B. Introduction to Cross-Border Restructuring

As already identified, the problem of this research concerns fairness in achieving the cross-border effects of restructuring plans. Before delving into the research problem, it is essential to discuss the foundations of debt restructuring with a particular focus on its cross-border aspects. Part B will aim to accomplish this goal. Section B.I will be devoted to the legal nature of restructuring proceedings. This analysis will reveal that most scholars view restructuring proceedings as insolvency proceedings and see these proceedings, in one form or another, within the existing cross-border insolvency system. This work, too, will conclude that the use of cross-border insolvency frameworks to achieve the cross-border effects of restructuring proceedings is, in principle, acceptable. Sections B.II and B.III, therefore, will further explore the underlying principles and instruments of cross-border insolvency law, respectively. Section B.IV will summarise the points discussed in this Part.

I. Legal Nature of Restructuring Proceedings

Insolvency law governs the collective satisfaction of claims against an insolvent debtor.[27] This is done by administering and realising the debtor's entire asset pool and distributing the proceeds among creditors under statutory distribution rules.[28] By preventing individual actions, insolvency law aims, *inter alia*, to maximise the value of the debtor's estate, ultimately benefiting creditors as a general body.[29] In situations where the debtor has a going concern value, keeping the business intact is more advantageous for creditors as a whole.[30] One way to achieve this is to sell the entire business to a third party and distribute the proceeds from the sale among

27 Ian F. Fletcher, *The Law of Insolvency* (5th edn, Sweet & Maxwell 2017) paras 1-007-08.

28 ibid para 1-008.

29 Kristin van Zwieten (ed), *Goode on Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018) para 2-04.

30 Douglas G. Baird, 'Priority Matters: Absolute Priority, Relative Priority, and the Costs of Bankruptcy' (2016) 165 U Pa L Rev 785, 789

the existing claimants.[31] However, it is essential to acknowledge that finding a third-party buyer willing or able to pay a price close to the going concern value of the business may be challenging for different reasons.[32] In such instances, the going concern value can be best preserved by restructuring existing claims against the debtor.[33] Modern restructuring frameworks are designed to facilitate this process.

That said, the legal nature of restructuring proceedings is far from clear. Several doctrinal approaches have been suggested in that regard. The debate is mainly about whether the same set of rules and principles should be applied to both insolvency and restructuring proceedings and, if not, what rules and principles should govern the latter. The PRD, which envisages the availability of restructuring mechanisms for not-yet-insolvent debtors, led to a more intense debate on the issue, particularly regarding the cross-border effects of such proceedings.[34] The matter is particularly relevant from the perspective of debt discharge, as these two proceedings do not treat discharge similarly. That is to say, insolvency proceedings affect the enforcement of pre-insolvency entitlements rather than discharging them outright in the eyes of substantive law.[35] Restructuring proceedings, on the contrary, can directly modify creditors' entitlements under the original debt instruments.[36] Under some frameworks, there is no way back, even if the debtor fails to fulfil the obligations under the confirmed plan. The reorganisation procedure under the US Bankruptcy Code ("BC"),[37] more specifically, under Chapter 11 of the BC ("Chapter 11"), is a notable example in this context: once the restructuring plan has been confirmed and become final, the debtor is discharged of all the original debts and can be sued

31 ibid.
32 ibid 789-90.
33 ibid.
34 See, eg, generally Dominik Skauradszun and Walter Nijnens, 'Brussels Ia or EIR Recast? The Allocation of Preventive Restructuring Frameworks' (2019) 16 Int Corp Res 193; Irit Mevorach and Adrian Walters, 'The Characterization of Pre-Insolvency Proceedings in Private International Law' (2020) 21 EBOR 855.
35 Generally, discharge only occurs once insolvency proceedings have been terminated and the debtor has been liquidated. Even in this scenario, one cannot talk about full discharge since creditors may still enforce the unpaid part of their claims against the debtor's assets discovered after the latter's liquidation. See, eg, German Insolvency Code (Insolvenzordnung ["InsO"]), s 201. For a more detailed discussion, see Riz Mokal, 'What is an Insolvency Proceeding? *Gategroup* Lands in a Gated Community' (2022) 31 Intl Ins Rev 418, 422.
36 Madaus, 'The Cross-border Effects of Restructurings' (n 3) 480.
37 Title 11 of the US Code ("BC").

