and, as a result, even third parties, including creditors unaffected by the scheme or even shareholders, may appear and voice objections against the sanctioning of the scheme.

invoked but rather as to whether it successfully discourages abusive or inefficient conduct.[164] In that respect, the suggested defence has the potential of appropriately addressing the risk of holdup by identifying, on the one hand, the main and most characteristic elements of abuse against dissenting creditors, while, on the other hand, providing courts with some residual discretion to adequately deal with any novel challenges that may be posed by contemporary restructuring practice.

Finally, it must be pointed out that the defence of adequate protection would not exclude the application of public policy. After all, public policy is considered a general principle in the field of private international law,[165] which forms part of the underlying structure of any judgment recognition framework.[166] As such, the public policy defence, operating under its usual constraints, could still be relied upon, as a residual rule, to refuse the recognition of a restructuring plan for reasons other than those envisaged by the suggested formulation of adequate protection. So for instance, a violation of creditor rights in the context of the application of cross-class cramdown (such as absolute priority from the US perspective)[167] could potentially be considered a bar to recognition, through the lens of public policy. In that sense, the proposed defence would not displace public policy but rather complement it in order to ensure that certain fundamental protections against hold up are respected in the foreign jurisdiction, without the limitations imposed by the constraints of public policy.

5. Conclusion

The preceding analysis illustrates that it is indeed possible to envision an alternative framework for cross-border restructurings, namely a third way, between the prevailing conceptions of cross-border restructuring law, either as part of the international insolvency architecture or as an expression of issues of contractual choice of law. The

[164] One such example is section 68 of the Arbitration Act 1996, which enables an English court to set aside an arbitral award on the ground of 'serious irregularity affecting the tribunal, the proceedings or the award.' Even though such applications to set aside are rarely accepted, this provision serves a valuable function by discouraging inefficient or abusive behaviour, when the arbitration is taking place: see David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (3rd edn, Sweet & Maxwell 2015) para 16.25.
[165] Franco Mosconi, 'Exceptions to the Operation of Choice of Law Rules', *Recueil des cours, Collected Courses of the Hague Academy of International Law* (Leiden, Brill | Nijhoff 1989) vol 217, 53.
[166] ibid 30.
[167] Douglas G Baird and Robert K Rasmussen, 'Boyd's Legacy and Blackstone's Ghost' (1999) 8 The Supreme Court Review 393. However, US courts generally do not consider that a foreign plan that does not conform to the absolute priority rule violates US public policy: see *Rede* (n 155).

classification of restructuring plans as judgments and the need to develop a specialized framework of judgment recognition unavoidably invites a thorough consideration of intricate and difficult aspects of private international law theory, such as the problems of indirect jurisdiction and the role of defences. An economic analysis of these issues leads to the design of a judgment recognition framework that conceptualizes jurisdictional requirements broadly and permissively but conditions the recognition of foreign plans not just on the public policy defence but also on the separate concept of 'adequate protection of dissenting creditors'. Such an approach has the potential to lead to efficient outcomes in cross-border cases, through the careful balancing of the dual considerations of holdout and holdup resolution and thus constitutes a principled improvement to alternative approaches and a valuable additional to contemporary academic discourse.

Of course, it is impossible to conclusively assess the efficiency of the proposed framework in abstract or theoretical terms. At the same time, it would be fruitless, though certainly tempting, to imagine how previous cases would have been decided under the proposed framework. What would be more worthwhile, in intellectual terms, is to consider whether the approach formulated in the present Chapter could prove practically relevant to alleviate some of the controversies that have ensued in the field of cross-border restructuring law. The obvious issue, where the proposed approach could prove consequential and useful is the application of the *Gibbs* rule in England. A consideration of the desirability of such a reform would involve not only an assessment of how such a specialized judgment recognition framework would fit within the broader context of English private international law but also a more practical investigation of whether existing instruments can serve as an impetus for reform along the lines that have been drawn here. The next Chapter will consider these issues.

CHAPTER VI: RETHINKING *GIBBS*- A REEVALUATION OF DOCTRINE AND A ROADMAP FOR REFORM

1. Introduction

It has by now become clear that the greatest share of the controversy that currently animates the academic debate in the field of cross-border restructuring law can be attributed to the effect of the *Gibbs* rule. Thus, any normative framework that aspires to attain any form of relevance in the field will need to present itself as a viable and realistic alternative to *Gibbs.* This case however cannot be made solely through reliance on efficiency considerations. If that were so, the arguments advanced in the previous Chapter would suffice to persuasively argue that *Gibbs* should be replaced by the proposed judgment recognition framework. Yet, doctrinal considerations also play an important role in the convergence of legal frameworks towards an efficient paradigm. As a matter of fact, doctrinal resistance can present obstacles to legal reform, especially if such reform involves a paradigm shift along efficiency lines.[1] This is even more so when the target of legal reform is a principle as seemingly entrenched within the fabric of English law as the *Gibbs* rule, as evidenced in the outcome of the recent consultations by the UK Insolvency Service.[2] It is therefore important to consider if and how the normative framework that has been developed in the preceding pages would fit with existing doctrine.

The present Chapter will seek to pick up the thread of the argument from previous Chapters and consider the doctrinal aspects of *Gibbs.* It has already been established that *Gibbs* is a normatively inefficient rule but one that continues to apply in England, even after the introduction of the Model Law and the development of universalist norms in cross-border insolvency. In that context, this Chapter will make an even more ambitious point than those previously made, namely that the proposed judgment recognition framework not only constitutes a more efficient alternative to *Gibbs* but

[1] The role of legal doctrine as an internal constrain to efficiency oriented legal reform has been illustrated in Eva Micheler, 'Doctrinal Path Dependence and Functional Convergence: The Case of Investment Securities' [2006] SSRN Electronic Journal < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=880110> accessed 19 March 2024.

[2] See Chapter IV, Section 3.b.

also one that fits more neatly within the broader framework of English private international law.

In advancing these arguments, the analysis will first attempt to establish the doctrinal foundations of *Gibbs* by considering its origins and historical development in English private international law. As will be demonstrated, the application of *Gibbs* to the recognition of foreign restructuring plans suffers from internal inconsistencies that are largely attributable to the rule's path-dependent development, which can be traced back to the English courts' early treatment of foreign bankruptcy discharges. Thereafter, the analysis will illustrate that the *Gibbs* rule is also systemically erratic and fundamentally at odds with the basic theoretical presuppositions of English private international law on the distinction between choice of law and judgment recognition issues, as has recently been affirmed and clarified in the context of the doctrine of the foreign act of state. Having concluded that *Gibbs* lies on shaky conceptual grounds, this Chapter will then proceed to consider whether, in spite of the proposals of the UK Insolvency Service, a complete adoption of the MLJ could constitute a viable and practical way to reform the English framework on cross-border restructurings towards a more doctrinally coherent approach. As will be asserted, though the MLJ may have its flaws and may not be suitable for wholesale adoption, this does not diminish the feasibility or desirability of the adoption of a judgment recognition framework for cross-border restructurings. In fact, far from constituting a revolutionary reconceptualization of the field, the introduction of such an approach in England would serve to reinstate the doctrinal coherence of English private international law.

2. Deciphering the doctrinal foundation of *Gibbs*

a. The question of bankruptcy discharges and the origins of *Gibbs*

A rather odd aspect of the debate surrounding the *Gibbs* rule is that, whereas the obvious inefficiencies, to which the principle leads, have often been the subject of ardent disapproval in academic literature, there seems to be a dearth of any meaningful or detailed consideration of its doctrinal coherence.[3] Perhaps this can be

[3] One such doctrinal critique of *Gibbs* can be found in Look Chan Ho, 'Recognising Foreign Insolvency Discharge and Stare Decisis' [2011] Journal of International Banking Law and Regulation 266. Although original, Ho's approach conflates issues of cross-border restructuring with cross-border insolvency and

attributed to the remote origins of the rule in 19th century jurisprudence, which makes the clear identification of its doctrinal foundations a particularly complex and cumbersome task. English courts, when called upon to apply the rule, also routinely sidestep the issue; for instance, Hildyard J's famous and forceful quotation that the ratio of *Gibbs* would be considered 'entirely obvious by a contract lawyer characterising the question as a contractual one (…) and applying ordinary conflict of law principles'[4] seems to be addressing the problem by merely stating it. The late Ian Fletcher was probably the first, and still the only, critic, who viewed *Gibbs* as premised on a doctrinal fallacy and a mischaracterization of the underlying legal issue.[5] At the same time, though he forcefully criticized the doctrinal coherence of *Gibbs* as a rule governing the effect of a foreign insolvency discharge, he did not seriously question, as a matter of legal doctrine, the application of the rule to the recognition of foreign restructuring plans. As a result, there has been, to date, no systematic doctrinal analysis of *Gibbs* as a rule of cross-border restructuring law.

Yet, such obvious disregard for the rule's doctrinal foundation has obscured several interesting questions. For instance, what can explain the obvious insularity of *Gibbs*? Truly, a puzzling aspect of the choice of law approach is that, historically, it has been propagated, almost exclusively, in common law jurisdictions and, out of all of them, most fiercely in England.[6] Yet, it has never seriously been considered why the English view developed, from a very early point, along these lines and how (and to what extent) that approach continues to be persuasive to this day. A consideration of these issues would not serve simply as a means to satisfy a legal historian's or a comparativist's intellectual curiosity. Rather, such an examination can provide valuable insights about how well-founded and consistent the existing doctrine is and thereby lead to especially useful conclusions about the feasibility of a potential paradigm shift. As a result, an examination of the rule's genesis and subsequent historical evolution is a necessary

thus concludes that *Gibbs* has been superseded by the Model Law, as being incompatible with the universalist approach that the latter espouses.

[4] *Re OJSC International Bank of Azerbaijan* [2018] Bus LR 1270 [47].

[5] Ian Fletcher, *The Law of Insolvency* (5th edn, Sweet & Maxwell 2017) para 29–065: see Chapter IV, Section 2.a.

[6] Kurt H Nadelmann, 'The Recognition of American Arrangements Abroad' (1942) 90 University of Pennsylvania Law Review and American Law Register 780, 789.

component of any analysis that seeks to establish the case for a reform of the English framework.

The origins of *Gibbs* can be traced back to the 18th century, when English courts were first presented with an issue that, from a contemporary point of view, has little to do with restructuring law, namely the effect in England of the discharge of a foreign debtor in personal bankruptcy. In *Smith v Buchanan*,[7] the first case that encountered this question, the plaintiffs had brought an action before the English courts for the recovery of sums due by the defendants under a contract that had been made in England. The defendants, who were citizens and residents of the state of Maryland in the United States, pleaded, as a defence to the claim, that they had obtained an order of discharge of all their remaining obligations by the Chancellor of the State of Maryland, under a state bankruptcy statute that provided debtors with a discharge, if they assigned all of their assets to a trustee for the benefit of their creditors. The Court of King's Bench however disagreed, holding that the Maryland discharge order could not affect claims governed by English law. As Lord Kenyon CJ famously stated 'it is impossible to say that a contract made in one country is to be governed by the laws of another'.[8] His view was further echoed by Lawrence J, who noted that the dispute rested 'solely on the question, whether the law of Maryland can take away the right of a subject of this country to sue upon a contract made here, and which is binding by our laws?', forcefully stating that '[t]his cannot be pretended.'[9] Thus, in their first encounter with the problem of the recognition of a foreign bankruptcy discharge, English courts characterized it as a contractual issue and resolved it by applying the relevant conflicts rule.

