A. Introduction

I. Introduction to the Topic

The restructuring of distressed companies is a delicate matter. It is a complex process that may involve measures such as reducing principal amounts, extending maturity dates, and transferring equity to creditors in order to achieve the objectives of a restructuring.[1] In the absence of a specific framework, a restructuring would require the consent of all affected claimants under general principles of private law, as is the case with contractual workouts.[2] However, a collective framework based on the unanimous support of the affected claimants has its shortcomings. Some claimants, known as *free riders,* may withhold their consent to receive better treatment at the expense of others.[3] This could obstruct the collective benefits that would be generated if the restructuring went through, commonly referred to as the *holdout problem* in the literature.[4] Lawmakers' response to prevent such unjustified holdout scenarios is creating specific restructuring frameworks that can bind all affected claimants, including holdouts.[5]

That said, such a binding effect may also give rise to opportunities for abuse and misuse.[6] That is to say, holdout behaviour is not always unjustified and may reflect legitimate opposition to an unfair distribution under

1 For a discussion of possible restructuring measures, see Riz Mokal, 'The Goals, Contents, and Structure of the Plan' (with help from Charles G. Case and Lorenzo Stanghellini) in Lorenzo Stanghellini and others (eds), *Best Practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law* (Wolters Kluwer 2018) s 3.

2 Jennifer Payne, 'The Role of the Court in Debt Restructuring' (2018) 77 CLJ 124, 127.

3 Stephan Madaus, 'The Cross-border Effects of Restructurings' in Katharina de la Durantaye and others (eds), *Festschrift für Christoph G. Paulus zum 70. Geburtstag* (CH Beck 2022) 472.

4 Stephan Madaus, 'Leaving the Shadows of US Bankruptcy Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law' (2018) 19 EBOR 615, 633ff.

5 Madaus, 'The Cross-border Effects of Restructurings' (n 3) 472. See also Payne, 'The Role of the Court' (n 2) 127-28.

6 Payne, 'The Role of the Court' (n 2) 129-131. For a more detailed discussion of fairness concerns in different scenarios of debt-restructuring, see generally Sarah Paterson, 'Debt Restructuring and Notions of Fairness' (2017) 80 MLR 600.

the restructuring plan. Most jurisdictions provide fairness frameworks to assess whether holdout behaviour is justified before binding holdout creditors to the plan.[7] Such an assessment is generally conducted by the court prior to sanctioning the plan or when the plan is challenged on the respective grounds, as the case may be.[8] Different jurisdictions apply varying tests and priority rules in this regard.[9]

The restructuring becomes even more delicate when cross-border elements are involved. A typical example involves a plan that contemplates the non-consensual discharge of a foreign law-governed debt. Here, more than the confirmation of the local court is needed to fully implement the plan, particularly in relation to the dissenting foreign creditor. To prevent that creditor from enforcing the original claim in foreign jurisdictions (e.g. in the jurisdiction whose law governs the creditor's original claim), the plan and its binding effect should be recognised in the eyes of those jurisdictions. Several additional issues arise concerning such cross-border recognition.

First and foremost, it is essential to identify which route to use for cross-border recognition. This, in turn, refers to the much more complex issue of determining the legal nature of a restructuring plan. As this work will outline in section B.I, there is no consensus in the literature regarding these matters. The same section of this work will also demonstrate that the majority in academia view restructuring proceedings as insolvency proceedings and, therefore, support achieving their cross-border effects through the existing cross-border insolvency frameworks. After briefly taking a stance on the legal nature of restructuring proceedings in that section, this work will not argue against the respective route of achieving the cross-border effects of restructuring plans. Section B.III of this work will indeed indicate that the cross-border insolvency frameworks examined therein expressly include restructuring proceedings.

II. Research Problem

The fact that restructuring proceedings fall within the existing cross-border insolvency frameworks does not eliminate the uncertainty surrounding the

7 For a more detailed discussion, see s E.II.
8 For a more detailed discussion, see sub-s D.II.1.c).
9 For a more detailed discussion, see s E.II.

cross-border effects of restructuring plans. That is to say, even jurisdictions that otherwise apply the progressive universalist approach to foreign insolvency proceedings, like England,[10] may adopt an over-protective approach to giving effect to foreign restructuring plans.[11] That is particularly true when recognising the discharge of a foreign law-governed debt under the plan. Since discharge is a central aspect of restructuring,[12] this matter is of high importance.