by the creditors only for the breach of the plan, not the original debt contracts.[38]

Section B.I will first summarise two main doctrinal approaches to the legal nature of restructuring proceedings in a purely domestic context, i.e. without considering a cross-border setting (B.I.1). It will then outline the cross-border implications of the respective approaches (B.I.2). This work will also briefly take a stance on the nature of restructuring proceedings in both contexts (B.I.3).

1. Restructuring Proceedings in a Domestic Setting

Below, this work will summarise two main approaches to the nature of restructuring proceedings. For the purposes of this work, they will be referred to as the *insolvency* and *contractual* approaches.

a) The Insolvency Approach

The insolvency approach, championed by most scholars and practitioners from across the globe, views restructuring proceedings as a form of insolvency proceedings. The idea is prevalent in the US, where the Constitution prohibits non-consensual impairment of debt under the contract law of individual states.[39] US scholars such as Thomas Jackson[40] and Douglas Baird[41] define restructuring as a form of insolvency proceedings in which the business is hypothetically sold as a going concern to the existing claimants (e.g. creditors) of the debtor instead of a third party. This definition is given as part of the *Creditors' Bargain Theory* on insolvency law, which suggests that insolvency law mirrors the mechanism that creditors would themselves *ex ante* agree upon for the insolvency scenario of the debtor, *inter alia*, to avoid dismantling the insolvent business through

38 Rodrigo Olivares-Caminal and others, *Debt Restructuring* (3rd edn, OUP 2022) para 3.130.

39 The Constitution of the US, art I, s 10, cl 1. For a more detailed discussion, see Madaus, 'A Proposal to Divide the Realms of Insolvency and Restructuring Law' (n 4) 628-29.

40 Thomas H. Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91 Yale LJ 857, 893ff.

41 Douglas G. Baird, 'The Uneasy Case for Corporate Reorganizations' (1986) 15 (1) J Legal Stud 127, 139.

individual advantage-taking creditor actions (thus, responding to the *common pool* problem).[42] Another US scholar, Jay Westbrook, who extensively publishes on cross-border insolvency matters, underscores *in rem* nature of restructuring proceedings based on insolvency (bankruptcy) theory on restructuring.[43]

The concept has strong support outside the US as well. Dutch scholar Rolef de Weijs defines restructuring as an alternative to liquidation under insolvency law but addressing the problem of *anticommons* rather than that of *common pool*.[44] English scholar and practitioner Riz Mokal suggests the purposive and contextual classification of insolvency law under which a restructuring proceeding shall be considered an insolvency proceeding when the proceeding operates pursuant to a law that is able to respond to 'circumstances peculiar to insolvency' and with respect to a 'sufficiently insolvent' (or 'insufficiently solvent') debtor.[45] To him, the fact that such proceeding may also be applied to a solvent debtor, as in the case of the English scheme of arrangement,[46] is irrelevant for the purposes of the classification.[47] Singaporean judge Kannan Ramesh criticises the contractual approach to debt discharge in restructuring proceedings, highlighting policy considerations behind such discharge.[48] Although he defines a scheme of arrangement 'as a statutory mechanism for the adjustment of contractual rights not predicated on the insolvency of the corporation', he underscores the circumstances

42 See generally Jackson (n 40). It should be noted that several alternative theories have also been advanced in US scholarship. See, eg, generally Robert K. Rasmussen, 'Debtor's Choice: A Menu Approach to Corporate Bankruptcy' (1992) 71 Tex L Rev 51 (*Menu Approach*); Anthony J. Casey, 'Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy' (2020) 120 Colum L Rev 1709 (*New Bargaining Theory*).

