D. Traditional Safeguards in the Recognition of Foreign Judgments: Public Policy and Procedural Fairness

As the title suggests, Part D will focus on the traditional safeguards in recognising foreign judgments, namely, public policy and procedural fairness. This work refers to these safeguards as *traditional* and brings them together in Part D because they are not specific to cross-border restructuring or insolvency cases. Instead, they have long been in place as general safeguards in the context of the recognition of foreign judgments in civil and commercial matters and form part of most cross-border instruments in that area.[448] Another reason they are grouped in this Part is that these safeguards are mainly in place to protect, in a broad sense, the legal order of the forum. Hence, these safeguards serve as a shield against the recognition and enforcement of foreign judgments that either conflict with the public policy of the forum or are tainted by procedural irregularities. Part D will provide a detailed analysis of the safeguards mentioned above, with a focus on their position under the MLCBI. Section D.I will examine public policy. Section D.II will analyse procedural fairness, followed by a summary in section D.III.

I. Public Policy

1. Introduction to the Public Policy Doctrine

Public policy is a legal doctrine that monitors private law arrangements, foreign laws, or foreign judgments to ensure that they align with the public policy (public interests, public morality, public security) of the forum.[449] The required degree of the alignment varies depending on the subject being

448 See, eg, Brussels I bis Regulation (n 135) art 45 (1) (a)-(b). See also sub-s C.II.2.c)aa).

449 Farshad Ghodoosi, 'The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements' (2016) 94 Neb L Rev 685, 689-90.

monitored. In the literature, two main concepts of public policy have been identified in this context: domestic and international public policy.[450]

Domestic, national, or internal public policy is a part of domestic (substantive) law and focuses on domestic private law arrangements.[451] In most jurisdictions, the legislation includes express norms against private law arrangements that are contrary to good morals.[452] The principal application of domestic public policy is in contract law, where it sets the boundaries for the cornerstone principle of party autonomy.[453] The focus of domestic public policy, however, is not the formation of a contract but rather its effects.[454] Accordingly, contracts that are properly formed in the eyes of contract law and are not illegal may still fall within the scope of domestic public policy.[455] The consequence of a successful invocation of the public policy defence can be the voidness or unenforceability of a contract, depending on the jurisdiction.[456]

International or external public policy is also a part of domestic law, specifically its private international law branch. When successfully invoked, it leads to the outcome that otherwise applicable foreign law is not applied, or a foreign judgment or award that is otherwise eligible for recognition

450 In the literature, transnational or truly international public policy is also distinguished. Unlike domestic or international public policy, here, the policy sought to be protected is based not on domestic law or values but rather on the fundamental principles and values under public international law, such as the prohibition of slavery, child labour, corruption, and so forth. Its typical area of application is international arbitration. See Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 J Priv Intl L 201, 214-15; Olaf Meyer, 'A Flexible System in Flux: On the Realignment of Public Policy' in Olaf Meyer (ed), *Public Policy and Private International Law: A Comparative Guide* (Edward Elgar Publishing 2022) paras 1-1049-52. Not many issues arise regarding this concept of public policy for the purposes of the present work, as what constitutes public policy is of universal nature accepted by most states and confined to particularly fundamental matters. Besides, issues concerning most of the values and principles protected by transnational public policy (child labour, slavery, and so forth) generally do not arise in the context of restructuring law. Therefore, this work will not discuss transnational public policy.

451 Bram Akkermans, 'Public Policy (Orde Public): A Comparative Analysis of National, Private International Law, and EU Public Policy' (2019) 8 EPLJ 260, 266-68.

452 German Civil Code (Bürgerliches Gesetzbuch), s 138; French Civil Code (Code civil), art 6.

453 Akkermans (n 451) 268.

454 Ghodoosi (n 449) 696.

455 ibid 696-98; Akkermans (n 451) 268.

456 For a comparative analysis, see Akkermans (n 451) 268-271. For a historical analysis of common law, see Ghodoosi (n 449) 695-96.

is not recognised.[457] In most civil law jurisdictions, the legislation contains express norms dedicated to international public policy.[458] However, it may also be applied as a doctrine of private international law without any specific norm in the legislation (e.g. France).[459] It has even been argued that international public policy may be invoked as a general principle under all international instruments of private international law if the respective instrument is silent on the matter.[460]

Based on these insights, the public policy exception under the MLCBI (article 6) can easily be attributed to international public policy. Additionally, as this work will identify later (D.I.3), the Guide to the MLCB expressly recommends differentiating public policy under article 6 of the MLCBI from domestic public policy.[461] Hence, this work will briefly explore the concept of international public policy in general (D.I.2) before examining the public policy exception under the MLCBI (D.I.3).

2. International Public Policy

a) Introduction to International Public Policy

aa) Role of Public Policy

Even though states are free to design their own private international law rules or to be part of international or regional private international law instruments, rules of private international law are traditionally based on objective criteria.[462] These rules aim to determine the best law or forum for each case and generally do not consider subjective criteria like the

457 P.B. Carter, 'The Role of Public Policy in English Private International Law' (1993) 42 Intl & Comp LQ 1, 1; Mills (n 450) 201.

458 See, eg, Germany: Introductory Act to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuche ["EGBGB"]), art 6; Code of Civil Procedure (Zivilprozessordnung), s 328 (1) (4).

459 Akkermans (n 451) 279.

460 Mills (n 450) 201 (fn 5 therein and accompanying text).

461 Therefore, hereinafter, the analysis of public policy will mostly be confined to international public policy. Accordingly, hereinafter, the reference to *public policy* should be understood as the reference to *international public policy* only, unless an express indication to the contrary (such as the usage of adjectives *domestic* or *transnational*).

462 Meyer, 'A Flexible System in Flux' (n 450) para 1-001.

quality, modernity, or fairness of a legal system in specific states.[463] That said, underlying legal principles and societal values that form the basis of legal systems vary globally, logically leading to differences in the substantive content of laws in different states. While some differences are (and should be) acceptable when considering deference to foreign laws, the variation may be so substantial that it conflicts with the fundamental principles of law or morality of the *lex fori*.[464] This is the point at which the public policy exception intervenes, preventing the application of a foreign law or the recognition of a foreign judgment violating these fundamental principles.[465]

The exception is often described through metaphoric expressions such as *escape route,*[466] *last bastion of defence,*[467] *life vest,*[468] and *safety net*[469]due to its crucial role against foreign laws or judgments that are irreconcilable with the fundamental principles of the legal system of the *lex fori*. Therefore, the importance of the public policy exception in private international law is widely acknowledged in scholarship despite the problematic issues associated with it, which this work will discuss later. Even in the context of EU law, where a significant number of areas of law are harmonised and the principle of mutual trust reigns among Member States regarding one another's legal system, the public policy exception retains its place in almost all EU private international law instruments.[470] Thus far, most proposals to exclude the public policy exception have not succeeded.[471]

bb) Public Policy and Overriding Mandatory Provisions

The modern concept of public policy has a negative function, as it does not specify which law should be applied to the matter but rather prevents

463 ibid paras 1-001-02.
464 ibid paras 1-002-3.
465 ibid paras 1-003.
466 Carter (n 457) 1; Meyer, 'A Flexible System in Flux' (n 450) para 1-005.
467 Meyer, 'A Flexible System in Flux' (n 450) para 1-003.
468 Peter Mankowski and Svenja Langenhagen, 'Germany' in Olaf Meyer (ed), *Public Policy and Private International Law: A Comparative Guide* (Edward Elgar Publishing 2022) para 8-001.
469 Mills (n 450) 202; Meyer, 'A Flexible System in Flux' (n 450) para 1-005.
470 Meyer, 'A Flexible System in Flux' (n 450) 1-006 (fn 7 therein and accompanying text); Wolfgang Wurmnest, 'Public Policy in European Private International Law' in Olaf Meyer (ed), *Public Policy and Private International Law: A Comparative Guide* (Edward Elgar Publishing 2022) para 2-004 (fn 10 therein and accompanying text).
471 Meyer, 'A Flexible System in Flux' (n 450) para 1-026.

the application of foreign laws that would otherwise be applicable (or the recognition of foreign judgments and awards that would otherwise be eligible for recognition).[472] A positive function in this context is fulfilled by another concept of private international law, namely, *overriding mandatory provisions*,[473] which dictates the application of certain mandatory norms of the *lex fori* to the relationship of the parties, regardless of the applicable law under private international law.[474]

cc) Public Policy and Procedural Fairness

When discussing the public policy exception in the context of the recognition of foreign judgments, one may ask whether the public policy exception should also encompass the procedural fairness of the respective foreign proceedings or be confined to the substantive content only. In some jurisdictions, due process (in foreign proceedings) constitutes a sub-branch (procedural public policy) of public policy along with substantive public policy.[475] This view is also supported by the language used in article 7 of the MLIJ, which expressly states that public policy includes 'the fundamental principles of procedural fairness' of the receiving state.[476] Besides, many cross-border private international law instruments, such as the EIR, do not expressly refer to procedural fairness, which is presumed to fall within the scope of the general public policy exception under these instruments. For example, In *Eurofood IFSC Ltd,* the Court of Justice of the European Union ("CJEU") acknowledged that the right to be heard may constitute the fundamental public policy of Member States and fall within the scope of the public policy exception under the EIR's predecessor.[477] An alternative view is that procedural fairness falls outside the scope of public policy

472 Akkermans (n 451) 273-74; Wurmnest (n 470) para 2-009.

473 The concept of *overriding mandatory provisions* will not be discussed further in s D.I of this work, but will be revisited in a different context in sub-s F.II.3.b).