The recognition of restructuring plans depends on the cross-border insolvency framework in question. For example, the European Insolvency Regulation ("EIR")[13] establishes a framework for automatic recognition of insolvency proceedings, which generally include restructuring proceedings.[14] Despite such recognition being subject to the public policy exception, the EIR can generally be considered an effective tool for recognising the cross-border effects of restructuring plans within the EU. Nonetheless, the current EU example does not reflect the global reality as it relies on mutual trust among a closed group of a limited number of countries with harmonised laws in several key areas. For example, the Preventive Restructuring Directive ("PRD")[15] aims to harmonise, to a certain extent, critical aspects of national restructuring laws across the EU.[16]

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10 English courts' universalist approach towards cross-border insolvencies goes back to the 18th century. See, eg, *Solomons v Ross* (1764) 1 HBl 131. For a more detailed discussion, see generally K. H. Nadelmann, 'Solomons v. Ross and International Bankruptcy Law' (1946) 9 MLR 154. See also Tom Smith, 'Recognition of Foreign Corporate Insolvency Proceedings at Common Law' in Richard Sheldon (ed) *Cross-Border Insolvency* (4th edn, Bloomsbury Professional 2015), paras 6.4-15. For a more detailed discussion of the universalist approach to cross-border insolvency in general, see sub-s B.II.3.

11 For a more detailed discussion of the English approach in this context, see sub-s C.II.1.

12 Jay Lawrence Westbrook, 'Comity and Choice of Law in Global Insolvencies' (2019) 54 Tex Intl L J 259, 270.

13 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) ("EIR").

14 For a more detailed discussion of the EIR, see sub-s B.III.1.

15 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) ("PRD").

16 For a more detailed discussion of the PRD, see sub-s E.II.3.

In this context, a quite different perspective is presented under the UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI").[17] To begin with, it provides a model that does not rely on mutual trust. Nor does it require reciprocity.[18] Therefore, this model allows the recognition of eligible proceedings from all jurisdictions. Furthermore, the MLCBI can easily be incorporated into national legislation without the consent of other states.[19] It has been implemented, in one or another form, in over 60 jurisdictions worldwide, representing different continents and legal systems, ranging from the US to Saudi Arabia, from Japan to Zimbabwe, from Australia to Chile, and so forth.[20] Additionally, the MLCBI is underpinned by the principle of modified universalism, developed as a fitting interim solution for the current world reality.[21]

Although the MLCBI generally encompasses restructuring proceedings, it does not expressly mention the recognition of restructuring plans. Such recognition does not come automatically upon recognition of foreign restructuring proceedings and may only be available as post-recognition relief under the MLCBI.[22] That said, the lack of express reference to the recognition of restructuring plans in the text of the MLCBI and the discretionary nature of such relief give rise to uncertainty. That is to say, jurisdictions that have implemented the MLCBI apply different approaches and tests to the respective matter. That holds true for England and the US, even though

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17 UNCITRAL adopted the Model Law on Cross-Border Insolvency ("MLCBI") in 1997 and revised its Guide to Enactment and Interpretation ("Guide to the MLCBI") in 2013. See UNCITRAL, *Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (UN 2014) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf> accessed 21 October 2025. For a summary of its origins and legislative history, see Adrian Walters, 'Modified Universalisms & the Role of Local Legal Culture in the Making of Cross-Border Insolvency Law' (2019) 93 Am Bankr LJ 47, 56.

18 Walters, 'Modified Universalisms' (n 17) 60. It is noteworthy that South Africa included a reciprocity requirement in its local version of the MLCBI. Christoph G. Paulus, 'Civil Law Codificationalism vs. UNCITRAL's Soft Law Approach in the Context of Insolvency Law' in Ángel María Ballesteros Barros and David Amable Morán Bovio (eds), *Insolvency Law in UNCITRAL: Instruments and Comments* (Editorial Aranzadi 2023), 392.

19 For a more detailed discussion of the MLCBI, see sub-s B.III.2.

20 For the status of the MLCBI, see UNCITRAL, 'Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)' <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status> accessed 21 October 2025.

21 For a more detailed discussion, see sub-s B.II.4.

22 For a more detailed discussion of the automatic effects of recognition and post-recognition relief under the MLCBI, see sub-s B.III.2.c).

they belong to the same legal system and have a common legal history. The English approach prioritises the protection of creditors by not recognising a discharge under a foreign restructuring plan (e.g. one confirmed in the debtor's home jurisdiction) unless it constitutes a valid discharge under the law governing the debt in question (the Gibbs rule).[23] By contrast, the American approach is more favourable to the debtor. It allows recognising a discharge (including that of a US law-governed debt) under a foreign plan, with certain safeguards in place.[24]

This work will thoroughly analyse the approaches mentioned above and seek to strike a fair balance between the interests of the debtor and dissenting foreign creditors in the recognition of restructuring plans under the MLCBI. For that purpose, particular attention will be given to the *adequate protection* safeguard under article 22 (1) of the MLCBI.

III. Definitions and Limitations

In this work, the term *restructuring proceedings* encompasses all formal rescue procedures that involve the restructuring of claims held by the distressed debtor's existing claimants, with binding effect on holdouts. Whether these procedures occur within insolvency proceedings or as stand-alone processes and what they are called (rehabilitation, reorganisation, restructuring, and similar terms) are irrelevant. The term *restructuring plan* should be construed accordingly. For the avoidance of doubt, plans that contemplate the ultimate liquidation of the debtor or its going-concern sale to third parties are excluded.

