C. Recognition of Restructuring Plans under the MLCBI: A Comparative Analysis and Preliminary Findings

Part C of this work will be dedicated to the recognition of restructuring plans under the MLCBI. As noted earlier, the MLCBI is not applied in a similar manner with respect to the recognition of restructuring plans, even though it is designed as a model law with the goal of harmonising the respective area in the enacting states.[186] For the reasons already provided (A.IV), Part C will examine two jurisdictions, namely, England and the US, in this regard. Although the MLCBI has been implemented in both jurisdictions, there are variations in the respective texts and even greater differences in how local courts interpret these texts.[187] This is best exemplified by the restructuring proceedings of the IBA ("IBA restructuring proceedings"), which were recognised as a foreign main proceeding in both jurisdictions. That is to say, the IBA's restructuring plan ("IBA plan"), which had been confirmed by the Azerbaijani court in the framework of the IBA restructuring proceedings, was fully recognised and enforced in the US but was not granted the same treatment in England.

Part C will first summarise the IBA restructuring proceedings (C.I). It will then examine the national versions of the MLCBI as implemented in England and in the US with respect to the recognition of restructuring plans (C.II). This will be followed by an assessment of the approaches adopted in the respective jurisdictions, focusing on their advantages and disadvantages (C.III). Based on this assessment, the present work will suggest a balanced model for the recognition of restructuring plans under the MLCBI (C.IV). A brief summary will conclude this Part (C.V).

186 Guide to the MLCBI (n 17) para 1.

187 For a discussion of the implementation of the MLCBI in these jurisdictions in light of the differences in their cross-border insolvency system, see Walters, 'Modified Universalisms' (n 17) s III. See also generally Gerard McCormack, 'US Exceptionalism and UK Localism? Cross-border Insolvency Law in Comparative Perspective' (2016) 36 Legal Studies 136; Daniel M. Glosband, 'Common Law Perspective on UNCITRAL Instruments on Insolvency Law' in Ángel María Ballesteros Barros and David Amable Morán Bovio (eds), *Insolvency Law in UNCITRAL: Instruments and Comments* (Editorial Aranzadi 2023) 406-09.

I. The IBA Restructuring Proceedings

This section will discuss the IBA restructuring proceedings.[188] It will first touch on the applicable Azerbaijani law (C.I.1), which will be followed by a summary of the facts of the case (C.I.2). This section will then turn to the recognition of the IBA restructuring proceedings in England and in the US (C.I.3).

1. Applicable Azerbaijani Law

a) Nature of Proceedings

Restructuring of banks is governed by the Law on Banks ("LB")[189] and the Civil Procedure Code ("CPC"),[190] as the general insolvency regime (and rehabilitation procedure within that regime) does not apply to banks.[191] The voluntary restructuring procedure under the LB may (but must not) be initiated by a bank that is unable (or under threat of it) to meet its obligations before creditors due to the lack or shortage of funds or impossibility of the usage of funds on other grounds.[192] As the name of the procedure implies, the process is voluntary and cannot be initiated by creditors. Although the proceedings are generally supervised by the Central Bank of the Republic

188 For a brief summary of the IBA restructuring proceedings (Azerbaijani law, facts, and the recognition abroad) by the author of this work, see also Abbas Abbasov, 'Protection of Dissenting Creditors' Interests: Direct Application of the "Substantive Fairness" Test While Considering the Recognition of Foreign Restructuring Plans' (2022) Richard Turton Award Paper 2021 <https://insol.azureedge.net/cmsstorage/insol/media/documents_files/richard%20turton%20award%20papers/richard-turton-award-final-paper-2021.pdf> accessed 21 October 2025 (Overview: Eurofenix [Aut 2022] 32; INSOL World [4th qtr 2022] 42), pt I.

189 Law of the Republic of Azerbaijan on Law on Banks (dated 16 January 2004) ("LB"). For voluntary restructuring of banks generally, see ch VIII-I thereof.

190 Civil Procedure Code of the Republic of Azerbaijan (entry into force: 01 September 2000) ("CPC"). For voluntary restructuring of banks generally, see ch 40-5 thereof.

191 The Law of the Republic of Azerbaijan on Insolvency and Bankruptcy (dated 13 June 1997) ("LIB"), art 2 (2).

192 LB (n 189) art 57-11.2.

of Azerbaijan ("Central Bank")[193] and the court,[194] the bank's management retains control and the bank is allowed to carry on its ordinary trade, subject to the limitations outlined in the LB and the restructuring plan itself.[195]

The bank may restructure some or all of its obligations, excluding those owed to insured depositors.[196] The LB does not provide specific criteria for determining which obligations to be restructured and which to remain unaffected, nor does it expressly require such selection to be justified in the restructuring plan. Although the LB does not specify restructuring measures either, it mandates that they be listed in the plan.[197] Furthermore, the LB does not provide any distribution or priority framework. It is also noteworthy that the bank has the right to suspend fulfilling the obligations affected by the restructuring plan, as well as those arising from contracts involving the sale, gifting, exchange, or other disposition of its assets, starting from the date the court order commencing the restructuring proceedings becomes final.[198]

To summarise, this procedure provides banks facing illiquidity with an opportunity to restructure their liabilities while continuing to trade, thus resolving liquidity issues and avoiding liquidation. Subject to the general supervision of the Central Bank and the court, banks are granted a wide range of powers regarding several key matters, such as the selection of liabilities to be restructured, the determination of restructuring measures, and the classification of creditors (liabilities) for the purpose of entitlements to be received as a result of restructuring.

193 The legislative provisions under which the IBA restructuring proceedings were commenced provided for the supervision of the Financial Markets Supervisory Authority. However, this function was transferred to the Central Bank following the former's dissolution by a Presidential Order dated 28 November 2019.

194 For the role of the Central Bank and the court, see generally LB (n 189) ch VIII-I. It is difficult to assess the actual effectiveness of such supervision due to its general nature, lack of guidelines and further cases so far.

195 ibid arts 57-11.15.4, 57-11.21.

196 ibid art 57-11.1.

197 ibid art 57-11.15.3.

198 ibid art 57-11.8.

b) Plan Content, Voting, and Confirmation

The bank's proposed restructuring plan shall include, *inter alia*, the purpose and duration of the restructuring, a list of the affected obligations, the restructuring measures, and any limitations to be imposed on the bank's activity in the course of the proceedings.[199] The draft plan must be approved by the Central Bank before the bank can apply to the court for the commencement of the proceedings.[200]

Once the court grants the application and the respective court order becomes final,[201] the information regarding the restructuring shall be advertised in local and international media as well as on the bank's website within seven working days.[202] The bank shall then convene a creditors' meeting,[203] where the affected creditors will vote as a single class despite the possibility of being treated differently under the plan.[204] At least two-thirds of the affected creditors in value must approve the plan at the meeting.[205] It is also noteworthy that insiders' votes are not expressly prohibited from being counted towards the requisite majority.

Once the plan has been duly approved by the requisite majority, the bank shall inform the Central Bank and apply to the court for the confirmation of the plan.[206] Upon receiving such an application, the court shall schedule a hearing within thirty days and send a notification of the hearing to all interested parties.[207] The court order confirming the plan, once issued, becomes effective immediately[208] and may be appealed according to the general rules for appeals in the CPC.[209] However, filing an appeal does not stay the implementation of the order.[210]

199 ibid art 57-11.5.
200 ibid arts 57-11.4-6.
201 For the procedural aspects, see CPC (n 190) arts 355-15-17.
202 LB (n 189) art 57-11.7.
203 ibid art 57-11.9.
204 The LB does not expressly provide for such a possibility. Nor does it prohibit such differential treatment. In fact, creditors were treated differently under the IBA plan (sub-s C.I.2).
205 LB (n 189) art 57-11.11.
206 ibid arts 57-11.12-13.
207 CPC (n 190) arts 355-18.2-18.3.
208 ibid art 355-18.4.
209 ibid ch 41.
210 ibid art 355-18.4.

c) Effects of Confirmation

Once the restructuring plan has been duly approved by the creditors and confirmed by the court, it has a binding effect on all obligations listed in the plan, including the ones before the dissenting creditors.[211] These obligations are considered duly fulfilled upon the termination of the proceedings on the grounds of the full implementation of the restructuring plan.[212]

During the implementation period, the enforcement or fulfilment of the claims arising out of the obligations to be restructured is suspended.[213] The restructuring proceedings, thus, the implementation of the plan, may last for up to 180 days from the date the court order commencing the proceedings becomes final.[214] However, this period may be extended by the court for up to 180 days, each time upon application of the bank, which, in turn, shall be pre-agreed upon with the Central Bank.[215] There is no limit to the number of such extensions.[216]

d) Creditor Rights

Creditors, whether local or foreign, enjoy a number of rights, mostly procedural in nature, in the framework of restructuring proceedings of banks. First and foremost, creditors' right to be heard is generally respected. That is to say, as already identified, the commencement of the restructuring proceedings should be advertised in the local and international media and on the website of the bank.[217] The affected creditors may receive a copy of the restructuring plan and the court decision commencing the restructuring proceedings.[218] Additionally, nothing prevents these creditors from proposing amendments to the plan, as the law expressly permits making

211 LB (n 189) art 57-11.12.
212 ibid art 57-11.18.
213 ibid art 57-11.14.
214 ibid art 57-11.6.
215 ibid.
216 ibid. Under the initial text of the respective article, the period of extension was limited to up to 90 days and any further extension was not allowed. For the respective amendment, see the Law of the Republic of Azerbaijan (970-VQD) dated 29 December 2017.
217 See text to n 202.
218 LB (n 189) art 57-11.7.

amendments to the proposed plan.[219] These amendments, however, shall be approved by the Central Bank and separately publicised.[220] Furthermore, the affected creditors are entitled to attend the creditors' meeting and vote on the restructuring plan or appoint a proxy to do so in their stead.[221] These creditors shall be notified of the court hearing on the confirmation of the plan.[222] They, thus, are entitled to attend the court hearing, present their case before the court, and raise objections to the confirmation of the restructuring plan in accordance with the general provisions of the CPC.[223] The affected creditors also have the right to appeal the court order confirming the plan.[224]

To sum up, the rights mentioned are procedural and are meant primarily to ensure due process. The LB, however, does not address how the substantive rights of the affected creditors, particularly those who disagree, should be properly protected. Furthermore, no well-established principles have been developed in Azerbaijani case law to address this issue.[225]

2. Facts

The brief facts of the IBA restructuring proceedings were as follows.[226] The IBA, the largest bank in Azerbaijan, initiated restructuring proceedings in 2017 to address financial difficulties stemming primarily from mismanage-

219 ibid art 57-11.9.
220 ibid arts 57-11.9-10.
221 ibid art 57-11.11.
222 See text to n 207.
223 See CPC (n 190) art 306.1, which provides for the application of the rules for general proceedings to such kind of special proceedings.
224 ibid art 357.1.
225 This is primarily due to the lack of actual cases. In fact, the IBA restructuring proceedings are the first and, thus far, the only case under the respective chapter of the LB. As to case law under the general insolvency regime in Azerbaijan, which despite being not applicable to banks could be used as an analogy, it should be noted that there are only a few actual cases. In fact, this work could not reach any court judgment addressing the issue of the protection of dissenting creditors' rights under the general insolvency regime.
226 Unless another source is cited, all the facts outlined in sub-s C.I.2 of this work are taken from the reserved judgment of Mr. Justice Hildyard in *In the Matter of the OJSC International Bank of Azerbaijan* [2018] EWHC 59 (Ch). For a more detailed summary of the undisputed facts of the case, see ibid [4]-[8], [30]-[42].

ment and the devaluation of the Azerbaijani manat.[227] The proceedings were commenced under the then newly introduced chapters to the LB and the CPC (C.I.1). The IBA plan contemplated restructuring the IBA's financial indebtedness, roughly amounting to 3.34 billion US Dollars. According to the IBA plan, the obligations to be restructured were divided into three categories, each receiving different treatment. The IBA plan provided for all affected obligations to be discharged in full and exchanged for various new entitlements. These entitlements mainly consisted of new debt securities, such as bonds issued by the Government of Azerbaijan or the IBA itself.