474 Akkermans (n 451) 273-74; Meyer, 'A Flexible System in Flux' (n 450) para 1-011; Wurmnest (n 470) para 2-009.

475 eg, Dutch law. See Akkermans (n 451) 276.

476 Guide to the MLIJ (n 130) para 74. See also Wan Wai Yee, 'Article 7: Public Policy Exception' in Reinhard Bork and Michael Veder (eds), *The UNCITRAL Model Laws on Cross-Border Insolvency and on the Recognition and Enforcement of Insolvency-Related Judgments: An Article-by-Article Commentary* (Edward Elgar 2025) para 2.7.1.

477 Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I/3813, [60]-[68].

and should be assessed under the framework of *natural justice*.[478] Both perspectives, however, agree that a judgment should not be recognised if the respective foreign proceedings lack due process. Therefore, the distinction between these two perspectives is not relevant for the purposes of the present work. That said, section D.I will discuss public policy solely in a substantive context. That is primarily because procedural fairness, which will be a matter for section D.II of this work, may be assessed even without invoking the public policy exception under the MLCBI.[479]

b) Problematic Aspects of Public Policy

This work has already highlighted the importance of the role that the public policy exception plays under private international law. However, it is essential to note that the exception is not without shortcomings. In that sense, there are two notable aspects related to the public policy exception.

One of the issues involves the ambiguity surrounding the definition of public policy.[480] In many jurisdictions, public policy is either not defined or defined in vague or general terms. For example, Dutch law simply refers to *public policy (order)*,[481] while under German law it is defined as *fundamental principles of German law* with a specific focus on *civil rights*.[482] As one commentator aptly puts it, 'Usually public policy is defined through examples of its application, or by what it is not'.[483] Even international or regional instruments on the harmonisation of different areas of private international law do not attempt to define public policy, leaving the matter to national laws.[484] One commentator points out in the general EU law context that the exception 'is the unharmonized part of private international law'.[485] Despite all undesired consequences that will be outlined below, this seems to be

478 Carter (n 457) 1; John Briggs, 'Bars to Common Law Recognition' in Richard Sheldon (ed) *Cross-Border Insolvency* (4th edn, Bloomsbury Professional 2015), para 11.10.
479 See n 570 (and accompanying text) and text thereto.
480 Mills (n 450) 202; Akkermans (n 451) 262-63; Meyer, 'A Flexible System in Flux' (n 450) para 1-007.
481 Dutch Civil Code (Burgerlijk Wetboek), art 10:6.
482 n 458 and accompanying text.
483 Akkermans (n 451) 262-63.
484 See, eg, Guide to the MLCBI (n 17) para 101.
485 Meyer, 'A Flexible System in Flux' (n 450) para 1-006.

a rather deliberate approach.[486] One reason for such an approach might be that even a carefully designed, all-encompassing definition of public policy bears the risk of omitting some important policies worth protecting. Second, public policy is a dynamic notion as the society's values upon which it is based are constantly changing.[487] Therefore, the policies deemed worthy of protection under the public policy exception today may not be considered so in the near future, and vice versa. Hence, avoiding clearly defining public policy, despite all the difficulties arising out of it, may be seen as a solution.

Another noteworthy problematic aspect concerns the application process, specifically the judiciary's broad or even unfettered discretion in considering the application of the public policy exception.[488] In some, if not many, jurisdictions, there are no guidelines for judges at all in this regard.[489] English judges are not even bound by the doctrine of precedent when applying the public policy exception, which is not the case with the application of domestic public policy.[490] Such broad discretion may be a result of a deliberate approach not to limit the power of judges for largely the same reasons behind the lack of a clear definition, as discussed above. Second, the absence of a clear definition of public policy itself may make it difficult to frame judges' discretion, even if the rationale behind it is set aside.

Those problematic aspects of the public policy exception, despite having some rationale behind them, result in unpredictability and uncertainty surrounding the notion.[491] The oft-quoted remark by an English judge describing the public policy exception as 'a very unruly horse, and when once you get astride it you never know where it will carry you' is fitting in this context.[492]

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486 See, eg, Akkermans (n 451) 277 arguing it for Dutch law.
487 Akkermans (n 451) 277; Meyer, 'A Flexible System in Flux' (n 450) para 1-013.
488 For arguments against the judiciary's unfettered discretion, see Mills (n 450) 202, Meyer, 'A Flexible System in Flux' (n 450) para 1-028.
489 See, eg, Mills (n 450) 203 arguing it for English law.
490 Akkermans (n 451) 279-280. See also, Mills (n 450) 206 (fn 34 therein and accompanying text).
491 Mills (n 450) 202.
492 *Richardson v Mellish* [1824] 2 Bing 229, 252.

c) Limited Application of Public Policy: Key Dimensions

After touching on the problematic aspects of public policy and their implications, this work will below explore the considerations to minimise them. Specifically, it will join the arguments supporting the limited use of public policy and outline the dimensions developed in the literature to frame the application of the exception.

aa) Limited Application

To begin with, scholarship generally agrees that international public policy should be used more sparingly than domestic public policy and should be limited to the most fundamental policies of the *lex fori*.[493] Under most cross-border legal instruments that aim to harmonise different areas of private international law and contain the public policy exception, the sparing application of the exception is implied by the usage of the qualifying language, such as *manifestly*.[494] Hence, not every mandatory norm or every policy of the *lex fori* that is important in a domestic context should constitute a bar to the application of a foreign law or the recognition of a foreign judgment. The logic of private international law itself is based on the idea that applying a foreign law may lead to an outcome different from the one that might be achieved as a result of the application of the *lex fori*.[495]

In addition, as correctly stated by Alex Mills, private international law rules also constitute public policies of states.[496] Hence, the overuse of the public policy exception with respect to a certain rule of private international law could undermine the public policy behind the establishment of the respective rule.[497] Furthermore, systematic unsparing use of the public policy exception in one state may have negative consequences for that state and its citizens. That is to say, it could potentially lead to other states reciprocating, particularly in terms of recognising judgments issued in that

493 See, eg, Carter (n 457) 2; Akkermans (n 451) 272-73; Meyer, 'A Flexible System in Flux' (n 450) paras 1-010 (and cited literature in fn 12 therein), 1-039; Wurmnest (n 470) paras 2-016-18.

494 Meyer, 'A Flexible System in Flux' (n 450) paras 1-054-56, Carter (n 457) 2 (the author, however, prefers *strongly* over *manifestly*).

495 Meyer, 'A Flexible System in Flux' (n 450) para 1-002.

496 Mills (n 450) 206.

497 ibid.

state. Although reciprocity is not always necessary for the operation of private international law rules, it is generally assumed that other states will follow similar rules.[498] In addition, the economic interests of that state and its nationals may be adversely affected over time, as fewer international actors may be willing to engage with that jurisdiction due to the unsparing application of the public policy exception.[499]

There are also strong arguments favouring the view that the assessment under the public policy exception should primarily focus on the result of the application of the foreign law in question rather than the content of that law.[500] That said, the mere content of a foreign law may also be a ground for the invocation of the public policy exception if it is 'unacceptably repugnant'.[501]

bb) Dimensions

As previously discussed, in most jurisdictions, public policy is not clearly defined and its application is at the judiciary's wide discretion. Hence, and also given the need to use the public policy exception sparingly, the establishment of certain principles or criteria to frame its application is of utmost necessity. In the literature, three main dimensions of the application of public policy have been developed for this purpose, which, according to the prevailing opinion,[502] should not be applied separately but rather be balanced against one another. Below, this work will summarise these dimensions.

