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Giving Effect to Foreign Restructuring Plans in Anglo-US Private International Law

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Introduction

1 There is a line of J.D. Salinger's that could have been written about Ian Fletcher because it sums him up so well:

> "You're a real prince. You're a gentleman and a scholar..."[1]

2 Given that Ian has dedicated so much of his distinguished and dignified career to promoting international co-operation in cross-border insolvency cases, it is a pity that we are honouring him at a point in time when things are not going quite as smoothly as he would hope. I refer, of course, to recent developments in UK international insolvency jurisprudence that exhibit a marked reluctance on the part of our senior judges to embrace an expansive view of modified universalism as a basis for extending the effects of foreign insolvency proceedings to the UK.[2]

3 Ian has written frequently on what he rightly perceives as some of the more backward features of UK private international law as it applies in the cross-border insolvency space. He is acutely concerned, in particular, about asymmetries of treatment, that is, instances where the UK courts respond less favourably to inbound requests for assistance from foreign officeholders than would the foreign court were the boot on the other foot. In an article written after the UK Supreme Court decided *Rubin*, he expressed this concern in the strongest possible language that his legendary standards of politesse will allow him:

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[1] J. D. Salinger, *The Catcher in the Rye* (1951, Random House, New York), at 62.

[2] *Rubin v Eurofinance SA*; *New Cap Insurance Corpn Ltd v Grant* [2013] 1 AC 236 (UKSC); *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36.

> "One further matter on which it is appropriate to comment is the contrast between the readiness of English courts to countenance the bringing of remedies established under English insolvency law against non-present parties who may elect not to submit to the jurisdiction for the purpose of contesting the proceedings on their merits, and the reluctance of the majority of the UK Supreme Court in the case of *Rubin v Eurofinance SA* to accord recognition and enforcement to the orders made against non-submitting defendants by foreign courts exercising jurisdiction in insolvency matters, where the remedy in question was closely analogous to those available to a trustee or liquidator under English law. The stultifying consequences of the Supreme Court's ruling are immediately apparent: how can we reasonably expect foreign courts to recognise the orders issued by English courts against offshore defendants, when we ourselves are unwilling to accord reciprocal assistance to foreign courts seeking to administer their corresponding remedies in a case where, according to the principles of international jurisdiction to which the UK openly subscribes… the foreign court has properly exercised jurisdiction by virtue of the debtor's centre of main interests being located in the country in question?"[3]

4 In this article in Ian's honour, I sketch in bare outline a comparative analysis of one aspect of the asymmetry that troubles our honouree by considering the reception that the US and UK courts afford to foreign restructuring plans. Having first considered the smooth passage that US courts grant to UK "foreign company" schemes of arrangement, I suggest that the journey in the opposite direction is unlikely to be as smooth. Moreover, the difference in approach and emphasis between these two members of the common law family, I maintain, points to differences in how the UNCITRAL Model Law has been received into, and is interacting with, their respective pre-existing legal cultures.

The Magyar Telecom Restructuring

5 I take as my starting point the recent Magyar Telecom restructuring. Although it is but one data point, the case adds powerfully to the impression that US bankruptcy courts will domesticate UK restructuring plans as a matter of routine.[4]

6 Magyar Telecom BV ("Matel") is the Dutch parent of Invitel, a Hungarian telecommunications company. Matel funded Invitel's business through inter-company loans that were financed by the issue of EUR 345 million senior secured 9.5% notes.[5] The notes were due for repayment in 2016. Matel issued the notes under the terms of an indenture that was expressly governed by New York law and that provided for the New York courts to have non-exclusive jurisdiction in relation to disputes between the parties arising out of, or based on, the indenture. Invitel's

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[3] I. Fletcher, "The Extra-Territorial Scope of Fraudulent Trading" (2013) 26(3) *Insolvency Intelligence* 44-46, at 46.

[4] My information about Magyar Telecom derives exclusively from the US Bankruptcy Court docket, which is publicly accessible via the PACER system, and from the reported decision of Richards J in *Re Magyar Telecom BV* [2014] BCC 448.

[5] These were what are euphemistically referred to as "high yield" notes. Moody's assigned the notes a B1 rating when they were issued in December 2009, see: <http://bit.ly/1wer3sk>. In plainer language, the notes were sub-investment grade "junk".

business was hit by a perfect storm of competitive pressures and falling demand. The net result was that Matel could no longer meet its obligations to noteholders. It therefore needed a restructuring solution that would bind all of its noteholders, including noteholders based in the US. The preferred solution was a formal debtor-in-possession style of financial restructuring achieved through a debt adjustment process that would avoid the stigma and value destruction associated with insolvency proceedings.[6]

7 This preferred solution could not be implemented under Dutch law without recourse to a formal insolvency proceeding. Matel's directors and advisers considered a Chapter 11 filing in the US but ruled it out on grounds of cost, inconvenience, and the perception that a US filing would have negative implications for the group's relationships with customers and suppliers. The increasingly popular alternative that Matel chose was a restructuring using the vehicle of a UK "foreign company" scheme of arrangement under Part 26 of the Companies Act 2006.

8 It is well settled that the UK courts have jurisdiction to sanction a scheme of arrangement in relation to a foreign company that is capable of being wound up in the UK based on the company having a "sufficient connection" with the UK.[7] The jurisdictional bar is not high. As a result, foreign company schemes of arrangement are now a recognized restructuring product and a growth industry for UK-based practitioners.[8] "Sufficient connection" in several of these restructurings was premised on the parties' agreed selection of English law and jurisdiction in the framework financing documents.[9] This jurisdictional hook was not available to Matel because New York law governed its financing documents. And, in any event, Matel needed to establish a more substantial connection with the UK than that afforded by an English choice of law clause for it to be able to export the effects of an English scheme to the US under the Model Law.

9 To satisfy the threshold UK jurisdictional requirement and, at the same time, establish a platform for global recognition and relief under the Model Law, Matel

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[6] It is conventional wisdom that informal contractual workouts or workouts given formal effect by statutory means outside of insolvency law are more value-preserving and therefore welfare-enhancing for debtors and creditors than formal insolvency proceedings: see generally, INSOL International, *Statement of Principles for a Global Approach to Multi-Creditor Workouts* (October 2000).

[7] Section 895(2)(b), Companies Act 2006; sections 220, 221(1), Insolvency Act 1986; *In Re Drax Holdings Ltd* [2004] 1 WLR 1049.

[8] See further, J. Payne, "Cross-Border Schemes of Arrangement and Forum Shopping" (2013) 14(4) *European Business Organization Law Review* 563-589.

[9] *Re Rodenstock GmbH* [2012] BCC 459; *Primacom Holding GmbH v Credit Agricole* [2013] BCC 201; *Re NEF Telecom Co BV* [2014] BCC 417; *Re Vietnam Shipbuilding Industry Group* [2014] BCC 433; *Re Tele Columbus GmbH* [2014] EWHC 249 (Ch). The High Court has also sanctioned a scheme where the financing documents were originally governed by German law but the choice of law and jurisdiction clauses were later amended with the sole aim of establishing English jurisdiction: see *Re Apcoa Parking Holdings GmbH* [2014] BCC 538.

registered as an overseas company under the UK Companies Act 2006 and moved its headquarters to London. In other words, this was an unadulterated forum shop involving a COMI shift. In accordance with the requirements of the Companies Act 2006, Matel asked the High Court to order the convening of creditors' meeting to consider its proposed scheme.[10] The scheme was supported by 97 per cent of the noteholders by number representing around 99 per cent of the notes' value. Having easily exceeded the statutory threshold for creditor approval,[11] Matel then sought and obtained an order from Richards J sanctioning the scheme,[12] a process that has some similarity to plan confirmation under Chapter 11 insofar as a scheme does not become legally binding until the court sanctions it.[13]

10 There are two other noteworthy features of the scheme and the English proceedings. First, the UK court will only sanction a scheme if satisfied that it will achieve its practical purpose. In what I now understand to be established practice, Matel's application was teed up with the aim of persuading the court that a US court would likely give effect to the scheme under Chapter 15 of the US Bankruptcy Code. Matel adduced expert evidence of US law suggesting that the US courts would be favourably disposed towards the scheme, even though it modified and replaced rights governed by New York law.[14] Moreover, the UK court also authorized Matel's managing director to act as foreign representative on behalf of the debtor-in-possession for the purposes of the application for recognition and relief in the US.[15] The English court therefore proceeded on the assumption that the scheme would be given practical effect in the US.

11 Second, as well as affecting the rights of Matel and the noteholders *inter se*, the scheme also released the noteholders' rights against a number of Matel subsidiaries that had guaranteed its obligations under the notes. It is well established in UK law that a scheme can release rights against third parties where necessary for the effective implementation of the scheme.[16] Had the guarantors been left exposed, it would have significantly undermined the practical value of the scheme, a point the court acknowledged.[17] Although third party releases are a fairly routine feature of

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[10] Section 896, Companies Act 2006.
[11] Ibid., section 899(1) (a majority in number representing 75% in value of the noteholders was required).
[12] *Re Magyar Telecom BV* [2014] BCC 448.
[13] Section 899(3), Companies Act 2006. Compare 11 USC 1141. It follows that a scheme cannot be imposed on dissenting creditors unless the court sanctions it.
[14] *Re Magyar Telecom BV* [2014] BCC 448, at paragraph 19. Although Richards J signalled a strong preference for independent expert evidence, he was prepared to proceed on the basis of evidence from a partner in the New York office of the law firm that represented Matel (at paragraph 27).
[15] Presumably under the courts inherent powers. The statutory power of authorization in the British Model Law, which appears as a schedule to the Cross-Border Insolvency Regulations 2006 SI 2006/1030, applies only to "British insolvency officeholders" defined as the official receiver, the Scottish Accountant in Bankruptcy, and persons acting as insolvency practitioners.
[16] *Re Magyar Telecom BV* [2014] BCC 448, at paragraph 33.
[17] Idem.

UK schemes, this was apparently the first time practitioners had tried to export a scheme with this feature to the US.[18]

12 Judge Sean H. Lane of the United States Bankruptcy Court for the Southern District of New York was the bankruptcy judge assigned to hear the foreign representative's Chapter 15 petition for recognition and relief. An ad hoc creditors' committee supported the petition and was separately represented at the hearing. There was no opposition and, having heard from counsel for the foreign representative, Judge Lane disposed of the matter by means of a comprehensive bench ruling memorialized in the hearing transcript. It appears that the bench ruling was pre-prepared. Subject to double-checking with counsel that noteholders had received proper due process, the judge had more or less decided how he would proceed in advance of the hearing based on his consideration of the papers filed in support of the petition.

13 The ruling itself walks carefully through a step-by-step analysis of Chapter 15.[19] As regards recognition Judge Lane found that the UK scheme was clearly a "foreign proceeding" within the meaning of section 101(23) of the Bankruptcy Code as it was a clearly proceeding for the "adjustment of debt" under the supervision of a foreign court that was "collective" because it involved all scheme creditors. Furthermore, the proceeding was a "foreign main proceeding" because, although incorporated in the Netherlands, Matel's:

> "nerve center and locus of operations have been in the UK since before the commencement of the UK proceedings, and have remained there to date."

14 As the petitioner was a "foreign representative" authorized to act in such capacity by the UK court and the procedural formalities of section 1515 of the Bankruptcy Code were met, recognition of the scheme was straightforward.

15 The automatic stay in section 362 of the Bankruptcy Code applies automatically by virtue of section 1520(a). However, section 362 only applies while a bankruptcy case remains open. Accordingly, the foreign representative was seeking permanent injunctive relief. Judge Lane granted this relief on two grounds:

(i) as: "any appropriate relief…necessary to effectuate the purpose of [Chapter 15] and to protect the assets of the debtor or the interests of creditors" under section 1521(a)(7); and

(ii) as "additional assistance" under section 1507 having regard to the enumerated factors in that section derived from former section 304.

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[18] According to Matel's lawyers, White & Case, in a client newsletter of January 2014: <http://bit.ly/1GjPx6P>.

[19] 11 USC 15.

16 Judge Lane found that permanent injunctive relief was appropriate under 1521(a) on a "likelihood of irreparable harm" standard. The risk that dissident scheme creditors could seek to leverage their position by bringing enforcement proceedings in the US where the UK restructuring commanded substantial creditor support was enough to meet the standard. All creditors interests were "sufficiently protected" by their treatment under the scheme and in the scheme proceedings. The court relied on the well-known *Metcalfe* decision[20] to expand the injunctive relief so as to prevent creditors from suing the guarantors noting as follows:[21]

> "Most of the requested relief is nearly identical to the relief available under Chapter 11 with respect to pre-packaged plans of reorganization. The Court is mindful that the releases afforded the subsidiary grantors [sic] have not been routinely granted in Chapter 11 cases. In the Second Circuit, however, a court may enjoin a creditor from suing a third party if the injunction plays an important part of the debtor's reorganization plan… In this case, strong grounds exist, under English law, to sanction the scheme, including the release of subsidiary grantors [sic]. That is, the scheme cannot function without such releases. If scheme creditors could simply press their discharge [sic] scheme claims against the subsidiary grantors [sic], which includes the group's operating companies, then nothing would have been achieved."

17 In passing, Judge Lane observed that:

> "schemes have routinely been recognized as foreign proceedings, including cases in this court."

18 There was a "long list" of examples[22] and he had no difficulty adding Matel to the list. The existence of this list, and the ease with which Matel navigated the Chapter 15 process in New York further reinforces an already positive feedback loop. As the positive noises coming out of the Southern District and the District of Delaware amplify, so will the comfort levels of UK judges asked to sanction future schemes that need to be exported to the US in order to have practical effect. Indeed, there is now a transatlantic ecosystem in which UK "foreign company" schemes of arrangement are thriving. And what is particularly noteworthy for comparative purposes is that this ecosystem has no trouble accommodating UK schemes that modify or discharge New York law governed obligations. Not surprisingly, the use of UK schemes to restructure New York law governed notes is catching on.[23]

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[20] *In re Metcalfe & Mansfield Alternative Investments* 421 BR 685 (Bankr SDNY 2010).

[21] I have preserved the apparent typographical errors in the transcript. "Grantors" should be "guarantors" and "discharge" should be (I think) "discharged".

[22] The foreign representative's supporting brief was replete with citations to unreported Southern District of New York and Delaware cases and also included a reference to *In re Board of Directors of Hopewell International Insurance Ltd* 238 BR 25 (Bankr SDNY 1999), an old section 304 case relating to a scheme approved under Bermudian legislation modelled on the English Companies Acts.

[23] *Re Zlomrex International Finance SA* [2014] BCC 440, Bankr SDNY 31 January 2014; *Re New World Resources NV* [2014] EWHC 3143 (Ch), Bankr SDNY 9 September 2014. Matel's lawyers, White & Case, also represented the debtors in these cases. To use the argot of US sportscasters, they are "on a roll".

19 It is important to emphasize that creditor support for the scheme was very broad and that the hearings in London and in New York were not contested. Greater challenges may face debtors who seek permanent injunctive relief under Chapter 15, where a significant minority of creditors voices opposition. But even then, the US court would frame its analysis by asking whether the interests of creditors are sufficiently protected (for the purposes of section 1522(a)) and whether, consistent with US notions of comity imported into section 1507 from former section 304, the foreign proceeding will assure creditors of due process and substantively fair treatment.[24] Indeed, the idea of comity is pervasive in Chapter 15,[25] and, as regards foreign proceedings taking place in a sister common law country, as long as the US court is satisfied that the foreign court has bankruptcy jurisdiction and the foreign proceeding is procedurally fair, the US court will usually defer.[26]

20 The US has well-known mechanisms for cramming down dissenting creditors that are broader than those in an English scheme.[27] In this respect, and having regard to the fact that comity is central to the Chapter 15 analysis, it is perhaps not surprising that US courts are receptive to UK restructuring plans that achieve an outcome commensurable to one that could easily be achieved in a hypothetical Chapter 11 case. But US courts have also shown themselves willing to use comity within Chapter 15 to override US law[28] or, relatedly, to give effect to foreign law outcomes that may not have been so readily achieved in a parallel US Chapter 11.[29]

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[24] *Metcalfe*, above note 20; *In re Vitro S.A.B. de C.V.* 701 F 3d 1031 (5th Cir 2012).

[25] The US enactment of Articles 7 and 9 of the Model Law is particularly striking. Section 1507 empowers the US court to provide "additional assistance…consistent with principles of comity" having regard to the former section 304 factors. Section 1509. Section 1509(b)(3) provides that, on recognition of a foreign proceeding under section 1517, "a court in the United States shall grant comity or cooperation to the foreign representative. On the centrality of comity in Chapter 15 see further *Vitro* (n 24) 1043 ("[c]entral to Chapter 15 is comity…"), 1044 ("[w]ithin the context of Chapter 15…[comity] is raised to a principal objective"), 1045, 1047, 1053 (comity described as a "central tenet" of Chapter 15; reference also to Chapter 15's "heavy emphasis on comity"); *In re Atlas Shipping A/S* 404 BR 726 (Bankr SDNY 2009), 738 ("[o]nce a case is recognized as a foreign proceeding, chapter 15 specifically contemplates that the court will exercise its discretion consistent with principles of comity").

[26] *Metcalfe*, above note 20, at 698-699.

[27] In Chapter 11, it is possible to cram down entire classes who oppose a plan as long as at least one impaired class supports the plan and as long as the plan does not discriminate unfairly and is fair and equitable: 11 USC 1129(a)(10), (b)(1). In a scheme, it is clear from the language of section 899(1), Companies Act 2006 that where there is more than one class of creditors, all classes must vote in favour. In other words, it is possible to cram down class minorities but not whole classes that reject the scheme.

[28] *In re Ephedra Products Liability Litigation* 349 BR 333 (Bankr SDNY 2006) (Canadian claims resolution procedure given effect in the US even though it denied US plaintiffs' constitutional right to a jury trial).

[29] *Metcalfe*, above note 20 (Canadian restructuring plan given effect in the US even though it contained comprehensive third party releases that were likely broader than would have been tolerated in a Chapter 11 plan under controlling 2nd Circuit precedent).

Travelling across the Atlantic in the Opposite Direction: *Rubin* and *Singularis*

21 How would a Magyar Telecom style restructuring be received the other way around? In other words, what if a non-US corporate debtor were to shift its COMI to New York, restructure its English law governed notes via a Chapter 11 plan, and then seek to export the effect of the plan to England and Wales under the British version of the Model Law in The Cross-Border Insolvency Regulations 2006?[30] The position is not nearly as clear-cut. And this remains true even if we posit a second less radical hypothetical involving a US incorporated entity, having its centre of gravity plainly in the US, that wishes to restructure a tranche of English law governed notes through Chapter 11.

22 Recent developments in the UK case law have crystallized the uncertainty. I refer in particular to *Rubin v Eurofinance SA*; *New Cap Insurance Corpn Ltd v Grant*[31] and, to a lesser extent, to *Singularis Holdings Limited v PricewaterhouseCoopers*.[32] Space does not permit me to go into all the ins and outs of *Rubin* and *Singularis*. Many readers will already be familiar with their gist.[33] Their greatest significance for present purposes lies in their devastating impact on the Privy Council's landmark decision in *Cambridge Gas Transport Corporation v The Official Committee of Unsecured Creditors of Navigator Holdings Plc*.[34] I suggest that *Rubin* and *Singularis* can be read as standing for the following interrelated propositions:

(1) The court has no power under the 2006 Regulations to recognize and enforce foreign insolvency-related orders even where the foreign insolvency proceeding itself qualifies for statutory recognition.
(2) Relief under the 2006 Regulations is "concerned with procedural matters"[35] and is limited to the type of relief that would be available in the case of a domestic insolvency.[36]

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[30] SI 2006/1030. Referred to hereinafter as "the 2006 Regulations". The 2006 Regulations apply in Great Britain and so cover Scotland, England and Wales. Separate regulations have been enacted for Northern Ireland that complete the UK-wide coverage.
[31] [2013] 1 AC 236 (UKSC).
[32] [2014] UKPC 36.
[33] *Rubin* has already generated an extensive academic and practitioner literature, For a flavour, see A. Briggs, "In for a Penny, in for a Pound" (2013) 26 *Lloyds Maritime and Commercial Law Quarterly*; W. Trower and C. Cooke, "Enforcement of Foreign Insolvency Judgments: a Missed Opportunity" (2013) 10(1) *International Corporate Rescue* 29; P. Omar, "The Limits of Co-Operation at Common Law" (2013) 10(2) *International Corporate Rescue* 106; K. Handley, "Cambridge Gas Rejected" (2013) 129 *Law Quarterly Review* 144-147; J. Kirshner, "The (False) Conflict Between Due Process Rights and Universalism in Cross-Border Insolvency" (2013) *Company Law Journal* 27-31; I. Fletcher, "Rowing Back From Rubin" (2014) 27(3) *Insolvency Intelligence* 43-47; H. Anderson, "Six of the Best" (2014) *Journal of Business Law* 194-206, at 202-204, 206.
[34] [2007] 1 AC 508.
[35] *Rubin*, above note 31, at 143 (Lord Collins).
[36] Ibid., at 28 (Lord Collins) further reinforced as regards the 2006 Regulations by *Fibria Celulose S/A v Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch), [2014] Bus LR 1041, at paragraphs 77-108.

(3) Foreign insolvency-related orders only qualify for recognition and enforcement if the foreign court was a court of competent jurisdiction under the traditional English common law rules of *in rem* and *in personam* jurisdiction applicable to foreign judgments. There is no bankruptcy exception to the traditional rules at common law. Special rules of international jurisdiction for insolvency-related orders require legislative intervention. Modified universalism does not provide a basis for "bankruptcy exceptionalism" at common law.[37]

(4) As the order giving effect to the US Chapter 11 plan in *Cambridge Gas* affected (i) property (shares) that, on ordinary conflicts principles, were situated in the Isle of Man, and (ii) parties who had not submitted to the jurisdiction of the US court, the US court had neither *in rem* nor *in personam* jurisdiction under the traditional rules.[38] The Isle of Man court therefore had no jurisdictional basis on which to exercise the common law power of judicial assistance and, to that extent, *Cambridge Gas* was wrongly decided.[39]

(5) A creditor who files a proof of debt in a foreign insolvency proceeding can be taken as having submitted to the jurisdiction of the foreign court responsible for the supervision of that proceeding merely by the act of filing the proof. The court therefore has power at common law to recognize and enforce insolvency-related orders made by the foreign court against that creditor on the basis that the foreign court has *in personam* jurisdiction.[40]

(6) There is a common law power to assist a foreign insolvency representative based on the principle of modified universalism.[41] This is a power "to assist foreign winding up proceedings so far as [the court] possibly can"[42] which "requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."[43] However, the common law power appears to be limited in at least the following ways:

   a. It only arises where the foreign court has bankruptcy jurisdiction based on domicile or place of incorporation.[44]

   b. It is not clear that it arises where the debtor is in a foreign reorganization or debt adjustment proceedings as opposed to a foreign bankruptcy or winding-up proceeding.

   c. The UK court cannot grant relief under the common law power simply because there would be a statutory power to make an equivalent order in a domestic insolvency.[45] To the extent that *Cambridge Gas* suggested

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[37] *Rubin*, above note 31, at 91, 106-132.

[38] Ibid., at 103, 132.

[39] Ibid. See also *Singularis*, above note 32, at 89 (Lord Collins).

[40] *Rubin*, above note 31, at 156-167. *Rubin* apparently widened the traditional *in personam* basis of jurisdiction to a degree that some UK private international lawyers regard as controversial because it extends to cases in which the creditor's proof has neither been admitted nor paid: see e.g. Briggs, above note 33. The Privy Council has subsequently confirmed that a creditor who files a proof submits to the *in personam* jurisdiction of the foreign court regardless of whether the proof is subsequently admitted or a dividend paid: *Stichting Shell Pensioenfonds v Krys* [2014] UKPC 41, [27]-[32].

[41] *Singularis*, above note 32, at 19, 23 (Lord Sumption) and at 112 (Lord Clarke).

[42] Ibid, at 15 (Lord Sumption).

[43] Ibid., at 16 (citing Lord Hoffmann's opinion in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 at 30, 132-135 (Lord Mance); *Stichting*, above note 40 (also citing Lord Hoffmann's opinion in *HIH*). For further acknowledgement that the principle of modified universalism is part of English law see *In re Tambrook Jersey Ltd* [2014] Ch 252, at 18 (Davis LJ).

[44] *Rubin*, above note 31, at 11, 13, 31, 46, 51, 121; *Singularis*, above note 32, at 10, 12, 23 (Lord Sumption), at 58 (Lord Collins), at 112 (Lord Clarke) and at 132 (Lord Mance); *Stichting*, above note 40, at 24 (Lord Sumption and Lord Toulson).

[45] *Singularis*, above note 32, at 18 (Lord Sumption) and at 134 (Lord Mance).

> otherwise, it was wrong.[46] Territorially limited statutory powers applicable in domestic insolvencies cannot be applied indirectly "by analogy" at common law in international insolvencies to which those statutory powers do not directly apply "as if" the foreign insolvency were a domestic insolvency. Similarly, the UK court cannot use the common law power to dispense with UK statutory requirements unless UK law provides a basis for dispensing with those requirements. Accordingly, the UK court cannot apply UK statutory procedures "by analogy" at common law to achieve a result that could have been achieved under the foreign insolvency law.[47] Those procedures (insofar as they are capable of applying to the foreign debtor) must be followed so as to replicate the foreign law outcome in domestic law. To allow judges either (i) to extend territorially limited local statutes to foreign parties or (ii) to disapply or disregard extraterritorially applicable statutory requirements would amount to impermissible judicial legislation.[48]
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> d. The UK court cannot grant assistance under domestic law that would give the foreign representative greater rights than would be available under the foreign insolvency law.[49]
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> e. In granting assistance, the UK court can only ever act within the limits of its own statutory and common law powers.[50]

23 Let me return to the two hypotheticals I raised in paragraph 21. On the law as it stands, would the UK court simply give effect to the US restructuring plan in these cases and grant a stay that would prevent holdout creditors from seeking to enforce English law governed rights in the UK?

24 In the case of the non-US debtor that does a COMI shift, assistance at common law is a non-starter. The recent case law does not depart from the view that a corporate entity can only properly be wound up in the country of its incorporation.[51]

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[46] Ibid., at 18 (Lord Sumption), at 83 (Lord Collins) and at 134 (Lord Mance).
[47] Ibid., at 38, 83, 91-93 (Lord Collins).
[48] Ibid., at 64, 82-83, 107-108 (Lord Collins).
[49] Ibid., at 29 (Lord Sumption), at 33 (Lord Collins), at 14 (Lord Clarke), at 117-118 (Lord Mance) and at 51 (Lord Neuberger) (by implication). This limitation was outcome determinative in *Singularis* because the Cayman liquidators were seeking assistance under Bermudan law that would not have been available to them under Cayman law.
[50] Ibid., at 19 (Lord Sumption), at 38, 51-60 (Lord Collins), at 112-113 (Lord Clarke) and at 132-134 (Lord Mance). Even Lord Hoffmann, whose *Cambridge Gas* and *HIH* opinions pushed the envelope of judicial assistance at common law, doubted whether a UK court could directly apply provisions of foreign insolvency law as opposed to fashioning assistance using provisions of domestic insolvency law: *Cambridge Gas*, above note 34, at 22. In *Singularis*, a majority of the Judicial Committee of the Privy Council held that Bermudan courts have a highly circumscribed common law power, deriving by analogy from other extant common law powers, to compel parties to produce information that will assist insolvency officeholders in discharging their functions. It followed that this domestic law power was available (at least in theory) to assist foreign liquidators in identifying and locating assets.
[51] Although the point was not taken in *Rubin* or *Singularis* (no doubt because there were bigger fish to fry), the Chapter 11 debtor in *Cambridge Gas*, above note 34, was a Manx entity with its principal place of business in Switzerland. If *Cambridge Gas* had been a Model Law case, there is cause to doubt whether the debtor would have been eligible for recognition on the basis of either COMI or establishment.

25 Otherwise, to the extent that the UK court would characterize a US confirmation order as a "judgment", the answer appears to be:

> "only if, the US court had *in personam* jurisdiction over the holdouts as a matter of UK private international law."

26 This answer is the same whether the foreign representative seeks relief under the 2006 Regulations or under the common law of judicial assistance because, either way, *Rubin* privileges the common law rules on the recognition and enforcement of judgments. So where there are holdouts who have no US presence, the foreign representative would need some basis for arguing that the holdouts had submitted to the US bankruptcy court's jurisdiction either by filing a proof of claim or by participating directly in some cognizable way in the US bankruptcy proceedings. How far the UK courts would be prepared to expand the concept of "submission" to deal efficiently with such holdouts while doing so in a manner consistent with the basic structure of the common law rules on recognition and enforcement of judgments is uncertain.[52]

27 But let us assume for the sake of argument that the UK court (i) would not necessarily always classify a foreign restructuring plan as a "judgment" and (ii) would at least have jurisdiction at common law to assist the US-incorporated Chapter 11 debtor. Even then the foreign representative would face two formidable obstacles to relief under the common law of judicial assistance:

> a. The inability of the UK court on *Singularis* logic to apply the UK scheme of arrangement or company voluntary arrangement procedures "by analogy" to achieve the same result in English law as can be achieved in the US under a confirmed Chapter 11 plan.
> b. The persistence of the rule in *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* [(1890) 25 QBD 390] that contractual obligations are only effectively discharged in England under the law applicable to the contract.[53] Under this rule a US bankruptcy discharge has no effect, as a matter of English law, on an English law governed contractual obligation.[54] The rationale of the rule is that the parties to a contract should not be discharged from their obligations by a law to which they did not agree to be bound.[55] The rule creates a bankruptcy safe harbour and is easy to criticize.[56] As insolvency

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[52] In *Cambridge Gas*, above note 34, at 10, Lord Hoffmann expressed surprise at the Manx courts' finding that Cambridge Gas had not submitted to the jurisdiction of the New York court. Indeed, the case would have been much less controversial had it been litigated and decided on the footing that the Chapter 11 proceedings were binding on Cambridge Gas *in personam*. For possible lines of argument, see Handley above note 33.

[53] (1890) LR 25 QBD 399 (CA). For modern applications that confirm that the rule is alive and well see *Wight v Eckhardt GmbH* [2004] 1 AC 147 (PC); *Global Distressed Alpha Fund 1 Ltd Partnership v PT Bakrie Investindo* [2011] 1 WLR 2038; *Dubai Islamic Bank PJSC v PSI Energy Holding Company BSC* [2013] EWHC 3186 (Comm).

[54] The rule is not entirely parochial. An English court will apply it to contract obligations expressly governed by a foreign law: see e.g., *Wight*, above note 53, at 11, 15.

[55] *Gibbs*, at 406 (Lord Esher); *Bakrie*, above note 53, at 12.

> law is designed to achieve a collective resolution of creditors' claims binding on all, the logical choice of law to govern the international effects of a bankruptcy discharge would be the *lex fori concursus*, assuming that the relevant country is an appropriate bankruptcy forum from an international jurisdictional perspective.[57] Nevertheless, the *Gibbs* rule reflects a deference to party autonomy and to transaction planning that remains a powerful feature of UK law − a feature evident also in the UK's tolerance of various species of *ipso facto* clause[58] that are neutered by bankruptcy law in other jurisdictions (notably the US).

28 So far then the road to common law assistance for both a non-US and a US Chapter 11 debtor appears to be blocked. The non-US debtor does not qualify for assistance because it is not in an insolvency proceeding in its place of incorporation. The US debtor qualifies but the UK court will not grant assistance that is inconsistent with, or disregards, UK law.

29 Is the position any more favourable under the 2006 Regulations? You could be forgiven for thinking that by enacting the Model Law, the UK has embraced a commitment to an international norm of cooperation that should be capable of overriding domestic law. *A fortiori*, our courts are directed by Article 8 to interpret the British version of the Model Law having regard to its international origin and to the need to promote uniformity in its application. That, you might also think, provides scope for UK courts to use modified universalism to move beyond the confines of the common law power and to break the shackles of the *Gibbs* rule. There is a perfectly respectable argument that the statutory power in Article 21(1)(a)(1) of the British version of the Model Law to:

> "grant any appropriate relief, including staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's…obligations or liabilities…"

should enable the UK courts to issue a permanent stay in order to prevent holdout creditors from undermining Chapter 11 proceedings. However, there are plenty of reasons to think that the argument would not succeed.

30 First, the recent trajectory of UK jurisprudence serves to remind us that the Model Law, while an important step forward, is a limited endeavour. The *Rubin*

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[56] See *Bakrie*, above note 53, at 14 (citing Fletcher's own forceful criticism of the rule); G. McCormack, "Universalism in Insolvency Proceedings and the Common Law" (2012) 32 *Oxford Journal of Legal Studies* 325-347, at 334-336; A. Walters and P. Moffatt, "Recognising the Effects of Foreign Insolvency Proceedings" (2011) 32 *Company Lawyer* 161-162; F. Toube, "Isolationism Revived" (2011) 24(5) *Insolvency Intelligence* 77-79. On the wider problem of choice of law in the international insolvency context of which the *Gibbs* rule is symptomatic see J. L. Westbrook, "Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum" (1991) 65 *American Bankruptcy Law Journal* 457-490.

[57] US courts have extended comity to foreign bankruptcy discharges and declined to adjudicate claims that ought properly to be dealt with in the foreign proceeding: see e.g., *Barclays Bank Plc v Kemsley* 992 NYS 2d 602 (2014) (New York Supreme Court) and cases therein cited.

[58] *Fibria*, above note 36; *Belmont Park Investments Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 AC 383 (UKSC).

court's theory of the British version of the Model Law is that it enables the UK courts to grant relief that is available under existing domestic law.[59] The 2006 Regulations may broaden the scope for recognition but, on this theory, the UK court will not use the powers therein simply to extend the foreign law effects of the foreign proceeding to the UK. Indeed, if those foreign law effects are inconsistent with settled English law, the UK court will likely deny relief.[60] The Model Law contains no choice of law rules and, according to the Guide to Enactment, one of the Model Law's underlying principles is that recognition does not directly import the consequences of the foreign law into the insolvency system of the enacting state.[61] Support is readily available for the view that domestic limits placed on the relief available under the 2006 Regulations are entirely consistent with limitations inherent in the Model Law itself.[62]

31 Second, as with any country's enacted version of the Model Law, the 2006 Regulations have to be accommodated within the domestic legal system. The Model Law is a transplant and local enactment is merely the first stage of its reception into the host legal system. The point is so far from being novel as to be trite.[63] In the UK system, the British version of the Model Law is forced to cohabit and interact with pre-existing law, including the various other pre-existing regimes for international cooperation in cross-border insolvency cases. This does not rule out the possibility of successful translation.[64] However, there may well be different visions of what "success" entails and there are embedded features of the UK's current legal landscape that are reinforcing the Model Law's inherent limitations. As a consequence, and to mix metaphors, the software (the Model Law) is working differently in the UK's operating system than it currently does in the US.

32 One such feature of the UK's current legal landscape is a strong judicial preference for the specific over the general and for rules over standards. This manifests itself in various ways. Sweeping general language such as "any appropriate relief" in the British Model Law has proved insufficient to oust dyed-in-the-wool common law rules. This is the thrust of *Rubin*. But it reflects the wider canon of statutory construction that Parliament is taken to enact legislation with full

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[59] *Rubin*, above note 31, at 28 and 143 (Lord Collins).
[60] *Fibria*, above note 36, at 77-108.
[61] United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*, (2014, United Nations, Vienna), at 83 (paragraph 178) and 89 (paragraph 194).
[62] Ibid, and see *Fibria*, above note 36, at 88-90, 107. At the time of writing, an appeal was pending in the *Fibria* case. For reasons expounded further in the text, the present author will be surprised if the appellants succeed in persuading the higher courts that the Model Law permits the application of Korean law in a manner that would be inconsistent with English law.
[63] There is, of course, an extensive comparative law literature on legal transplantation of foreign law, much of it a reaction to A. Watson, *Legal Transplants: An Approach to Comparative Law* (1974, Scottish Academic Press, Edinburgh).
[64] See e.g., E. Orucu, "Law as Transposition" (2002) 51 *International and Comparative Law Quarterly* 205-223.

knowledge of the common law.[65] So, to extend the metaphor, general discretionary language has so far not been effective to "uninstall" rules that are long embedded within the system.

33 At the same time, our current crop of senior judges has shown no appetite for rewriting or reinvigorating the common law in environments where statute has extensively encroached. This is *Rubin* again. It is also *HIH*, a case that has attracted interest internationally principally because of Lord Hoffmann's minority opinion,[66] but which actually decides that the UK court could remit assets to Australia for distribution in accordance with Australian priorities because Parliament (via section 426 of the Insolvency Act 1986) clearly sanctioned the outcome.[67] Meanwhile, in *Singularis* their Lordships were divided only as to the degree of caution (mildly cautious or very cautious) that the judiciary ought to exercise in developing the common law.[68] Indeed, *Singularis* provides a case study of judicial discipline in the face of felt constraint.

34 In this climate, it is far from certain that our courts would be prepared to grant a permanent stay under Article 21(1)(a) of the British Model Law when to do so would result in a functional discharge and thus produce an outcome contrary to the *Gibbs* choice of law rule. The first obstacle is the theory that the UK courts grant relief under domestic law rather than extend the effects of foreign law. The second obstacle is the lack (in contrast to other cross-border insolvency legislation on the books) of any choice of law framework in the 2006 Regulations that expressly alters English choice of law rules.[69]

35 Even if we were to assume for a moment that the 2006 Regulations empower the courts to assist the foreign representative by doing whatever it can do in a domestic insolvency (as per Lord Hoffmann's now discredited view from *Cambridge Gas* as to the scope of the UK courts' inherent powers), it is doubtful whether a court would apply an English discharge "by analogy" with what would happen were a parallel proceeding to be initiated in the UK. In the absence of clear language in the 2006 Regulations permitting the blanket relaxation of domestic statutory

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[65] See e.g., *Belmont*, above note 58, at 102 (Lord Collins) and at 150 (Lord Mance).

[66] See e.g., a symposium edition of the Texas International Law Journal discussing the role of national priority rules in cross-border insolvency introduced by Professor Westbrook at (2011) 46 Texas International Law Journal 437.

[67] *HIH*, above note 43, at 37, 44 (Lord Phillips), at 59-62 (Lord Scott) and at 66, 69, 74-77 (Lord Neuberger).

[68] *Singularis*, above note 32, at 19, 25 (Lord Sumption), at 65-83 (Lord Collins), at 109-113 (Lord Clarke), at 130-135 (Lord Mance) and at 149-157 (Lord Neuberger).

[69] Readers might object that the British Model Law does change English choice of law rules in some respects. For example, Article 13(3), which prevents a creditor's claim from being challenged solely on the grounds that it is a claim by a foreign tax or social security authority, clearly modifies the rule in *Government of India v. Taylor* [1955] AC 491. A response is that the objection proves too much and that, had Parliament intended to abrogate *Gibbs*, it would have chosen to do so in language equally as plain as that found in Article 13(3).

procedures, UK judges may well feel unable to take short cuts. To be sure, the 2006 Regulations do grant foreign representatives access to provisions of domestic insolvency law, such as transaction avoidance provisions, without requiring them to initiate a domestic insolvency proceedings. However, it is plausible to assume that the courts will be cautious when asked to generalize from particular provisions of the Regulations, especially as general relief "by analogy" would be a device for working around *Gibbs*.

36 Furthermore, there are at least two reasons why our courts may not be prepared to overrule *Gibbs* as a precursor to granting Article 21 relief in the absence of further statutory intervention. A narrow reason is UK commercial law's cherished commitment to party autonomy, freedom of contract, and transactional certainty.[70] A broader reason is that the effect of a foreign discharge is merely one choice of law issue. It is therefore plausible that courts will say that the adoption of a general *lex fori concursus* rule is properly left to Parliament as part of a systematic consideration of choice of law rules.

37 For present purposes, I am neutral as to the merits (positive or normative) of any of the arguments I have articulated.[71] My point is a narrow one. The arguments are sufficiently plausible that it is questionable whether an English lawyer could safely advise a US Chapter 11 debtor to proceed without initiating a parallel English scheme or company voluntary arrangement as a mechanism for modifying or discharging English law governed rights. Moreover, UK practitioners have no great incentive to lobby for change in this climate of uncertainty given the fees that can be generated off the back of what is perfectly proper and prudent advice.

Conclusion

38 As things stand, there can be little doubt that the UK's and US's treatment of each other's restructuring plans is asymmetric. The US version of the Model Law is a single legislative gateway to assistance that embodies a statutory commitment to comity as an animating principle. If the foreign court has jurisdiction, it appears that the US court will grant comity to a foreign proceeding even if the effects of that proceeding under foreign law are effects that could not be achieved domestically under US law. The limits on comity are the safeguards in Chapter 15 itself – the narrow basis for non-recognition on public policy grounds in section 1506 and the "sufficient protection" caveat in section 1522. As long as US interests are guaranteed due process within the foreign proceeding, the US court will give the green light. Indeed, as Judge Lane's bench ruling in Matel suggests, US courts

[70] A central theme of *Belmont*, above note 58.

[71] *Fibria*, above note 36, is the latest test case. If the administrators succeed on appeal in that case, and the courts develop a theory of the 2006 Regulations as embodying a more potent version of modified universalism than does the common law, the landscape could change.

are happy to accord comity to UK standards of due process without any fuss. There appears to be a broad continuity between practice under Chapter 15 and practice under prior US law.[72]

39 In the UK, the British Model Law is a latecomer. It is not a single gateway. It is the latest addition to a so-called "menu" of options available to foreign representatives that is, in truth, a complex patchwork of overlapping statute and common law. It coexists with the European Insolvency Regulation and with older modes of assistance available under the common law and to courts in countries that receive "favoured nation" treatment via section 426 of the Insolvency Act 1986. These regimes do not all apply in all cases. Nor are they necessarily mutually exclusive. A US bankruptcy trustee may request assistance at common law and/or under the 2006 Regulations, while an Australian liquidator has the common law, section 426 and/or the 2006 Regulations at her disposal.[73] How these various regimes are supposed to interact is a live issue. And even if one (or more) does not apply in a given case, judges are likely to look at the body of law as a whole to elucidate the workings of the individual parts.

40 So far the reception of the Model Law into UK law appears to have been relatively weak. Comity is not writ large in the 2006 Regulations. In *Rubin* comity was the proverbial dog that simply did not bark.[74] The 2006 Regulations also represent a kind of continuity. Or rather, they have not been a powerful enough vehicle for disruption and discontinuity within the pre-existing system. This is in part a reflection of the Model Law's self-proclaimed limitations – it is a Model Law and not a treaty after all. But it is also a reflection of local conditions and, in the hands of cautious judges who are (quite reasonably) concerned with domestic legal constraints on their room for manoeuvre, the Model Law has not quite found its feet. It is very striking that the common law power of judicial assistance was centre stage in *Rubin* with the Model Law making only a cameo appearance. This was a consequence of the first instance judge more or less assuming that he had no power to act under the Model Law in a manner that was inconsistent with the common law

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[72] See e.g., *Canada Southern Railway Co. v Gebhard* 109 US 527 (1883) (US Supreme Court); J. Westbrook, "Chapter 15 and Discharge" (2005) 13 *American Bankruptcy Law Review* 503-520.

[73] The legislative history clearly indicates that section 426 was to remain available on current terms and that foreign representatives in designated countries or territories would therefore be able to seek relief under section 426 and/or the 2006 Regulations: Insolvency Service, *Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain* (August 2005), at paragraphs 40-43; Insolvency Service, *Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain: Summary of Responses and Government Reply* (March 2006), at paragraphs 66-76.

[74] In this respect, Lord Collins's treatment of *Metcalfe*, above note 20, at 144 in *Rubin* is misleading. He dismisses the salience of the decision on the ground that the US Bankruptcy Court "applied the normal rules in non-bankruptcy cases for enforcement of foreign judgments in the United States." *Metcalfe*, as any US lawyer would tell you, is simply an application of the principle of comity enshrined *within* Chapter 15 (see above note 25). The question that ought to have been raised on a fair reading of *Metcalfe* is: "as the US recognizes and enforces foreign insolvency-related judgments under Chapter 15, can we not do the same under the 2006 Regulations?"

rules on the recognition and enforcement of judgments. The Model Law was sidelined in *Rubin* from the outset.[75]

41 Similarly, our judges proclaim allegiance to a principle of modified universalism but have not as yet worked out what that means in the Model Law context. In the system as a whole the principle takes on various guises. In its European Insolvency Regulation guise, the principle is relatively aggressive. There is a clear choice of law framework and the regime is underpinned by a powerful treaty-driven *grundnorm*. We ceded sovereignty. We must apply EU law. In its section 426 guise, it is also fairly aggressive. In *HIH* the court deferred to the *lex fori concursus*[76] because it felt able to do so by virtue of statutory mandate. As the British Model Law lacks comparable features, it is perhaps not surprising that its reception is weaker and its version of modified universalism less potent.

42 There is a good argument that Article 8 provides some impetus for judges to push through local barriers. However, it is an interpretive principle that, rightly or wrongly, is easily glossed. In *Fibria Celulose S/A v Pan Ocean Co Ltd*[77] few could argue that Morgan J failed to "have regard" to the Model Law's international origin even though he disagreed with the view of the US Court of Appeals for the Fifth Circuit[78] that a court acting under Article 21 can grant relief under foreign law. He would say that he did his best having regard to his duty to uphold the law. Set alongside clear statutory choice of law rules in other parts of the UK's statutory "menu" that dictate or permit particular outcomes, Article 8 looks somewhat aspirational and hortatory.[79]

43 Some divergence in the implementation and reception of a weak harmonizing instrument like the Model Law is inevitable. It is part and parcel of the whole experiment. The US has taken the lead on issues such as reception of foreign law. But other countries are not strictly bound to follow. And, in the US too, issues have arisen concerning the interaction of Chapter 15 with pre-existing law in the Bankruptcy Code of which it forms part. This interaction is producing some idiosyncratic results attributable mainly to local drafting problems.[80]

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[75] *Rubin v Eurofinance SA* [2009] BPIR 1478, at 50-73.

[76] Or, at the very least, to Australian choice of law rules: see E. Janger, "Reciprocal Comity" (2011) 46 *Texas International Law Journal* 441-448, at 453.

[77] *Fibria*, above note 36.

[78] *In re Condor Insurance Ltd* 601 F 3d 319 (2010).

[79] And possibly, to some eyes, a vehicle for the export of US norms bearing in mind that the US is unquestionably the largest producer of Model Law jurisprudence. The fact that the US has never acquired "favoured nation" status under section 426 is perhaps a silent commentary on UK resistance to certain aspects of US legal culture.

[80] See e.g., *Drawbridge Special Opportunities Fund LP v Barnet* 737 F 3d 238 (2nd Cir 2013) (foreign entity seeking recognition under Chapter 15 must have a residence, domicile, place of business, or assets in the US under section 109(a) of the Bankruptcy Code as well as satisfying the requirements for recognition based on COMI or establishment); *In re Fairfield Sentry Limited, Krys v Farnum Place, LLC* 768 F 3d 239 (2nd Cir 2014) (BVI court's approval of sale of US-law governed claim in BVI

44 If there is a lesson, it is that policymakers need to be very clear about their goals in implementing the Model Law in terms of the desired effect on outcomes in concrete cases and, having articulated those goals, to pay very close attention to issues of local reception and local systemic "fit". If, as a matter of policy, we want to promote outcome *x* in specific instance *y*, a comprehensive review of local law may sometimes be necessary to ensure that the transplant will do the job. More aggressive harmonization at the UNCITRAL level may derail the whole Model Law project (countries will be less inclined to sign up).[81] Convergence therefore likely depends on a saleable shared vision of the Model Law as it currently stands and effective local implementation of that vision.

45 The UK faces an image problem. Do we want to be perceived as a sanctuary for scammers (*Rubin*) and a haven for holdouts? Do we want to be perceived as offering (continuing to offer?) a distinctly third class and more expensive service to foreign representatives from outside the EU and from countries that are not members of the section 426 club? Is there any policy reason why we should not at least give our judges a clear section 426-style mandate in the 2006 Regulations to provide assistance in accordance with foreign law at their discretion in appropriate cases? Or at least in cases originating from countries where we can be confident of reciprocal treatment? Perhaps we do not care too much about our image. But, given the generous assistance our restructuring industry receives from US bankruptcy courts, US judges and policymakers may well be justified in concluding that our lack of bilateral reciprocity "just isn't cricket".

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liquidation was not entitled to comity and was subject to review and approval under domestic US bankruptcy law).

[81] Though Working Group V at UNCITRAL now has recognition and enforcement of foreign insolvency-derived judgments squarely on its agenda: see United Nations, General Assembly, UNCITRAL Working Group V, *Insolvency Law, Recognition and enforcement of foreign insolvency-derived judgements, Note by the Secretariat*, A/CN.9/WG.V/WP.126 (6 October 2014), available at: <http://bit.ly/1Fp0SW7>.