Nevertheless, in those early days, debtors often tried to challenge the prevailing view. In *Phillips v Allan*[10] the defendant had applied to the Court of Session to be declared bankrupt under a Scottish statute, which provided that a debtor could cede all his property to a trustee for the benefit of creditors, in exchange for his release from prison and the discharge of all remaining and unpaid debts. Notice was given to creditors to submit objections to the release and discharge of the debtor and the plaintiff, being a

[7] *Smith v Buchanan* (1800) 1 East 6.
[8] ibid at 11.
[9] ibid at 12.
[10] *Phillips v Allan* (1828) 8 Barnewall and Cresswell 477.

creditor himself, appeared before the court and argued against the granting of these benefits. When the Court of Session nevertheless ordered the debtor's release and discharge, the plaintiff sued under a bill of exchange in England. In opposing the suit, the defendant argued that the case should be distinguished from the rule established in *Smith v Buchanan,* since the plaintiff had appeared before the foreign court and had impliedly consented to be bound by its order of discharge. In his own words, '[a]ssuming that the Court of Session in Scotland is to be considered a foreign Court, it had jurisdiction to adjudicate upon this debt; and having adjudicated upon it, its judgment is binding on the plaintiff, who was a creditor of the defendant, and appeared before that Court to oppose his discharge'.[11] In advancing this position, the defendant attempted to frame the issue as one of judgment recognition, by arguing that the discharge should be recognized in England as the effect of a judgment of a foreign court of competent jurisdiction. The court however refused to entertain this view, considering that the plaintiff's participation in the foreign proceeding made no difference.[12] Nonetheless, it admitted that the case might have been decided differently, if the plaintiff had participated more actively in the foreign proceeding, such as by claiming relief from the court or receiving a dividend in the foreign proceeding, as this could be construed as consent to be bound by Scottish law and the judgment of the Scottish court.[13] By relying on these notions, the Court of Session thus insisted on viewing the problem as one of choice of law, implicating notions of implied consent to determine whether a foreign discharge could affect English debts.

The development of this early case law owes much to the prevailing socio-economic conditions of that era. The British economy, during the 19th century, was a net creditor[14] meaning that Englishmen would frequently invest in foreign countries and enter in commercial or financing arrangements with foreign debtors.[15] In that context, the protection of the rights of English creditors was a pressing consideration. The view

[11] ibid at 480.
[12] ibid at 484–85.
[13] ibid at 484.
[14] Elise Brezis, 'Foreign Capital Flows in the Century of Britain's Industrial Revolution: New Estimates, Controlled Conjectures' (1995) 48 Economic History Review 46, 56.
[15] Although, it has been pointed out that, until the late 19th century, British creditors seldom invested in countries other than the colonies or the United States: DCM Platt, 'British Portfolio Investment Overseas before 1870: Some Doubts' (1980) 33 The Economic History Review 1, 2. This can explain why, out of the entire corpus of 19th-century English case law on the issue, only *Gibbs* involved a debtor located in a jurisdiction other than the United States or a colony.

articulated in *Smith v Buchanan* essentially provided English creditors with a measure of protection, as it ensured that they would be able to sue in England to recover their debts against a foreign debtor, notwithstanding a bankruptcy discharge in the debtor's home jurisdiction. This concern with protecting (what was then viewed as) the legitimate expectations of English parties is evident in Lord Kenyon CJ's rhetorical question in *Smith v Buchanan*, which pondered 'how can it be pretended that he [i.e. an English creditor] is bound by a condition to which he has given no assent either express or implied?'.[16] Many of these early cases involved precisely these policy considerations.

In addition, this approach, at the time it was developed, aligned with the general predisposition of English courts to approach issues of cross-border bankruptcy law through the lens of choice of law. It should be remembered for instance that even the effect of foreign bankruptcies on assets situated in England was originally framed as a question raising choice of law issues.[17] This was pointed out by the court in *Smith v Buchanan* in response to the defendants' arguments, who complained that it would be inconsistent to recognize the proprietary effects of a foreign bankruptcy order and enable the foreign trustee to sue on the debts in England but refuse to recognize a foreign bankruptcy discharge as a valid defence to an action in England. The court however addressed the issue nonchalantly; in its own view, personal property and contractual claims were governed by different applicable laws, the former being subject to the debtor's *lex domicilii*, whereas the latter to the law of the country, where the contract was made.[18] It is thus clear that, at least in the early 19th century, the choice of law approach, as a doctrine, not only reflected an underlying policy to safeguard the contractual rights of English creditors against foreign debtors but also was in line with the general orientation of English law in the field of cross-border insolvency to subsume judgment recognition questions under the applicable law inquiry.

[16] *Smith v Buchanan* (n 7) 11.
[17] In the seminal case of *Solomons v Ross* (1764) 1 H Bl 131n, English courts had established the rule that a foreign bankruptcy declaration has the effect of vesting movable assets situated in England to the foreign trustee under the conflicts rule of '*mobilia sequuntur personam*', whereas the same effect could not be achieved in respect of immovables that followed the rule of lex rei sitae: see Chapter III, Section 2.a.
[18] *Smith v Buchanan* (n 7) 11.

Yet, although English courts quickly changed their views on the issue of recognition of foreign bankruptcy adjudications and began considering their effects in England as judgments,[19] the approach on foreign bankruptcy discharges, developed in *Smith v Buchanan,* persisted. This intransigence can be explained by reference to the context, in which the subsequent case law developed. During that period, English courts were often presented with the question of whether a discharge obtained in the colonies constituted a valid discharge in England. Such cases were usually resolved on the basis of a detailed and rather arcane consideration of the scope of the relevant statute, under which the discharge in question was granted. As English courts were quick to point out, if a discharge were granted in a colonial jurisdiction but under an act of parliament, whose application purported to extend to the colonies,[20] it would not be considered a 'foreign discharge', and could thus operate as a discharge of English law governed obligations.[21] Accordingly, this position meant that a discharge obtained in England would most likely extend to the colonies, considering that English statutes would often be construed as having a universal effect throughout the United Kingdom's dependent territories, and could therefore extinguish obligations contracted in the colonies.[22]

The fact that the early case law on foreign discharges raised such complex issues of commonwealth and colonial law led courts to focus, almost entirely, on the textual interpretation of the relevant statutes and thus never seriously question the antecedent question of the proper framing of the issue. Against this backdrop, the ruling in *Gibbs* must have seemed a foregone conclusion; in determining whether a French winding up could discharge English law governed debts the court merely applied the principles

[19] *Re Blithman* (1866) LR 2 Eq 23; *Re Davidsons Settlement Trusts* (1872-73) LR 15 Eq 383. That the common law regards the issue of recognition of foreign bankruptcies fundamentally as an issue of foreign judgment recognition is beyond doubt and has recently received explicit judicial affirmation by the Court of Appeal in *Kireeva v Bedzhamov* [2022] EWCA Civ 35.
[20] Even though, as a general principle, the imperial parliament was considered to have unlimited jurisdiction to legislate over dependent territories (such as colonies), it had long been conceded that an act of the parliament of the United Kingdom did not apply to dependent territories, unless otherwise provided expressly or by necessary intendment: see Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stevens & Sons 1966) 141.
[21] *Sidaway v Hay* (1824) 3 Barnewall and Cresswell 12; *Simpson v Mirabita* (1868-69) LR 4 QB 257.
[22] *Lewis Owen Edwards v Howard Ronald George Dickson and Thomas Learmouth* (1830) I Knapp 259; *Ellis v McHenry* (1870-71) LR 6 CP 228. The reverse proposition however does not hold true, since acts passed by the constituent legislative assemblies of colonial jurisdictions would not be construed to extend to other parts of the United Kingdom: see *Bartley v Hodges* (1861) 1 Best and Smith 375.

that had been established by *Smith v Buchanan*[23] and confirmed across a long line of case law throughout the 19th century.

In this progressive development of the contractual approach, culminating in the Court of Appeal's ruling in *Gibbs,* it is possible to discern elements of path dependence. Although it is evident that the original formulation of the rule served a particular socio-economic policy in 19th century Imperial Britain, the subsequent crystallization of the approach in legal doctrine owes much to the sequence, in which the case law developed. [24] As the application of the approach, introduced in *Smith v Buchanan,* raised more specific and complex questions of statutory construction in subsequent cases, English courts were not presented with an opportunity to consider the merits of the underlying rule. At the same time, litigant parties, especially defendants/debtors, avoided raising arguments on the issue, even though a close reading of *Phillips v Alan* seems to have, at least in principle, left the door open for a reconsideration of the veracity of the choice of law approach. It is perhaps telling that none of the cases after *Smith v Buchanan* even vaguely considered whether a foreign discharge order constituted an exercise of adjudicatory authority that would in principle justify the application of principles of judgment recognition. In this context, a self- reinforcing mechanism developed, as courts found that maintaining the same approach was both logically sound and expedient from their own narrow perspective.[25] The early English case law on the subject thus exerted a disproportionate influence on the development of *Gibbs* through the generation of positive feedback loop over time, which led to the entrenchment of the choice of law approach in English law.[26]

Nevertheless, it must be pointed out that all the cases that have been analysed so far, including *Gibbs,* were strictly limited to the question of discharge, whether in personal bankruptcy or in a corporate winding up. From a historical point of view, this should not be surprising. At the time, personal bankruptcies or (more rarely) corporate winding ups were the only context, in which the issue of mandatory discharge of contractual

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[23] *Antony Gibbs And Sons v Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399, 410.
[24] Oona A Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2001) 86 Iowa Law Review 601, 621-626.
[25] Alec Stone Sweet, 'Path Dependence, Precedent, and Judicial Power' in *On Law, Politics, and Judicialization* (1st edn, Oxford University Press 2002) 113.
[26] The disproportionate effect that early events have on the subsequent development of legal institutions is often referred to as 'nonergodicity': see Hathaway (n 24) 628.

obligations could conceptually arise.[27] In contrast to continental Europe,[28] mechanisms facilitating the collective decision making between creditors of a financially distressed debtor as a means to rescue the debtor's business were largely absent in England until the late 19th century.[29] As a matter of fact, the first case to encounter the question of discharge of debts in the context of a foreign restructuring was the case of *New Zealand*.[30] In that case, an English company, also trading in the colonies, including the Colony of Victoria, had entered into a scheme of arrangement with its creditors under the, then applicable, Joint Stock Companies Arrangement Act 1870. A creditor sued in Victoria claiming than the discharge afforded by the English scheme did not affect its claim, under the rule established in *Gibbs.* The defendant company, relying on prior case law, attempted to argue that the scope of the relevant statute made *Gibbs* redundant, by pleading that the English discharge was not a foreign discharge, since the Joint Stock Companies Arrangement Act 1870 was phrased in such a way so as to extend to the colonies and thus bind creditors in Victoria. The Privy Council however disagreed concluding that, unlike the Bankruptcy Act, which was ruled to extend to the colonies,[31] the Arrangement Act was only effective insofar as the claims in question were governed by English law.[32] As a result, it ruled that an English scheme could not bar a suit by a creditor, under a contract concluded in Victoria and thereby effectively solidified the application of *Gibbs* in the context of recognition of foreign restructurings.[33]

In one sense, *New Zealand* can be viewed as yet another step in the path-dependent development of the choice of law approach. In applying *Gibbs* to the cross-border

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[27] Louis Edward Levinthal, 'The Early History of Bankruptcy Law' (1918) 66 University of Pennsylvania Law Review 223, 224-225.
[28] In fact, Roman law had first provided the possibility of an arrangement, under a majority rule, in the case of insolvent estates of deceased individuals: see Roland Obenchain, 'Roman Law of Bankruptcy' (1928) 3 Notre Dame Law Review 169, 186.
[29] Kurt H Nadelmann, 'Compositions: Reorganizations and Arrangements: In the Conflict of Laws' (1948) 61 Harvard Law Review 804, 823. This can best be explained by the individualistic approach of English law on the issue of creditor rights, which was difficult to reconcile with majoritarian decision making: see Israel Treiman, 'Majority Control in Compositions: Its Historical Origins and Development' (1938) 24 Virginia Law Review 507, 524-525.
[30] *New Zealand Loan and Mercantile Agency Co Ltd v Morrison* [1898] AC 349, 358.
[31] *Ellis v McHenry* (n 22).
[32] In reaching this conclusion, the court seems to have considered the general principle applying in the realm of commonwealth relations, namely that, where a colony has been granted its own legislative institutions, the Crown's royal prerogative to legislate over that colony shall not be exercisable, unless there is an express reservation to that effect: see Roberts-Wray (n 20) 162.
[33] *Re Nelson* [1918] 1 KB 459.

recognition of schemes of arrangement, the court effectively avoided any consideration of the merits of the choice of law approach and merely applied, by analogical reasoning, the rule that had been developed for the recognition of foreign bankruptcy discharges to the recognition of foreign schemes of arrangement. From that perspective, the judgment in *New Zealand* can be characterized as a case of 'rational inertia',[34] namely the tendency of courts to apply existing concepts and rules (or their adaptive versions) to novel issues they may encounter.