(1) Proximity to the Forum

The fact that the respective rules of private international law point to a foreign legal system (applicable law and/or competent forum) does not mean that there is no domestic interest in the dispute in question at all.[503] The stronger such domestic interest is, the more justified the application of the

498 Akkermans (n 451) 273.
499 ibid (quoted text from the case cited in fn 62 therein).
500 Wurmnest (n 470) para 2-019; Mankowski and Langenhagen (n 468) para 8-021.
501 Carter (n 457) 3. See also Mills (n 450) 209.
502 Mills (n 450) 218ff; Meyer, 'A Flexible System in Flux' (n 450) para 1-035.
503 Mills (n 450) 211.

public policy exception.[504] Conversely, tolerance of a foreign legal concept is greater when it has only limited domestic effect.[505] Under German law, for example, specific relation to Germany (*Inlandsbezug*) is also necessary for successfully invoking the exception, even though article 6 of the EGBGB does not expressly contain such a requirement.[506]

(2) Worthiness of Protection

This dimension focuses on the importance of a policy being safeguarded by the public policy exception. According to Alex Mills, the more such a policy is shared universally or considered absolute, the stronger the argument for protecting it and invoking the public policy exception.[507] That said, this perspective is not fully shared in the literature.[508]

(3) Seriousness of the Breach

Not every violation of a policy that is worth protecting warrants invoking the exception. That is to say, a rule worth protecting may only be violated in a technical manner and that alone may not be sufficient grounds for applying the public policy exception.[509] As a result, the more significant the violation, the more likely the public policy exception will be invoked.[510]

504 ibid 211-12.
505 Meyer, 'A Flexible System in Flux' (n 450) para 1-068.
506 Mankowski and Langenhagen (n 468) para 8-032.
507 See Mills (n 450) 216. For a more detailed discussion, see ibid 212-18.
508 See, eg, Kenny Chng, 'A Theoretical Perspective of the Public Policy Doctrine in the Conflict of Laws' (2018) 14 J Priv Intl L 130, 157, where it is argued that international consensus is only a reflection of the fundamental and universal character of a policy, not vice versa. See also Meyer, 'A Flexible System in Flux' (n 450), where it is argued (paras 1-034, 1-039) that the importance of a policy depends on its position within the domestic system as a whole (eg comparing constitutional rights to the mere technical provisions), but also admitted (para 1-044) that when the respective policy is of significant importance also in other states, the arguments in favour of the application of the exception gain additional weigh.
509 Mills (n 450) 218.
510 ibid; Meyer, 'A Flexible System in Flux' (n 450) para 1-034.

3. The Public Policy Exception under the MLCBI

As noted earlier, the public exception is not unique to cross-border insolvency and restructuring law instruments. Most, if not all, international, regional, and national frameworks contemplating, in one form or another, deference to a foreign jurisdiction include the public policy exception.[511] That said, the exception is of particular importance under the reign of modified universalism, where insolvency or restructuring of the debtor with worldwide effect is conducted in its home jurisdiction, and all other affected states are expected to defer to that particular jurisdiction. Even the EIR, which expressly refers to the universal scope of insolvency proceedings within the EU and mutual trust among Member States,[512] contains the public policy exception.[513] The MLCBI is no different in that regard. Article 6 provides for the general exception of public policy, which applies to recognition under article 17, as well as granting any additional relief or assistance, e.g. under articles 7 or 21:

> Article 6. Public policy exception
> Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

Neither the instrument itself nor the Guide to the MLCBI attempts to define *public policy*, deliberately leaving the matter to national laws.[514] Notwithstanding, the Guide to the MLCBI highlights the dichotomy between 'domestic public policy' and 'public policy as it is used in matters of international cooperation and the question of recognition of effects of foreign laws'.[515] Accordingly, the Guide to the MLCBI emphasises the need for a restrictive interpretation of the exception and its application 'under exceptional circumstances' by referring to the word *manifestly* in the text of article 6.[516] It is worth noting that some jurisdictions (e.g. Canada, Serbia, Singapore, and South Korea) enacted article 6 without the word

511 See, eg, nn 448, 458 and accompanying text.
512 EIR (n 13) recs 23, 65.
513 ibid art 33.
514 Guide to the MLCBI (n 17) para 101.
515 ibid para 103.
516 ibid para 104. For a more detailed discussion of the (narrow) interpretation, see Kristin van Zwieten, 'Article 6: Public Policy Exception' in Reinhard Bork and Michael Veder (eds), *The UNCITRAL Model Laws on Cross-Border Insolvency and*

manifestly.[517] However, it has been argued that this omission should not necessarily be interpreted as an indicator of the legislative intent in those jurisdictions to construct the public policy exception broadly.[518]

a) The Public Policy Exception under Chapter 15

Below, this work will separately discuss Chapter 15 with respect to the public policy exception. This is because this issue has been extensively litigated in Chapter 15 cases, and the difference with other jurisdictions implementing the MLCBI is significant in that regard.[519]

To begin with, the US adopted article 6 of the MLCBI almost verbatim (section 1506 of the BC). Therefore, by keeping the phrase *manifestly contrary* unchanged during the adoption, the US legislature adhered to the approach favouring the limited use of the exception.[520] US courts, too, hold the view that the public policy exception should be construed restrictively and applied only when the fundamental policies of the US are at stake.[521]

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on the Recognition and Enforcement of Insolvency-Related Judgments: An Article-by-Article Commentary (Edward Elgar 2025) paras 1.6.11-18.

517 van Zwieten, 'Article 6: Public Policy Exception' (n 516) para 1.16.19. See also Michael A. Garza, 'When Is Cross-Border Insolvency Recognition Manifestly Contrary to Public Policy' (2015) 38 Fordham Intl LJ 1587, 1596; UNCITRAL, 'Digest of Case Law on the Model Law on Cross-Border Insolvency' (UN 2021) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20-06293_uncitral_mlcbi_digest_e.pdf> accessed 21 October 2025 (Digest of Case Law), 22 (Note 3 therein and accompanying text); Kristy Zander, 'Application of the Public Policy Exception in the UNCITRAL Model Law on Cross Border Insolvency: Issues and Challenges' (December 2022) INSOL International, Technical Paper Series 54 <https://insol.azureedge.net/cmsstorage/insol/media/document-library/technical%20paper%20series/application-of-the-public-policy-exception-in-the-uncitral-model-law-on-cross-border-insolvency.pdf> accessed 21 October 2025, s 2.2 (fn 7 therein and accompanying text).

518 Garza (n 517) 1596-97. For a more detailed discussion, see van Zwieten, 'Article 6: Public Policy Exception' (n 516) para 1.6.19.

519 Buckel (n 367) 95 (fn 91 therein and accompanying text). See also Digest of Case Law (n 517) 22-23, where it can be observed that a vast majority of the cited cases are Chapter 15 cases.

520 Garza (n 517) 1604, 1627-28. See also. Omer Shahid, 'The Public Policy Exception: Has Sec. 1506 been a Significant Obstacle in Aiding Foreign Bankruptcy Proceedings' (2010) 9 J Intl Bus & L 175, 181-182; Markell, 'The International Two-Step' (n 366) 42.

521 *In re Ephedra Products Liability Litigation,* 349 BR 333, 336 (SDNY 2006).