The IBA plan was approved by 99.7 per cent of those voting at the meeting of a single class of creditors, who held 93.9 per cent of the value of the affected obligations. Subsequently, the Azerbaijani court confirmed the IBA plan in an unopposed hearing.

3. Recognition Abroad

a) Recognition in England

Shortly after the commencement of the proceedings in Azerbaijan, the IBA applied to the High Court of England and Wales ("EWHC") for an order recognising the IBA restructuring proceedings as a foreign main proceeding under the Cross-Border Insolvency Regulations 2006 ("CBIR"),[228] which is the British version of the MLCBI. The court granted the order sought, which was unopposed.[229] The court also imposed a moratorium[230] pursuant to article 21 of Schedule 1 to the CBIR instead of the automatic effects under article 20.[231] The moratorium temporarily prevented creditors

227 International Bank of Azerbaijan, 'ABB Launches Debt Restructuring Offer to its Creditors' (2017) <https://abb-bank.az/en/maliyye-ve-investisiya/diger-melumatlar/press-relizler/londonda-azerbaycan-beynelxalq-bankinin-xarici-kreditorlari-ile-gorus-kecirilib> accessed 21 October 2025.

228 Cross-Border Insolvency Regulations 2006, SI 2006/1030 ("CBIR").

229 *In the Matter of OJSC International Bank of Azerbaijan* [2017] EWHC 2075 (Ch) [25]. An anonymous group of creditors was initially considering opposing the application but then chose not to do so at that stage (ibid [18]-[21]).

230 The moratorium granted was similar to that under the Insolvency Act 1986, sch B1 (Administration), para 43.

231 *International Bank of Azerbaijan* [2017] EWHC 2075 (Ch) (n 229) [14]-[16], [21], [23], [25]. Under the CBIR (sch 1, art 20), the automatic effects of recognition are only reserved for the proceedings analogous to the winding-up of companies under the Insolvency Act 1986. The discretionary relief in this case was, thus, requested

from commencing or continuing any legal proceedings against the IBA and its assets without the permission of the court.[232]

Later in 2017, the foreign representative of the IBA applied to the EWHC for the continuation of the already imposed moratorium for an indefinite period.[233] Two dissenting creditors, who had their debts governed by English law, opposed the application and filed cross-applications to lift the moratorium.[234] The IBA, in turn, opposed their cross-applications.[235] The issues raised in these three applications are also at the heart of the present work. Specifically, the focus was on the relationship between the principle of modified universalism and the rule of English private international law known as the Gibbs rule.[236] According to this rule, which will be thoroughly examined later in this work, English law recognises a discharge of a debt in foreign insolvency proceedings only when it is a discharge under the governing law of the contract. It was not contested by the IBA that, for the purposes of the applications at hand, the court was bound by the rule.[237] Nor did the IBA dispute that the IBA plan had not discharged the debts in question in the eyes of English law or the Azerbaijani court order confirming the IBA plan could not be directly recognised and enforced under the CBIR.[238]

Nonetheless, the IBA argued that, if granted, the permanent moratorium requested would not result in the discharge of the debts in question and, therefore, the Gibbs rule would still be formally observed.[239] Hence, the IBA suggested distinguishing the issue of the permanent impediment to the enforcement of a right from its discharge.[240]

The respondents (the dissenting creditors), by referring to the Gibbs rule, opposed the IBA's application, arguing that their claims had not been discharged under the IBA plan and that the permanent moratorium sought

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and granted by the court under the CBIR, sch 1, art 21, as the aim of the IBA restructuring proceedings was the rescue of the IBA rather than its liquidation.

232 n 230 and accompanying text.

233 *International Bank of Azerbaijan* [2018] EWHC 59 (Ch) (n 226) [12]-[13].

234 ibid [3], [14], [20]. For more about the identity of the opposing creditors and their claims, see ibid [9]-[11], [38]-[39].

235 ibid [13].

236 ibid [1]-[2].

237 ibid [16].

238 ibid [16]-[17].

239 ibid [60]-[75].

240 ibid.

would prevent them from enforcing their English law rights.[241] The court agreed with the respondents' position, holding that the relief requested would, if granted, have had practically the same effect as a discharge,[242] as had generally been predicted in the literature.[243] Consequently, the previously imposed moratorium was lifted (that lifting being subject to stay pending the IBA's appeal).[244]

The IBA appealed the EWHC judgment and this appeal was dismissed by the Court of Appeal of England and Wales ("EWCA").[245] The EWCA held that article 21 or any other provision of the MLCBI (as incorporated in the CBIR) cannot be used to bypass the substantive rights of English law creditors under the Gibbs rule and, therefore, English courts lack jurisdiction to grant the moratorium sought.[246] The EWCA also pointed out the possibility of the initiation of analogous proceedings in England by the IBA, which had not been the case.[247]

b) Recognition in the US

In 2017, the IBA also submitted a petition to the US Bankruptcy Court for the Southern District of New York ("SDNY"), seeking the recognition of the IBA restructuring proceedings as a foreign main proceeding under Chapter 15 of the BC ("Chapter 15"), which is the US version of the MLCBI.[248] The application was objected to by an ad hoc group of noteholders.[249] The objection was based on the arguments that the applicable Azerbaijani law does not adequately protect creditors, particularly foreign ones, and does not ensure procedural and substantive fairness, thus violat-

241 ibid [14].
242 ibid [142]-[147].
243 Adrian Walters, 'Giving Effect to Foreign Restructuring Plans in Anglo-US Private International Law' (2015) 3 NIBLeJ 20 375 <https://irep.ntu.ac.uk/id/eprint/11905/1/220288_2492.pdf> accessed 21 October 2025, 388.
244 *In the Matter of the OJSC International Bank of Azerbaijan* [2018] EWHC 792 (Ch).
245 *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802 (*IBA*).
246 ibid [83]-[101].
247 ibid [88].
248 *In re International Bank of Azerbaijan* 17-11311 (JLG) (Bankr SDNY, entered 7 July 2017)
249 Elena D. Lobo and Daniel J. Soltman, 'Azeri Restructuring Could Test Limits of Chapter 15 Foreign Plan Enforcement' (2018) 5 (Winter 2017-2018) Emerg Mark Rest J 37, 38-39.

ing the public policy of the US.[250] These arguments were supported, *inter alia*, by the claims that under Azerbaijani law, there are no restrictions on considering insider votes towards the requisite majority, and no provisions for preventing fraudulent transactions.[251] Additionally, the objection pointed out the possibility of different treatment of creditors who vote as a single class under Azerbaijani law.[252]

Despite these objections, the bankruptcy court granted the IBA's petition by recognising the IBA restructuring proceedings as a foreign main proceeding and expressly confirming the automatic effects under article 20.[253] The court overruled the objection, considering it premature, and pointed out that the respective issues would be better addressed while deciding on possible post-recognition relief on the recognition and enforcement of the IBA plan.[254] According to the court, the mere recognition would not violate the public policy of the US.[255]

A few months later, the foreign representative of the IBA indeed filed a motion to the same court to request the recognition and enforcement of the IBA plan, along with a permanent moratorium (injunctive relief) in the US, referring to, *inter alia*, sections 1507 and 1521 of the BC.[256] The court granted the relief requested and overruled any objections thereto.[257] It is not entirely clear, however, whether or not the same objections were in place when the court considered the IBA's request. As a result, the IBA plan (as well as the court order confirming the IBA plan) was recognised and entitled to full force and effect and any claim arising out of the debt discharged thereunder became permanently unenforceable in the US.[258] This included the unenforceability of judgments and being barred from commencing or continuing proceedings against the IBA and its assets in the US.[259]

250 ibid.
251 ibid 39
252 ibid.
253 *International Bank of Azerbaijan* 17-11311 (JLG) (Bankr SDNY, entered 7 July 2017) (n 248).
254 See Lobo und Soltman (n 249) 39.
255 ibid.
256 *In re International Bank of Azerbaijan* Case No 17-11311 (JLG) (Bankr SDNY, entered 23 January 2018).
257 ibid.
258 ibid.
259 ibid.

The court based its decision on several general arguments, such as preventing harm to the creditors of the IBA and other stakeholders involved in the IBA restructuring proceedings.[260] Such harm could arise, according to the court, due to potential individual actions against the IBA and its assets in the US in the absence of the relief requested.[261] The court also held that granting relief was consistent with the principle of comity, necessary for the purposes of Chapter 15, and did not contradict the public policy of the US.[262]

II. Interpretation of the MLCBI in England and in the US with Respect to the Recognition of Restructuring Plans

After discussing the IBA restructuring proceedings as an illustrative example of the different interpretations of the MLCBI in England and in the US with respect to the cross-border effects of restructuring plans, this work will below analyse the matter in each jurisdiction separately. Subsection C.II.1 will examine the English (British) version of the MLCBI, while subsection C.II.2 will focus on the American version. Subsection C.II.3 will provide a comparative summary.