Nevertheless, in applying *Gibbs* to the recognition of foreign plans, the court in *New Zealand* identified a problem, as was pointed out by the defendant: if an English restructuring did not discharge obligations contracted abroad, as the application of *Gibbs* would suggest, then the English arrangement would no longer be collective, notwithstanding an explicit reference in the Joint Stock Companies Arrangement Act 1870 that the scheme should affect 'all creditors'. It is not immediately clear why the same issue had not presented a problem to courts in earlier cases dealing with foreign bankruptcy discharges.[35] In any case, to contend that an arrangement, which was explicitly envisioned as collective, would have only a partial effect, vis-à-vis a specific group of creditors, presented a real conceptual difficulty. Though not directly relevant to the outcome of the case, the court in *New Zealand* tried to reconcile this apparent inconsistency, by arguing that the statutory provisions were 'expressed to extend to all creditors, and so they do, to foreign as well as Colonial creditors, but only when their rights are in question in the Courts of the United Kingdom'.[36] As Lord Davey J emphasized (quoting Holroyd J) '"All" means "all," wherever the creditors may be found, whether in the United Kingdom or in the Colonies or in foreign countries; and within the jurisdiction of the English Courts, all, wherever domiciled, will be bound by the result'.[37] This position seemed to reconcile the application of *Gibbs,* as the norm governing the recognition of foreign restructurings, with the conceptual difficulties raised by statutory text.

[34] Richard A Posner, 'Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship' (2000) 67 The University of Chicago Law Review 573, 585.
[35] Perhaps this can be attributed to the fact that the relevant statutes (e.g. s. 28 Bankruptcy Act 1883 c. 52) were not worded in such a way as to provide that a discharge affects 'all creditors' and so the courts did not really pick up the issue.
[36] *New Zealand* (n 30) 357.
[37] ibid at 358.

At this point however, the cracks begin to show. Though obiter, the suggestion that an English scheme would be considered to discharge all debts, even foreign ones, but only if this issue were brough for consideration before the English courts, is rather odd.[38] One potential explanation that is, at least superficially, in line with *Gibbs'* choice of law foundations is that the court considered the provisions of the Joint Stock Companies Arrangement Act 1870 to have a mandatory and overriding effect on foreign contractual debts. In that context, the Act's reference to 'all' creditors can be conceptualized as (impliedly) introducing a unilateral choice of law rule, providing for the application of English restructuring law on all contracts, even those governed by foreign law. Another explanation however, that can be better supported by the wording of the judgment, is that an English scheme should be considered to have a conclusive effect in England, as being somewhat similar to a judicial determination of the creditors' rights. One can discern some implicit references to such a view in Lord Davey J's explicit (and unusual) reference to the jurisdiction of the English courts as a factor determining the effect of a discharge.[39]

The dicta in *New Zealand* thus seem to imply that the reason why an English scheme can be regarded, in the eyes of English courts, as discharging obligations governed by foreign law is the fact that it constitutes a judgment, having full force and effect in England and thus binding all persons within the jurisdiction of the English courts. From that perspective, the basic premise of *New Zealand* appears to oscillate between choice of law and judgment recognition. Though constituting the foundational case for the current English approach to the problem of cross-border restructurings, the judgment *New Zealand* clearly is indicative of the doctrinal inconsistencies that unavoidably arise when *Gibbs* is applied to the recognition of foreign restructuring plans.

[38] A similar argument had been advanced in the context of personal bankruptcy discharge in the case of *Armani v Castrique*, where it was said, in an obiter fashion, that 'a foreign certificate is no answer to a demand in our Courts; but an English certificate is surely a discharge as against all the world in the English Courts': *Armani v Castrique* (1844) 13 Meeson and Welsby 443, 447. Yet, this dictum was not referred to in any subsequent case.

[39] At a later point in the judgment Davey LJ responds to the claimants' argument that the English court may discharge the liabilities of an English company by adding 'so far as the jurisdiction of that Court extends': *New Zealand* (n 30) 359.

The judgment recognition angle that has been lurking under the surface of *Gibbs* since *New Zealand* has, over the years, been made more explicit, further widening the rift between legal doctrine and practice. The best manifestation of this trend was the recent case of *Erste Group Bank AG (London) v JSC (VMZ Red October),*[40] which raised (once again) the question of recognition of a foreign insolvency discharge. In that case, a Russian guarantor of an insolvent debtor pleaded that there was no reasonable issue for the court to try a claim brought by an English creditor, because the guaranty had been set aside by an order of the Russian insolvency court. The claimant on the contrary argued that, since the guaranty was governed by English law, the rule in *Gibbs* suggested that its rights under the guaranty could not be affected by a Russian judgment. The Court of Appeal however disagreed arguing that, by submitting proof in the Russian insolvency, the creditor had submitted to the jurisdiction of the Russian courts and could therefore not rely on *Gibbs.*[41] This argument however directly contradicts the English courts' approach; if *Gibbs* is indeed premised on choice of law considerations, the jurisdiction of the foreign court, including the question of potential submission, should be irrelevant in determining the effect of the foreign discharge, as ruled in *Phillips v Allan*. As a matter of fact, this was also the conclusion in *Gibbs* itself, where the court had rejected the defendants' argument that, since the claimant had proven in the French winding up, his claim should be considered to have been discharged, irrespective of the proper law of the contract.[42]

It seems that, in reaching this outcome, the court in *Erste* was influenced by the Supreme Court's judgment in *Rubin,* which had already established that the participation in a foreign insolvency proceeding should be considered submission for the purposes of recognition of insolvency related judgments.[43] But as Gloster LJ himself admitted*,* the judgment in *Rubin* did not implicate *Gibbs.*[44] These inconsistencies do not seem to weigh particularly heavily in the minds of English judges. In fact, much like *Erste*, a consideration of the defendant's submission before the foreign court has now become a staple of the English court's approach in the

[40] [2015] EWCA Civ 379.
[41] ibid [76].
[42] *Gibbs* (n 23) 405.
[43] *Rubin v Eurofinance SA* [2012] UKSC 46.
[44] *Erste* (n 40) [76].

recognition of foreign plans.[45] Yet, this development undermines the coherence of *Gibbs'* doctrinal presuppositions and shifts the rule's conceptual underpinnings from choice of law to judgment recognition.

It has often been pointed out that a path-dependent development of the law on the basis of the incremental application of an established rule to novel problems can result in inefficient outcomes and equilibria.[46] Yet, the problem with the application of *Gibbs* to cross-border restructurings is not merely that the result may be inefficient but rather that the entire argumentation framework breaks down.[47] Starting from *New Zealand* as the foundational case for the application of *Gibbs* to foreign restructurings, a close reading of the development of the case law demonstrates that the application of a pure choice of law approach to address the problems of cross-border restructuring law is fraught with internal contradictions. The court in *New Zealand* seemed to have realized, presciently, that the application of a doctrine that was developed for bankruptcy discharges to the problem of cross-border restructurings brought to the forefront a number of problems. This can best be attributed to the conceptual differences between bankruptcy discharges and the discharge that may be provided under a restructuring plan, which renders the analogy in *New Zealand* false; whereas the former constitute blanket releases of a debtor's remaining obligations, primarily for its own benefit, the latter are part of a broader bargained release, serving (at least in principle) the interests of both the debtor and its creditor.[48]

Although it is evident that the Privy Council identified these inconsistencies, it refused to abandon its basic premise, and tried to explain away these contradictions by offering complex and ineffectual rationalizations, which however further undermined the rationality and persuasiveness of the choice of law approach. As a result, it set the English approach down a path, which, although prevailing to this day,[49] is internally erratic. Whereas *Gibbs* has traditionally been cited by English as standing for the

[45] *Re OJSC International Bank of Azerbaijan* [2019] Bus LR 1130 [28].
[46] Hathaway (n 24) 629, 636.
[47] Argumentation frameworks are another word to describe doctrine, namely a structure that organizes how parties to a legal dispute ask questions of judges and how courts frame their decisions: see Stone Sweet (n 25) 124.
[48] Nadelmann (n 29) 823.
[49] See Chapter III, Section 3.c.

proposition that a contract may not be affected by a law other than its proper law,[50] its application in the recognition of foreign restructuring plans oscillates between a choice of law and a judgment recognition paradigm. This lack of doctrinal consistency suggests that the application of *Gibbs* on the recognition of foreign restructuring plans is not premised on as strong a doctrinal footing as is often assumed.

b. The doctrine of foreign act of state: a clash of approaches?

In criticizing the English approach to the recognition of foreign bankruptcy discharges, the late Ian Fletcher had pointed out that *Gibbs* was an error of the court's own making. In his view, the court should not have considered the effect of the foreign discharge on an English contract as a matter of applicable law but should have instead posed the question of 'whether English law, as the proper law of the contract, ought to recognise the exercise of bankruptcy jurisdiction by the courts of the foreign country in question and, consequently, the effects resulting from those proceedings'.[51] But why should the English courts have treated the problem as one of judgment recognition instead of choice of law? Sure enough, such an alternative characterization would have avoided the inconsistencies of the English case law on the matter, as illustrated above. Nevertheless, Fletcher's observations do not seem to have accounted for the logical and doctrinal fallacies emerging from the application of *Gibbs* to the recognition of foreign restructuring plans. As already pointed out, his criticisms are limited to *Gibbs*, as a rule governing the effect of foreign insolvency discharges. Still, by insisting that the matter be approached by considering the effect of the exercise of jurisdiction by the foreign court, he implied that *Gibbs* stands in contrast to certain fundamental principles of English private international law, which govern the characterization of a conflict of laws question as an issue of choice of law or judgment recognition. These observations suggest that the *Gibbs* rule is not only internally incoherent but also systemically inconsistent with the broader framework of English private international law.

[50] It is perhaps telling that *Gibbs* was often cited as support for this contention in cases that had absolutely nothing to do with insolvency discharges: see *New Brunswick Railway Co Ltd v British And French Trust Corp Ltd* [1939] AC 1; *National Bank of Greece and Athens SA v Metliss* [1958] AC 509.
[51] Fletcher (n 5) para 29–065.

Some guidance on this question can be deduced from a rather unexpected source, namely the recent case law on the doctrine of the foreign act of state. In its most elementary form, this doctrine is considered to stand for the general maxim that an English court will not sit in judgment of the acts of a foreign state.[52] From this general maxim, several propositions follow, as clarified by Lord Neuberger's judgment in the landmark case of *Belhaj v Straw*,[53] of which however two are relevant for the purposes of the present analysis: first, that an English court will recognise the effect of foreign law in relation to any acts, which take place or take effect within the territory of the foreign state,[54] and secondly, that an English court will recognise the effect of an act of a foreign state's executive which takes place or effect within the territory of that state, especially in relation to property.[55]

Both of these propositions,[56] which are nonetheless qualified by the operation of public policy,[57] bear resemblance to conventional choice of law rules.[58] So, the fact that an English court will not question the effect of the law of a foreign state on property, whether tangible or intangible,[59] which is situated within the jurisdiction of that foreign state, can be conceptualized as stemming directly from the application of the *lex rei sitae*.[60] The potentially relevant choice of law rules are not limited to the *lex rei sitae* but may also include the *lex contractus*, as illustrated in the case of *Re Helbert Wagg and Co Ltd*.[61] In that case, the English courts argued that it was 'an elementary