Merely having a foreign law different from US law, without other considerations, does not justify applying the exception.[522]

As to the scope of the application of the exception, US courts have developed certain principles that distinguish between two categories of cases. One category concerns cases in which foreign proceedings have not been procedurally fair.[523] As mentioned earlier, the matters related to procedural fairness will be discussed separately in section D.II of this work. Below, this work, therefore, will explore only the other category of cases in which the action sought under Chapter 15 'would frustrate a U.S. court's ability to administer the Chapter 15 proceeding and/or would impinge severely a U.S. constitutional or statutory right, particularly if a party continues to enjoy the benefits of the Chapter 15 proceeding'.[524]

In most Chapter 15 cases, when the issue of public policy had been raised, the courts decided against applying the exception.[525] Nonetheless, these cases are of significance, as they provide some guidelines as to what constitutes, or to be more precise, what does not constitute the public policy of the US. For example, it was stated that the relief granted in foreign proceedings does not have to be identical to that available under US law.[526] Additionally, it was held that the fact that US creditors may receive less than they would in similar US proceedings, without other considerations, does not justify invoking the public policy exception.[527]

As to the cases where the exception was applied, this work will below briefly discuss three of them in chronological order.

aa) *Toft*

In re Toft, a US bankruptcy court considered issuing *ex parte* relief, under sections 1507, 1519, and 1521 of the BC, recognising and enforcing a mail interception order that had been granted by a German court.[528] The court highlighted the significance of the protection of privacy rights as a matter of policy under US law:

522 *Micron Technology, Inc. v. Qimonda AG (In re Qimonda AG Bankruptcy Litigation),* 433 BR 547, 570 (ED Va 2010).
523 ibid.
524 ibid.
525 Digest of Case Law (n 517) 21 (para 8 and cited US cases therein).
526 *Metcalfe* (n 381) 697.
527 *In re Ernst Young, Inc.,* 383 BR 773, 781 (Bankr D Colo 2008).
528 *In re Toft*, 453 BR 186 (Bankr SDNY 2011).

> The relief sought would directly compromise privacy rights subject to a comprehensive scheme of statutory protection, available to aliens, built on constitutional safeguards incorporated in the Fourth Amendment as well as the constitutions of many States. Such relief would impinge severely a U.S. constitutional or statutory right.[529]

The court, therefore, concluded that the public policy exception should be applied.[530]

bb) *Qimonda*

In re Qimonda AG, a US bankruptcy court addressed, *inter alia*, the issue of whether the termination (non-continuation) of US patent cross-licences by an insolvency administrator under German insolvency law[531] was manifestly contrary to the public policy of the US.[532] The issue was considered in light of the fact that the BC would protect the licensees in a similar scenario.[533] Stating that 'Although innovation would obviously not come to a grinding halt if licenses to U.S. patents could be cancelled in a foreign insolvency proceeding, … the resulting uncertainty would nevertheless slow the pace of innovation', the court decided in favour of the application of the exception to protect 'U.S. public policy promoting technological innovation'.[534]

The decision of the bankruptcy court has received controversial commentaries. Some critics argue that there was no need for the court to address public policy issues after denying the relief under section 1522 of the BC,[535] endorsing the approach taken by the appellate court in reviewing the case.[536] Others additionally point out that the court's interpretation of what constitutes public policy (i.e. technological innovation) was too broad

529 ibid 198 (footnotes and citations omitted).
530 ibid 201.
531 InsO (n 35) s 103.
532 *In re Qimonda AG*, Case No 09-14766-SSM (Bankr ED Va 2011).
533 BC (n 37) s 365 (n).
534 *Qimonda* (n 532) 33-34.
535 See, eg, Garza (n 517) 1590 (fns 9-11 therein and text thereto).
536 *Jaffé v Samsung Elecs Co*, 737 F3d 14, 32 (4th Cir 2013).

and, thus, not in line with the objectives of Chapter 15.[537] The bankruptcy court's reasoning has also been endorsed in the literature.[538]

cc) *Vitro II*

In *Vitro II,* a US bankruptcy court reached the conclusion that the protection of third-party claims constitutes a fundamental policy of the US and the enforcement of a foreign plan (in that case, a Mexican plan) non-consensually extinguishing such claims would be manifestly contrary to the public policy of the US.[539] In this case, too, the appellate court did not address the issue because the release sought had already been denied under other provisions of Chapter 15.[540] However, the appellate court's reasoning on the matter suggests that it was leaning against the application of the public policy exception in that particular case.[541] The bankruptcy court's position on applying the public policy exception with respect to third-party releases has not been shared by several other courts[542] and has been criticised by some commentators.[543]

537 Buckel (n 367) 1304-06. See also Lia Metreveli, 'Toward Standardized Enforcement of Cross-Border Insolvency Decisions: Encouraging the United States to Adopt UNCITRAL's Recent Amendment to Its Model Law on Cross-Border Insolvency' (2017) 51 Colum JL & Soc Probs 315, 338.

538 See, eg, generally John J. Chung, 'In Re Qimonda AG: The Conflict between Comity and the Public Policy Exception in Chapter 15 of the Bankruptcy Code' (2014) 32 BU Intl LJ 89.

539 *Vitro II* (n 399) 132.

540 *Vitro* (n 87) 1070. For a more detailed discussion of the case, see sub-s C.II.2.d)dd).

541 *Vitro* (n 87) 1069-70.

542 See, eg, *Bakrie* (n 375) 890-91. It is open to question, however, whether this trend will continue following the recent USSC decision in *Purdue* (n 387), which categorically denied non-consensual third-party releases under Chapter 11 as a matter of law (see n 387 and accompanying text). That said, it has been suggested that the USSC's position in that case should not affect Chapter 15 proceedings, as nothing in the court's opinion indicates that non-consensual third-party releases violate the public policy of the US. See Anthony J. Casey and Joshua C. Macey, 'Purdue Pharma and the New Bankruptcy Exceptionalism' (2025) [2024] Sup C Rev 365, 397. The present work supports this view.

543 See, eg, Buckel (n 367) 1306-07.

b) The Public Policy Exception in Other Jurisdictions Implementing the MLCBI

As already noted, the public policy exception under the MLCBI has not been litigated in other jurisdictions implementing the MLCBI as extensively as in the US.[544] That said, in several other jurisdictions (such as Australia, Canada, and England), too, courts tend to interpret the exception narrowly.[545] For example, in *Akers v Deputy Commissioner of Taxation*, an Australian court concluded that remitting assets of the debtor to the foreign jurisdiction where the debtor was being wound up without paying local taxes would not violate the Australian public policy.[546] In a recent Australian case, it was held that 'The public policy exception is to be construed restrictively and only invoked in exceptional circumstances in relation to matters of fundamental importance for Australia'.[547] In *Hartford Computer Hardware,* a Canadian court interpreted the exception restrictively and granted the recognition and implementation (in Canada) of a US court order (issued in a Chapter 11 proceeding) containing a provision (*roll up*) that would not be available under Canadian law.[548] In *Agrokor DD,* in considering the recognition of Croatian proceedings as a foreign main proceeding under the CBIR, the EWHC refused to apply the public policy exception on the grounds of, *inter alia,* the possible non-compliance with the *pari passu* principle[549] in the Croatian proceedings.[550] The court stated that the priorities of foreign law in restructuring or liquidation of companies being different from those of English law does not justify the application of the exception.[551]

544 See n 519 (accompanying text) and text thereto.
545 See Zander (n 517) sub-ss 2.3.2-3, where its restrictive application in Australia and Great Britain is highlighted. See also Briggs (n 478) para 11.5, where it is stated that public policy is rarely applied in cross-border insolvency cases in England.
546 *Akers as a joint foreign representative of Saad Investments Company Limited (in Official Liquidation) v Deputy Commissioner of Taxation* [2014] FCAFC 57 [144]-[148].
547 *PricewaterhouseCoopers Inc in its Capacity as Foreign Representative of IE CA 3 Holdings Ltd v IE CA Holdings Ltd* [2024] FCA 1208 [131].
548 *Hartford Computer Hardware, Inc. (Re),* 2012 ONSC 964, [17]-[18].
549 For a more detailed discussion of the *pari passu* principle, see sub-s E.I.1.
550 *In the matter of Agrokor DD* [2017] EWHC 2791 (Ch) [109]-[131].
551 ibid [131].

c) Analysis of the Main Issues

aa) Limited Application

This work has already highlighted the problematic aspects of public policy in a general private international law setting, namely, the lack of a clear definition and the judiciary's broad discretion in the application process. The public policy exception under the MLCBI is no exception in this regard. Those aspects eventually result in inconsistency in the application of the public policy exception under the MLCBI.[552] Such inconsistency, in turn, leads to uncertainty and unpredictability,[553] contradicting one of the core objectives of the MLCBI.[554] The overuse of the exception under the MLCBI framework, whether consistently or inconsistently, is even more problematic since it may undermine the entire framework. This work has already discussed the importance of using the exception sparingly in a general private international law context. The same applies to the MLCBI. The exception should be limited to essential policies, such as constitutional guarantees or fundamental values on which the legal system of the receiving state is built. In addition, restricting the application of the exception to genuinely exceptional cases would promote consistency and increase legal certainty and predictability.