43 Westbrook, 'Comity and Choice of Law' (n 12) 263. See also Jay Lawrence Westbrook, 'Interpretation Internationale' (2015) 87 Temp L Rev 739, 748; Jay Westbrook, 'Ian Fletcher and the Internationalist Principle' (2015) 3 NIBLeJ 30 565 <https://ssrn.com/abstract=3064868> accessed 21 October 2025, 566.

44 Rolef de Weijs, 'Too Big to Fail as a Game of Chicken with the State: What Insolvency Law Theory Has to Say About TBTF and Vice Versa' (2013) 14 EBOR 201, 210-12.

45 Mokal, 'What is an Insolvency Proceeding?' (n 35) 429.

46 For a more detailed discussion of the English scheme of arrangement, see sub-s E.II.2.b).

47 In relation to such debtor, the proceeding should not be considered as an insolvency proceeding as per Riz Mokal's classification. See Mokal, 'What is an Insolvency Proceeding?' (n 35) 429.

48 Kannan Ramesh, 'The Gibbs Principle - A Tether on the Feet of Good Forum Shopping' (2017) 29 SAcLJ 42, para 21ff.

in light of which these proceedings typically occur.[49] To him, they are sought mainly by insolvent corporations as a debtor-in-possession regime to restructure debt obligations, and this context should not be disregarded while considering the legal nature of schemes of arrangement.[50] Hence, he underscores the insolvency underpinnings of schemes of arrangement.[51] Kannan Ramesh's criticism of the (mis)characterisation of discharge as a contractual (rather than an insolvency law) matter is supported by US bankruptcy judge Martin Glenn.[52]

These examples are illustrative of the global support for the insolvency approach.

b) The Contractual Approach

Stephan Madaus provides a detailed exposition of the contractual approach, which offers a different perspective.[53] He draws a normative distinction between insolvency and restructuring proceedings and argues against applying insolvency law rules and principles to the latter.[54] In his view, the main purpose of insolvency law is to prevent the overuse, through uncoordinated creditor actions, of the insufficient common pool of the debtor's remaining assets.[55] Restructuring proceedings, says Stephan Madaus, whether they respond to a present common pool problem or aim to prevent one, focus on the debtor's future income, which is not part of the common pool of the debtor's remaining assets.[56] Here, the purpose is, according to him, to prevent an underuse of common goods (the *anticommons* problem).[57] Stephan Madaus, thus, argues that:

> Any solution that goes beyond the common pool requires an agreement between the debtor and (most of) his creditors (about future income). Such a solution is always a contractual

49 ibid para 28.
50 ibid.
51 ibid.
52 *In re Agrokor dd* 591 BR 163, 195 (Bankr SDNY 2018) (*Agrokor*).
53 See generally Madaus, 'A Proposal to Divide the Realms of Insolvency and Restructuring Law' (n 4).
54 ibid.
55 ibid 619-21, 623-24.
56 ibid 621-623.
57 ibid 633ff.

> solution and, consequently, any legal framework supporting the conclusion of such agreements (restructuring law) should be based on contract and company law principles instead of those of a liquidation (insolvency principles).[58]

In simple terms, Stephan Madaus defines restructuring proceedings as a court-assisted execution of a contract.[59] As to the issue of binding holdouts under contract law, which would otherwise contradict the core contract law principle of party autonomy, he suggests referring to other contract law principles (doctrines) such as hardship, abuse of rights, bad faith, self-contradictory behaviour as a solution.[60]

2. Restructuring Proceedings in a Cross-Border Setting

Restructuring proceedings can be purely domestic. This is the case when the debtor has no business and assets abroad, all stakeholders, including creditors, are local, and all claims against the debtor are governed by local law and so on. Such proceedings generally do not require legal action abroad. That said, globalisation and the internet bring increasingly international elements to previously purely local businesses. The COVID-19 pandemic has undoubtedly accelerated this trend, particularly for online services that do not adhere to borders. Once an international element is involved, one can no longer talk about the purely domestic nature of the restructuring. That is to say, the restructuring is now considered to be of an *international* or *cross-border* nature.