Chapter 11's Inclusivity Problem

Sarah Paterson* & Adrian Walters**

This Article rests on four premises: (i) that modern market participants frequently seek legal tools to compromise selected liabilities and not all the liabilities of the firm; (ii) that it is difficult to achieve a selective corporate restructuring in Chapter 11 given its inclusivity; (iii) that selective corporate restructuring strategies are normatively desirable but must only be permitted within strict boundaries; and (iv) that U.S. practitioners have worked around the challenges which Chapter 11's inclusivity poses to selective strategies but sufficient boundaries have not been placed around these workarounds. While restructuring of long-term financial liabilities is the prime example of a selective restructuring strategy, the Article demonstrates that it is far from being the only one. Thus, the Article represents the first attempt to join currently siloed debates about financial restructuring, landlord restructuring, and restructuring of tort liabilities into a single debate about selective strategies and the need for formal selective restructuring tools alongside traditionally inclusive bankruptcy tools. Having reframed the understanding of modern restructuring practice in the United States by reference to selectivity, we argue that, in line with developments in other countries, notably the United Kingdom, it is high time that the Bankruptcy Code is reformed to accommodate selective restructuring while providing safeguards against its abuse. In other words, it is time to tackle Chapter 11's inclusivity problem head on.

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INTRODUCTION

In the last half century, there has been a worldwide paradigm shift in corporate bankruptcy law away from *liquidation* regimes in which the debtor's business ceases, its assets are sold off piecemeal, and the proceeds distributed among creditors, towards *reorganization* or *restructuring* regimes.[1] Underlying this shift is the theory (broadly) that preservation and maximization of the going concern value of distressed but viable firms that would otherwise be broken up better promotes creditor welfare and, via positive spillover effects, wider stakeholder welfare.[2] Chapter 11 of the Bankruptcy Code has featured prominently in this shift and has been a source of inspiration for bankruptcy law reform worldwide. Building blocks of Chapter 11 law and practice—debtor in possession financing,[3] the ability to confirm plans that cram down entire dissenting classes,[4] the treatment of executory contracts and unexpired leases,[5] and the Bankruptcy Code's aversion to *ipso facto* clauses in contracts that permit debtor counterparties to terminate on the occurrence of a bankruptcy event[6]—have been especially influential.[7]

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1. JAY L. WESTBROOK ET AL., A GLOBAL VIEW OF BUSINESS INSOLVENCY SYSTEMS §§ 4.0–4.1 (2010).

2. *See* U.N. COMM'N ON INT'L TRADE L., LEGISLATIVE GUIDE ON INSOLVENCY LAW (PARTS 1 & 2), U.N. Sales No. E.05.V.10 11 (2005) ("An insolvency law needs to balance the advantages of near-term debt collection through liquidation . . . against preserving the value of the debtor's business through reorganization . . . . Achieving that balance may have implications for other social policy considerations, such as encouraging the development of an entrepreneurial class and protecting employment. Insolvency law should include the possibility of reorganization of the debtor as an alternative to liquidation, where creditors would not involuntarily receive less than in liquidation and the value of the debtor to society and to creditors may be maximized by allowing it to continue. This is predicated on the basic economic theory that greater value may be obtained from keeping the essential components of a business together, rather than breaking them up and disposing of them in fragments."). We use "creditor welfare" here in a narrow sense to denote the optimal enhancement of creditors' interests in the particular distressed firm rather than any general, non-firm specific improvement in their economic circumstances. *See* Douglas G. Baird et al., *The Bankruptcy Partition*, 166 U. PA. L. REV. 1675, 1676–77 (2018). Spillover benefits to other stakeholders include preservation of employment and continuity of supply chain and customer relationships.

3. 11 U.S.C. § 364.

4. § 1129(b).

5. §§ 365(e), 541(c)(B).

6. *See* § 365(e).

7. For the role of U.S. influence and interests on international standard setting through international financial institutions such as the World Bank, the International Monetary Fund, and the Asian Development Bank and international organizations such as the United Nations Commission on International Trade Law, see Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of*

Key to preserving viable firms that are in distress, or at risk of distress, is early intervention, whether formal or informal.[8] A useful model for thinking about the importance of early intervention to successful restructuring is the demise curve which charts the decline of a firm from a healthy state at one extreme to an unsalvageable state at the other extreme.[9] All financially distressed debtors lie somewhere on the demise curve. Those high on the curve have only just started to experience real pressure on cash. Moreover, some debtors high on the demise curve will have a sound underlying business but a specific problem which is putting pressure on their cash position. For example, the debtor may have long term borrowings from financial creditors which have become unsustainable because of a changing trading environment. It may be a retailer, casual dining operator, or hospitality business which is paying above-market rents on a portfolio of leased properties that made sense based on revenue projections when the leases were entered into but are now a problem because of a revenue squeeze arising from changing consumer habits. Or it could be increased competition, or the impact of the global pandemic; or it may face significant tort liabilities as a result of historical business practices which it no longer pursues in its current operations.

The important point for these debtors is that if the specific problem—whether it be an over-leveraged balance sheet; a particularly burdensome tranche of operating liabilities; or substantial tort liabilities—can be resolved by swift and early intervention, the debtor will slide no further down the demise curve. Lower down the curve the debtor's distress is no longer causally linked to a specific bundle of liabilities. Rather, it has become generalized. Even debtors who start their journey with an identifiable cash-draining issue and a sound underlying business are likely to descend into a

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Corporate Insolvency Regimes, 112 AM. J. SOCIO. 1135, 1187 (2007) ("The United States leads the world in its experience with reorganization of corporations through bankruptcy law . . . and its philosophy of corporate rehabilitation has been incorporated in all the global standards by [international financial institutions]. To this degree, the global template for reforms that has emerged from international organizations bears more than a little resemblance to a 'globalized localism,' namely, an elevation of certain principles in U.S. law to the world at large.").

8. WESTBROOK ET AL., *supra* note 1, § 4.6, at 161 ("One cannot overemphasize the importance of providing a system under which debtors are encouraged to seek the help of the protective rehabilitation regime early enough to ensure that the maximum benefit can be achieved . . . . "); *id.* § 5.3, at 170 ("There can be little doubt that early action in the form of consultation between a debtor that is insolvent, or nearing insolvency, and major creditors substantially increases the chances of a successful informal outcome for all who have an interest in the debtor's business.").

9. *See* Irit Mevorach & Adrian Walters, *The Characterization of Pre-Insolvency Proceedings in Private International Law*, 21 EUR. BUS. ORG. L. REV. 855, 857 (2020).

condition of general default if they are unable to fix their problems earlier at a higher point on the demise curve. This is because the longer debtors spend on the demise curve, the more news of their difficulties will spread so that other suppliers and customers begin to adjust their behavior, and the cash position steadily deteriorates. In other words, there is a relationship between the time which has elapsed since the debtor began its descent down the curve and the debtor's cash position. Thus, the main objective of many debtors high on the demise curve is to limit their restructuring negotiations to the specific contracts they need to renegotiate or liabilities they need to deal with and to achieve a restructuring as quickly as possible before they slide further down the curve.[10]

However, debtors face challenges in persuading the relevant creditors to renegotiate the specific contracts or liabilities that are causing the problem. Some creditors may hold out in the hope that by actively refusing to concede issues in the renegotiation they will be paid off in full; hold up (delay or string out) the negotiations in the hope that this will result in a better deal; free ride in the hope that the sacrifice of other creditors who consent to revised terms will be sufficient to enable the company to emerge from distress and repay them in full; or simply misjudge the severity of the situation.[11] At the same time, if the debtor cannot renegotiate the specific contracts or liabilities, it will slide down the demise curve with the result that everyone, including the target creditors, will be worse off. It is for this reason that the debtor will turn to corporate reorganization law tools which allow it, high on the curve, to *select* specific contracts or liabilities to compromise while everyone else rides through the case wholly unscathed. We call this process whereby formal reorganization procedures are used to renegotiate the claims of a narrow group of creditors while everybody else simply rides through unaffected *selective corporate restructuring*.

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10. We do not posit the demise curve as a "one size fits all" model of reality. There will be firms that fall off a cliff edge and plummet fast, especially where the cause of failure is an exogenous shock such as a pandemic or an endogenous problem such as accounting fraud. But we do think it is a useful way to think about managerial and professional advisory decision making in real-time. Where you are, what kind of problem you have, and the current cash position of the business will determine what tools you need and what tools are still available to you. Higher up the curve, you may still be able to make use of the kind of formal pre-bankruptcy restructuring tool that is now prevalent in the United Kingdom ("UK") and Europe. *See infra* Part IV. Lower down the curve, you may need a full-blown bankruptcy proceeding to have any chance of stabilizing the business and creating liquidity.

11. For a discussion of these terms, see Sara Comin, *Strategic Behaviours and Priority Rules in Debt Restructuring*, 2022 EUR. INSOLVENCY & RESTRUCTURING J. 1, 4, 7 (2022).

Of course, imposing losses on selected creditors when the debtor is unable to pay all of its liabilities in full, rather than mandating that all creditors share in the loss, raises obvious legitimacy concerns. We return to this important point below when we consider the normative foundations of selective corporate restructuring. For the moment, we simply note that selectivity goes hand in hand with early intervention. If the policy objective is a corporate reorganization system that incentivizes early intervention, then it makes sense to complement formal bankruptcy procedures, which require the debtor to put the whole firm up for grabs and bring all creditor and equity claims into the resolution equation, with formal restructuring procedures that facilitate more targeted intervention higher up the curve in circumstances where an informal workout—requiring unanimous creditor support—is simply unfeasible. At the same time, the demise curve compellingly illustrates why early intervention is highly desirable.

Despite its undeniable influence on global trends in bankruptcy law reform, Chapter 11 does not measure up well as a tool for this kind of targeted intervention. More specifically, Chapter 11 was not designed to facilitate a selective corporate restructuring strategy that requires the plan of reorganization to be crammed down on an entire dissenting class or classes while the majority of creditors ride through or stay entirely outside the case.[12] Four self-reinforcing design features of Chapter 11 operate in tandem to make it difficult for debtors to pursue selective restructuring by means of such a non-consensual plan,[13] and this, in turn, has important implications for the

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12. To be clear, the focus of the Article is on reorganization as it affects large corporates. We do not consider law and practice as it affects small business debtors eligible to file a so-called subchapter V case in accordance with 11 U.S.C. §§ 101(51D), 1181–1195, which provisions were introduced by the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. To be eligible for subchapter V, a debtor must be engaged in commercial or business activities and have aggregate noncontingent liquidated secured and unsecured debts of not more than $7,500,000. *See* The Bankruptcy Threshold Adjustment and Technical Corrections Act of 2022, Pub. L. No. 117-151, 136 Stat. 1298.

13. We distinguish *non-consensual* plans from *quasi-consensual* plans. A *non-consensual* plan is one which is confirmed and becomes binding even where at least one class dissents. To use now commonplace European parlance, such a plan may also be characterized as a *cross-class cramdown* plan because it is imposed by the debtor and the accepting classes on a dissenting class or classes without their consent. We identify two types of *quasi-consensual* plan. The first is one which is approved by the relevant majorities of *all* the classes under the applicable voting rules even though there are dissenting minorities in some or all classes. This first type of plan still involves cramdown in that it is imposed by the debtor and the requisite majorities in each class on dissenting minorities in each class without their consent. But here the cramdown is *intra-class* and not *cross-class*. In the second type of quasi-consensual plan, the debtor constructs a class which is treated as unimpaired for the purposes of 11 U.S.C. § 1126(f) and is therefore deemed to accept the plan but the Bankruptcy Code nevertheless interferes with pre-bankruptcy

conduct of restructuring negotiations in the shadow of the entire Chapter 11 regime. First, as regards assets and claims, Chapter 11 is fundamentally *inclusive.* The entire firm is brought into the financial resolution. Second, Chapter 11 has guardrails in the form of the distributional rules in section 1129(b) of the Bankruptcy Code that are designed to test the overall fairness of a non-consensual plan but that also constrain the debtor's room for maneuver. These guardrails are important because they protect dissenting creditors from opportunistic debtors who might otherwise transfer too much enterprise value to other creditors and/or to equity. But they also serve as roadblocks to a selective restructuring strategy designed to compromise some claims while keeping similarly situated claims or junior claims and interests intact. Third, the stay in Chapter 11 is not only automatic, but it is also extraordinarily powerful. The stay prevents the debtor from paying most pre-bankruptcy liabilities.[14] This poses obvious challenges for a selective restructuring plan in which the objective is for most creditors to ride through the case unscathed. And finally, courts take different approaches to third party claims in Chapter 11 which can make it difficult to release guarantees provided by operating companies in a finance holding company's Chapter 11 case, so that the whole group must be placed into Chapter 11 proceedings even where the restructuring plan only implicates financial liabilities.

The core claim of this Article is that Chapter 11's inclusivity problem gives rise to two troubling implications for modern U.S. corporate reorganization law and practice.

First, ingenious lawyers have used the Bankruptcy Code's complex mesh of rules to engineer solutions to Chapter 11's inclusivity problem in a highly problematic way. We identify four ways in which practitioners have engineered selective restructurings: (i) prepackaged plans; (ii) plan "unimpairment," a strategy for selective restructuring of commercial real estate lease portfolios that, to date, has not attracted much attention from academics; (iii) section 363 sales; and (iv) divisional mergers (so-called Texas Two-Steps). What all four strategies have in common is that they circumvent the distributional guardrails in Chapter 11 that are designed to test the overall fairness of the plan and replace them with technical grounds

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entitlements of creditors in the class. An example is landlords whose claim outside of bankruptcy would exceed the cap in 11 U.S.C. § 502(b)(6). In this second type of quasi-consensual plan, many creditors may object to their treatment in the plan because their prebankruptcy entitlements are affected by it, but they do not have a vote. We prefer *quasi-consensual* to *consensual* as a descriptor because a debtor who can restructure with the unanimous consent of all the creditors whose claims it wishes to compromise usually has no need of a formal bankruptcy or restructuring procedure: they can achieve an informal workout instead.

14. 11 U.S.C. § 362(a).

of objection which operate in a piecemeal and disjointed fashion. Thus, selective restructuring involves complex strategic maneuvers that have the unintended pathological effect of limiting comprehensive review of the plan in one of the situations in which it is arguably needed most. For sure, the court must always be satisfied that the plan has been proposed in good faith[15] but, for reasons we expand on later, we are largely skeptical that this can serve as a mandate to review the overall shape of the plan.

Secondly, if the debtor worries that strategic maneuvers within Chapter 11 will not work to achieve the desired outcome or will push the envelope too far, they may engage in another type of legal engineering: using the flexibility created by contract terms in their finance documents to raise more debt to address their cash flow difficulties and so opt out of corporate reorganization altogether. In a recent, agenda-setting article, Vincent Buccola has shown how private equity sponsors may engage in this strategy,[16] and, in our view, Chapter 11's inclusivity problem offers one explanation for the phenomenon. The problem with staving off corporate reorganization by raising further debt is that, without renegotiation of the problematic liabilities, the debtor may continue to slide down the demise curve with the result that it simply enters Chapter 11 too late, with even more liabilities, and after an unnecessary further decline.[17]

Our normative position is that selective restructuring is useful and defensible. This is likely anathema to scholars who think that if the firm is unable to pay all its liabilities in full, losses should be shared by all creditors in accordance with their priority position in liquidation.[18] Hostility to our position is understandable if one starts from the proposition, as much U.S. scholarship does, that a Chapter 11 corporate reorganization is a "better" form of enforcement than compulsory collection by creditors from the debtor's estate under state law,[19] in which the firm is effectively "sold" to its existing

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15. *Id.* § 1129(a)(3).

16. Vincent S.J. Buccola, *Sponsor Control: A New Paradigm for Corporate Reorganization*, 90 U. CHI. L. REV. 1, 4 (2023).

17. Barry E. Adler, *Accelerated Resolution of Financial Distress*, 76 WASH. U.L.Q. 1169, 1169 (1998).

18. *See, e.g.*, Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain*, 99 VA. L. REV. 1235, 1236 (2013) ("Because a firm in bankruptcy lacks sufficient value to repay all its creditors, priority rules determine the order of payment.").

19. *See* Raymond T. Nimmer, *Executory Contracts in Bankruptcy: Protecting the Fundamental Terms of the Bargain*, 54 U. COLO. L. REV. 507, 510 (1983) ("[B]ankruptcy provides a central forum to resolve multiple claims by channeling all collection activities and assets into a single court. The assets (or their value) are distributed under a structure that provides equal treatment for creditors of a similar type . . . ."); Douglas G. Baird, *Loss Distribution, Forum*

creditors.[20] However, we build on a different normative foundation to argue instead that selective corporate restructuring is justified by its role in resolving a failure of rational bargaining. Unless the debtor can renegotiate with the target creditors, the debtor will slide down the demise curve, and everyone, including the target creditors, will be worse off. It is therefore rational for the target creditors to renegotiate. Moreover, they should be prepared to agree voluntarily to revised terms that make them better off, bargaining rationally. Yet, because of the hold out, hold up, free rider, and misjudgment risks we referred to earlier, rational bargaining has not proved possible. Thus, selective corporate restructuring tools solve the failure of rational bargaining with target creditors by imposing a deal on them involuntarily which they ought to have been prepared to agree to voluntarily.[21] At the same time, however, guardrails need to be in place to

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Shopping, and Bankruptcy: A Reply to Warren, 54 U. CHI. L. REV. 815, 827, 829 (1987) ("Bankruptcy law creates another avenue of enforcement . . . the existence of bankruptcy's avenue of enforcement springs from the collective action problem."); Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 807–08 (2000) ("[B]ankruptcy 'Law,' for the most part, functions not to create distinct federal grounds for recovery or relief, but to create an alternative means for enforcing existing substantive rights, most of which are grounded in state law."); Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy as (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931, 952 (2004) ("[O]ne can see bankruptcy as a class action enforcement proceeding for rightsholders; it provides a single proceeding in a single court in which the affairs of the debtor and its rightsholders are sorted out.").

20. For the classic description of corporate reorganization as enforcement, see Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 893 (1982) ("A reorganization, at least as a start, may be viewed as a *form* of liquidation. The business entity, however, is sold to the creditors themselves rather than to third parties." (emphasis added)); *see also* Edward R. Morrison, *Introduction*, *in* 1 ECONOMICS OF BANKRUPTCY, at xi (Edward R. Morrison ed., 2013) ("Reorganization is effectively a 'hypothetical sale' of a firm to its creditors. Instead of selling to third parties for cash or securities, the reorganization process sells the firm to existing creditors, who exchange old claims for new interests (debt or equity) in the reorganized firm.").

21. Anthony Casey has also suggested that Chapter 11 reorganization is better conceived of as a framework for renegotiation. *See* Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709, 1711 (2020). Some European scholars have also located restructuring closer to contract law. *See* Stephan Madaus, *Leaving the Shadows of US Bankruptcy Law: A Proposal To Divide the Realms of Insolvency and Restructuring Law*, 19 EUR. BUS. ORG. L. REV. 615, 618 (2018) (outlining a contractual approach to restructuring proceedings, which are conceived of as resolving an anti-commons problem, in contrast to insolvency proceedings, which resolve a common pool problem); Horst Eidenmüller, *What Is an Insolvency Proceeding?*, 92 AM. BANKR. L.J. 53, 61, 66 (2018) (distinguishing between "fully collective" proceedings such as U.S. Chapter 11, which are characterized as insolvency proceedings, and proceedings which affect only the interests of some creditors or creditor classes which are not).

ensure that debtors (and senior creditors with leverage to dictate debtors' strategic choices) do not abuse these powerful tools.

Given the desirability of selective restructuring, it is hardly surprising that the market has found ways to work around Chapter 11's inclusivity problem. However, as in our view none of the workarounds generated by market innovation provide sufficient protections for target creditors, we believe it is high time that the Bankruptcy Code was reformed to accommodate the market's demand for selective restructuring while providing sufficient safeguards against its abuse, thus tackling the inclusivity problem head on. We are reinforced in this conclusion by evidence that certain types of large corporate debtors may be avoiding corporate reorganization altogether.[22]

To shed further light on Chapter 11's inclusivity problem, our Article takes a comparative turn. The United Kingdom and other European jurisdictions have developed procedures that are more conducive to selective restructuring than Chapter 11. The UK's principal tools for large corporate restructuring are the Part 26 scheme of arrangement and the Part 26A restructuring plan.[23] Debtors are free to propose a Part 26 scheme of arrangement or Part 26A restructuring plan to whichever creditors they choose.[24] Unlike Chapter 11, these procedures are not designed to be inclusive procedures, and it is routine for schemes and plans to compromise only selected liabilities. Importantly, selectivity is not just *possible* in Part 26 or Part 26A; it is the *norm*. There is a long history, in the London market, of attempts to contain restructuring negotiations within manageable bounds to reduce the risk of escalating distress in which the debtor will slide further down the demise curve.[25] Moreover, there is no automatic stay in Part 26 and 26A. Debtors that need the protection of a moratorium can opt for it by first entering either a moratorium proceeding[26] or an administration proceeding[27] and then proposing a scheme of arrangement or restructuring plan from within the shelter of one of these other proceedings. But debtors can equally choose to propose their scheme of arrangement or restructuring plan on a free standing basis without the protection afforded by an administration or moratorium proceeding. As a result, it is much more straightforward to pay

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22. Buccola, *supra* note 16, at 37–39.

23. Companies Act 2006, c. 46, §§ 895–901 (Part 26) & §§ 901A–901L (Part 26A) (c. 46) (UK). Part 26A was introduced by the Corporate Insolvency and Governance Act 2020 (c. 12) (UK).

24. *See infra* Part IV.

25. JOHN FLOOD ET AL., THE PROFESSIONAL RESTRUCTURING OF CORPORATE RESCUE: COMPANY VOLUNTARY ARRANGEMENTS AND THE LONDON APPROACH 7 (1995).

26. Insolvency Act 1986, c. 45, §§ A1–A55 (UK).

27. Insolvency Act 1986, c.45, sch. B1.

ride through creditors during the case and, even if moratorium protection is invoked, it is easier to chart a course to facilitate payment.[28] And there is a tried and tested approach to the release of third-party claims in both Part 26 and Part 26A. While both procedures facilitate selective restructuring, they also require the UK court to undertake a holistic review of the fairness of the scheme or restructuring plan (as the case may be). Other jurisdictions in the British common law world are already developing similar tools and adding their own twist.[29] Moreover, the European Union's Restructuring Directive,[30] and the new restructuring procedures which E.U. member states are developing to implement it, typically follow the same selective approach as the UK.

The Article proceeds as follows. In Part I we explain and defend selective restructuring's usefulness while acknowledging the obvious concern that if bankruptcy and restructuring laws become too permissive of selectivity, they will be exploited by opportunistic debtors.

In Part II we demonstrate how the Bankruptcy Code obstructs the proposal and confirmation of non-consensual selective plans: in our view, the essence of Chapter 11's inclusivity problem.

In Part III we discuss (i) the market innovations identified above, focusing particular attention on the "unimpairment" strategy used to restructure commercial real estate portfolios which, compared to the other workarounds we will consider, has traveled somewhat under the radar; and (ii) how Chapter 11's inclusivity problem helps to explain why some large corporate debtors may be avoiding corporate reorganization altogether, and raising more debt to address cash flow difficulties instead.

Part IV draws the contrast between Chapter 11 and the emerging Anglo-European model for selective restructuring of financial and operating contracts and liabilities. Dwelling on the UK's Part 26A restructuring plan, we highlight how European lawmakers have fashioned flexible tools which permit the straightforward separation of creditors included in and excluded from the plan and apply different norms for the purposes of determining whether (i) the decision to include some creditors and exclude others is legitimate; and (ii) the plan's treatment of creditors who are included is fair.

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28. *See infra* Part IV.

29. A case in point is Singapore which has introduced a cross-cram down feature into its equivalent of the UK scheme of arrangement. *See* Wee Meng Seng, *The Singapore Story of Injecting US Chapter 11 into the Commonwealth Scheme*, 15 EUR. COMP. & FIN. L.R. 553, 555 (2018).

30. Council Directive 2019/1023, art. 1, 2019 O.J. (L172/18) ¶ 4 (discussing preventive restructuring frameworks).

Relatedly, in Part IV, we show how the UK's test for determining whether or not a Part 26A restructuring plan treats the creditors selected for inclusion fairly—the relevant alternative test[31]—and the residual judicial discretion to sanction the plan together address both rational bargaining failure and the concern that selectivity encourages debtor opportunism. We also outline the benefits of both optional stay protection and flexible release of third-party claims for a selective corporate restructuring strategy.

In Part V we sketch a proposal for reform building on an earlier proposal from the National Bankruptcy Conference ("NBC") for a new Chapter 16 of the Bankruptcy Code.[32] The NBC proposal sought to provide a halfway house for bond restructuring between the extremes of an out-of-court workout and a full blown Chapter 11 case.[33] We suggest a broader and more foundational approach that would be designed explicitly to address Chapter 11's inclusivity problem, provide tools for selective restructuring coupled with appropriate safeguards, and channel selective restructuring cases out of Chapter 11 into a bespoke restructuring chapter. We close with a brief conclusion.

I. IN DEFENSE OF SELECTIVE CORPORATE RESTRUCTURING

Bankruptcy and restructuring laws provide formal mechanisms that financially distressed debtors can use to accomplish resolutions ranging from a restructuring of some or all of their liabilities to a going concern sale of their assets to the liquidation of their assets on a piecemeal basis. In many jurisdictions, resolution mechanisms that facilitate asset sales have evolved from outright liquidation (or, in British common law parlance, winding-up) regimes whereas procedures to restructure or reorganize liabilities have been developed with voting mechanisms of various specifications, the purpose of which is to overcome holdout problems associated with the general law of debt composition by enabling majorities to bind minorities without the need for unanimous consent.[34] A familiar legislative pattern is for jurisdictions to enact over time a menu of formal tools, some of which are predominantly restructuring tools, others of which are bankruptcy tools, to accomplish a

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31. Companies Act 2006 c. 46, § 901G(3)–(4) (UK).

32. *See* Tobias Wetlitzky, *Water Under the Bridge? A Look at the Proposal for a New Chapter 16 of the Bankruptcy Code from a Comparative Law Perspective*, 37 EMORY BANKR. DEV. J. 255, 264 (2021).

33. *Id.* at 264–65.

34. *See* Sarah Paterson & Adrian Walters, *Selective Corporate Restructuring Strategy*, 86 MODERN L. REV. 436, 438 (2023).

going concern or liquidating asset sale.[35] Chapter 11 is much more of a "one stop shop": a single portal through which debtors can restructure through a classic plan of reorganization process,[36] or sell their assets as a going concern,[37] with the fallback of conversion to a Chapter 7 liquidation[38] should resolution in Chapter 11 prove unsuccessful.

That the law and practice have evolved along these lines reflects the needs of debtors in the market for debt resolution. Debtors that are high on the demise curve frequently need restructuring tools that enable them to address an isolated problem before their financial situation worsens. Without early intervention, distress may spread to a point where the debtor lacks the liquidity to meet a wide range of its financial and operating liabilities. At this lower point on the curve, restructuring its liabilities may be a tall order. For firms that have reached this point and are in, or approaching, a condition of general default, the legal and market response is to provide bankruptcy tools that can stabilize and salvage their businesses. These tools will usually combine a stay on creditor enforcement that prevents the break-up of the firm[39] with mechanisms that can facilitate a going concern sale.

Where the debtor has identified a specific problem, it makes sense to intervene early to prevent it from spreading and having contagion effects on other parts of the business and operations. As a rule of thumb, the sooner you move to contain and address a problem, the easier it is to fix. This is where selective restructuring comes in. Tools which allow debtors high on the demise curve to select specific contracts or liabilities (call them "target claims") to renegotiate while everyone else rides through the case, have at least two advantages.

First, selective restructuring reduces direct process costs. We know that multilateral bargaining with multiple constituencies of stakeholders is costly.[40] The further you slide down the curve and the closer you get to a

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35. For example, at the latest count, the UK has at least six formal procedures: Part 26 schemes of arrangement, Part 26A restructuring plans, company voluntary arrangements, and a stand-alone moratorium (all broadly designed to promote restructuring); and administration and winding-up (which typically function as business or asset sale regimes). *See* Companies Act 2006 c. 46, §§ 895–901 (UK) (Part 26); §§ 901A–901L (Part 26A); Insolvency Act 1986 c. 45, §§ A–1A55 (UK) (Part A1 moratorium); §§ 1–7B (Part 1 company voluntary arrangements); § 8, sch. B1 (administration); §§ 73–229 (Parts IV & V winding-up).

36. 11 U.S.C. §§ 1121–1129.

37. § 363; *see* Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751, 756 (2002).

38. 11 U.S.C. § 1112.

39. Such as the automatic stay in 11 U.S.C. § 362.

40. *See* Paul M. Goldschmid, *More Phoenix than Vulture: The Case for Distressed Investor Presence in the Bankruptcy Reorganization Process*, 2005 COLUM. BUS. L. REV. 191 (2005).

condition of general default, the larger and wider the group becomes with which you need to negotiate. An effective way for debtors with scarce resources to reduce direct process costs is to narrow what the military historian and theorist of strategy Lawrence Freedman calls the "circle of cooperation."[41] In other words, the fewer folks you have to negotiate with, the less costly the process will be.[42]

Second, selective restructuring reduces indirect costs[43] by enabling debtors to keep on board, and create confidence among, those parties who will be unaffected by the restructuring endeavor. The signal to these constituents is resoundingly "business as usual": suppliers and employees will continue to be paid; customers will continue to be serviced. Moreover, the signal carries with it the reassurance that suppliers, customers, and employees will be able to deal with the debtor in confidence once the restructuring is done.[44] Because it avoids adverse signaling, selective restructuring can therefore reduce the risk that suppliers and customers will desert the firm or otherwise adjust their behavior in ways that squeeze profits and increase costs of supply and credit, thus jeopardizing firm value.

A fundamental criticism of selective corporate restructuring is that it is illegitimate for a specific constituency to bear the loss once the debtor is unable to pay all its liabilities in full.[45] If we conceive of corporate reorganization as a method of enforcement, this criticism has some force. Chapter 11 has its origins in the railroad receiverships of the nineteenth century.[46] Railroad receiverships were substantively a reorganization of the railroad but took the form of an enforcement process in which the railroad was "sold" to existing creditors and equity holders.[47] Corporate

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41. LAWRENCE FREEDMAN, STRATEGY: A HISTORY 612 (2013).

42. *See* Paterson & Walters, *supra* note 34, at 440. On the benefits of lower cost restructuring procedures for debtors who would gain little from a costly full-blown Chapter 11 reorganization, see Kenneth Ayotte & David A. Skeel, Jr., *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 437–41 (2006).

43. *See* Edward I. Altman, *A Further Empirical Investigation of the Bankruptcy Cost Question*, 39 J. FIN. 1067, 1070–72 (1984) (classifying as indirect costs lost sales, lost opportunities, higher cost of credit, and higher costs of supply attributable to adverse market perceptions of a distressed firm's prospects).

44. On the signaling and information processing benefits of a selective restructuring's "business as usual" message to suppliers and customers faced with uncertainty about the debtor's prospects, see Sarah Paterson, *Restructuring Moratoriums Through an Information-Processing Lens*, 23 J. CORP. L. STUD. 37, 42–43 (2023).

45. *See, e.g.*, Paterson & Walters, *supra* note 34, at 436.

46. *Chapter 11 Bankruptcy: An Overview*, KPBB L. (Nov. 14, 2017), https://www.kppblaw.com/chapter-11-bankruptcy-overview/ [https://perma.cc/SZX2-R6Q8].

47. The literature describing the equity receivership is voluminous. *See, e.g.*, Albro Martin, *Railroads and the Equity Receivership: An Essay on Institutional Change*, 34 J. ECON. HIST. 685,

reorganization is still conceptualized in this way in the modern literature.[48] Essentially, all of the firm's assets are treated as having been sold to the creditors themselves, at a price which could be achieved in normal market conditions between a willing seller and a willing buyer,[49] and the proceeds of the sale are allocated to the creditors and shareholders in accordance with distributional rules which reflect creditors' liquidation priorities.[50] Viewed through this lens, there would seem to be no justification for distinguishing between different types of creditors who would otherwise rank equally in the distributional order of priority in liquidation. As Bruce Markell has put it, any difference "dissolve[s] when you realize that both types of indebtedness are treated the same in state court enforcement."[51] In short, there is simply no justification for imposing losses unevenly between otherwise equally ranking creditors.

However, we do not conceptualize a selective corporate restructuring as an enforcement event. Indeed, we consider it is better theorized as a mechanism to *avoid* an enforcement event. The starting assumption is that the target creditor is party to a contract which does not reflect current market terms or is owed a substantial liability. In each case this threatens the viability of the firm. If the target creditor renegotiates the contract or agrees terms to settle the liability, then the firm will no longer face distress and will no longer be on the demise curve. On the other hand, if the target creditor does not renegotiate or settle, the firm will descend the demise curve and may eventually reach a point of crisis at which it can no longer be saved. If the target creditor can be persuaded to negotiate, everyone (including the target creditor) will be no worse off than they would be without negotiation and at

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686–708 (1974); Peter Tufano, *Business Failure, Judicial Intervention, and Financial Innovation: Restructuring U.S. Railroads in the Nineteenth Century*, 71 BUS. HIST. REV. 1, 4–37 (1997); David A. Skeel, Jr., *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 VAND. L. REV. 1325, 1351–71 (1998); DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 59–74 (2001); DOUGLAS G. BAIRD, THE UNWRITTEN LAW OF CORPORATE REORGANIZATIONS 26–45 (2022).

48. *See, e.g.*, Bruce A. Markell, *Fair Equivalents and Market Prices: Bankruptcy Cramdown Interest Rate*s, 33 EMORY BANKR. DEV. J. 91, 96 (2016) (showing how statutory reorganization law mirrored prior receivership practice).

49. Edwin L. Sterne, *The Absolute Priority Rule in Corporate Reorganization*, 1 CUMB. SAMFORD L. REV. 35, 37 (1970). We consider the "purchase price" for the "sale" transaction in more detail in Part II below, when we discuss the "fair and equitable" requirement and the absolute priority rule.

50. For the classic description of reorganization proceedings as a sale of the enterprise to the creditors themselves, see Jackson, *supra* note 20.

51. Bruce A. Markell, *The Clock Strikes Thirteen: The Blight of Horizontal Gifting*, 38 BANKR. L. LETTER 1, 4 (2018).

least some (may be all) of the firm's creditors will be better off (negotiation is *Pareto superior*). However, crucially, selective corporate restructuring is not normatively defensible solely on efficiency or utilitarian grounds. In most jurisdictions that provide selective corporate reorganization tools, the target creditors must also receive a deal which they could reasonably be expected to accept, if rational bargaining had been possible.[52] Viewed from this perspective, in cases where, say, one constituency has a long-term off market contract or is owed an outsized liability, the decision to target them rather than the claims of other creditors with whom they would rank equally in liquidation is more readily understandable.

Another familiar criticism of selective corporate restructuring is that it does not address wider operational issues.[53] All that these cases achieve, so the charge goes, is to kick the proverbial can down the proverbial road. Kenneth Ayotte and David Skeel have offered one possible line of defense. In conditions of uncertainty, it may be more efficient for the debtor to undertake a rapid, less costly workout than a full-blown Chapter 11 case, even if that means that the debtor is forced to return for a second restructuring later (a so-called Chapter 22).[54] We offer another explanation. For many, although by no means all, firms high on the demise curve financial stress is caused by a specific problem which, if it can be cauterized, will not affect the debtor's wider business and operations. This is, we argue, the rightful place of selective corporate reorganization strategies in the corporate bankruptcy toolbox: there simply is no wider problem which corporate reorganization law is required to solve.

It follows that for many firms high on the demise curve, a full-blown bankruptcy or reorganization procedure which encompasses *all* creditor claims and equity interests and captures and reallocates the *entirety* of the firm's enterprise value[55] is a proverbial sledgehammer to crack a nut. The direct and indirect costs of engaging the entire creditor body in a comprehensive resolution will outweigh the benefits if the cause of the company's financial difficulties can be isolated and addressed. Conversely, debtors high on the curve who cannot address the specific cause of their distress without recourse to a formal procedure, because of holdouts who will not agree to an out-of-court "workout," face a dilemma if selective

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52. *See infra* Part IV.

53. *See* Harvey Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 2004–05 (2002); *see also* Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L.J. 247, 300–01 (2022).

54. Ayotte & Skeel, *supra* note 42.

55. Which is how we would characterize Chapter 11. *See infra* Part II.

restructuring tools are unavailable. These debtors may delay filing for fear of the sledgehammer with the consequence that their isolated problem escalates, and they slide down the curve.

Of course, one question which our argument immediately raises is why corporate bankruptcy law is needed at all if the debtor is seeking to negotiate only with selected creditors. Many scholars have suggested different mechanisms by which businesses might agree to a system for resolving financial distress other than the U.S. federal system of Chapter 11.[56] As Alan Schwartz puts it, the call has been to "privatize bankruptcy."[57] If bankruptcy privatization seems implausible for cases implicating all of a debtor's financial, trade, and other creditors, it is surely more realistic where the reorganization implicates only a specific group.[58] Perhaps, then, the focus should be on removing limits such as those found in the Trust Indenture Act of 1939 ("TIA")[59] which restricts out-of-court bond workouts,[60] leaving debtors greater freedom to negotiate contract terms, such as collective action clauses, with the groups they may need to compromise with in the future.

Our response is twofold. First, we suggest that creditors are likely to want the assurance of independent, holistic review of the fairness of the plan in any situation where they are singled out to absorb the loss, unless there has been near-unanimous agreement to the debtor's proposal. Thus, exchange offers, which are effectively a contractual alternative to a reorganization of corporate bonds through a Chapter 11 plan, are typically only effective where an extremely high majority of bondholders agree to the offer,[61] while syndicated

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56. *See, e.g.*, Steven L. Schwarcz, *Rethinking Freedom of Contract: A Bankruptcy Paradigm*, 77 TEX. L. REV. 515, 524–34 (1999); Alan Schwartz, *Bankruptcy Contracting Reviewed*, 109 YALE L.J. 343, 346–48 (1999); Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807, 1850–51 (1998) [hereinafter *Contract Theory Approach*]; Barry E. Adler, *Finance's Theoretical Divide and the Proper Role of Insolvency Rules*, 67 S. CAL. L. REV. 1107, 1110, 1118–20 (1994); Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 STAN. L. REV. 311, 319–24 (1993); Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51, 117 (1992); Lucian Arye Bebchuk, *A New Approach to Corporate Reorganizations*, 101 HARV. L. REV. 775, 776–77 (1988).

57. *Contract Theory Approach*, *supra* note 56, at 1851.

58. For an acknowledgment that criticism of private-law bankruptcy alternatives may not apply to all cases which are not complex business bankruptcies, see Susan Block-Lieb, *The Logic and Limits of Contract Bankruptcy*, 2001 U. ILL. L. REV. 503, 508 n.19 (2001) and accompanying text.

59. Pub. L. 76-253.

60. For a detailed discussion of the TIA's restrictions, see Mark J. Roe, *The Voting Prohibition in Bond Workouts*, 97 YALE L.J. 232, 250–69 (1987); William W. Bratton & Adam J. Levitin, *The New Bond Workouts,* 166 U. PA. L. REV. 1597, 1615–19 (2018).

61. Wetliztky, *supra* note 32, at 270.

loan agreements typically demand unanimous consent for amendments to principal terms such as payment terms and maturity dates.[62]

Secondly, contract bankruptcy leaves out creditor groups that could conceivably be selected to absorb loss. Some groups, such as landlords, are not cohesive and so it is difficult to see how a coordinated contract bankruptcy regime could be negotiated with them *ex ante*. Tort creditors never expect to be creditors of the debtor in the first place and would at least prefer their interests to be balanced against those of the debtor and other creditors under the supervision of the bankruptcy court, rather than binding themselves to a purely contractual process. In short, we do not believe that contractual solutions displace the need for selective corporate restructuring law tools.

Even so, an obvious objection to selective restructuring is that it could prove to be a charter for debtor opportunism. There is a very real risk that the debtor adopts a selective approach to wash off certain liabilities unfairly transferring too much value to all the other stakeholders. We take this risk seriously. Debtors should not be permitted to use selective restructuring to reduce or eliminate some of their costs when there is no genuine threat to firm viability. Debtors should only be able to use selective restructuring to promote *Pareto superior* outcomes, in other words outcomes that make everyone (including the target creditors) no worse off and many, if not all, stakeholders better off than they would have been in alternative states of the world. And debtors should not be able to favor one group of creditors over another for capricious reasons, especially where insiders are involved. Accordingly, we have proposed elsewhere that selective restructuring tools should be accompanied by safeguards: in particular, a credible threat of independent, quasi-inquisitorial court review of the debtor's overall strategy by reference to clear and transparent criteria that require debtors to justify thoroughly their decisions to differentiate between the target creditors and the unaffected "ride-through" stakeholders.[63]

In sum, selective restructuring with appropriate safeguards provides distressed firms high on the curve with a pathway to early intervention in the form of a low-cost containment strategy that can be used to address specific problems forensically before they get out of hand, and subject to safeguards, in a manner consistent with rational bargaining.

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62. Letter from Richard Levin, Chair, Nat'l Bankr. Conf., to Reps. Marino and Johnson, and Sens. Grassley and Leahey (Dec. 18, 2015) (on file with author).

63. Paterson & Walters, *supra* note 34.

II. CHAPTER 11'S INCLUSIVITY PROBLEM OUTLINED

We start this Part by restating our premise. Chapter 11 has an inclusivity problem because it does not readily facilitate the proposal and confirmation of *non-consensual selective plans* that address a specific cause of distress, such as a problem in the firm's long-term financing (for example, a series of bonds that are approaching maturity); or a portfolio of over-market leases that has become unsustainable in a changed trading environment; or tort liabilities relating to historic business practices.[64]

Chapter 11 has four specific, self-reinforcing design features which, when combined, raise obstacles to the proposal and confirmation of non-consensual selective plans and therefore affect the ability of debtors to bargain for a selective restructuring in the shadow of the law. These design features are Chapter 11's all-encompassing *inclusivity* as regards assets and claims; the distributional rules with which a non-consensual plan must comply if it is to win confirmation; the mandatory automatic stay which prevents payment of pre-bankruptcy liabilities; and the challenge of third-party releases. We consider each in turn.

A. Chapter 11's (Over)-Inclusivity

Recall that the objective of selective restructuring is to contain and address the specific cause of distress and limit direct costs (by reducing the circle of cooperation) and indirect costs (by sending a "business as usual" signal to ride-through stakeholders).[65] Selective restructuring involves a radical partitioning of the target creditors with whom the debtor needs to negotiate from the rest of the firm's stakeholders. It demands a laser-focused procedure that enables the debtor to include and address only the target claims without either touching the firm's assets or bringing the claims and interests of ride-through stakeholders into its maw.

The first thing we notice about Chapter 11's design is that it simply does not contemplate this kind of partitioning of the "included" and the "excluded." Chapter 11 is fundamentally all-encompassing and highly

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64. *See* Anthony Casey & Joshua Macey, *A Qualified Defense of Divisional Mergers*, BANKR. ROUNDTABLE (June 28, 2022), http://blogs.harvard.edu/bankruptcyroundtable/2022/06/28/texas-two-step-and-the-future-of-mass-tort-bankruptcy-series-a-qualified-defense-of-divisional-mergers/ [https://perma.cc/V6QL-BNXY] (noting the costs of an enterprise-wide proceeding for addressing tort liabilities).

65. *See supra* Part II.

inclusive. Virtually all the debtor's assets come into the bankruptcy estate[66] and are sheltered by the automatic stay[67] within the protective jurisdiction of a federal court.[68] Rights to payment included with the Bankruptcy Code's broad definition of claims[69] are affected by the bankruptcy case regardless of whether an individual creditor files a proof of claim.[70] Furthermore, all claims must be brought within and treated in some way by the plan of reorganization even if they are designated as unimpaired.[71] What is contemplated is a comprehensive resolution of the debtor's financial past that brings the entire firm into the bankruptcy reckoning. A Chapter 11 case is, as Casey and Macey have expressed it, an "enterprise-wide filing."[72]

Thus, while Chapter 11 is commonly held up as being uniquely conducive to early intervention because of its lack of any threshold insolvency requirement,[73] the design assumption baked into it is that debtors who need bankruptcy relief are in a situation of widespread default so that "[the] firm's entire capital structure becomes due and payable at a single instant."[74] It puts all the assets on the table; it encompasses all the liabilities; it requires the debtor in possession to engage with everyone: senior finance creditors, junior finance creditors, trade creditors, lease and long-term contract counterparties,

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66. 11 U.S.C. § 541(a)(1) ("Such estate is comprised of . . . all legal or equitable interests of the debtor in property as of the commencement of the case."). Post-bankruptcy augmentations of various kinds, including proceeds of estate property, are also captured. 11 U.S.C. § 541(a)(5), (6), (7).

67. 11 U.S.C. § 362(a)(2)–(5). The estate is formed and the stay applies as soon as the debtor files a bankruptcy petition. 11 U.S.C. § 541(a) ("The commencement of a case under . . . this title creates an estate."); § 362(a) ("[A] petition filed under . . . this title . . . operates as a stay . . . .").

68. 28 U.S.C. § 1334(e)(1).

69. 11 U.S.C. § 101(5)(A) ("The term 'claim' means- right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . .").

70. As a general rule, the *in rem* rights to collateral of mortgagees and other secured parties are unaffected and ride through the bankruptcy case. *See* Long v. Bullard, 117 U.S. 617, 619–21 (1886); Dewsnup v. Timm, 502 U.S. 410, 417 (1992). However, in the light of 11 U.S.C. § 1141(c), which provides that "except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors," any mortgage or lien will be extinguished on confirmation unless the plan or confirmation order expressly preserves it. *See In re* Penrod, 50 F.3d 459, 463 (7th Cir. 1995); JCB, Inc. v. Union Planters Bank, NA, 539 F.3d 862, 870 (8th Cir. 2008).

71. 11 U.S.C. § 1123.

72. Casey & Macey, *supra* note 64.

73. WESTBROOK ET AL., *supra* note 1, § 3.4.3 (noting the contrast between the U.S. and most other jurisdictions which typically condition formal eligibility on a showing of insolvency even in voluntary cases).

74. Stephen J. Lubben, *The Overstated Absolute Priority Rule*, 21 FORDHAM J. CORP. & FIN. L. 581, 584 (2016).

utility suppliers—the whole shebang. It was simply not designed as a restructuring tool for selective corporate restructuring.[75]

B. Non-Consensual Plans: Chapter 11's Classification and Distributional Rules

As we noted above, one implication of Chapter 11's all-encompassing inclusivity is that a plan of reorganization must necessarily be inclusive. All claims and interests must be classified. The Code is clear on the point. It states that "a plan shall . . . designate . . . classes of claims,"[76] provides further that "substantially similar" claims may be included in the same class,[77] and requires the plan to distinguish between impaired and unimpaired classes.[78] The plan therefore has to include and treat all claims in one way or another, the only exception being certain categories of priority unsecured claims which, as a general rule, have to be paid in full unless the holders of such claims consent to a different treatment.[79]

As well as permitting a debtor to designate a class as unimpaired, the Code also permits the allocation of unsecured claims to a separate class, designated as an administrative convenience class, where the costs of impairing those claims and paying them over time through the plan would exceed their value.[80] It follows then that the claims of ride-through creditors in a selective restructuring context must necessarily be classified either as unimpaired claims or as so-called "convenience" claims, or (counterintuitively) have their rights altered in some minimal way (for example, a modest change in payment terms) so that they can be classified as impaired claims. The Code offers no further illumination other than to provide that an unimpaired class, and each holder of a claim in such a class, are conclusively presumed to

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75. It is widely acknowledged that the Bankruptcy Code was framed with industrial firms having relatively straightforward and under-leveraged capital structures in mind. *See* AM. BANKR. INST., COMM'N TO STUDY THE REFORM OF CHAPTER 11, 2012–2014, FINAL REPORT AND RECOMMENDATIONS 12 (2014).

76. 11 U.S.C. § 1123(a)(1).

77. § 1122(a).

78. § 1123(a)(2)–(3). A claim is unimpaired if the plan leaves unaltered the legal, equitable, and contractual rights to which such claim entitles the holder or cures all defaults, reinstates the original maturity of the claim, and compensates the holder of the claim for any damages. § 1124.

79. § 1123(a)(1); § 1129(a)(9) (expressly excluding claims specified in §507(a)(2), (3), and (8) from the classification requirement and providing for their treatment).