Throughout this work, the term *requisite majority* refers to a majority in number and/or in value in the meeting of all claimants or any specific group of them, as required by the applicable law for approval of a particular type of restructuring plan. A *dissenting* or *holdout creditor* is a creditor who has not supported the proposed plan, whether by voting against it, abstaining from voting, or not participating in the vote. The term *discharge* in relation to a dissenting creditor refers to any non-consensual modification of the original claim of that creditor in restructuring proceedings. In this work, the term *governing law of the contract* refers to the law applicable to a contract as determined under private international law rules.

23 For a more detailed discussion, see sub-s C.II.1.
24 For a more detailed discussion, see sub-s C.II.2.

This work will focus on the problem described above and, therefore, will not address related side issues. That is to say, for the purpose of this work, the *debtor* should be considered as a single, non-regulated company. Hence, individuals, whether merchants or consumers, are excluded. Furthermore, this research will not address issues related to the restructuring of groups, whether in a domestic or cross-border context. Additionally, this work will not delve into the matters specific to the restructuring of regulated companies, such as credit institutions and insurance undertakings. Although third-party releases will be touched on while discussing the US case law on the recognition of foreign restructuring plans, the focus of this work will be on the claims against the debtor itself. Therefore, the concept of third-party releases in restructuring will not be analysed.

This work will focus on fairness issues in recognising foreign restructuring plans under the MLCBI framework. Therefore, it will not address choice-of-forum and choice-of-law rules for cross-border restructuring cases. However, under the MLCBI, a *foreign main proceeding* is considered to take place in the state where the debtor's centre of main interests ("COMI") is located, as will be evident in subsection B.III.2 of this work. Therefore, for the purposes of this work, it will be assumed that the main restructuring proceedings take place in the jurisdiction where the debtor's COMI is located. Throughout this work, this jurisdiction may also be referred to as the *debtor's home country* or *jurisdiction*. Additionally, this work will assume that the court in the debtor's home jurisdiction applies the law of the forum (the *lex fori concursus*) to procedural and substantive matters.[25]

IV. Structure of the Research

As stated, this work will focus on striking a fair balance between the interests of the debtor and dissenting foreign creditors when recognising restructuring plans. It was also noted that this work will describe and analyse the research problem using a model based on the MLCBI. That said, other frameworks, such as the EIR, may also be referred to, e.g. for comparison.

This work comprises five main parts. Part B will provide an introduction to cross-border restructuring, considering several crucial aspects. This

25 The MLCBI is silent on the matter. Nevertheless, this is generally the case under the principles of universalism and modified universalism (see sub-ss B.II.3 and B.II.4, respectively) and the EIR (see sub-s B.III.1.b)).

includes discussing the academic debate and taking a stance on the legal nature of restructuring proceedings as well as their cross-border effects, examining underlying principles and modern mechanisms of the cross-border insolvency system.

Part C will provide a comparative analysis and outline the preliminary findings. As mentioned earlier, the focus of this work will be on the interpretation of the MLCBI in England and in the US regarding the recognition of restructuring plans. There are several reasons for selecting these jurisdictions. First, both England (London) and the US (New York) are widely known as *financial hubs* hosting major financial institutions and stock exchanges. This ultimately affects the choice of governing law for most international debt instruments, which, in turn, influences the number of recognition proceedings in these jurisdictions. In addition, both jurisdictions are also *restructuring hubs* equipped with advanced statutory mechanisms and case law principles, as well as competent judges who apply the law. These factors naturally impact litigation involving cross-border restructuring issues in these jurisdictions in terms of well-established principles and the competence of judges. Finally, the rule protecting creditors, which has been touched on earlier, is almost specific to English law. On the other hand, American courts have a long record of granting comity to foreign insolvency and restructuring proceedings.[26] The fact that the recognition of the restructuring proceedings of the International Bank of Azerbaijan ("IBA"), an exemplary case that will be discussed in section C.I, was sought in these two jurisdictions is also a relevant factor. After analysing those jurisdictions, this work will suggest a middle-ground model drawing primarily on the American approach.

Part D will examine the traditional safeguards in recognising foreign judgments as part of this model, namely, public policy and procedural fairness. This work will discuss several important aspects of each safeguard, mainly in the context of recognising restructuring plans under the MLCBI.

Then, this work will turn to the analysis of substantive fairness. Part E will generally analyse substantive fairness in restructuring proceedings without considering a cross-border context. It will also examine how the concept is implemented in different jurisdictions. Part F will develop a framework to ensure substantive fairness in considering the recognition of restructuring plans under the MLCBI as part of the model suggested in this

26 See sub-s C.II.2.

work. As already noted, the *adequate protection* safeguard under article 22 (1) of the MLCBI will be closely examined in this context.