In restructuring proceedings, international elements often involve foreign creditors with claims governed by foreign laws and/or the presence of assets located abroad.[61] Domestic restructuring laws generally apply to restructuring proceedings in a scenario with one or more international elements, too. Nonetheless, once restructuring proceedings "cross" borders, a number of additional cross-border issues arise. These include determining which state's court should administer the case, under which law substantive

58 ibid 618.
59 ibid 637.
60 ibid 629-30, 637-38.
61 For a more detailed discussion of the features of internationality in insolvency (restructuring) proceedings, see van Zwieten (ed), *Principles of Corporate Insolvency Law* (n 29) para 16-02.

rights should be modified, and how to bind dissenting creditors in other jurisdictions.[62]

The varying opinions within the academic community regarding the legal nature of restructuring proceedings also apply in a cross-border context. More to the point, there is no global consensus in scholarship as to whether the existing cross-border insolvency frameworks should extend to the recognition and enforcement of restructuring plans. If not, a secondary question to answer is what the other options are.

a) The Insolvency Approach

For scholars who are fully committed to the insolvency approach in a domestic context, the answer to the first question above is straightforward: affirmative.[63] Since they view restructuring proceedings as insolvency proceedings, it logically follows that such proceedings fall within the scope of cross-border insolvency frameworks.

Some scholars support, in principle, the idea of cross-border insolvency instruments applying to restructuring proceedings but with some qualifiers, albeit different in each case. Horst Eidenmuller suggests limiting cross-border insolvency frameworks only to the fully collective restructuring proceedings, i.e. ones that affect all creditors.[64] As already noted, according to Riz Mokal, restructuring proceedings shall fall within the scope of cross-border insolvency instruments when they pertain to an insolvent debtor.[65] Irit Mevorach and Adrian Walters are in favour of the inclusion of pre-insolvency restructurings in the existing cross-border insolvency system built mainly upon the principle of modified universalism but generally stress the importance of safeguards (such as *public policy* and *adequate protection*) under such a system to address unique aspects of those proceedings.[66]

62 For a more detailed discussion of the issues of cross-border insolvency and restructuring (from the angle of English law), see ibid para 16-03.

63 See, eg, generally Westbrook, 'Internationalist Principle' (n 43); Westbrook, 'Comity and Choice of Law' (n 12) 263.

64 Horst Eidenmuller, 'What Is an Insolvency Proceeding' (2018) 92 Am Bankr LJ 53, 65ff.

65 Mokal, 'What is an Insolvency Proceeding?' (n 35) 442. See also text to nn 45, 47.

66 Mevorach and Walters (n 34) 877ff.

b) The Contractual Approach

Stephan Madaus defends his contractual approach in a cross-border context, too, by generally favouring international civil procedure or contract law frameworks.[67] He opposes the use of cross-border insolvency frameworks, which are designed for asset-oriented insolvency proceedings, in the context of restructuring proceedings, highlighting the debt-oriented nature of the latter.[68] Accordingly, Stephan Madaus suggests a new framework for the recognition of the cross border effects of restructuring plans, which stipulates that a restructuring of substantive rights should be conducted under the law with the 'closest connection', namely, the governing law of the contract (in the case where the affected contracts are governed by several laws: a law governing 'a clear majority' of these contracts or agreed as such by 'a qualified majority' of creditors) and should be recognised globally through general private international law mechanisms (both the applicable law and judgement recognition routes).[69] In the event that it is not possible to determine a specific law with the closest connection, in his view, a foreign debt may be modified under the *lex fori concursus*, but 'substantive limits' of the governing law of the contract should be respected (establishing, thus, a 'sufficient connection' to that law) in order to achieve the cross-border effects through the judgement recognition route.[70] Without such sufficient connection, according to him, any cross-border effect should not be expected.[71]

67 Madaus, 'A Proposal to Divide the Realms of Insolvency and Restructuring Law' (n 4) 643-44.

68 Madaus, 'The Cross-border Effects of Restructurings' (n 3) 479-82.

69 ibid 483-84.