1. England

a) Introduction to the CBIR

The CBIR is a statutory instrument implementing the MLCBI in Great Britain in 2006.[263] Schedule 1 to the CBIR contains the modified text of the MLCBI.[264] One of the main modifications relates to article 20 of the MLCBI. That is to say, in the case of non-individual debtors, the automatic effects of recognition under article 20 can only take place with respect to foreign main proceedings that are analogous to the winding-up of a company under the Insolvency Act 1986, i.e. proceedings commenced for

260 ibid.
261 ibid.
262 ibid.
263 CBIR (n 228) s 2 (1).
264 ibid.

the purpose of liquidating the debtor.[265] Hence, foreign proceedings aimed at rescuing the debtor as a going concern rather than liquidating it, upon being recognised as a foreign main proceeding, do not enjoy the automatic effects of recognition under the CBIR. This is the reason why the IBA restructuring proceedings were not granted automatic relief under article 20 upon recognition as a foreign main proceeding under the CBIR, but rather a similar relief under the British version of article 21 of the MLCBI.[266] That said, article 21 is not construed generously by English courts, as will become evident as subsection C.II.1 of this work progresses.

b) The Gibbs Rule

Below, this work will discuss the Gibbs rule, which significantly shapes the English approach to the matter.

aa) *Antony Gibbs*

The rule derives its name from the 19th-century case of *Antony Gibbs & Sons Ltd v La Société Industrielle et Commerciale des Métaux*.[267]

(1) Facts

The main facts of the case were as follows.[268] The case involved a dispute over contracts for the sale of copper governed by English law. The buyer under the contracts was a French company which eventually went into judicial liquidation in France and refused to accept cooper under the contracts. The seller brought an action against the buyer in England for damages due to the non-acceptance of the copper (including the non-acceptance of the copper that became due only after the pronouncing of the judicial liquidation in France) under the contracts. The defendants (buyer) argued that the pronouncement of the liquidation under French law then in force had the

265 ibid sch 1, art 20 (2) (a).
266 See n 231 and accompanying text.
267 *Antony Gibbs & Sons Ltd v La Société Industrielle et Commerciale des Métaux* [1890] LR 25 QBD 399 (CA).
268 For the facts of the case, see ibid 399-401.

effect of the company existing only for the purposes of liquidation, with all its assets and affairs being vested in the liquidator and of the dissolution of the liability to be sued on the contracts. As to the breaches of the obligation (non-acceptance) under the contracts that had not become due until after the announcement of liquidation, the defendants further submitted that the contracts had been cancelled by operation of law then in force in France and, therefore, no liability could arise due to the non-performance of the contracts after such announcement. The defendants further argued that the law of England then in force recognised and gave effect to a foreign bankruptcy or liquidation in accordance with the respective principles of international law. According to the defendants, the effect of the liquidation in France, thus, constituted a bar to the action in England or at least a ground for a stay of proceedings and the seller should not be allowed to have access to the assets of the defendants in England, which, in turn, should be vested in the liquidator in France and administered accordingly.

(2) Reasoning

The EWCA unanimously dismissed the appeal against the judgment in favour of the claimants.[269] Lord Esher, who delivered the judgment of the EWCA, held that a contract cannot be discharged by foreign insolvency proceedings, referring to a general rule that the issue of a discharge of a contract is governed only by its proper law.[270] He highlighted the importance of respecting the agreement of contracting parties in this context by asking his oft-quoted rhetoric question: 'Why should the plaintiffs be bound by the law of a country to which they do not belong, and by which they have not contracted to be bound?'.[271] Lord Esher further noted that the non-recognition of a foreign bankruptcy discharge (other than one under the governing law of the contract) of a contract in England was not confined to English law-governed contracts only:

> I should say, too, that, if the contract had been made in any foreign country other than France, the plaintiffs could sue upon it in this country, and their action would not be affected

269 ibid 409-11.
270 ibid 405-06.
271 ibid 406.

> by the law of France. In that case the law of such other foreign country would govern the contract.[272]

The court decided the issue of the stay of proceedings against the defendants as well.[273]

bb) English Private International Law Rule on the Recognition of a Foreign Bankruptcy Discharge

The English private international law rule on the recognition of a foreign bankruptcy discharge is often associated with Lord Esher's reasoning summarised above and, thus, known as the Gibbs rule. However, it should be noted that the reasoning itself did not develop a new rule and was based on the settled case law.[274] The respective rule states that: 'A discharge from any debt or liability under the bankruptcy law of a foreign country outside the United Kingdom is a discharge therefrom in England if, and only if, it is a discharge under the law applicable to the contract'.[275] It is worth noting that the rule is not without exception. That is to say, the Gibbs rule does not afford protection to a creditor submitting to foreign bankruptcy proceedings[276] and whether the submission has taken place is construed broadly by English courts.[277]

As can be seen, both Lord Esher's reasoning and the definition of the rule are not confined to English law alone but rather apply to the governing law of the contract generally. Most recently, the EWCA reaffirmed this position in *IBA*.[278] That said, the Gibbs rule is primarily associated with

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272 ibid 406-407.

273 ibid 409.

274 See, eg, the case referred to in the reasoning: *Smith v. Buchanan* (1800) 1 East, 6. For a summary of the earlier case law, see Andrew Grossman, 'Conflict of Laws in the Discharge of Debts in Bankruptcy' (1996) 5 Int Ins Rev 1, 15-18; Riz Mokal, 'Shopping and Scheming, and the Rule in Gibbs' [2017 March] South Square Digest 58, 58; McCormack 'UK Contracts and Modification under Foreign Law' (n 166) pt 2.

275 Lord Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris & Collins on the Conflict of Laws* (16th edn, Sweet & Maxwell 2022) vol 2, Rule 211, para 31R-105 (footnote omitted).

276 *IBA* (n 245) [28]. For a more detailed discussion of the exception, see McCormack 'UK Contracts and Modification under Foreign Law' (n 166) s 3.a.

277 See text to nn 356, 357.

278 *IBA* (n 245) [30].

English law-governed contracts in practice. However, the rule may theoretically be invoked in relation to a discharge of a debt governed by a law other than English law. In that respect, this work will below discuss four scenarios illustrating the position of English law on bankruptcy discharge involving foreign elements.[279]

(1) Recognition of a Foreign Bankruptcy Discharge of an English Law-Governed Debt

This is the most prominent area of the application of the Gibbs rule, and there is no uncertainty surrounding this scenario. As was the case in *Antony Gibbs*[280] itself and *IBA*,[281] English courts do not recognise a discharge of an English law-governed debt in foreign insolvency or restructuring proceedings unless the English creditor has submitted to those proceedings.

(2) Recognition of a Foreign Bankruptcy Discharge of a Debt Governed by That Foreign Law

Not much uncertainty is involved also in this scenario. It perfectly aligns with the Gibbs rule, as the debt in question has been discharged by its proper law. Lord Esher's *dicta* in *Antony Gibbs* suggests that a discharge in this scenario would be recognised in England.[282] Hence, the Gibbs rule should not be a bar to recognising such a foreign discharge in the eyes of English law.[283] In *IBA*, too, the EWCA expressly stated in *dicta* that 'if they [the relevant contracts] had been governed by Azeri law, the English court would have recognised the effect of the restructuring'.[284]

279 For the purpose of this discussion, bankruptcy discharge also includes discharge in restructuring proceedings.
280 *Antony Gibbs* (n 267).
281 *IBA* (n 245).
282 *Antony Gibbs* (n 267) 406.
283 Lord Collins and Harris (n 275) paras 31-107 (see cited cases in fn 280 therein), 31-112 (Illustration 1 therein).
284 *IBA* (n 245) [30].

(3) Recognition of a Foreign Bankruptcy Discharge of a Debt Governed by Another Foreign Law

Things are slightly complex in this scenario. Imagine a case where a New York law-governed debt is discharged by a restructuring plan under German law without the New York law creditor submitting to the German proceedings. Would English courts recognise and give effect to the German plan in England despite the objection of the New York law creditor? Here, a preliminary question to answer is whether or not the German discharge is valid in the eyes of New York law. If the answer is affirmative, the Gibbs rule should not be an obstacle and English courts would likely to recognise the discharge in the German proceedings since it is also a valid discharge under the governing law of the contract (New York law).[285] The same does not hold if the answer to the preliminary question is negative, i.e. New York law itself does not recognise the discharge in the German proceedings.[286] According to this work, English courts do not have jurisdiction to recognise such a discharge under the Gibbs rule and they would unlikely to grant recognition in such a case. Deciding otherwise would contradict Lord Esher's *dicta* in *Antony Gibbs* expressly referring to such a scenario[287] and its reaffirmation by the EWCA in *IBA* by stating 'that questions of discharge of a contractual liability are governed by the proper law of the contract, whether or not that law is English law'.[288] That said, this work could not reach any English case applying the Gibbs rule in a similar situation.

(4) English Bankruptcy Discharge of a Foreign Law-Governed Debt

Technically, this scenario does not fall within the scope of the Gibbs rule, as it does not involve the recognition of a foreign bankruptcy discharge. Instead, it pertains to an English bankruptcy discharge of a foreign law-governed debt. However, Lord Esher's reasoning in *Antony Gibbs* was predicated on the general principle that a debt can only be discharged under its proper law.[289] Hence, one would logically expect English law to confine English bankruptcy discharge to English law-governed debts

285 Lord Collins and Harris (n 275) paras 31-111, 31-112 (Illustration 4).
286 ibid.
287 See text to n 272.
288 *IBA* (n 245) at [30].
289 See text to nn 270, 271.

only. However, English law surprisingly takes the opposite approach. That is to say, an English bankruptcy discharge (section 281 of the Insolvency Act 1986) is a discharge in England, irrespective of the governing law of the contract.[290] Furthermore, English courts generally sanction schemes of arrangement under Part 26 of the Companies Act 2006 modifying foreign law-governed debts if satisfied that the scheme will be given effect in the respective foreign jurisdictions, i.e. the scheme 'will achieve its purpose'.[291] That holds true for the recently introduced restructuring framework under Part 26A of the same act.[292]

290 Lord Collins and Harris (n 275) Rule 205 (para 31R-069) and Comment thereto (paras 31-070-73). This aspect constitutes one of the key arguments of critics of the Gibbs rule. See n 312 (and accompanying text) and text thereto.

291 See, eg, *in the matter of Magyar Telecom B.V. Magyar Telecom B.V.,* [2013] EWHC 3800 (Ch) [16]. In that case, the EWHC sanctioned a scheme modifying New York law-governed notes after being convinced that the scheme would be given effect in the US under Chapter 15 (ibid [16]-[25]. Indeed, recognition was subsequently granted under Chapter 15, along with permanent injunctive relief. See Walters, 'Giving Effect to Foreign Restructuring Plans' (n 243) 378-81. See also *in re Avanti Commc'ns Grp. PLC*, 582 BR 603 (Bankr SDNY 2018) (*Avanti*), where an English scheme of arrangement modifying New York law-governed notes was recognised and given effect in the US under Chapter 15. For a more detailed discussion of this case, see sub-s C.II.2.d)bb). See also Robert van Galen, 'The Scheming Brits' in Katharina de la Durantaye and others (eds), *Festschrift für Christoph G. Paulus zum 70. Geburtstag* (CH Beck 2022) 215.