80. § 1122(b). Separate classification of unsecured claims in a "convenience class" must be "reasonable and necessary for administrative convenience." *See also In re* S&W Enterprises, 37 B.R. 153, 158 (Bankr. N.D. Ill. 1984).

accept the plan[81] and that an impaired class whose holders are offered no recovery in the plan on account of their claims is deemed to have rejected the plan.[82]

The key (if perhaps trite) point is that whichever way a class of claims is designated—impaired, unimpaired, or convenience—it is *within* the plan. Impaired classes must get a plan treatment that meets at least the minimum floor of the "best interests" test.[83] And for a non-consensual plan to be crammed down on a dissenting impaired class, there must be at least one impaired accepting class.[84] If we assume that a selective plan proponent can engineer an accepting impaired class and offer dissenting classes at least the minimum payout required by the "best interests" test, the non-consensual plan's proposed treatment of the dissenting class must also satisfy the distributional rules in section 1129(b)[85] if it is to win confirmation. Section 1129(b) has a twin mandate: the plan must not discriminate unfairly and must be fair and equitable with respect to each impaired class that has not accepted it.[86] Significantly, these distributional rules require the court to benchmark the treatment of the relevant impaired class against the proposed treatment of all the other classes within the plan to ensure that enterprise value is not allocated unfairly. As such, they serve as end-of-case guardrails against debtor opportunism.[87] We consider each below.

1. Unfair Discrimination

The Code states that a non-consensual plan must not discriminate unfairly with respect to non-accepting impaired classes, but it does not elaborate further on the meaning of unfair discrimination. Some points that have bearing on the phrase's meaning can be elicited from the Code's classification rules. Chapter 11's classification scheme is not purely binary. Claims can only be grouped together if they are substantially similar, with

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81. 11 U.S.C. § 1126(f).

82. § 1126(g).

83. § 1129(a)(7). Each holder of a claim in an impaired class must either have accepted the plan or be projected to receive on account of their claim no less than they would have received had the debtor been liquidated in Chapter 7 on the effective date of the plan.

84. § 1129(a)(10), (b)(1).

85. § 1129(b).

86. § 1129(b)(1).

87. *See* Vincent S.J. Buccola, *The Janus Faces of Reorganization Law*, 44 J. CORP. L. 1, 2–9 (2019) (explaining how Chapter 11 instantiates a strict entitlement paradigm at the conclusion of a reorganization case which vindicates distributional expectations and guards against opportunistic non-repayment by debtors that would adversely affect the cost of credit *ex ante*).

the statutory implication that dissimilar claims (for example, secured claims and unsecured claims) must be separately classified.[88] But there is no prohibition on separate classification of substantially similar claims. To this extent the Code permits plan proponents to discriminate.

Courts generally interpret the requirement not to discriminate unfairly to mean that dissenting classes should receive roughly equal treatment in the restructuring plan compared with other similarly situated classes.[89] This means that the proposed payout on the claims in a dissenting impaired class of unsecured claims will be compared directly with the proposed payout to unsecured claims in other classes. Thus, the requirement seeks to achieve some rough "horizontal" equity among claims having the same priority[90] and to guard against unfair allocation of reorganization surplus in excess of baseline liquidation value.[91] The implication for selective restructuring is that the plan's differential treatment of the ride-through claims in the unimpaired and convenience classes and the impaired target claims that the debtor wishes to cram down will need to be fully justified.

As separate classification of substantially similar claims is not prohibited, it follows that discrimination *per se* among similarly situated classes is not of itself a bar to confirmation of a cramdown plan. Moreover, a plan does not unfairly discriminate merely because it does not offer equal treatment to claims that would rank equally and share *pro rata* in a liquidation. To this extent, the Code recognizes that the distribution of reorganization surplus through a plan need not precisely match the distribution of firm assets that would occur in a liquidation.[92]

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88. 11 U.S.C. § 1122(a).

89. RODRIGO OLIVARES-CAMINAL ET AL., DEBT RESTRUCTURING 126 (3d ed. 2022).

90. David A. Skeel, Jr., *The Empty Idea of "Equality of Creditors*,*"* 166 U. PA. L. REV. 699, 713 (2017) ("The unfair discrimination requirement has been consistently construed as concerned primarily with the treatment of classes of creditors with the same priority—that is, with horizontal equity, and as reflecting the equality of creditors principle."); Bruce A. Markell, *A New Perspective on Unfair Discrimination in Chapter 11*, 72 AM. BANKR. L.J. 227, 227–28 (1998) (characterizing the requirement as a "horizontal limit on nonconsensual confirmation").

91. COLLIER ON BANKRUPTCY ¶ 1129.03[3] (Richard Levin & Henry J. Sommer eds., 16th ed. 2023).

92. *Id.* ("By including the 'unfair discrimination' test, Congress made it clear that . . . a reorganization surplus did not have to be allocated to creditors on the basis of liquidation preferences. There can be 'discrimination,' so long as it is not 'unfair.' This makes some practical sense: unsecured creditors under nonbankruptcy law include such diverse entities as tort claimants, trade creditors, bondholders and possibly nontax governmental claims. On liquidation, all of these claimants share *pro rata*. To hold . . . that all such creditors should share proportionately in the reorganization surplus, when each group does not contribute proportionately to its creation and maintenance, makes little sense.").

Courts have developed different tests for determining unfairness.[93] Some courts consider whether the discrimination has a reasonable basis and is necessary for reorganization.[94] Others, following Bruce Markell, apply a "rebuttable presumption" test, a presumption of unfair discrimination arising where there is:

> (1) a dissenting class; (2) another class of the same priority; and (3) a difference in the plan's treatment of the two classes that results in either (a) a materially lower percentage recovery for the dissenting class . . . , or (b) regardless of percentage recovery, an allocation under the plan of materially greater risk to the dissenting class in connection with its proposed distribution.[95]

According to the court in *Dow Corning*:

> The plan proponent could rebut the presumption of unfairness established by a significant recovery differential by showing that, outside of bankruptcy, the dissenting class would similarly receive less than the class receiving a greater recovery, or that the alleged preferred class had infused new value into the reorganization which offset its gain. The plan proponent could overcome the presumption of unfair treatment based on different risk allocation by showing that such allocation was consistent with the risk assumed by parties before the bankruptcy.[96]

Importantly, line drawing between what is or is not a "materially" lower recovery or a "materially" greater risk is left at large for case-by-case determination.[97]

On one view, the commercial rationale underlying some varieties of selective restructuring strategy will be sufficient to justify 100% recoveries for a large unimpaired class of ride-through claims when the target class of similarly situated claims is suffering less favorable treatment.[98] For example,

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93. *Id.* ¶ 1129.03[3][a].

94. *See In re* Dow Corning Corp., 244 B.R. 696, 701 (Bankr. E.D. Mich. 1999) ("[T]he prevailing view is that the minimum requirements for finding a chapter 11 plan does not unfairly discriminate are that it has 'a rational or legitimate basis for discrimination and the discrimination must be necessary for the reorganization.'").

95. Markell, *supra* note 90, at 228, 249; *see In re* Dow Corning Corp., 244 B.R. at 701–03 (adopting the rebuttable presumption test); *In re* Trib. Co., 972 F.3d 228, 241–44 (3d Cir. 2020) (giving guidance on the application of the rebuttable presumption test).

96. *In re* Dow Corning Corp., 244 B.R. at 702.

97. *In re* Tribune Co., 972 F.3d 228, 243 (3d Cir. 2020).

98. At one extreme, it would seem hard to justify a zero or small cents-on-the-dollar recovery for target unsecured claims compared to a one hundred percent recovery for ride-through unsecured claims. At the other extreme, where, for example, rejected lease claims are offered one

in the *Nuverra* case, secured debt was converted to equity; unsecured noteholders received between 4% and 6% of their debt; and unsecured trade creditors were paid in full.[99] One unsecured noteholder, sufficient to carry its class, voted against the plan. The decisions of both the bankruptcy court and the district court in this case turned on other issues besides unfair discrimination, but in his examination of the case, Markell observes that the debtor "did try to justify the disparity by arguing that Class A6 was financial debt, arising differently from trade debt, and that treating trade creditors through any other method than non-impairment would threaten the reorganization, both in the short and in the long term."[100]

Yet, it appears from the cases that debtors by and large eschew structuring a non-consensual selective plan in this way. Hynes and Walt give examples of difference in treatment between two classes of claims enjoying equal priority which courts have approved: higher distribution on union members' wage claims in the face of a threatened strike; discrimination in favor of credit card claims when the debtor needed access to cards to continue business; and discrimination in favor of a creditor with a claim partly secured by a car needed for the debtor's business.[101] What is striking about these examples is that they involve courts making exceptions from equal treatment for very specific and laser-focused reasons. This is a far cry from the type of selective corporate restructuring with which we are concerned which may well involve plans that specifically target some categories of unsecured claims held by finance creditors or landlords for write downs but leave equal priority trade claims wholly unimpaired. Markell's strident criticisms of *Nuverra* offer possible insights into the risks that confront non-consensual selective plan proponents. He argues that:

> [E]nforcement against the debtor outside of bankruptcy requires all unsecured debt – whether it be trade debt, deficiency claims, or unsecured loans – to be reduced to judgment, as only judgments can

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hundred percent of damages for out-of-bankruptcy efficient breach payable over time (subject to the cap in 11 U.S.C. § 502(b)(6)) when the plan proposes to pay ride-through claims immediately in full in cash, the difference in payment terms may conceivably be justifiable on the basis that the ride-through creditors are critical to business continuity. *See* COLLIER ON BANKRUPTCY, *supra* note 91, ¶ 1129.03[3][b][i]–[ii].

99. *In re* Nuverra Env't Sols. Inc., 590 B.R. 75, 79–80 (D. Del. 2018); *accord* Markell, *supra* note 51, at 2–5.

100. Markell, *supra* note 51, at 4.

101. Richard M. Hynes & Steven D. Walt, *Inequality and Equity in Bankruptcy Reorganization*, 66 U. KAN. L. REV. 875, 879 (2018) (citing *In re* Kleigel Bros. Universal Elec. Stage Lighting Co., 149 B.R. 306, 308–09 (Bankr. E.D.N.Y. 1992); *In re* Perskin, 9 B.R. 626, 630–32 (Bankr. N.D. Tex. 1981); *In re* Ragsdale, 15 B.R. 668, 670–71 (Bankr. N.D. Ga. 1980)).

> serve as the basis for seizure and sale of debtor's property. If nonbankruptcy law essentially treats such debts as the same, it beggars justification to use this empty distinction [between funded debt and trade debt] against non-consenting lenders in bankruptcy.[102]

If selective corporate restructuring is viewed exclusively through an enforcement lens—the lens used by many U.S. scholars, practitioners, and judges[103]—then this is the natural conclusion. As a result, it would seem to be extraordinarily risky for debtors to rely on difference-in-type-of-claim arguments to justify unimpairment, where they may need to confirm a non-consensual plan.

2. The "Fair and Equitable" Requirement and the Absolute Priority Rule

To be "fair and equitable," it is well settled that the plan's allocation of value must comply with the absolute priority rule ("APR") which, expressed broadly, stipulates that no junior class should recover until a senior class has recovered in full and, as a corollary, that no senior class should recover more than it is owed.[104] In effect, the APR is a rule of vertical priority or equity[105] that, consistent with the enforcement analysis we have already highlighted, treats a corporate reorganization as a sale of the firm to the creditors.[106]

When viewed in this way, it becomes necessary to decide what the "purchase price" (representing the enterprise value of the firm) is and how it should be divided among creditors' claims and equity interests. Thus, the first step is to determine a single enterprise value for the firm.[107] How this should be done is fraught with controversy and valuation disputes are a common feature of non-consensual plan negotiations.[108] Experts for the parties commonly use the discounted cash flow method to calculate the enterprise

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102. Markell, *supra* note 51, at 4.

103. *See generally* sources cited *supra* note 19.

104. OLIVARES-CAMINAL ET AL., *supra* note 89, at 127; *see also* COLLIER ON BANKRUPTCY, *supra* note 91, ¶ 1129.03[4][a][i].

105. *See* Skeel, *supra* note 90, at 711–12.

106. *See* sources cited *supra* note 20.

107. *See* Kenneth Ayotte & Edward R. Morrison, *Valuation Disputes in Corporate Bankruptcy*, 166 U. PA. L.R. 1819, 1830 (2018).

108. *Id.* at 1820; *see also* Douglas G. Baird, *Bankruptcy's Quiet Revolution*, 91 AM. BANKR. L.J. 593, 594 (2017) ("Chapter 11 vindicates priority rights through nonmarket valuations. Nonmarket valuations are necessarily imprecise, and the judge can do little more than find that any particular plan falls within a broad range of what is reasonable.").

value, although what Ayotte and Morrison call "more transparent approaches" may also be used (such as comparable transaction multiples or comparable company multiples).[109] This enterprise value is then distributed down the creditor priority waterfall so that value is allocated to the senior class until it has recovered in full, and so on until the value has been exhausted.[110]

The amounts which the plan proposes to pay the holders of a dissenting impaired class of target claims will be compared with the distributions down the creditor priority waterfall to determine whether it meets the fair and equitable standard. Thus, a secured creditor could object to a sizeable class of unimpaired unsecured claims where the APR indicates that unsecured claims are only entitled to receive cents on the dollar. And, significantly, in selective restructurings where target claims will receive less than a one hundred percent payout, holders of these claims could object to a plan that does not eliminate equity. Where the aim of a selective restructuring strategy is to pay the ride-through claims in full while leaving equity with some interest in the firm, the "fair and equitable" requirement presents perhaps an even greater obstacle to selective restructuring than does the opacity and fact dependency of the unfair discrimination requirement.

C. The Mandatory Automatic Stay

The third aspect of Chapter 11's inclusivity problem is the mandatory automatic stay. The filing of the Chapter 11 petition invokes the automatic stay, not only preventing a wide range of creditor action against the debtor but also preventing the debtor from paying pre-bankruptcy liabilities.[111] The inability to pay pre-bankruptcy liabilities is a serious challenge for a selective corporate restructuring strategy where a fundamental part of the strategy is to keep most creditors current. Furthermore, serious signaling and information-processing disadvantages exist for a debtor invoking a stay while pursuing a selective strategy high on the demise curve.[112] At the same time, there may be much less need to stay a creditor enforcement action in a selective corporate restructuring case. If most creditors are kept current, they may lack either the grounds or the incentives to commence enforcement action against the debtor while the target creditors may also lack incentives to go the enforcement route for fear of creating a run on the firm that ultimately does

109. Ayotte & Morrison, *supra* note 107, at 1822.
110. Buccola, *supra* note 87, at 7.
111. 11 U.S.C. § 362(a).
112. Paterson, *supra* note 44.

them no good. For example, where the case targets only financial creditors, Buccola has noted:

> Senior lenders' acceleration rights and security interests imply that they will be first in right to a large fraction of the debtor's assets should junior investors precipitate a run by seeking to withdraw their investments. . . . Because this dynamic is common knowledge, junior investors have correspondingly little reason to undermine the lender's effective control.[113]

The commercial realities facing landlords when they are the target of a selective corporate restructuring strategy may similarly disincentivize them from pursuing enforcement action during the case, a point we explore further in Section III.A.2. below.

D. The Vexed Issue of Third-Party Releases

In a selective restructuring of the claims of the financial creditors of a corporate group that lie against the group holding company, it makes sense to keep operating subsidiaries and affiliates out of the resolution to avoid adverse signaling costs. But the operating companies will invariably have given guarantees supported by liens over their assets to secure the primary obligations of the holding company. If these guarantees and supporting security are not released and payment is demanded on them, the operating companies will be entitled to an indemnity against the principal debtor—a right of subrogation commonly referred to as a "ricochet" claim—the reimbursement of which will defeat the purpose of the restructuring.[114]

Consensual third party releases are available in Chapter 11, but there is some debate about whether creditors must affirmatively consent to them by opting in or if they can be deemed to consent by failing to opt out after receiving appropriate notice.[115] However, there is considerable uncertainty—fueled by high profile mass tort cases such as Purdue Pharma and Boy Scouts of America—about whether courts have constitutional and statutory authority to confirm plans containing non-consensual releases of third parties who are

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113. Vincent S.J. Buccola, *Bankruptcy's Cathedral: Property Rules, Liability Rules, and Distress*, 114 NW. U. L. REV. 705, 718–19 (2019).

114. Ilya Kokorin, *Third-Party Releases in Insolvency of Multinational Enterprise Groups*, 18 EUR. CO. FIN. L. REV. 108, 115–16 (2021).

115. For discussion, see, for example, *In re* Arsenal Intermediate Holdings, LLC, No. 23-10097, slip op. at 1 (Bankr. D. Del. Mar. 27, 2023).

contributing funding for plan payments in return for these releases.[116] It remains to be seen whether the Supreme Court or Congress will intervene either to permit, restrict, or entirely outlaw non-consensual releases.[117]

In the face of this current uncertainty, debtors must choose between an inclusive group-wide procedurally consolidated filing or venue shopping for a jurisdiction that is conducive to this type of selective restructuring.[118] Perhaps ultimately the law will settle on a framework that shows less tolerance for aggressive releases of tort victims' claims against third parties that arouse understandable public policy concern than it does for releases of guarantee obligations owed to sophisticated lenders. But for the time being, doubts about the lawfulness of non-consensual third-party releases affect their practical utility for resolving both tort and contract claims against third parties as part of a global resolution.

III. WORKING AROUND THE INCLUSIVITY PROBLEM OR AVOIDING CORPORATE REORGANIZATION ALTOGETHER

To recap the argument so far: as all claims have to be included and treated in the plan; a non-consensual plan's allocation of enterprise value must be assessed by reference to section 1129(b)'s distributional rules; and the Chapter 11 stay is mandatory and automatic and prevents payment of pre-filing liabilities; debtors face considerable challenges in engineering, negotiating, and confirming selective non-consensual plans over the head of an impaired class of target claims.

Nevertheless, ingenious lawyers have used the Bankruptcy Code's complex mesh of detailed rules and settled folkways to engineer solutions to

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116. *See*, *e.g.*, Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J.F. 960 (2022); Melissa B. Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 TEX. L. REV. 1745 (2023); Edward J. Janger, *Aggregation and Abuse: Mass Torts in Bankruptcy*, 91 FORDHAM L. REV. 361 (2022); Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079 (2022); Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 447 (2022); Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154 (2022).

117. Congressional attempts to amend the Bankruptcy Code to restrict third party releases have not yet been successful. *See* Nondebtor Release Prohibition Act, H.R. 4777 & S. 2497, 117th Cong. (2021). At the time of this writing, the Supreme Court has granted certiorari in Purdue Pharma's Chapter 11 case to address the question whether the Bankruptcy Code authorizes courts to approve non-consensual releases in plans of reorganization. *See* Harrington v. Purdue Pharma, L.P., No. 23-124, 2023 WL 5116031 (S. Ct. Aug. 10, 2023).

118. Which would likely shift the focus back onto venue reform. For a thoughtful review of the venue debate, see Anthony J. Casey & Joshua C. Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, 37 EMORY BANKR. DEV. J. 463, 470–82 (2021).

Chapter 11's inclusivity problem. In this Part, we discuss four innovations that practitioners have developed to accomplish selective restructurings, each of which targets a different group. The common thread is that these innovations all work around Chapter 11's distributional rules for non-consensual plans and enable debtors to pursue selective strategies without any comprehensive review of whether or not these strategies allocate value fairly. The results are pathological. Because selective restructuring is useful, practitioners push the envelope. But pushing the envelope involves disabling the distributional rules in Chapter 11 that safeguard creditors from debtor opportunism. Target creditors are left having to rely on narrow, technical challenges under the Code that courts approach in a piecemeal fashion. For sure, the court must always be satisfied that the plan has been "proposed in good faith and not by any means forbidden by law."[119] However, this mandates a relatively narrow inquiry into the debtor's probity which does not serve as a proxy for a comprehensive, holistic fairness review. What you end up with is selective restructuring without any independent review of the overall fairness of the plan.

Workarounds are one response. But if debtors cannot be persuaded to pursue one of these complex adaptations, or the facts of the specific case are not susceptible to such an adaptation, they may seek to avoid corporate reorganization altogether. Towards the end of this Part, we consider why Chapter 11's inclusivity problem may prompt debtors to resort to outright avoidance and why this may be less desirable than having Chapter 11 facilitate a selective strategy in the first place.

A. Workarounds

1. Prepackaged Bankruptcies

In a prepackaged Chapter 11 case (or "prepack" for short), the debtor negotiates the plan, solicits plan acceptances from classes of claims and interests that it proposes to impair before filing for bankruptcy, and then brings the bankruptcy case to implement the plan, filing the draft plan and disclosure statement with the petition.[120] The debtor and accepting creditors commonly enter into a restructuring support or "lock-up" agreement prior to the filing whereby the creditors consent to the modified terms and pledge to

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119. 11 U.S.C. § 1129(a)(3).

120. COLLIER ON BANKRUPTCY, *supra* note 91, ¶ 1100.10.

vote in favor of the plan.[121] If the debtor can solicit sufficient acceptances to ensure that Chapter 11's voting thresholds are met,[122] a consensual plan binding in dissenters who would otherwise be an obstacle to an out-of-court workout can be confirmed. At this point, we should note that we prefer to call these plans quasi-consensual because the statutory majority (a majority in number and two-thirds in value of claims in a class) may be met while still leaving a significant dissenting minority in an accepting class.

Prepacks are a specific type of selective restructuring used predominantly to compromise long-term financing obligations within the debtor's capital structure.[123] They are a well-established tool that has become increasingly prevalent[124] and the Bankruptcy Code facilitates them in various ways.[125] The literature typically identifies speed as the overwhelming advantage of a prepackaged bankruptcy when compared with a traditional Chapter 11 case.[126] Indeed, a crucial aim of a prepack strategy is to minimize the time the debtor spends in Chapter 11 by completing the negotiations with the stakeholders who are critical to success beforehand. A prepack is streamlined in a manner that reduces the direct costs of the Chapter 11 proceeding and the adverse impact—and thus indirect costs—of a lingering Chapter 11 case on supplier and customer confidence and on business operations.[127]

But important though speed undoubtedly is, prepacks have more to recommend them than speed alone. They are a selective restructuring tool *par excellence*, enabling the debtor to engage only with target financial creditors,

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121. *See* Baird, *supra* note 108, at 603–08.

122. 11 U.S.C. § 1126(c) (explaining that a class accepts the plan if holders of at least two-thirds in amount and more than half in number of the allowed claims of the class vote to accept the plan).

123. *See* Dennis F. Dunne et al., *Prepackaged Chapter 11 in the United States: An Overview*, *in* THE ART OF THE PRE-PACK 1–2 (Jacqueline Ingram & Ryan Cattle eds., 2d ed. 2022). In this respect, they share many similarities with the UK scheme of arrangement discussed *infra* Part IV.

124. *See* Dunne et al., *supra* note 123, at 29–30, 32 (citing data on the rising numbers of prepacks since the turn of the century and giving examples of cases filed).

125. 11 U.S.C. § 341(e) (permitting the U.S. Trustee to dispense with a first meeting of creditors); § 1102(b)(1) (permitting the U.S. Trustee to appoint an ad hoc prepetition creditors committee as the creditors committee in the case); § 1121(a) (authorizing the debtor to file a plan with the petition); § 1125(g) (authorizing vote solicitation before approval of the disclosure statement as long as the solicitation complies with applicable nonbankruptcy law and where the party being solicited was solicited prepetition in accordance with applicable nonbankruptcy law); § 1126(b) (allowing votes solicited prepetition to count subject to adequate disclosure); FED. R. BANKR. P. 3018(b) (expressly contemplating plan acceptance or rejection before commencement of the case).

126. *See* Baird, *supra* note 108, at 594 ("[M]odern debtors are interested in a speedy and successful exit from Chapter 11. . . . In crafting the plan, those controlling the debtor join forces first with those who can do most to help them exit bankruptcy quickly.").

127. *See* Dunne et al., *supra* note 123, at 37–40; *see also supra* Part II.

relying on achieving the statutory majority in each class to avoid Chapter 11's cram down distributional rules. The first challenge debtors face is assuring ride-through creditors of the operating business that they will be kept whole, notwithstanding the mandatory automatic stay, which restricts their ability to collect prepetition debts. In some recent cases, the debtor has asked the court to move to confirm the prepackaged plan with such speed that the automatic stay offers no practical limitation to the payment of outstanding debts.[128] If the assumption is that the exit from bankruptcy will follow hard on the heels of the petition, unsecured claims can be classified as unimpaired in the plan and paid in cash in full on the effective date of the plan. Where the debtor proposes a prepackaged plan that leaves ride-through creditors' claims unimpaired, the U.S. Trustee will be inclined not to appoint an official creditors committee, which will further reduce direct costs.[129] Where such a speedy confirmation has not proved possible, ingenious lawyers have deployed a variety of techniques to facilitate payment of ride-throughs. Prepetition debts to creditors designated as critical vendors can be settled during the case under a critical vendor order[130] or (if the predicates are made out) as administrative claims under section 503(b)(9).[131]

It will be readily apparent that if the plan treats the ride-through creditors as unimpaired and leaves the equity interests intact, dissenting creditors in the impaired target class(es) who will receive a haircut are treated less favorably relative to other unsecured claims (on the horizontal axis) and relative to equity (on the vertical axis). But if the debtor can engineer a quasi-consensual plan in which the impaired target class(es) accept by the requisite majority, the dissenters cannot object that the selective strategy unfairly discriminates against them and/or violates the APR. The distributional rules in section 1129(b) are simply not engaged because, while there are dissenting creditors, there is no dissenting class. If the plan at least meets the baseline

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128. For a description of Belk's "one-day" Chapter 11 plan in which Belk filed on the evening of February 23, 2021, and the court confirmed the plan at 10:00 AM the next morning, see LoPucki, *supra* note 53; Robert K. Rasmussen & Roye Zur, *The Beauty of* Belk, 97 AM. BANKR. L.J. 438 (2023).

129. *See* Dunne et al., *supra* note 123, at 40.

130. *See* Elizabeth Shumejda, *Critical Vendor Trade Agreements in Chapter 11 Bankruptcy*, 24 AM. BANKR. INST. L.R. 159 (2016); Buccola, *supra* note 87, at 16–17. The operation of these mechanisms may not always be entirely straightforward. *See* Paterson & Walters, *supra* note 34, at 449–50.

131. 11 U.S.C. § 503(b)(9) (allowing as an administrative claim the value of unpaid goods sold to the debtor in the ordinary course of the debtor's business and received by the debtor within twenty days before commencement of the case).

of the "best interests" test,[132] dissenting creditors are left having to pursue costly technical objections to confirmation[133] under section 1129(a)—on grounds, for example, that the plan does not comply with the Code's plan, contents, and classification requirements.[134] Of course, as we have already noted, the court must also be satisfied that the plan has been proposed in good faith[135] and that the plan is feasible.[136] To date, courts appear generally inclined to defer to the debtor's business judgment and the wishes of the majority,[137] and to give these considerations relatively little weight. Douglas Baird has recently suggested that the good faith requirement could be reinvigorated, perhaps to do some of the work which we suggest needs to be done here.[138] Yet, in our view, a good faith requirement is no substitute for an overall, holistic review of the fairness of the plan. A debtor press-ganged by a powerful majority on which it is entirely dependent into washing off certain liabilities may be acting entirely in good faith and yet the selective plan may still not withstand wider fairness scrutiny.

Expressed differently, once the section 1129(b) guardrails are disengaged, the good faith requirement is left to do too much work, even if the courts felt inclined to flex it more, and the other grounds of objection operate in a piecemeal and unsatisfactory fashion. To be sure, if the target claims include a class of junior unsecured notes, dissenters could in theory object that separate classification of, say, trade creditor claims, in a class designated as unimpaired, violates the Code's plan classification and contents requirements,[139] which would prompt judicial consideration of the commercial justification for impairing the notes while leaving the trade creditors whole.[140] However, there is no straightforward way to ask the court

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132. § 1129(a)(7). On the origins of the test and the limited scope of the protection it now provides see BAIRD, *supra* note 47, at 56–61.

133. Which as parties in interest they have standing under the Code to bring. 11 U.S.C. §§ 1109(b), 1128(b).

134. *See* § 1129(a)(1).

135. § 1129(a)(3).

136. *See* § 1129(a)(11).

137. *In re* Aegerion Pharms., Inc., 605 B.R. 22, 32 (Bankr. S.D.N.Y. 2019) (where an impaired class votes overwhelmingly in favor of a plan that provides better treatment to a separate class of trade creditor claims, evidence that ongoing trade relationships are essential to a successful reorganization will support the debtor's business judgment to treat the trade claims more favorably).

138. BAIRD, *supra* note 47, at 149.

139. 11 U.S.C. §§ 1122–1123, 1129(a)(1).

140. *In re* Aegerion Pharms., 605 B.R. at 31–32 (reviewing separate classification of ongoing trade claims and concluding that there were good business reasons for it).

simply to step back and assess the overall fairness of the quasi-consensual plan.

Prepackaged plans work best where the specific liabilities to be compromised are financial rather than operating liabilities. Sophisticated finance creditors will readily appreciate the benefits of selective restructuring and that widening the compromise to encompass the claims of non-finance creditors could cost more than it is worth. Accordingly, they will often be prepared to accept impairment while claims that would be equal ranking or junior in the priority waterfall ride through unimpaired. Furthermore, financial creditors are well-placed to make *ex ante* adjustments to compensate themselves for these distributional consequences in bankruptcy.[141] For this reason, prepackaged bankruptcies compromising only financial liabilities may also be the least controversial of the selective corporate restructuring strategies which we consider in this section and the lack of an overall review of fairness may be of less concern than it is in other scenarios. Nonetheless, we note for the moment that where there is a significant minority of dissenting creditors within the plan's accepting classes, those minority creditors cannot straightforwardly demand that the court pause to consider the overall fairness of the plan, even if the court were minded, in the prepack context, to approach such a fairness review with a strong inclination to respect the will of the majority.

2. Plan "Unimpairment" of Target Claims

As we have said, prepackaged plans compromising specific financial liabilities can work well. But what if the debtor wants to selectively restructure a specific set of operating liabilities? Assume, for example, that the debtor, a nationwide chain retailer, wishes selectively to restructure its leasehold estate, retaining performing leases and dispensing with non-performing leases. To be sure, the debtor in possession can exercise the Code power in section 365[142] to assume the performing leases and reject the non-performing leases, leaving the holders of the rejected leases with a prepetition claim for damages.[143] But the plan proponent will still need to classify these rejected lease claims and provide some plan treatment.

Recall that the whole idea of the selective restructuring is to target *only* the holders of the non-performing leases while all the other unsecured claims

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141. Baird et al., *supra* note 2, at 1682.
142. 11 U.S.C. § 365.
143. *See* § 365(g)(1).

(trade credit and the like) are either paid in the case (once again avoiding the problem of the mandatory automatic stay via a critical vendor order or an administrative claim treatment under section 509(b)(9)) or left unimpaired in the plan. Of course, if the target lease claims are classified in a single impaired class and enough of their holders agree to accept their lot,[144] the debtor can get a quasi-consensual plan confirmed subject to the "best interests" test and the other basic standards of section 1129(a). But let us further assume that the holders of the non-performing leases are unhappy with the direction of travel ("why are we being singled out?"). How then does the plan proponent craft a selective plan that impairs a dissenting class of target claims?[145]

Next, assume that the plan proponent can engineer an accepting impaired class as a pre-condition to plan confirmation[146] without running the gauntlet of a gerrymandering challenge.[147] And assume further: (i) that the target claims are impaired by the plan and cannot be classified as convenience claims; and (ii) that the target claims cannot be lumped together with, and swamped for voting purposes by, say, other minimally impaired unsecured claims to create an accepting impaired class because all claims within the same class must receive the same treatment.[148] Already, it is apparent that Chapter 11's requirement for all claims to be included and classified within the plan creates a threshold problem that requires delicate engineering. Even if the plan proponent can engineer acceptance by an impaired class, it would need to cram down the target lease claims at which point it would hit the roadblock of the distributional rules in section 1129(b). On top of all of this, if the debtor is trying to rebalance a nationwide commercial real estate

144. Two-thirds in amount and more than half in number. *Id.* § 1126(c).

145. We also assume for the purposes of the hypothetical that the non-performing leases threaten firm viability, and the debtor is targeting them to deal with the cause of its distress and to preserve value for other creditors such that the case would survive a motion to dismiss it as a bad faith filing under 11 U.S.C. § 1112. In other words, the debtor has not been screened out as an opportunistic abuser of bankruptcy process.

146. *Id.* § 1129(a)(10), (b)(1).

147. COLLIER ON BANKRUPTCY, *supra* note 91, ¶ P. 1129.02[10](a) (distinguishing cases that hold that artificial impairment to contrive an accepting class absent an economic imperative violates § 1129(a)(10) from cases that hold that artificial impairment, while not violating § 1129(a)(10), does raise an issue of whether the plan proponent is proposing the plan in good faith under § 1129(a)(3)).

148. 11 U.S.C. § 1123(a)(4). As well as a class of minimally impaired claims, another possibility might be a secured party's deficiency claim in circumstances where the senior lender is on board with the restructuring and has agreed to an "underwater" valuation of their collateral. This is conceivable in the case of an over-leveraged debtor with an oversized leasehold footprint where the two problems are mutually self-reinforcing, i.e., excess lease liabilities that make it hard to service senior debt and vice versa.

portfolio, there may be extensive issues that will have to be litigated under section 365, raising the specter of direct and indirect costs. At first blush, this is not the obvious case for a prepack.[149]

In a handful of cases,[150] practitioners have found a solution that purports to offer the speed benefits of a prepack while making full use of section 365 in both the case and plan to reduce the debtor's retail store footprint. The strategy in the lead up to the filing is for the debtor to organize its leases into three buckets: (i) non-performing leases it will definitely reject during the case; (ii) performing leases it definitely wishes to assume; (iii) leases it wishes to renegotiate on more favorable terms under threat of rejection. In a variation on the prepack theme, the debtor then files a petition together with a plan that addresses all three buckets and the ride-through creditors.

The problem of the mandatory automatic stay and payment of ride-through creditors is dealt with as in a regular prepack by some combination of a critical vendor order, section 503(b)(9) treatment, or designation as an unimpaired class in the plan. But pivotal to the strategy is what we call plan "unimpairment" of the rejected lease claims in the first and third buckets. Rather than classify these claims as impaired, the plan proponent offers to pay them in cash in full through the plan and classify them instead as *unimpaired*, with the convenient result that they are conclusively presumed to have accepted the plan.[151] The plan is quasi-consensual because there is no impaired class to vote against it, and the section 1129(b) guardrails are thereby disengaged.[152]

To explain further how this engineering works, let us take the example of a landlord who outside of bankruptcy would either be able to prevent the tenant from unilaterally breaking the lease or would have a claim against the debtor for breaking the lease that exceeds the bankruptcy cap in section

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149. *See* Dunne et al., *supra* note 123, at 35 ("A prepackaged case is not a panacea for all cases of financial distress. This technique is practical only in those situations where the debtor's financial distress primarily is caused by burdensome funded debt levels and the company does not need a comprehensive restructuring of its business operations. All the other tools otherwise available under Chapter 11 for business restructuring are available to a prepackaged case debtor, but their use may result in time-consuming litigation that would frustrate the principal benefit of a prepackaged case – reduced time under court supervision.").

150. The standout is *In re Mattress Firm, Inc.*, No. 18-12241 (Bankr. D. Del. filed Oct. 5, 2018). The contours of our account in the text are largely derived from our study of the *Mattress Firm* docket, https://dm.epiq11.com/case/mattressfirm/info [https://perma.cc/X4SK-2H88].

151. 11 U.S.C. § 1126(f).

152. There being no impaired class of unsecured claims in the plan, there is also no need for a creditors committee. *See* Dunne et al., *supra* note 123, at 40.

502(b)(6).[153] One might be forgiven for thinking that such a claim must surely be impaired for Code purposes[154] because its holder's prepetition nonbankruptcy rights have been altered. Indeed, as in some states, such as New York and Pennsylvania, commercial real estate lessees have no unilateral right outside of bankruptcy to terminate the lease in the absence of a break clause and no express duty is imposed on the landlord to mitigate damages, the Bankruptcy Code's interference with landlords' entitlements goes further than just capping their damages claim.[155]

But Courts of Appeal in the Second, Third, and Fifth Circuits have held that where the plan proposes to pay the full amount of an allowed claim in bankruptcy, the claim is unimpaired even if 100 percent of the allowed claim is less than the amount that could have been collected on it under nonbankruptcy law.[156] These courts distinguish between *Code* impairment via the statutory limit on claims allowance in section 502(b)(6)[157] and *plan* impairment to conclude that disallowance of part of a claim under the Code's claims allowance provisions is not impairment for the purposes of plan treatment. Thus, in the example above, a rejection damages claim that will receive 100 cents on the dollar up to the section 502(b)(6) cap in cash on the effective date of the plan is unimpaired. It follows that plan "unimpairment"

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153. 11 U.S.C. § 502(b)(6) (capping the lessor's damages resulting from termination of a lease of real property at the rent reserved by the lease, without acceleration, for the greater of one year, or 15 percent not to exceed three years, of the remaining term of the lease following the earlier of the petition date or the date on which the landlord repossessed or the lessee debtor surrendered the property). Courts generally treat the prepetition damages claim arising from lease rejection under § 365 as arising from lease termination and therefore subject to the § 502(b)(6) cap. *See* COLLIER ON BANKRUPTCY, *supra* note 91, ¶ P. 502.03[7][b]. This treatment appears to follow in part from § 502(g)(1) (which provides in pertinent part that a claim arising from rejection of an unexpired lease under § 365 or under a Chapter 11 plan shall be determined and allowed under § 502(b)).

154. *See* 11 U.S.C. § 1124(1) (distinguishing impaired and unimpaired claims).

155. *See* Dawn R. Barker, Note, *Commercial Landlords' Duty Upon Tenants' Abandonment – To Mitigate?*, 20 J. CORP. L. 627, 629–30 (1995); David Crump, *Should the Commercial Landlord Have a Duty To Mitigate Damages After the Tenant Abandons? A Legal and Economic Analysis*, 49 WAKE FOREST L. REV. 187 (2014); Holy Props. Ltd., L.P. v. Kenneth Cole Prods., Inc., 661 N.E.2d 694 (N.Y. 1995); Stonehedge Square Ltd. P'ship v. Movie Merchs., Inc., 715 A.2d 1082 (Pa. 1998).

156. *See, e.g.*, *In re* PPI Enters. (U.S.), Inc., 324 F.3d 197 (3d Cir. 2003); *In re* Ultra Petrol. Corp., 913 F.3d 533 (5th Cir. 2019); *In re* LATAM Airlines Grp. S.A., 55 F.4th 377 (2d Cir. 2022).

157. Section 365 federally preempts the landlord's right to refuse to accept the tenant's surrender of a commercial real estate lease in states that follow the old common law rule that landlords have no duty to mitigate their damages when their tenants abandon leased property. 11 U.S.C. § 365. This is a further Code impairment of landlords' rights in those states.

of lease rejection claims is a legally viable strategy, at the very least in these Circuits.

With the case commenced, the draft plan on the docket, and a standard package of first-day orders entered (including a critical vendor order) to allow the business to continue under court supervision, the debtor will then file omnibus motions to reject the leases in the first bucket. These will be adjudicated by the court under the prevailing and deferential business judgment standard.[158] The plan will then provide machinery for claims resolution of the rejection damages claims with a bar date for proofs and a claims objection deadline.

To complete the picture, the leases in the second and third buckets will be handled through the plan. Insofar as relevant, section 1123(b)(2) of the Code provides that a plan may "subject to section 365 of this title, provide for the assumption, rejection or assignment of any . . . unexpired lease of the debtor not previously rejected under such section."[159] There is no specific rule elaborating on the procedure to be followed where a debtor is assuming or rejecting a lease under a plan and so practice has developed through the cases.[160]

The practice that has emerged for assuming leases in the second bucket under a plan is for the debtor to give notice of intent to assume (seemingly via notice of the confirmation hearing) and individual notice of a proposed cure amount to each contract and lease counterparty during the case with the plan setting out a process whereby cure amounts can be resolved following objection.

For leases in the third bucket, the plan will set up a game of chicken in the form of a procedure that defers the "assume versus reject" decision for a fixed period after the plan's effective date with lessor consent. The debtor will then be at liberty to assume leases on such modified terms as may be agreed with a backstop threat of rejection at the end of the period if agreement has not been reached.

Given the present state of the retail market, the strategy can be executed in a reasonably short time frame.[161] Much of the leverage lies with debtors

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158. *See* COLLIER ON BANKRUPTCY, *supra* note 91, ¶ P. 365.03[2].

159. 11 U.S.C. § 1123(b)(2).

160. FED. R. BANKR. P. 6006, 9014 (which read together carve assumption and rejection through the plan out of the usual requirement for court approval on motion after notice and a hearing); *see also* Irve J. Goldman, *Dealing with Executory Contracts: Notice of Intent Still Critical*, 26-FEB AM. BANKR. INST. J. 48, 48–49 (2007).

161. In *In re Mattress Firm Inc.*, No. 18-12241 (Bankr. D. Del. filed Oct. 5, 2018), the debtor filed its petition and plan on October 5, 2018, and confirmed the plan on November 16, 2018, some 42 days later. By the time the court confirmed the plan, the company had closed around 700

when it comes to negotiating cure amounts or more favorable terms. Landlords are better off with a rented property than being left with a capped rejection damages claim and confronted with trying to relet vacant premises in a moribund market. We have seen already that landlords whose leases are rejected cannot challenge their unimpairment solely because their non-bankruptcy entitlements are altered by the plan. With speed of the essence and the plan therefore postponing resolution of some rejection damages claims until after its effective date, landlords could conceivably raise technical objections to confirmation on the ground that they are impaired because, by definition, they will not be paid immediately in cash in full; their payment will be delayed.[162] There is then some measure of execution risk for a debtor who is in a hurry to exit bankruptcy and objections along these lines may have some nuisance potential that landlords can exploit to bid up the value of their allowed claim in the claims resolution process. But for landlords who face having their leases rejected in any event, and whose claims will be capped in any event, the costs of trying to construct a coalition that could credibly push for misclassification as a route to the added leverage of section 1129(b) likely outweigh the benefits. Crucially, to the extent then that there is any court review of the selective strategy, it happens in a disjointed and piecemeal fashion—on a motion to reject under section 365 or an objection under section 1129(a) at the confirmation hearing—and in a manner where target landlords are effectively disenfranchised through unimpairment. Once again, there is no overall, holistic fairness review of plans which target only a subset of unsecured creditors and which, given how unimpairment works around section 1129(b) to engineer a quasi-consensual plan, can be confirmed without eliminating equity.

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stores, amended leases on a further 1,000 stores, and remained in negotiations relating to 500 other stores. *See* Becky Yerak, *Mattress Firm Wins Court Approval of Chapter 11 Plan*, WALL ST. J. (Nov. 16, 2018), https://www.wsj.com/articles/mattress-firm-wins-court-approval-of-chapter-11-plan-1542389945?mod=trending_now [https://perma.cc/3Y8V-PQAE].

162. This is particularly so in connection with leases in the third bucket that are kept open for assumption or rejection by the plan. Landlords might also object that the plan delays the "assume versus reject" decision beyond plan confirmation in a manner that violates 11 U.S.C. § 365(d)(4)(A)(ii). Though, to the extent § 365(d)(4)(A)(ii) overrides § 1123(b)(2), which merely states (albeit expressly subject to § 365) that the plan should *provide for* assumption or rejection, the upshot is that leases in the third bucket would be deemed rejected in any event. § 1123(b)(2). Furthermore, as part of the engineering, landlords with leases in the third bucket consent to deferral of the "assume versus reject" decision beyond the effective date of the plan, albeit under threat of having their leases rejected.

3. Section 363 Sales

The main alternative to a prepackaged plan for executing a speedy restructuring strategy that does not involve a long, drawn-out stay in Chapter 11 is a section 363 sale of all or substantially all of the debtor's assets as a going concern through a court approved auction.[163] A common rationale for section 363 sales is that they allow a quick, streamlined disposal of the business before its value deteriorates:[164] the so-called "melting ice cube" theory.[165] Where the firm's assets are subject to blanket security interests in favor of a senior lender, they are also used to conduct what, viewed again through an enforcement lens, is commonly characterized as a nationwide federal foreclosure that avoids the need for multiple state foreclosure proceedings and in so doing preempts state law.[166] A major attraction for buyers is that the court can approve the sale free and clear of non-debtor interests in the assets.[167] Once the sale is completed, any such interests will lie in the sale proceeds which will usually be distributed through a liquidating plan, a structured dismissal, or after conversion of the case to Chapter 7.[168]

Section 363 sales invariably involve a selective restructuring at the behest of the buyer. The buyer will determine which stakeholders it needs to keep on board to preserve the value of the business and which it can do without. As with the prepack and plan impairment strategies outlined above, critical vendor orders will be required to assure key suppliers that they will be kept whole, and the debtor in possession will need to resort to section 365 to sort between the contracts and leases the buyer wishes to retain and those it wishes to shed.[169]

The practice of conducting whole business sales under section 363 in a Chapter 11 case has been the subject of heavy criticism. Commentators worry about the increased risk of collusion between the debtor, its senior lenders,

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163. COLLIER ON BANKRUPTCY, *supra* note 91, ¶ P. 363.02. 11 U.S.C. § 363(b)(1) authorizes the trustee or debtor in possession to use, sell or lease estate property other than in the ordinary course of business with court approval after notice and a hearing.

164. COLLIER ON BANKRUPTCY, *supra* note 91, ¶ P. 363.02[3].

165. *See* Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862, 865–86 (2014) (discussing the use of melting ice cube arguments to justify quick sales in Chapter 11).

166. *Id.*

167. 11 U.S.C. § 363(f); *see also* COLLIER ON BANKRUPTCY, *supra* note 91, ¶ P. 363.06.

168. Norman L. Pernick & G. David Dean, *Structured Chapter 11 Dismissals: A Viable and Growing Alternative After Asset Sales*, 29 AM. BANKR. INST. J. 1, 55–56 (2010).

169. COLLIER ON BANKRUPTCY, *supra* note 91, ¶ P. 363.02[3] (noting that courts have approved additional sales terms relating to the assumption of executory contracts and that buyers are commonly involved in designating critical vendors).

and the buyer and the associated potential for abuse.[170] They point to how sales circumvent the disclosure, voting, and fairness protections applicable to plans almost entirely.[171] The main safeguard lies in the requirement for court approval of the sale. But the tests that courts have developed for determining whether or not to approve sales—courts ask whether the sale is for a sound business reason and at a fair and reasonable price[172]—are designed to try and ensure that aggregate estate value is maximized and do not focus on the selectivity dimension. Selectivity is again addressed piecemeal through mechanisms such as critical vendor orders or the power to assume or reject executory contracts and unexpired leases that sort out who will ride through with the business and who will be left behind. There is no holistic consideration of whether the reallocation of enterprise value is fair from a distributional standpoint.

4. Divisional Mergers (Texas Two-Steps)

In the workarounds we have described so far, the target claims are all contract claims of various kinds. Our final example—pre-bankruptcy divisional mergers under state law (known pejoratively as Texas Two-Steps after a facilitative Texas statute)—targets mass tort claims. In a divisional merger, debtors separate their businesses into two entities, a "GoodCo" which retains the business assets and a "BadCo" which assumes the tort liabilities. With the tort liabilities thus detached from the assets, the BadCo files for bankruptcy specifically to resolve those liabilities[173] and without the underlying business itself—and the value it represents—coming under court supervision at all.[174] The business, now insulated from the liabilities, and with

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170. Jacoby & Janger, *supra* note 165, at 866 (voicing the concern that quick sales may facilitate collusive deals between incumbent managers, senior creditors, and potential purchasers); *see also* Jessica Uziel, *Section 363(b) Restructuring Meets the Sound Business Purpose Test with Bite: An Opportunity To Rebalance the Competing Interests of Bankruptcy Law*, 159 U. PA. L. REV. 1189, 1214 (2011) ("Section 363 sales' expedited process and lesser disclosure requirements make investigation of the purchaser's behavior vital in order to protect creditors, equity holders, and debtors from exploitation. Increased potential for abuse threatens creditors' interests as well as the debtor's ability to maximize the value of the estate.").

171. AM. BANKR. INST., *supra* note 75, at 84 ("The primary concerns of courts and commentators with this practice are premised on the absence of stakeholder protections that are otherwise incorporated into the section 1129 plan process.").

172. COLLIER ON BANKRUPTCY, *supra* note 91, ¶ P. 363.02[3] (outlining the applicable tests).

173. *See* Casey & Macey, *supra* note 64.

174. *See* Jared Ellias, *Upending the Traditional Chapter 11 Bargain*, BANKR. ROUNDTABLE (June 21, 2022), http://blogs.harvard.edu/bankruptcyroundtable/2022/06/21/texas-two-step-and-the-future-of-mass-tort-bankruptcy-series-upending-the-traditional-chapter-11-bargain/

the rest of its stakeholders remaining on board, continues outside of bankruptcy. This has all the hallmarks of a selective strategy because it targets only the tort claims and works around the direct and indirect costs of bringing the business, its other creditors and equity holders into the bankruptcy process.[175]

Key to the strategy is the funding agreement that GoodCo enters into with BadCo to finance payouts on the tort claims.[176] If the funding agreement leaves tort claimants no worse off than they would have been had the original pre-merger entity filed for bankruptcy, the strategy is defensible.[177] But the obvious distributional concern is that the tort claimants will be shortchanged while other creditors and equity continue to enjoy the benefits of the business assets free and clear of the tort liabilities.[178] The counterbalance lies in challenges under the Code: either a motion to dismiss BadCo's bankruptcy case on the ground that the filing is in bad faith[179] or an action to avoid the merger as a fraudulent transfer,[180] with the latter, in particular, prone to result in costly litigation on technical points of law.[181]

[https://perma.cc/A2R9-5S6T] (describing Johnson & Johnson's first of two attempts to use a two-step to address tort liabilities arising from asbestos in its leading talcum product and criticizing the technique as "a way to obtain the benefits of Chapter 11 without accepting the burden of operating a business under court oversight").