[52] AV Dicey and others, *Dicey, Morris & Collins on the Conflict of Laws*, vol 1 (16th Ed., Sweet & Maxwell 2019) para 8–030; Mary V Newbury, 'Foreign Act of State—A Practical Guide from Buttes Gas to Belhaj' (2019) 1 Amicus Curiae 6, 7.
[53] [2017] UKSC 3. Lord Mance's judgment, although differing on certain points, is similar as far as their basic approach is concerned: see Newbury (n 52) 40.
[54] *Williams And Humbert Ltd v W&H Trade Marks (Jersey) Ltd* [1986] AC 368.
[55] *AM Luther Co v James Sagor And Co* [1921] 3 KB 532; *Princess Paley Olga v Weisz* [1929] 1 KB 718. Lord Mance and Lord Neuberger suggested that this rule is limited to property: see *Belhaj* (n 53) [64]–[84], [231]–[233]. Lord Sumption on the other hand subsumed this rule with the first one and considered that it also applies to instances of injury or death: see ibid [227]–[233]. However, the Supreme Court in *Maduro* ruled that this rule extended beyond property to issues such as executive appointments.
[56] The other proposition for which the doctrine stands is that an English court will refrain from resolving issues, which involve a challenge to the lawfulness of the act of a foreign State under public international law: *Buttes Gas and Oil Co v Hammer (No3)* [1981] 3 WLR 787. This however only applies when the lawfulness of the act of a foreign state is part of, and not incidental to, the underlying cause of action: see *Ukraine v Law Debenture Trust Corp Plc* [2023] UKSC 11 [189].
[57] *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19.
[58] *Buttes Gas* (n 56) 931; *Belhaj* (n 53) [150].
[59] *Peer International Corp v Termidor Music Publishers Ltd (No1)* [2004] 2 WLR 849.
[60] *Belhaj* (n 53) [35]–[36], [229].
[61] [1956] Ch 323. This case is cited as constituting an illustration of the act of state doctrine in practice in *Belhaj* (n 53) [36].

proposition that […] every civilized state must be recognized as having power to legislate in respect of movables situate within that state and in respect of contracts governed by the law of that state';[62] as a result, it was ruled that German legislation purporting to apply a moratorium on payments to foreign nationals by German companies could discharge obligations under a loan agreement governed by German law and the effect of such legislation could not be reviewed or challenged by the English courts.[63] In that sense, although the rule, as articulated in Dicey, is expressed in jurisdictional terms,[64] there is a close link between certain of its aspects and choice of law rules, essentially concerning the proper law to be applied to a particular issue.[65]

A corollary of the aforementioned aspects of the act of state doctrine that is consistent with their underlying choice of law foundations is that the doctrine's application is precluded, when the act in question (whether a legislative or executive act) extends outside the territory of that foreign state,[66] such as by affecting rights over assets located abroad or stemming from contracts governed by a different law. This latter point however constitutes precisely the normative underpinning of the *Gibbs* rule. As a matter of fact, in the case of *Smith v Buchanan,* Lord Kenyon CJ, arguing against the recognition of the Maryland discharge, postulated a scenario that was very similar to the facts of *Helbert Wagg*. In particular, he stated that if the discharge obtained in Maryland could discharge obligations under English contracts then '[i]t might as well be contended that if the State of Maryland had enacted that no debts due from its own subjects to the subjects of England should be paid, the plaintiff would have been bound by it'.[67] This argument suggests that the choice of law approach to cross-border restructurings can be viewed as merely the mirror image of the act of state doctrine, as applied to contractual rights and obligations. As a result, even though it is now generally conceded that the doctrine of the foreign act of state is not identical to the

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[62] *Re Helbert Wagg and Co Ltd* (n 61) 344–45.

[63] Except on grounds of public policy, which the court found not to be applicable, since the relevant German legislation constituted a legitimate exercise of foreign exchange control: ibid at 349.

[64] Rule 20 of Dicey (16th ed.) states that 'English courts have no *jurisdiction* (emphasis added) to entertain an action: (…) b) founded upon an act of state': Dicey and others (n 52) vol. 1, para 8R-001.

[65] Andrew Dickinson, 'Acts of State and the Frontiers of Private (International) Law' (2018) 14 Journal of Private International Law 1, 10. In the past, this had prompted some commentators to question, whether the doctrine was in fact necessary or provided any added value to the operation of traditional choice of law rules: FA Mann, 'The Foreign Act of State' in *Foreign Affairs in English Courts* (Oxford University Press 1986) 164.

[66] *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2012] EWCA Civ 855 [69].

[67] *Smith v Buchanan* (n 7) [11].

application of choice of law rules,[68] there seems to be a close link between the doctrine's application in cases like *Helbert Wagg* and the choice of law approach to cross-border restructurings, as articulated in *New Zealand, Gibbs* and their progeny. More importantly, the existence of this connection suggests that that the English courts' application of the doctrine of foreign act of state can potentially provide important insights as to the proper ambit of a choice of law approach.

There is one fundamental limitation that English courts traditionally recognize to the scope of the foreign act of state doctrine that should give us pause for thought. In particular, it is generally accepted that the doctrine can have no application as far as the effect of foreign judicial acts is concerned. For instance, in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd*,[69] the Privy Council concluded that foreign judgments should not enjoy the same degree of deference as foreign laws and therefore the foreign act of state doctrine, which normally precludes an inquiry into the validity of a foreign legislative or executive act, does not preclude an English court from assessing whether justice was done before a foreign court.[70]

This limitation was systematized in much more explicit terms in the Court of Appeal's judgment in *Yukos Capital Sarl v OJSC Rosneft Oil Co.*[71] In that case, the claimant contended that certain Russian judgments, which had annulled a Russian arbitration award, should not be recognized in England, because they were issued in a partial and dependent process that offended English notions of substantial justice. The defendants on the other hand argued that the inquiry into the arguments relating to bias (such as the alleged political campaign to expropriate the assets of a Russian corporate group and imprison its ultimate owner) required English courts to assess the validity of acts of state, which was barred by application of the act of state doctrine. Nevertheless, Rix LJ, following *Altimo,* ruled that judgments should not be considered acts of state for the purposes of application of the doctrine. Unlike legislative or executive acts, the doctrine of foreign act of state does not apply to allegations of

[68] The foreign act of state doctrine is now considered to include an additional dimension and operate as a 'super choice of law rule', in that the court cannot assess the validity of a foreign territorial legislative or executive act under foreign law: *Maduro Board of the Central Bank of Venezuela v Guaido Board of the Central Bank of Venezuela* [2021] UKSC 57 [135].
[69] [2011] UKPC 7.
[70] ibid [101].
[71] [2012] EWCA Civ 855.

impropriety against a foreign court.[72] Thus, foreign judgments do not come 'within the rationality of such doctrines', and their effect is regulated by 'other principles, such as principles of estoppel, and all the rules which govern the recognition or enforcement of foreign judgments'.[73]

These notions were recently affirmed at the highest level by the Supreme Court in the context of the controversies arising from the fragile political situation in Venezuela.[74] Two separate board of directors were contesting over which was entitled to represent the Central Bank of Venezuela and thus empowered to give instructions to certain financial counterparties (including the Bank of England) as to the handling of money and gold reserves that belonged to Venezuela. The Supreme Court concluded that the appointment of a board by the president of Venezuela's National Assembly, who had been recognized as the legitimate government of Venezuela by the UK, constituted executive acts of the government of Venezuela, which could not be reviewed by the English courts, as falling within the scope of the act of state doctrine.[75] The competing board however (which had purportedly been appointed by the country's rival government) countered that such executive appointments had been declared null and void by virtue of a series of judgments of the Supreme Tribunal of Venezuela, on the basis that they did not constitute legitimate executive acts.

In approaching this issue, Lord Lloyd-Jones JSC, relying on *Altimo* and *Yukos,* noted that the act of state doctrine has no application 'where courts in this jurisdiction merely give effect to a judicial decision whereby the courts of the foreign state concerned […] have previously declared the executive acts to be unlawful and nullities'.[76] Instead, 'foreign judgments fall to be assessed under different rules from those applicable to legislative and executive acts and are simply less impervious to review'.[77] In that sense, judgments do not enjoy the protection of the act of state doctrine but rather their status 'is left to be determined in accordance with domestic rules on the recognition and enforcement of foreign judgments'.[78] As a result of this judgment, the

[72] ibid [90].
[73] ibid [128].
[74] *Maduro* (n 68).
[75] ibid [137]–[146].
[76] ibid [169].
[77] ibid [159].
[78] ibid [161].

case was remitted to the High Court, which, applying the traditional rules of judgment recognition, concluded that the 'quashing' judgments of the Venezuelan courts were not entitled to recognition in England at common law.[79]

In practical terms, these cases suggest that, if, in a case like *Helbert Wagg,* the discharge of foreign law governed debts was the result of a foreign judicial decision (as opposed to foreign legislation), the proper approach should have been different. Unlike the effect of foreign legislation, the effect of foreign judgments must be judged by 'judicial standards, including international standards regarding jurisdiction, in accordance with doctrines separate from the act of state doctrine'.[80] Rather than merely deferring to the operation of the *lex contractus,* an English court would not be precluded by the foreign act of state doctrine from assessing the jurisdiction of or the process before a foreign court, under the application of judgment recognition rules, as it actually did in *Maduro*. This carveout ensures that English courts possess a potentially more effective filtering mechanism to assess the effect of foreign judgments as opposed to foreign legislation or executive acts. Still, as Lord Lloyd-Jones JSC pointed out in *Maduro* '[t]his difference of approach does not reflect any hierarchical inferiority of judicial acts but rather reflects a shared understanding of how courts should behave under the rule of law'.[81] Thus, at least as far as the act of state doctrine is concerned, there seems to be an elemental difference between judgment recognition and choice of law, which is reflected in the more extensive scope of review that English courts possess as far as foreign judgments are concerned.

Although, in principle, the aforementioned limitations serve to restrict the effect of foreign judgments, they can also potentially operate in the opposite direction. In particular, the fact that foreign judgments do not benefit from the operation of the act of state doctrine also suggests that their effect should not in principle be limited to assets located in their jurisdiction of origin or rights governed by the law of that jurisdiction. Instead, the fact that a foreign judgment will always be reviewed by the

[79] *Deutsche Bank AG (London Branch) v Central Bank of Venezuela* [2022] EWHC 2040 (Comm). In particular, recognition was refused as there being no legal basis for recognizing these judgments and also for being contrary to English public policy, since giving effect to these judgments would contradict the UK government's recognition of the President of the National Assembly as the head of the legitimate government of Venezuela: ibid [191]–[218].
[80] *Yukos* (n 66) [87].
[81] *Maduro* (n 68) [158].

English courts before being recognized in England implies that there is no prima facie bar to that judgment having an extraterritorial effect, provided that the requirements of recognition and enforcement are satisfied. To put this argument in perspective, if, in a case like *Helbert Wagg,* there was a German judgment and the underlying obligations were governed by English law, there would be, at least from the perspective of the act of state doctrine, no bar on the German judgment discharging the English law governed debts. Rather, the exclusion of judgments from the ambit of the foreign act of state doctrine and the determination of their effect under traditional judgment recognition rules suggests that their effect should not be as limited as the effect of foreign legislative or executive acts. In that sense, the fact that the status of foreign judgments falls to be assessed under the application of different rules means that foreign judgments can potentially have a more far-reaching effect than foreign legislative or executive acts and can potentially also affect foreign rights and obligations, provided that the requirements set by the applicable rules of judgment recognition are met.

The question that emerges from the above analysis however is how to distinguish between the application of the doctrine of foreign act of state and the rules of judgment recognition. This question was at the heart of the controversy surrounding the case of *Koza Ltd v Koza Altin Isletmeleri AS.*[82] There, the court encountered the issue of whether the authority of the directors of a Turkish company (Koza Altin) to cause that company to take certain steps as the shareholder of an English subsidiary (Koza Ltd) should be recognized in England. The problem stemmed from the fact that the directors of Koza Altin were trustees that had been appointed by virtue of a ruling of a Turkish criminal court, as a result of terrorism allegations levelled against the company's owners and former directors. Before the High Court, Koza Ltd, attempting to resist certain shareholder measures that its shareholder/parent company was preparing to take, argued that the authority of the directors of Koza Altin should not be recognized, because it was founded on a corrupt foreign judgment, whose sole purpose was to expropriate the assets of Koza Altin's original owners for political reasons.[83] The trustees however noted that their authority did not derive directly from the criminal court judgment; rather, they had been appointed by virtue of subsequent

[82] [2022] EWCA Civ 1284.
[83] *Koza Ltd v Koza Altin Isletmeleri AS* [2021] EWHC 2131 (Ch) [63]–[75].

executive acts, issued on the basis of legislation, which had been introduced after the original judgment was issued and which had transferred the authority of trustees to an administrative agency.[84] In any case, in their view, they were not trying to enforce the Turkish judgment but were merely relying on their authority derived from Turkish law to represent Koza Altin as a shareholder of an English company.[85]

The High Court agreed with the latter contention arguing that the question of authority of the trustees to represent the shareholder of an English company is a matter of English law and the mere fact that such authority could be traced back to a flawed Turkish judgment was not relevant from the perspective of the English court.[86] Relying on the foreign act of state doctrine, Trower J concluded that the relevant judgments as well as executive decrees were all valid, as a matter of Turkish law,[87] and therefore there was no serious issue to be tried as to the claimants' contentions on lack of authority. On appeal however, the claimants argued that the court was wrong to treat the authority issue as raising a question of choice law, when the authority of the foreign directors emanated from a judgment. According to their view, '[t]he principle which [the High Court Judge] should have applied was that, where a party asserts in England a right or status derived from a foreign judgment, it must be shown that that judgment is entitled to recognition in line with domestic principles, otherwise that judgment can have no legal effect in this jurisdiction'.[88] The Court of Appeal agreed with this approach, finding that the High Court was incorrect to determine the authority issue on the basis of a choice of law approach and thus to rely on the fact that Turkish law regards the appointment of the trustees as appointment as valid.[89] Relying on *Altimo*, Sir Julian Flaux J noted that 'where a person's status derives from a foreign judgment, the English court applies its rules on recognition of foreign judgments to determine whether that status should be recognised and does not simply accept without more the position under the relevant foreign law'.[90] As a result, if the trustees of Koza Altin

[84] ibid [87].
[85] ibid [88].
[86] ibid [93]–[94].
[87] ibid [99].
[88] *Koza* (n 82) [82].
[89] ibid [139].
[90] ibid [144].

were indeed appointed by the purportedly corrupt Turkish judgment, the claimants would prevail.