292 See, eg, *in the matter of AGPS Bondco Plc* [2023] EWHC 916 (Ch), where the EWHC sanctioned a plan amending the terms of German law-governed notes (in the framework of the restructuring of a group of companies with parent company in Luxembourg and assets in Germany) after being satisfied 'that there is at the very least a reasonable prospect that the Plan will be recognised under both German law and the law of Luxembourg' (ibid [332]). The decision, however, was subsequently set aside by the EWCA following a successful appeal (but not over the jurisdiction issue, instead due to fairness matters). For a more detailed discussion of this case, see sub-s E.II.2.c)bb)(2)(b). For a discussion of the recognition of plans under Part 26A of the Companies Act 2006 in Germany, see, on the one hand, generally Stephan Madaus, 'Are Non-EU Preventive Restructuring Plans Effective in Germany?' (2025) 22 Int Corp Res 198, on the other hand, generally Dominik Skauradszun, Johannes Schröder, and Jeremias Kümpel, 'Why a Sanction Order Pursuant to Part 26A UK CA Cannot Be Recognised in Germany: Part One' (2024) 21 Int Corp Res 349; generally Dominik Skauradszun, Johannes Schröder, and Jeremias Kümpel, 'Why a Sanction Order Pursuant to Part 26A UK CA Cannot Be Recognised in Germany: Part Two' (2025) 22 Int Corp Res 7.

cc) The Gibbs Rule and the CBIR

The CBIR further (in addition to the court's power to assist a trustee in foreign bankruptcy proceedings under common law[293]) diminishes the effect of the Gibbs rule in relation to foreign insolvency proceedings. Once recognised in England as such, foreign main insolvency proceedings enjoy the automatic effects of recognition under the British version of article 20 of the MLCBI. Additionally, the court has the discretion to assign the administration, realisation, or distribution of some or all of the debtor's assets in Great Britain to the foreign representative (subject to adequate protection of the interests of local creditors).[294] Hence, although their English law claims remain undischarged,[295] English creditors may be permanently prevented from enforcing their claims against the debtor's assets in Great Britain. As critics of the rule state, had *Antony Gibbs*[296] been decided with the CBIR in force, the stay sought by the defendants in that case would have been granted under the CBIR.[297]

The situation is quite different with respect to foreign restructuring proceedings. As already mentioned, one of the main distinctions is that the automatic effects of recognition under the British version of article 20 are not available for foreign restructuring proceedings. However, the court may grant similar relief in such cases under the British version of article 21 of the MLCBI, as it did upon the recognition of the IBA restructuring proceedings as a foreign main proceeding.[298] That said, article 21 is constructed narrowly by English courts and is generally confined to procedural matters rather than affecting substantive rights. That is to say, based on the Gibbs rule, English courts not only refuse to recognise a discharge of an English law-governed debt in foreign restructuring proceedings but also do not allow a moratorium that would permanently prevent English creditors from

293 See text to nn 302, 313.
294 CBIR (n 228) sch 1, art 21((1) (e), (2)).
295 As already identified, that is because insolvency proceedings, unlike restructuring proceedings, do not directly discharge pre-insolvency entitlements. See n 35 (and accompanying text) and text thereto.
296 *Antony Gibbs* (n 267).
297 Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell 2016) para 4-031; Ramesh (n 48) para 32.
298 See nn 230, 231 (and accompanying text) and text thereto.

enforcing their rights under English law.[299] As they do so due to the lack of jurisdiction, it is not even a matter of discretion.[300]

dd) Academic Reception

The Gibbs rule has been the subject of academic debate, particularly in recent decades. This is because restructurings became a global trend only a few decades ago. As mentioned earlier, discharge is particularly important in restructuring proceedings and operates in a significantly different way from discharge in insolvency proceedings.[301] Besides, under another rule of English private international law, the debtor's movables may vest in the foreign trustee in foreign insolvency proceedings, resulting in the debtor remaining liable under an English law-governed debt in England but without assets there.[302] This significantly reduces the impact of the Gibbs rule regarding foreign insolvency proceedings. As already noted, things are different in restructuring proceedings, which are not asset-oriented proceedings and generally do not focus on marshalling and the realisation of the assets of the debtor.[303] Therefore, the Gibbs rule is of particular importance in relation to restructuring proceedings.

Additionally, two events in the 21st century have sparked discussions around the rule. One is the adoption of the MLCBI, underpinned by modified universalism, in Great Britain. The other one is a consultation commenced by the UK Government regarding, *inter alia*, the implementation of Article X of the MLIJ.[304]

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299 See text to n 246.

300 ibid.

301 See nn 35, 36 (and accompanying text) and text thereto.

302 Lord Collins and Harris (n 275) para 31-111 (referring to Rule 208, para 31R-086). See also Fletcher (n 27) para 29-064; Ramesh (n 48) para 34.

303 See sub-s B.I.3.a).

304 Insolvency Service (UK), 'Implementation of Two UNCITRAL Model Laws on Insolvency Consultation' (published 7 July 2022, updated 10 July 2023) <https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency/implementation-of-two-uncitral-model-laws-on-insolvency-consultation> accessed 21 October 2025. It should be noted that it was not the Government's intent to override the Gibbs rule. In fact, the consultation states that one of the reasons for not implementing the MLIJ in full is that the full implementation would override the Gibbs rule. Besides, one of the factors suggested by the Government in the consultation that courts may take into account in denying recognition of a foreign judgment under the MLCBI after implementing Article X is:

Below, this work will summarise the reception of the Gibbs rule.

(1) Arguments Against the Gibbs Rule

The Gibbs rule has been roundly criticised in the literature. Its application in relation to discharges under foreign restructuring plans was already being questioned in the mid-20th century.[305] Those critics differentiate *compositions*[306] from bankruptcy (insolvency) discharges in that respect.[307] They argue that, unlike bankruptcy discharge, which is in the interests of the debtor only, compositions, negotiated and assented by the majority of cred-

'The defending party did not submit to the foreign jurisdiction and the originating court did not otherwise exercise jurisdiction on a basis that is compatible with UK law'. That said, most of the responses to the consultation raised concerns about the uncertainty regarding the effect of the implementation Article X over the Gibbs rule. See Insolvency Service (UK), 'Implementation of Two UNCITRAL Model Laws on Insolvency: Summary of Consultation Responses and Government Response' (updated 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#:~:text=On%207%20July%202022%20the,Law%20> 21 October 2025.

305 See, eg, Kurt H. Nadelmann, 'Compositions: Reorganizations and Arrangements: In the Conflict of Laws' (1948) 61 Harv LR 804, 819ff; 'Bankruptcy in English Private International Law. II: Foreign Adjudications' (1955) 4 Intl & Comp LQ 1 (published online by CUP in 2008), 20ff.

306 *Composition* is defined, in the respective context, as 'an agreement of an insolvent debtor … with his creditors in a judicial proceeding whereby a proposed agreement is accepted by a majority of the creditors … and made binding on all creditors by the decision of the court'. See 'Bankruptcy in English Private International Law' (n 305) 20. Thus, in the sources cited in n 305, for the purpose of the differentiation from bankruptcy discharges, the term *composition* was defined broadly to include then-existing analogues of modern restructuring frameworks (reorganisations, arrangements). However, one type of composition was distinguished and likely to be excluded: 'where the debtor assigns all his assets and receives, in return, a release from his debt'. Nadelmann, 'Compositions: Reorganizations and Arrangements' (n 305) 823. The respective exclusion, however, is not relevant to this work since the mentioned type does not qualify as a *restructuring plan* for its purposes. Except for the discussion herein, examining origins, legal nature, and types of compositions falls outside the scope of this work.

307 Nadelmann, 'Compositions: Reorganizations and Arrangements' (n 305) 819ff, 'Bankruptcy in English Private International Law' (n 305) 20ff.

itors, are in the interests of a general body of the creditors, too.[308] According to them, the non-recognition of the binding effect of compositions in foreign jurisdictions equals giving vetoing power to the dissenting individual creditors, who are otherwise expected to be bound by the outcome.[309] This is unfair to the assenting majority bound by this outcome and can even jeopardise the execution of the composition, which would be against the interests of creditors as a whole, say critics.[310] It is also noteworthy that the rule was applied with respect to compositions at least in two cases in the late 19th - early 20th century.[311]

The more recent criticism of the Gibbs rule is mainly about its non-conformity with modern trends in cross-border insolvency law and the principle of (modified) universalism. Therefore, the rule has faced significant criticism from the universalist front in particular. English law's conflicting position towards the effect of a bankruptcy discharge (universal effect for an English discharge versus territorial effect for a foreign discharge) is often highlighted by opponents. Ian Fletcher, one of the harshest critics of the Gibbs rule, labels English private international law in this regard as 'xenophobic' and accuses it of 'maintaining dual standards with regard to the principle of universality of bankruptcy'.[312] He also points out the inconsistency that English law, while acknowledging the title of the foreign trustee to the debtor's assets in England (subject to the respective rules of English private international law), fails to apply 'the usual corollary that, in return for surrendering his available property to the trustee in bankruptcy for distribution among his creditors, the bankrupt becomes dis-

308 Nadelmann, 'Compositions: Reorganizations and Arrangements' (n 305) 822; 'Bankruptcy in English Private International Law' (n 305) 21.

309 Nadelmann, 'Compositions: Reorganizations and Arrangements' (n 305) 822-23; 'Bankruptcy in English Private International Law' (n 305) 21, 25.

310 Nadelmann, 'Compositions: Reorganizations and Arrangements' (n 305) 822-26, 'Bankruptcy in English Private International Law' 21-25.

311 *New Zealand Loan & Mercantile Agency Co. v. Morrison* [1898] AC 349 (PC); *Re Nelson, ex p. Dare and Dolphin* [1918] 1 KB 459. For a brief summary of these cases, see Nadelmann, 'Compositions: Reorganizations and Arrangements' (n 305) 824-26; 'Bankruptcy in English Private International Law' (n 305) 22-24.

312 Fletcher (n 27) para 29-067. See also Mokal, 'the Rule in Gibbs' (n 274) 59-60. Jay Westbrook also made a similar statement (albeit not in the context of the criticism of the rule in Gibbs): 'If we claim a certain global effect for our discharges, we should presumably feel a bit awkward in denying those effects to discharges granted by other legal systems, if those systems meet our usual standards of fairness' See Jay Lawrence Westbrook, 'Chapter 15 and Discharge' (2005) 13 Am Bankr Inst L Rev 503, 512.

charged from all his provable debts'.[313] English law's denial of support for foreign restructuring proceedings while maintaining a supportive approach for foreign insolvency proceedings has also been highlighted by others in academia.[314]

Look Chan Ho believes that the Gibbs rule and the CBIR are mutually exclusive, arguing that 'they are philosophically incompatible and practically irreconcilable'.[315] Like most other critics, he highlights the rule's territorialism underpinning while the CBIR being based on modified universalism.[316] He also suggests that the traditional common law rule that a discharge of an obligation is governed by its proper law should be discarded in relation to bankruptcy discharge, *inter alia*, for the following reasons. Firstly, he questions the pure contractual approach to bankruptcy discharge by underscoring that such discharge is not a consensual matter.[317] It shall rather be characterised as an *in rem* matter, according to him.[318] Additionally, a foreign bankruptcy discharge is likely to be within the expectation of a person who contracts with a foreign counterparty, even if the respective foreign law does not govern their relationship, says Look Chan Ho.[319]

Kannan Ramesh is another vocal critic of the Gibbs rule. He scrutinises Lord Esher's implied reasoning that the matter of discharge in foreign insolvency proceedings is a contractual matter rather than an insolvency issue.[320] He argues that a creditor's (dis)agreement to be bound by the law of a specific country is not a relevant issue in characterising a bankruptcy discharge due to the policy considerations underpinning such a discharge.[321] He, as a logical conclusion of this argument, indirectly answers the rhetorical question posed by Lord Esher[322] with a counter (rhetorical) question:

313 Fletcher (n 27) para 29-064.
314 See, eg, van Zwieten (ed), *Principles of Corporate Insolvency Law* (n 29) para 16-62, where both (insolvency and restructuring) proceedings are referred to as a type of sale: sale to third parties and *hypothetical* sale to creditors, respectively.
315 Ho (n 297), para 4-028.
316 ibid paras 4-029-30.
317 ibid paras 4-095-101.
318 ibid paras 4-102-03.
319 ibid paras 4-103-05. See also Ramesh (n 48) para 25; McCormack 'UK Contracts and Modification under Foreign Law' (n 166) pt 2.
320 Ramesh (n 48) para 21ff.
321 ibid paras 22-24.
322 See text to n 271.