175. Casey & Macey, *supra* note 64 (explaining how a divisional merger avoids the costs of an "enterprise-wide filing" and focuses the proceedings solely "on the specific mass tort resolution that is necessary for the preservation of value").

176. *See* Samir D. Parikh, *Mass Exploitation*, 170 U. PA. L. REV. ONLINE 53, 69 (2022).

177. Casey & Macey, *supra* note 64.

178. *See* Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 MICH. L. REV. 38, 40–41 (2022) (explaining how the use of cross-indemnification and third-party releases could combine to deprive tort claimants of value).

179. *Id.* at 44–48; *see also In re* LTL Mgmt., LLC, 58 F.4th 738 (3d Cir. 2023) (petition by BadCo entity dismissed as bad faith filing where on the facts BadCo was not in financial distress because of its valuable payment rights under the terms of the funding agreements with its corporate parent and the GoodCo entity). Following dismissal, LTL Management, LLC entered into a new funding agreement and filed a second Chapter 11 case with a view to consummating an improved settlement. This second petition was dismissed on the same ground. *See In re* LTL Mgmt., LLC, 652 B.R. 433 (Bankr. D.N.J. 2023).

180. Parikh, *supra* note 176, at 59, 68–70 (outlining the fraudulent transfer risks associated with "two-stepping").

181. *See* Mark Roe & William Organek, *The Texas Two-Step: The Code Says It's a Transfer*, BANKR. ROUNDTABLE (July 19, 2022), https://bankruptcyroundtable.law.harvard.edu/2022/07/19/texas-two-step-and-the-future-of-mass-tort-bankruptcy-series-the-texas-two-step-the-code-says-its-a-transfer/ [https://perma.cc/582P-Y7M4] (foreshadowing and rebutting arguments that divisional mergers do not involve a "transfer" for the purposes of the Code's fraudulent transfer avoidance statute); *cf*. Hon. Judith K. Fitzgerald & Adam J. Levitin, *The Texas Two-Step: A Different Look at Bankruptcy Code Section 548*, BANKR. ROUNDTABLE (Nov. 1, 2022),

Along with third party releases in the mass tort context,[182] divisional mergers are highly controversial. Advocates point to the comparative advantage of the bankruptcy system as a mechanism for resolving mass tort claims and getting money into the hands of tort victims – namely its ability to bind holdouts and future claimants.[183] Critics slam divisional mergers as maneuvers that shift leverage away from victims to debtors,[184] and serve no useful bankruptcy purpose given that BadCo has no going concern to reorganize.[185] Furthermore, the stakes in mass tort cases differ from cases involving only contract claims because of what Jonathan Lipson calls the "dignitary" interests of tort victims, by which he means non-economic interests, including the individual rights of victims to their day in court and to a jury trial.[186] Selective up-curve restructuring that targets only tort claims when no-one else is absorbing the loss therefore implicates a wider set of public policy concerns that may be *sui generis*. For now, we merely note that both third party releases and divisional mergers work around Chapter 11's inclusivity to accomplish selective ends in an uneasy fashion.

B. Avoiding Corporate Restructuring Altogether

In a paradigm-shifting contribution to the literature, Vincent Buccola has shown how private equity sponsors increasingly avoid Chapter 11 altogether, in favor of exploiting flexibility in acquisition finance documents to raise new debt to address cash crises.[187] At the core of his argument is the claim, with which we agree, that private equity sponsors have "powerful incentives to preserve the value of sponsor investments."[188] With this insight in hand, we

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https://bankruptcyroundtable.law.harvard.edu/2022/11/01/texas-two-step-and-the-future-of-mass-tort-bankruptcy-series-a-different-look-at-sec-548-and-concluding-thoughts/ [https://perma.cc/DLP3-D6ST] (arguing that there is no transfer by the BadCo entity for the purposes of 11 U.S.C. § 548 but that BadCo's assumption of the tort liabilities is susceptible to possible avoidance under 11 U.S.C. § 548(a)(1)(B)).

182. *See supra* Section II.D.

183. Casey & Macey, *supra* note 64; Janger, *supra* note 116 ("Bankruptcy offers advantages over both [multidistrict litigation] and class actions: a confirmed Chapter 11 plan binds dissenters; a confirmed Chapter 11 plan can address future claims . . . .").

184. Francus, *supra* note 178, at 49.

185. *Id.* at 46.

186. Jonathan C. Lipson, *Vertical Forum Shopping in Bankruptcy*, BANKR. ROUNDTABLE (June 14, 2022), https://bankruptcyroundtable.law.harvard.edu/2022/06/14/texas-two-step-and-the-future-of-mass-tort-bankruptcy-series-vertical-forum-shopping-in-bankruptcy/ [https://perma.cc/X8UT-T3Q7].

187. Buccola, *supra* note 16, at 43–44.

188. *Id*. at 1.

can see that private equity sponsors have little incentive to file for Chapter 11 high on the demise curve if there is a risk that the absolute priority rule is engaged so that equity will, almost inevitably, lose its shirt. When the business is in the early stages of financial distress, sponsors may well be prepared to inject new capital to retain their stake. They are well-informed about the prospects of the business and may be confident that if a specific issue can be resolved high on the curve, the decline will be halted, and the business will return to profitability. And non-target creditors may view the private equity sponsor's contribution as vital in other ways—for example, through labor, management, or expertise. The private equity sponsor, and the bulk of the company's creditors, may be unwilling to accept that the existing shareholders should have no continuing stake in the business where a selective corporate restructuring is undertaken high on the demise curve. And yet, if the APR is engaged, this may very well be the result.[189]

Thus, private equity sponsors who consider their portfolio company debtor to be facing specific challenges high on the demise curve may prefer to avoid Chapter 11 altogether and to raise further debt to deal with cash flow difficulties. This has the potential to be even more pathological than the workarounds already discussed. If the debtor raises further debt without addressing the cause of its financial difficulties it may simply stave off the inevitable, with the result that it enters Chapter 11 too late, with more liabilities, and having suffered a further decline.[190] We have pushed back in Part II against the argument that selective corporate restructuring necessarily involves kicking the proverbial can down the proverbial road. Indeed, we consider that this kind of "can kicking" is more likely if the lack of selective corporate restructuring tools causes debtors high on the demise curve to favor the raising of new debt over a restructuring transaction.

IV. SELECTIVE CORPORATE RESTRUCTURING IN THE UNITED KINGDOM AND EUROPE

In Part III we saw how debtors have accomplished selective strategies in various ways. With the exception of the Texas Two-Step, they all involve an

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189. We have not undertaken a detailed examination of "gifting" or the so-called "new value exception" for the purposes of this Article because both are inherently uncertain and only entertained at all by certain courts. A sponsor may certainly wish to avoid relying on these rather precarious exceptions as a way of retaining equity. For a good discussion, see Alexandra Wilde, *Considerations for Private Equity Firms When Utilizing Chapter 11 New Value Deals*, 1 MICH. J. PRIV. EQUITY & VENTURE CAP. L. 197 (2012).

190. Adler, *supra* note 17, at 1183.

enterprise-wide filing and implicate some of the costs associated with Chapter 11's inclusivity. And all—including the Two-Step—take the main distributional safeguards for a dissenting class of impaired creditors in section 1129(b) totally off the table and do not replace them with any adequate form of holistic fairness review. To be sure, some Code protections may remain depending on the strategy, but these operate in something of a piecemeal fashion and do not home in directly on the balance that needs to be struck between the benefits of selectivity and the risks of debtor opportunism. We also identified that the lack of properly adapted selective corporate restructuring tools may cause some large corporate debtors to avoid Chapter 11 altogether, preferring to raise new debt rather than address their specific financial difficulties.

This brings us to our comparative turn. In this part we will show how the UK, and increasingly continental Europe, have developed and are developing tools specifically designed to facilitate a selective corporate restructuring strategy. This will lay the foundations for our suggestions in Part V as to how the Bankruptcy Code could usefully be reformed.

A. UK Schemes of Arrangement

UK schemes of arrangement are a nineteenth century creation, now found in the Companies Act 2006.[191] Schemes can be used for a wide variety of purposes,[192] including the proposal of a restructuring to a debtor's creditors and/or members. Ordinarily, the debtor negotiates the restructuring with its creditors and/or members and then applies to court for leave to convene meetings to vote on the restructuring plan. Creditors and members are divided into classes for the purposes of voting at these meetings, and this first court hearing is held to determine only that the classes are properly constituted and that there is no blot on the scheme which would prevent it being sanctioned,[193] but "emphatically not . . . to consider the merits and fairness of the schemes."[194] Assuming the court grants leave to convene, the meetings are held and the legislation prescribes that the vote of a majority in number representing seventy-five percent by value of creditors or members present

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191. Companies Act 2006, c. 46, §§ 895–901 (UK).

192. For a comprehensive account, see JENNIFER PAYNE, SCHEMES OF ARRANGEMENT: THEORY, STRUCTURE AND OPERATION (2d ed. 2021).

193. Court "sanction" of a UK scheme or restructuring plan is equivalent to court confirmation of a plan under 11 U.S.C. § 1129. *See*, *e.g.*, Companies Act 2006, c.46, § 899.

194. *In re* Telewest Communications plc (No. 1) [2004] EWHC (Ch) 924, [2004] B.C.C. 342 [14].

and voting must be achieved in each class for the scheme to proceed.[195] If the statutory majority is achieved in each class, the debtor returns to court to ask the court to sanction the scheme of arrangement. If the court does sanction it, the scheme takes effect once the court's order has been delivered to the Registrar for Companies.[196]

A UK scheme of arrangement shares many similarities with a prepackaged Chapter 11 bankruptcy case. Both procedures are frequently used to target financial liabilities.[197] Creditors and members are divided into classes in both procedures and the statutory majority must be achieved in each class for the restructuring plan to be capable of implementation. However, schemes of arrangement are better adapted as a selective corporate restructuring tool because they address, head on, our criticisms of the prepackaged adaptation of Chapter 11 for financial restructuring purposes.

While the debtor has to work hard to engineer around Chapter 11 to develop a prepackaged strategy which facilitates selectivity, schemes of arrangement are explicitly selective. A debtor is free to decide which creditors and members it proposes its scheme to.[198] However, as Gibson L.J. said in the *Sea Assets* case:

> If the creditors within the Scheme think the proposal unfair to them and unduly favourable to those left outside the Scheme, they can vote against the Scheme. If the majority vote in favour of the Scheme, then a minority creditor has the opportunity to seek to persuade the court that the Scheme is unfair and should not be sanctioned.[199]

This illuminates a second important difference between schemes of arrangement and prepackaged Chapter 11 plans as selective corporate restructuring tools. As we saw in Part III, Chapter 11 treats a plan in which the majority is achieved in every class as consensual and offers no holistic, overall review of fairness other than the rather high bar of a failure to meet the "good faith" standard: there is broad deference to the majority vote in this eventuality. We also saw, in Part III, that the prepackaged plans are engineered in this way to avoid the rigid distributional rules which apply to non-consensual plans, and which are so problematic for selective

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195. Companies Act 2006, c.46, § 899(1).

196. § 899(4).

197. For the UK context, see Sarah Paterson, *Reflections on English Law Schemes of Arrangement in Distress and Proposals for Reform*, 15 EUR. CO. & FIN. L. REV. 471 (2018).

198. Sea Assets Ltd. v. Perusahaan Perseroan (Persero) PT Perusahaan v. Penerbangan Garuda Indonesia [2001] EWCA (Civ) 1696 [51] (appeal taken from Ch.).

199. *Id.* at [45].

restructuring given that Chapter 11 requires all claims to receive some plan treatment. In contrast, and notwithstanding that the voting threshold for class acceptance is higher in a scheme of arrangement than in Chapter 11, UK courts retain the capacity to subject schemes of arrangement to holistic fairness review before sanction.

No fairness grounds are specified in the statute which instead leaves the court an apparently broad discretion as to whether to sanction the scheme of arrangement or not.[200] However, nineteenth century judges laid down a decision-making framework for the exercise of this discretion which is broadly followed to this day.[201] This decision-making framework has recently been paraphrased in modern language by Snowden J. in the following terms:

> (i) At the first stage, the Court must consider whether the provisions of the statute have been complied with . . . .
>
> (ii) At the second stage, the Court must consider whether the class was fairly represented by the meeting, and whether the majority were coercing the minority in order to promote interests adverse to the class whom they purport to represent.
>
> (iii) At the third stage, the Court must consider whether the scheme is a fair scheme which a creditor could reasonably approve. Importantly it must be appreciated that the Court is not concerned to decide whether the scheme is the only fair scheme or even the "best" scheme.
>
> (iv) At the fourth stage, the Court must consider whether there is any "blot" or defect in the scheme that would, for example, make it unlawful or in any other way inoperable.[202]

Two things are particularly striking about this framework. First, there is a general fairness review at (iii). Secondly, the conduct of the fairness review is heavily informed by the inquiry at (ii). Given that the statutory majority must be achieved in each class, the court is really pausing to consider whether there is any concern for majority oppression of the minority: for example, because majority creditors were connected with the company in some way or had some other collateral interest which motivated them to vote for a scheme which was fundamentally unfair to those without the collateral interest. Thus,

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200. The statute is drafted in permissive terms, providing that if the statutory majority agrees to the scheme of arrangement the court "may" sanction it. Companies Act 2006, c.46, § 899(1).

201. Sarah Paterson, Judicial Discretion in Part 26A Restructuring Plan Procedures (Jan. 24, 2022) (unpublished manuscript), https://ssrn.com/abstract=4016519 [https://perma.cc/7U7K-53AE].

202. *In re* Noble Grp. Ltd. [2018] EWHC (Ch) 3092, [2019] B.C.C. 349 [17].

the fairness test in schemes of arrangement serves as an "important cross-check."[203] The court starts from the premise that creditors are better judges of what is in their interests than the court.[204] Unless the court has reason to suspect majority oppression of the minority it will be minded to sanction the plan. Nonetheless, the fairness cross-check will always be part of the court's inquiry and it does not serve solely to protect class minorities from capricious insiders. It may also prompt an inquiry into whether, in Gibson L.J.'s words, the scheme is "unduly favourable to those left outside the Scheme."[205] Dissenting minority creditors can therefore straightforwardly object to the sanctioning of the scheme on this ground.

While we regard holistic fairness review as essential in all selective corporate restructuring cases in which the plan has not been unanimously approved, it does not necessarily follow that fairness review should be undertaken with the same intensity in a case supported by a super-majority of creditors and/or members as it would be in a cross-class cram down case. In our view, the fairness review in schemes of arrangement strikes an appropriate balance. It pays due regard to the wishes of the majority and is likely to be relatively light touch in most cases. But it is not a rubber stamp. Thus, where dissenting creditors raise non-trivial concerns about their treatment relative to other creditors, or there is reason to suspect the majority's motivations, the court can refuse to sanction.

Both the role of holistic fairness review and the scope for adjusting the intensity of review are well-illustrated by England's own experience of a Two-Step. In 2006, Cape Plc and twenty-four subsidiaries filed what was called a "composite scheme of arrangement" between the companies and actual and potential claimants for damages for asbestos.[206] Although Cape was solvent, the court found that, "the uncertainty as to future asbestos-related concerns raises a real but unquantifiable risk that at some point in the future Cape or other companies in the group could become insolvent."[207] Under the scheme a new subsidiary was incorporated to which the asbestos claims were transferred and against which the asbestos liabilities would be solely enforceable in the future.[208] The new subsidiary received an initial

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203. *In re* Amicus Fin. plc [2021] EWHC (Ch) 3036, [2022] Bus. L.R. 86 [40].

204. *Id.* at [43]; *In re* Telewest Communications plc (No. 2) [2004] EWHC 1466 (Ch), [2005] B.C.C. 36 [22].

205. Sea Assets Ltd. v. Perusahaan Perseroan (Persero) PT Perusahaan v. Penerbangan Garuda Indonesia [2001] EWCA (Civ) 1696 at [45].

206. *In re* Cape Plc [2006] EWHC (Ch) 1316, [2006] 3 All E.R. 1222 [1].

207. *Id.* at [5].

208. *Id.* at [20].

payment of £40 million and was to receive continued funding from its parent going forward.[209]

Consistent with the UK's selective restructuring approach, the Cape scheme was only put to those who, at that time, had or, in the future, may have had asbestos-related claims or derivative claims.[210] Yet, the Two-Step was still employed to try to insulate the trading business from the asbestos-related claims as they arose.[211] In weighing the tort claimants' interest in Cape's continued solvency,[212] and for its discussion of novel provisions enabling the scheme to be amended in the future,[213] the judgment provides much food for thought. But what is of immediate interest to us is the composite nature of the scheme and the holistic review of its fairness. All the group companies were parties to the scheme and all aspects of it were before the court: the transfer of the liabilities;[214] the funding arrangements;[215] and the proposals for paying tort claims.[216] The scheme was challenged by a former employee of a Cape subsidiary and a current Cape group employee.[217] These legal challenges were funded by Cape so that the court had arguments opposing the scheme clearly put it to at the sanction stage.[218] This comprehensive approach to evaluating the fairness of the scheme contrasts with the highly fragmented way in which Texas Two-Steps come before bankruptcy courts in the U.S.

A third way we consider schemes of arrangement to be better adapted as a selective corporate restructuring tool than prepackaged Chapter 11s is that they do not trigger the formation of an estate and impose a mandatory stay. Thus, it is straightforward for a debtor high on the demise curve to avoid the signaling and information-processing disadvantages associated with a stay, and it is straightforward for the company to continue to pay ride-through creditors while the scheme of arrangement is in progress.

Moreover, even if the debtor does decide it needs the protection of a stay, it is still more straightforward to continue paying ride-through creditors than it is in a prepackaged Chapter 11 case. There are two ways by which a debtor

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209. For an excellent discussion of the case, see John Townsend, *Schemes of Arrangement and Asbestos Litigation:* In re *Cape Plc*, 70 MOD. L. REV. 837, 837–47 (2007).

210. *See In re* Cape Plc [2006] EWHC (Ch) 1316, [2006] 3 All E.R. 1222, [8], [21]–[52].

211. *Id.* at [6].

212. *Id*. at [6], [37].

213. *Id*. at [56]–[73].

214. *Id.* at [3], [5], [46], [85].

215. *Id.* at [20].

216. *Id.* at [80].

217. *Id.* at [12]–[13].

218. *Id*. at [14]–[15].

can obtain a stay (known in the UK as a moratorium). The first is the Part A1 moratorium introduced into the Insolvency Act 1986[219] by the Corporate Insolvency and Governance Act 2020 ("CIGA").[220] The Part A1 moratorium permits a debtor to continue paying pre-filing debts in one of three ways: up to a threshold without consent; above the threshold, with the consent of the insolvency practitioner who oversees the moratorium (known as the monitor); or with the consent of the court.[221] Thus, even if the Part A1 moratorium is obtained to support the debtor's efforts to implement a scheme of arrangement, ride-through creditors can be paid without the approvals required to get around the automatic stay to achieve the same objective in a Chapter 11 case.

The same is true if the debtor files for administration, the second means by which a debtor can obtain a stay in UK law. Administration is the principal corporate insolvency tool in the UK and, while it does not contain any mechanisms to impose a restructuring plan on dissenting creditors, the administration moratorium can be used to shelter and support efforts to achieve a scheme of arrangement.[222] In an administration, the insolvency practitioner who takes office as the administrator can make payments to creditors where they consider it "likely to assist the achievement of the purpose of the administration."[223] The Court of Appeal in England and Wales has recently confirmed the breadth of this power,[224] and it provides the administrator, and the debtor in administration, with broad authority to pay ride through creditors' pre-administration liabilities.[225]

Finally, it is permissible to release guarantees and securities granted by group operating companies in a finance holding company's scheme of arrangement without the operating companies having to propose their own schemes of arrangement.[226] Thus, it is commonplace for a group holding company to propose a scheme of arrangement that restructures the claims of its financial creditors and releases guarantees and securities granted by the

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219. Insolvency Act 1986, c. 45, §§ A1–A55 (UK).

220. Corporate Insolvency and Governance Act 2020, c. 12, § 1 (UK).

221. Insolvency Act 1986, §§ A28, A31(3), A32(3).

222. *See generally* THE INSOLVENCY SERV., SUMMARY OF RESPONSES: A REVIEW OF THE CORPORATE INSOLVENCY FRAMEWORK 48 (2016).

223. Insolvency Act 1986, c.45, sch. B1, ¶ 66.

224. *In re* Debenhams Retail Ltd. [2020] EWCA (Civ) 600, [2020] 3 All E.R. 319 [59], [66]–[68] (appeal taken from Ch).

225. *Id.* at [3].

226. *In re* Noble Grp. Ltd. [2018] EWHC (Ch) 3092, [2019] B.C.C. 349 [24]; *see also* Kokorin, *supra* note 114, at 121–24 (explaining how schemes of arrangement can be used to release claims against third parties that are closely connected to claims against the scheme debtor).

operating companies.[227] This facilitates selective restructuring because the principal target claims against the finance holding company can be compromised while keeping the operating companies and their operating liabilities wholly outside the restructuring. "Ricochet" claims by the operating companies against the holding company that would otherwise result from calls on the operating company guarantees do not arise and adverse signaling costs are avoided. The position with regard to non-consensual third-party releases is thus more certain than it is under Chapter 11.[228]

Nonetheless, a limitation of the scheme of arrangement is that the statutory majority must be achieved in every voting class.[229] A scheme cannot be crammed down on a dissenting class. The UK's restructuring plan procedure, to which we turn next, does not have this limitation.

B. UK Restructuring Plans

In addition to introducing the Part A1 moratorium, CIGA also introduced the new Part 26A restructuring plan procedure into the UK Companies Act 2006.[230] The Part 26A restructuring plan procedure is closely modelled on the scheme of arrangement but with certain significant differences including the power for the court to impose the plan over the objections of an entire dissenting class or classes—the so-called cross-class cram down power.[231] Part 26A once again explicitly supports selective corporate restructuring.[232] And Part 26A restructuring plans are a more powerful tool than the scheme of arrangement and can be used in a wider range of selective corporate restructuring settings.

Just as with a scheme of arrangement, the debtor is free to select creditors and/or equity holders to be compromised by the plan. The procedure is therefore explicitly designed to facilitate a selective, rather than inclusive, enterprise-wide, corporate restructuring strategy. The statutory test for evaluating the fairness of a restructuring plan where one or more classes

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227. *See In re* Van Gansewinkel Groep BV [2015] EWHC (Ch) 2151, [2015] Bus. L.R. 1046 [63]; *In re* Noble Grp. Ltd. [2018] EWHC (Ch) 3092, [2019] B.C.C. 349 [24].

228. *See supra* Section II.D.

229. Companies Act 2006, c.46, § 899(1); WEIL, SCHEMES OF ARRANGEMENT AS RESTRUCTURING TOOLS 1 (2015), https://eurorestructuring.weil.com/wp-content/uploads/2015/01/140553_LO_BFR_Schemes_Arrangement_Brochure_v12.pdf [https://perma.cc/RV5Q-TBRJ].

230. Companies Act 2006, c. 46, Part 26A, §§ 901A–901L (UK).

231. § 901G.

232. *See id.*

dissent is more specific than the judicially developed fairness requirement for a scheme. The court must be satisfied that "none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative."[233] The relevant alternative is "whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned."[234]

The "relevant alternative" test provides dissenting creditors with more open, contextualized grounds of objection than are available in Chapter 11. This is a meaningful difference. Douglas Baird, Anthony Casey, and Randal Picker have shown how additional amounts which a purchaser may be willing to pay prepetition suppliers to preserve the relationship, over and above the purchase price which they offer for the debtor's business and assets are irrelevant for the purposes of assessing the fairness of competing bids in a Chapter 11 case.[235] However, this is precisely the sort of payment that a creditor could argue it would receive where the relevant alternative to the Part 26A restructuring plan is a sale of the business and assets as a going concern, and which can therefore be taken into account in determining whether or not what the plan offers the creditor would make them worse off.

Moreover, even if the "no worse off" test is satisfied, it is still in the court's discretion whether to sanction the plan.[236] The statute offers no guidance on the exercise of this discretion and the courts are in the foothills of working out a structured decision-making framework that they can use to assess not only that the dissenting creditors are not worse off as a result of the plan than they would be in the event of the relevant alternative, but also to ensure that no creditor or member gets too good a deal (too much unfair value) as a result of the plan.[237]

Overall, however, the judicial exercise is the same in the case of a Part 26A restructuring plan as it is in the case of a scheme of arrangement. In order to sanction the plan or scheme, the court determines whether the plan is a fair plan, which a creditor in the dissenting class could reasonably be expected to consent to, notwithstanding that they withheld their consent.[238] Thus, the relevant alternative concept and the residual judicial discretion operationalize the requirement that the plan is one that a rational creditor in the dissenting

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233. § 901G(3).

234. § 901G(4).

235. Baird et al., *supra* note 2, at 1682–83.

236. *See* Paterson, *supra* note 201.

237. *Id.*

238. LATHAM & WATKINS LLP, INSOLVENCY LITIGATION 41 (Suzzanne Uhland et al. eds., 2021).

class could reasonably consent to, notwithstanding that they did not do so. A sanctionable plan is *Pareto superior*: everyone is at least as well off as they would be if the plan were not sanctioned and most (if not all) stakeholders are better off under the plan. But the justification for imposing the plan on the dissenting creditors is not anchored solely in efficiency or utilitarian arguments. The plan is also one which the dissenting creditors could be expected to consent to if rational bargaining had been possible. In other words, just as in a Part 26A scheme of arrangement, the plan must be a fair plan which a creditor could reasonably approve.[239]

Part 26A is, of course, relatively new, and so there have been relatively few cases. But cases have arisen in which the court has been asked to exercise its cross-class cramdown power and there has already been considerable judicial focus on excluded creditors. The courts have begun to develop guidelines for dealing with excluded creditors and, strikingly, are developing a flexible, rather than a rigid, approach. In other words, the court does not test the relative treatment of the excluded creditors and the included creditors by reference to the "no worse off" test. Instead, depending on the circumstances, the court will seek to ascertain whether the excluded creditors are critical to the restructuring; whether the costs of including them outweigh the benefits; and generally, whether including them within the plan would make a material difference to target creditors.[240] This would seem to be precisely the sort of exercise which Markell argues should have happened in the *Nuverra* case: "[t]he real argument seems to be that trade debt is necessary for the reorganization's success, and thus may be treated more favorably. This may be true. As an empirical observation, however, it should be subject to proof."[241]

Notably, UK courts have also begun to put debtors' feet to the fire on this point, even where the cross-class cramdown power is not engaged.[242] For example, in the convening hearing in the *Virgin Atlantic* case, Trower J. carefully reviewed the exclusion from the plan of more than 1,000 creditors with claims of under £50,000 for reasons of "logistical difficulties"; public bodies with claims for liabilities such as air traffic control charges required for the continuation of the company's business; creditors such as sales agents

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239. *In re* Virgin Active Holdings Ltd. [2021] EWHC (Ch) 1246, [2022] 2 B.C.L.C. 62 [221].

240. *See* Paterson & Walters, *supra* note 34, at 446–47; *In re* DeepOcean 1 UK Ltd. [2020] EWHC (Ch) 3549, [2021] Bus. L.R. 632 [11]–[12]; *In re* Virgin Active Holdings Ltd. [2021] EWHC (Ch) 814 [11]; *In re* Virgin Active Holdings Ltd. [2021] EWHC (Ch) 1246 at [264]; *In re* Virgin Atl. Airways Ltd. [2020] EWHC (Ch) 2191, [2021] 1 B.C.L.C. 87 [11]; *In re* Virgin Atl. Airways Ltd. [2020] EWHC (Ch) 2376, [2021] 1 B.C.L.C. 105 [65]–[67].

241. Markell, *supra* note 51, at 4.

242. Paterson & Walters, *supra* note 34, at 446–47.

whose goodwill was similarly essential for business continuity; and suppliers who had agreed with the debtor to accept payment at or below the level proposed in the plan.[243] At the sanction stage, Snowden J. agreed that all of these creditors had been excluded for "respectable commercial reasons."[244] He focused, particularly, on the logistical burden of bringing numerous creditors with small claims into the plan and, specifically, the company's explanation in its explanatory statement that "the cost savings to be borne by including those below £50,000 are outweighed by the practical time and cost of including them."[245] Overall, the task is to ensure that excluded creditors are not getting too good a deal—too much unfair value which should be shared with the target creditors. The court may arrive at the conclusion that this is not the case because if it were to insist on a sharing of the excluded creditors' returns, the restructuring would simply fail and everyone, including the target creditors, would be worse off; or because the costs of selecting between critical creditors and non-critical creditors would exceed the gains so that the only winners would be the advisers; or because even if the excluded creditors were brought within the compromise, the losses to target creditors would not be materially reduced so that the game is not worth the candle.[246] In all of these cases, if the excluded creditors were to be brought within the renegotiation, target creditors would be no better off, and in some cases, worse off. Crucially, the fact that creditors are excluded from the renegotiation should not lead rational target creditors to withhold consent to their own renegotiation.

As it becomes more common to review ride through creditors in Part 26A restructuring plans even where no party has objected, we would expect this practice to be adopted in the scheme of arrangement context, without undermining our point on the varying intensity of review. The schemes of arrangement and restructuring plan procedures therefore do a better job of facilitating selectivity while at the same time protecting dissenting creditors than does Chapter 11.

Part 26A also has nothing equivalent to the APR. Indeed, the court has jurisdiction to sanction a plan in which existing shareholders retain equity even if creditors are not paid in full.[247] Even so, as we have seen, the statutory test for evaluating the fairness of a cross-class cram down restructuring plan

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243. *In re* Virgin Atl. Airways Ltd. [2020] EWHC (Ch) 2191 at [11].

244. *In re* Virgin Atl. Airways Ltd. [2020] EWHC (Ch) 2376, [2021] 1 B.C.L.C. 105 [67].

245. *Id.* at [65]–[66].

246. For a more detailed discussion, see Paterson & Walters, *supra* note 34.

247. This follows from the legislative decision not to incorporate the APR in Part 26A. *See* Paterson, *supra* note 201.

involves comparing the creditor's treatment in the plan with what they would receive in the event of the relevant alternative. In exercising its residual discretion, the court will likely focus on the justification for the decision to allocate shareholders equity in the plan if they would have received nothing in the event of the relevant alternative. Nonetheless, the courts can sanction a plan which allocates equity to existing shareholders over the objections of a dissenting class if they consider it fair to do so, an outcome which is much more difficult to engineer in Chapter 11.

In the *Virgin Active* case,[248] Snowden J. considered two justifications for shareholder participation somewhat akin to the "gifting" and "new value" exceptions to the APR. Gifting, which is controversial in the U.S., permits senior creditors to gift to junior classes, including shareholders, part of the distribution they would otherwise be entitled to.[249] The new value exception allows existing shareholders to retain their shares, even when a senior class has not been paid in full, if they have contributed new capital necessary for a successful restructuring.[250] In *Virgin Active* Snowden J. gave weight both to gifting[251] and the introduction of fresh shareholder money[252] as justification for the allocation of equity to existing shareholders[253] and the approach to new value in particular suggests that UK courts have the flexibility to go beyond the relatively tight boundaries on the concept in the U.S. courts, both in regards to non-cash contributions and the need for market testing.[254]

Seymour and Schwarcz are fiercely critical of corporate restructuring regimes which do not insist on absolute priority.[255] In their view, the omission of the APR removes a vital incentive to bargaining while opening the door for senior creditors and shareholders to collude to cut intermediary classes out of the plan.[256] However, as we have sought to demonstrate in Part III

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248. *In re* Virgin Active Holdings Ltd. [2021] EWHC (Ch) 1246, [2022] 2 B.C.L.C. 62 [266]–[300].

249. Michael Carnevale, *Is Gifting Dead in Chapter 11 Reorganizations? Examining Absolute Priority in the Wake of the Second Circuit's No-Gift Rule in* In re *DBSD*, 15 U. PA. J. BUS. L. 225, 235 (2012).

250. Wilde, *supra* note 189, at 199.

251. *In re* Virgin Active Holdings Ltd. [2021] EWHC (Ch) 1246 [266]–[269].

252. *Id.* at [278]–[300].

253. One of us has suggested elsewhere that new value provides the more robust analytic foundation for continuing shareholder equity participation. *See* Paterson, *supra* note 201 (arguing that there is no adequate safeguard against the risk of collusion between secured parties and equity with gifting).

254. *Id.*

255. Jonathan M. Seymour & Steven L. Schwarcz, *Corporate Restructuring Under Relative and Absolute Priority Rules: A Comparative Assessment*, 2021 U. ILL. L. REV. 1, 19–33.

256. *Id.* at 10.

above, practitioners have worked around the APR to engineer plans which are not subject to a holistic, independent fairness review and the rule's inflexibility may encourage debtors high on the demise curve to take on more debt so that they enter Chapter 11 too late, with more liabilities. We therefore approve of the broad discretion given to UK courts to allow shareholders to retain equity even when creditors are not paid in full. Without this flexibility, shareholders have little incentive to tackle isolatable problems high on the demise curve where they risk losing their investment. Finally, we should also mention that Part 26A offers the same benefits as the scheme of arrangement in terms of the lack of an automatic stay; the availability of moratoria which facilitate payments to ride through creditors; and the ability to release third party guarantees in the plan for the principal debtor.

C. A Note of Caution About the UK

There are some caveats to our general approval of the UK approach. First, the new Part 26A restructuring plan procedure offers debtors the ability to exclude a class from the vote where they have no "genuine economic interest in the company."[257] The courts are just beginning to work out the contours of this test, but it may be that dissenting creditors have less ability to argue that the plan is unfair because of their treatment relative to ride through creditors where it is engaged. Secondly, other procedures in the UK statutory toolbox that facilitate selective restructuring are open to the criticism that they do not adequately balance and safeguard the interests of target creditors.[258] It is not the purpose of this Article to offer a detailed critique of the UK corporate insolvency and restructuring law system, but the short point is that while we consider that the general approach to selectivity in schemes of arrangement and Part 26A restructuring plans offers considerable inspiration for a well-balanced regime, we are not uncritical of selectivity as it functions in UK law as a whole. Indeed, there is undoubtedly the flexibility for ingenious lawyers to work around the UK regime to achieve selectivity in ways we would categorically not approve of.

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257. Companies Act 2006, c. 46, § 901C(4) (UK).

258. Sarah Paterson, *Debt Restructuring and Notions of Fairness*, 80 MOD. L. REV. 600, 601–11 (2017) (critiquing pre-packaged administrations); Paterson & Walters, *supra* note 34, at 454–59 (disapproving of company voluntary arrangements).

D. Emerging European Variants

Although the UK scheme of arrangement has been on the statute books since the nineteenth century, for much of the twentieth century large corporate restructuring was predominantly an out of court affair in the UK.[259] However, when changes in the finance markets made out-of-court restructuring more challenging during the last quarter of the twentieth century, the scheme of arrangement was reinvigorated as a corporate restructuring tool.[260] Although the lack of a cross-class cram down power came to be seen as a limitation,[261] leading to CIGA's introduction of Part 26A, the scheme of arrangement performed relatively well as a corporate restructuring tool in the decade after the financial crisis.[262]

In contrast, many continental European jurisdictions did not have effective tools for restructuring large corporations. This led the European Commission to publish a non-binding recommendation on a new approach to business failure in 2014 which sought to encourage E.U. Member States to implement early restructuring procedures.[263] Impatient with the lack of any progress in response to the recommendation, the E.U. subsequently enacted a directive on preventive restructuring frameworks.[264] While the Directive does not have automatic effect in Member States in E.U. law—national legislation is required to implement it—and the Directive adopts a minimum harmonization approach, with a good deal of optionality for Member States within it,[265] it does provide foundations for a comprehensive unified European approach to selective restructuring.

The Directive is firmly anchored in the concept of "preventive" proceedings.[266] Broadly, the restructuring procedures with which it is concerned are intended to be available where there is a "likelihood" that the debtor will become insolvent falling short of actual insolvency as understood

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259. *See* SARAH PATERSON, CORPORATE REORGANIZATION LAW AND FORCES OF CHANGE 38–40 (Oxford Univ. Press, 2020).

260. *Id*. at 72–74.

261. *See* Paterson, *supra* note 197, at 486–88.

262. *See* PATERSON, *supra* note 259, at 72–74.

263. *See generally* Commission Recommendation of 12 Mar. 2014, On a New Approach to Business Failure and Insolvency, 2014 O.J. (L 74/65).

264. *See generally* Council Directive 2019/1023, 2019 O.J. (L 172/18).

265. For criticism of this approach see Horst Eidenmüller, *Contracting for a European Insolvency Regime*, 18 EUR. BUS. ORG. L. REV. 273 (2017).

266. *See* Council Directive 2019/1023, 2019 O.J. (L 172/18) 1. For the difficulties with this concept see Nicolaes W.A. Tollenaar, *The European Commission Proposal for a Directive on Preventive Restructuring*, 30 INSOLVENCY INTEL. 65 (2017).

by national law.[267] The Directive is therefore aimed squarely at debtors who have not slid too far down the demise curve and seeks to ensure that Member States have tools that enable debtors to take steps to avoid wider enforcement. Unsurprisingly, therefore, it takes an approach that facilitates the adoption of selective restructuring procedures in Member States.

Article 8 of the Directive provides that the restructuring plan must specify "the affected parties," either individually or by category, together with their claims or interests covered by the plan.[268] Additionally, it requires a description of the parties who are not affected by the plan either individually or by category of debt "together with a description of the reasons why it is not proposed to affect them."[269] Thus, as with the UK approach, the debtor can select creditors who will ride through unaffected by the plan by reference to criteria other than the Directive's distributional tests of fairness.[270] This has already been borne out in practice in cases where debtors have used the new Dutch procedure, *Wet Homologatie Onderhands Akkoord* ("WHOA") to restructure. In one such case, the debtor proposed a restructuring of ordinary, unsecured claims, while claims incurred after a cut-off date were to be paid in full out of new unsecured financing provided by its bank. The debtor justified this unequal treatment on the ground that the claims arising after the cut-off date would have to be paid in full in order to enable the debtor to continue in business—and the Rotterdam District Court agreed.[271]

Furthermore, the Directive provides for an optional, rather than mandatory stay.[272] We have already argued that this facilitates selective corporate restructuring strategy because a debtor high on the demise curve targeting specific liabilities may wish to avoid the signaling and information-processing disadvantages of stay protection and may be able to manage its process without a stay.[273] Moreover, the stay protection provided for in the European Restructuring Directive is even better adapted to a selective corporate restructuring strategy than the English law moratoria which we

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267. Council Directive 2019/1023, Art. 4, 2019 O.J. (L 172/18).

268. *Id.* at Art. 8.

269. *Id.* at Art. 2(1)(2) provides that "affected parties" means "creditors, including, where applicable under national law, workers or classes of creditors and, where applicable under national law, equity holders, whose claims or interests respectively, are directly affected by the restructuring plan."

270. *Id.* at Arts. 10–13; *see also* OLIVARES-CAMINAL ET AL., *supra* note 89, at 60–61.

271. Ferdinand Hengst & Reinout Vriesendorp, *The WHOA in Practice: With Greater Clarity, Come Teething Problems*, DE BRAUW BLACKSTONE WESTBROEK (Mar. 17, 2021), https://www.debrauw.com/articles/the-whoa-in-practice-with-greater-clarity-come-teething-problems [https://perma.cc/9MDV-YM82].

272. Council Directive 2019/1023, art. 6, 2019 O.J. (L 172/18).

273. *Supra* Section II.C.

discussed in Section IV.A. This is because Article 6 provides that the stay can be general (affecting all creditors) or applicable to individual creditors (though not the claims of workers unless alternative protection is in place).[274] Thus, the Directive offers the flexibility to target stay protection at particularly troublesome creditors, while leaving creditors who are excluded from the plan entirely outside of the stay's scope. The Directive also appears to permit Member States to choose to keep the stay confidential from those who are not included within it.[275]

The Directive is silent on the possibility of releasing third party guarantees in the restructuring of the principal debtor. However, recall that the Directive adopts a minimum harmonization approach: there is nothing to prevent a Member State from supplementing their national procedure with a third party release mechanism,[276] and both the Dutch WHOA and the German *Unternehmensstabilisierungs- und Restrukturierungsgesetz* ("StaRUG") include such mechanisms.[277] The Directive provides explicitly for cross-class cram down and the distributional tests of fairness in a cross-class cram down scenario are complex and difficult to interpret.[278] Notably, the Directive provides Member States with the option to select between an APR and a relative priority rule ("RPR").[279] It is interesting to note that the Dutch WHOA adopts the APR in a cross-class cram down unless there is a justification to deviate from it and the deviation is not detrimental to the interests of the relevant creditor class.[280] Similarly, the German StaRUG has the APR but with exceptions which include where the cooperation of the shareholder is required for the continuation of the business.[281] The APR is therefore an anchor rule in the WHOA and StaRUG which distinguishes these

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274. Council Directive 2019/1023, art. 6(3), 2019 O.J. (L 172/18).

275. José M. Garrido et al., *Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive* 5–7 (IMF., Working Paper No. 2021/152, 2021), https://www.imf.org/en/Publications/WP/Issues/2021/05/27/Restructuring-and-Insolvency-in-Europe-Policy-Options-in-the-Implementation-of-the-EU-50235 [https://perma.cc/54A9-PJZM].

276. Kokorin*, supra* note 114, at 110.

277. *Id.*

278. *See* OLIVARES-CAMINAL ET AL., *supra* note 89, at 67–70.

279. *See* Council Directive 2019/1023, art. 11, 2019 O.J. (L 172/18). For criticism of this approach see Seymour & Schwarcz, *supra* note 255 and text thereto.

280. DE BRAUW BLACKSTONE WESTBROEK, COURT CONFIRMATION OF EXTRAJUDICIAL RESTRUCTURING PLANS: WHAT YOU NEED TO KNOW ABOUT THE NEW ACT 5 (2022), https://dwbxnuhxoazve.cloudfront.net/20220321-WHOA-Booklet-March-2022.PDF [https://perma.cc/X5ZS-CLW9].

281. *See The New German Restructuring Regime ("German Scheme") Will Enter into Force on 1 January 2021*, MILBANK (Dec. 30, 2020), https://www.milbank.com/en/news/the-new-german-restructuring-regime-german-scheme-will-enter-into-force-on-1-january-2021.html [https://perma.cc/8KL7-3FDU].

procedures from the UK's Part 26A restructuring plan procedure, but the approach to cross-class cramdown is still more flexible than it is in the U.S.

In sum, the Directive is well-designed to facilitate selective corporate restructurings, and it is clear that Member States are implementing it in ways that facilitate selective restructuring. This brings us to our recommendations.

V. TACKLING CHAPTER 11'S INCLUSIVITY PROBLEM HEAD ON

In this Part we explore the possibility of a new Chapter of the Bankruptcy Code which would tackle Chapter 11's inclusivity problem head on. But what we hope to do, above all else, is start a broader conversation joining siloed debates about financial restructuring; landlord restructuring; and restructuring of tort liabilities into a single debate about selective strategies. The detail of what follows is therefore much less important than our overall conclusion: selectivity is normatively desirable but must be subject to independent oversight; Chapter 11 provides serious obstacles to selectivity and lawyers' ingenious efforts to engineer around these obstacles either undermine efforts to review the selective plan holistically or are so complex and fraught with risk that debtors avoid Chapter 11 altogether raising more debt and entering the process too late and with more liabilities; and thus, it is time for a serious conversation about how U.S. corporate bankruptcy law could better accommodate selective restructuring while providing safeguards against abuse.

Our starting point is a proposal by the National Bankruptcy Conference ("NBC") in 2014 to introduce a new Chapter 16 of the Bankruptcy Code to "facilitate court supervision of bond restructurings."[282] The NBC was focused on the difficulties of restructuring bond debt out of court caused by limitations imposed by the Trust Indenture Act of 1939 which we have already touched on in passing.[283] They considered prepackaged Chapter 11 bankruptcy to be unnecessarily expensive for a selective restructuring of financial debt, stating that "[w]here disinterested financial creditors are the only affected creditors and a supermajority of them can agree to the terms of a restructuring of their obligations, a Chapter 11 filing, in any form, may be inefficient and unnecessarily risky."[284]

Thus, the NBC recommended the introduction of:

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282. Letter from Richard Levin, *supra* note 62.
283. *See* Roe, *supra* note 60; *see* Bratton & Levitin, *supra* note 60.
284. Letter from Richard Levin, *supra* note 62, at 3.

> [A] new, streamlined procedure under a new chapter of the Bankruptcy Code that would permit a court to impose on all members of the affected creditor class a modification of payment terms that has been accepted by the requisite disinterested majority or super majority vote, without triggering the whole panoply of Bankruptcy Code provisions, requirements and limitations that typically accompany the filing of a petition under the Bankruptcy Code.[285]

This new procedure could only be initiated by the debtor and would only be available for the purpose of modifying the rights of one or more classes of claims for borrowed money under a bond indenture or a loan agreement. Crucially, there would be no bankruptcy estate; no automatic stay; and no restriction on the payment of prepetition debt. In arriving at its recommendations, the NBC drew inspiration from European procedures, including the UK scheme of arrangement, and what was, at the time, a proposal in the Netherlands to introduce an equivalent proceeding, which eventually became the WHOA. They described these procedures as "specialized procedures that allow debtors to restructure bank or bond debt with judicial oversight without having to initiate broader insolvency proceedings."[286]

We would categorize the UK scheme of arrangement and the Dutch WHOA more broadly as tools which facilitate selective corporate restructuring strategies. For sure, restructuring financial liabilities while all other creditors ride through the case is a classic example of a selective corporate restructuring strategy. But as we have sought to demonstrate, it is not the only one. A selective strategy makes sense whenever the debtor is high on the demise curve and its financial distress relates to a specific bundle of liabilities so that, if those liabilities are restructured, the debtor's difficulties will be resolved, and no broader operational restructuring is necessary. We have already seen that the prepackaged Chapter 11 is not ideally adapted for this purpose because the debtor is still having to engineer around multiple issues: a fundamentally inclusive process; an automatic stay which makes it difficult to pay ride through creditors; an inhospitable environment for third party releases; and a technique which depends on consent in every class. It will come as no surprise, therefore, that we support the NBC's proposal. But we would go much further.

At this point, it is worth recalling that one of our concerns about prepackaged Chapter 11 cases is that they undermine protection for

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285. *Id.* at 2.
286. *Id.* at 4.

dissenting creditors. The NBC recommendation underlines the sophisticated nature of financial creditors and their ability to adjust their finance terms and we agree with both propositions. But in a world where senior creditors may increasingly line up with equity to drive through a plan,[287] we are concerned about a process in which controlling groups have little to fear by way of independent, holistic overview. We are, therefore, in some sympathy with scholars who have criticized the short circuiting of a full Chapter 11 plan by means of a prepackaged case.[288] However, where we part company with these scholars is that we do not think the answer is to force the parties back into Chapter 11's all-inclusive machinery. Instead, we suggest that what is needed is a mechanism specifically designed to facilitate selectivity but with appropriately tailored protections.

Thus, we would not limit a new Chapter 16 to cases modifying rights under an indenture or loan agreement. We would take seriously the question of whether a new type of optional stay, which could be inclusive or targeted, should be available where necessary. We would not limit the procedure to cases where the vote was achieved in every class, and we would revisit Chapter 11's rigid distributional rules to see whether they remain fit for the twenty-first century to incentivize debtors high on the demise curve to address specific difficulties proactively if doing so means that equity will inevitably lose its shirt. The problem of the incentives to file where equity will inevitably be lost are well-known in a small business context and have led to the introduction of the new subchapter V of Chapter 11 of the Bankruptcy Code with a new cram down rule.[289] Notwithstanding strident defense of the APR and furious criticism of the more flexible distributional rules in Europe,[290] we consider it less desirable if debtors high on the demise curve are disincentivized from cauterizing a developing situation before it infects the rest of the business because doing so will inevitably lead to their equity position being wiped out. In other words, the APR cure may be worse than the disease.

But most importantly of all, we would follow the UK approach of putting an independent, holistic review of the overall fairness of the plan by the judge at the very center of any new Chapter. In his work, Vincent Buccola has also considered the case for a more streamlined version of Chapter 11 and in a

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287. *See generally* Kenneth Ayotte & Jared A. Ellias, *Bankruptcy Process for Sale*, 39 YALE J. ON REGUL. 1 (2022).