70 ibid 484-86. This work will return to this point in sub-s F.II.2.b)dd). See also Stephan Madaus, 'Corporate Reorganisation Law and the Shaping Powers of Market Realities and Doctrinal Concepts' (2022) 42 OJLS 1195, 1211, where Stephan Madaus concludes that the cross-border effects of the plan should be denied in the respective jurisdictions with respect to rights of stakeholders if '(i) the impairment under the foreign plan is not in line with the policy choice of the *lex causae* and (ii) the impaired stakeholders are worse off under the plan compared to a restructuring under the *lex causae*'.

71 Madaus, 'The Cross-border Effects of Restructurings' (n 3) 485.

3. Position on the Legal Nature of Restructuring Proceedings

Below, this work will briefly present its own perspective on the legal nature of restructuring proceedings, both in a domestic setting and concerning cross-border effects.

a) Domestic Context

To begin with, this work fully agrees with the argument that, unlike asset-oriented insolvency proceedings, restructuring proceedings are mainly debt-oriented.[72] That is to say, the primary focus of these proceedings is not the collective satisfaction of claimants (of the debtor) by realising the debtor's assets. Instead, they aim to preserve the going concern value of the debtor for the collective benefit of the claimants by modifying the latter's claims with a binding effect on holdouts. Hence, if the restructuring proves successful, the debtor will not be liquidated and will generally continue to trade (with assets remaining wholly or partly untouched but original obligations being permanently discharged), which can even lead to a profitable business over the years.[73] Against this backdrop, this work does not consider restructuring proceedings of a purely insolvency nature.

72 ibid 479-80.

73 Take the IBA as an example. After successfully restructuring some of its liabilities (see s C.I) and as a result of other rescue measures implemented in Azerbaijan, such as the transfer of its non-performing loan portfolio to a state-owned corporation (see Decree of the President of the Republic of Azerbaijan on the measures for rehabilitation related to the preparations for privatising the state-owned shares of "the International Bank of Azerbaijan" [No 507, dated 15 July 2015]), the IBA turned out to be a viable business generating profits (For the IBA's IFRS financial statements, see International Bank of Azerbaijan, 'Reports' <https://abb-bank.az/en/hesabatlar> accessed 21 October 2025). In the context of questioning the US bankruptcy approach to restructuring (viewing restructuring as a hypothetical sale to creditors), Sarah Paterson also highlights that 'if one class retains equity after the restructuring then … it has the chance to benefit from potentially unlimited future upside if the company returns to profitability. … other creditors may see their claims written down or even written off completely, in a way that certainly does crystallise their loss' Sarah Paterson, 'The Conceptual Foundation of Cross-class Cramdown' (18 September 2024) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4959732> accessed 21 October 2025, 15.

That said, this work does not characterise restructuring proceedings as purely contractual either.[74] Hence, this work agrees with the arguments that under restructuring frameworks, the modification of obligations does not occur in the ordinary course of circumstances.[75] Besides the process (of the modification of obligations), its background (the debtor's distress) is also a crucial factor to consider. In most cases, the alternative to the restructuring is the debtor's asset-oriented insolvency, whether through going concern or piecemeal sale. In this alternative scenario, claimants of the debtor would not be able to enforce their original claims according to general rules of private law but rather seek some recovery (if any) from the existing assets of the debtor under the statutory order of distribution.[76] It is not a coincidence that fairness tests under restructuring frameworks generally look at the alternative scenario as a comparator, which, again, is the debtor's insolvency in most cases.[77] Accordingly, the insolvency-related background of restructuring proceedings should not be disregarded.

Furthermore, general rules and principles of contract law might be limited in addressing all the issues that arise from restructuring, in particular, binding holdouts to the will of the majority (assessing fairness in this context) and moratoriums (as the case may be). In addition, restructuring frameworks are driven by broader policy objectives, such as maintaining