More to the point, article 6 of the MLCBI sets out not a general rule but rather an exception. In addition, as previously noted, international public policy should be applied more restrictively compared to its domestic counterpart. Hence, not every deviation from domestic law justifies the application of the exception. The public policy exception should be interpreted even more restrictively in commercial matters, including restructuring of corporate debtors, compared to other areas, such as family law. This is because the affected parties may require greater protection, and moral and social considerations may play a significantly larger role in the latter. The argument supporting a more restrictive application of the exception in commercial matters is particularly relevant for cross-border insolvency and restructuring cases under the MLCBI, which is underpinned by modified universalism. As already noted, under this principle, a single main forum

552 Zander (n 517) s 3.3.

553 ibid s 3.4. For a discussion of the significance of the predictability and legal certainty, albeit mostly in a procedural context, in cross-border insolvency, see Bork, *Principles of Cross-Border Insolvency Law* (n 93) para 3.30ff.

554 MLCBI (n 17) Preamble (b).

(in the debtor's home jurisdiction) oversees the liquidation or restructuring of the debtor, to which all other affected states are expected to defer. Therefore, the tolerance towards foreign jurisdictions should be much greater under frameworks like the MLCBI, despite the important role of the exception in such frameworks, as highlighted earlier.

Furthermore, as Alex Mills correctly notes, main private international law rules, with public policy as an exception, also represent public policies of states.[555] Therefore, protecting one public policy of a state should not come at the expense of another public policy of that state. That is to say, extensively using the public policy exception would weaken the public policy of the state on which the respective rule of private international law is based.[556] This raises the question of why the main rule was necessary in the first instance.

More specifically, by implementing the MLCBI, the enacting states make it part of their public policy, *inter alia*, to participate in an international framework based on modified universalism. This involves cooperating with and deferring to insolvency or restructuring proceedings in the debtor's home jurisdiction. This public policy has its own rationale that is worth protecting. That is to say, a system based on modified universalism (a single set of proceedings in the debtors' home jurisdiction with universal effect through the cooperation of the courts of all other affected states) offers several advantages such as value maximisation, efficiency, and just treatment of all creditors.[557] Consequently, each state would naturally desire this framework to function properly for the debtors who have their COMI within its territory. However, this framework works in both directions.[558] That is to say, what Ian Fletcher and other scholars argue about double standards in the treatment of bankruptcy discharge under English law holds true, *mutatis mutandis*, also in this context.[559]

Hence, being part of an international framework based on modified universalism is a significant policy objective that should not be undermined by a broad construction and the extensive application of the public policy

555 See text to n 496.
556 See text to n 497.
557 See sub-s B.II.3.a).
558 It is worth reiterating that the MLCBI does not require reciprocity. However, the existence of the exception under the MLCBI is often linked to the absence of a reciprocity requirement within the instrument. See van Zwieten, 'Article 6: Public Policy Exception' (n 516) para 1.6.06.
559 n 312 (and accompanying text) and text thereto.

exception under the MLCBI.[560] This policy objective is likely one of the main reasons why many developed jurisdictions, such as the US, Great Britain, Australia, Canada, Japan, and the Republic of Korea, which host multi-billion dollar transnational companies with business operations and assets around the world, have implemented the MLCBI. Once again, the extensive use of the public policy exception would significantly undermine the respective policy objective.

To summarise the current point, once a main rule, whatever it may be, is put into effect, the public policy exception should only be applied in cases where fundamental policies, such as constitutional guarantees, are being violated, and such violation cannot be justified by the policy objectives of the state behind the main rule. That holds also for the policy objectives behind the implementation of the MLCBI in a particular jurisdiction.

bb) Premature Consideration and Misinterpretation of the Purpose

Another set of issues worth discussing concerns the premature consideration and the misinterpretation of the purpose of the public policy exception under the MLCBI, particularly when it is invoked to protect local interests. This work supports the arguments against prematurely considering the exception.[561] That is to say, article 6 is placed in Chapter I (General provisions) of the MLCBI. Accordingly, the public policy exception is an exception of a general nature and should be considered only after all specific defences have been exhausted.[562] For example, when relief is sought under article 21, the requirements of article 22 should be examined first.[563] If those requirements are met, then the public policy exception may be considered, but it does not necessarily need to be applied.

In addition, the primary purpose of public policy exception is not to secure the interests of local creditors or other local interests,[564] but rather

560 See Scott C. Mund, '11 U.S.C. 1506: U.S. Courts Keep a Tight Rein on the Public Policy Exception, but the Potential to Undermine Internationals Cooperation in Insolvency Proceedings Remains' (2010) 28 Wis Intl LJ 325, 334, where it is correctly argued that a broad interpretation of the exception would undermine the advantages of the MLCBI.

561 See, eg, Garza (n 517) 1623.

562 *Toft* (n 528) 195-96; Garza (n 517) 1625-27.

563 ibid.

564 For similar concerns, see Bork, *Principles of Cross-Border Insolvency Law* (n 93) para 2.29. For a different view, see Chung (n 538) 116. For a discussion of the

to safeguard the most fundamental policies of the receiving state.[565] When, for example, the recognition of a foreign restructuring plan is sought under article 21, again, article 22 is the appropriate provision for assessing whether the interests of the creditors (including local ones) have been adequately protected in the respective foreign restructuring proceedings.[566] It is also noteworthy to reiterate that under US case law, the mere fact that foreign law is not identical to US law[567] or that the treatment of US creditors in foreign proceedings is worse than it would be in similar US proceedings[568] is not sufficient for the application of the public policy exception.

II. Procedural Fairness

As already identified in this work, deference to foreign insolvency (restructuring) proceedings has its limitations under the principle of modified universalism. The procedural unfairness of the foreign proceedings in question is one of the most notable limitations, not only in this context but also generally in the recognition of foreign judgments. For example, it has been long established under US case law that comity can be granted to foreign court judgments if, *inter alia*, due process has been followed in the respective foreign proceedings.[569]

For determining the place of procedural fairness review within the ML-CBI framework, the model developed under Chapter 15 case law provides a suitable reference. Specifically, when considering the recognition of foreign restructuring proceedings under section 1517 of the BC, any issue regarding the non-compliance with due process in foreign proceedings should be addressed as part of the public policy analysis under section 1506, which is the only possible basis for denying recognition. When deciding on discretionary post-recognition relief under sections 1507 or 1521 of the

problem of local interests in cross-border insolvency in general, see generally John A. E. Pottow, 'Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to Local Interests' (2006) 104 Mich L Rev 1899.

565 Nonetheless, it should be noted that the interests of certain local parties may be safeguarded by the most fundamental policies of the receiving state and, thus, protected by the public policy exception.

566 Buckel (n 367) 1307-11. The respective point will be revisited later in sub-s F.I.1.c) of this work.

567 See text to n 522.

568 See text to n 527.

569 See text to n 371.

BC, procedural fairness may be evaluated within the comity analysis even without resorting to the public policy exception under section 1506 of the BC.[570]

As to the notion itself, as Riz Mokal puts it, fairness in a procedural context is not a substantive goal of insolvency (restructuring) law.[571] It rather focuses on the fairness of process that enables the realisation of substantive goals (one of which is fairness in a substantive context)[572] of that law.[573] Guaranteeing procedural fairness is primarily the responsibility of the national law of the state where the process takes place.[574] The respective rules need not be identical to those of the receiving state and the difference can be tolerated to some extent.[575] Nonetheless, a review of the procedural fairness of foreign proceedings in granting comity is mainly based on the fundamental procedural fairness standards of the receiving state.[576] Article 7 of the MLIJ also expressly refers to 'the fundamental principles of procedural fairness' of the receiving state. For example, US courts have developed a non-exhaustive list of factors to consider when evaluating the procedural fairness of foreign proceedings in Chapter 15 cases:

> (1) whether creditors of the same class are treated equally in the distribution of assets; (2) whether the liquidators are considered fiduciaries and are held accountable to the court; (3) whether creditors have the right to submit claims which, if denied, can be submitted to a bankruptcy court for adjudica-

570 See, eg, *Bakrie* (n 375). However, several courts assessed the procedural fairness of foreign proceedings within public policy analysis when considering granting relief under section 1521. See, eg, *Ephedra* (n 521); *In re Sivec SRL*, Case No 11-80799-TRC (Bankr ED Okla 2011).

571 Riz Mokal, 'Fairness' in Lorenzo Stanghellini and others (eds), *Best Practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law* (Wolters Kluwer 2018) sub-ss 1.1, 1.3.