However, as the court was quick to point out, whereas the original trustees were appointed by the judgment in question, subsequent legislation had transferred that authority to an executive agency, which had then appointed a different group of individuals as Koza Altin's trustees. In that context, the legal basis for the appointment of the trustees, who claimed to represent Koza Altin, was not a judicial decision but rather the subsequent Turkish legislation and the acts of an executive agency, whose review was however precluded by virtue of the foreign act of state doctrine.[91] While disagreeing with the rationale of the High Court's judgment, the Court of Appeal thus eventually found in favour of the defendants,[92] on the basis that an English court will recognize and not question the validity of foreign legislative or executive acts.

The judgment in *Koza* seems to be premised on the same assumptions as *Maduro,* namely that that '[t]he question of whether a foreign judgment should be recognised by the English court does not attract the foreign act of state doctrine'.[93] This approach ensures that English courts have a control mechanism in place to assess a foreign court's determinations.[94] Perhaps more fundamentally however, *Koza* illustrates how the application of choice of law rules should in practice be distinguished from a judgment recognition approach. The key in this respect is whether, under foreign law, the effect on the rights in question is the outcome of legislative or executive acts or rather of a judicial process. The court in *Koza* engaged in such an inquiry in order to determine whether the authority of Koza Altin's trustees, which were named as defendants in Koza's suit, was premised on the purportedly corrupt Turkish judgment or the subsequent Turkish legislation and the executive acts that implemented it. In reaching its conclusion, the court relied on the defendants' arguments that, under Turkish law, the trustees' authority to represent Koza Altin did not stem from the judgment and refused to entertain the claimants' legal constructions that,

[91] ibid [150].
[92] The Court of Appeal also noted, in obiter fashion, that, even if the trustees' authority was predicated on the Turkish criminal judgment in question, such judgment would not be considered corrupt and thus would be capable of recognition in England: ibid [153]–[166].
[93] ibid [143].
[94] ibid [140].

notwithstanding the subsequent passage of legislation and the implementing executive acts, the trustees' authority could nonetheless be traced back to the original corrupt judgment.[95] It is perhaps crucial that such determination, though not explicitly admitted, was conducted by reference to Turkish law and through a careful examination of the purportedly applicable statutory instruments. In that sense, *Koza* is important in illustrating how courts should be expected to tread the line between choice of law and judgment recognition.

The Court of Appeal's approach in *Koza* demonstrates that *Gibbs* is inherently premised on the erroneous application of a choice of law analysis to a judgment recognition question. When English courts first developed and applied the rule in the context of foreign bankruptcy discharges, they seemed to have taken for granted that a foreign bankruptcy discharge was granted by operation of foreign statutory provisions. Whether this was actually true is not immediately apparent from the case law. Still, this approach is justifiable considering that, at that time, the granting of discharge in England, though considered a judicial act,[96] practically involved very limited judicial determination and resembled more a rubber-stamping exercise, where the Chancellor (and later the courts) merely certified that the requirements for discharge had been met.[97] Perhaps in this context English courts could be excused for considering that the recognition of a foreign bankruptcy discharge raised issues of choice of law.

Yet, it is evident that this analogy falters in the case of restructurings. As a matter of fact, a discharge obtained in a foreign restructuring differs markedly from a discharge provided directly under foreign law. The crucial element here, from the perspective of private international law, is the interpolation of a judgment; a discharge of an obligation

[95] ibid [147]–[149].

[96] Louis Edward Levinthal, 'The Early History of English Bankruptcy' (1919) 67 University of Pennsylvania Law Review 1, 19.

[97] In the early 18th century, the appointed commissioners, having obtained the consent of a certain supermajority of the debtor's creditors, would issue a certificate of conformity, confirming that the bankrupt had behaved appropriately, following which a certificate of discharge would be issued by the Lord Chancellor: Sheila Marriner, 'English Bankruptcy Records and Statistics before 1850' (1980) 33 The Economic History Review 351, 364. The same basic structure for the granting of certificates of discharge persisted, with a number of variations, until the mid-19th century, when the authority to grant discharges was awarded to the courts: Ann M Carlos and others, 'Bankruptcy, Discharge, and the Emergence of Debtor Rights in Eighteenth-Century England' (2019) 20 Enterprise & Society 475, 488. At the time *Gibbs* was decided, orders of discharge were granted by the court under s. 28 Bankruptcy Act 1883.

in the context of a restructuring takes place in a judicial procedure, under the oversight of a court, exercising adjudicative authority and involving detailed judicial determinations. This should have been evident to English courts from a mere textual examination of the applicable statutory provisions. In that sense, the court in *New Zealand* should have paid less attention to the reference that a scheme of arrangement affects 'all' creditors and more attention to the words that immediately preceded it, namely the phrase 'if sanctioned by an order of the Court'.[98] Considering that, under almost every legal framework around the world, the discharge or modification of creditor claims in the context of a restructuring is the result of a judgment that approves or sanctions the plan, the question of its recognition in England should, as a matter of principle, be framed as an issue of judgment recognition, involving a consideration of the jurisdiction of and the procedure before the foreign court. In that sense, the *Gibbs* rule is not only erratic from an internal perspective but also systemically inconsistent and irreconcilable with the general principles of English private international law.

3. A judgment recognition approach to reform *Gibbs*

a. Why does *Gibbs* persist?

As the foregoing analysis suggests, *Gibbs* suffers from considerable deficiencies and appears indefensible, also from a doctrinal perspective, as the governing principle on the question of recognition of foreign restructurings plans. So why does it continue to be relied upon and applied by English courts? The obvious answer is precedent; as *Gibbs* is a judgment of the Court of Appeal it constitutes binding authority on lower courts.[99] Unsurprisingly, English courts have indicated their unwillingness to depart or otherwise modify the rule, absent statutory intervention.[100] That being said however, there are several, less formalistic, arguments that are sometimes advanced in favour of maintaining *Gibbs.* The most characteristic of these points is that *Gibbs* provides contracting parties with legal certainty that their contractual claims will be treated in a predictable manner and will not be jeopardized as a result of a debtor commencing a

[98] s. 2 Joint Stock Companies Arrangement Act 1870.
[99] Notwithstanding arguments to the contrary: Ho (n 3).
[100] *Global Distressed Alpha Fund 1 Ltd Partnership v PT Bakrie Investindo* [2011] EWHC 256 (Comm) [24]–[25].

proceeding in a jurisdiction that does not respect the creditors' claim or priority.[101] Any change to *Gibbs* is thus portrayed as carrying the risk of upending the parties' expectations and potentially leading to an increase in borrowing costs and more limited access to credit for borrowers. However, this argument disregards the fact that the legal certainty provided by *Gibbs* is the certainty of application of an erratic rule which, as outlined above, makes little sense from a choice of law perspective. The fact that market participants have managed to find a way to work with, and even around, *Gibbs* thus offers no convincing justification for maintaining the rule, particularly if a better and more coherent approach can be developed.

One of the noted effects of *Gibbs* is that it protects contractual rights acquired by English law and thus incentivizes market participants to choose English law as the law applicable to cross-border commercial contracts. Nevertheless, it is unclear whether the choice of English governing law, on its own, is a feature that has to be protected. Even if we assume that English contract law is generally more efficient and thus should be preferred as the law of choice in cross-border contracts, especially financing arrangements and bond indentures, it is not self-evident that the abandonment of *Gibbs* would have any noticeable effect on this choice. For one thing, English law has traditionally been the law of choice in bond indentures for the majority of European issuers,[102] even though, until Brexit, *Gibbs* was ineffective in the context of EU cross-border restructurings by virtue of the European Insolvency Regulation.[103] In that sense, the choice of English law by European issuers would have afforded no protection to their creditors against the potential discharge of their claims in the event of a debtor restructuring in an EU jurisdiction.

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[101] Bruce Bell and others, 'In Defence of Gibbs' (*Latham & Watkins LLP*, 20 June 2023) <https://www.lw.com/en/insights/in-defence-of-gibbs> accessed 19 March 2024; Deborah Tillett and others, 'Insolvency Service Consultation on Implementation of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments' (*Enyo Law LLP*, 11 October 2022) <https://www.enyolaw.com/posts/221/insolvency-service-consultation-on-implementation-of-the-uncitral-model-law-on-recognition-and-enforcement-of-insolvency-related-judgments> accessed 19 March 2024.

[102] Ranko Jelic and others, 'Foreign-Law Premium for European High-Yield Corporate Bonds' (2023) 52 Finance Research Letters 103584.

[103] As noted, under the EIR, a restructuring plan issued in the context of an insolvency proceeding in another Member State would be liable to recognition in England pre-Brexit under art. 32: see Paul Oberhammer and Florian Scholz-Berger, 'Recognition and Enforceability of Other Judgments' in Reinhard Bork and Kristin van Zwieten (eds), *Commentary on the European Insolvency Regulation* (Oxford University Press 2022) 414.

In addition, there is, at least anecdotal, evidence that, post-Brexit, English law is losing ground as the law of choice for bond issuances, particularly to New York law as well as the law of other continental jurisdictions,[104] even though these jurisdictions do not provide nearly as extensive protection against the effects of foreign restructurings as the rule in *Gibbs*. At the same time, legal practitioners in the field of capital markets have suggested that other considerations, such as the predictability of contractual terms or the way in which liability is assigned to the parties, play an equally or even a more important role than the insulation against the effect of foreign restructurings in determining the choice of a particular law in a cross-border financing arrangement.[105] Whereas it is impossible to conclusively assess the counterfactual scenario, it seems that the effect of *Gibbs* on contractual choice of law is not as straightforward as is sometimes suggested.