288. *See*, *e.g.*, LoPucki, *supra* note 53.

289. 11 U.S.C. § 1190(3).

290. Seymour & Schwarcz, *supra* note 255.

broader context than the NBC proposal.[291] He leans towards a far more restrictive role for judges in which they would be presented with essentially binary choices: do the conditions warrant displacing the ordinarily prevailing property rules, and if so, does the proposed transaction give those whose interests are being transformed fair compensation?[292]

We would go the other way and leave the judge broad discretion to decide on the fairness of a selective plan including, crucially on the fairness of leaving excluded creditors outside the plan. Of course, as Lord Bingham has put it in a UK context, we would expect the exercise of judicial discretion in selective restructuring plans to "quickly be confined between banks of practice and authority."[293] Yet, we consider that what Buccola calls "a wise chancellor" is essential where a debtor is targeting specific creditors to absorb the loss, to guard against both debtor opportunism and majority oppression.[294]

Of course, we acknowledge very real concerns for the relationship between bankruptcy rules and judicial discretion. In Douglas Baird's words: "Guiding the decision making of judges is what legislation is all about. Rules exist in every legal system because unbridled discretion is not a good thing. Judges ordinarily do not play tennis without a net."[295]

Thus, in one view, the role of the bankruptcy judge is solely to "call balls and strikes, not to pitch or bat."[296] For us, however, judicial discretion in selective corporate restructuring is an example of what Carl Schneider has called "rule-failure discretion."[297] As Schneider puts it, discretion can be deliberately created "where it is believed that cases will arise in circumstances so varied, so complex, and so unpredictable that satisfactory rules that will accurately guide decision-makers to correct results in a sufficiently large number of cases cannot be written."[298]

We envisage that the new Chapter 16 would clearly mark the boundaries within which judicial discretion is to be exercised. We have already seen that the foundational concept of the relevant alternative provides a powerful

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291. Buccola, *supra* note 113, at 750.

292. *Id.* at 748.

293. TOM BINGHAM, THE BUSINESS OF JUDGING: SELECTED ESSAYS AND SPEECHES: 1985-1999, at 36, 42–43 (2000).

294. Buccola, *supra* note 113, at 747.

295. Baird, *supra* note 19, at 832.

296. *Chief Justice Roberts Statement – Nomination Process*, U.S. CTS., https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process [https://perma.cc/4WU7-SMDB].

297. CARL E. SCHNEIDER, *Discretion and Rules: A Lawyer's View*, *in* THE USES OF DISCRETION 47, 62 (Keith Hawkins ed., 1992).

298. *Id.* at 62.

orientating principle against which judicial discretion is exercised in the UK. As Schneider puts it "rules have a primacy in law because of their capacity to provide superior legitimacy, wisdom, fairness and efficiency."[299] Yet, as Schneider also convincingly demonstrates, rules regularly "fail to deliver on those promises."[300] In our view, no set of rules will ever deliver the type of holistic fairness review which we consider essential to a selective corporate restructuring regime. And so, for us, there will always be a place for judicial discretion.

We offer no further detail here because it is not our principal objective to produce a granular proposal. Specifically, we do not address here the powerful criticism that we cannot simply graft a selective regime onto a fundamentally inclusive regime and must, instead, rewrite the entire rule book.[301] One reason we do not engage with this criticism is because we do think that a new Chapter 16 can be developed without undermining all of Chapter 11's architecture. Another reason boils down to pragmatism: there is an urgent need to tackle Chapter 11's inclusivity problem, but Congress is unlikely to contemplate comprehensive reform of Chapter 11 any time soon.[302] To reiterate: our aim is not to present a detailed blueprint for a new selective restructuring regime.

Instead, we seek to start a broader conversation about selectivity in Chapter 11. To that end, we have drawn on UK and European examples to make our concerns for Chapter 11's inclusivity problem more vivid. And having regard to this wider comparative and international context, we note the concerns that some scholars have expressed about regulatory competition: that the availability of more streamlined procedures which facilitate selectivity will drive U.S. debtors to restructure overseas.[303]

VI. CONCLUSION

Market appetite for selective restructuring is understandable. As we have sought to explain, selective restructuring is normatively desirable for debtors high on the demise curve who face distinct challenges that lend themselves

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299. *Id.* at 88.

300. *Id.*

301. We are grateful to Daniel Bussel for this excellent point.

302. Lack of Congressional engagement to date with the ABI Commission's comprehensive proposals informs our skepticism. *See* AM. BANKR. INST., *supra* note 75.

303. *See generally* Oscar Couwenberg & Stephen J. Lubben, *Good Old Chapter 11 in a Pre-Insolvency World: The Growth of Global Reorganization Options*, 46 N.C. J. INT'L. L. 353 (2021); Bruce A. Markell, *Domestic Entities as Chapter 15 Debtors: A Possibility?*, 41 BANKR. L. LETTER NL 1 (2021); Casey & Macey, *supra* note 64.

to a targeted approach. But the law needs to channel selective restructuring cases into appropriately designed procedures which provide sufficient guardrails against debtor opportunism and majority oppression. Otherwise, benefits will become unbundled from appropriate checks and balances—precisely the accusation critics level at many aspects of modern Chapter 11 practice.[304]

Chapter 11 uneasily accommodates this market appetite with two potential adverse consequences: (i) that selective restructuring plans shoehorned into Chapter 11 lack sufficient guardrails; and/or (ii) that Chapter 11's "sledgehammer to crack a nut" inclusivity becomes so unattractive that debtors simply eschew filing as an early response to financial distress, raise more debt, and enter Chapter 11 too late with a greater debt burden that makes it more difficult to stabilize the business.

We end, however, with two notes of caution. First, we share the concerns of those who worry that selective restructuring is just a cloak for collusive deals between powerful creditors and equity at the expense of target creditors. Hence, our criticism of current workarounds and our emphasis throughout on the importance of guardrails. Second, we categorically do not recommend a single standard of review, or the same intensity of review, in all types of selective restructuring case. One size does not fit all. Different considerations may apply where strongly adjusting finance creditors absorb the loss than where the challenge relates to tort liabilities associated with historic business practices. Indeed, while we understand the concern that we are asking judges to do too much, one benefit of our approach in placing the judge in the center of a selective restructuring procedure with a wide discretion, gradually bounded by precedent and practice, is that different answers can be offered for qualitatively different questions. It may well be that a tort victim has a claim to what we have elsewhere[305] called, borrowing from Calabresi and Bobbit, "absolute worthiness."[306] In other words, tort claimants may have a greater moral claim to see a wider pool of creditors share in the loss than other target creditors in other types of selective restructuring cases. This issue deserves its own treatment, and we plan to devote a further article to it. For now, we merely place a marker that the quality and intensity of review need not necessarily be identical in every type of selective restructuring case.

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304. *See, e.g.,* Melissa B. Jacoby, *Shocking Business Bankruptcy Law*, 131 YALE L.J.F. 409, 411 (2021).

305. Paterson & Walters, *supra* note 34, at 464.

306. GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES: THE CONFLICTS SOCIETY CONFRONTS IN THE ALLOCATION OF TRAGICALLY SCARE RESOURCES 63 (1978).

AI SUMMARY:

Modified Universalisms & the Role of Local Legal Culture in the Making of Cross-Border Insolvency Law
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Central Thesis:
The article critically examines the effectiveness of the UNCITRAL Model Law on Cross-Border Insolvency, which embodies modified universalism, and argues that its implementation is hindered by divergent legal cultures and choice-of-law orientations across jurisdictions. While the Model Law has achieved high recognition rates, its ability to provide consistent discretionary relief is limited. The article contends that without stronger institutional frameworks and international legislative action, the goal of a universalist system in cross-border insolvency remains elusive.

Legal/Academic Issues Addressed:
- The challenges of implementing a universalist system in cross-border insolvency law.
- The role of domestic courts in interpreting and applying the UNCITRAL Model Law.
- The tension between comity and statutory provisions in U.S. and U.K. approaches to cross-border insolvency.
- The limitations of modified universalism in achieving uniformity across jurisdictions.

Methodologies/Data Sources:
- Comparative analysis of U.S. and U.K. enactments and judicial practices.
- Examination of specific court cases, including In re Condor Insurance Ltd., HIH, Rubin, and Pan Ocean.
- Critical evaluation of Westbrook's argument on universalism and the Model Law.

Findings/Analysis:
- The U.S. approach under Chapter 15 is more deferential to foreign insolvency law, while the U.K. prioritizes domestic law and requires specific statutory bases for assistance.
- The Model Law's choice-of-law neutrality leads to inconsistent interpretations and applications across jurisdictions.
- The U.K.'s restrictive approach, as seen in Rubin and Pan Ocean, underscores the challenges for universalism.
- Westbrook's proposal for an "international interpretive rule" is critiqued as overreaching, as it relies on judicial discretion rather than legislative action.

Recommendations/Implications:
- International legislative action is necessary to address inconsistencies in cross-border insolvency law.
- Legislatures, rather than courts, should define the scope of a lex concursus rule and its exceptions.
- A systematic discussion of institutional actors and their roles is essential for

implementing universalist goals in practice.

Modified Universalisms & The Role of Local Legal Culture in the Making of Cross-Border Insolvency Law

by

*Adrian Walters**

Abstract

Cross-border insolvency law scholars have devoted much attention to theoretical questions of international system design. There is a general consensus in the literature that the ideal system would be a universalist system in which cross-border insolvencies would be administered in a single forum under a single governing law, but scholars have paid less systematic attention to how a universalist system can be implemented in the real world by institutional actors, such as legislatures and judges. This article seeks to redress the balance by discussing the reception of the UNCITRAL Model Law on Cross-Border Insolvency in the United States and the United Kingdom and exploring the role that judges play in harmonizing cross-border insolvency law.

As the Model Law is choice-of-law neutral, domestic enactments typically contain no express choice-of-law rules. Universalists urge judges to take their cue from modified universalism and interpret Model Law enactments in a manner that approximates to universalism's ideal "one court, one law" approach. But comparative analysis of Anglo-American judicial practice reveals that the contours of modified universalism are contested. "Modified universalism," as it is understood in the United States, implies that judges should presumptively defer

*Ralph L. Brill Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology (U.S.) and Professor, Centre for Business and Insolvency Law, Nottingham Law School, Nottingham Trent University (U.K.). All uniform resource locators cited in footnotes were live on April 23, 2019. I thank participants in a panel on Judges and Judging at the Law and Society Association Annual Meeting held in Mexico City in June 2017 and an internal workshop held at Chicago-Kent in August 2017 for comments on early drafts. I particularly thank Cody Lipke (Chicago-Kent Class of 2018) for research assistance and the following for insightful comments and discussions: Tim Barnes, Drew Dawson, Amalie Frese, Graham Ferris, Dan Glosband, Allan Gropper, Steve Harris, Rick Mason, Irit Mevorach, Sarah Paterson, Mark Rosen, Ray Warner, Jay Westbrook, and Tally Wiener. The usual disclaimers apply. This article was supported by a generous summer grant from Chicago-Kent College of Law. I use the terms "bankruptcy" and "insolvency" interchangeably. In the U.S., "bankruptcy" cases can affect both individuals and legal entities. In other countries, such as the U.K., "bankruptcy" refers only to individuals and does not include entities, whereas "insolvency" is all embracing.

to the law of the foreign insolvency proceeding (lex concursus). American universalists tend, therefore, to favor a strong, centralizing version of modified universalism. In contrast, British modified universalism has a forum law (lex fori) choice-of-law orientation. British modified universalism supports effective coordination of insolvency proceedings with one court having a primary coordinating role, but it lacks any commitment to a centralizing lex concursus rule in the absence of statutory mandate.

Framed by reference to this account of the Model Law's Anglo-American reception, this article argues that modified universalism offers no convincing theory of how a universalist system is to be institutionalized in practice in the absence of more and harder law, the province of legislatures. Competing versions of modified universalism cannot support an interpretive methodology capable of yielding global judge-made rules of private international law that would address the Model Law's choice-of-law indeterminacy.

INTRODUCTION

Cross-border insolvencies generate obvious coordination and governance difficulties. The basic problem - the presence of assets, claims, and creditors in more than one jurisdiction - is magnified by the prevalence of complex, multinational enterprises operating through multinational corporate group structures constituted according to the laws of numerous jurisdictions, onshore and offshore. Private international law unification instruments[1] and other soft harmonization initiatives designed to nurture convergence among national insolvency laws[2] and cooperation in cross-border insolvency cases have emerged to address these difficulties.[3] A leading private international law instrument - the UNCITRAL Model Law on Cross-Border Insolvency ("the Model Law")[4] - marked its twentieth anniversary in 2017. Supporters hail the Model Law as an embodiment of "modified universalism" that pro-

[1]The two leading examples are Regulation (EU) No. 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), see 2015 O.J. (L. 141/19) [hereinafter E.U. Insolvency Regulation] (revising and recasting Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, 2000 O.J. (L. 60/1)), and U.N. Comm'n on Int'l Trade Law (UNCITRAL), Model Law on Cross-Border Insolvency (1997) with Guide to Enactment, U.N. Sales No. E.99.V.3 (1999).

[2]*See* U.N. Comm'n on Int'l Trade Law (UNCITRAL), UNCITRAL Legislative Guide on Insolvency Law, Parts 1 & 2 (2004), Part 3 (2010), Part 4 (2013), http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.

[3]*See* Ian F. Fletcher & Bob Wessels, *Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases*, AM. L. INST. & INT'L INSOLVENCY INST. (2012) [hereinafter Global Principles].

[4]U.N. Comm'n on Int'l Trade Law (UNCITRAL), Model Law on Cross-Border Insolvency (1997) with Guide to Enactment, U.N. Sales No. E.99.V.3 (1999) [hereinafter Model Law]; U.N. Comm'n on Int'l Trade Law (UNCITRAL), Model Law on Cross-Border Insolvency (1997) with Guide to Enactment (revised 2013), U.N. Sales No. E14.V.2 (2013) [hereinafter Guide to Enactment].

vides a foretaste of a fully universalist system for fair and efficient administration of cross-border insolvencies in a single forum under a single law.[5] On the theoretical plane, universalist scholars have claimed victory.[6] But despite universalism's theoretically triumphant template for a market symmetric, welfare maximizing international insolvency system, universalists have no convincing account of *how* their system can be institutionalized in practice without a comprehensive insolvency convention or global courts and centralized enforcement mechanisms.

Universalism's ambitions are grand. Yet its methods are pragmatic and realistic.[7] Universalists recognize that global conventions are hard to accomplish[8] and that a world government will not be established any time soon. They accept that the vision of "one forum, one law" can only be realized in baby steps. Methodologically, they favor slow-burning techniques - at the international level, legislative incrementalism designed to create conditions for more intensive interstate cooperation over time;[9] at the domestic level, purpose-oriented judicial interpretive practice, embracing comity and fidelity to international system building, are favored.[10] They deploy modified universalism both as a theory to undergird a transitional system sensitive to the interests of sovereign states and local stakeholders, pending the establishment of a fully universalist system, and as a normatively laden method or principle

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[5]*See* Jay L. Westbrook, "National Regulation of Multinational Default", *reprinted in* Economic Law and Justice in Times of Globalisation, at 777 (Festschrift für Carl Baudenbacher) (Nomos 2007) [hereinafter Westbrook, National Regulation] (the Model Law "tacitly adopted the approach of modified universalism."); *infra* Section I.B.

[6]*See* John A. E. Pottow, *Beyond Carve-Outs and Toward Reliance: A Normative Framework for Cross-Border Insolvency Choice of Law*, 9 BROOK. J. CORP. FIN. & COM. L. 202, 202 (2014) [hereinafter Pottow, *Beyond Carve Outs*] ("And it has been settled. The universalists, at least as a normative matter, appear to have won.").

[7]*See* Jay L. Westbrook, *Chapter 15 at Last*, 79 AM. BANK. L.J. 713, 716 (2005) [hereinafter Westbrook, *Chapter 15 at Last*] ("Universalism is now characterized as modified universalism, meaning a pragmatic approach that seeks to move steadily toward the ideal of universal proceedings while accepting the reality of step-by-step progress through cooperation.").

[8]*See* Westbrook, *National Regulation*, *supra* note 5, at 778-79 ("The ideal of universalism is of a single primary bankruptcy proceeding in the debtor's home country, with courts elsewhere acting in an ancillary or supportive role to the primary court, resulting in unitary administration of assets under one bankruptcy law. Because that result would require sophisticated international agreements, the ideal remains some distance away.").

[9]*See* John A. E, Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 VA. J. INT'L. L. 935 (2005) [hereinafter Pottow, *Procedural Incrementalism*]; On the role of incrementalism in international lawmaking generally, see Susan Block-Lieb & Terence C. Halliday, *Incrementalisms in Global Lawmaking*, 32 BROOK. J. INT'L. L. 851 (2007) [hereinafter Block-Lieb and Halliday, *Incrementalisms*] and Susan Block-Lieb & Terence C. Halliday, *Less is More in International Private Law*, 3 NOTTINGHAM. INSOLV. & BUS. L. E-J. 43 (2015), https://www4.ntu.ac.uk/nls/document_uploads/174815.pdf [hereinafter Block-Lieb & Halliday, *Less is More*]. Block-Lieb and Halliday focus on how international law is made and developed. They do not pursue an explicitly universalist agenda.

[10]*See* Model Law, *supra* note 4, at art. 8; Jay L. Westbrook, *Interpretation Internationale*, 87 TEMP. L. REV. 739 (2015) [hereinafter Westbrook, *Interpretation Internationale*].

that, applied correctly, will help bring about a fully universalist system. Modified universalism as *method* has an ideological and teleological quality - domestic courts should "cooperate to achieve a result as close to the ideal as circumstances and existing domestic law permit."[11] This approximation of the "real" to the "ideal", or the present state to the desirable end state, resembles how classical economists have historically justified government intervention in real markets using the concept of a perfect market, operating under conditions of perfect competition, as a guide to policy and practice.[12]

In their implicit commitment to global free markets, universalists naturally assume that the job of international commercial law is to create frictionless and transcendent international legal frameworks that facilitate efficient allocation of global capital by increasing predictability and reducing transaction costs *ex ante* (when credit is extended) and *ex post* (when debtors default). But as deglobalization takes hold in the post-2008 world, notably in the West, global markets and free trade are increasingly under attack.[13] And, thus, the prospects for universalism's *constitutive* agenda - the establishment of worldwide insolvency infrastructure in support of global trading and credit markets - now seem highly contingent. Indeed, in the current global economic and geopolitical context, the mismatch between the scale of universalism's theoretical ambitions and the gradualism of its practical working methods is striking.

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[11]*See* Jay L. Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2301 (2000) [hereinafter Westbrook, *Global Solution*]; *see also* Westbrook, National Regulation, *supra* note 5, at 779.

[12]I confess here my own Burkean animus against the design and benchmarking of systems by reference to abstract desiderata and my preference instead for going forward from real world premises. *See* Edmund Burke, Speech on Reform of Representation in the House of Commons (1784), http://www.econlib.org/library/LFBooks/Burke/brkSWv4c2.html ("It seems to me a preposterous way of reasoning, and a perfect confusion of ideas, to take the theories, which learned and speculative men have made from. . .government, and then, supposing it made on these theories, which were made from it, to accuse government as not corresponding with them. I do not vilify theory and speculation . . . No; whenever I speak against theory, I mean always a weak, erroneous, fallacious, unfounded or imperfect theory; and one of the ways of discovering that it is a false theory is by comparing it with practice."); *see also* Ronald H. Coase, *The Regulated Industries: A Discussion*, 54 AM. ECON. REV. 194, 195 (1964) ("Contemplation of an optimal system may suggest ways of improving the system. . .[and] it may go far to providing a solution. But in general its influence has been pernicious. It has directed. . .attention away from the main question, which is how alternative arrangements will actually work in practice.").

[13]*See, e.g.*, Nikil Saval, *Globalisation: The Rise and Fall of an Idea that Swept the World*, THE GUARDIAN (Jul. 14, 2017), https://www.theguardian.com/world/2017/jul/14/globalisation-the-rise-and-fall-of-an-idea-that-swept-the-world; *Management Theory is Becoming a Compendium of Dead Ideas*, THE ECONOMIST (Dec. 17, 2016), https://www.economist.com/business/2016/12/17/management-theory-is-becoming-a-compendium-of-dead-ideas; Simon Nixon, *Risk of Deglobalization Hangs Over World Economy*, WSJ (Oct. 5, 2016), https://www.wsj.com/articles/risk-of-deglobalization-hangs-over-world-economy-1475685469; Frank J. Garcia, *Introduction: Globalization, Power, States, and the Role of Law*, 54 B.C. L. REV. 903, 904-05 (2013) (discussing how globalization has both weakened and strengthened states).

A journey of a thousand miles begins with the first step[14] and the progress made to date in international insolvency cooperation cannot be underestimated. Meaningful and effective coordination involving courts and practitioners has led to successful multijurisdictional resolutions in large, complex cross-border insolvency cases such as Maxwell,[15]Lehman,[16] and Nortel.[17] International cooperation has proved possible notwithstanding feasibility constraints. But universalists have not convincingly demonstrated how progress will be made towards universalism other than in fits and starts. Go too fast and countries may push back. Go too incrementally and there is a risk of stasis – a system in a state of semi-permanent transition at best – akin to getting stuck part way up a hill.[18]

My starting assumption is that universalists are right that a universalist system would be the best (or least worst) system we could devise to address the social cost of problems that arise from cross-border insolvencies. My differences with leading universalists are methodological. Under the present state of affairs, modified universalism can only beget universalism through the agency of various state and non-state actors: legislatures (international and domestic), courts, practitioners, and professional bodies (through the influence they exert as non-state actors in legislative processes and as providers of continuing professional development and know-how to their members). The roles these actors play, the incentives they have, and the constraints they face, in actualizing universalism in practice in the real world, demand attention. To date, there has been little systematic discussion of institutional actors in the legal literature on international insolvency.[19] The "universalism versus territorialism" debate in the academic literature operates at a high, theoretical level of generality and focuses on "blue sky" questions about what is the normatively appropriate model or system for governing cross-border

[14]Westbrook, *Chapter 15 at Last*, *supra* note 7, at 716, n.23. The proverb (or a variant thereof) is usually attributed to Lao-Tzu, the Chinese philosopher said to have been the founder of Taoism.

[15]*In re* Maxwell Comm'n Corp., 93 F.3d 1036 (2d Cir. 1996).

[16]*In re* Lehman Brothers Holdings, Inc., 422 B.R. 407 (Bankr. S.D.N.Y. 2010).

[17]*In re* Nortel Networks, Inc., 532 B.R. 494 (Bankr. D. Del. 2015), *aff'd*, 2016 WL 2899225 (D. Del. 2016).

[18]A self-described "aggressive universalist," whose work unpacks modified universalism's incremental methodology, acknowledges this risk. *See* Pottow, *Beyond Carve-Outs*, *supra* note 6, at 209 ("The glass half full narrative is that modest reforms will tear down sovereign mistrust and participant-actors' skepticism of the evils of applying foreign insolvency law. The half empty narrative, however, is that these modest reforms will get readily enacted with self-congratulatory back-slapping but then stall without further progress when the truly difficult sovereignty concessions have to be made (e.g. selection of priority and distribution rules.")).

[19]A notable exception is the work of Terry Halliday and Susan Block-Lieb on international legislatures and standard-setting. *See, e.g.*, Block-Lieb & Halliday, *Incrementalisms*, *supra* note 9; Terrence C. Halliday, Josh Pacewicz & Susan Block-Lieb, *Who Governs? Delegations in Global Trade Lawmaking*, 7 REG. & GOVERNANCE 279 (2013); SUSAN BLOCK-LIEB & TERRENCE C. HALLIDAY, GLOBAL LAWMAKERS: INTERNATIONAL ORGANIZATIONS AND THE CRAFTING OF WORLD MARKETS (Cambridge Univ. Press 2017).

insolvencies.[20] The practitioner literature, often excellent at capturing case law developments and practice innovations,[21] serves the "street" or micro-level needs of its primary audience. What we lack is an abundance of meso-level scholarship analyzing how the international insolvency system functions, with regard to the main actors in the system, and their interactions, processes, instrumentalities, methods, and frames of reference. We cannot hope to understand fully the dynamics of the system and the possible trajectories of its evolution without more comparative accounts of how the work of coordinating cross-border insolvency cases actually gets done iteratively on the ground over time.

To mark the twentieth anniversary of the Model Law, this article reviews experiences in two leading common law countries that were early adopters of the Model Law - the United States and the United Kingdom[22] - to explore the Model Law's self-fulfilling limits as a coordinating instrument and the limits of modified universalism as a method for propelling the universalist agenda forward. I focus in particular on the frontline role domestic courts play in cross-border insolvency governance, in implementing international insolvency law, and in linking the international and domestic legal orders. While the Model Law has successfully promoted domestic recognition of foreign insolvency proceedings, results have been predictably less consistent when it acts as a guiding framework and leaves local legislatures wide discretion on the detail of implementation. This is especially so when foreign insolvency trustees - "foreign representatives" in Model Law parlance - request domestic judges to grant discretionary relief entailing the application of, or deference to, foreign insolvency law. Local Model Law enactments confront judges with a species of interlegality,[23] taking the form of an interaction

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[20]This article assumes some familiarity with the contours of this debate. The various positions are staked out in the following law review articles: Jay L. Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457 (1991) [hereinafter Westbrook, *Theory and Pragmatism*]; Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696 (1999) [hereinafter LoPucki, *Cooperation in International Bankruptcy*]; Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216 (2000) [hereinafter LoPucki, *Cooperative Territoriality*]; Westbrook, *Global Solution*, *supra* note 11; Edward J. Janger, *Universal Proceduralism*, 32 BROOK. J. INT'L. L. 819 (2007).

[21]*See, e.g.*, Peter M. Gilhuly et. al., *Bankruptcy Without Borders: A Comprehensive Guide to the First Decade of Chapter 15*, 24 AM. BANKR. INST. L. REV. 47 (2016); R. CRAIG MARTIN & CULLEN DRESCHER SPECKHART, CHAPTER 15 FOR FOREIGN DEBTORS (Am. Bankr. Inst. 2015).

[22]The selection is partly pragmatic. These are the countries with which I am most familiar and my personal standpoint is that of a transatlanticist striving to see the U.K. through U.S. eyes and vice versa. Pragmatism aside, the U.S. handles significantly more cases than any other enacting state and is by some distance the leading producer of Model Law jurisprudence, while the U.K.'s approach is representative of developments in the British common law world.

[23]WILLIAM TWINING, GLOBALISATION & LEGAL THEORY, 229-31 (Cambridge Univ. Press, 2000) (discussing BOAVENTURA DE SOUSA SANTOS, TOWARDS A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION (Cambridge Univ. Press, 2 ed. 2002)).

between the international and domestic legal orders. However, beyond aspirational statements of legislative purpose, Model Law enactments provide these "glocal"[24] judges with limited guidance in circumstances when foreign representatives request discretionary relief. With judges sometimes forced to choose between purpose-oriented international norms and domestic law, it is hardly surprising that "glocal" judging generates inconsistent outcomes that do not satisfy universalists.[25] Ultimately, judicial authority is constrained by domestic legal frameworks and cultures, which exert a gravitational force when judges encounter hard questions. Judges, as creatures of their own systems, work within leeways that are shaped by the manner of local legislative implementation and the judicial sense of how the Model Law "fits" within domestic cross-border insolvency law as a whole.

Requests for relief often implicate choice-of-law questions. But the Model Law is choice-of-law neutral and domestic enactments typically contain no express choice-of-law rules. Universalists urge judges to take their cue from modified universalism and interpret Model Law enactments in a system-oriented way with regard to universalist goals. But modified universalism is not yet a unified theory with an agreed set of characteristics. Modified universalism as it is generally understood by U.S. scholars implies that judges should defer to the law of the foreign insolvency proceeding (the *lex concursus*) whenever possible, so as to mimic universalism's preferred "one court, one law" approach. This is a strong "centralizing" version of modified universalism, associated with leading scholars, notably Jay Westbrook, that favor the closest possible approximation of judicial practice to the universalist ideal. But modified universalism, as practiced in the U.K. under the Model Law and at common law, is a weaker strain that sticks resolutely to a forum insolvency law (*lex fori*) choice-of-law orientation. British modified universalism supports effective coordination of insolvency proceedings with one court having a primary coordinating role. But it lacks any commitment to a fully centralizing *lex concursus* rule in the absence of a specific domestic statutory mandate. In this "coordinating" version of modified universalism, local courts will try, when they deem it permissible, to provide foreign representatives with direct assistance under local insolvency law without the foreign representative needing to commence a duplicative, parallel insolvency proceeding.

The article proceeds in four sections. Section I reviews the Model Law and provides general background on its adoption and operation to date. It

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[24]The origins of this term are murky but it distils the idea of "thinking globally, acting locally," *e.g.*, through the adaptation of global brands to local markets.

[25]Some commentators attribute the inconsistency to modified universalism's inbuilt concession to local interests and regard it as no bad thing. *See, e.g.*, Edward S. Adams & Jason K. Fincke, *Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism*, 15 COLUM. J. EUR. L. 43 (2009) [hereinafter Adams & Fincke, *Coordinating Cross-Border Bankruptcy*].

includes a brief account of the Model Law's connection to the universalist agenda and a synthesis of available empirical evidence suggestive of its successes and limits.

Section II frames the role of "glocal" judges as transnational, frontline actors in the international insolvency system seeking to make sense of local enactments of non-binding international law within the context of local legal systems and cultures. In so doing, it pushes back against the tendency in academic discourse to characterize international insolvency cooperation within interstate framings premised on utilitarian notions of aggregate welfare (as per the "universalism" versus "territorialism" debate) while paying no attention to the mechanics of actual decision-making that relies on judicial agency.

Section III compares the reception of the Model Law in the U.S. and the U.K. and the implications of Anglo-U.S. reception for our understanding of modified universalism as a vehicle for harmonization. In the U.S., a powerful commitment to comity reinforces Model Law goals and instantiates a relatively strong centralizing version of modified universalism. However, some U.S. courts decline deference to foreign court orders or foreign insolvency law either by prioritizing fidelity to domestic statutory text (meaning the Bankruptcy Code into which the Model Law has been incorporated) over an internationally oriented, purposive, interpretive method or by using Model Law concepts such as "sufficient protection" as a basis for resistance.

In the U.K., the Supreme Court's 2012 decision in *Rubin v. Eurofinance SA*[26] subordinates the U.K.'s Model Law enactment to other pre-existing private international law frameworks and carves out from its scope the recognition and enforcement of foreign insolvency-related judgments, such as asset recovery orders or discharges. *Rubin* and subsequent cases, including cases from the British offshore world decided by the Judicial Committee of the Privy Council, adumbrate a weaker version of modified universalism that signals a powerful commitment to two related ideas: first, in keeping with the British common law concept of ancillary winding up, that jurisdiction to assist in cross-border cases is intrinsically domestic; and, second, that courts should not cooperate in a given instance without a specifically enumerated, domestic statutory or common law basis for the requested assistance.

As modified universalism's choice-of-law orientation is contested and its strong and weak variants are self-reinforcing products of pre-existing legal-cultural divergence, it cannot serve as a uniform guiding principle for resolving the inevitable tension between the universal aspirations of international law and its local application.[27] To ask it to play such a role is to ask courts to

[26][2012] UKSC 46, [2013] 1 A.C. 236 (UK).

[27]*See* Helmut Philipp Aust, *Between Universal Aspiration and Local Aspiration and Local Application:*

resolve questions about what an appropriate choice-of-law framework should look like when such discourse is best suited to further legislative determination. Accordingly, I argue towards the end of Section III that Professor Westbrook's notion of a goals-oriented international interpretive rule[28] is at odds with the realities of the Model Law's divergent Anglo-U.S. implementation and reception.

Section IV offers some brief concluding thoughts about the respective roles of legislatures and judges in the evolution of cross-border insolvency law and in the further consolidation of the international forum-shopping system.

I. THE UNCITRAL MODEL LAW: THE FIRST TWENTY YEARS IN OVERVIEW

A. ORIGINS, OBJECTIVES, AND SCOPE

The Model Law is a procedural, private, international law instrument that was adopted by UNCITRAL on May 31, 1997.[29] The Model Law's aims are set out concisely in its preamble:

> The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border Insolvency so as to promote the objectives of:
>
> (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
>
> (b) Greater legal certainty for trade and investment;
>
> (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
>
> (d) Protection and maximization of the value of the debtor's assets: and
>
> (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Concluding Observations, The Interpretation of International Law by Domestic Courts (Helmut Phillip Aust & Georg Nolte eds., 2015).

[28] See Westbrook, *Interpretation Internationale*, *supra* note 10.

[29] U.N. Comm'n. on Int'l Trade Law, Working Group V (Insolvency Law), Report of Working Group V (Insolvency Law on the Work of Its Thirtieth Session, U.N. Doc. A/52/17 (1997); *see generally* André J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. OF INT'L. & COMP. L. 309 (1998) [hereinafter Berends, *UNCITRAL Model Law*]; Jenny Clift, *The UNCITRAL Model Law on Cross-Border Insolvency - A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency*, 12 TUL. J. INT'L. & COMP. L. 307 (2004) [hereinafter Clift, *UNCITRAL Model Law*]; Jenny Clift, *Choice of Law and the UNCITRAL Harmonization Process*, 9 BROOK. J. CORP. FIN. & COM. L. 20 (2014) [hereinafter Clift, *Choice of Law*].

Its origins can be traced back to a joint colloquium organized by UNCITRAL and INSOL International, a prominent umbrella organization of national associations of insolvency professionals, held in Vienna in 1994. Building on earlier texts developed by organizations (such as the International Bar Association), an UNCITRAL Working Group, consisting of delegates from UNCITRAL member states and observers from professional organizations, including INSOL and the International Bar Association, drafted and agreed to the text of the Model Law and the accompanying Guide to Enactment over the course of four meetings between November 1995 and January 1997 - a remarkable achievement in such a short span of time. Since 1997, the text of the Model Law has not been amended, but a revised Guide to Enactment was issued in January 2014.

The speed with which the Model Law was agreed to can be attributed to several factors. First, the Working Group's deliberations were informed by developments in Europe where, after a stop-start process over a thirty-year period, the E.U. 's member states had finally agreed on the text of a Bankruptcy Convention.[30] Second, the Working Group drew on recent initiatives by professional organizations, chiefly the International Bar Association. Third, many of the Working Group's members had been involved in these roughly contemporaneous endeavors. Fourth, the Working Group chose to draft a model law rather than a convention on the assumption that the provisions of a non-binding model law would be easier to draft and agree to than a "take-it-or-leave-it" convention.

The choice of a model law over a convention demonstrates that the approach of the Model Law's framers was pragmatic and incremental. The legislative consensus was that the Model Law should be narrow in scope and primarily procedural in orientation, in the hopes that this would make progress swifter and the risk of dissention significantly reduced. Insightful commentator and self-described universalist, John Pottow, characterizes the underlying strategy as:

> *procedural incrementalism*, a form of incrementalism that moves for gradually increasing subjugation of sovereignty on seemingly less threatening, procedural matters as a form of acclimation to the imposition of foreign law (or at least foreign court control over) domestic insolvency proceedings.[31]

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[30]*See* Berends, *UNCITRAL Model Law*, *supra* note 29, at 316-17. The Bankruptcy Convention never came into effect. However, it was resurrected in 2000 as an E.U. regulation. *See generally*, IAN F. FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW 339-58 (Oxford, 2005) [hereinafter FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW].

[31]*See* Pottow, *Beyond Carve-Outs*, *supra* note 6, at 203; *see also* Pottow, *Procedural Incrementalism*, *supra* note 9.

Thus, while a global convention was favored as the optimal solution,[32] the idea of a convention was kicked into the long grass, where it has largely remained.[33]

Comprehensive private international law instruments govern questions of venue, choice-of-law, the mutual recognition and enforcement of foreign proceedings and orders, and parallel proceedings (*lis alibi pendens*).[34] The Model Law covers much less ground. It defines the scope of a foreign proceeding.[35] It determines when foreign proceedings will be recognized in an enacting state, drawing on well-established international jurisdictional standards borrowed from the E.U.Insolvency Regulation - namely, centre of main interests ("COMI")[36] and establishment[37] - and provides for streamlined recognition[38] of foreign main proceedings in the country where the debtor has its COMI and foreign non-main proceedings in countries where the debtor has an establishment,[39] unless recognition would be "manifestly contrary to public policy" in the country in which recognition is sought.[40]

The Model Law has three other core features. First, it confers direct rights of access on the foreign representative to an enacting state's courts. This foreign representative is the party entrusted with the governance of the

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[32]Reflecting the view of prominent judges in the common law world. *See, e.g.*, Sir Peter Millett, *Cross-Border Insolvency: The Judicial Approach*, 6 INT'L. INSOLV. REV. 99, 108 (1997).

[33]*See* Clift, *The UNCITRAL Model Law*, *supra* note 29, at 308; *also* Berends, *UNCITRAL Model Law*, *supra* note 29, at 319 ("A model law is better than an unratified convention. A convention ratified by too few countries is worse than a partially enacted model law."). Unsuccessful attempts have been made in the recent past at the instigation of the International Bar Association to revisit the idea of a global convention at UNCITRAL. *See* U.N. Comm'n. on Int'l Trade Law, Working Group V (Insolvency Law), Report of Working Group V (Insolvency Law on the Work of Its *Forty-Fourth Session*, U.N. Doc. A/CN.9/78 (2013) at ¶¶ 18-19; Patrick Rona, *Goodbye UNCITRAL Model Law; Hello International Insolvency Convention*, GLOBAL TURNAROUND 11 (Apr. 2016); Jenny Clift, *UNCITRAL Model Law - Alive and Well in 43 Jurisdictions and Counting!*, GLOBAL TURNAROUND (May 2016).

[34]Examples include the E.U. Insolvency Regulation, *supra* note 1; Regulation (EC) No.593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), 2008 O.J. (L.177/6); Regulation (EU) No.1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (recast), 2012 O.J. (L. 351/1); Hague Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions.

[35]*See* Model Law, *supra* note 4, at art. 2(a) ("'Foreign proceeding' means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation."); Guide to Enactment, *supra* note 4, at paras 62-79.

[36]*See* Model Law, *supra* note 4, at arts. 2(b), 16(3), 17(2)(a); Guide to Enactment, *supra* note 4, at ¶¶ 1, 11, 18, 31, 81-84, 141-44, 145-49, 157-59, 162, 178, 236, 238.

[37]*See* Model Law, *supra* note 4, at arts. 2(c), 2(f), 16(3), 17(2)(a); Guide to Enactment, *supra* note 4, at ¶¶ 32, 72, 83, 85, 88-90 (noting the E.U. law derivation of establishment), 156, 160, 225-27, 235.

[38]*See* Model Law, *supra* note 4, at arts. 15-17; Guide to Enactment, *supra* note 4, at ¶¶ 29, 127.

[39]*See* Model Law, *supra* note 4, at art. 17(2); Guide to Enactment, *supra* note 4, at ¶¶ 31-32.

[40]*See* Model Law, *supra* note 4, at art. 6; Guide to Enactment, *supra* note 4, at ¶¶ 101-104.

foreign proceeding who has standing under the Model Law to act as the representative of the foreign proceeding,[41] including the right to apply for recognition of the foreign proceeding.[42] It also promotes direct process and participatory rights for foreign creditors rooted in a principle of non-discrimination.[43]

Second, it makes provision for the grant of relief in the enacting state to assist the foreign proceeding. Interim relief, pending recognition, is available at the discretion of the court.[44] Fundamental forms of relief (such as a stay of individual enforcement actions against the foreign debtor or the debtor's assets, and a suspension of the debtor's right to transfer or encumber assets), come into effect automatically on recognition of a foreign main proceeding.[45] Discretionary relief is also available following recognition to both foreign main and foreign non-main proceedings.[46] The court can use its discretionary power to expand the automatic relief applicable on recognition of a main proceeding or to provide relief to a foreign non-main proceeding.

Third, the Model Law provides a framework for cooperation and communication, including court-to-court communication, and for coordination of concurrent proceedings relating to the same debtor in more than one country.[47] This framework, which is not dependent on recognition, provides a legal foundation for the negotiation, use, and court approval of cross-border insolvency protocols as a mechanism for coordinating the various proceedings.[48]

As a pragmatic exercise in the art of the possible, the Model Law is otherwise neutral by design. Its framers believed that neutrality was crucial to achieving the level of buy-in needed to break down procedural barriers and

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[41]*See* Model Law, *supra* note 4, at art. 2 (d); Guide to Enactment, *supra* note 4, at ¶¶ 62-64, 86.

[42]On the foreign representative's access and standing rights see Model Law, *supra* note 4, at arts. 9-12, 15, 23-24; Guide to Enactment, *supra* note 4, at ¶¶ 25-26.

[43]*See* Model Law, *supra* note 4, at arts.13-14; Guide to Enactment, *supra* note 4, at ¶¶118-126; *also* Pottow, *Procedural Incrementalism*, *supra* note 9, at 980-82 (flagging the individual notice requirements in art. 14).

[44]*See* Model Law, *supra* note 4, at art. 19; Guide to Enactment, *supra* note 4, at ¶¶ 35-36, 170 ("Article 19 deals with 'urgently needed' relief that may be ordered at the discretion of the court and is available as of the moment of the application for recognition. . ."); *id.* at 171-75.

[45]*See* Model Law, *supra* note 4, at art. 20; Guide to Enactment, *supra* note 4, at ¶¶ 35-36, 176-188 ("While relief under articles 19 and 21 is discretionary, the effects provided by article 20 are not, for they flow automatically from recognition of the foreign main proceeding.").

[46]*See* Model Law, *supra* note 4, at art. 21; Guide to Enactment, *supra* note 4, at ¶¶ 35-36, 189-195.

[47]*See* Model Law, *supra* note 4, at arts. 25-32; Guide to Enactment, *supra* note 4, at ¶¶ 3, 40-45, 209-41. The Model Law in art. 25 (1) mandates cooperation, ("the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives. . .."), but what such cooperation entails is left open-ended in the interests of flexibility.

[48]*See* U.N. Comm'n on Int'l Trade Law, Practice Guide on Cross-Border Insolvency Cooperation, U.N. Sales No. E.10.V.6 (2010), http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf.

institute a basic international architecture that would facilitate swift access to foreign courts for purposes of asset preservation.[49] The Model Law makes no attempt at substantive unification of insolvency law. It has no uniform choice-of-law rules, and no enumerated rules on recognition and enforcement of foreign insolvency-related judgments, such as foreign discharge or claw back orders.[50] Much is therefore left to local implementation and local rules.

In this way, the Model Law contrasts with the E.U. Insolvency Regulation – a more complete procedural private international law code forming part of the E.U. 's *acquis communautaire*, the body of supranational law directly applicable in E.U. member states by virtue of the E.U. 's founding treaties.[51] This establishes a reciprocal legal framework containing uniform rules on jurisdiction, applicable law, recognition of insolvency proceedings, and recognition and enforcement of insolvency-related judgments. Importantly, the E.U. Insolvency Regulation leaves less leeway for divergent local implementation because it directly applies in Member States and its binding, supranational legal character is further reinforced by the centralized role that the Court of Justice of the European Union plays in its interpretation.

Until it is locally enacted, the Model Law has no binding force. As the uniform text can be modified locally, the Model Law trades certainty for flexibility[52] and aims at harmonization by softer, non-binding means. Article 8

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[49]*See* Berends, *UNCITRAL Model Law*, *supra* note 29, at 319 (characterizing the Model Law as a "first step"); *id.* at 321 ("The general idea behind the Model Law is that there are only three things that are important in cross-border insolvency: speed, speed, and more speed. . . . . To avoid the dissipation of assets that may result from time-consuming procedures or considerations, the Model Law also provides for a system that enables quick action.").

[50]*See* Berends, *UNCITRAL Model Law*, *supra* note 29, at 321 ("The Model Law does not modify the existing material rules concerning insolvency proceedings in the enacting State. The State effecting the opening of the proceedings does not export the effects it attaches to the insolvency proceeding; the law of the State where the foreign proceeding is recognized determines which effects are given to the proceeding."); *see also* Clift, *Choice of Law*, *supra* note 29, at 28-30.

[51]*See* Treaty on the Functioning of the European Union (Consolidated version 2016), 2016 O.J. (C. 202/01), art. 288. The E.U. Insolvency Regulation does not apply to Denmark. *See* E.U. Insolvency Regulation, *supra* note 1, recital 88. On June 23, 2016, the U.K.'s electorate voted to leave the E.U. in a referendum. At the time of writing, the U.K. had not yet completed its formal withdrawal in accordance with procedures set out in the Treaty on European Union (Consolidated version 2016), 2016 O.J. (C. 202/01). Until such time as the U.K. does formally withdraw, E.U. law, including the Insolvency Regulation, will continue to apply. Although on March 29, 2017 the U.K. government notified the European Council of its intention to withdraw, the manner of the U.K.'s withdrawal and the nature of its future political and legal relationship with the E.U. was still uncertain at the time that this article went to press. Under Article 50(3) of the Treaty on European Union, the formal date of a leaving country's departure is the date a withdrawal agreement between the E.U. and the leaving country enters into force. This allows for the possibility of transitional arrangements. However, if agreement on terms of withdrawal is not reached, Article 50 provides that the Treaties cease to apply two years after a leaving country makes a withdrawal notification, unless the European Council agrees to extend the default two-year period. In the U.K.'s case, the European Council agreed to extend the two-year period beyond March 29, 2019, the date originally set for the U.K.'s departure.

[52]*See* Guide to Enactment, *supra* note 4, at ¶ 20.

promotes harmonized interpretation of Model Law enactments,[53] thus permitting courts to consider sources beyond the domestic text, and the Guide to Enactment encourages enacting states to be as faithful as possible to the Model Law text when incorporating it into their legal systems.[54]

The Model Law also contains no default reciprocity requirements.[55] Instead, it favors unilateral commitments to recognition, relief, and cooperation as a first move towards a multilateral framework based on what Professor Westbrook describes as "critical mass reciprocity."[56] The neutrality of the Model Law - especially as regards choice-of-law[57] - is important because it leaves room for tension between divergent legal traditions and between stronger and weaker forms of modified universalism, as we will see.

B. The Model Law as an Instrument of Modified Universalism

There is a scholarly consensus that universalism, characterized as the "administration of multinational insolvencies by a leading court applying a single insolvency law," is the ideal system for managing cross-border insolvencies in a global market setting.[58] A system of "pure universalism" that combines "unity of insolvency" (a single, exclusive, and preclusive insolvency forum in which assets and claims worldwide are administered and resolved) and "universality of insolvency" (a single insolvency law having worldwide effect) has always been considered politically unfeasible.[59] The universalist ideal in a

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[53] *Id.* at ¶¶ 22, 106-107.

[54] *Id.* at ¶¶ 20-22. There is, however, no institutional mechanism for centralized interpretation, a function that the Court of Justice of the European Union performs in the E.U. context.

[55] *See* Keith D. Yamauchi, *Should Reciprocity Be a Part of the UNCITRAL Model Cross-Border Insolvency Law*, 16 Int. Insolv. Rev. 145 (2007). I pass no comment on the virtues or vices of reciprocity requirements. My point is to contrast the Model Law with the E.U. Insolvency Regulation which is supranational and multilateral in character.

[56] *See* Westbrook, *Theory and Pragmatism*, *supra* note 20, at 467 (identifying "critical mass reciprocity" as a subset of multilateral reciprocity "sufficient to convince each cooperating state that enough other states have joined in reciprocal relationships to ensure the obtaining of the benefits expected to flow from a particular sort of cooperation."); *id.* at 488 (discussing "common unilateralism" as a possible way to achieving critical mass reciprocity without the necessity for a treaty).

[57] *See* Guide to Enactment, *supra* note 4, at ¶¶ 35, 178; Clift, *UNCITRAL Model Law*, *supra* note 29, at 324 ("[T]he Model Law adopts a neutral approach, standardizing the effects of recognition. . .rather than importing the consequences of the foreign law into the insolvency system of the enacting State."); Clift, *Choice of Law*, *supra* note 29, at 28-30 (outlining how the Model Law's framers, after considering various options, including an applicable "law of the main proceeding" rule, adopted a choice of forum test that was deliberately choice-of-law neutral so that recognizing courts would not be corralled into applying foreign law).

[58] *See* Westbrook, *Global Solution*, *supra* note 11, at 2277.