572 Rizwaan Jameel Mokal, 'On Fairness and Efficiency' (2003) 66 MLR 452, 457, 462-63.

573 Mokal, 'Fairness' (n 571) sub-s 1.3.

574 Bork, *Principles of Cross-Border Insolvency Law* (n 93) para 3.53.

575 See, eg, *Ephedra* (n 521) 337, where a US District Court held that the absence of jury trial alone, which would have been the case under US law, does not suffice to conclude on the procedural unfairness of foreign proceedings. See also *In re OAS S.A.,* 533 BR 83, 104-5 (Bankr SDNY 2015), where a US bankruptcy court stated with respect to *ex parte* orders of a foreign court that 'even the absence of certain procedural or constitutional rights will not itself be a bar under § 1506' (citations omitted).

576 *In re Hourani*, 180 BR 58, 64 (Bankr SDNY 1995).

> tion; (4) whether the liquidators are required to give notice to the debtors' potential claimants; (5) whether there are provisions for creditors' meetings; (6) whether a foreign country's insolvency laws favor its own citizens; (7) whether all assets are marshalled before one body for centralized distribution; and (8) whether there are provisions for an automatic stay and for the lifting of such stays to facilitate the centralization of claims.[577]

The right to a fair trial, which encompasses most of the factors listed above, undoubtedly constitutes the core of procedural fairness. It is one of the universally accepted fundamental human rights enshrined in international treaties.[578] A fair and full opportunity to make their case for affected parties is also a recognised right in most soft and hard law sources of cross-border insolvency (restructuring) law.[579] Below, this work will examine several elements of the right to a fair trial, particularly those that are relevant in a restructuring context.

I. Right to Be Heard

a) Due Notice

Due notice serves as both a minimum requirement and an outer limit for the right to a fair trial in general and the right to be heard in particular. It is considered a minimum requirement because if an affected party has not been properly notified, it can be assumed that due process has not been adhered to in the proceedings in which that party was absent.[580] It also serves as an outer limit because the absence or inaction of a party who has been duly notified is generally irrelevant in assessing procedural fairness.[581] This holds true even when a party leaves the jurisdiction to avoid being served with notice.[582]

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577 *Finanz Ag Zurich v. Banco Economico S.A.*, 192 F3d 240, 249 (2d Cir 1999).
578 See, eg, Convention for the Protection of Human Rights and Fundamental Freedoms (Rome 1950), art 6. See also *Eurofood* (n 477) [65].
579 Bork, *Principles of Cross-Border Insolvency Law* (n 93) paras 3.54-55.
580 *Hourani* (n 576) 67-68; *Sivec* (n 570).
581 Briggs (n 478) para 11.11.
582 ibid.

The notice requirement in restructuring proceedings primarily involves notifying all affected parties and stakeholders about the start of the proceedings so that they can adjust their legal positions accordingly.[583] In addition, affected parties, particularly creditors, should be informed of all procedural actions that can impact their legal positions.[584] This includes (but is not limited to) being notified about court hearings, creditors' meetings (time, location, and agenda), and procedural documents.

aa) Means of Notice

One of the important issues related to the due notice requirement is the method of giving notice. This work supports the argument that all affected known and traceable creditors should be individually notified in order to fully comply with due process.[585] In restructuring proceedings, it is extremely important to send individual notices for creditors' meetings, especially the one where the proposed plan will be voted on,[586] and for court hearings, particularly the one where the court will consider the confirmation of the adopted plan. The requirement for individual notice is essential for foreign creditors with no other business in the jurisdiction where the proceedings take place.[587] It should also be noted that providing actual notice to the specific creditor should meet the due process requirement, even if foreign law does not mandate individualised notice to known creditors.[588]

Collective announcements via publication in official newspapers, public registries, and/or on the website of the debtor or the designated authority also play an important role in insolvency and restructuring proceedings,

583 Bork, *Principles of Cross-Border Insolvency Law* (n 93) para 3.23.

584 Mokal, 'Fairness' (n 571) s 3 (and Policy Recommendation #2.2).

585 *Hourani* (n 576) 68; Mokal, 'Fairness' (n 571) s 3 (and Policy Recommendation #2.4). For a discussion of the international instruments of insolvency law that provide for individual notice, see Bork, *Principles of Cross-Border Insolvency Law* (n 93) para 3.26.

586 Mokal, 'Fairness' (n 571) s 3.

587 See *Hourani* (n 576) 68, where the court stated that it is unreasonable to expect a known foreign creditor to check local media in the debtor's home country on a routine basis when an option of individual notice to that creditor is possible.

588 *Finanz* (n 577) 249. That said, not all US courts share this view. See, eg, *Hourani* (n 576) 68, where the court stated in this context that 'It is the integrity of the liquidation process being reviewed … not the happenstance of a particular incident'.

given the risk of exclusion of unknown and untraceable creditors (e.g. tort creditors) from distribution.[589] That said, such collective announcements generally should not replace individual notices for known and traceable creditors but rather supplement them.[590]

bb) Adequacy of Notice

Another important issue regarding the requirement for providing due notice is adequacy. Merely being notified, even individually, is not sufficient. The recipient of the notice should also have enough time to prepare for the notified action.[591] This includes having sufficient time to review the relevant documents (such as a draft plan or a court decision), prepare a legal position (for example, by hiring a lawyer and preparing a defence), and make any necessary travel arrangements. Under the MLIJ, failing to give notice of proceedings 'in sufficient time and in such a manner as to enable a defence to be arranged' constitutes a ground to deny the recognition and enforcement of an insolvency-related judgment.[592] In *Eurofood*, the CJEU stated that any urgent measures that restrict the right to be heard must be justified and procedural guarantees must be in place to ensure that affected persons can challenge such urgent measures.[593] Again, the sufficient time requirement is particularly important for foreign creditors. This is because there may be additional issues, such as translation, complexity of the local legal system, representation in a foreign country, legalisation of documents, and travel restrictions.[594]

589 Bork, *Principles of Cross-Border Insolvency Law* (n 93) para 3.26.

590 See *Hourani* (n 576) 68.

591 Riz Mokal suggests a range of two to four weeks in the plan confirmation process. See, Mokal, 'Fairness' (n 571) s 3 (and Policy Recommendation #2.2).

592 MLIJ (n 130) art 14 *(a)* (i).

593 *Eurofood* (n 477) [66]. One of the issues raised before the court concerned sufficient notice, as the provisional liquidator appointed in the Irish proceedings had been notified of a court hearing in Italy only a few days before the date of the hearing (see ibid [22]).

594 For a similar discussion, see Rodrigo Rodriguez, 'Article 14: Grounds to Refuse Recognition and Enforcement of an Insolvency-related Judgment' in Reinhard Bork and Michael Veder (eds), *The UNCITRAL Model Laws on Cross-Border Insolvency and on the Recognition and Enforcement of Insolvency-Related Judgments: An Article-by-Article Commentary* (Edward Elgar 2025) para 2.14.13. For a discussion of the potentially unfavourable position of foreign creditors, see McCormack and Wan (n 155) 292.

b) Participation in Proceedings

aa) Lodging Claims

Since restructuring proceedings generally result in the collective modification of the claims of all or some of the debtor's creditors, affected creditors should play a central role in these proceedings. First and foremost, all affected creditors must have an opportunity to file their claims when such filing is a prerequisite for participation.[595] As already noted, creditors, particularly foreign creditors, should be duly notified and given sufficient time to lodge their claims.

bb) Right to Information

Additionally, creditors must have the right to information.[596] In order to make an informed decision before taking a stance on the proposed plan, affected creditors must have the opportunity to access all relevant information about the actual financial situation of the debtor, measures to ensure the continued operation of the debtor's business, and the position of all affected parties under the plan as well as in the alternative scenario.[597] In most jurisdictions, similar information is required by law to be included in the plan, with which the affected creditors must have an opportunity to get familiar before voting.[598] Even in such a case, a creditor's request for additional information should be respected, provided that this information is relevant for the purpose mentioned above.

595 Bork, *Principles of Cross-Border Insolvency Law* (n 93) para 3.58. That said, most stand-alone restructuring frameworks do not require creditors to lodge their claims. See, eg, the frameworks examined in sub-ss C.I.1, E.II.1, E.II.2.a), E.II.2.b), E.II.2.c).

596 For a discussion of the right to information in a general insolvency law context, see Bork, *Principles of Cross-Border Insolvency Law* (n 93) paras 3.27-29. See also *Hourani* (n 576) 66-67.