> Once a court has properly taken subject matter jurisdiction over the distressed debtor enabling it to initiate insolvency or restructuring procedures, why should there be a lacuna in its power to discharge certain contractual debts which form part of the debtor's overall liabilities, simply because those debts are not governed by its law?[323]

Martin Glenn assesses the Gibbs rule from the perspective of the *(modified) universalism versus territorialism* debate and describes its essence as territorialism.[324] Jay Westbrook also criticises the approach taken by the EWCA in *IBA,*[325] describing it as 'pure territorialism' which might 'destroy the unity of bankruptcy law and render global management of a global insolvency nearly impossible'.[326]

The Gibbs rule has also been criticised for incentivising holdout behaviour and, thus, creating 'unfair, value-reducing outcomes'.[327]

(2) Arguments in Favour of the Gibbs Rule

The Gibbs rule also has its defenders. Sarah Paterson advances arguments in defence of the Gibbs rule in the context of restructuring proceedings, while acknowledging the strength of arguments against its application in insolvency proceedings.[328] Building on her distinction between insolvency and restructuring, where the former is defined as 'a unitary proceeding in which all creditors are subject to the same mandatory regime to determine their rights and interests' and the latter is characterised as 'renegotiation in distress with different treatment of different, affected creditors', she argues that the governing law of the contract, originally chosen by the

323 Ramesh (n 48) para 26.
324 Agrokor (n 52) 192. For a different view, see generally Louis Noirault, 'Rule in Gibbs: The Continuation of Territorialism by Other Means?' (2025) 15 Harv Bus L Rev 325.
325 *IBA* (n 245).
326 Westbrook, 'Comity and Choice of Law' (n 12) 262.
327 Varoon Sachdev, 'Choice of Law in Insolvency Proceedings: How English Courts' Continued Reliance on the Gibbs Principle Threatens Universalism' (2019) 93 Am Bankr LJ 343, 350.
328 See generally Paterson, 'A Qualified Defence of the Rule in Gibbs' (n 74).

parties, should govern such renegotiation.[329] In most cases, the choice of a specific law to govern a contract reflects important legal and non-legal considerations, and may influence the parties' decision whether to enter into the contract or the terms (e.g. price) upon which they do so, says Sarah Paterson.[330] In her view, therefore, it is legitimate to expect that the same law should also govern any renegotiation of the contract.[331]

The other main argument supporting the rule is legal predictability and certainty for participants of a transaction, particularly a creditor.[332] That is to say, no law other than the governing law of the contract may discharge the substantive rights of a creditor in the eyes of that law, even in the case of the debtor's insolvency or restructuring.[333] Advocates argue that this factor is of crucial importance for institutionalised lenders.[334] The absence of such certainty would have adverse practical effects on debt financing (unavailability or higher costs), say proponents.[335]

It has also been argued that the rule makes English law attractive on a global scale and is a key factor for market participants choosing English law to govern cross-border debt instruments.[336] Another related argument is that the Gibbs rule provides for good forum shopping and brings debt-restructurings to financial hubs (whose laws typically govern high-value cross-border transactions) with flexible restructuring mechanisms for the advantage of creditors.[337]

329 ibid pt IV. For Sarah Paterson's characterisation of restructuring proceedings, see also n 74 and accompanying text.

330 Paterson, 'A Qualified Defence of the Rule in Gibbs' (n 74) pt IV.

331 ibid.

332 See, eg, generally Financial Markets Law Committee (FMLC), 'The Rule in Gibbs: Exploring its Value and Practical Use in the Financial Markets as a Guarantor of Legal Predictability' (29 February 2024) <https://fmlc.org/wp-content/uploads/2024/02/Paper-The-Rule-in-Gibbs-Exploring-its-value-and-practical-use-in-the-financial-markets-as-a-guarantor-of-legal-predictability-29-February-2024.pdf)> accessed 21 October 2025.

333 ibid para 4.10.

334 ibid paras 4.8-9.

335 ibid para 4.31. See also Paterson, 'A Qualified Defence of the Rule in Gibbs' (n 74) pt IV.

336 See the discussion in James Brady, 'Investor Protections in England: The Non-Recognition of the Foreign Discharge of English Law-Governed Debt' (2019) 15 Pratt's J Bankr L 22, 27

337 See the discussion in McCormack 'UK Contracts and Modification under Foreign Law' (n 166) s 3.b.

c) *Rubin* and *New Cap*

Another significant aspect of the narrow interpretation of the British version of article 21 of the MLCBI is that foreign insolvency-related judgments, including those confirming restructuring plans, are not eligible for recognition and enforcement under this article. This is due to the authority of the decision of the UK Supreme Court ("UKSC") in *Rubin v Eurofinance SA* and *New Cap Reinsurance Corporation (In Liquidation) v A E Grant,* handed down by Lord Collins.[338] Below, this landmark decision will be briefly discussed.

aa) Background: *Cambridge Gas*

In those cases, the UKSC considered two appeals involving the issue of the recognition and enforcement of a foreign judgment in bankruptcy avoidance proceedings: one delivered by a US bankruptcy court *(Rubin)* and the other by an Australian court *(New Cap)*.[339] In *Rubin v Eurofinance SA*[340] and later in *New Cap Reinsurance Corporation Limited (In Liquidation) v A E Grant*[341] (following, *inter alia*, its decision in the former case), the EWCA allowed the enforcement of the respective foreign bankruptcy judgments in England and Wales. This approach was taken under the influence of Lord Hoffmann's *dicta* in the Privy Council's decision in *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc*.[342] In *Cambridge Gas*, the Privy Council categorised bankruptcy judgments as neither *in rem,* nor *in personam* but rather *sui generis* for the purposes of the private international law rules on the recognition and enforcement of foreign judgments.[343] The main idea behind Lord Hoffmann's reasoning was that 'bankruptcy, whether

338 *Rubin v Eurofinance SA (Rubin)* & *New Cap Reinsurance Corporation v A E Grant (New Cap)* [2012] UKSC 46. For a more detailed summary of the decision and further developments, see Fletcher (n 27) paras 28-025-34; Walters, 'Modified Universalisms' (n 17) 95-101.

339 *Rubin* & *New Cap* (n 338) [1].

340 *Rubin v Eurofinance SA* [2010] EWCA Civ 895.

341 *New Cap Reinsurance Corporation Limited (In Liquidation) v A E Grant* [2011] EWCA Civ 971.

342 *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26.

343 ibid [13]-[14].

personal or corporate, is a collective proceeding to enforce rights and not to establish them'.[344] With respect to the recognition and enforcement of foreign bankruptcy judgments, Lord Hoffman underscored the importance of the traditional view taken by the English common law that 'bankruptcy proceedings should have universal application', according to which a single bankruptcy case deals with the claims of all creditors.[345]

bb) Legal Issues

The UKSC considered several important matters in its decision. Below, this work will touch on three of them that are relevant to its topic.

(1) Disapproval of *Cambridge Gas* and Adherence to the Traditional Rule

A part of the decision was dedicated to *Cambridge Gas* and its analysis.[346] The UKSC disagreed with the classification of bankruptcy judgments as *sui generis*, stating that it would result in 'a radical departure from substantially settled law' and that the matter, therefore, should be addressed by the legislature, not the judiciary.[347] In his reasoning, Lord Collins described the argument that a person doing business with a foreign party impliedly submits to the insolvency legislation of the respective foreign country as 'wholly unrealistic'.[348] Hence, he posed a rhetorical question similar to one asked by Lord Esher in *Antony Gibbs*[349]: 'why should the seller/creditor be in a worse position than a buyer/debtor?'.[350] Consequently, the UKSC decided against abandoning, with respect to judgments in foreign insolvency avoidance proceedings, the traditional common law rule on the recognition and enforcement of foreign judgments *in personam*, which requires, *inter alia*, the judgment debtor to have been present in or submitted to the jurisdiction of the respective foreign country.[351]

344 ibid [15].
345 ibid [16].
346 See *Rubin* & *New Cap* (n 338) s V.
347 ibid [128]-[129].
348 ibid [116]. This argument constitutes one of the main arguments of critics of the Gibbs rule. See n 319 (and accompanying text) and text thereto.
349 See text to n 271.
350 See *Rubin* & *New Cap* (n 338) [116].
351 ibid [7].

(2) Enforcement of Foreign Insolvency-Related Judgments under the CBIR

In *Rubin*, the UKSC also considered whether foreign insolvency-related judgments could be enforced through the CBIR.[352] Lord Collins responded in the negative on that issue, firmly stating that foreign judgments in insolvency matters are not capable of recognition and enforcement under the CBIR:

> But the CBIR (and the Model Law) say nothing about the enforcement of foreign judgments against third parties. ... Recognition and enforcement of judgments in civil and commercial matters (but not in insolvency matters) have been the subject of intense international negotiations at the Hague Conference on Private International Law, which ultimately failed because of inability to agree on recognised international bases of jurisdiction.
> It would be surprising if the Model Law was intended to deal with judgments in insolvency matters by implication. Articles 21, 25 and 27 are concerned with procedural matters. No doubt they should be given a purposive interpretation and should be widely construed in the light of the objects of the Model Law, but there is nothing to suggest that they apply to the recognition and enforcement of foreign judgments against third parties.[353]

(3) Submission to Foreign Proceedings

Another relevant issue was submission to foreign proceedings.[354] As already noted, such submission constitutes an exception to the Gibbs rule and a creditor who does so consequently loses the protection under the rule.[355] The UKSC determined that non-appearance before the court in avoidance proceedings is not the only factor to consider, and all other relevant facts should be taken into account.[356] By submitting to the insolvency proceed-

352 ibid s VI.
353 ibid [142]-[143].
354 ibid s VIII.
355 See n 276 (and accompanying text) and text thereto.
356 *Rubin* & *New Cap* (n 338) [164]-[165].

ings (e.g. submitting proofs of debts, participating in creditors' meetings, and voting there) generally, according to Lord Collins, the judgment debtor in *New Cap* had indeed submitted to the jurisdiction of the foreign court overseeing the proceedings.[357]

cc) Reception

The approach taken by the UKSC in those landmark cases can be considered a setback to the universalist convention and, therefore, received harsh criticism from the universalist front. It was described as 'a serious reverse to the cause of international cooperation in insolvency matters'[358] or as reflecting 'a profoundly negative approach to international cooperation' under the MLCBI.[359]

The uncertainty caused by *Rubin* with respect to the nature of post-recognition relief under article 21 of the MLCBI, more specifically as to the recognition of insolvency-related judgments thereunder, prompted UNCITRAL to introduce the MLIJ.[360] In addition to a stand-alone framework for recognising foreign insolvency-related judgments, MLIJ contains a separate article (Article X) directly addressing *Rubin,* which states that foreign insolvency-related judgments can be recognised under article 21 of the MLCBI.

The UK Government also responded to the developments following *Rubin* by launching a consultation in 2022, *inter alia*, on the implementation of MLIJ.[361] That said, the Government intended to implement only Article X of the MLIJ to set aside *Rubin* instead of adopting it in full.[362]

357 ibid [157]-[158], [167].
358 Fletcher (n 27) para 28-026.
359 Westbrook, 'Interpretation Internationale' (n 43) 739.
360 Guide to the MLIJ (n 130) para 2. For a more detailed discussion, see McCormack and Wan (n 155) 298; Mevorach, 'Overlapping International Instruments' (n 166) 293.
361 n 304 and accompanying text.
362 ibid.