[59] *Id.*; *see also* LoPucki, *Cooperation in International Bankruptcy*, *supra* note 20, at 705-706; Adams & Fincke, *Coordinating Cross-Border Bankruptcy*, *supra* note 25, at 48. On "unity" and "universality" and their binary opposites "plurality" and "territoriality" (which imply multiple domestic, territorial proceedings administered in accordance with local law), *see* Fletcher, Insolvency in Private International Law, *supra* note 30, at 11-15.

world of sovereign nation states is a system in which a single main insolvency proceeding is instituted in the debtor's "home" country - the country where the debtor has its COMI - with courts elsewhere assisting the "home" court to accomplish a unitary administration of the worldwide estate under "home" insolvency law. Thus, in the absence of a system of world government, the "ideal" is universality without unity: a dominant "home" court to which ancillary courts elsewhere will defer to facilitate centralized, collective administration of estate property and claims.[60]

Normatively, this system of dominant and ancillary courts, rooted in principles of universality and deference, would achieve virtually everything to which universalists aspire. It would replicate transnationally the welfare benefits of domestic insolvency systems by replacing a costly, duplicative, value-destructive international free-for-all with a global market-symmetrical, value maximizing, cost reducing, collective proceeding incorporating a single, efficient claims resolution process that affords similarly situated creditors equal treatment worldwide. It would pull cross-border insolvency law decisively away from territorialism - universalism's polar opposite - an uncoordinated, state-centric default "system" in which each jurisdiction "grabs" and administers locally situated assets in a local insolvency proceeding for the benefit of creditors claiming locally with no regard for what is happening elsewhere.[61]

As an intellectual paradigm, modern universalism (dating from around 1990) has two characteristics. First, it takes globalization for granted and assumes that law's job is to facilitate global markets by making them as legally convergent and frictionless as possible.[62] It posits a world in which

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[60]*See* Westbrook, *National Regulation*, *supra* note 5, at 778-79 ("The ideal of universalism is of a single primary bankruptcy proceeding in the debtor's home country, with courts elsewhere acting in an ancillary or supportive role to the primary court, resulting in unitary administration of assets under one bankruptcy law.").

[61]In truth, "pure" or "ideal" universalism and wholly unmitigated territorialism are the bookends of a complex spectrum, neither of which accords with reality. Territorialists, such as Professor LoPucki, do not support unmitigated territorialism and accept that legal convergence may ultimately create conditions for universalism. *See* LoPucki, *Cooperative Territoriality*, *supra* note 20, at 2217. But territorialists worry about the imposition of COMI insolvency law on remote stakeholders and about universalism's incursions into state sovereignty, especially its ramifications for local priority rules that implicate local policy preferences. These worries harbor a further concern that universalism will encourage pernicious forum shopping. Accordingly, territorialists prefer cooperation that accords sovereigns equal dignity over the global hegemony of COMI law. *See* LoPucki, *Cooperation in International Bankruptcy*, *supra* note 20, at 709-713, 743, 750; John J. Chung, *The New Chapter 15 of the Bankruptcy Code: A Step Towards Erosion of National Sovereignty*, 27 NW. J. INT'L. L. & BUS. 89 (2006).

[62]*See e.g.* Westbrook, *Global Solution*, *supra* note 11, at 2277 ("The force that drives us to [the] future is free-market capitalism constrained in the vessel of democratic institutions. One important element in its progress is the fashioning of an international system for managing the financial crises that are one of the free market's inevitable consequences."); *see also* Westbrook, *Global Solution*, *supra* note 11, at 2288-92 (discussing how globalization and economic integration drive legal convergence and progress towards universalism).

creditor expectations are shaped globally rather than locally and dismisses territorialist concerns about the legitimate expectations of local creditors as a throwback to old notions of vested rights.[63] In this sense, it represents a strand of thinking, akin to the Whig view of history,[64] in which the world is progressing towards the perfection of the liberal international order. Second, it is profoundly North American in orientation. In the hands of its leading modern champion, Professor Westbrook, universalism amounts to a globalized version of U.S. bankruptcy law - a single "meta" law that stays and collectivizes claims arising throughout the U.S. under the non-bankruptcy law of multiple sovereign states with a view toward liquidation or reorganization.[65]

To what extent universalism's globalizing, unifying paradigm can hold under the conditions of deglobalization prevailing in the second decade of the twenty-first century is an open question. As a theory powerfully associated with liberal internationalism,[66] it will need rethinking in an era in which the post-World War II liberal international order is withering.[67] In any event, universalists have long acknowledged that "the ideal remains some distance away."[68] For now they put their faith in modified universalism, conceived of as an interim, transitional solution - a staging post on the road to universalism - which makes concessions to sovereigntist concerns by accommodating protections for local creditors and state interests.

The modified universalism that universalists generally favor maintains the dominant/ancillary court aspect of the universalist ideal but anticipates

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[63]*See id.* at 2301, 2320-22. The universalist objection is to vested rights as understood in the unilateralist conflicts tradition associated with Currie. *See, e.g.*, William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L. L.J. 101, 110-119 (1998).

[64]*See generally* HERBERT BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY (W. W. Norton & Co. 1931).

[65]*See* Westbrook, *Global Solution*, *supra* note 11, at 2277 ("The only substantive objection is that universalism would too greatly submerge national policies, but experience in the United States and elsewhere demonstrates that a national, market-symmetrical law can largely accommodate local policies. In the same way, an international system could permit considerable play to varying national policies and could enforce them more effectively against multinationals."); *see also* Westbrook, *Global Solution*, *supra* note 11, at 2286-87 (discussing the establishment of the U.S. bankruptcy system within the U.S. constitutional order).

[66]On the connection between universalism and liberal international relations theory, see Lore Unt, *International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue*, 28 LAW & POL'Y INT'L BUS. 1040 (1997).

[67]No sooner had Francis Fukuyama proclaimed the triumphant universalization of western liberal democracy as the final form of human government in THE END OF HISTORY AND THE LAST MAN (1992), others were sounding the panic bell. *See, e.g.*, Stanley Hoffmann, *The Crisis of Liberal Internationalism*, FOREIGN POL'Y, Mar. 1, 1995, at 159. Hoffmann was prescient. *See id.* at 174 ("The formation of a global transnational economy constitutes a triumph of the liberal vision that first appeared in the eighteenth century (when philosophers saw private interests cutting across borders as potential tamers of clashing state passions), but it also provides evidence of the fact that fulfillment of the vision has mounting costs and unexpected consequences.").

[68]*See* Westbrook, *National Regulation*, *supra* note 5, at 779.

pragmatically that states may be unwilling to cede sovereignty over locally situated assets and creditors and reluctant to tolerate outcome differences that would arise were local assets and claims administered under COMI law priority rules rather than local priority rules. Under modified universalism's dominant strain,[69] the ancillary court is expected to defer to the law applicable in the main proceeding but such deference is not automatic. Ancillary courts retain the ability to evaluate the fairness of the main proceeding and to protect the interests of local creditors.[70] They may refuse to defer when home country policies are at odds with fundamental local policies: a standard public policy escape route.[71] But universalists exhort ancillary courts to ignore trivial outcome differences in pursuit of the aggregate welfare benefits of cooperation over time.[72] On this view, courts have some leeway in determining how or whether they cooperate, but the leeway should be narrow.

Supporters of the strain of modified universalism just outlined - call it American modified universalism - conceive of it as the best way to progress towards universalism in the absence of an international convention.[73] Sometimes, they frame modified universalism as a transitional means for laying foundations, through sustained cooperative engagement, for a global convention.[74] At other times, they view "modified universalism with presumptive deference to COMI law" (as I would characterize it) as a system that will replicate most of the benefits of universalism even in the absence of a convention. The assumption is that if courts are encouraged through international cooperation to "produce results as close to those that would arise from a single proceeding as local law will permit,"[75] modified universalism will create a workable proxy for universalism without the need for a convention.[76]

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[69]*See* Pottow, *Beyond Carve-Outs*, *supra* note 6, at 203 (referencing the "now-dominant paradigm of modified universalism").

[70]*See* Westbrook, *Global Solution*, *supra* note 11, at 2301.

[71]*See* Pottow, *Procedural Incrementalism*, *supra* note 9, at 952-53.

[72]The idea is that the aggregate gains to be made from cooperation will offset losses suffered by creditors from outcome differences in individual cases. *See* Westbrook, *Theory and Pragmatism*, *supra* note 20, at 464-66 (discussing the "Rough Wash" and "Transactional Gain" arguments for universalism). LoPucki objects to this less than Pareto optimal aggregate welfarism. *See Cooperative Territoriality*, *supra* note 20, at 2218 ("Westbrook's analysis ignores that it is creditors, not nations that have entitlements in bankruptcy estates. The creditor that goes unpaid because its country surrenders the assets to a foreign court for distribution according to the foreign country's laws is not consoled by the fact that some other creditor of the same nationality received a windfall from that foreign court in another case."). I demur because I doubt that judges whose focus is on the immediate case in hand, rather than on aggregate welfare across a run of cases, can effectively implement such a system absent a clear statutory mandate. *See also* Section II, *infra*.

[73]*See* Westbrook, *Global Solution*, *supra* note 20, at 2302.

[74]*Id.*

[75]*Id.*

[76]I speculate that American advocates of modified universalism know only too well that global private international law conventions, especially conventions that will command widespread (including U.S.) sup-

Commentators generally agree that the Model Law is an instrument that embodies modified universalism[77] or, at worst, an artful compromise between universalism and territorialism.[78] It embraces the concept of a dominant main proceeding presumptively entitled to administer the debtor's worldwide insolvency in the jurisdiction where the debtor has its COMI and yet, at the same time, gives courts grounds for not cooperating, or for conditioning their cooperation, having regard to local public policy or stakeholder concerns, while also permitting concurrent, plenary local proceedings.[79]

But its real significance for universalists who subscribe to "modified universalism with presumptive deference to COMI law" lies in the fact that the Model Law's system of recognition and relief is anchored by a choice-of-forum rule - the COMI principle - that can double as a choice-of-law rule. And so although, as I outlined earlier, the Model Law is choice-of-law neutral and does not insist that the recognizing court concede the application of main proceeding insolvency law, it adopts as its core the dominant/ancillary court

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port, have proved historically difficult to achieve. The Hague Conference successfully engineered a Choice of Court Convention and has subsequently revived the idea of a global Judgments Convention. *See The Judgments Project*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, https://www.hcch.net/en/projects/legislative-projects/judgments. But if past is prologue there are reasons to be pessimistic about the Judgments Project's prospects.

[77]*See* Westbrook, *Chapter 15 at Last*, *supra* note 7, at 716; Pottow, *Procedural Incrementalism*, *supra* note 9, at 963-69 (describing the Model Law as having core universalist features with territorialist caveats); Janger, *supra* note 20, at 824 ("Under a modified universalist regime, the insolvency case is governed from the debtor's. . .COMI. Assets in multiple jurisdictions are administered. . .by the local courts, but those courts defer to the main proceeding for administration of the case. This is the approach embodied in the UNCITRAL Model Law on Cross-Border Insolvency. . ."); Adams & Fincke, *Coordinating Cross-Border Bankruptcy*, *supra* note 25, at 61-63 (describing the Model Law as modified universalism with a territorialist foundation); Irit Mevorach, *On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency*, 12 EUR. BUS. ORD. L. REV. 517, 520 (2011) ("The Model Law. . .aim[s] at a 'modified universalism', promoting a regime which allows for opening more than one set of proceedings but also strives for maximum cooperation and a worldwide perspective."); Allan L. Gropper, *The Curious Disappearance of Choice of Law as an Issue in Chapter 15 Cases*, 9 BROOK. J. CORP. FIN. & COM. L. 152, 153 (2014) [hereinafter Gropper, *Curious Disappearance*] (describing U.S. enactment of the Model Law in Chapter 15 of the Bankruptcy Code as substituting "the principle of modified universalism for territorial principles that had previously prevailed."); Andrew Dawson, *The Problem of Local Methods in Cross-Border Insolvencies*, 12 BERKELEY BUS. L.J. 45, 53 (2015) [hereinafter *Local Methods*] ("The Model Law, adopted in the United States Bankruptcy Code under Chapter 15, embodies the modified universalist approach."); REINHARD BORK, PRINCIPLES OF CROSS-BORDER INSOLVENCY LAW 26-44 (2016).

[78]*See* Sefa Franken, *Cross-Border Insolvency Law: A Comparative Institutional Analysis*, 34 OX. J. LEG. STUDIES 97, 98, 116 (suggesting that the Model Law reflects a cooperative territorialist approach).

[79]*See* Clift, *Choice of Law*, *supra* note 29; *see also* Model Law, *supra* note 4, at arts. 17s(2)(a) (recognition of foreign main proceeding based on debtor's COMI), 6 (public policy exception to recognition or relief), 21(2) (ancillary court's power to entrust distribution of assets to foreign representative subject to court being satisfied that interests of local creditors are adequately protected), 22(1) (ancillary court's power to grant or deny relief under art. 19 or 21 conditioned on court being satisfied that the interests of creditors and other interested persons, including the debtor, are adequately protected), 28-29 (preserving possibility of full local concurrent proceedings subject to requirements of cooperation and coordination).

model and, in theory, permits ancillary courts to behave "universalistically," *i.e.* by choosing to defer to main proceeding insolvency law.[80] Universalists therefore regard the Model Law as incrementally advancing a universalist agenda.[81] They see leeway for courts in Model Law enacting states to approximate universalist outcomes wherever possible, and nudge modified universalism towards universalism proper. And they advocate for judges to behave accordingly.[82]

In theory, then, the Model Law is universalism's Trojan horse. Its neutrality should make it palatable for countries to adopt; repeated interactions between enacting states should acclimate courts to cooperation along universalist lines. In time, the presumed entitlement of the COMI court to control the administration of the estate and resolution of claims on a global basis should harden the COMI principle as both a choice-of-law and choice-of-forum rule, creating conditions for linear progress towards actualization of the universalist model in the real world. However, as the Model Law's neutrality presents ancillary courts with choices (deference, non-deference, or something in between) but disguises the underlying choice-of-law questions,[83] it is equally plausible that its middle-of-the-road compromise will yield an uneven distribution of inconsistent decisional outcomes. This is especially so as regards to those aspects of the Model Law that confront judges with leeways that involve (implicit) choices between international cooperation and fidelity to hard-wired domestic legal norms or pre-existing domestic conceptions of cooperation that the Model Law - or its local manner of implementation - does not displace. I develop this theme in Sections II and III.

C. Patterns of Adoption

To date, forty-six jurisdictions have enacted laws based on the Model Law.[84] Some regional patterns have emerged, notably the Model Law's

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[80]*See* Pottow, *Procedural Incrementalism*, *supra* note 9, at 970-72.

[81]*See id.* at 970; *see also* Clift, *Choice of Law*, *supra* note 29, at 33 ("While the Model adopts [a] middle path, at the same time, it is advancing the universalist agenda, recognizing the primacy of one proceeding (the main proceeding), albeit with what might be described as an incremental approach, and fostering greater acceptance of differences."). Universalists promote a similar agenda in relation to corporate groups. *See* Samuel L. Bufford, *Coordination of Insolvency Cases for International Enterprise Groups: A Proposal*, 86 Am. Bankr. L.J. 685 (2013).

[82]*See* Westbrook, *Interpretation Internationale*, *supra* note 10.

[83]*See* Gropper, *Curious Disappearance*, *supra* note 77.

[84]*See Status*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html. The jurisdictions are: Australia, Benin, Burkina Faso, Cameroon, Canada, Central African Republic, Chad, Chile, Colombia, Comoros, Côte d'Ivoire, Democratic Republic of the Congo, Dominican Republic, Equatorial Guinea, Gabon, Greece, Guinea, Guinea-Bissau, Japan, Kenya, Malawi, Mali, Mauritius, Mexico, Montenegro, New Zealand, Niger, Philippines, Poland, Republic of Korea, Romania, Senegal, Serbia, Seychelles, Singapore, Slovenia, South Africa, Togo, Uganda, United Kingdom (which has separate enactments covering Great Britain and Northern Ireland and is therefore counted as

wholesale adoption by the Francophone countries that constitute the Organization for the Harmonization of Business Law in Africa (OHADA), and its adoption at different times by the NAFTA countries (Canada, Mexico, and the U.S.), by four countries in the Asia-Pacific region (Australia, Japan, New Zealand, and Singapore), and by two countries in Central and South America (Chile and Colombia).[85] However, very few E.U. member states have enacted the Model Law.[86] Other jurisdictions, such as Israel and Thailand, are considering adoption.

Critics, impatient at the rate of progress since 1997, identify the Model Law's widespread lack of adoption among many significant UNCITRAL and OECD member states as a sign of weakness.[87] Conversely, adoption by developing countries that do not have high volumes of cross-border cases gives credence to the view that World Bank and International Monetary Fund programs are spreading the Model Law by coercive means.[88] Model Law enactments also exhibit considerable variation. Some stick closely to the Model Law text, a practice encouraged by the Guide to Enactment.[89] Others deviate in various ways reinforcing the impression that the Model Law is a non-binding procedural instrument at best.[90]

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two jurisdictions), United States, Vanuatu, and two British overseas territories, British Virgin Isles and Gibraltar.

[85]Singapore, which is seeking to position itself as the leading restructuring hub in Asia, is the most significant recent adopter. For background, see Wee Meng Seng, *Lessons for the Development of Singapore's International Insolvency Law*, 23 SING. ACAD. L.J. 932, 966 (2011); Report of the Insolvency Law Review Committee, Final Report (2013); Kannan Ramesh, Address at the International Association of Insolvency Regulators' Annual Conference and General Meeting: Cross-Border Insolvencies: A New Paradigm 19 (Sept. 6, 2016), https://www.supremecourt.gov.sg/Data/Editor/Documents/IAIR%202016%20Speech_Ramesh%20JC_delivered.pdf (confirming Singapore's commitment to adopting the Model Law).

[86]*See* Jenny Clift, *UNCITRAL Model Law -Alive and Well in 43 Jurisdictions and Counting!*, GLOBAL TURNAROUND 10 (May 2016) (suggesting that many E.U. member states apply the E.U. Insolvency Regulation's provisions externally and regard the Model Law as unnecessary).

[87]*See* S. Chandra Mohan, *Cross-Border Insolvency Problems: Is the UNCITRAL Model Law the Answer?*, 21 INT'L. INSOLV. REV. 199, 207 (2012) (identifying that ninety-one percent of UN members, eighty-two percent of UNCITRAL members, eighty-one percent of E.U. members, fifty-eight percent of the G20, and 5 members of the G8 had not adopted the Model Law). Significant states with large economies that have not formally adopted the Model Law include: Brazil, China, France, Germany, India, Italy, and Russia.

[88]On international institutional support for Model Law adoption as a best practice standard, *see id.* at 206-07; *see also* Rona, *supra* note 33 (attributing the OHADA enactments to conditions attached by the World Bank to debt restructuring aid).

[89]*See* Guide to Enactment, *supra* note 4, at ¶¶ 21-22.

[90]*See* Mohan, *supra* note 87, at 208-15 (outlining various deviations from the Model Law text in local enactments including express reciprocity requirements, wider than contemplated exclusions for banks and financial institutions, wider public policy exceptions, and access restrictions); *see also* FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW, *supra* note 30, at 486 (expressing optimism about the Model Law as a "first-base advance along the arduous path of the journey towards a really worthwhile and effective model of international regulation of cross-border insolvency" but cautioning that "[t]he fact that

D. The Model Law in Practice: Empirical Evidence

Empirical studies on the operation of Model Law enactments published so far have focused mainly on the U.S.'s Model Law enactment in chapter 15 of the Bankruptcy Code.[91] Three U.S. studies considered the whole population of chapter 15 cases up to defined cut off dates, but these studies are already somewhat historic.[92] A fourth study includes cases from eight jurisdictions but confirms the U.S.'s dominance of case volumes.[93]

With one important caveat, the studies show that the recognition process under Model Law enactments works smoothly.[94] Courts grant recognition of a foreign main proceeding in the vast majority of cases. Courts rarely invoke the public policy exception in Article 6.[95] Moreover, although the Model Law makes no specific provision for corporate groups,[96] and its recognition standards must be applied entity by entity, the evidence suggests that the Model Law is used with some success to assist foreign group proceedings

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it is open to a State to enact as much, or as little, of the Model Law as it pleases is likely to be viewed by some as an Achilles' heel of this form of international harmonization."); Kent Anderson, *Testing the Model Soft Law Approach to International Harmonisation: A Case-Study Examining the UNCITRAL Model Law on Cross-Border Insolvency*, 23 Aus. Yearbook of Int'l Law 1, 11-14 (2004) (doubting whether Japan has fully implemented the Model Law given deviations from the official text); Andrew Godwin et al., *The Inherent Power of Common Law Courts to Provide Assistance in Cross-Border Insolvencies: From Comity to Complexity*, 26 Int'l. Insolv. Rev. 5, 35 (2017) (noting Canadian deviations from the Model Law text and acknowledging the variable permutations of local Model Law enactments and interpretive practices).

[91]*See* Andrew Dawson, *Offshore Bankruptcies*, 88 Neb. L. Rev. 317 (2009); Jeremy Leong, *Is Chapter 15 Universalist or Territorialist? Evidence from United States Bankruptcy Cases*, 29 Wis. Int'l. L.J 110 (2011); Jay L. Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross-Border Insolvency*, 87 Am. Bankr. L.J. 247 (2013).

[92]Dawson's dataset includes all chapter 15 cases filed between Oct. 17, 2005 (when chapter 15 became effective) and Oct. 17, 2008. Leong's dataset includes all chapter 15 cases filed between chapter 15 coming into effect and Jun. 8, 2009 (although he counts cases that were administratively consolidated as a single case). Westbrook's dataset includes all chapter 15 cases filed between chapter 15 coming into effect and Jan. 30, 2012.

[93]*See* Mevorach, *supra* note 77. Mevorach's dataset captures case abstracts and decisions up to January 2011from a variety of databases including UNCITRAL's CLOUT database, Westlaw, LexisNexis and WordLII. 145 out of 195 cases in the dataset were US cases.

[94]*See* Leong, *supra* note 91 (recognition granted in 88 out of 94 cases); Westbrook, *supra* note 91, at 254-55 (recognition granted in around ninety-six percent of cases); Mevorach, *supra* note 77, at 533-37 (recognition granted in 186 out of 195 cases with objections raised and litigated in only a handful of cases).

[95]*See* Model Law, *supra* note 4, at art. 6; Guide to Enactment, *supra* note 4, at ¶¶101-104. Recognition can be refused if it would be "manifestly contrary" to an enacting state's public policy. The use of the qualifier "manifestly" signals that the exception should be restrictively construed.

[96]UNCITRAL has issued legislative guidance on the treatment of enterprise groups in insolvency for national legislatures and is considering amendments to the Model Law to deal specifically with the cross-border insolvency of groups. *See* UNCITRAL, Legislative Guide on Insolvency Law Part 3 (2010), http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html; U.N. Comm'n on Int'l Trade Law, Working Group V (Insolvency Law), *Facilitating the Cross-Border Insolvency of Multinational Enterprise Groups: Draft Legislative Provisions*, A/CN.9/WG.V/WP.142 (Oct. 3, 2016) (Note by the UNCITRAL Secretariat).

administratively consolidated in a single jurisdiction.[97] An unpublished study by Alix Partners, which covers the entire population of chapter 15 cases up to September 2016, confirms the impression that courts grant recognition routinely and swiftly.[98]

The caveat concerns offshore jurisdictions. Courts must recognize a foreign proceeding as a main proceeding if it was commenced where the debtor has its COMI.[99] While the debtor's registered office is presumptively the COMI,[100] the registered office presumption can be rebutted where the central administration of the debtor, as discerned by creditors, is somewhere other than the corporate domicile. To qualify for recognition as a foreign nonmain proceeding, the proceeding must have commenced in a jurisdiction where the debtor has an establishment, meaning "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services."[101] The adoption of these formal recognition standards aligned the Model Law with the E.U. Insolvency Regulation and placed the emphasis on the location of core governance functions and the administration of the debtor's operating business. This had the intended effect of disfavoring offshore domiciled "letterbox" entities that are managed onshore while maintaining only a formal connection with the offshore jurisdiction.[102] This effect was amplified in U.S. practice by the *Bear Stearns* decision,[103] which held that the court must satisfy itself that the recognition standards are met even when no party has objected to recognition. Although the tide has turned back towards offshore jurisdictions in light of more recent case law, which acknowledges that COMI can become lodged in the offshore

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[97]*See* Mevorach, *supra* note 77, at 537-43; Westbrook, *supra* note 91, at 265-68.

[98]Simon Appell, Address at the Annual Conference of the International Bar Association, Washington, D.C. (Sep. 20, 2016) (on file with author).

[99]*See* Model Law, *supra* note 4, at art. 17(2)(a).

[100]*See id.* at art. 16(3).

[101]*See id.* at arts. 2(f), 17(2)(b).

[102]*See* Dawson, *supra* note 91, at 328; *see also* Westbrook, *Chapter 15 at Last*, *supra* note 7, at 727-28; Westbrook, *Global Solution*, *supra* note 11 at 2317 ("A naked incorporation in a sun-drenched bank haven would easily fall before proof of the actual center of the business."). Westbrook was a member of the U.S. delegation to UNCITRAL during the period of the Model Law's gestation and was involved in its drafting. He was also the co-drafter of chapter 15.

[103]*In re* Bear Stearns High-Grade Structure Credit Strategies Master Fund, Ltd., 374 B.R. 122 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008); *see* Dawson, *supra* note 91, at 336-40 (finding a significant decrease in filings from haven countries after *Bear Stearns*); *see also* Westbrook, *supra* note 91, at 254-55, 262-63 (sixty-three percent of chapter 15 cases in which foreign main proceeding recognition was denied originated from tax havens). Under section 304, chapter 15's statutory predecessor, the debtor or its foreign representative could file an ancillary petition and seek relief in aid of a foreign proceeding in the U.S. without filing a full bankruptcy case. Relief was discretionary and standards-based and the court was required to exercise its discretion by reference to a series of factors, including comity. *See* Dawson, *supra* note 91, at 325-28. There were, however, no threshold jurisdictional criteria and so a domiciliary proceeding commenced in a haven jurisdiction was *prima facie* entitled to seek relief and the main issue was whether relief should be granted.

jurisdiction where an insolvency proceeding is pending,[104] the Model Law's emphasis on substantial, rather than formal jurisdictional connections, made it initially less "recognition friendly" for insolvency proceedings of offshore domiciliaries while increasing the prospect that ancillary courts in the country of the corporate domicile would recognize a foreign proceeding of their own domiciliary because its business was being conducted and administered elsewhere.[105]

The Model Law's attempts to harmonize streamlined recognition standards and to steer enacting states away from time-consuming idiosyncratic local practices, such as *exequatur* (written official recognition giving authorization by a consular officer) and letters rogatory,[106] have succeeded. And because recognition as a main proceeding carries with it automatic relief, including a stay on individual enforcement, the Model Law has also succeeded in granting foreign representatives access to a basic package of relief. This is an undoubted triumph for soft law.[107] Predictably, however, the evidence suggests that practice as regards the granting of more extensive discretionary relief is spottier.[108] Thus, the Model Law is self-fulfilling. Its structure is predictive of the patterns observed in the empirical studies.[109]

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[104]*In re* Fairfield Sentry Ltd., 714 F.3d 127 (2d. Cir. 2013), *aff'g* No. 10 Civ. 7311 (GBD), 2011 WL 4357421 (S.D.N.Y. Sept. 16 2011), aff'g 440 B.R. 60 (Bankr. S.D.N.Y. 2010); *In re* Suntech Power Holdings Co., 520 B.R. 399 (Bankr. S.D.N.Y. 2014). *Cf. In re* Millenium Global Eng'g Credit Master Fund Ltd., 458 B.R. 63 (Bankr. S.D.N.Y. 2011), *aff'd*, 474 B.R. 88, 93 (S.D.N.Y. 2012); Guide to Enactment, *supra* note 4, at ¶¶157-59; *see also* 8 COLLIER ON BANKRUPTCY ¶ 1517.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2018); Jay L. Westbrook, *Chapter 15 Comes of Age*, ANN. REV. OF INSOLVENCY L. 185-86 (Sarra ed. 2013). Courts have also accepted that debtors can switch COMIs for purposes of restructuring to offshore as well as onshore jurisdictions before the filing of the recognition petition. *See, e.g., In re* Ocean Rig UDW Inc., 570 B.R. 687 (Bankr. S.D.N.Y. 2017).

[105]*See, e.g., In re Buccaneer Energy Limited* [2014] FCA 711 (Austl.) (Australian court recognizing U.S. chapter 11 proceeding of Australian public company with Australian stock exchange listing on the basis that the center of main interests was in the U.S.); *In re* 19 Entertainment Limited [2016] EWHC 1545 (Ch) (U.K.) (English High Court recognizing U.S. chapter 11 proceeding of U.K. subsidiary of U.S. group where evidence showed its business and operations were conducted in Los Angeles).

[106]*See* Guide to Enactment, *supra* note 4, at ¶¶ 7-8.

[107]Though, as the U.S. was already accustomed to granting such relief under section 304, success should not be exaggerated. *See, e.g., In re* Ace Track Co., Ltd., 556 B.R. 887, 897 (Bankr. N.D. Illinois 2016) ("Cynically, it seems that much of the international cooperation that has taken place thereunder would have happened nonetheless under the preexisting framework developed under what was section 304 of the Bankruptcy Code.").

[108]Leong found that local assets were remitted for administration in the foreign proceeding in less than 50% of cases and that unconditional turnover of assets was ordered in only 9.1% of cases in which recognition was granted and in which there were local creditors. His findings must be treated with some caution, see Westbrook, *supra* note 91, at 260-61, but they suggest unsurprisingly that ancillary courts tend to qualify relief by reference to local considerations.

[109]A view that universalists do not dispute. *See* Westbrook, *Interpretation Internationale*, *supra* note 10, at 743. ("Given [the Model Law's] structure, one would expect to see considerable success in achieving recognition and a more mixed bag as to relief granted, which is a fair description of what has happened in the adopting countries.").

That the Model Law is an American-led enterprise is beyond doubt.[110] U.S. case volumes dwarf those in the other enacting states, as one would expect given America's outsized position in the global economy. The U.S. enacted the Model Law out of a conviction that others would follow America's lead.[111] By signaling its commitment to the Model Law, and acceptance of some constraints on U.S. jurisdiction over U.S.-based assets and claims, America sought to encourage other countries to acquiesce in the creation of a multilateral system of coordination, the benefits of which would become apparent over time. But one consequence of an implicit bargaining strategy, in which a dominant state pursues its interests by shaping the character of the international order, is that other countries may resist. The friction between forms and cultures of international insolvency cooperation in the U.S. and the U.K., discussed further below in Section III, is one source of resistance to the development of a multilateral system along American universalist lines.

II. INTERNATIONAL HARMONIZATION AND "GLOCAL" JUDGES

Where frameworks for coordination of cross-border commercial activity derive from instruments of private international law, domestic courts are in the front line of global governance.[112] Thus, it is domestic courts that allocate governance authority in cross-border insolvency cases. The decision-making matrix for courts often has a binary quality. Decisions to assume insolvency jurisdiction rather than defer to a foreign court on *forum non conveniens* grounds, or to grant rather than deny recognition to a foreign insolvency proceeding, or to apply local priority rather than foreign priority rules to the distribution of local assets, or to domesticate rather than resist enforcement of a foreign insolvency court judgment, all affect how governance authority is allocated and exercised among states.[113]

The well-rehearsed "universalism vs. territorialism" debate is concerned with what an appropriate framework for international insolvency cooperation should ideally look like. It is framed theoretically in terms of states' inter-

[110]A cursory search of Model Law case law on UNCITRAL's CLOUT system provides ample confirmation. *See Case Law on UNCITRAL Texts*, UNCITRAL (2018), http://www.uncitral.org/uncitral/en/case_law.html.

[111]*See* Westbrook, *Chapter 15 at Last*, *supra* note 7, at 726 ("The number one reason for adopting it was to demonstrate the United States commitment to the Model Law and to cooperation and universalism generally, in the hope that our example would encourage other countries to follow."). For legislative history, see National Bankruptcy Review Commission Final Report, Bankruptcy: The Next Twenty Years, 351-70 (1997); H.R. REP. NO. 190-31, at 105-119 (2005) [hereinafter House Report].

[112]*See* Ralf Michaels, *Global Problems in Domestic Courts*, *in* THE LAW OF THE FUTURE AND THE FUTURE OF THE LAW 165, 173-74 (Muller et al. eds. 2011).

[113]*See* Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67 (2009).

ests on the international plane. Stripped to its basics, it involves arguments about the benefits of states conceding some sovereignty in return for aggregate welfare gains from cooperation.[114] Thus, the literature focuses on states' incentives to cooperate and/or on how states' incentives may influence the contours of the international framework.[115]

Universalists contend that the benefits of cooperation under their model exceed any costs associated with loss of sovereignty, whereas territorialists contend the opposite. As universalism, territorialism, and the plethora of intermediate positions, modified universalism chief among them, have come to permeate legal discourse, they have become convenient frames for talking about judicial decision-making in individual cases. If a judge refuses to remit assets to a main proceeding unless and until the claims of local lien creditors are satisfied, we are tempted to describe the judicial behavior crudely as "territorialist." Conversely, if a judge remits the assets and directs local lien creditors to file their claims in the foreign proceeding, we are tempted to describe the judicial behavior as "universalist." Theorizing about model specifications at a high level of generality has given international insolvency lawyers a conceptual - perhaps even a moral - vocabulary that we now use to talk about individual cases at a "street" level of generality.

In the process, theory has metastasized. Universalism's normatively laden account of how inter-country cooperation *should* be constructed at an abstract level of generality has morphed into a meta judicial guiding principle. The modified universalist frame of American universalists enlists judges as the change agents who, by crafting approximations of universalist outcomes, will nurture the growth of a universalist system.[116] But there is a disconnect. Judges are not policymakers operating at the theoretical level of system design. In the common law tradition (my immediate frame of reference as an Anglo-American), they are decision-makers who resolve disputes by deciding the immediate case and controversy in accordance with law and their judicial oath, having due regard for precedent.[117] So, while the argument that we

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[114]*See* Westbrook, *Theory and Pragmatism*, *supra* note 20; LoPucki, *Cooperation in International Bankruptcy*, *supra* note 20; LoPucki, *Cooperative Territoriality*, *supra* note 20; Franken, *supra* note 78; Lucian A. Bebchuk, *An Economic Analysis of Transnational Bankruptcies*, 42 J. L. ECON. 775 (1999); Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177 (2000).

[115]*See* Westbrook, *Theory and Pragmatism*, *supra* note 20; Franken, *supra* note 78; Frederick Tung, *Is International Bankruptcy Possible?* 23 MICH. J. INT'L. L. (2001); *Fear of Commitment in International Bankruptcy*, 33 GEO. WASH. INT'L. L. REV. 555 (2001).

[116]*See infra* Section III.D.

[117]For a persuasive general account of how theoretical legal scholarship fails to account for the nature of legal phenomenon at what I call the "street level," see Ronald J. Allen & Ross M. Rosenberg, *Legal Phenomena, Knowledge, and Theory: A Cautionary Tale of Hedgehogs and Foxes*, 77 CHI.-KENT. L. REV. 683, 693 (2002) ("Courts at all levels. . . ignore the theorists, while citing the practitioners. The judges apparently, and not surprisingly, are looking for answers to discrete questions, not solutions grounded in grand theory.").

should not sacrifice aggregate benefits that could be gained through universalistic cooperation over time on the altar of local creditor interests is a defensible utilitarian position, judges do not operate within this type of mindset.[118] Instead, judges decide whether or not to cooperate in specific instances working within the leeways afforded them by the applicable (local) legal framework.

For us to understand the practical utility of modified universalism as a principle for guiding judicial decision-making, we therefore need to pay attention to judges and their frames of reference and go beyond the accounts of judicial agency that we have in the international insolvency law literature to date. John Pottow, writing insightfully from a universalist perspective on how a sovereign's interests in enforcing its own law will affect its incentives to commit to a universalist system, has made a fine start.[119] But ultimately (and this is not intended as a criticism), Pottow's purpose, which is primarily theoretical, differs from mine. He conceives of decisions not to cooperate as decisions of "states" without fully drilling down into judicial frames of reference. There is then, as I think universalists would acknowledge, a problem that a policy of interstate cooperation driven by state level incentives on the international plane is implemented by domestic courts in individual cases as they arise.[120]

The Model Law presents a commonplace legal transposition problem characterized by interlegality. Its origins are international but it has to be enacted by states to have any legal effect. The source of any legally binding norms is domestic law and the orders of domestic courts made thereunder. In dualist systems, even a convention - which creates interstate rights and obligations on the international plane - is not a source of directly enforceable rights and obligations within domestic law. Accordingly, insofar as the

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[118]LoPucki's critique of the twin pillars of Westbrook's universalism ("Transactional Gain" and "Rough Wash") in *Cooperative Territoriality*, *supra* note 11, at 2218 is germane: "Westbrook's analysis ignores that it is creditors, not nations that have entitlements in bankruptcy estates. The creditor that goes unpaid because its country surrenders the assets to a foreign court for distribution according to the foreign country's laws is not consoled by the fact that some other creditor of the same nationality received a windfall from that foreign court in another case." *See also* John A. E. Pottow, *Greed and Pride in International Bankruptcy: The Problems and Proposed Solutions to "Local Interests"* 104 MICH. L. REV. 1899, 1908 [hereinafter Pottow, *Greed and Pride*] (elaborating on how local creditors in countries where the ratio of assets to claims is high lose out under universalism). My positivistic-cum-realistic riff on LoPucki is that some judges in the common law tradition will find it difficult to defer to foreign law without explicit statutory command. *See infra* Section III.

[119]*See* Pottow, *Greed and Pride*, *supra* note 118.

[120]*See id.* at 1919 (making the point, albeit with particular reference to former § 304, that modified universalist regimes can face the difficulty that resolution of "policy-clash problems at the sovereign-state level" is in the hands of decision-makers tasked by law "to conduct analyses at the individual-participant level."). I would go further and say that discretionary decision-making at the individual-participant level across systems is a function, in part, of local legal culture and locally constructed leeways.

Model Law is a source of international norms, these norms only take effect through transplantation into domestic legal orders. Domestic legislatures plant international seeds in domestic soil. All of this is so well understood as to be banal. It is also a trite comparative lawyer's point that the nature of the soil will affect how (and whether) the seeds grow.[121]

When a state enacts the Model Law, the enacting state is, of course, internalizing Model Law norms. But in a framework that confers discretion on courts in individual cases, a straightforward problem of interlegality is apparent. Two normative orders have a bearing on judicial discretion: the domestic legal order, which both constitutes and constrains the domestic court and serves as its primary source of legal authority; and the normative order of international insolvency cooperation – a non-state order, albeit one based on international consensus - internalized by the domestic Model Law enactment. Interlegality demands that judges (consciously or unconsciously) navigate the interaction of these normative orders. It is conceivable that Model Law "high generality" cooperative norms (such as a preference for reorganization and value maximization) may push in one direction while the local enacted text, and the wider domestic legal order in which it is embedded, will pull in the opposite direction.

In the event of this kind of "text versus purpose" conflict – which will often present as a suppressed "should the court defer to the 'home' insolvency court/law?" comity-cum-choice-of-law question – judges operate "glocally". The local enactment may well require them to pay attention to the international (global) origin of the Model Law and its legislative purpose and permit them to go beyond the local text for purposes of interpretation (to consider, for example, the Model Law and Guide to Enactment and, via Article 8, foreign court rulings on Model Law provisions). And yet they are still anchored within their domestic system and its path dependencies.[122] The extent of the porosity between global and local – which courts will determine in applying the domestic enactment over time – will, in turn, determine how the "global" influences the "local" or vice versa. How the interaction plays out will shape the reception of international norms within domestic law.[123] Interlegality does not presuppose any particular outcome. Normative

[121]*See generally* DAVID NELKEN & JOHANNES FEEST, ADAPTING LEGAL CULTURES (Hart Pub. 2001).

[122]On the importance of historical institutionalism and path dependency in understanding the evolution of law and policy comparatively, see Iain Ramsay, *US Exceptionalism, Historical Institutionalism, and the Comparative Study of Consumer Bankruptcy Law*, 87 TEMP. L. REV. 947 (2015). *See also* Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001); John Bell, *Path Dependence and Legal Development*, 87 TUL. L. REV. 787 (2013).

[123]*See generally* William Twining, *Diffusion and Globalization Discourse*, 47 HARV. INT'L L.J. 507 (2006); William Twining, *Normative and Legal Pluralism: A Global Perspective*, 20 DUKE J. COMP. & INT'L. L. 473 (2010); *see also* TWINING, *supra* note 23; Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV.

orders can conflict or they can fuse and accommodate through contestation, coordination, and negotiation,[124] though accommodation of international norms may depend on questions of national "fit."[125]

This question of how domestic courts handle norms that originate from the international order is old hat. There is an extensive body of literature on the role of national courts in the international legal order, much of it seeking to come to terms with the impact of globalization on Westphalian "black-box" notions of national territorial sovereignty.[126] Related literature explores divergence in national interpretation of international law - international conventions in particular.[127] A large subset of this literature is concerned with the domestic reception of public international law in circumstances where international law has not formally become part of domestic law within dualist systems. Nevertheless, it reinforces the point that "glocal" judges have a multifaceted status as domesticators and shapers of international norms.[128]

L. & Social Sci. 243 (2009); Kaarlo Tuori, *Transnational Law: On Legal Hybrids and Legal Perspectivism* in Transnational Law: Rethinking European Law and Legal Thinking (Maduro et al. eds. 2014) (on plural legal orders and interlegality); Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in The Oxford Handbook of Comparative Law (Reimann & Zimmermann eds. 2006) (on how transfer and reception both diffuses and shapes norms); Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 Intl. & Comp. L. Q. 57 (2011) (on the dual nature of the role of national courts in the creation and enforcement of international law).

[124]Twining, *Diffusion and Globalization Discourse*, 47 Harv. Int'l L.J. 507, 513 (2006) ("Interlegality suggests interaction between discrete entities, but the interaction is often more like that between waves or clouds or rivulets than between hard, stable entities like rocks or billiard balls."); *see also* Paul Schiff Berman, *Global Legal Pluralism*, 80 S. Cal. L. Rev. 1158 (2007); Paul Schiff, *Federalism and International Law Through the Lens of Legal Pluralism*, 73 Mo. L. Rev. 1151 (2008); Paul Schiff, *Towards a Jurisprudence of Hybridity*, 1 Utah L.Rev. 11 (2010); Robert Wai, *The Interlegality of Transnational Private Law*, 71 L. & Contemp. Prob. 107 (2008).

[125]*See* Antoine Hol, *Highest Courts and Transnational Interaction*, 8 Utrecht L. Rev. 1 (2012) (on the tension between consistency in transnational law and internal coherence in domestic legal systems).

[126]*See, e.g.*, Neil Walker, *Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders*, 6 Int'l J. of Con. L. 373 (2008); John Linarelli, *Analytical Jurisprudence and the Concept of Commercial Law*, 114 Penn St. L. Rev. 129 (2009).

[127]*See, e.g.*, Michael F. Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Laws in Conflicts of Interpretation*, 27 Va. J. Int'l. L. 729 (1987); Michael Joachim Bonell, *International Uniform Law in Practice - Or Where the Real Trouble Begins*, 38 Am. J. Comp. L. 865 (1990); Larry A. DiMatteo, *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 Nw. J. Int'l. & Bus. 299 (2004); Paul Schiff Berman, *The Inevitable Legal Pluralism Within Universal Harmonization Regimes: The Case of the CISG*, Unif. L. Rev. (2016) (offering various accounts of the generic problem of divergent judicial interpretation of uniform law among different interpretive communities).

[128]*See* Roberts, *supra* note 123, at 59-60, 61-64 (discussing how the duality of domestic court decisions creates ambiguity about the actual and appropriate role of national courts and may lead to divergent interpretations of the content of international law due, in part, to national courts having different perceptions of their own role in the reception and application of international law); Stephane Beaulac, *Thinking Outside the "Westphalian Box": Dualism, Legal Interpretation and the Contextual Argument*, in The New International Law: An Anthology (Eriksen & Emberland eds. 2010).

Faced with the domestic-international hybridity of a Model Law enactment, what can we expect "glocal" judges to do? To arrive at an answer we need some basic understanding of their incentives[129] and how they conceive of their own role, consciously or unconsciously, as frontline actors. In regard to incentives, we might expect judges to be motivated by a mixture of institutional and personal factors: preservation of judicial independence, fidelity to the law and to their oath, judicial economy (including effective management of cases, dockets, and workload), career progression, and reputation. As regards their role in mediating between the international and domestic planes, "universalism versus territorialism" provides one possible conceptual frame but it is crude and quickly collapses into modified universalism's unspecific "they should cooperate as far as they are able."[130] Let me make the assumption that most judges will care most deeply about fidelity to the law and the avoidance of time-consuming jurisdictional conflicts, *i.e.* economy or, more crudely, docket management. If that assumption holds most of the time, courts will try to give effect to the cooperative spirit of the local enactment having regard to permissible sources (which include the Model Law, the Guide to Enactment, and, via Article 8, foreign court determinations), but they will necessarily pay close attention to the manner of implementation and how the local enactment fits in with, or alters, pre-existing local law. In short, judges may well be outward looking and inclined to cooperate in a broad sense, but their response to specific requests for discretionary relief will inevitably be conditioned by locally configured leeways.

The Model Law's combination of choice-of-law neutrality and flexibility (flexibility both in the sense that it can be customized by legislatures to fit

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[129]*See, e.g.*, LEE EPSTEIN, WILLIAM M. LANDES, & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2013); Renée Cohn Jubelirer, *The Behavior of Federal Judges: The "Careerist" In Robes*, 97 JUDICATURE 98 (2013). Of course, incentives may differ among judges in the same legal system (*e.g.* between elected and unelected judges and between life-tenured Article 3 and fixed term Article 1 federal judges in the U.S.) and among judges in different legal systems. My brief sketch of incentives in the text is biased towards the global north, which reflects my prior experience.

[130]*See, e.g.*, Jay L. Westbrook, *Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation*, 76 AM. BANKR. L.J. 1, 9 (2002) ("The universalists respond to the pragmatic argument of the territorialists with 'modified universalism.' There is no doubt that national insolvency laws differ greatly, especially as to priority in distribution, and that these differences will continue to exist for some time. Modified universalism responds to this difficulty by proposing a pragmatic development of universalism, moving toward the ultimate goal within the practical limits established by the markets and by local laws at any particular time and place. But to say this position is pragmatic is not to say it lacks principle or direction. On a national legislative level, it presses for less rigid rules for multinational debtors. Under existing laws, it adopts a worldwide perspective that seeks results as close to those achievable under a true universalism as national laws will permit in the circumstances of each case."); Westbrook, *National Regulation*, *supra* note 5 "[A]dvocates of universalism generally support modified universalism, a process in which courts within various countries cooperate to achieve a result as close to the ideal as circumstances and existing domestic law permit.").

the local system and in the sense that it contains general standards and confers judicial discretion), and its built-in concessions to local interests, make it susceptible to divergent readings within and across legal systems. These aspects are a welcome feature rather than a bug. Universalists crave bold judges who will appeal to norms of international cooperation embedded in the legislative purposes of Model Law enactments to overcome domestic roadblocks. However, even though Model Law enactments internalize international norms and gesture towards harmonized interpretation through the soft mandate of Article 8,[131] and non-prescriptive practice guidance issued by UNCITRAL,[132] many judges will struggle to give such general norms priority over highly specific domestic rules. General norms and soft mandates will not override rules that carry authoritative weight under domestic rules of recognition (in the positivist sense). On issues where the Model Law creates judicial leeway, its choice-of-law neutrality provides no concrete guide to decision. Some judges in some systems may incline towards a universalist reading of the local enactment. Other judges will worry about the lack of any clear normative hierarchy mandating them to prioritize universalist forms of cooperation, especially in systems that traditionally favor application of local bankruptcy law.[133] It is no surprise, then, that Model Law enactments, as some legal unification skeptics predicted at the outset, yield mixed results from a universalist perspective.[134]

This account of interlegality and the role of domestic courts as receivers and shapers of international norms does not resolve much. But its greater sensitivity to the task confronting judges provides a loose frame for under-

[131]The language of Article 8 directs judges to have regard to its international origin and to the need to promote uniformity. I argue in Section III.D., *infra*, that Article 8 creates a norm of engagement with foreign legal sources but one that is insufficient to displace domestic norms.

[132]*See* U.N. Comm on Int'l Trade Law Model Law on Cross-Border Insolvency: The Judicial Perspective, (Feb. 2012), http://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial_Perspective_ebook-E.pdf ; U.N. Comm'n on Int'l Trade Law, Practice Guide on Cross-Border Insolvency Cooperation, U.N. Sales No. E.10.V.6 (2010), http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf.

[133]Contrast, for example, the normative hierarchy in systems of supranational law, such as E.U. law, that are constitutionalized in ways that *require* national courts to give primacy to supranational law over conflicting domestic law. On the primacy of E.U. law over national law, see Case C-6/64, Costa v. ENEL, [1964] E.C.R. 585 (European Court of Justice). On the problems associated with incomplete hierarchies of normative authority, see Walker, *supra* note 126.