597 Jay Lawrence Westbrook and others, *A Global View of Business Insolvency Systems* (World Bank and Brill 2010) s 4.4; Mokal, 'Fairness' (n 571) ss 3-4 (and Policy Recommendations #2.5-6); Bob Wessels and Stephan Madaus, *Rescue of Business in Europe: A European Law Institute Instrument* (OUP 2020) s 8.8 (Recommendation 8.03 therein).

598 See, eg, InsO (n 35) s 220.

cc) Participation and Voting in Creditors' Meeting

Finally, all affected creditors should have the opportunity to participate in creditors' meetings and vote on the issues on the agenda.[599] Again, they should be duly notified of such a meeting. Of utmost importance is, undoubtedly, a meeting convened to vote on the proposed restructuring plan. All affected creditors must be duly notified and have the opportunity to participate in this meeting, propose amendments, and vote on the plan.

dd) Illustrative Example: *Bakrie*

As already noted, nearly all of the issues discussed above concerning creditor participation in foreign proceedings were raised in *Bakrie*.[600] In the Indonesian proceedings, an ad hoc committee of a group of affected creditors claimed that the Indonesian plan had not provided sufficient information to make an informed decision. In addition, the case allegedly involved the exclusion of some creditors from participating in the creditors' meeting and voting on the plan. The Indonesian courts approved the administrators' decision to exclude these creditors because the debtor's record and report did not contain the respective claims. The US court, however, did not decide on the alleged voting irregularities while considering the recognition of the Indonesian plan since it had already denied recognition on another ground.[601]

c) Right to Contest

The judicial oversight of the plan confirmation process is of particular significance, since a successfully confirmed plan can modify substantive rights against the will of their holders.[602] The process is susceptible to abuse and, therefore, requires external supervision, which is most appropriately

599 Wessels and Madaus (n 597) s 8.8 (Recommendation 8.06 therein).

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

601 See text to n 422.

602 For a discussion of the central role of the court in restructuring proceedings, see generally Payne, 'The Role of the Court' (n 2). See also Westbrook and others (n 597) sub-s 4.2.5.

provided by the court.[603] Binding effect on holdouts is the main feature that sets formal restructuring proceedings apart from out-of-court workouts, in which substantive rights can be modified only with the consent of their holders.[604] Hence, courts play a central role in protecting creditors' substantive rights and ensuring the fairness of outcome in restructuring proceedings, particularly with respect to holdouts. It is commonly accepted that an administrative body designated by law can also take on this role.[605] Nonetheless, the court is considered a better option for this task,[606] and the confirmation decision made by an administrative body (as the case may be) should be subject to a court review (again, due to the non-consensual alteration of substantive rights).[607]

The court's intervention may be necessary at various stages of restructuring proceedings, such as classifying claims and convening meetings of creditors.[608] However, the most significant role is the fairness assessment, which determines whether the adopted plan should bind the dissent.[609] The extent and manner of the court's intervention at this stage, nonetheless, may vary depending on the restructuring mechanism being used.[610] Most mechanisms require court confirmation once the requisite majority has approved the plan and the plan only becomes binding if the court confirms it in a so-called *confirmation* or *sanctioning* hearing.[611] Under some mechanisms, however, the plan becomes final once it has been approved by the requisite majority without any court involvement.[612] Nonetheless, an affect-

603 Payne, 'The Role of the Court' (n 2) 130-33. For an analysis from a constitutional law perspective, see Madaus, 'A Proposal to Divide the Realms of Insolvency and Restructuring Law' (n 4) 638-39. For a discussion of the advantages (and disadvantages) of judicial (or administrative) supervision over the plan confirmation, see Ignacio Tirado, 'Examining and Confirming Plans' in Lorenzo Stanghellini and others (eds), *Best Practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law* (Wolters Kluwer 2018) sub-s 4.2.

604 Payne, 'The Role of the Court' (n 2) 127.

605 See, eg, Tirado (n 603) sub-s 4.3.

606 ibid. See also Payne, 'The Role of the Court' (n 2) 133.

607 See, eg, PRD (n 15) rec 65; Tirado (n 603) sub-s 4.3.

608 For a discussion of the court's role at this stage (in the example of the English scheme of arrangement), see Payne, 'The Role of the Court' (n 2) 135-137.

609 For a discussion of the court's role at this stage (in the example of the English scheme of arrangement), see ibid 137-140.

610 For a discussion of different options, see Tirado (n 603) sub-s 4.4. See also Payne, 'The Role of the Court' (n 2) 133.

611 See, eg, the mechanisms examined in sub-ss C.I.1, E.II.1, E.II.2.b), E.II.2.c).

612 See, eg, the mechanism examined in sub-s E.II.2.a).

ed party can still challenge the plan on fairness or other grounds before the court and, if successful, have it suspended or revoked.[613] Although there are some differences in the respective types of court involvement,[614] they are not of great significance for the purpose of the right to be heard before the court. Ultimately, a dissatisfied party has the opportunity to challenge a plan that modifies the party's rights without consent. The main focus here is the dissatisfied party's ability to present its case and respond to the opposing party's arguments before the court.

That said, the court is by no means bound by the evidence and arguments of the contesting party. When reviewing the procedural fairness of foreign proceedings in this context, the focus is not on the merits of the final decision but on ensuring that all affected parties had had the opportunity to express their views to the decision-maker before the decision was made. One detail, however, should be clarified in this context. The fact that the merits of the respective decision cannot be reassessed through a procedural fairness review at the recognition stage should not lead to the conclusion that the decision on the respective substantive matter should not be justified at all. Mere granting access to the courtroom and hearing the arguments of the dissatisfied party do not suffice. The decision should contain a 'clear and formal record' of how the contesting party's right to be heard has been ensured as well as the justification of the respective decision, whatever it may be, on the substantive matter in question.[615]

2. Right of Appeal

Whether the affected parties should have the right of appeal in restructuring proceedings remains open for debate.[616] Best practices recommend granting affected parties the right to appeal in a general insolvency law

613 See, eg, the *unfair prejudice* challenge in sub-s E.II.2.a)bb).

614 For a more detailed discussion, see Tirado (n 603) sub-s 4.4. See also Payne, 'The Role of the Court' (n 2) 133.

615 See *Bakrie* (n 375) 887, where the court refused to recognise and enforce an Indonesian plan in the US not merely because of third-party releases under the plan but rather due to the absence of 'at least a rudimentary record in the foreign proceeding as to the basis for such releases and procedural fairness of the underlying process'. For a more detailed discussion of the case, see sub-s C.II.2.d)ee).

616 See, eg, Bob Wessels, 'Should Parties Have the Right to Appeal a Restructuring Plan?' (7 August 2023) Bob Wessels Blog (2023-08-doc1) <https://bobwessels.nl/blog/2023-08-doc1-should-parties-have-the-right-to-appeal-a-restructuring-p

context.[617] When it comes to restructuring proceedings, the respective right is often discussed in the context of appealing the court order confirming or rejecting the plan and is generally recommended.[618] It is also recommended that an appeal from the decision on confirmation, if permitted, should generally not prevent the plan from taking effect.[619]

In restructuring proceedings, where time and certainty are crucial, a lengthy process of appeal, particularly one delaying the implementation of the plan, can potentially undermine the chance of a successful outcome.[620] Perhaps this explains why some modern restructuring tools do not include a second court review of plan confirmation.[621] On the other hand, no court decision is immune to judicial errors. Recent cases decided by the EWCA have indeed illustrated how a second court review could reinstate substantive justice, particularly in the context of newly implemented restructuring frameworks.[622]

The question of whether foreign proceedings should be considered unfair in the absence of the right of appeal is not easy to answer. This work argues in favour of the right of appeal in restructuring proceedings without an automatic stay of the implementation of the plan, as noted above. However, it argues that the lack of the right of appeal by itself should not result in denying recognition of foreign plans due to procedural unfairness. Instead, this aspect should be assessed in the overall context of the procedural fairness of the proceedings in question. In this context, it

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lan/> accessed 21 October 2025. For a comparative summary of jurisdictions across Europe, see Wessels and Madaus (n 597) s 8.5.4.

617 See, eg, UNCITRAL, *Legislative Guide on Insolvency Law, Parts One and Two* (UN 2005) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf> accessed 21 October 2025, pt 2, ch III, para 120 (and Recommendation 138); World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (World Bank 2021) <https://documents1.worldbank.org/curated/en/391341619072648570/pdf/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf)> accessed 21 October 2025, pt C2.1.