At the same time however, it must be conceded that the continuous application of *Gibbs* is indeed beneficial for the domestic legal industry, which, unsurprisingly, is the most vocal constituency in expressing support for maintaining the rule.[106] This negative predisposition of English practitioners to a reform of *Gibbs* can be explained on public choice grounds. As has already been pointed out, it is widely acknowledged that the refusal of a jurisdiction to recognize foreign judgments forces cases involving local defendants to be litigated locally, leading to an increase of local mandates for local lawyers.[107] At the same time, this strategy is not free of costs, since other jurisdictions may retaliate, leading to the loss of instructions in cases having connections to foreign jurisdictions, which can offset the gains stemming from an increase in purely local mandates.[108] In that sense, the only scenario, in which non-recognition may be beneficial for local practitioners, as a rent-seeking group, is the scenario, where other jurisdictions do not retaliate but continue to recognize its judgments. This imbalance is however reflective of the current state of affairs in the field of cross-border restructurings: *Gibbs'* policy of non-recognition forces any foreign

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[104] Virginia Furness, 'Investors Sweat the Small Print as Brexit Fragments Bond Laws' (*Reuters*, 8 March 2019) <https://www.reuters.com/article/us-britain-eu-bonds-analysis-idUSKCN1QP11V> accessed 19 March 2023.
[105] Philip Wood, 'Choice of Governing Law for Bonds' (2020) 15 Capital Markets Law Journal 3.
[106] Bell and others (n 101); Tillett and others (n 101).
[107] Michael Whincop, 'The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments' (1999) 23 Melbourne University Law Review 416, 422.
[108] ibid 423.

debtor that has an exposure to English creditors to undertake a restructuring in England, whereas the policy of other jurisdictions to recognize English restructuring plans or schemes of arrangement encourages, not only English but also foreign creditors, to restructure in England. In that context, England is in a very advantageous position as a restructuring hub, which can explain why there is an incentive for English legal practitioners to resist a reform of *Gibbs.*

Nevertheless, it does not necessarily follow that a reform of *Gibbs* will affect England's attractiveness as a restructuring forum. After all, the English framework boasts efficient restructuring mechanisms that will most likely continue to be relevant and attractive,[109] even if a disposal of *Gibbs* will mean that the courts of other jurisdictions will be able to modify or discharge English law governed claims (under the condition that none of the defences to recognition is applicable). Although there is reason to believe that, on balance, there will be some detrimental effect, England will likely remain a restructuring hub even post-*Gibbs.* This has certainly been the case for the US, which, though recognizing the effects of foreign restructurings, continues to be the jurisdiction of choice for many restructurings involving foreign companies, since the US framework provides many useful tools to distressed debtors.[110] As a result, the justifications for maintaining *Gibbs,* even if viewed from the self-interested perspective of the legal industry, do not appear particularly convincing.

Whereas these observations may not cast doubt on the rule's validity, as a matter of positive law, they have important implications for the case of legal reform. If viewed under that light, the motivation behind contemporary arguments in favour of *Gibbs* appears to be the need to justify existing legal practice on something more than mere precedent. As a result, the rule appears entrenched and immovable as a matter of English law, despite its many fallacies. However, the real reason why *Gibbs* persists and continues to be justified by part of the legal industry is the absence from the debate so far of any coherent and convincing alternative to the rule. The emphasis on 'legal certainty', as the preeminent consideration underpinning the continuous application of *Gibbs* is thus not surprising. However, if an alternative, were to be articulated, it would

[109] Anthony Casey and Joshua Macey, 'Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars' (2021) 37 Emory Bankruptcy Developments Journal 101, 126.
[110] Such as debtor-in-possession (DIP) financing: see *In re Latam Airlines Group SA* 620 BR 722 (2020) (Bankr SDNY).

be possible to properly weight the benefits of such an alternative approach in practice, against the backdrop of legal certainty, and thus appreciate the case for legal reform. In that regard, since the only thing holding *Gibbs* in place is precedent, a judgment recognition approach, as developed in the previous Chapter appears a viable alternative that is capable not only of ensuring efficient outcomes in cross-border restructurings but also restoring logical and doctrinal consistency across the entire spectrum of English private international law.

b. Considering the introduction of the MLJ

Given the desirability of an alternative approach, it is worthwhile to examine how a reform of the English framework towards a judgment recognition paradigm can be achieved in practical terms. One recent development that could potentially serve as an opportunity to consider such a conceptual shift is the MLJ. However, as has already been pointed out, the recent consultations by the UK Insolvency Service do not advocate the wholesale adoption of its provisions but only a minimum and targeted implementation of its Article X'.[111] Yet, the limited scope of current proposals should not distract us from the fact that the MLJ includes, within its subject matter scope, judgments confirming or varying a plan of reorganization or approving a voluntary or out-of-court restructuring agreement.[112] In that sense, the MLJ could, in principle, provide a doctrinally appropriate framework to displace *Gibbs.*

In considering whether a wholesale adoption of the MLJ would be a positive step in reforming the English framework of cross-border restructurings however, one would need to consider its provisions in their entirety, especially by reference and comparison to the normative judgment recognition approach that has been proposed in the previous Chapter. From that perspective, there are various aspects of the MLJ that conform to or can even complement the suggested normative framework for cross-border restructurings. For instance, a central aspect of the MLJ is that it places few requirements on the recognition of a foreign judgment; as long as the judgment has effect and is enforceable in the country of origin, it is prima facie recognizable and

[111] Chapter IV, Section 3.b.

[112] United Nations Commission on International Trade Law, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments* (UN Publication 2019) para 60(e).

enforceable in the country of recognition.[113] As a result, recognition or enforcement of the foreign judgment is the default outcome under the MLJ.[114] In addition, the MLJ sets out the procedural requirements for recognition and enforcement in a very permissive way, requiring few formal stipulations, namely only a copy of the judgment in question, any other documents evidencing the legal effect of that judgment in the country of origin and, if necessary, a translation into the language of the country of recognition.[115] Thus, the MLJ provides a high degree of legal certainty, as far as the outcome of the recognition inquiry is concerned, and can ensure that a foreign judgment be recognized and enforced in a cost- and time-efficient manner. Furthermore, the court of recognition is afforded the option to grant provisional relief to the applicant, such as a stay on any asset disposition, until a final ruling on recognition and enforcement is issued.[116] Finally, the MLJ clarifies that the existence of review procedures against the foreign judgment in the jurisdiction of origin (or the availability of such procedures) does not constitute a bar against recognition and enforcement. Instead, the court is free, at its own discretion, to postpone or refuse recognition or even make recognition or enforcement provisional on the granting of security.[117] These elements suggest that the MLJ can, in theory, be conceptualized as a viable and efficient framework for cross-border restructurings.

Other aspects of the MLJ however can be a bit more problematic, when applied to the recognition of foreign restructuring plans. Perhaps the most important issue relates to the available defences. One particularly odd aspect of the MLJ is that the absence of a valid basis of jurisdiction is considered a defence and not a requirement to recognition, as is usually the case in most judgment recognition frameworks.[118] The framing of jurisdiction as a defence has two important implications: first, that it must be invoked by the defendant and, secondly, that even if an adequate basis of indirect jurisdiction is not established, refusal of recognition or enforcement of the judgment in question is discretionary, as already noted. If viewed in conjunction with the vaguely

[113] Arts. 9, 13 MLJ.
[114] Irit Mevorach, 'Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism?' (2021) 22 European Business Organization Law Review 283, 299.
[115] Art. 11 MLJ.
[116] Art. 12 MLJ.
[117] Art. 10 MLJ.
[118] See Chapter V, Section 3.a.

defined defence of adequate protection, this approach has the potential of leading to unpredictability in the outcome of recognition.

The problem of unpredictability becomes more pronounced, if one considers the actual formulation of the jurisdictional defence under the MLJ. In particular, the MLJ provides that the recognition of a judgment may be refused for lack of jurisdiction, unless the court of origin exercised jurisdiction on the basis of a jurisdictional safe harbour,[119] which can, alternatively, be consent (referring primarily to the existence of a jurisdiction agreement), submission, or any other ground of jurisdiction, which can relied upon by the courts of the recognizing state or is not incompatible with the law of the country of recognition.[120] One thing that is immediately obvious from this formulation is the intention to expand, as broadly as possible, the scope of the acceptable grounds of jurisdiction and thereby to favour recognition of foreign judgments. At the same time however, this provision is expressed in very uncertain terms, especially as regards the requirement that the jurisdiction of the court of origin is based on a ground that is not incompatible with the law of the country of recognition. It is not immediately clear how this jurisdictional standard should be assessed or how the question of compatibility should be approached by the court of recognition.[121] It is very likely that a debtor would face insurmountable obstacles to determine ex ante, at the time when the restructuring forum is selected, whether the ensuing plan will be recognized in a particular jurisdiction, unless it could rely on an alternative ground of jurisdiction, such as consent or submission. This indeterminacy may also lead to an increase the costs of restructurings, especially when recognition will need to be sought in multiple jurisdictions and, therefore, an assessment of every single legal framework will need to be conducted to ascertain the ‘compatibility’ of available jurisdictional grounds with the ground of jurisdiction actually relied upon by the court approving or sanctioning the plan. As a result, the open-endedness of the MLJ’s jurisdictional defence increases uncertainty, as far as the recognition of foreign restructuring plans is concerned.

As far as defences in the strict sense are concerned, several additional issues emerge. As a general matter, the MLJ’s list of defences is considered exhaustive. At the same

[119] UNCITRAL, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments* (n 112) para 110.
[120] Art. 14(g) MLJ.
[121] Mevorach (n 114) 297.

time however, the operation of defences is discretionary, meaning that the court of recognition remains free to recognize or enforce the judgment in question, notwithstanding the applicability of a defence.[122] Whereas this formulation, being reflective of the MLJ's pro-recognition orientation, is not necessarily problematic, there are few defences that could potentially be applicable to cross-border restructurings. Natural justice for instance is not expressed as a general standard but rather as specific requirements for the notification or service of the claim on the defendant in a timely manner, which, however, are largely inapplicable to non-bilateral disputes.[123] Other defences such as fraud[124] or inconsistency between other prior judgments of the courts of the recognizing jurisdiction[125] are similarly of limited relevance in a restructuring context. It must be pointed out that the MLJ also includes a general public policy exception. This enables the court of recognition to refuse the recognition or enforcement of a judgment, if manifestly contrary to the forum's public policy, including fundamental principles of procedural fairness. Whereas this procedural conceptualization of public policy could in theory accommodate a holdup-oriented defence, the limitation of this defence to 'manifest' violations suggests, as confirmed in the MLJ's Guide to Enactment, that it is envisaged to apply in very rare circumstances.[126] As a result, most of the available defences are not particularly fitting at addressing the issue of holdup in a cross-border restructuring context.

As has already been pointed out however, the MLJ includes a defence, that is specifically targeted at applying to judgments materially affecting the rights of creditors, such as judgments approving restructuring plans. In particular, the MLJ provides that such judgments may be refused recognition in cases where the interests of creditors and other interested persons are not adequately protected.[127] Although, as has been explained, the concept of adequate protection can be useful in developing a hold-up oriented defence, which can ensure that foreign plans that disadvantage dissenting minorities will not benefit from recognition, the manner in which this defence

[122] UNCITRAL, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments* (n 112) para 98.
[123] Art. 14(a) MLJ. In that sense the MLJ resembles the natural justice defence in art. 45(1)(b) of Brussels I Recast Regulation.
[124] Art. 14(b) MLJ.
[125] Art. 14(c), (d) MLJ.
[126] Art. 7 MLJ. See also UNCITRAL, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments* (n 112) para 73.
[127] Art. 14(f) MLJ.

is formulated would lead to considerable uncertainty. As a matter of first order, it is not straightforward that this formulation would actually be sufficient to dispose of *Gibbs.* As already noted, the concept of adequate protection, as applied in the original Model Law, involves a consideration of the substantive treatment of creditors in a foreign proceeding.[128] It would thus not be inconceivable for an English court to conclude that, to the extent that a foreign plan modifies English law governed claims, the interests of English creditors in that foreign proceeding are not adequately protected, thereby turning *Gibbs* into a choice-of-law defence against judgment recognition.[129]

Even if such interpretation were not to take hold, the exclusive reliance on a such broad standard would lead to unpredictability in the defence's application, especially considering that it is construed to encompass the interests not only of creditors but also the debtor. In particular, as articulated, the adequate protection defence could be interpreted in a way that would enable the court of recognition to engage in an extensive review of the judgment in question and thereby clash with the MLJ's overarching principle that the merits of the foreign judgment should not be reviewed at the stage of recognition.[130] In fact, there is nothing in the text of the MLJ that sets any limit to the scope of this defence or provides any guidance on how it should be interpreted by courts. In addition, the MLJ's Guide to Enactment provides little to no guidance as to how courts should tread this fine line and consider issues of adequate protection without interfering with the merits of the foreign judgment.[131] Although these features do not mean that a court will necessarily intrude into the merits of the foreign judgment, the application of such a broad and unrestricted formulation of the adequate protection standard is likely to engender significant difficulties in its application by courts and would likely operate ineffectively in a cross-border restructuring context.

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[128] See Chapter V, Section 4.c.

[129] As has already been pointed out, the judgment in *Erste* suggests that English courts are already, though not admittedly, applying *Gibbs* in a way that resembles a choice of law defence.