[134]*See* Paul D. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L. L. 743, 785 (1999). Stephan argues in favor of clear and precise choice-of-law rules. *Id.* at 748. Hannah L. Buxbaum, *Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory*, 36 STAN. J. INT'L. L. 23 (2000) also favors an explicit choice-of-law approach. I am skeptical about choice-of-law harmonization unless it is layered on deeper, pre-existing foundations of international cooperation and integration because of the concern that states will not buy in. Even in E.U. law, the exceptions to the *lex concursus* dwarf the rule. Because of the trade-offs involved, I also think that legislatures have comparative advantages in devising choice-of-law rule and exception frameworks or in codifying existing market trends.

standing how Model Law enactments are handled, and why practice may diverge within and across legal systems.[135] Moreover, it implies that interlegality could be resolved in manifold ways, leading to hybridity (approaches that prioritize international norms over domestic norms, approaches that prioritize domestic norms over international norms, various strains in between). The account also illustrates that international insolvency law scholarship needs to pay systematic attention to institutional factors, including local legislative implementation and judicial agency, so as to bridge the gap between its system design theories and the actualization of those theories in practice.

III. ANGLO-AMERICAN EXPERIENCE WITH MODEL LAW ENACTMENTS

The Model Law was enacted into U.S. law as chapter 15 of the Bankruptcy Code with effect from October 17, 2005.[136] The following year, the Model Law was enacted into British law by the Cross-Border Insolvency Regulations 2006 ("CBIR").[137] Ostensibly, in transposing the law, both the U.S. and U.K. stayed close to the Model Law's text in accordance with the Guide to Enactment's recommendation "that States make as few changes as possible in incorporating the Model Law into their legal systems."[138] However, this apparent shared fidelity to the Model Law text masks significant

[135]Pottow, *Greed and Pride*, *supra* note 118 argues that states have an interest in applying local law for local law's sake independent of whether this confers any quantifiable benefit on private local actors. Hence he distinguishes "greed" (a creditor preference for the highest possible payout) from "pride" (a state's vindication of regulatory sovereignty over assets it can plausibly claim to control). My conception of judging maps somewhat onto Pottow's notion of pride, although I prefer to characterize judicial incentives in terms of local legal culture and felt institutional constraint rather than parochialism. To my mind, judges can hardly be criticized for seeking to be faithful to shared understandings of local legislative intent.

[136]Bankruptcy Abuse Protection and Consumer Protection Act of 2005, Pub. L. No. 109-8 §§ 801, 1501(a) (codified as amended at 11 U.S.C. §§ 1501-1532 (2012)).

[137]SI 2006/1030. The CBIR have force in the two jurisdictions in Great Britain, *i.e.* (i) Scotland and (ii) England and Wales. The Model Law was separately enacted in virtually identical terms in the U.K.'s third constituent jurisdiction, Northern Ireland, by the Cross-Border Insolvency Regulations (Northern Ireland) 2007, SI 2007/115 (N.I.) pursuant to Northern Ireland's devolution arrangements.

[138]*See* Guide to Enactment, *supra* note 4, at ¶ 20. On U.S. fidelity to the Model Law text, see *In re Condor Insurance Ltd.*, 601 F.3d 319, 322 (5th Cir. 2010) ("Chapter 15 closely hewed to the text of the [Model Law]. . .) and Westbrook, *Chapter 15 at Last*, *supra* note 7, at 720 ("Any departures from the actual text of the Model Law in its official English version were as narrow and limited as possible. In only one or two respects were those departures meant to make any substantive change and those instances were specifically identified."). On U.K. fidelity to the Model Law text, see THE INSOLVENCY SERVICE, IMPLEMENTATION OF UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY IN GREAT BRITAIN (2005) [hereinafter UK CONSULTATION DOCUMENT] at ¶ 21 ("The Model Law is a legislative text that forms the basis of a recommendation to States for incorporation into their national law. When drafting the articles, we have tried to stay as close to the drafting in the Model Law as possible to try and ensure consistency, certainty and harmonisation with other States enacting the Model Law and to provide a guide for other States who are considering enacting the law. Our policy has been to try and enact as drafted, which may result in the use of some terms, which may not be standard in British insolvency law.").

differences in the structure, language, and normative underpinnings of U.S. and U.K. cross-border insolvency law.

The divergence between the systems has two related implications. The first is that subtle differences in local implementation and local context, amplified by "glocal" judging, will reinforce divergence. The second, which grows out of the first, is that Model Law enactments will inevitably germinate local hybrids, reinforced by local legal culture, that present challenges for universalism's harmonization agenda. This section accounts for the divergence and teases out these implications further. What emerges is that the U.S. under chapter 15 takes a unilateral approach to international cooperation that conforms broadly to what I have characterized as a strong, American, version of modified universalism, albeit with some lines of resistance that prioritize the text of local law over the text and purpose of the Model Law. The CBIR, by contrast, is one strand of a "third country" regime within a complex, multi-tiered system of U.K. cross-border insolvency law in which other elements of the system (the E.U. Insolvency Regulation and section 426 of the U.K.'s Insolvency Act) have pronounced multilateralist features. "British" modified universalism may be of the same genus as its American counterpart, but it is a different species. And judges have plausibly interpreted the CBIR to protect this species from extinction.

A. Manner of Enactment: Structural and Textual Aspects of Anglo-U.S. Reception of the Model Law

Both countries signaled that they favored a "copy out" mode of enactment and both countries' enactments acknowledge their international origins while closely tracking the Model Law's core structure and provisions. Nonetheless, there are important differences between chapter 15 and the CBIR. I focus on three in particular: (i) the different structure and contours of U.S. and U.K. cross-border insolvency law; (ii) the variable emphasis on comity in the enactments; and (iii) the different approaches to implementation of Article 23 of the Model Law, which provide a window on divergent Anglo-U.S. responses to the Model Law's choice-of-law neutrality.[139]

1. *Single portal (U.S.) versus multiple portals (U.K.)*

The U.S. incorporated the Model Law within the Bankruptcy Code and consciously created a single federal gateway to international insolvency cooperation. The Bankruptcy Code is the sole, exclusive source of, and authority for, U.S. federal judicial assistance of foreign representatives and the bank-

[139]For other discussions from a U.K. perspective of divergence in Anglo-U.S. Model Law enactments, see Gerard McCormack, *COMI and Comity in UK and US Insolvency Law*, 128 L. Q. Rev. 140 (2012) and *US Exceptionalism and UK Localism? Cross-Border Insolvency in Comparative Perspective*, 36 L. Stud. 136 (2016).

ruptcy courts act as gatekeepers to the U.S. legal system as a whole.[140] Moreover, the U.S. venue rules prescribe that a chapter 15 case will take place in a single venue.[141] Thus, the U.S. departed from its practice under section 304 by channeling access to U.S. system-wide cooperation through a single federal bankruptcy court.[142] The recognition process in chapter 15 is the key that unlocks the door. Once a foreign proceeding is recognized in chapter 15, the foreign representative has standing and authority throughout the U.S. system, including the right to commence a full bankruptcy case under chapter 7 or chapter 11.[143]

The CBIR were enacted as secondary legislation under ministerial powers created by the Insolvency Act 2000.[144] They cross-reference the Insolvency Act 1986, the U.K.'s primary domestic insolvency law, but are otherwise free standing. They also have a gateway feature - the foreign representative's access to judicial assistance throughout the British legal system is channeled through Chancery Division of the High Court in England and Wales and the Court of Session in Scotland[145] - but the CBIR are far from being the only source of cross-border insolvency law.

U.K. cross-border insolvency law has evolved in the manner of a medieval church with new parts being added at various times without any great concern for the architectural unity of the edifice as a whole. The CBIR are the most recent addition to that edifice. This source of cross-border insolvency law co-exists with the common law of judicial assistance (which includes the English doctrine of ancillary winding up), the statutory regime in section 426 of the Insolvency Act 1986, and the E.U. Insolvency Regulation. I have referred to this elsewhere as a "menu" of different options for foreign representatives.[146] But it is not an *à la carte* menu. Indeed, U.K. cross-border

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[140]*See* 11 U.S.C. §§ 1504, 1509; Gilhuly et. al., *supra* note 21, at 79-80.

[141]28 U.S.C. §§ 157(a), (b)(1), (b)(2)(P), 1410, 1412.

[142]House Report, *supra* note 111, at 110 ("Subsections (b)(2), (b)(3), and (c) [of § 1509] make it clear that chapter 15 is intended to be the exclusive door to ancillary assistance to foreign proceedings. The goal is to concentrate control of these questions in one court. . . This section concentrates the recognition and deference process in one United States court, ensures against abuse, and empowers a court that will be fully informed of the current status of all foreign proceedings involving the debtor.").

[143]11 U.S.C. §§ 1509(b), 1511, 1512, 1524, 1528. A foreign representative can get access to U.S. courts for narrow purposes without recognitions. *See* 11 U.S.C. 1509(f) (foreign representative's right to collect or recover a claim which is property of the debtor without commencing a case or obtaining recognition under chapter 15). Legislative history characterizes this as a "limited exception to the prior recognition requirement" that allows a foreign representative to collect assets, such as account receivables. *See* House Report, *supra* note 111, at 110-11; *see also In re* Lida, 377 B.R. 243, 258 (B.A.P. 9th Cir. 2007); *In re* Loy, 380 B.R. 154, 164 (Bankr. E.D. Va. 2007).

[144]Insolvency Act 2000 § 14 (c. 39) (UK).

[145]CBIR, reg. 2(1), sch. 1, art. 2. The articles in Schedule 1 of the CBIR correspond numerically to the articles in the Model Law. For ease of reference, I will hereafter cite directly to the articles, e.g. CBIR, art. 1.

[146]*See* Adrian Walters, *Giving Effect to Foreign Restructuring Plans in Anglo-US Private International*

insolvency law is better thought of as being like a building with four rooms in which access to each room depends on the identity of the country where the insolvency proceeding is taking place.

Each one of these cross-border insolvency regimes has discrete parameters of application. The E.U. Insolvency Regulation applies only when the debtor has its COMI in an E.U. member state.[147] Letters of request for assistance under section 426 can only be entertained from the courts of designated countries having jurisdiction that corresponds to U.K. courts' subject matter jurisdiction in relation to insolvency law.[148] Section 426 is a "favored nation" regime and the countries designated for special treatment all have some historic connection with the U.K.[149] Significantly, the U.S. is not designated for section 426 purposes.

While discrete, the various regimes are not mutually exclusive. A United States bankruptcy trustee[150] could seek judicial assistance at common law and/or under the CBIR. An Australian or Canadian foreign representative could have recourse to the common law, the CBIR, and/or section 426. But this lack of exclusivity begs questions about the interactions between each regime and the overall coherence of the law as a whole. It is clear that the E.U. Insolvency Regulation applies to the exclusion of the other regimes to cases falling within its scope,[151] and that the CBIR do not affect the continu-

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Law, 3 NOTTINGHAM. INSOLV. & BUS. L. E-J. 375, 390, 391 (2015) [hereinafter *Giving Effect to Foreign Restructuring Plans*]; *The UNCITRAL Model Law on Cross-Border Insolvency and the UK*, 36 COMP. L. 261 (2015).

[147]*See* E.U. Insolvency Regulation, *supra* note 1, recital (25).

[148]Insolvency Act 1986 § 426(1), (4), (10), (11) (c.45) (UK).

[149]Insolvency Act 1986 § 426(1) provides for internal cooperation among the constituent jurisdictions of the United Kingdom. Insolvency Act 1986 § 426(11)(a) designates the Channel Islands and the Isle of Man, which are Crown dependencies, as § 426 territories. The following countries or territories are designated by statutory instruments pursuant to delegated legislative powers in § 426(11)(b): Anguilla, Australia, the Bahamas, Bermuda, Botswana, British Virgin Islands, Brunei Darussalam, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Republic of Ireland, Malaysia, Montserrat, New Zealand, South Africa, Saint Helena, Turks and Caicos Islands, and Tuvalu. *See* Cooperation of Insolvency Courts (Designation of Relevant Countries and Territories) Orders of 1986 (S.I. 1986/2123), 1996 (S.I. 1996/253), and 1998 (S.I. 1998/2766). All of these countries and territories have at least one (in some cases more than one) of the following attributes: (i) formerly subject to British rule; (ii) member of the Commonwealth; or (iii) British Overseas Territory. All have legal systems that are based on English common law.

[150]Under most circumstances, the debtor-in-possession exercises the rights of a trustee. 11 U.S.C. § 1107 (a).

[151]This is the effect of the European Communities Act 1972 §§ 2(1), (4), 3(1) combined with the doctrine of E.U. law primacy developed by the Court of Justice of the European Union. *See* Case C-6/64, Costa v ENEL, 1964 E.C.R. 585 (European Court of Justice); Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 1125 (European Court of Justice); Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A, 1978 E.C.R. 629 (European Court of Justice); Regina v. Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2) [1991] 1 A.C. 603, 658G-659C, (European Court of Justice and U.K. House of Lords); *see also* CBIR, art. 3. The U.K.'s withdrawal from the E.U. will significantly affect the position. But at the time of writing the U.K. had not completed its formal withdrawal and the E.U. Regulation therefore

ing application of the common law and section 426.[152] How the approach under one regime might affect the approach under the other regimes is left to the courts.

Another way to characterize U.K. cross-border insolvency law is as a tripartite, semi-hierarchical system that has one set of rules for the E.U. , a second set of rules for section 426 countries, and a third set of rules, the CBIR and common law, for "third countries," *i.e.* non-E.U., non-426 countries. The E.U. Insolvency Regulation has express choice-of-law rules that apply to the "home" country insolvency law subject to a raft of carve-outs.[153] Moreover, it is binding supranational law underpinned by treaty and grounded in norms of mutual trust and reciprocity. Section 426(5) of the Insolvency Act empowers the U.K. court to apply the insolvency law applicable by either the U.K. court or the requesting court in relation to comparable matters falling within its jurisdiction.[154] Section 426 is also a reciprocity-based regime with what amounts to a system accreditation feature. The countries designated by statutory instrument are countries that the U.K.'s executive branch has determined will afford the same favorable treatment to requests for assistance from U.K. courts as U.K. courts afford to courts in designated countries. It is no coincidence that section 426 countries are all from the British common law world. The historic relationships between the legal systems of the U.K. and the section 426 countries provide the basic foundation for a reciprocal approach. Section 426 may appear unilateral insofar as it mandates the U.K. court to assist a court of corresponding jurisdiction in a designated country. But the statutory mandate is underpinned by a system of accreditation in which the executive and legislative branches predetermine which countries qualify for assistance based on a guarantee of reciprocal treatment.

In the U.K., then, the CBIR and the common law together constitute a body of cross-border insolvency law that applies to requests for assistance

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continued to apply. *See supra* note 51. In the long run, it is far from certain whether the U.K. and E.U. will be able to agree to a closely aligned post-Brexit relationship which might then lead to treaty arrangements for handling cross-border insolvency based on mutual recognition that would be comparable to the E.U. Regulation. If such arrangements are not forthcoming, the treatment in the U.K. of cases from E.U. countries would presumably be determined under the CBIR. It is difficult to assess how Brexit will affect existing patterns of convergence and divergence given current uncertainties about the shape and trajectory of the U.K. and E.U. 's future relationship.

[152]CBIR, art. 7 (not precluding court from providing assistance under other laws of Great Britain); UK CONSULTATION DOCUMENT, *supra* note 138, ¶¶ 40-43.

[153]*See* E.U. Insolvency Regulation, *supra* note 1, at arts. 7-18, 35. The opening of secondary proceedings based on an establishment also triggers an exception to the main proceeding choice-of-law rule as regards assets situated within the territorial scope of the secondary proceedings. *Id.* at arts. 7, 34-35.

[154]Insolvency Act 1986 § 426(5) (c. 45) (UK). The willingness of the U.K. bench and bar to use the § 426 jurisdiction creatively is illustrated by cases such as *In re Tambrook Jersey Ltd*, [2013] EWCA Civ 576, [2014] Ch 252.

originating from non-E.U., non-426 "third countries." The CBIR upgraded but did not fully codify this "third country" regime. The common law therefore continues to apply and the courts are left to determine how the CBIR and common law should interact.[155] Moreover, the CBIR, like America's chapter 15, are unilateral in character. Thus, under the CBIR a U.K. court is bound to recognize a foreign main proceeding if it meets the eligibility criteria for recognition regardless of whether the foreign court would recognize a U.K. proceeding, subject only to the public policy exception. This matters because it means that the CBIR differ normatively from the two other legislative regimes. In contrast, the E.U. and section 426 regimes are underpinned by strong reciprocity norms generated through pre-existing, inter-country legal and structural relationships of various kinds.

2. *Textual commitment to comity (U.S.) versus textual silence on comity (U.K.)*

The U.S. version of the Model Law in chapter 15 expresses a clear statutory commitment to comity, whereas the CBIR, consistent with the text of the Model Law, make no mention of comity. Take, for example, the manner in which the two countries have enacted Article 9 of the Model Law. The CBIR tracks the single sentence of Article 9 verbatim: "A foreign representative is entitled to apply directly to a court in Great Britain." However, section 1509 of the Bankruptcy Code creates a system of access that, subject to recognition, confers broad entitlements on the foreign representative including in section 1509(b)(3) an express entitlement to "comity or cooperation." The U.S.'s idiosyncratic enactment of Article 7 in section 1507 also requires courts, among other things, to act "consistent with principles of comity" in granting additional assistance to foreign representatives. Legislative history and subsequent chapter 15 jurisprudence indicate that, subject to the requirement of recognition, the U.S. sought to preserve established forms of relief that courts had granted under section 304 guided by principles of comity.[156]

The difference is subtle. It does not mean that the U.K. pays no attention

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[155]For example, Parliament did not address the relationship between the "third country" cross-border insolvency regimes and the statutory and common law rules on recognition and enforcement of judgments in ordinary civil litigation when it enacted the CBIR. *See infra* discussion of *Rubin* in Section III.C.2.b.

[156]*See* House Report, *supra* note 111, at 109, 116; *In re* Atlas Shipping A/S, 404 B.R. 726, 738-739 (Bankr. S.D.N.Y. 2009) ("[M]any of the principles underlying section 304 remain in effect under chapter 15. Significantly, chapter 15 specifically contemplates that the court should be guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief. This is evidenced by the pervasiveness with which comity appears in chapter 15's provisions. . . . In short, while chapter 15 replaced section 304 and provided a more structured framework for recognizing foreign proceedings, Congress specifically granted courts discretion to fashion appropriate post-recognition relief, consistent with principles underlying section 304."); *In re* Condor Ins. Ltd., 601 F.3d 319, 328 (5th Cir. 2010) ("Congress intended that case law under section 304 apply unless contradicted by Chapter 15."); Gilhuly et al., *supra* note 21, at 53-56.

to comity, a well-established common law doctrine.[157] But in the U.K.'s statutory edifice, which as outlined above also includes two reciprocity-based legislative regimes, there is no reference to comity, whereas it is carried over from prior U.S. law and embedded in the U.S.'s chapter 15. There is no question that U.K. courts could make use of the doctrine to flesh out Model Law principles of cooperation.[158] However, as much ground is now occupied by statutory schemes of one sort or another, comity in the U.K. is a residuum. The variance in emphasis on comity in the U.K. and U.S. Model Law enactments therefore matters. In the U.S. scheme, it is an anchor principle that animates a single body of cross-border insolvency law.[159] In the U.K. scheme, it is a common law footnote[160] to a complex body of mainly statutory law, much of which rests on deep foundations of international cooperation based on treaties or other reciprocal ties.

3. *The great divide: Articles 23, 21, and divergent responses to choice-of-law neutrality*

The U.S. enactment of Article 23 is exceptional and the difference between the U.S. approach and that of other countries, including the U.K., is symptomatic of a wider structural divergence between U.S. and U.K. conceptions of modified universalism and of the role of a local ancillary insolvency proceeding. Article 23 provides that, on recognition of a foreign proceeding, the foreign representative has standing to initiate avoidance actions available under local law to a person or body administering a reorganization or liquidation proceeding. UNCITRAL had in mind the suite of avoidance powers that insolvency laws commonly grant to trustees to enable them to set aside

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[157]*See* Lawrence Collins, *Comity in Modern Private International Law*, REFORM AND DEV. OF PRIVATE INT'L. L. 89 (J.J. Fawcett ed. 2002); Adrian Briggs, *The Principle of Comity in Private International Law*, 354 RECUEIL DES COURS 65 (2012).

[158]Indeed, UNCITRAL hoped that the principles of cooperation in Articles 25-27 of the Model Law would provide a statutory foundation upon which comity could operate more concretely in cross-border insolvencies in countries where the doctrine is used as a legal basis for international cooperation. *See* Guide to Enactment, *supra* note 4, at ¶ 214.

[159]*See* Martin & Speckhart, CHAPTER 15 FOR FOREIGN DEBTORS, *supra* note 21, at 140-41 (on the pervasiveness of comity in chapter 15); *see also In re* Vitro S.A.B. de C.V., 701 F.3d 1031, 1043 (5th Cir. 2012) ("[c]entral to Chapter 15 is comity. . ."); *id.* at 1044 ("[w]ithin the context of Chapter 15. . .[comity] is raised to a principal objective"); *id.* at 1045, 1047, 1053 (comity described as a "central tenet" of chapter 15; reference also to chapter 15's "heavy emphasis on comity"); *In re* Atlas Shipping A/S, 404 B.R. 726, 738 (Bankr. S.D.N.Y. 2009) ("[o]nce a case is recognized as a foreign proceeding, chapter 15 specifically contemplates that the court will exercise its discretion consistent with principles of comity"). Comity is acknowledged to be a foundational principle of American private international law. *See* Joel R. Paul, *The Transformation of International Comity*, 71 L. & CONTEMP. PROB. 19 (2008); Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11 (2010); William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 1 (2015).

[160]On English dismissiveness of comity as an independent basis for judicial decision in the realm of private international law, see Collins, *supra* note 157, at 91-94 and Briggs, *supra* note 157, at 80-81.

pre-insolvency transactions that are detrimental to creditors, such as unfair preferences or fraudulent transfers.

The CBIR enacted Article 23 as written and added modifications dealing primarily with applicable claw back periods to ensure that Article 23 actions mesh properly with the U.K. Insolvency Act avoiding powers regime. Thus, the CBIR track the Model Law in permitting the foreign representative to pursue statutory avoidance actions that under local law can usually only be pursued by a local officeholder in a local insolvency proceeding.[161]

In stark contrast, the U.S. version of Article 23, in section 1523 of the Code, confers standing on the foreign representative of a recognized foreign proceeding to initiate avoidance actions but only in a full bankruptcy case under chapter 7 or 11. Accordingly, section 1521(a)(7) precludes the court from granting relief under the main Code avoiding powers as discretionary relief. Thus, a foreign representative must seek recognition under chapter 15 and then commence an involuntary bankruptcy case under chapter 7 or 11 of the Bankruptcy Code pursuant to section 303(b)(4) to make use of U.S. avoiding powers. This approach was born of concerns raised by the U.S. delegation to UNCITRAL that the Model Law's limited grant of standing left complex questions of appropriate forum and choice-of-law entirely at large[162] and reflects the strongly held U.S. view that avoiding powers are so integral a part of an insolvency law's distributional scheme that avoidance and distributional rules should derive from the same system of law.[163]

At first blush, the difference appears slight. All Article 23 does is confer procedural standing on the foreign representative. It is choice-of-law neutral and, therefore, neutral as to the foreign representative's substantive rights.[164] Article 23 of the CBIR would not preclude a U.K. court from denying a foreign representative relief under English avoiding powers on English choice-of-law grounds. But if we scratch the surface, the difference over Article 23 points to a more fundamental difference in the choice-of-law orientation of U.S. and U.K. cross-border insolvency law in practice.

The Model Law was drafted on the basis of an agreed principle that recognition should have its own effects and should not directly import the consequences of foreign law into the local insolvency system.[165] Choice-of-law neutrality is fundamental to the design - a feature not a bug. It implements a legislative compromise that perpetuates the divergent viewpoints on

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[161]*See* Guide to Enactment, *supra* note 4, at ¶¶ 201, 203.

[162]House Report, *supra* note 111, at 116.

[163]*In re* Condor Ins. Ltd., 601 F.3d 319, 323-327 (5th Cir. 2010); Jay L. Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L. L. 499 (1991).

[164]Guide to Enactment, *supra* note 4, at ¶ 201; *In re* Condor Ins. Ltd., 601 F.3d 319, 323-324, 326-327 (5th Cir. 2010).

[165]Guide to Enactment, *supra* note 4, at ¶¶ 35, 178.

choice-of-law that made the compromise necessary in the first place. The leeway the Model Law affords countries to prevent infiltration of foreign law from legal systems in which they may not have full confidence is one of its major selling points.[166] The possibility of determining the effects of recognition by reference to foreign law, local law or, akin to section 426(5) of the U.K. Insolvency Act, in accordance with either foreign or local law, was canvassed at UNCITRAL but rejected.[167] UNCITRAL decided instead to include a short list of autonomous effects in Article 20, designed to provide immediate protection for locally situated assets, which would be triggered automatically by recognition of a foreign main proceeding, while giving courts leeway in Article 21 to grant additional discretionary relief.[168] Taken as a package of relief measures, Articles 20, 21, and 23 thus contain no express choice-of-law rules.

Leeways inevitably permit a range of possible decisional outcomes. One effect of choice-of-law neutrality is that it suppresses choice-of-law analysis even when the question before the court has choice-of-law implications.[169] Another effect is that it leaves judges to construe the local enactment by reference to their sense of the local legal framework as a whole. Courts *could* choose to apply the law of the foreign proceeding as a default choice-of-law rule.[170] But it does not necessarily follow that they will. Faced with choice-of-law neutrality, "glocal" judges could equally well look to local law, including local private international law, and local legal tradition for clues. And, in the U.K.'s complex body of cross-border insolvency law, there are mixed choice-of-law messages that make narrow readings of parliamentary intent entirely plausible.

As outlined above in Section III.A.1, the E.U. and section 426 regimes contain express choice-of-law rules that either mandate application of foreign law, subject to carve-outs, or permit reference to foreign law. Significantly, however, the tradition in the English common law is for assistance to the foreign representative to be provided either through the mechanism of an ancillary winding up[171] or otherwise by reference to the domestic law that

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[166]*See* Zoltán Fábok, *International Insolvency Law in the New Hungarian PIL Code-A Window of Opportunity to Enact the UNCITRAL Model Law on Cross-Border Insolvency?*, UNCITRAL 5.4 (2017), http://www.uncitral.org/pdf/english/congress/Papers_for_Congress/119-FABOK International_Insolvency_Law_in_the_New_Hungarian_PIL_Code_.pdf

[167]*See* Clift, *Choice of Law*, *supra* note 29, at 28-30.

[168]*Id.*

[169]*See* Gropper, *Curious Disappearance*, *supra* note 77.

[170]*See id.* at 160-64, 178-79.

[171]*See* Phillip St. J. Smart, *International Insolvency: Ancillary Winding Up and the Foreign Corporation*, 39 INT'L & COMP. L.Q. 827 (1990); Andrew Godwin et al., *The Inherent Power of Common Law Courts to Provide Assistance in Cross-Border Insolvencies: From Comity to Complexity*, 26 INT'L. INSOLV. REV. 5, 12-13 (2017).

would apply were a local insolvency proceeding to be commenced.[172] One structural question in U.K. law therefore is how far the Model Law alters the pre-existing common law position. The CBIR's enactment of Article 23 suggests that one plausible answer is "not much." The U.K.'s Article 23 cleaves to the tradition that the U.K. courts provide assistance to a foreign representative under domestic law through an ancillary English insolvency proceeding while relaxing the requirement for the foreign representative to commence a full U.K. parallel proceeding to gain access to U.K. avoiding powers. That tradition is further exemplified by the language of Article 21(1)(g) of the CBIR which, read together with the opening sentence of Article 21, states that "the court may. . .grant any appropriate relief, including. . .granting any additional relief that may be available to a British insolvency officeholder under the law of Great Britain. . .." Thus, in the British common law world, the question of whether, and to what extent, a local court will grant relief to a foreign representative by reference to foreign law is far from settled.[173]

B. Normative continuities and discontinuities in the Anglo-U.S. reception of the Model Law: a summary

The structural differences in the U.S. and U.K. enactments reflect subtle normative differences. The U.S. has a single federal body of cross-border insolvency law in chapter 15, animated by comity. There is normative continuity with former section 304, including some willingness among judges to grant relief to foreign representatives by reference to foreign law and thus some inclination to resolve the Model Law's choice-of-law neutrality in favor of foreign law that is in keeping with a strong version of modified universalism.[174] Comity is channeled through the statute and subjected to various

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[172]*See* Fletcher, Insolvency in Private International Law, *supra* note 30, at 185-88. ("The powerful grip of the *lex fori* upon the main structure of the insolvency process is seemingly unshakeable.).

[173]Even in *Cambridge Gas Transport Corp v. The Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 A.C. 508, [22], the high watermark of judicial support for universalism in the U.K., Lord Hoffmann doubted whether common law assistance, as distinct from assistance under §426, "could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system." *See* Justice Steven Rares, *Consistency and Conflict - Cross-Border Insolvency*, Presented at Annual Conference of Banking & Financial Services Law Association, Brisbane (2015) at ¶ 3 ("However, the legal basis on, and extent to, which the Court of the forum will depart from its local law in co-operating with the law of an insolvent's domicile or centre of main interests is not settled. . .") (Justice Rares is a judge in the Federal Court of Australia); *see also* Picard v. Primeo, Cayman Islands Court of Appeal, April 16, 2014 (court finding statutory authority to apply Cayman transaction avoidance provisions but not foreign avoidance provisions).

[174]Though, as Allan Gropper points out, chapter 15 does constrain the U.S. court's authority to enforce the *lex concursus* by the requirements in §§1521(b) and 1522(a) that the court be satisfied that parties in interest are sufficiently protected and by the enumerated factors conditioning a grant of additional assistance in §1507. *See* Gropper, *Curious Disappearance*, *supra* note 77, at 163-76; *also* Clift, *Choice of Law*, *supra* note 29, at 26-31 (characterizing the COMI test as a choice of forum rule that

statutory constraints – the threshold requirements for recognition in sections 1515-1517, the public policy exception in section 1506, and the concept of sufficient protection in sections 1521-1522.[175] In embracing the Model Law, the U.S. has signaled that it will act unilaterally in the hope that other countries will follow suit and so engender a multilateral approach to international insolvency cooperation by means other than a convention.

In contrast, U.K. cross-border insolvency law lacks a unitary approach. The U.K. currently has four cross-border insolvency regimes, two of which (the E.U. Insolvency Regulation and section 426) are grounded in pre-existing legal orderings[176] that have strong normative foundations of mutual recognition and reciprocity. The remaining two – the CBIR and the common law – comprise the law applicable to requests for judicial assistance emanating from foreign representatives in "third countries." The orientation of the CBIR – as reflected in the U.K.'s enactment of Article 23 and Article 21(1)(g) – is outward looking and yet rooted in the tradition of the common law ancillary winding up in which U.K. courts will grant assistance insofar as it would be available in an English insolvency proceeding under English law. Thus, the inclination of the U.K.'s third country regime is to resolve the Model Law's choice-of-law neutrality by defaulting to English law and mimicking the effects of a local parallel ancillary insolvency proceeding. Moreover, the structure of U.K. cross-border insolvency law as a whole inclines courts towards textual analysis rather than policy or system-oriented readings of the CBIR.

C. "GLOCAL" JUDGES AND THE MODEL LAW

1. *"Glocal" judging in the U.S.*

The prevalence of comity in U.S. foreign relations law[177] and cross-border insolvency law, and the continuity between former section 304 and chapter 15, inclines the U.S. towards an unarticulated but functional universalist choice-of-law rule. This is evident in the tendency of U.S. courts to give effect to foreign moratoria[178] and discharge injunctions[179] and to permit ac-

encourages a degree of deference to the foreign law of the main insolvency proceeding "qualified by the public policy exception of article 6, the requirement to consider whether the interests of local creditors are adequately protected under article 21(2), and by the provisions of articles 28 and 29 that preserve the pre-eminence of local proceedings over any foreign proceeding . . . .").

[175]Gropper, *Curious Disappearance*, *supra* note 77.

[176]Rubin v. Eurofinance SA; New Cap Insurance Corp. Ltd v. Grant [2012] UKSC 46, [2013] 1 A.C. 236, [25] (*per* Lord Collins: "Consequently, there are four main methods under English law for assisting insolvency proceedings in other jurisdictions, two of which are part of regionally or internationally agreed schemes.").

[177]*See* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 1 (2015).

[178]*See In re* Sanjel (USA) Inc., No. 16-50778-CAG, 2016 WL 4427075 (Bankr. W.D. Tex. July 29, 2016) (recognition order giving effect to stay in Canadian foreign proceedings pursuant to 11 U.S.C. § 1521(a)(1)).

tions in the U.S. under foreign avoiding powers[180] subject only to the public policy exception in section 1506 and other conditioning provisions in chapter 15. It is also evident in section 1521(a)(7)'s bar on foreign representatives having access to U.S. avoiding powers. An implicit assumption is that the law of the foreign proceeding should provide the starting point in the absence of express contrary stipulation. So while section 1520 defines the automatic effects of recognition by reference to U.S. law, U.S. courts have extended the scope of the automatic stay by giving U.S. effect to the foreign law stay in the exercise of their discretion under section 1521(a)(1).[181] Relatedly, in *In re Condor Insurance Ltd.*, the Fifth Circuit inferred from the purpose, structure, and international origins of chapter 15 that, by denying foreign representatives standing to sue under U.S. avoiding powers in sections 1521(a)(7) and section 1523, Congress did not intend to prevent U.S. courts from applying the avoidance law of the foreign proceeding.[182] Thus, the court's authority in section 1521(a) to grant "any appropriate relief" was sufficiently wide to permit a foreign representative from Saint Kitts and Nevis to pursue an avoidance action in the U.S. under Nevis law.

U.S. courts have also routinely given effect in the U.S. to the foreign law effects of foreign reorganization plans, thus binding parties subject to U.S. jurisdiction without any need for confirmation of a parallel chapter 11 plan.[183] In so doing, U.S. courts have endorsed features of foreign plans, such as non-party releases, that would likely be unacceptable in domestic chapter 11 reorganization proceedings.[184] Foreign plans emanating from sister common law jurisdictions, notably Canada and the U.K., have received particularly favorable treatment. These include plans that modify or discharge New

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[179]*See, e.g., In re* Avanti Commc'n. Grp. PLC., 582 B.R. 603, 605 (Bankr. S.D.N.Y. 2018) ("Recognition and enforcement of schemes of arrangement sanctioned by UK courts has become commonplace in chapter 15 cases. . .."); *In re* Energy Coal S.P.A., 582 B.R. 619 (Bankr. D. Del. 2018) (injunction in support of restructuring plan following recognition of Italian *concordato preventivo*); *see also* Walters, *Giving Effect to Foreign Restructuring Plans*, *supra* note 146 (noting at 390 n.72 continuity in U.S. practice traceable back to the Supreme Court decision in *Canada Southern Railway Co. v. Gebhard*, 109 U.S. 527 (1883)).

[180]*See In re* Atlas Shipping A/S, 404 B.R. 726, 744 (Bankr. S.D.N.Y. 2009); *In re* Condor Ins. Ltd., 601 F.3d 319 (5th Cir. 2010); *In re* Hellas Telecomm. (Luxembourg) II SCA, 535 B.R. 543 (Bankr. S.D.N.Y. 2015).

[181]*See, e.g., In re* Sanjel (USA) Inc., 2016 WL 4427075 (Bankr. W.D. Tex. 2016); *In re* Daebo Int't. Shipping Co., Ltd., 543 B.R. 47 (Bankr. S.D.N.Y. 2015); Collins v. Oilsands Quest Inc., 484 B.R. 593 (S.D.N.Y. 2012).

[182]601 F.3d 319, 324-328 (5th Cir. 2010). This willingness to apply foreign law appears to reflect practice under the prior law in 11 U.S.C. § 304. *See, e.g., In re* Bd. of Dir. of Multicanal, S.A. 314 B.R. 486 (Bankr. S.D.N.Y. 2004) (recognizing and enforcing Argentine restructuring plan and dismissing involuntary chapter 11 case).

[183]*See* Walters, *Giving Effect to Foreign Restructuring Plans*, *supra* note 146.

[184]*See In re* Metcalfe & Mansfield Alt. Inv., 421 B.R. 685 (Bankr. S.D.N.Y. 2010); *In re* Sino-Forest Corp., 501 B.R. 655, (Bankr. S.D.N.Y. 2013); *In re* Avanti Commc'ns. Grp. PLC, 582 B.R. 603, 605 (Bankr. S.D.N.Y. 2018).

York law governed obligations.[185] Viewed from the other side of the Atlantic, U.S. practice in all these instances exemplifies American exceptionalism.[186] No other Model Law country, apart perhaps from Canada,[187] has taken such a comity-driven, proto-universalist approach.

U.S. courts do not unhesitatingly apply foreign insolvency law in chapter 15 cases. Indeed, it is important to point out that chapter 15 petitions are frequently uncontested and so result in what might be described as functionally universalist applications of the Model Law. But even in contested cases, when U.S. courts have declined to apply foreign law, they have used tempering concepts within the statute itself - such as the requirement that the court may grant discretionary relief only if the interests of creditors and other entities are sufficiently protected - to frame their decision. This is evident from the decisions in two well-known and controversial cases, *Qimonda*[188] and *Vitro*.[189]

In *Jaffe v. Samsung*[190] (referred to herein as *Qimonda*, the name of the underlying debtor), the Fourth Circuit prevented a German foreign representative from unilaterally terminating the debtor's licenses of its U.S. patents, a course open to him under German insolvency law. Holding that the sufficient protection standard in section 1522(a) required a balancing of the competing substantive interests of the debtor (in maximizing the value of its patent portfolio) and U.S. patent licensees (in protecting investments made in reliance on cross-license agreements that would have been protected in a domestic bankruptcy case by section 365(n) of the Bankruptcy Code), the court concluded that the adverse implications for the licensees outweighed the benefit of the requested relief to the debtor.

In *Vitro*, the Fifth Circuit declined to give effect to a Mexican *concurso* plan in the peculiar circumstances of that case, concluding that section 1507(b)(4) precluded the granting of such relief because the treatment of noteholder claims in the plan was drastically inferior to the treatment they

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[185]Under current U.K. law, a U.S. plan purporting to discharge English law governed obligations, by contrast, would not be given effect in the U.K. A parallel proceeding and U.K. plan would be necessary to achieve the objective of a binding discharge in both countries. *See* Walters, *Giving Effect to Foreign Restructuring Plans*, *supra* note 146. The U.K. is not alone. This is the position in some Asian jurisdictions. *See* Min Han, *Recognition of Insolvency Effects of a Foreign Insolvency Proceeding: Focusing on the Effect of Discharge*, *in* 19 TRADE DEVELOPMENT THROUGH HARMONIZATION OF COMMERCIAL LAW 345 (2015); *see also* Muruga P. Ramaswamy & Joao Ribero, *Deliberations on Trade Development through Harmonization of International Commercial Law*, *in* 19 TRADE DEVELOPMENT THROUGH HARMONIZATION OF COMMERCIAL LAW 345 (2015).

[186]Gerard McCormack, *US Exceptionalism and UK Localism? Cross-Border Insolvency in Comparative Perspective*, 36 L. STUD. 136, 152-154, 160 (2016).

[187]*See* Westbrook, *Interpretation Internationale*, *supra* note 10, at 745.

[188]Jaffé v. Samsung Elecs. Co. Ltd., 737 F.3d 14 (4th Cir. 2013).

[189]*In re* Vitro S.A.B. de CV, 701 F.3d 1031 (5th Cir. 2012).

[190]737 F.3d 14 (4th Cir. 2013).

would have received under a comparable chapter 11 plan. *Vitro* is best regarded as an exceptional case that turns on its own peculiar facts.[191] The court's statements of general principle do nothing to detract from the view, expressed above, that U.S. courts routinely give U.S. effect to foreign plans — even when the relief requested by the foreign representative is not identical to (or is more generous than) the relief available in a comparable domestic bankruptcy proceeding.[192] And although the foreign representative lost in both cases, *Qimonda* and *Vitro* do not significantly deviate from the prevailing American view that comity is the animating norm of chapter 15 and that limitations on comity must be drawn from within the statute.[193]

As chapter 15 is an addition to the pre-existing Bankruptcy Code, instances have arisen when the text of the Code is in tension with the Model Law's stated goals. In these instances that involve apparent conflicts of text and purpose, some judges have adopted textualist readings that evidence a more skeptical tendency in U.S. judicial practice as regards reception of the Model Law[194] - especially among appeals courts that are one or more steps removed from the frontline bankruptcy courts and more generalist than specialist in terms of their expertise.

In *In re Barnet*,[195] the Second Circuit ruled that section 109 of the Bankruptcy Code - which determines whether a *debtor* is eligible to file a case under the various chapters of the Code - also applies to cases filed under chapter 15. Section 109(a) provides that "only a person that resides or has a domicile, a place of business, or property in the United States may be a debtor under this title." Adopting a plain meaning approach to statutory in-

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[191]Acceptance of the Mexican plan depended on the votes of Vitro non-debtor subsidiaries that held intercompany debt. As a result of an earlier restructuring, the subsidiaries had been transformed from intercompany debtors into intercompany creditors. The circumstances of the earlier restructuring were opaque to say the least. The plan eliminated guarantees from non-debtor insiders whose votes were critical to plan acceptance. *See id.* at 1038-42, 1052-53.

[192]*Id.* at 1043-45, 1053-54 ("Central to Chapter 15 is comity . . . [w]ithin the context of Chapter 15 . . . [comity] is raised to a principal objective . . . In considering whether to grant relief, it is not necessary that the result achieved in the foreign bankruptcy proceeding be identical to that which would be had in the United States. It is sufficient if the result is 'comparable' . . . Given Chapter 15's heavy emphasis on comity, it is not necessary. . .that the relief requested . . . be identical to, or available under, United States law . . . .")

[193]*See id.* at 1054 ("Nevertheless, Chapter 15 does impose certain requirements and considerations that act as a brake or limitation on comity, and preclude granting the relief requested. . ."). The *Qimonda* decision is less emphatic about comity but acknowledges the statutory reference to it in § 1509, as well as the tempering mechanisms built into the statutory framework. Jaffé v. Samsung Elec. Co., Ltd., 737 F.3d 14, 24 (4th Cir. 2013). Of the two decisions, U.S. commentators tend to regard *Qimonda* as the one that is least easy to justify. *See, e.g.* Gropper, *Curious Disappearance*, *supra* note 77, at 172-75; G. Ray Warner, *Cross-Border Cooperation in the United States: A Retreat or Merely a Pause?*, 3 NOTTINGHAM. INSOLV. & BUS. L. E-J. (2015); Dawson, *Local Methods*, *supra* note 77, at 69-72.

[194]*See generally* Dawson, *Local Methods*, *supra* note 77.

[195]737 F.3d 238 (2d Cir. 2013).

terpretation, the Second Circuit reasoned that chapter 1 of the Bankruptcy Code, which includes section 109(a), applies to chapter 15, and that "foreign proceedings" involve the "assets and affairs of a debtor." Accordingly, the court concluded that a foreign proceeding can only be recognized under chapter 15 if the debtor in that proceeding is also eligible to be a debtor under the Code as a whole - by meeting the section 109(a) debtor eligibility requirements. Fortunately, section 109(a) is a low bar to debtor eligibility for domestic bankruptcy proceedings.[196] The mere presence of debtor property in the United States will usually suffice. Thus, it is straightforward for forum-shopping foreign debtors to engineer a full chapter 11 filing. In many chapter 15 cases, the additional requirement of debtor eligibility will easily be met because the purpose of the application for recognition will be to deal with the debtor's U.S. assets. But in *Barnet*, the debtor had no assets in the United States - or none that the Australian foreign representatives knew of. Their purpose in filing the chapter 15 case was to seek discovery against various entities relating to a lawsuit the foreign representatives had commenced in Australia. U.S. courts can grant such relief "upon recognition" in their discretion under section 1521(a)(4).[197]

Critics of *Barnet* fairly point out that section 109 is concerned with *debtor* eligibility whereas the sole actor for the purposes of a chapter 15 case is the *foreign representative*. The Delaware Bankruptcy Court has declined to follow the Second Circuit on precisely this basis, setting up a potential circuit split.[198] However, prudent practitioners in other circuits have to factor the risk that *Barnet* may be followed in preparing chapter 15 filings. Thus, the resolution of a "text versus purpose" conflict in favor of text in *Barnet* has added a gloss to the Model Law's recognition framework that requires foreign representatives to demonstrate and, if necessary, engineer compliance with domestic rules.[199]

In similar vein, some courts have read the automatic application upon

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[196]*See* Adrian Walters, *United States' Bankruptcy Jurisdiction Over Foreign Entities: Exorbitant or Congruent*, 17 J. CORP.L. STUD. 367 (2017), http://dx.doi.org/10.1080/14735970.2017.129984.

[197]*In re* Barnet, 737 F.3d 238, 246 (2d Cir. 2013).

[198]*In re* Bemarmara Consulting a.s., Case No. 13-13037 (KG) (Bankr. D. Del. Dec. 17, 2013). A District Court in the Ninth Circuit sided with the Second Circuit. *In re* Forge Grp. Power Pty Ltd., Case No. 17-2405 (N.D. Cal., Feb. 12, 2018). However, a bankruptcy court in the Eleventh Circuit declined to follow *Barnet* and its decision survived an appeal to the District Court. Batista v. Mendes, Case No. 17-24308 (S.D. Fla, April 2, 2018).

[199]For discussion and criticism, see Letter from National Bankruptcy Conference to Congress (Jan. 27, 2016) available at http://nbconf.org/wp-content/uploads/2015/07/NBC-Ltr-to-Cong-re-Ch-15-Amendments2.pdf (asking Congress to disapply §109 in chapter 15 cases). *See also* Daniel Glosband & Jay L. Westbrook, *Chapter 15 Recognition in the United States: Is a Debtor "Presence" Required?*, 24 INT. INSOLV. REV. 28 (2015); Dawson, *Local Methods*, *supra* note 77, at 72-74; Adrian Walters, Comment, *Recognition of Foreign Insolvency Proceedings in the United States: the Lingering Barnet Problem*, 38 COMPANY LAW. 201 (2017).

recognition of section 363 to transfers of debtor property within U.S. territorial jurisdiction[200] as requiring them to conduct a full sales approval process under U.S. law rather than granting comity to a prior approval order of the foreign court.[201] Commentators have detected in these and other instances a tendency to privilege local interpretive methodologies over more flexible interpretive methodologies that may better reflect the Model Law's international origins and purpose.[202] Be that as it may, U.S. chapter 15 jurisprudence, as a whole, reveals considerable commitment to a strong version of modified universalism that is presumptively deferential to foreign law.

2. *"Glocal" judging in the U.K.*

Outward looking judges *could* conceivably fashion the exercise of discretionary powers under the CBIR along American modified universalist lines, taking cues from experience under the E.U. Insolvency Regulation, section 426, and the specific adjustments that the CBIR makes to the common law. But that is not what has happened in practice.

It is beyond question that the CBIR explicitly depart from the common law in important ways. They establish rules of recognition based on COMI and establishment that align "third country" cross-border insolvency law with E.U. law and move away from the common law's insistence that the country of incorporation is the proper venue for winding up proceedings. One consequence is that U.K. courts will recognize foreign insolvency proceedings relating to U.K.-incorporated debtors without the necessity for a parallel U.K. proceeding.[203] The CBIR also abrogate the rule in *Government of India v. Taylor*[204] (which bars recovery of foreign tax claims in U.K. insolvency proceedings) and trigger automatic consequences in English law that affect procedural rights under contracts governed by English law.[205]

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[200]11 U.S.C. § 1520 (a)(2).

[201]*In re* Elpida Memory, Inc., No. 12-10947 (CSS), 2012 WL 6090194 (Bankr. D. Del. Nov. 20, 2012) ("The result here under a plain meaning analysis is straightforward. Section 1520(a) unequivocally states that 'sections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States *to the same extent that the sections would apply to property of an estate.*" (emphasis added)). The emphasized language clearly provides that section 363 and, by implication, its standards are applicable to the transfer of assets located in the United States by a foreign debtor in a foreign main proceeding outside the ordinary course of business."). *In re* Fairfield Sentry Ltd., 768 F.3d 239, 246 (2d Cir. 2014) ("The language of section 1520(a)(2) is plain; the bankruptcy court is *required* to conduct a section 363 review when the debtor seeks a transfer of an interest in property within the territorial jurisdiction of the United States. . . . The language of the statute makes it plain that the bankruptcy court was required to conduct a section 363 review. Deference to the BVI Court was not required.").

[202]Dawson, *Local Methods*, *supra* note 77. Dawson astutely points out that courts that defect from the Model Law's language and purpose are not necessarily motivated by territorialist instincts to protect local interests. Sometimes local law (or, for Dawson, local interpretive method) overrides.

[203]*In re* 19 Entertainment Limited [2016] EWHC 1545 (Ch).

[204][1955] A.C. 491. *See* CBIR, art. 13(3).