2. The US

a) Introduction to Chapter 15

As already identified, the MLCBI was implemented also in the US, as Chapter 15 of the BC in 2005.[363] In most parts, the text is similar or identical to that of the CBIR. That said, there are some material differences between these texts. For example, unlike the British text, the automatic effects of recognition are not limited to foreign liquidation proceedings in the American version.[364] An even more significant difference arises in the interpretation of the MLCBI in these jurisdictions with respect to the recognition of restructuring plans. To begin with, US courts are not bound by the Gibbs rule.[365] Accordingly, courts in the US attach a much broader interpretation to their discretionary powers under the American versions of articles 7 and 21 of the MLCBI (sections 1507 and 1521 of the BC, respectively). That is to say, the recognition and enforcement of foreign restructuring plans and a discharge of a debt (whether or not governed by US law) thereunder and granting a permanent moratorium fall within the scope of sections 1507 and 1521 of the BC,[366] the matters that this work will examine in-depth as subsection C.II.2 progresses.

b) Historical Background: *Gebhard*

It should be noted that the recognition and enforcement of foreign insolvency-related judgments (including those confirming foreign restructuring plans) in the US is not a new concept introduced by Chapter 15. That is to say, US courts have a long history of collaborating with foreign jurisdic-

363 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub L No 109-8, 119 Stat 23 (2005). For a more detailed discussion of Chapter 15 and the changes it brought to US law, see generally Jay Lawrence Westbrook, 'Chapter 15 at Last' (2005) 79 Am Bankr LJ 713.

364 BC (n 37) s 1520.

365 *Agrokor* (n 52) 193-96.

366 The relation (overlap, dominance) between these two sections is not completely clear. For a more detailed discussion, see *Vitro* (87) 1054-57. See also Bruce A. Markell, 'The International Two-Step: Recognizing Domestic Chapter 15 Reorganizations' (2024) 98 Am Bankr LJ 1, 39-40. Further discussion of this matter is outside the scope of this work.

tions in cross-border insolvency cases under the doctrine of comity.[367] For example, in the 19th-century case of *Canada Southern R.Co. v. Gebhard*, a Canadian arrangement contemplating the exchange of New York law-governed bonds was recognised by the USSC and, consequently, constituted a bar to individual actions under the original bonds in the US.[368] The *Gebhard* court, emphasising that contracting with a foreign company entails an implied submission to a foreign jurisdiction, noted that 'anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere'.[369] The court, thus, concluded that 'true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries'.[370]

c) Recognition Requirements

aa) General Requirements for Recognising Foreign Judgments

In *Hilton*, the USSC summarised minimum requirements for the recognition of foreign judgments, such as: 'opportunity for a full and fair trial abroad before a court of competent jurisdiction', 'due citation or voluntary appearance of the defendant', and ' a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries'.[371] Additionally, a judgment should not be tainted by 'prejudice in the court, or in the system of laws' or 'fraud in procuring the judgment', and no other special ground to deny recognition should be present.[372]

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367 Westbrook, 'Chapter 15 at Last' (n 363) 718-19. See also Elizabeth Buckel, 'Curbing Comity: The Increasingly Expansive Public Policy Exception of Chapter 15'(2013) 44 Geo J Intl L 1281, 1287-88.

368 *Canada Southern R. Co. v. Gebhard*, 109 US 527 (1883).

369 ibid 537-38. As it can be seen, this perspective, which constitutes one of the primary arguments of critics of the Gibbs rule (see n 319 (and accompanying text) and text thereto) fully contradicts the position of Lord Esher in *Antony Gibbs* (see text to n 271) and, more recently, that of Lord Collins in *Rubin* & *New Cap* (see text to n 348).

370 *Gebhard* (368) 539.

371 *Hilton* (n 86) 202-03. See also Buckel (n 367) 1285-87.

372 ibid.

bb) Recognition Requirements under Chapter 15

With respect to the recognition of foreign restructuring proceedings and related judgments, Chapter 15 and case law thereunder specify different criteria for recognising foreign proceedings under section 1517 and for granting post-recognition relief under sections 1507 or 1521. This relief may include, *inter alia,* recognising and enforcing foreign restructuring plans (foreign court orders confirming such plans), as will be evident while exploring Chapter 15 case law.

(1) Recognition of Foreign Proceedings

The recognition of foreign restructuring proceedings is based on objective criteria under section 1517.[373] Put another way, such recognition is non-discretionary and the court must grant it once all the requirements set out in section 1517 are met, provided that the exception under section 1506 (public policy) does not apply. Even in some cases where the US courts subsequently refused to extend comity and enforce foreign restructuring plans in the US under sections 1507 and 1521, the respective foreign restructuring proceedings were initially recognised under section 1517.[374] This is due to the fact that the respective applications met the requirements of section 1517 and the public policy exception did not apply. Accordingly, the recognition of foreign proceedings under section 1517 is a relatively straightforward matter. That said, such recognition 'is not a rubber stamp exercise', and the foreign representative bears the burden of proof for each requirement of section 1517.[375]

(2) Post-Recognition Relief

As to granting post-recognition relief under sections 1507 or 1521, which also includes the recognition and enforcement of foreign restructuring plans, it shall be first stated that additional assistance under section 1507 is

373 *In re Bear Stearns High-Grade Structured Credit*, 389 BR 325, 333 (SDNY 2008).
374 See, for example, the cases discussed in sub-ss C.II.2.d)dd) and C.II.2.d)ee).
375 *In re PT Bakrie Telecom Tbk,* 628 BR 859, 870 (Bankr SDNY 2021) (*Bakrie*).

conditioned upon the requirements set out in section 1507 (b) (1) – (5)[376] and any relief under section 1521 may be granted 'only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected'.[377] Besides, unlike the recognition of foreign proceedings, granting post-recognition relief under sections 1507 or 1521 is discretionary[378] and requires the application of the subjective criteria 'that embody principle of comity'.[379] In *Bakrie*, the court summarised the main factors that courts in the US examine in deciding to extend comity: procedural fairness, public policy, and fraud.[380]

d) Case Law under Chapter 15

This work will now turn to an analysis of the case law under Chapter 15 concerning the recognition and enforcement of restructuring plans in the US. It will discuss five notable Chapter 15 cases in that respect. In the first three cases, presented chronologically *inter se,* comity was granted to the respective foreign plans. In the last two cases, presented in the same order, the recognition of foreign plans was denied by the US courts. The examination of the cases will be followed by a brief summary.

aa) *Metcalfe*

In *Metcalfe,* Judge Martin Glenn of the US Bankruptcy Court for the SDNY considered the recognition of Canadian restructuring proceedings as a foreign main proceeding and the enforcement of the Canadian court

376 These requirements do not appear in the MLCBI (or the CBIR) and have been borrowed from Chapter 15's predecessor (section 304 of the BC [repealed]) and case law. More on this, see Kristin van Zwieten, 'Article 7: Additional Assistance under Other Laws' in Reinhard Bork and Michael Veder (eds), *The UNCITRAL Model Laws on Cross-Border Insolvency and on the Recognition and Enforcement of Insolvency-Related Judgments: An Article-by-Article Commentary* (Edward Elgar 2025) para I.7.7.

377 BC (n 37) s 1522 (a). This section corresponds to art 22 (1) of the MLCBI. For a more detailed discussion, see sub-s F.I.2.b).

378 That is because these sections use the verb *may* as opposed to *shall* used in section 1517.

379 *Bear Stearns* (n 373) 333.

380 *Bakrie* (n 375) 878.

orders sanctioning and implementing a Canadian restructuring plan in the US.[381] These orders included, *inter alia*, third-party non-debtor release and injunction.[382] The enforcement of the Canadian court orders was sought as additional assistance under section 1507 of the BC.[383] There was no controversy concerning the recognition of the Canadian proceedings as a foreign main proceeding under Chapter 15.[384] The central point of the judge's opinion, therefore, was a discussion around the post-recognition relief on the enforcement of the Canadian court orders in the US.[385] Despite 'significant limitations on bankruptcy courts ordering non-debtor releases and injunctions in confirmed chapter 11 plans' imposed by the Second Circuit,[386] the central issue was whether the Canadian orders should be enforced in the US in that Chapter 15 case rather than reassessing the merits of the respective release and injunction provisions in light of those limitations.[387] Stating that a 'U.S. bankruptcy court is not required to make an independent determination about the propriety of individual acts of a foreign court',[388] the judge concluded as follows:

> There is no basis for this Court to second-guess the decisions of the Canadian courts. Principles of comity in chapter 15

381 *In re Metcalfe Mansfield Alternative Investments*, 421 BR 685 (Bankr SDNY 2010) (*Metcalfe*).

382 ibid 688.

383 ibid 696.

384 ibid 688.

385 ibid 694-700.

386 ibid 694-95. The respective bankruptcy court hearing the case falls within the jurisdiction of the Second Circuit.

387 ibid 696. As already mentioned in s A.III, the examination of third-party releases in restructuring proceedings, including those in Chapter 11 plans, falls outside the scope of this work. However, it should be briefly noted that third-party releases constitute one of the controversial issues under Chapter 11. For years, varying approaches have prevailed among the Circuits regarding such releases. For a summary of the differing Circuit-level approaches to the matter, see *Avanti* (n 291) 606; generally Dorothy Coco, 'Third-Party Bankruptcy Releases: An Analysis of Consent Through the Lenses of Due Process and Contract Law' (2019) 88 Fordham L Rev 231. For a more detailed discussion and critical analysis, see generally Ralph Brubaker, 'Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations' [1997] U Ill L Rev 959. It is also important to note that, in 2024, the USSC addressed the availability of *non-consensual* third-party releases under Chapter 11, more specifically, under s 1123 (b) (6) of the BC and categorically denied such availability as a matter of law. See *Harrington v. Purdue Pharma LP*, 603 US 204 (2024) (*Purdue*).

388 *Metcalfe* (n 381) 697.