[130] UNCITRAL, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments* (n 112) para 97; Verma Medhashree and Siddharth Jain, 'Recognition of Insolvency Related Judgments: An Undetermined Sphere of International Insolvency' (*KSLR Commercial & Financial Law Blog*, 18 September 2020) <https://blogs.kcl.ac.uk/kslrcommerciallawblog/2020/09/18/recognition-of-insolvency-related-judgments-an-undetermined-sphere-of-international-insolvency-medhashree-verma-and-siddharth-jain/#_ftn22> accessed 19 March 2024.

[131] UNCITRAL, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments* (n 112) para 108.

On a more conceptual level, one of the main drawbacks of the MLJ is that, although it is envisaged as a stand-alone instrument, it remains to a great extent complementary to the Model Law.[132] From that perspective, and to the extent that it applies to the recognition of foreign restructuring plans, the MLJ would continue to foster a view of restructurings as being ancillary to insolvency. This insolvency centred view is evident in various aspects of the MLJ, especially the definition of its subject matter scope by reference to the definition of insolvency-related judgments, as judgments that arise as a consequence of or are materially associated with an insolvency proceeding.[133] This practically means that a judgment approving a restructuring plan would only be capable of recognition, if issued following the opening of an insolvency proceeding, which is defined as a 'collective proceeding pursuant to a law relating to insolvency, in which […] the assets and affairs of a debtor are or were subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation'.[134] Although the definition is supposed to be wide enough to encompass various forms of restructuring plans, including for instance pre-packaged restructuring plans,[135] it creates potential issues in cases, where a restructuring plan has been confirmed, without the opening of formal proceedings in the above sense.

Finally, there are various other points of intersection with the Model Law, which can complicate the operation of the MLJ's judgment recognition provisions in the restructuring context. For instance, among the applicable defences, the MLJ includes a defence that is premised on the interference of the insolvency-related judgment with the administration of insolvency proceedings (such as a stay on creditor actions),[136] as well as a defence on the basis that the foreign judgment originated in a proceeding that could not have been recognized under the Model Law.[137] Yet, both of these elements seem irrelevant in the context of a restructuring, since they do not ordinarily implicate or otherwise raise holdup concerns. These features suggest that, though the MLJ can conceptually accommodate the recognition of foreign restructuring plans and

[132] As a matter of fact, one of its stated objectives, as stated in art. 1(f) of its preamble, is to complement the UNCITRAL Model Law on Cross Border Insolvency, where it has been enacted.
[133] Art. 2(d) MLJ.
[134] In that respect, many of the definitions in the MLJ rely or draw from the definitions included in other UNCITRAL texts, such as the Model Law: see UNCITRAL, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* (UN Publication 2014) para 22.
[135] ibid para 48.
[136] Art. 14(e) MLJ.
[137] Art. 14(h) MLJ.

is normatively preferrable to *Gibbs*, it has several flaws, which suggest that its wholesale adoption would not be the optimal way of reforming the existing framework.

c. The MLJ as a potential impetus for reform

Given these conclusions, it seems that the MLJ has limited relevance in a potential reform of *Gibbs.* For one thing, the recent consultations of the UK Insolvency Service suggest that one of the rationales behind the limited enactment of the MLJ, in the form of the introduction only of Article X, is to overturn *Rubin*, while leaving *Gibbs* untouched. Given this stated policy goal, it is reasonable to expect that the introduction of the full text of the MLJ, especially with the objective of reforming *Gibbs*, is not a realistic possibility, at least in the immediate future. At the same time however, the MLJ would also suffer from considerable deficiencies and flaws, if it were required to operate as a cross-border restructuring framework. These features suggest that the MLJ's introduction in the UK would not serve the purpose of leading to an efficient paradigm change in the recognition of foreign restructuring plans, especially when considered in juxtaposition to the normative framework that has already been developed in this thesis. As a result, the introduction of the MLJ appears to be neither forthcoming nor desirable from a policy perspective.

Nevertheless, and despite these drawbacks, it would be specious to view the MLJ as completely irrelevant or inconsequential. As a matter of fact, the MLJ's introduction by UNCITRAL has increased the awareness of the gaps of the Model Law framework and the need to develop a supplementary set of rules to address them.[138] Within this broader context, the appreciation of the peculiar problems of cross-border restructuring law, as distinct from the issues of cross-border insolvency has increased. Over the past several years, there has actually been a growing academic as well as practitioner support for a reform of *Gibbs*, which is slowly, yet steadily, being expressed in the policy debate.[139] These intellectual trends and undercurrents are more evidently

[138] Walters refers to the MLJ to illustrate the 'recursivity' of the UNCITRAL law making process: see Adrian Walters, 'Modified Universalisms & The Role of Local Legal Culture in the Making of Cross-Border Insolvency Law' (2019) 93 American Bankruptcy Law Journal 47, 106

[139] John Churchill, 'Please Recognize Me: The United Kingdom Should Enact the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments' (2020) 46 Brooklyn Journal of International Law 215; David Steinberg and Helen Martin, 'UK Consultation on UNCITRAL Model Law on "judgments" - Do the Proposals Go Far Enough?' (2022) 16 Insolvency and Restructuring International.

reflected in the responses to the UK Insolvency Service's consultations, which have called for the initiation of wider debate on the reform of *Gibbs,* before a final policy decision on the implementation of the MLJ is made.[140] This change in tone is not merely reflective of the need for a more coherent doctrinal framing of the issue but is informed by a desire to adequately and definitively address a pressing problem of current practice. In fact, under this pressure, the Insolvency Service, while remaining keen on the enactment of MLJ's Article X, appears to be considering a debate on *Gibbs,* signposting this issue as the next frontier in the development of English cross-border restructuring law.[141] As a result, although *Gibbs* has survived to fight another day, the discussion on its potential reform appears to have already commenced.

The effect of the MLJ is not however limited to the creation of a policy juncture for a reconsideration of the *Gibbs* rule. In addition, and notwithstanding the potential flaws of its provisions, the MLJ's explicit acknowledgment that restructuring plans constitute judgments is an important milestone in the growing awareness that cross-border restructuring law can be premised on the grounds of a judgment recognition approach. Having already framed the question as a matter of judgment recognition, it is thus reasonable to assume that any future debate on *Gibbs* will consider, at least as a potential avenue for reform, the development of a judgment recognition framework specifically targeted to the recognition of the effects of restructuring plans. As a result, the introduction of the MLJ has been crucial in the appropriate framing of the main issue of cross-border restructuring law as an issue of judgment recognition.

Within this context, the analysis developed in this thesis comes at an especially opportune moment, as it has the potential to influence and shape the forthcoming debate. In particular, the suggested normative proposal, while building on the MLJ's conceptual paradigm by viewing restructuring plans as judgments, further improves on it, by introducing significantly more nuanced and efficiency-oriented conceptions of jurisdictional standards as well as applicable defences. From that perspective, the proposed approach does not offer a radical reconceptualization of the problem, when compared to existing instruments. Additionally, considering that the MLJ is envisaged as a flexible instrument, so that any state is free to incorporate it in whole or in part or

[140] See Chapter IV, Section 3.b.
[141] ibid.

adopt it with modifications,[142] the suggested framework can even be complemented by certain elements of the MLJ, such as the procedural steps and requirements to recognition, which can further bolster the suggested approach. As a result, the MLJ has the potential to contribute to the development of a comprehensive and normatively efficient judgment recognition framework for foreign restructuring plans.

Overall, the MLJ can therefore be considered as providing an important impetus towards a future reform of *Gibbs.* Although, when viewed on its own, it may not constitute a realistic let alone a desirable avenue for reform, it is a consequential development in opening up the policy debate and assisting in the formulation of doctrinally coherent and normatively efficient proposal for the recognition of foreign restructuring plans in England. In the context of this policy juncture, the normative analysis proposed in the previous Chapter has *a* realistic potential of coming to fruition or at the very least constituting a meaningful contribution in future policy discussions.

4. Conclusion

Most contemporary discussions of *Gibbs* assume that, in spite of the rule's many and considerable inefficiencies, it remains so entrenched in English law, as a result of its continuous application by English courts for more than a century, that the costs of transition to a new paradigm would be significant and even prohibitive. Yet, as the preceding discussion has illustrated, this is not accurate. In fact, *Gibbs* is characterized by considerable internal and systemic inconsistencies, which become immediately apparent upon close scrutiny. These doctrinal flaws suggest that the abandonment of the rule and the reform of the English framework on cross-border restructurings towards a judgment recognition paradigm would not involve a radical reconsideration of existing doctrine but would in fact have the added benefit restoring both the approach's internal logical consistency and reinstate the wider systemic harmony with other principles of English private international law.

In light of the above, most arguments that are advanced in favour of *Gibbs* appear unconvincing. Considering the feasibility as well as the desirability of such a reform,

[142] UNCITRAL, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments* (n 112) para 77.

one could identify the MLJ as providing the necessary opportunity to achieve a paradigm shift from *Gibbs* towards a judgment recognition approach. Nevertheless, the MLJ falls short of fostering a truly efficient approach in cross-border restructurings. Its flaws do not refer merely to the wording or the content of specific rules but more conceptually to its insolvency-centred orientation, which may undermine the doctrinal autonomy of cross-border restructuring law and thereby lead to sub-par outcomes in the handling of cross-border cases. In that sense, the doctrinal framework that was advocated in the previous Chapter, appears a more desirable route for reforming *Gibbs*, towards an efficient judgment recognition paradigm. Within this context however, the MLJ has the potential of serving as the normative impetus for facilitating such a policy discussion and creating the necessary juncture for a paradigm shift towards a more efficient approach in the field.

CHAPTER VII: CONCLUSION

1. A new conceptual framework for cross-border restructurings

The function of understanding is fundamentally the perception of patterns.[1] As argued in Chapter II, restructurings originally developed as procedures that were ancillary to insolvency proceedings, merely enabling a different resolution of financial distress, the rescue of the debtor's business, as opposed to the liquidation of its assets. Nevertheless, modern restructurings often differ considerably from this paradigm; they frequently take place before the formal onset of insolvency, they may affect a limited number of creditors and are often shaped by contractual arrangements, under which creditors may be treated differently, depending on the degree of their commitment to support the plan. Notions, such as the collectivity of proceedings or the equal treatment of creditors, the traditional lynchpins of insolvency law, begin to lose their descriptive value in the restructuring setting. The observation of this pattern of development leads to a novel understanding of modern restructuring law, not as a mere implication of insolvency, but rather as an autonomous legal field, raising its own distinctive problems and concerns. The gap that exists between the traditional scholarly understanding of restructuring and the emergent reality that developments in restructuring frameworks and practice have created lies at the heart of the arguments advanced in this thesis.

One of the stated aims of this thesis was to account for these developments by constructing a novel theory of restructuring law, as a field that is dogmatically and conceptually autonomous from insolvency. Traditional economic accounts of insolvency law generally posit that insolvency rules reflect a hypothetical bargain between the various creditors of an insolvent debtor, as a means to solve a collective action problem. This problem takes the form of a value-destructive creditor race against a debtor's assets, when the debtor finds itself in financial difficulty. The function of legal rules in such a scenario involves the institution of a collective enforcement procedure, which supersedes individual enforcement, and thus safeguards the value of assets for the benefit of all creditors.

[1] Isaiah Berlin, *The Proper Study of Mankind: An Anthology of Essays* (Chatto & Windus 1997) 129.

However, as argued in Chapter II, if one applies the same tools of economic analysis and game theoretical insights to the restructuring field, it becomes apparent that legal rules serve a fundamentally different function in this context. In particular, the analysis in Chapter II has identified the respective function of restructuring law as fostering actual and efficient bargaining between a debtor and its creditors under conditions of financial distress. Efficient bargaining in that context can be defined as the rescue of the debtor's business and the generation of going concern value. In order to achieve this value-generating outcome, legal rules are tasked with addressing the dual problems of holdout and holdup, as they emerge in the context of multiparty contractual renegotiation. The central components of restructuring frameworks therefore provide a majoritarian decision making mechanism, which limits the effect of holdouts, while at the same time putting in place structural and substantive limitations to majority rule to protect dissenting minorities. Although this dogmatic distinction does not negate points of intersection or overlap between these two fields, nor does it suggest that firms face the respective economic problems in isolation, the analysis nevertheless purported to draw a sharp line between the function of legal rules in each respective scenario.