[205]Samsun Logix Corporation v. DEF [2009] EWHC 576 (Ch), [2009] B.P.I.R. 1502.

But these departures - and proclaimed judicial allegiance to modified universalism - have not led judges to give effect to foreign insolvency law when exercising their discretionary powers.[206] Instead, judges have used modified universalism as rhetorical cover to rationalize the grant of judicial assistance to foreign representatives under, and subject to the limits of, U.K. law. The utility of this approach should not be underestimated. It permits the court to assist foreign representatives to the extent it would ordinarily assist an English liquidator or administrator without the need for a parallel English insolvency proceeding, even in circumstances where the debtor would not strictly be eligible to commence a parallel local proceeding. However, it is a weaker version of modified universalism that does not match the loftier ambitions of universalists because it falls well short of a single, all-encompassing global insolvency proceeding under one law.[207] Three examples from the case law will suffice to illustrate how the complex, fragmented structure of U.K. cross-border insolvency law has contributed to a cautious approach to the exercise of judicial discretion under the CBIR, reinforcing existing fault lines between U.K. and U.S. practice.

a) HIH

Re HIH Casualty and General Insurance Ltd[208] was decided before the CBIR came into force. Nevertheless, it is important because it illustrates the prevailing restrictive U.K. judicial mindset notwithstanding Lord Hoffmann's creative attempt to develop an expansive common law principle of modified universalism. *HIH* concerned an Australian insurance and reinsurance group

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[206]This is illustrated by *Pan Ocean* discussed in the text *infra* at III.C.2.c. But *Pan Ocean* is not an outlier. Consistent with the Guide to Enactment, *supra* note 4, at ¶ 21(b), U.K. courts craft relief to foreign representatives under discretionary powers in CBIR, art. 21 by reference to the relief available in a comparable U.K. proceeding. *See In re* Atlas Bulk Shipping A/S [2011] EWHC 878 (Ch), [2012] Bus. L.R. 1124 (treating the relief available to the foreign representative under art. 21 as including that which would be available to a U.K. officeholder in respect of a U.K. insolvency proceedings commenced on the date of commencement of the foreign proceeding); *In re* 19 Entertainment Limited [2016] EWHC 1545 (Ch), [11]-[12] ("[T]he effect of the Model Law is to give to the English court the possibility of enabling the position of a company which is in Chapter 11. . .in the United States, to be put on a similar footing in England. . .the scheme laid down by [the CBIR] is not to import American law into England, but rather to enable proceedings to be conducted in relation to insolvency matters in England on a footing comparable to the footing under which the matter would be dealt with. . .in the United States."). Thus, it is standard practice for U.K. courts to use their powers in CBIR, art. 21 to extend the automatic stay provided for in CBIR, art. 20 so as to make the stay in the U.K. equivalent in scope to the moratorium that takes effect in a U.K. administration proceeding: *Id.* at [20]-[22]. *See also In re* Peak Hotels & Resorts Ltd. [2017] EWHC 1511 (Ch) (liquidators of BVI debtor entitled in principle to relief under U.K. statutory lien avoidance powers).

[207]So much so that universalists can justifiably claim that U.K. judges are mischaracterizing universalism. I concede that "modified territorialism" could well be a more appropriate characterization. But this does not detract from my basic point that what U.K. judges call "modified universalism" is not understood in quite the same way in the U.K. as it is understood in much of American legal discourse.

[208][2008] 1 WLR 852 (UKHL).

that was in liquidation in its country of incorporation. HIH group companies were also in parallel provisional liquidation proceedings in England and Wales. At the instigation of the Australian liquidators, the Australian court asked the English court to direct the provisional liquidators to remit assets gathered in the English proceeding for distribution in the Australian liquidation. The issue in *HIH* arose because of a conflict of priority rules. If reinsurance recoveries in the U.K. were distributed according to Australian rules, insurance creditors would get a priority they would not enjoy were the English provisional liquidators to distribute the assets in accordance with English law. Creditors who would be better off under English law would be worse off under Australian law and *vice versa*. The case raised a fundamental question - when acting in ancillary fashion in aid of a foreign main insolvency proceeding, does the English court have the power to ignore English statutory distributional rules and, if so, on what basis?

In a speech rightly hailed by universalists as a landmark, Lord Hoffmann opined that the English court had inherent jurisdiction at *common law* to direct the provisional liquidators to remit assets and, having regard to "the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century," that "English courts should, so far as is consistent with justice and U.K. public policy co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."[209] But, while the House of Lords as a whole agreed with Lord Hoffmann in the result and directed remittal of the English assets to Australia for distribution under Australian priority rules, only one other judge supported his reasoning. Two judges held that the legal basis for remittal lay in section 426 of the Insolvency Act rather than the common law, and a third expressed no view on the common law position. The *HIH* decision, then, rests ultimately on a statutory, not a common law, footing: the English court could, in its discretion, safely remit the assets for distribution in a designated country otherwise than in accordance with the English statutory scheme precisely because the statutory scheme (via section 426) so authorized.[210]

HIH illustrates a tendency among U.K. judges to seek a specific statutory basis in English law for the relief sought by a foreign representative or court and a corresponding unwillingness (contrary to Lord Hoffmann's inclination) to fashion a broad unenumerated discretionary common law power of judicial

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[209] *Id.* at [30].

[210] *Id.* at [59], [61]-[62] (Lord Scott), [66], [75]-[77], [82] (Lord Neuberger); Andrew Godwin et al., *The Inherent Power of Common Law Courts to Provide Assistance in Cross-Border Insolvencies: From Comity to Complexity*, 26 INT'L. INSOLV. REV. 5, 19-20 (2017).

assistance animated by modified universalism.[211] Article 21 of the CBIR provides a statutory basis for the English court to turn over assets to a foreign main or non-main proceeding[212] and so it is conceivable that English practice in response to requests for remission of assets from foreign representatives in section 426 countries and third countries will become unified. But Lord Hoffmann's attempt to modernize the common law notwithstanding, the overall message of *HIH* is that well-developed statutory forms of judicial assistance tend to curb the scope for expansive common law development.

b) Rubin

In *Rubin v. Eurofinance SA; New Cap Insurance Corp. Ltd. v. Grant*[213] a 4-1 majority of the U.K. Supreme Court[214] declined to recognize and enforce default money judgments entered by a U.S. insolvency court in proceedings brought in a chapter 11 case under statutory insolvency avoiding powers against defendants who were not present in the United States and had not

[211]In the absence of a statutory basis for relief, U.K. judges have also been loathe to develop the common law of judicial assistance expansively, preferring instead to fashion specific common law powers incrementally by analogy with existing powers. *See, e.g.*, Singularis Holdings Limited v. PricewaterhouseCoopers [2014] UKPC 36, [2015] A.C. 1675. This, I believe, is significant. The Judicial Committee of the Privy Council (which decided *Singularis*) remains the ultimate arbiter of cases from many of the British offshore jurisdictions. Cross-border insolvency law in these jurisdictions is underdeveloped and rests heavily on the common law. *See* Ian Kawaley, *"Relashiol": Liberating the Common Law on Judicial Cooperation from its State of Arrested Development - The British Atlantic and Caribbean World*, 3 NOTTINGHAM. INSOLV. & BUS. L. E-J. 167, https://www4.ntu.ac.uk/nls/document_uploads/174824.pdf; Andrew Godwin et al., *The Inherent Power of Common Law Courts to Provide Assistance in Cross-Border Insolvencies: From Comity to Complexity*, 26 INT'L. INSOLV. REV. 5, 13-14 (2017). My working hypothesis is that U.K. courts would prefer to see these jurisdictions develop statutory frameworks rather than create an expansive offshore common law that would be at odds with the residual status of the common law in the U.K. There is a prevailing unease about the co-existence of an expansive common law that implicates a generous measure of judicial discretion alongside statutory bases of relief even among some creatively inclined offshore judges. *See, e.g., In re* Saad Investments [2013] SC (Bda) (Bermuda) *per* Kawaley CJ at [6] ("This is an area of law that in recent times has often been dominated by commercial pragmatism combined with an almost deification of the goal of promoting cross-border co-operation in insolvency cases with an international element, unwittingly no doubt, at the expense of the development of a set of coherent principles."); *In re* China Agrotech Holdings Limited, FSD 157 of 2017 (NSJ) *per* Segal J at [26(b)] ("I would, for myself, note that there appears to be an unhelpful tendency in the writings of some commentators to mischaracterise the status and effect of this guiding and flexible principle [of modified universalism] by elevating it into a rigid rule of law that independently generates rights and remedies and is to be treated, and applied, as if it were a doctrine in metaphysics or theology."); *see also* Lord Neuberger, Keynote Speech at the International Insolvency Institute Annual Conference: The Supreme Court, the Privy Council and International Insolvency (June 19, 2017), https://www.supremecourt.uk/docs/speech-170619.pdf [hereinafter Neuberger, Keynote Speech] (providing insights into the mindset of senior U.K. judges consistent with my analysis here).

[212]*See, e.g. In re* SwissAir Schweizerische Luftverkehr-Aktiengesellschaft [2009] EWHC 2099 (Ch), [2010] B.C.C. 667 (though in this case a distribution under either Swiss or English law would have produced the same outcome for creditors).

[213][2012] UKSC 46, [2013] 1 A.C. 236.

[214]The Supreme Court was established pursuant to the Constitutional Reform Act 2005 (c. 4) and replaced the Appellate Committee of the House of Lords as the UK's highest court in 2009.

submitted to the U.S. insolvency court's jurisdiction. *Rubin* was a turf war about the scope of U.K. cross-border insolvency law as a whole. The *Rubin* court's holding stakes out the boundaries of the English law of judicial assistance in international insolvencies (cross-border insolvency law) and resists its encroachment on the common law private international law rules relating to recognition and enforcement of judgments. *Rubin*'s main implication is that, absent specific statutory provision, there is no independent basis in cross-border insolvency law for enforcing judgments entered during the course of foreign insolvency proceedings. By "judgments entered during the course of foreign insolvency proceedings," I do not mean judgments or orders that *commence* an insolvency proceeding. The actual insolvency proceeding is squarely within the province of cross-border insolvency law. Instead, I mean what international insolvency lawyers now describe as "insolvency-related judgments", *i.e.* additional judgments and orders made within the insolvency case - proceedings within insolvency proceedings. Two examples of insolvency-related judgments are: judgments avoiding antecedent transactions on grounds such as fraudulent transfer law (the subject matter of *Rubin*); and orders confirming a reorganization plan that is binding on all creditors, whether they voted in favor of it or not.

The *Rubin* court ruled that insolvency-related judgments were no different from other civil judgments and therefore could be recognized only under the ordinary English rules for recognition and enforcement of judgments.[215] The court rejected the argument that the English court should treat insolvency-related judgments as a special category and give effect to them under Lord Hoffmann's theory of modified universalism.[216] Writing for the majority, Lord Collins opined that it would be an act of judicial legislation for the courts to create a separate, more liberal regime for recognition and enforcement of insolvency-related judgments within cross-border insolvency law.[217] He observed, in passing, that universalism, characterized as the administration of multinational insolvencies by a lead court applying a single insolvency law, was "a trend, but only a trend."[218]

Furthermore, the court found no statutory basis in the CBIR or in section 426 for recognition and enforcement of insolvency-related judgments. The court's general discretion to grant relief available to a British insolvency office-holder under U.K. law and to cooperate with foreign courts and repre-

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[215]*Id.* at [106]-[132].

[216]An argument that was open to the foreign representative based on the Privy Council's decision in *Cambridge Gas Transport Corp v. The Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 A.C. 508.

[217][2012] UKSC 46, [2013] 1 A.C. 236, [129].

[218]*Id.* at [16].

sentatives[219] was not a source of implied authority for the recognition and enforcement of insolvency-related judgments.[220] Similarly, general powers of assistance in section 426 could not impliedly cover the ground occupied by long-established common law and statutory rules applicable to recognition and enforcement of ordinary civil judgments.[221]

Rubin amplifies the structural differences between U.S. and U.K. cross-border insolvency law and provides a silent commentary on the lack of any judgments convention between the U.K. and the U.S. E.U. law, for the time being still applicable in the U.K., has specific supranational rules on recognition and enforcement of judgments in civil and commercial matters[222] and makes specific provision in the E.U. Insolvency Regulation for recognition and enforcement throughout the E.U. of insolvency-related judgments.[223] The absence of enumerated powers for the recognition of insolvency-related judgments in the U.K.'s cross-border insolvency framework for non-E.U. countries was therefore fatal to the foreign representative's attempt to have the U.S. judgment recognized under cross-border insolvency law.[224] *Rubin* consolidates the trend observable in *HIH* that U.K. courts are reluctant to grant assistance unless there is a specific U.K. law basis for the particular relief the foreign representative seeks. It also underscores the U.K. courts' disinclination to fashion specific relief using broadly couched statutory powers of assistance and cooperation.[225]

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[219]CBIR, arts. 21, 25, 27. The British enactment substitutes "may" for "shall" in art. 25(1). Cooperation with foreign courts or foreign representatives thereunder is therefore a matter of discretion rather than obligation. Moreover, the British enactment provides that cooperation could be achieved through a British insolvency officeholder and so contemplates the possibility of a complementary parallel proceeding.

[220][2012] UKSC 46, [2013] 1 A.C. 236, [133]-[144].

[221]*Id.* at [145]-[155]. Section 426 did not apply in *Rubin* because the U.S. is not a designated country. However, its scope was relevant to an appeal by an Australian liquidator in the *New Cap Insurance* case on an identical question, which was conjoined with the appeal in *Rubin*.

[222]Regulation (EU) No.1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (recast), 2012 O.J. (L. 351/1). The U.K. also has reciprocal regimes for the recognition and enforcement of judgments with several jurisdictions with which it has historical or constitutional relationships. These are embodied in the Administration of Justice Act 1920 (10 & 11 Geo.5 c.81) and the Foreign Judgments (Reciprocal Enforcement) Act 1933 (23 & 24 Geo.5 c.13).

[223]E.U. Insolvency Regulation, *supra* note 1, at art. 32.

[224][2012] UKSC 46, [2013] 1 A.C. 236, [24], [142]-[143]. Under the applicable common law rules of personal jurisdiction, the U.S. court lacked jurisdiction to enter judgments against parties who were not present and had not submitted to U.S. jurisdiction at that time. *Id.* at [6]-[10]. This has led courts to broaden what qualifies as "submission" to the foreign jurisdiction under these rules. *Id.*, [156]-[167]. *See* Stichting Shell Pensioenfonds v. Krys (PC) [2014] UKPC 41, [2015] A.C. 2016; Erste Group Bank AG, London Branch v. JSC 'VMZ Red October' & Ors. [2015] EWCA Civ 379, [2015] 1 C.L.C. 706; Vizcaya Partners Ltd v. Picard (PC) [2016] UKPC 5, [2016] Bus. L.R. 413. For the argument that the U.K. should simply grant comity to the U.S.'s broader rules of personal jurisdiction where due process has been followed in accordance with U.S. constitutional standards, see Jodie Kirshner, *The (False) Conflict Between Due Process Rights and Universalism in Cross-Border Insolvency*, 72 CAMB. L.J. 27, 30-31 (2013).

[225]Other Model Law countries are encountering similar uncertainties on the fault line between cross-

One consequence of *Rubin* is an Anglo-U.S. fault line in the treatment of foreign reorganization plans and foreign discharges of debt. U.S. courts have commonly recognized and given effect in the U.S. to foreign plans and discharges in the form of relief and/or additional assistance under chapter 15.[226] Under the *Rubin* holding, U.K. courts can only give effect to foreign plans and discharges in non-E.U. insolvency proceedings if they satisfy applicable English private international law rules on the recognition and enforcement of judgments. In a case where U.K.-based holdout creditors have not submitted to the foreign jurisdiction, the workaround is a parallel English insolvency proceeding yielding a binding plan and discharge that would be effective under English law[227] - the kind of duplication that universalists are anxious to avoid. UNCITRAL has proposed a draft Model Law[228] to deal specifically with insolvency-related judgments that could potentially address the gap in domestic legal provisions for judgments not covered by a treaty-based regime, such as E.U. law.

c) Pan Ocean

In *Fibria Celulose S/A v. Pan Ocean Co Ltd*,[229] a Korean-incorporated shipowner had entered into a long-term contract to charter ships to carry cargo for a Brazilian wood pulp supplier. The contract was expressly governed by English law. In a Korean-rehabilitation proceeding, the shipowner wanted the contract to continue because the freight payable under it was above market rates. The supplier sought to terminate it, relying on a clause in the contract that allowed termination upon insolvency or the taking of steps in an insolvency proceeding. The termination clause was valid under English law, even though other jurisdictions, including the U.S., outlaw such so-called *ipso facto* clauses because of concerns that they harm legitimate attempts by debtors to reorganize.[230]The Korean administrator obtained recognition of the rehabilitation proceeding and asked the English court for relief in the

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border insolvency law and the law relating to the recognition and enforcement of civil and commercial judgments. *See, e.g.*, Justice Nye Perram, Judicial Insolvency Network Conference: Issues in Recognition and Enforcement of Foreign Insolvency Judgments - An Australian Perspective (Oct. 10-11, 2016), http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-perram/perram-j-20161010.

[226]Walters, *Giving Effect to Foreign Restructuring Plans*, *supra* note 146. The English rule that contract debts can only be discharged under the governing law of the contract puts a further obstacle in the way of U.K. judges who might otherwise be inclined to give effect to foreign discharges in the U.K. *See In re* OJSC International Bank of Azerbaijan [2018] EWCA Civ 2802, [2019] 1 B.C.L.C. 1.

[227]Walters, *Giving Effect to Foreign Restructuring Plans*, *supra* note 146.

[228]U.N. Comm'n on Int'l Trade Law, Working Group V (Insolvency Law), Recognition and enforcement of insolvency-related judgments: draft model law (Note by the Secretariat for the fifty-second session, December 18-22, 2017), U.N. Doc A/AC.9/WG.V/WP.150.

[229][2014] EWHC 2124 (Ch), [2014] Bus LR 1041.

[230]English law tends to be more protective of contractual rights, especially in the context of sophisticated commercial transactions. *See, e.g.* Belmont Park Investments Pty Ltd v. BNY Corporate Trustee Services Ltd [2011] UKSC 38, [2012] 1 A.C. 383.

form of an order restraining the supplier from terminating the contract on the ground that the clause was unenforceable under Korean insolvency law.

For universalists, this case is a lightning rod. In their estimation, the U.K. court should have deferred to the law applicable in the Korean proceeding. Instead it held that the words "any appropriate relief" in the opening language of Article 21(1) of the CBIR, while broad, did not permit the court to grant relief that would not have been available in an English insolvency proceeding. The absence of any express statutory basis for applying foreign law was again fatal, as the following passage from the judgment illustrates:

A power for the recognising court to grant relief in that way would be a very significant power. It is odd to think that such a power was intended without there being any specific reference to the recognising court's ability to apply the law of a foreign state, or even to do something which no system anywhere would allow. This is particularly so in view of the terms of subparagraph (g) [of Article 21(1)] which deliberately limit relief under that subparagraph to relief which would be available to a British insolvency office holder under the law of Great Britain.[231]

d) Summary

These three cases show powerfully how fidelity to pre-existing local law has shaped the U.K.'s application of the Model Law. Elsewhere in U.K. law, lines between cross-border insolvency law and judgments recognition and enforcement are clearly drawn. Powers couched in open-ended language supported by enumerated examples (the linguistic structure of Article 21(1)) have not redrawn those lines. The E.U. Insolvency Regulation and section 426 expressly contemplate the application of the law of the foreign proceeding. This prompts the conclusion that the lack of any express power in the CBIR to apply foreign law is preclusive.

The U.K. approach to the Model Law is at odds with the U.S. approach in this regard. The *Pan Ocean* court's reading of Article 21 defaults to the traditional common law approach under the doctrine of ancillary winding up in the absence of any express statutory choice-of-law rule, whereas U.S. courts have read the equivalent language in section 1521 of the Bankruptcy Code as permitting them to grant relief under foreign law as well as U.S. law in the absence of a statutory prohibition.[232]

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[231][2014] EWHC 2124 (Ch), [2014] Bus LR 1041, [80(E)]. It is true that, by virtue of CBIR, art. 2(q), "the law of Great Britain" expressly includes domestic private international law. But the point goes nowhere useful for universalists because the U.K.'s Insolvency Act does not provide a U.K. officeholder appointed thereunder with a basis for seeking relief under any law other than U.K. law.

[232]*See, e.g.*, *In re* Condor Ins. Ltd., 601 F.3d 319, 322 (5th Cir. 2010). In similar vein, U.S. courts place far less emphasis on non-bankruptcy choice of law. There is a tradition, already noted, of granting comity to foreign insolvency law, even where it overrides contract rights governed by state law in the U.S. This is perhaps borne out of the U.S. conception of bankruptcy jurisdiction as all encompassing federal *in rem*

In recent years, much of the jurisprudential debate in the U.K. has concerned the scope of common law powers and the extent to which U.K. courts can grant relief by analogy to relief that would be available to an officeholder in a parallel U.K. proceeding, but without incurring the actual cost of such a proceeding. In its landmark decision in *Cambridge Gas Transport Corp v. The Official Committee of Unsecured Creditors of Navigator Holdings PLC*, the Privy Council, speaking through Lord Hoffmann, held that the Manx court could give effect in the Isle of Man to a chapter 11 plan relating to a Manx entity under its common law powers of assistance on the basis that the exact same result could have been achieved under Manx law by means of a winding up and a scheme of arrangement under the Isle of Man Companies Act.[233] *Cambridge Gas* proved controversial in the U.K. because it contemplated an independent basis for recognition of insolvency-related judgments going beyond the common law rules for recognition and enforcement of civil judgments generally (an approach later rejected in *Rubin* as a judicial overreach). It also implied that courts could use common law powers synthetically to procure results that would usually require full compliance with U.K. statutory procedures. Lord Hoffmann's rationale for broad inherent powers was the "underlying principle of universality" and the desirability of avoiding the costs of additional Manx proceedings.[234] "Why," Lord Hoffmann asked, "should the Manx court not provide assistance by giving effect to the plan without requiring creditors to go to the trouble of parallel proceedings in the Isle of Man?"[235] A differently constituted Privy Council in *Singularis Holdings Limited v. Pricewaterhouse Coopers* provided an answer. While endorsing modified universalism as a basis for incremental development of common law powers, the *Singularis* court rejected Lord Hoffmann's conception of a broad judicial power as constitutionally improper.[236]

The *Singularis* case aside, even under Lord Hoffmann's broad view in *Cambridge Gas*, British modified universalism amounts, at its highest, to a principle for avoiding parallel insolvency proceedings by giving the foreign representative "the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."[237] Indeed, the *Cambridge Gas* court doubted whether common law assistance "could take the form of applying provisions of the foreign insolvency law which form no

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subject matter jurisdiction. For a rare and probably anomalous exception, see *In re SunEdison, Inc.* 577 B.R. 120 (Bankr. S.D.N.Y. 2017).

[233][2006] UKPC 26, [2007] 1 A.C. 508, [24].

[234]*Id.* at [16], [20].

[235]*Id.* at [25].

[236][2014] UKPC 36, [2015] A.C. 1675, [16]-[17], [19], [32], [35]-[36], [38], [64], [82]-[102], [108], [112], [122], [134].

[237][2006] UKPC 26, [2007] 1 A.C. 508, [22].

part of the domestic system."[238] And, to date, while the CBIR does authorize U.K. judges in some respects to apply U.K. law synthetically without the need for a parallel U.K. proceeding, British modified universalism, as we have seen, has not embraced the application of foreign insolvency law. It is more restrained than its American cousin: a coordinating, rather than a centralizing, principle. As Lord Sumption put it in *Singularis*, "the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers."[239] Current judicial instincts in the U.K. are therefore cautious and incremental. U.K. judges look first for a statutory basis for the specific relief sought and, failing that, they are willing to develop the common law only interstitially rather than create expansive, general powers.[240] Judges, such as the immediate past President of the Supreme Court, have highlighted this difference between the U.S. and U.K. approaches[241] and regard any such inconsistency as a spur to further international legislative action rather than a call to creative, ends-oriented judicial activism.[242]

D. The Limits of Modified Universalism as an Interpretive Methodology

Professor Westbrook argues[243] that the Model Law is a text that seeks to establish an international system for managing cross-border insolvencies predicated on universalism and that judges should interpret it accordingly. He is right in his assessment that the structure of the Model Law is such that "one would expect to see considerable success in achieving recognition and a more mixed bag as to relief granted."[244] This assessment is borne out by the empirical evidence discussed earlier. And while I agree with him that the U.K. cases discussed above present a contrast with North American experi-

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[238]*Id.*

[239][2014] UKPC 36, [2015] A.C. 1675, [19].

[240][2006] UKPC 26, [2007] 1 A.C. 508, [25], [38], [65]-[69], [113], [115], [135], [137], [147], [151]-[155], [157]-[161]; *see also* Ian Kawaley, *"Relashio!": Liberating the Common Law on Judicial Cooperation from its State of Arrested Development - The British Atlantic and Caribbean World*, 3 Nottingham. Insolv. & Bus. L. e-J. 167, 209 ("Granting common law insolvency assistance by deploying well-defined remedial powers available under the general law is obviously a far more straightforward task than developing or extending an ancient inherent power in aid of a loosely defined principle of 'providing as much assistance as one can.'").

[241]Lord Neuberger, Keynote Speech, *supra* note 211 ("The extent to which the Model Law promotes substantive universalism (i.e. the application of the law governing the foreign insolvency proceeding) appears to be answered differently in different jurisdictions. Thus, the US courts seem to have adopted a rather more universalist approach than the courts of the UK.").

[242]*Id.*

[243]Westbrook, *Interpretation Internationale*, *supra* note 10.

[244]*Id.* at 743.

ence, I think it is an exaggeration to say that U.K. judicial attitudes "now hover between hostility and indifference to the Model Law and perhaps to internationalism in general."[245] My point is *not* that U.K. judges are necessarily right in some objective sense. It is entirely defensible to view their current statutory-mindedness as stifling any meaningful development of U.K. cross-border insolvency law, especially insofar as it relates to third countries.[246] But my point is that the decisions in *HIH*, *Rubin*, and *Pan Ocean* are perfectly plausible, once we pay attention to the Model Law's place in the fragmentary set up of U.K. cross-border insolvency law in the absence of further local legislative amendment. For this reason, while I dislike the outcome in *Rubin*, and the tone of the leading opinion,[247] I would concede that it is correctly decided (or not clearly erroneous) in a situated sense from a U.K. lawyer's perspective. Any suggestion that *Rubin* is an abandonment of modified universalism is overblown. It reflects - as subsequent decisions have borne out - a less potent version of modified universalism encompassing a preference for forms of coordination that use the tools of local insolvency law. British modified universalism, as currently practiced, finds expression in Articles 21(g) and 23 of the CBIR.[248] It grants the foreign representative access to relief that would be available to a British officeholder under local law without the need for a parallel proceeding. Conceivably, relief under Article 21(g) could be *broader* than relief available under the law of the foreign proceeding - a positive feature.[249] The post-*Rubin* debate has focused mainly on the question of the extent to which U.K. law - especially the common law - permits local law to be used *synthetically* without following all of the locally applicable statutory formalities[250] and rather less on the question of the appli-

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[245]*Id.* at 746; *cf.* Lord Neuberger, Keynote Speech, *supra* note 211.

[246]There are reasonable arguments that statutory innovations like the Model Law should be a spur to creative yet judicious development of the common law and purpose-oriented exercise of statutory discretion. The doctrine of ancillary winding up, for example, is a common law artifact of pre-1986 U.K. insolvency law. It was developed at a time when the insolvency law of much of the common law world, under the influence of the British Empire for all intents and purposes, was English law. The doctrine is wholly out of step with the late-twentieth century global embrace of rescue and restructuring regimes as a value-enhancing alternative to liquidation. Thus, under one view, the judges *could* use statutory cues to update ancient common law doctrines of cross-border insolvency but it is not a view that commanded any support from the Privy Council in *Singularis*. *See* [2014] UKPC 36, [2015] A.C. 1675, [73]-[75].

[247]*See* Walters, *Giving Effect to Foreign Restructuring Plans*, *supra* note 146 (identifying an unhelpful asymmetry in the U.K.'s approach to foreign discharges compared to that of the U.S.).

[248]In fairness to Professor Westbrook, I reiterate my concession *supra* note 207. This is not modified universalism as he would understand it. I suspect that he would characterize it as "modified territorialism."

[249]In this respect, the CBIR authorizes relief that is more expansive than that available at common law. It is clear from *Singularis* that a court cannot exercise its common law powers of assistance to achieve ends that could not be achieved under the law of the foreign proceeding. *See* [2014] UKPC 36, [2015] A.C. 1675.

[250]One sticking point arises from the U.K.'s private international law rule that contractual obligations are only properly discharged under the law applicable to the contract. Following the rejection of *Cam-*

cability of foreign law.

Westbrook's premise is that the adoption of the Model Law represents the adoption of universalism in insolvency matters.[251] He develops his argument in favor of a systemic interpretive rule by reference to Article 8 of the Model Law and comparable interpretive provisions in other international instruments. Article 8 - which is faithfully reproduced in the U.S. and U.K. enactments - directs courts to have regard for the international origin of the Model Law and the need to promote uniformity in its application. Westbrook argues that uniformity in interpretation is too narrow a goal because pragmatically he doubts "our [U.S.] courts should follow whatever path has been laid down by courts in other countries, especially where we view that path as wrongheaded in the context of the international system that the instrument seeks to create."[252] So he would allow judges some leeway to depart from a system-oriented approach. Nevertheless, he proposes a broad "international interpretive rule" under which judges would interpret Model Law enactments in line with the goals of the international system of cross-border insolvency coordination that the Model Law attempts to establish and "consistent with the maximum cooperation and efficiency within an international matrix of courts applying the Model Law".[253] In pushing back against *Rubin* and *Pan Ocean*, Westbrook ushers us towards a modified universalist default principle that courts should presumptively give effect to the *lex concursus* (at very least - if I read him correctly - as regards the *in rem* effects of foreign plans of reorganization).

To my mind, the argument overreaches. Westbrook acknowledges that UNCITRAL settled on a Model Law because a widely adopted international insolvency treaty would be difficult to achieve. He also acknowledges that Model Laws are products of compromise. And yet, his argument seems to boil down to the following: by adopting the Model Law, an enacting state is committing to an international system, a core principle of which is modified universalism. Judges should behave as system-oriented, purpose-governed, modified universalists and interpret Model Law texts accordingly. This way

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bridge Gas in *Rubin* and *Singularis*, it is not currently possible for a U.K. court to engineer a synthetic local law discharge as a means of implementing a foreign plan of reorganization. *See* Walters, *Giving Effect to Foreign Restructuring Plans*, *supra* note 146.

[251]Westbrook, *Interpretation Internationale*, *supra* note 10, at 742. In a footnote he identifies modified universalism as "[t]he most favored doctrine in the current era. . .which seeks to achieve steady pragmatic progress toward the ideal within the framework of existing political and technological possibilities." *Id.* at 742 n.13.

[252]*Id.* at 751. The same is true the other way around. It is worth noting that a really powerful role for Article 8's pursuit of harmonized interpretation would thoroughly Americanize the international insolvency system because the U.S. is by far and away the largest producer of Model Law jurisprudence. *See* Section I.D., *infra*.

[253]Westbrook, *Interpretation Internationale*, *supra* note 10, at 754.

we can achieve what amounts to a back door convention by fashioning a default *lex concursus* rule out of the Model Law's choice of forum COMI rule. *Et voilà*! Common unilateralism (countries choosing to enact the Model Law without insisting on formal reciprocity) can be transformed into multilateral universalism *sans* convention. It is possible that I am over-reading. But even if Westbrook's principle is merely intended to encourage U.K. judges to apply U.K. law synthetically across the board, appeals to the Model Law's purposes still meet the roadblock of long-established rules of private international law that have not been expressly displaced.

My account of U.K. cross-border insolvency law in practice shows why I think Westbrook's argument overreaches. For so long as the Model Law's deliberate indeterminacy on choice-of-law is carried over into local enactments in countries that traditionally provide assistance under local law (as in the U.K.), it will tend to be self-fulfilling - a kind of regression to the mean. Judges from such traditions can perfectly well say that they are doing their best to accomplish the goal of international cooperation by granting relief that would be available under local law. Article 8 directs courts to have regard to the Model Law's international origin and the need to promote uniformity and therefore encourages them to *engage* with foreign law sources on Model Law enactments. But they are not bound by such sources (which is just as well given the variance in Model Law enactments).[254] Judges can also legitimately say that general statutory language replete with noble cooperative sentiments[255] is no substitute for specific legislative commands or hard private international law rules; nor does it override the default structure of local cross-border insolvency law. Hence, modified universalism as a principle or methodology gets stuck. It cannot do the work of a convention but apparently it asks judges to approximate to a convention where there is none.

Anglo-U.S. experience demonstrates that modified universalism is not a unified phenomenon with a single set of characteristics or predicates. It varies across legal cultures in subtle ways that reproduce the compromise at the heart of the Model Law.[256] As the Model Law "system" is dominated by the

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[254]In Pan Ocean, Morgan J. followed Article 8's direction and took account, *inter alia*, of the Fifth Circuit's *Condor* decision but declined to apply it principally because of differences in legislative history and manner in which the U.K. and U.S. implemented the Model Law. *See* [2014] EWHC 2124 (Ch), [2014] Bus LR 1041, [93]-[108].

[255]Such as those expressed in the Model Law's preamble and reproduced in 11 U.S.C. § 1501 (a)(1). It is also worth noting that CBIR, art. 25(1) departs from the Model Law's mandatory language in providing that "the court *may* cooperate to the maximum extent possible with foreign courts or foreign representatives. . .." (emphasis added).

[256]On the self-reinforcing tendency of legislative compromise in a different context, see Graeme Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 737 (2001) ("As more recent efforts at intellectual property harmonization in the European Union . . . have demonstrated, achieving comprehensive unification of laws is extremely difficult in areas where divergent national jurisprudence has already taken root. And if unprincipled compromise is

U.S., the leading producer of Model Law jurisprudence, Westbrook's interpretive principle just seems like an invitation to judges in other Model Law countries to subscribe to a strong, American version of modified universalism. "Glocal" judges are not guaranteed to accept such an exercise of American soft power,[257] especially those judges who expect to see choice-of-law issues dealt with explicitly by convention or statute rather than by judicial rulemaking.[258] Thus, a harmonizing interpretive principle, freighted with U.S. jurisprudence under chapter 15, encounters resistance in other countries where local Model Law enactments reinforce local path dependencies.

I should emphasize that my differences with Professor Westbrook are (I think) slight. I share his view that a "plain meaning" approach to statutory interpretation that ignores the purpose and structure of the statute can lead to unintended and unhelpful results.[259] But in the present context, there is a question of integration and fit, *i.e.* how is the domestic Model Law enactment to be integrated within the existing *corpus juris* of the enacting state? Thus, Westbrook prioritizes the Model Law's international origins and goals, whereas my focus is on the natural limits of instruments that only acquire legal life through assimilation by domestic legal systems.

IV. THE EVOLUTION OF INTERNATIONAL INSOLVENCY LAW

Without either a preponderance of highly activist judges or local enactments that go beyond the Model Law's soft "PIL-light"[260] approach, exhorta-

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forced, either through political log-rolling or language consciously susceptible of all meanings to all parties, national courts steeped in different traditions may re-effect historical divergence.").

[257]On the phenomenon of Americanization of transnational legal process through soft power, see Benjamin Brake & Peter J. Katzenstein, *The Transnational Spread of American Law: Legalization as Soft Power*, INST. INT'L L. & JUST. (October 2010), http://www.iilj.org/wp-content/uploads/2016/11/Katzenstein-The-Transnational-Spread-of-American-Law-2010.pdf. I acknowledge, of course, that the assertion of soft power by nations that have the clout and the desire to influence international standard setting will likely have real world effects. But I am skeptical that judges, particularly in the global north, will read the Model Law as a "system" text without further hard law guidance as to what such a system entails.

[258]*See* Lord Neuberger, Keynote Speech, *supra* note 211 ("[I]n highly technical fields, and where cross-border issues are involved, judicial development of the law presents obvious difficulties, when compared with domestic and cross-border law-making by governments and legislators . . . I did not dissent in *Singularis* because I am a little Englander. *Au contraire.* I think that universalism is a noble aim, but I think it is normally better achieved by legislation and treaty-making."); *id.* at 26 ("The extent to which the Model Law promotes substantive universalism (i.e. the application of the law governing the foreign insolvency proceeding) appears to be answered differently in different jurisdictions. Thus, the US courts seem to have adopted a rather more universalist approach than the courts of the UK . . . . Hopefully, this is another example of national inconsistencies which will encourage more international legislative action.").

[259]*See* Daniel Glosband & Jay L. Westbrook, *Chapter 15 Recognition in the United States: Is a Debtor "Presence" Required?*, 24 INT. INSOLV. REV. 28 (2015).

[260]PIL here is an acronym for private international law. This description of the Model Law was coined in Block-Lieb & Halliday, *Less is More*, *supra* note 9.

tions to courts to behave like American modified universalists and interpret their local Model Law enactments accordingly are not especially useful. This is not to decry the Model Law. On the contrary, I support its "less is more"[261] orientation and believe that the professional international insolvency and restructuring community should continue to promote Model Law enactment and "know how" as one aspect of a multi-dimensional strategy involving international, regional, and local lawmaking allied to an increased emphasis on network governance.

Divergence in transatlantic practice within the common law world reinforces the view that evolution of harmonized cross-border insolvency law frameworks towards greater universalism will depend on legislative incrementalism of the kind engaged in by UNCITRAL, involving recursive cycles of lawmaking and implementation that deepen and broaden the coverage of reform endeavors over time.[262] Recursivity is already evident in the work of UNCITRAL Working Group V on insolvencies of multinational enterprises and (in response to *Rubin*) on insolvency-related judgments.[263] In a similar vein, UNCITRAL has already touched on choice-of-law issues[264] and there is every reason to suppose that the construction of an international choice-of-law rule-and-exceptions architecture will feature squarely on UNCITRAL's forward agenda.[265] The balancing of interests involved in creating such an architecture is such that legislatures are institutionally better placed than courts to define the scope of a *lex concursus* rule and to consider the principled basis for appropriate exceptions, dealing with such matters as security interests, set-off rights, labor contracts, and avoiding powers, for which express provision is made in the E.U. Insolvency Regulation.[266] A strong ver-

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[261]*Id.*

[262]*See* Block-Lieb & Halliday, *Incrementalisms*, *supra* note 9; Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOC. 1135 (2007).

[263]U.N. Comm'n on Int'l Trade Law, Working Group V (Insolvency Law), A/CN.9/903, May 26, 2017, Report of Working Group V (Insolvency Law) on the work of its fifty-first session (New York, May 10-19, 2017).

[264]U.N. Comm'n on Int'l Trade Law, Working Group V (Insolvency Law), UNCITRAL Legislative Guide on Insolvency Law, Parts 1 & 2 (2004), at 67-72 (recommending that domestic legislatures should consider enacting a *lex concursus* choice-of-law rule with exceptions for financial markets, payment systems, and labor contracts); *see also* Gropper, *Curious Disappearance*, *supra* note 77, 160-63.

[265]Much current thinking is being directed toward that end. *See* Pottow, *Beyond Carve-Outs*, *supra* note 6; Clift, *Choice of Law*, *supra* note 29; Edward J. Janger, *Silos: Establishing the Distributional Baseline in Cross-Border Bankruptcies*, 9 BROOK. J. CORP. FIN. & COM. L. 180 (2014); Irit Mevorach, *Cross-Border Insolvency of Enterprise Groups: The Choice of Law Challenge*, 9 BROOK. J. CORP. FIN. & COM. L. 226 (2014). Choice-of-law harmonization has been a legislative priority at UNCITRAL for a few years. *See* U.N. Comm'n on Int'l Trade Law, A/CN.9/798, January 8, 2014, Report of Working Group V (Insolvency Law) on the work of its forty-fourth session (Vienna, December 16-20, 2013), para 24.

[266]On the comparative advantage of legislatures in weighing competing (and possibly incommensurable) interests albeit in a different, domestic U.S. context, see Mark D. Rosen, *Congress' Primary Role in*

sion of modified universalism may well serve as a useful policy framework for this kind of legislative deliberation.[267] But there needs to be an open, deliberative debate within international lawmaking fora, rather than passing the buck to judges, many of whom may reasonably be inclined to punt or (as in cases like *Qimonda*) to use statutory tools as a veiled mechanism for applying local law.

Harder and deeper forms of international insolvency law are perhaps most likely to emerge successfully where they are layered onto, and integrated into, existing bilateral and multilateral frameworks for international and regional cooperation. The E.U. Insolvency Regulation and section 426 of the U.K. Insolvency Act provide good examples of such an approach. Layering does not treat international insolvency cooperation as discrete, but instead involves the construction of unified approaches to private international law on the foundations of pre-existing forms of cooperative ordering. The E.U. Insolvency Regulation added a comprehensive scheme of harmonized private international rules to the E.U. 's existing commitments to judicial cooperation in civil matters, powerfully underpinned by norms of mutual recognition and trust. These norms flow from the E.U. 's supranational legal ordering and reflect the breadth and depth of regional economic, legal, and political integration that the E.U. has accomplished since 1957.[268] Similar orderings may conceivably arise through bilateral or multilateral trade treaties that could over time (as E.U. experience has shown) yield mutual recognition frameworks. Section 426 arises from historic family relationships between the U.K. and its overseas territories and former colonies. It amounts to a lattice of bilateral commitments arrived at by the executive on the basis of a norm of reciprocity and endorsed by the legislature through a system of favored-nation accreditation. In similar vein, U.S.-Canadian judicial cooperation has gone much deeper than U.S.-U.K. cooperation. U.S. judges in New York and Delaware and Canadian judges in Toronto are accustomed to coordinating the cross-border insolvency cases that arise from geographical proximity against the background of wider frameworks for regional cooperation (NAFTA).[269] Of

Determining What Full Faith and Credit Requires: An Additional Argument, 41 CAL. W. INT'L. L.J. 7 (2010).

[267]*See* Pottow, *Beyond Carve-Outs*, *supra* note 6 (proposing modified universalism as a second-order choice of law theory); IRIT MEVORACH, THE FUTURE OF CROSS-BORDER INSOLVENCY: OVERCOMING BIASES AND CLOSING GAPS (Oxford Univ. Press 2018) (arguing that modified universalism promotes a global approach to cross-border insolvencies that is flexible and capable of adjustment to real world conditions in different transnational settings rather than "one size fits all"). On a separate note, increasing convergence among corporate bankruptcy laws influenced by international and supranational institutions may, over time, reduce the salience of conflict of laws and choice-of-law problems.

[268]The U.K.'s impending departure from the E.U. does not detract from the basic point that the E.U. has created strong norms of mutual recognition based on a treaty foundation institutionally reinforced by the Court of Justice.

[269]The depth of U.S.-Canadian cooperation in cross-border insolvencies is such that Canadian and U.S.

course, this will leave gaps outside of such frameworks, a point underscored by the poor relation status of the U.K.'s "third country" cross-border insolvency regime. But Rome wasn't built in a day.

This is not to say that judges do not have a role to play in creative interpretation and in improving coordination, pending further cycles of international and local legislative intervention. They can develop cross-border insolvency law interstitially, having regard both to international and domestic law (albeit this will have variable results depending on the manner in which the Model Law is enacted and interpreted in different legal systems and cultures). This may produce some overreaching (cases like *Cambridge Gas*) and some under-reaching (cases like *Rubin*), but judicial overreaching and under-reaching can be useful in helping to set forward legislative agendas. UNCITRAL's response to *Rubin* is a case in point.

Moreover, while the legislative wheels grind slowly forward, judges can establish and develop mechanisms for network governance that will lead to more effective transnational coordination of cases in line with the Model Law's goal of fostering court-to-court communication.[270] Indeed, meaningful attempts at developing common procedural rules and protocols for managing complex multinational insolvencies and encouraging communication and cooperation between courts have already been made.[271]

The recently established Judicial Insolvency Network ("JIN"), instigated by the Chief Justice of the Singapore Supreme Court,[272] represents the latest advance in network governance. Initially comprising judges from Australia,

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courts have held joint hearings. *See* Lauren L. Peacock, *A Tale of Two Courts: The Novel Cross-Border Bankruptcy Trial*, 23 AM. BANKR. INST. L. REV. 543 (2015). Regional cooperation has a long history. For other examples, see REINHARD BORK, PRINCIPLES OF CROSS-BORDER INSOLVENCY LAW, 8-9 (Intersentia 2017).

[270]On the role of judges and regulators in transgovernmental networks, see, for example, Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L. L. 1103 (2000); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L. L.J. 191 (2003); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L. L. 1 (2002). For discussion of network governance and transnational judicial dialogue in the specific context of international insolvency cooperation, see Global Principles, *supra* note 3, at 38-39.

[271]Global Principles, *supra* note 3; AMERICAN LAW INSTITUTE, PRINCIPLES OF COOPERATION AMONG THE NAFTA COUNTRIES (Juris Pub. 2003); BOB WESSELS & MIGUEL VIRGOS, EUROPEAN COMMUNICATION AND COOPERATION GUIDELINES FOR CROSS-BORDER INSOLVENCY (Insol Europe 2007); JUDICIAL INSOLVENCY NETWORK, GUIDELINES FOR COMMUNICATION AND COOPERATION BETWEEN COURTS IN CROSS-BORDER INSOLVENCY MATTERS (2016).

[272]Singapore is setting out its stall with a view to becoming the leading Asian restructuring hub. As well as the JIN initiative, its courts are showing some willingness to branch out and differentiate Singaporean cross-border insolvency law from its U.K. counterpart in the context of a spate of legislative reform. *See In re* Pacific Andes Resources Development Ltd, [2016] SGHC 210, at [46]-[52] (signaling Singapore's willingness to depart from the English rule that debts can only be discharged in accordance with the governing law of the contract. Singapore has also established a specialist international commercial court); Andrew Godwin et al., *International Commercial Courts: The Singapore Experience*, 18(2) MELBOURNE J. INT'L L. 1 (2017).

Bermuda, the BVI, Canada, the Cayman Islands, England & Wales, Singapore, and the U.S., and with observers participating from other countries, JIN produced guidelines in 2016 that have subsequently been adopted as local rules by courts in Delaware, New York, Florida, Bermuda, England and Wales, New South Wales, and Singapore.[273] The JIN Guidelines provide for the incorporation of protocols into court orders when there are parallel proceedings affecting a debtor company or group. They draw on existing judicial experience in cases such as *Nortel* to provide open-ended "soft" case guidelines (including the possibility of innovative practices such as joint hearings). They do not interfere with each court's jurisdiction or affect substantive rights, but they do create a methodology for identifying conflicts and determining the sequence in which issues should be resolved, with each court being made aware of what other courts are doing. The phenomenon of international judicial negotiation[274] is not new but in the insolvency context it is understudied. Transnational procedural approaches usefully supplement and flesh out the cooperative mandate of instruments like the Model Law. Moreover, subject to standard caveats about accountability of unelected judicial actors and cross-cultural sensitivities, it makes sense for the frontline actors who have direct, practical experience of cooperation and coordination to lead in developing transnational procedural and case management approaches.[275] Insofar as transnational case sequencing helps to avoid costly and time consuming jurisdictional conflicts, it serves goals such as judicial economy in which judges are invested. Institutionalized interactions of the sort promoted by JIN and the INSOL Judicial Colloquium will continue to be significant in building trust and in creating the infrastructure of the emerging international forum shopping system, in which cases are allocated primarily according to majority creditor preference.[276]

While I understand American universalist attempts to use the Model Law, and modified universalism, to nudge towards a global *lex concursus* rule, my article shows that differences in implementation and reception of the Model Law reveal different understandings of modified universalism. These different understandings are not radically divergent, but they do undermine the practical utility of modified universalism as a source of guidance for judges exercising discretionary powers under Model Law enactments. My

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[273]*See* Guidelines for Communications and Cooperation Between Courts in Cross-Border Insolvency Matters, NYSB (2017), http://www.nysb.uscourts.gov/sites/default/files/Chapter15Guidelines.pdf.

[274]*See* Jay L. Westbrook, *International Judicial Negotiation*, 38 TEX. INT'L L.J. 567 (2003).

[275]*See* Lord Thomas of Cwmgiedd, Singapore Academy of Law Annual Lecture: Cutting the Cloth to Fit the Dispute: Steps Towards Better Procedures Across Jurisdictions (Sept. 2016), https://www.judiciary.gov.uk/wp-content/uploads/2016/10/lcj-speech-singapore-academy-of-law.pdf.

[276]*See, e.g.*, *In re* Suntech Power Holdings Co., 520 B.R. 399 (Bankr. S.D.N.Y. 2014) (debtor with creditor support choosing to restructure in the Cayman Islands rather than China).

article serves also (I hope) as a call to international insolvency scholars to shift even more of our collective focus towards the processes and institutions that contribute to the making of international insolvency law.