> cases support enforcement of the Canadian Orders in the United States whether or not the same relief could be ordered in a plenary case under chapter 11. Therefore, the Court will enter an order recognizing this case as a foreign main proceeding and enforcing the Canadian Orders.[389]

bb) *Avanti*

In *Avanti,* the same judge considered the enforcement of a scheme of arrangement sanctioned by the EWHC and the respective court order in the US under sections 1507 and 1521 of the BC.[390] The scheme provided for a debt-for-equity exchange of the notes issued under a New York law-governed indenture.[391] Emphasising that 'in the exercise of comity that appropriate relief under section 1521 or additional assistance under section 1507 may include recognizing and enforcing a foreign plan confirmation order',[392] the judge granted the discretionary relief sought.[393]

cc) *Agrokor*

In *Agrokor*, the same judge was asked to recognise and enforce a settlement agreement approved by a Croatian court following the recognition of the respective Croatian proceedings as a foreign main proceeding under Chapter 15.[394] This settlement agreement involved the discharge of debts governed by English and New York laws (including the release of third-party guarantees).[395] The judge not only granted the relief requested [396] but also took the opportunity to examine and, consequently, criticise the Gibbs rule in detail as part of his opinion.[397]

389 ibid 700.
390 *Avanti* (n 291).
391 ibid 609-611.
392 ibid 616
393 ibid 619.
394 *Agrokor* (n 52).
395 ibid 169, 171-75.
396 ibid 196-97.
397 ibid 192-96.

dd) *Vitro*

Vitro was a case before the Fifth Circuit, where the court considered, *inter alia*, two appeals from a bankruptcy court decision denying the enforcement of a Mexican reorganisation plan and a permanent injunction sought under sections 1507 and 1521.[398] The bankruptcy court, whose decision was appealed, had refused, based on several provisions of Chapter 15, to enforce the Mexican reorganisation plan providing for the release of third-party non-debtor guaranties governed by New York law and to grant a permanent injunction.[399]

As to the availability of the relief requested under section 1507, the bankruptcy court referred to section 1507 (b) (4) in denying the relief.[400] According to the court, the distribution of the debtor's assets under the Mexican court order in question had substantially deviated from the order of distribution under Chapter 11,[401] which is an analogous US framework. As far as section 1521 was concerned, the bankruptcy court grounded its decision to reject the respective application on section 1522 (a), as, in the court's view, the Mexican court order had not provided sufficient protection to US creditors, nor had it maintained an adequate balance between the interests of creditors on one side and the debtor and its subsidiaries on the other.[402] The bankruptcy court also referred to section 1506 (the public policy exception) by holding that the protection of third-party claims in insolvency cases constitutes the public policy of the US, which the Mexican plan in question had failed to ensure.[403]

The debtor in the Mexican proceedings and one of its largest creditors appealed the bankruptcy court's decision.[404] The appellate court held that the respective relief falls outside section 1521 because the specific provisions under section 1521 (a) (1) – (7) and (b), as well as *any appropriate relief*

398 *Vitro* (n 87). The court also addressed a consolidated appeal by a group of creditors from the district court's decision on the recognition of the Mexican reorganisation proceedings and the appointment of the foreign representatives under Chapter 15. The respective appeal, however, will not be discussed further in this work.

399 *Vitro, S.A.B. de C.V. v. ACP Master, Ltd. (In re Vitro, S.A.B. de C.V.)*, 473 BR 117, 133 (Bankr ND Tex 2012) (*Vitro II*).

400 ibid 132.

401 ibid.

402 ibid.

403 ibid. This aspect of the bankruptcy court's decision will be separately discussed in sub-s D.I.3.a)cc).

404 *Vitro* (n 87) 1041.

under section 1521 (a) apply to the debtor only, thus, does not provide for discharge of non-debtor third-party obligations.[405] The appellate court further noted that even if the relief requested 'were theoretically available' under section 1521, the bankruptcy court had not exceeded its discretion under section 1522 in denying the relief for substantially the same reasons as under section 1507,[406] which will be summarised below.

The appellate court also ruled on the denial of the relief under section 1507, stating that although the relief sought could theoretically be available, the bankruptcy court had not been wrong in denying the relief based on section 1507 (b) (4).[407] The court found that the debtor had failed to demonstrate extraordinary factors supporting the third-party releases.[408] In addition, the court emphasised that there had been a significant retention of equity value while the distribution to the creditors had not come close to their original entitlements.[409] The court also underscored that the debtor had only reached the requisite majority because of insider voters and the majority of the affected non-insider creditors had not voted for the plan.[410] The court, thus, distinguished the facts of *Metcalfe,*[411] where a Canadian restructuring plan contemplating third-party non-debtor release had been recognised under section 1507.[412]

The appellate court did not specifically address whether the public policy exception under section 1506 should apply since the relief sought had been properly denied under both sections 1507 and 1521.[413]

ee) *Bakrie*

In *Bakrie,* a US bankruptcy court considered recognising Indonesian restructuring proceedings under section 1517 and granting additional relief on the enforcement of the Indonesian restructuring plan under sections 1507

405 ibid 1058-60.
406 ibid 1060.
407 ibid 1060-61.
408 ibid.
409 ibid 1067.
410 ibid.
411 *Metcalfe* (n 381).
412 *Vitro* (n 87) 1068.
413 ibid 1069-70.

and 1521.[414] The brief facts of the case were as follows.[415] The recognition and the additional relief sought was objected to by a group of holders of notes issued under a New York law-governed indenture. The notes (totalling 380 million US Dollars) were issued not by the debtor in the Indonesian proceedings but rather by its wholly owned subsidiary. The issuer, however, loaned the proceeds from the issuance of the notes to the debtor and subsequently assigned its rights under the respective loan arrangements to the trustee under the indenture. Besides, the repayment of the notes was separately guaranteed by the debtor under a New York law-governed parent guarantee, which provided direct recourse from the debtor for noteholders and the indenture trustee. One notable feature of this case is that, despite the assignment and the parental guarantee, neither noteholders nor the indenture trustee, instead the issuer (the wholly owned subsidiary of the debtor), had been listed as creditor and permitted to vote on the Indonesian restructuring plan for the 380 million US Dollars notes. The respective claim of the issuer had been approved by the court-appointed administrator and subsequently verified by the Indonesian courts despite the objections of the indenture trustee and an ad hoc committee of noteholders.

The bankruptcy court rejected the objecting noteholders' arguments opposing the recognition of the Indonesian restructuring proceedings as a foreign main proceeding and granted recognition under section 1517.[416] These noteholders also objected to the additional relief on enforcing the Indonesian restructuring plan in the US under sections 1507 and 1521 based on the arguments that the Indonesian restructuring plan had not properly contained the third-party releases and they had not received fair treatment during the Indonesian restructuring proceedings, underscoring their exclusion from voting.[417]

Given the discretionary nature of relief under either section 1507 or section 1521 and its dependency upon the principle of comity, the bankruptcy court decided not to enforce the Indonesian restructuring plan after conducting its comity analysis.[418] The reason for that was the lack of 'a clear and formal record' in the Indonesian court order on whether the affected

414 *Bakrie* (n 375).
415 For the facts of the case, see ibid 864-70.
416 The respective arguments of the objecting noteholders and the court's reasoning on those arguments (ibid 871-875) will not be discussed further in this work.
417 ibid 876.
418 ibid 877ff.

creditors had received adequate procedural protections in the Indonesian proceedings as to the third-party release issue and on the substantive justification or explanation for any third-party release.[419] The court, thus, distinguished previous cases where third-party releases had been enforced in the US in a Chapter 15 case.[420]

As to the voting issue raised by the objecting noteholders, the court acknowledged that the record is 'not particularly fulsome' on the issue, highlighting the importance of the factor of insider voting under US law.[421] Despite that, the court chose not to reach whether or not the matter of the exclusion of the objecting noteholders from voting would constitute a bar to extend comity to the Indonesian restructuring plan, as the relief requested had already been denied due to the matter of third-party release.[422]

ff) Summary

The cases examined above illustrated that foreign restructuring plans may be recognised and enforced in the US as discretionary post-recognition relief under the American version of the MLCBI, namely, under sections 1507 or 1521 of the BC. However, US courts do not blindly defer to foreign restructuring proceedings. Instead, they conduct their comity analysis and examine these proceedings first, but primarily in a procedural fairness context.

3. Comparative Summary

Thus far, section C.II has analysed the implementation of the MLCBI in England (the CBIR) and in the US (Chapter 15) with respect to the recognition of restructuring plans. This subsection will provide a brief comparative overview.

To begin with, the automatic effects of recognition under the CBIR only apply to foreign main proceedings that aim to liquidate (wind up) the debtor. Therefore, they do not take effect with respect to foreign restructuring proceedings. By contrast, Chapter 15 does not draw such a distinction

419 ibid 884-85.
420 ibid 885-86.
421 ibid 887-89
422 ibid 890.

and provides for those effects in relation to all foreign main proceedings upon recognition.

Furthermore, a discharge in foreign restructuring proceedings is not recognised in the eyes of English law unless it is valid under the governing law of the contract or the creditor has submitted to the foreign proceedings in question. The implementation of the MLCBI in England has not altered this position. On the other hand, such a discharge of a debt, including one governed by US law, may be recognised in ancillary Chapter 15 proceedings.

In addition, foreign insolvency-related judgments (including foreign court orders confirming restructuring plans) are not capable of recognition and enforcement under the CBIR. Instead, general rules of English private international law on the recognition and enforcement of foreign judgments apply. By contrast, such judgments may be recognised and enforced under Chapter 15 (sections 1507 or 1521 of the BC).

Finally, upon recognition of foreign restructuring proceedings as a foreign main proceeding under the CBIR, English courts lack jurisdiction to grant a moratorium that would permanently prevent creditors (whose substantive rights have not been discharged as a matter of English law) from enforcing their substantive rights. This is because it would effectively discharge those rights, which is not allowed under the Gibbs rule. However, US courts do have such jurisdiction. In exercising their discretion in this matter, as well as when recognising foreign restructuring plans and any debt discharge thereunder, US courts base their decision on the comity analysis. Hence, they primarily assess whether or not the public policy of the US is violated and the respective foreign proceedings satisfy the fundamental standards of procedural fairness.

III. Assessment of the Approaches Adopted in England and in the US

Having discussed the implementation of the MLCBI in England and in the US with respect to the recognition of restructuring plans, this work now turns to the assessment of the approaches adopted in these jurisdictions. They will be referred to as the *English* and *American* approaches, respectively. To begin with, this work argues that neither approach, taken in its entirety, strikes a fair balance between the interests of the debtor and dissenting foreign creditors in the recognition of restructuring plans. Nonetheless, each approach, particularly the American one, possesses cer-

tain advantageous features that can be functional and effective for this purpose. Below, this work will examine the advantages and disadvantages of each approach separately.

1. The English Approach

a) Advantages

The English approach offers only a few advantages. The main benefit is certainty to creditors: once a law governing a debt instrument has been selected, substantive rights and protections thereunder will remain unchanged in the eyes of this law, even if restructuring proceedings in other jurisdictions discharge the debt.[423] From a creditor's perspective, such certainty is crucial, particularly when the debtor is from a jurisdiction whose law is not well-equipped to ensure a fair outcome in the event of the debtor's restructuring. As proponents argue, this holds particularly true for institutionalised market participants lending to debtors from across the globe.[424] If the fact that the country having jurisdiction over a potential restructuring of the debtor can be changed *ex post* (e.g. due to a COMI shift) is added to the picture,[425] the importance of such certainty is hard to overstate. Providing certain safeguards for the protection of creditors' substantive rights, therefore, is not only understandable but also of necessity. However, this should not be done according to the formula of the Gibbs rule since the rule does not implement the idea in the right way.