The aforementioned conceptual distinction is indeed an important contribution in the theory of restructuring law. Although prior scholarship had pointed out the different function of corporate insolvency, when a distressed debtor has a restructuring surplus, this analysis restricted itself to piecemeal issues and only considered these economic aspects in a cursory manner. On the contrary, the analysis offered in this thesis constitutes a comprehensive reconceptualization of restructuring law, as a balancing exercise between two countervailing problems of strategic behaviour. By focusing not only on the resolution of holdouts, by virtue of majority decision making, but also on the need to protect dissenting minorities, the analysis places the emphasis on elements of restructuring frameworks that had hitherto been largely overlooked or taken for granted, such as the assignment of creditors in different classes, the provision of adequate information and the substantive limitations on the content of the plan. This does not only offer a richer and more convincing account of the nature of restructuring law, but also has important implications for the design of efficient restructuring frameworks, including in the cross-border context.

This last point is in fact the main point of focus of this thesis. One of the central arguments advanced by Chapter II is that the dichotomy between insolvency and restructuring law, once established, has profound implications for the way we think about these fields in the realm of private international law. Starting from the premise that the function of substantive rules should inform the design and structure of private international law rules, the analysis has identified a distinct function of cross-border restructuring rules. Traditionally, the discussion on cross-border insolvency frameworks, most notably the Model Law, had concluded that a universalist approach would better foster more efficient outcomes. Universalism in cross-border insolvency essentially suggests that the effects of an insolvency proceeding commenced in the debtor's home jurisdiction, especially the stay on creditor enforcement actions, should be recognized in other jurisdictions, where assets may be located, in order to ensure that the proceeding remains collective for all creditors. However, efficiency in the cross-border restructuring context necessitates a refinement of this rudimentary approach. In particular, it requires a mechanism to recognize the effects of foreign restructuring plans, particularly against foreign creditors in order to address the emergence of cross-border holdouts, subject however to the adequate protection of the rights of such creditors in the restructuring process, as a means to avoid advantage taking and address the countervailing concern of creditor hold up. In that sense, Chapter II has translated the distinction between insolvency and restructuring law in the cross-border context and has set out the basic components of efficient cross-border restructuring frameworks.

2. Evaluating the current state of the law

The above theoretical framework would however constitute mere intellectual play, if it could not be applied to practical problems and illuminate our understanding of current issues. As Chapter III has illustrated, there is indeed no shortage of controversies in the field of cross-border insolvency and restructuring law. Yet, as far as the former are concerned, it is generally conceded that the introduction of the Model Law has had a positive effect in the strengthening and development of efficient cross-border insolvency norms in the major jurisdictions of the US and the UK. At the same time, an overview of the case law on the recognition of the effect of foreign restructuring plans, in those same jurisdictions, reveals significant divergences and disagreements

on matters of underlying principle. The primary source of these complexities revolves around the English approach, as developed in *Gibbs*, which precludes the recognition of foreign restructurings over English law governed claims. This rule, by strengthening the holdout position of holders of English law-governed claims fails to conform to the basic normative mission of cross-border restructuring law, as identified in Chapter II. At the same time, it also diverges significantly from the approach originally developed in the US on the matter. In this context, the effect of the introduction of the Model Law has had an ambiguous effect; whereas US courts routinely rely on the Model Law to recognize foreign restructuring plans, English courts consider that its introduction has no effect on the continuous application of *Gibbs*. This divergence, and especially the insistence of English jurisprudence to continue to apply *Gibbs* has been the main source of controversy in the field of cross-border restructuring law.

That being said, there is a pressing need to approach these issues through a new frame of analysis, as contemporary views appear unable to offer a convincing explanation of how these difficulties arose let alone develop a feasible way to overcome them. Chapter IV has demonstrated how the majority of criticisms of the English approach appear to be taking for granted that the principle of universalism, as reflected in the provisions of the Model Law, is sufficient to overcome *Gibbs* and enable the recognition of foreign restructuring plans against English law governed claims. Viewed in that light, the English approach appears logically indefensible and reflective of an obstinately parochial understanding of the real issues presented in cross-border restructurings. However, these arguments have faltered against the repeated insistence of English courts, in cases like *IBA,* to refuse to construe the Model Law as providing a legal basis for overcoming *Gibbs*. Even more importantly, conventional criticisms have also failed to persuade the UK to utilize recent statutory initiatives, such as the introduction of the MLJ, in order to reform its approach, as evidenced by the outcomes of the recent consultations by the UK Insolvency Service. As underlined in Chapter IV, the conventional critiques, which emphasize the Model Law and the principle of universalism as an all-encompassing norm capable of meeting the demands of cross-border restructurings have proven incapable to move the debate forward in any meaningful way.

Against this background, this thesis has posited that the conceptual framework developed in Chapter II can shed considerable light not only in understanding why English courts continue to rely on *Gibbs* but also in identifying the proper way of reforming this approach. Chapter IV has contended that, the Model Law, if viewed from the perspective of the distinction between cross-border insolvency and restructuring law, is a framework that is distinctively geared toward the former. As a result, and rather unsurprisingly, it contains no provisions enabling the recognition of foreign restructuring plans under certain conditions, nor can such requirements be somehow construed from existing provisions. In that sense, the analysis has justified the resistance of English courts to an expansive interpretation of the Model Law, by relying on conceptual and purposive counterarguments as opposed to the formalist arguments that English courts normally resort to. This analysis essentially struck a middle ground; though conceding that *Gibbs* is an inefficient rule that has to be abandoned, it suggested that this cannot be achieved by relying on the Model Law but rather necessitates the development of a separate framework for the recognition of foreign restructuring plans, which meets the benchmarks identified by Chapter II.

At the same time, the thesis also dispels the widely held impression that US courts rely on the Model Law to recognize foreign restructuring plans. In fact, the analysis reveals, through a close examination of the relevant case law, that US courts actually utilize the concept of comity, as reflected in the US enactment of the Model Law, to recognize the effect of foreign restructurings. Although this element has conspicuously been ignored by academic commentary, it provides a convincing counterargument against one of the staunchest positions of contemporary scholarship, namely that the Model Law, and the universalist principles underpinning it, is an all-encompassing framework that is capable of addressing all potential issues that may arise in the cross-border insolvency and restructuring context. In that sense, Chapter IV utilized a conceptualization of cross-border restructurings as different and separate from cross-border insolvency to justify the English position on the (non-) application of the Model Law to the recognition of foreign plans, while at the same time underlining the need for the development of a new normative framework.

3. The recognition of restructuring plans as judgment recognition

In addition to assisting in the proper understanding of the current state of affairs, the fundamental conception of cross-border restructuring law, as a self-standing field that is targeted at addressing particular economic concerns, can also be utilized as a benchmark to map out the basic components of a normatively efficient legal framework. A particularly relevant question in that regard is whether effect may be given to foreign restructuring plans by relying on choice of law rules. This point is frequently made by commentators and practitioners alike in order to provide an alternative avenue for recognition and thus address the indeterminacy that characterizes the field. The analysis in Chapter V however demonstrated that, whereas the operation of choice of law rules can lead to the recognition of a foreign plan against creditors, whose claims are governed by the lex fori concursus, such rules, due to their prescriptive nature, are incapable of conditioning such recognition on certain minimum principles of minority protection. In addition, public policy, the usual limiting factor for choice of law rules cannot properly filter instances of holdup behaviour, due to its exceptional and relative nature. As a result, the fundamental balancing function of cross-border restructuring rules between holdout and holdup cannot be accommodated within the traditional structure of a choice of law framework.

Following up on this conclusion, the most important argument of Chapter V, and one of the most important of this thesis in general, has been the claim that the recognition of foreign restructuring plans can be approached as a question of foreign judgment recognition. Although there is admittedly some conceptual difficulty in construing restructuring plans as judgments, the analysis demonstrated that these obstacles are overstated, since such a conceptualization reflects more accurately the true nature of the authority that the court exercises in the restructuring context. In addition, the fundamental structure of judgment recognition frameworks, as comprised of requirements of and defences to recognition, suggests that these rules are indeed more capable of being formulated in such a way as to enable the conditional recognition of restructuring plans, thus addressing the dual considerations of holdout and holdup. As a result, this thesis has put forward the argument that a targeted judgment recognition framework for restructuring plans should be comprised of a basic judgment recognition rule, enabling the straightforward recognition of a foreign plan as

a means of addressing holdouts, and, on the other hand, of a set of defences that can preclude such recognition, when the plan abuses the rights of dissenting minorities.

Once the basic outlines of this framework are put in place, it is possible to develop each of these points in turn. As far as the requirements for recognition are concerned, the primary focus has been on jurisdictional standards. In that context, the main argument advanced in Chapter V was that such standards should be formulated broadly, encompassing both COMI as well as additional creditor-oriented standards, namely the law governing the underlying claim and submission by virtue of choice of forum clauses. Such a formulation can facilitate recognition, and thus counter holdout behaviour, both in collective as well as in selective restructuring strategies. Regarding defences, the analysis pointed out that traditional defences, such as public policy and natural justice, are incapable of accurately fulfilling the holdup resolution function and therefore underlined the need to develop an autonomous and self-standing defence for the cross-border restructuring context. In particular, the analysis advocated in favour of the introduction of a flexible standard as a defence, the adequate protection of dissenting creditors, further specified by a non-exclusive list of specific procedural rights, which, if violated in the foreign proceeding, would trigger the application of the defence. Relying on the economics of efficient bargaining, the normative proposal identified five fundamental minimum requirements that have to be met in the foreign proceeding; the right to vote on the plan, the assignment of creditors into separate classes, the provision of adequate information, the non-infringement of the liquidation value of creditor claims and the right to appear at the confirmation hearing and object against the plan. All the above, constitute the main components of a normatively efficient framework for the recognition of foreign restructuring plans.

Is such an approach a feasible alternative to *Gibbs*? The conclusion of Chapter VI is that a reform of the current position of English law through the introduction of a judgment recognition approach is not only capable of leading to efficient outcomes but can also imbue the field with much needed doctrinal consistency. In particular, the analysis demonstrated that *Gibbs* suffers from considerable inconsistencies, as it oscillates between a choice of law and a judgment recognition paradigm to the recognition of foreign restructuring plans. In addition, if examined from a purely doctrinal perspective and by reference to the English case law on the act of state

doctrine, *Gibbs* appears indefensible, as resting on a fallacious conceptualization of the problem of recognition of foreign plans, as a question of choice of law as opposed to judgment recognition. Although these fallacies have not yet been identified by contemporary scholarship, they illustrate that the resilience of *Gibbs* cannot be justified on doctrinal grounds but only on grounds of precedent. At the same time however, the MLJ, which in theory could introduce such a framework, suffers from several flaws, which would likely impede its ability to adequately deal with the problems raised in the cross-border restructuring setting. As concluded in Chapter VI, a judgment recognition approach, along the lines of the normative proposal illustrated in Chapter V is not only feasible but in fact the most desirable avenue for reforming *Gibbs* towards a more efficient paradigm. In this context, the MLJ can nevertheless function as the normative impetus for seeing such a reform through in the future.

4. Looking ahead to the future

Circling back to the original conception of the problem, this thesis has attempted to initiate a change in our understanding of cross-border restructurings, by offering a novel conceptual framework to replace the prevailing piecemeal understanding of contemporary issues. This shift, from a fox- to a hedgehog-like understanding of the field, has led to a normative proposal for the development of an autonomous and efficient framework for the recognition of foreign restructuring plans that has the potential of overcoming the inefficiencies that are generated by existing approaches. Such a transition, though appearing feasible, will not necessarily be immediate let alone smooth. As with any new conceptualization of an existing problem, its crystallization into positive norms takes time and considerable intellectual struggle. This is of course not surprising; as Berlin himself had pointed out '[f]oxes settle for what they know and may live happy lives. Hedgehogs will not settle and their lives may not be happy'.[2] It of course a stretch to suggest that the role of legal scholarship is to ensure personal happiness let alone that it may be the cause of one's misery. Still, this adage is suggestive of the challenges that remain. Regardless, it is hoped that the

[2] Isaiah Berlin, *The Hedgehog and the Fox: An Essay on Tolstoy's View of History* (2nd edn, Weidenfeld and Nicholson 2022).

present thesis will mark the first step in the (hopefully not so) long road to the adoption of a new approach to cross-border restructuring law.

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