618 See, eg, PRD (n 15) rec 65; Tirado (n 603) sub-s 4.5 (and Policy Recommendation #6.4).

619 See, eg, PRD (n 15) art 16 (3); Tirado (n 603) sub-s 4.5 (and Policy Recommendation #6.4); Wessels and Madaus (n 597) s 8.8 (Recommendation 8.10 therein).

620 Tirado (n 603) sub-s 4.5.

621 See, eg, Dutch Act on the Confirmation of Extrajudicial Restructuring Plans (Wet Homologatie Onderhands Akkoord), art 1 (F) (thereby introduced art 369 (10) to the Dutch Bankruptcy Act (Faillissementswet).

622 *Strategic Value Capital Solutions Master Fund LP & Ors v AGPS BondCo PLC (Re AGPS BondCo PLC)* [2024] EWCA Civ 24 (*Adler*); *Saipem SPA & Ors v Petrofac Ltd & Anor* [2025] EWCA Civ 821 (*Petrofac*).

is crucial to consider, *inter alia*, the following factors: (i) whether the plan was initially confirmed by an administrative agency or a court; (ii) if by a court, whether by a general civil or administrative court or a specialised bankruptcy (commercial) court; (iii) whether the confirmation hearing was a mere formality or genuinely addressed fairness concerns; and (iv) whether affected parties had had the opportunity to object to the plan and present their case before the decision was made.[623]

3. Non-Discrimination of Foreign Creditors

The equal treatment of similarly situated creditors is one of the main substantive objectives of insolvency law.[624] This substantive principle is also central to the concept of universalism, which aims to distribute the debtor's assets to all creditors in a single proceeding, regardless of their location.[625] The principle is relevant in a procedural context, too, as all creditors, irrespective of their domicile, nationality, place of business, and so forth, should have the same procedural rights in restructuring proceedings.[626] Several cross-border insolvency and restructuring instruments contain express provisions on equal procedural rights of foreign and local creditors.[627] As noted earlier, foreign creditors should be given additional consideration as far as matters such as individualised notices or the adequacy of notice are concerned. Positive discrimination of foreign creditors in this context, therefore, should be allowed and encouraged.

As stated above, the issue of discrimination against foreign creditors extends beyond a procedural setting. Such discrimination, if present, is not easily identifiable through a procedural fairness review alone. Therefore, the matter will be revisited later in this work when arguing for the necessity of a substantive fairness review at the recognition stage.

623 See, Tirado (n 603) sub-s 4.5, where most of those aspects are highlighted in the context of whether an appeal should be heard by a court of first instance or a higher court. The same arguments are also relevant in this context.

624 For a more detailed discussion, see sub-s E.I.1.

625 van Zwieten (ed), *Principles of Corporate Insolvency Law* (n 29) para 16-09.

626 Bork, *Principles of Cross-Border Insolvency Law* (n 93) paras 2.62, 3.56.

627 See, eg, MLCBI (n 17) art 13 (1). For a more detailed discussion, see McCormack and Wan (n 155) 291-93.

4. Absence of Arbitrariness

The absence of arbitrariness is one of the core pillars of procedural justice. Procedural safeguards, some of which have been discussed in this work, should not be granted arbitrarily on an ad hoc basis. Instead, they should be based on clear norms and principles of law.[628] Even when discretion is given in granting certain safeguards (e.g. permitting an appeal and ordering disclosure), the decision-maker should not act arbitrarily but instead follow the respective principles of law.[629] The need to avoid arbitrariness applies not only in relation to procedural safeguards but is also true when deciding on substantive matters. This is particularly crucial in restructuring proceedings where several substantive matters are at the discretion of the court, as will be elaborated on in subsection E.I.2.

5. Absence of Fraud

The fact that a foreign judgment has been obtained by fraud constitutes a general defence to its recognition and enforcement.[630] This applies to orders of foreign courts in insolvency or restructuring proceedings as well.[631] Below, this work will touch on some important aspects of the fraud defence generally.

What constitutes fraud in foreign proceedings can be given a broad construction. It has been argued that fraud in foreign proceedings '"*includes every variety of mala fides and mala praxis whereby one of the parties misleads and deceives a judicial tribunal*"'.[632] Two main types of fraud have been distinguished. One common type involves unlawfully influencing the foreign court, for example, through corruption or bribery, to reach a decision in favour of the winning party (*fraud by the court*).[633] The other type involves deceiving the court by the winning party, for example, through

628 *Hourani* (n 576) 67

629 Bork, *Principles of Cross-Border Insolvency Law* (n 93) para 3.1.

630 See, eg, *Hilton* (n 86) 202-03, Pippa Rogerson, *Colliers's Conflict of Laws* (4th edn, CUP 2013) 254; Briggs (n 478) para 11.6.

631 See, eg, MLIJ (n 130) art 14 *(b)*.

632 See Rogerson (n 630) 254 quoting *Jet Holdings Inc v Patel* [1990] 1 QB 335.

633 See Rogerson (n 630) 254 and cited cases therein. See also Timothy G. Nelson, 'Down in Flames: Three U.S. Courts Decline Recognition to Judgments from Mexico, Citing Corruption' (2010) 44 Intl L 897, 90, classifying it as *extrinsic fraud*.

bribed witnesses or forged evidence (*fraud on the court*)[634]. There are other patterns of fraud as well, such as *fraud on the merits* and *collateral fraud*.[635]

The fact that the alleged fraud has been raised before the foreign court and been rejected does not generally preclude the application of the fraud exception at the recognition stage under English law,[636] subject to a few exceptions.[637] Nor does the fact that the party invoking the fraud defence could have done (but did not do) so in the foreign proceedings in question.[638] Such a broad approach, however, has been questioned.[639] This work agrees with the criticism of the respective broad approach and also considers that invocation of the fraud defence at the recognition stage should be primarily limited to the *fraud by the court* cases. Other types of fraud should generally be invoked and litigated in the respective foreign jurisdiction.[640]

That said, it can be challenging to prove fraud in foreign proceedings, particularly *fraud by the court*. The party claiming fraud during the recognition stage is generally required to provide at least *prima facie* evidence to support the respective claim.[641] General arguments and evidence are typically deemed insufficient by US courts in Chapter 15 cases. For example, objections to the recognition and enforcement of a foreign plan based on expert testimony on the corruption generally in the respective foreign (Mexican) judicial system were overruled in *Vitro II*.[642] Similarly, objections to recognising and enforcing an Indonesian plan based on the corruption of the Indonesian proceedings, citing country reports on human rights by the US Department of State, were not upheld in *Bakrie*.[643]

634 See Rogerson (n 630) 254 and cited cases therein. See also Nelson (n 633) 901, classifying it as *intrinsic fraud*.
635 For a more detailed discussion, see Rogerson (n 630) 254 and cited cases therein.
636 Rogerson (n 630) 255; Briggs (n 478) para 11.7.
637 One main exception to the mentioned approach is when the fraud issue has been separately litigated in the foreign jurisdiction. See Rogerson (n 630) 256.
638 ibid 255.
639 See *Bakrie* (n 375) 879, where it was held that the fraud defence should be invoked in cases where 'there was no adequate opportunity for correction of the fraud in the foreign proceeding, including a timely appeal' and 'Alleged fraud must relate to matters other than issues that could have been litigated'. See also Rogerson (n 630) 255-56.
640 Nelson (n 633) 902.
641 Rogerson (n 630) 256.
642 *Vitro II* (n 399) 130.
643 *Bakrie* (n 375) 890.

The difficulty of proving fraud in foreign proceedings, too, justifies the need for a substantive fairness review at the recognition stage, as suggested by this work. Therefore, the respective aspect will be revisited later in this work.

III. Summary

In Part D, this work discussed two main general safeguards in the context of recognising foreign court judgments, both of which are also relevant under the MLCBI framework: public policy (D.I) and procedural fairness (D.II). This work examined key aspects of these safeguards, particularly those relevant to restructuring proceedings and the position of foreign creditors in these proceedings. Despite acknowledging the importance of applying the standards of the receiving state when considering the invocation of those safeguards, this work underscored the need to exercise caution in considering their application. That holds particularly true for the public policy exception. This work underscored the importance of its restrictive application and that the main purpose of the exception is to protect the fundamental policies of the receiving state rather than the interests of local creditors.