Another advantage, albeit from a policy perspective, is that the English approach can make a significant contribution to the development of the restructuring market in jurisdictions that adopt it. That is to say, this approach effectively requires the debtor to initiate restructuring proceedings (either as parallel or main proceedings) in the jurisdiction whose law governs the debt in order to achieve its discharge.[426] Under this approach, restructurings of debtors from across the globe will be channelled to jurisdictions whose laws are typically chosen to govern cross-border transactions,

423 See text to nn 332, 333.
424 See text to n 334.
425 For a more detailed discussion, see sub-s F.II.2.b)bb).
426 In theory, it does not directly require such proceedings. Nonetheless, as Stephan Madaus puts it, most restructuring frameworks require the involvement of local courts. See Madaus, 'The Cross-border Effects of Restructurings' (n 3) 484-85.

such as England. It is not surprising that practitioners in England generally support the Gibbs rule.[427]

b) Disadvantages

The English approach, shaped by the Gibbs rule, presents several drawbacks, primarily arising from the manner of its implementation. However, this work will first focus on its doctrinal aspects. As noted earlier, this work does not agree with the pure contractual classification of restructuring proceedings.[428] It agrees with the argument of critics that the Gibbs rule treats discharge in restructuring proceedings as a purely contractual matter between the debtor and a single creditor without taking into account a background context (such as the debtor's distress) and overlooks broader policy objectives.[429]

In addition, the English approach is not principle-based. The universal effect of an English bankruptcy discharge of a debt, whether or not governed by English law, as opposed to the territorial effect of a foreign bankruptcy discharge in the eyes of English law, a paradox often highlighted by critics,[430] is noteworthy at this point.[431]

As to the implementation, as already stated, the English approach effectively requires the debtor to initiate restructuring proceedings (either as parallel or main proceedings) under the governing law of the contract.[432] This approach has certain drawbacks.[433] First and foremost, if the confirmed plan under the *lex fori concursus* treats a foreign creditor no less favourably than the treatment what the governing law of the contract would provide, there seems to be no justifiable reason for initiating costly and time-consuming parallel proceedings. Second, it is worth reiterating that discharge in this context is not merely a matter between the debtor and a single creditor. Rather, it generally affects the majority of creditors, if not all

427 See, eg, FMLC (n 332).
428 See sub-s B.I.3.a).
429 See, eg, a summary of Look Chan Ho's and Kannan Ramesh's criticism of the rule (text to nn 315-323). See also McCormack 'UK Contracts and Modification under Foreign Law' (n 166) pt 2.
430 n 312 (and accompanying text) and text thereto.
431 n 290 (and accompanying text) and text thereto.
432 n 426 (and accompanying text) and text thereto.
433 For a criticism of that aspect of the Gibbs rule by the author of this work, see also Abbasov (n 188) pt II.

of them. It is not uncommon for various foreign laws to govern the debts affected by a restructuring plan. Were all these foreign laws to adopt a similar approach, the debtor would be required to initiate several concurrent proceedings in the respective foreign jurisdictions. Such multiple parallel proceedings could have detrimental effects on costs and efficiency and might even obstruct an otherwise viable plan.[434]

Furthermore, this work also agrees with critics on the point that the Gibbs rule is inconsistent with the principle of modified universalism,[435] which is based on the concept of a single set of proceedings with universal effect. This work has already touched on the advantages of administering cross-border insolvency and restructuring cases under the respective concept.[436]

Finally, this work agrees with the arguments that the Gibbs rule effectively incentivises holdout behaviour and may lead to unfair and value-destructive outcomes.[437] That is to say, the rule encourages foreign creditors not to cooperate in restructuring proceedings in the debtor's home jurisdiction from the outset, since it might amount to submission to those proceedings.[438]

2. The American Approach

a) Advantages

To begin with, the American approach does not pose any of the problems associated with the English approach, as discussed above. That is to say, a discharge of a debt (including one governed by US law) in foreign restructuring proceedings may theoretically be recognised in the US. Furthermore, foreign court orders confirming restructuring plans may be recognised and

434 For similar arguments, see Westbrook 'Internationalist Principle' (n 43) 570. For a different view, see Paterson, 'A Qualified Defence of the Rule in Gibbs' (n 74) s VII.B.

435 See, eg, text to nn 316, 324, 326.

436 See sub-s B.II.3.a).

437 See, eg, nn 309, 310, 327 (and accompanying text) and text thereto. For criticism of such holdout behavior, see Westbrook 'Internationalist Principle' (n 43) 568-69. For a different view, see Paterson, 'A Qualified Defence of the Rule in Gibbs' (n 74) ss VII.B, VII.C, VII.D.

438 Submission to foreign proceedings is an exception to the Gibbs rule. A creditor submitting to the foreign proceedings in question loses the protection of the rule. See text to nn 276, 277.

given full force (combined with a permanent moratorium) under Chapter 15. All those matters can be resolved in an ancillary Chapter 15 proceeding. Consequently, no main or parallel restructuring proceedings in the US are required. To sum up, the American approach is, on its surface, a notable example of how modified universalism can function in practice.

b) Disadvantages

There is little room for criticism of the American approach, given all the advantages mentioned above. Nonetheless, this work argues that the American approach is not without shortcomings either. As already identified (B.II.4), the principle of modified universalism contemplates an evaluation of the fairness of foreign proceedings before recognising their cross-border effects. As noted earlier, US courts primarily evaluate foreign proceedings based on procedural fairness and public policy considerations, which are important safeguards in this context. That said, equally important is a safeguard for ensuring that foreign creditors' substantive rights have been adequately protected in a restructuring in the debtor's home jurisdiction (substantive fairness review), as already highlighted in this work.[439] Put another way, 'foreign creditors are entitled to more than just the right to be heard and voted down in a foreign proceeding'.[440] It should also be noted that US courts' review of the fairness of foreign proceedings is not purely procedural in nature and also encompasses some substantive aspects without expressly referring to substantive fairness. However, they conduct their analysis on substantive matters mainly within a procedural framework, as generally observed in the cases examined in this work. For example, in *Bakrie,* the court denied the recognition of an Indonesian plan containing third-party release due to a lack of a formal court record on the issue.[441] In *Vitro*, the court's decision to deny comity to a Mexican plan (again, on the issue of third-party releases) was significantly influenced by the fact that the plan had been adopted only with the support of insiders.[442] However,

439 See sub-s C.III.1.a). See also Abbasov (n 188) pt II.

440 Stephan Madaus, 'The Rule in Gibbs, or How to Protect Local Debt from a Foreign Discharge' (OBLB 19 December 2018) <https://blogs.law.ox.ac.uk/business-law-blog/blog/2018/12/rule-gibbs-or-how-protect-local-debt-foreign-discharge> accessed 21 October 2025.

441 *Bakrie* (n 375). For a more detailed discussion of this case, see sub-s C.II.2.d)ee).

442 *Vitro* (n 87). For a more detailed discussion of this case, see sub-s C.II.2.d)dd).

in *Metcalfe*, where no such kind of procedural irregularities were present, a Canadian plan contemplating third-party release was granted comity in the US.[443] This work argues that such an approach is not entirely preferable since it may not guarantee substantive fairness in all cases and may lead to inconsistent outcomes.[444]

Another noteworthy issue is that the American approach is primarily designed to protect US creditors. That is to say, in assessing the outcome of foreign proceedings, similarity to US law is required under this approach.[445] Hence, the American approach focuses not on the governing law of the contract but rather on the law of the forum (US law) for this purpose. In cases where US law (e.g. New York law) is also the governing law of the contract (perhaps in most cases), this issue does not arise. However, there may be cases where the governing law of the contract is the law of a state other than the state in which recognition is sought (in most cases, due to the location of assets in the latter state) and opposed by the respective creditor. The legal order and public policy of the receiving state should undoubtedly be taken into account, but not within the framework of a substantial fairness review. These are the subject matters of procedural fairness review and the public policy exception. This is one of the occasions where the distinction between asset-oriented insolvency proceedings and debt-oriented restructuring proceedings becomes significant.[446] That is to say, restructuring proceedings primarily focus on the claims against the debtor rather than the debtor's assets and generally do not involve the marshalling or sale of the debtor's entire asset pool. Therefore, in the context of a substantive fairness review invoked by the opposing creditor, similarity should be required with the governing law of the contract. Accordingly, this work advocates developing a more principled approach to the matter, which will be elaborated in greater detail later.

IV. Towards a Balanced Model

Section C.III illustrated that both the English and American approaches have their advantages and disadvantages, with the latter ultimately being preferable. Hence, this work suggests a middle-ground model between the

443 *Metcalfe* (n 381). For a more detailed discussion of this case, see sub-s C.II.2.d)aa).
444 This point will be revisited in sub-s F.II.2.a)dd).
445 BC (n 37) s 1507 (b) (4). See, eg, the case discussed in sub-s C.II.2.d)dd).
446 See sub-s B.I.3.a).

English and American approaches, leaning more closely towards the latter. This model attempts, to the extent possible, to combine the fairly advantageous features of both approaches and eliminate their one-sided, unfairly disadvantageous aspects.

Hence, the model suggested in this work aims to prevent parallel proceedings in multiple jurisdictions, while ensuring robust procedural and substantive protections for foreign creditors affected by a restructuring in the debtor's home country.[447] This model draws on the American approach, as it is more consistent with the current best practices in cross-border insolvency law, including the adherence to the principles of comity and modified universalism. Furthermore, the American approach provides well-established criteria for evaluating procedural fairness in foreign proceedings. With these considerations in mind, there is a solid foundation (the American approach) on which to develop the intended model. That said, the American approach should raise the bar for fairness review to expressly encompass the substantive fairness of foreign restructuring plans in contested cases.

In the framework of the respective model, this work will first analyse the traditional safeguards in recognising foreign judgments, such as public policy and procedural fairness, which are also relevant under the MLCBI (Part D). As mentioned earlier, the American approach offers a well-established framework in this regard. Therefore, Chapter 15 case law will be closely examined. Then, this work will turn to substantive fairness in restructuring. It will discuss this concept in a domestic context (Part E), before delving into a thorough analysis of ensuring substantive fairness in considering the recognition of restructuring plans under the MLCBI and developing a framework for this purpose (Part F). This work will particularly seek to find a solution that balances the interests of the debtor and dissenting foreign creditors.

V. Summary

In Part C, this work analysed the recognition of restructuring plans under the MLCBI, focusing on the different approaches to the matter under the adopted versions in England and in the US. It first illustrated the

447 See Abbasov (n 188) pt III, where the author of this work underscored a need for such an approach and outlined his initial general ideas regarding a substantive fairness review in the framework of the mentioned approach.

differences using the example of the IBA restructuring proceedings (C.I) and then separately examined each jurisdiction (C.II). This was followed by an assessment of the approaches adopted in the respective jurisdictions (C.III). The assessment identified that neither the English approach nor the American one is entirely preferable. That is to say, certain aspects of the English and American approaches can unfairly disadvantage the debtor and dissenting foreign creditors, respectively. More to the point, the English approach views discharge in restructuring proceedings as a purely contractual matter and, thus, requires proceedings under the governing law of the contract to bind dissenting foreign creditors. While this approach offers certainty to creditors, it is not in line with modified universalism, thus, denying the advantages that a modified universalism-based system offers. Nor does it align with the spirit of the MLCBI specifically. As to the American approach, it generally is in conformity with modified universalism but evaluates substantive aspects of foreign restructuring proceedings primarily within a procedural context, which may lead to inconsistency regarding substantive fairness. In addition, the American approach prioritises US law (over the governing law of the contract) when comparing the substantive outcome of foreign restructuring proceedings.

Hence, this work suggested a model, to the extent possible, combining the fairly advantageous aspects of the respective approaches while eliminating their unfairly disadvantageous features (C.IV). This model is primarily based on the American approach but includes a substantive fairness review in contested cases.