74 While questioning the US bankruptcy (insolvency) approach to restructuring and underscoring that 'Restructurings require a new bargain, achieved either through private bargaining or court order…', Sarah Paterson also notes that 'This does not require us to equate a restructuring squarely with contract law, or to draw divisions between fully inclusive or selective corporate restructurings'. Sarah Paterson, 'A Qualified Defence of the Rule in Gibbs' (15 April 2025) LSE Legal Studies Working Paper 6/2025 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5218429> accessed 21 October 2025, pt III. This approach builds on her earlier proposition that restructuring law and insolvency law should be treated as distinct branches of what she refers to as 'the law of corporate distress'. See generally Sarah Paterson, 'Rethinking the Role of the Law of Corporate Distress in the Twenty-First Century' (2014) LSE Law, Society and Economy Working Papers 27/2014 <https://eprints.lse.ac.uk/60583/1/WPS2014-27_Paterson.pdf> accessed 21 October 2025. In the US context, while describing Chapter 11 as a framework for the renegotiation of incomplete contracts in financial distress as part of his New Bargaining Theory of bankruptcy, Anthony Casey argues that general contract law is not the appropriate venue for addressing the problem (of incomplete contracts in financial distress) due to, *inter alia*, the ubiquity of the issue. Casey (n 42) pt II.

75 See, eg, text to nn 48, 49, 50.

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

77 For a discussion of the fairness tests under US and English laws as well as the PRD, see s E.II.

the stability of the financial sector and economy as a whole and preventing the loss of jobs or know-how.[78] Addressing these broader objectives goes beyond the goals and capabilities of contract law.

Hence, restructuring proceedings should be characterised as neither purely contractual nor purely insolvency-related but rather as *sui generis*. While being primarily debt-oriented procedures, restructuring proceedings may have rules and principles peculiar to them or employ those of insolvency law necessary to achieve their objectives. The matter, however, will not be explored further in this work.[79] That is because this work focuses mainly on the cross-border aspects of restructuring proceedings. The cross-border model suggested in this work, built on the *sui generis* nature of restructuring proceedings, will also function under both the insolvency and contractual approaches to restructuring. However, some compromises will be necessary from each approach, as will become evident as this work unfolds.

b) Cross-Border Effects

In light of the position outlined above, this work, in principle, does not argue against achieving the cross-border effects of restructuring proceedings through cross-border insolvency frameworks, given the advantages that the respective route offers.[80] However, restructuring proceedings should be differentiated from asset-oriented insolvency proceedings and the debt-oriented nature of the former should not be disregarded. Hence, the interests of the parties to the debt in question (the debtor and the dissenting foreign creditor) should be balanced in recognising restructuring plans through cross-border insolvency frameworks. This work will attempt to determine whether it is possible under those frameworks. For the reasons articulated in section A.II, the present work will use the MLCBI framework as a model for this discussion. Hence, this work will deeply explore the MLCBI and

78 See, eg, MLCBI (n 17) Preamble (e); PRD (n 15), recs 2-3. See also Paterson, 'The Conceptual Foundation' (n 73) 20.

79 That said, the differences between restructuring and insolvency proceedings or distinction from the pure contractual approach may be discussed throughout this work in different contexts.

80 For a discussion of the advantages, see particularly sub-s B.II.3.a).

the safeguards thereunder to determine whether these safeguards suffice to strike the respective balance.[81]

II. Principles of Cross-Border Insolvency Law

As identified earlier, this work will focus on the cross-border effects of restructuring plans within the cross-border insolvency system, in particular under the MLCBI. Below, this work will outline the fundamental principles underpinning the existing cross-border insolvency system. This work will first discuss the comity doctrine from which some of the important principles of cross-border insolvency stem. Then, it will turn to more specific principles of cross-border insolvency law, particularly those relevant to the focus of this work. Some of those principles compete with each other, i.e. unity versus plurality and universality versus territoriality. This work will mainly focus on the ones (out of each pair) with overwhelming scholarly support and that are reflected in the modern instruments of cross-border insolvency.

1. Comity

Under the doctrine of territorial sovereignty, insolvency or restructuring proceedings (judgments issued in the framework of such proceedings) in one state have effect only within that state, unless other states accept their cross-border effects.[82] Hence, a foundation should be in place for recognising the effect of a law or a judgment (including one associated with insolvency or restructuring proceedings) belonging to one jurisdiction in other jurisdictions. An essential concept playing a crucial role in this context is the *comity* doctrine, initially developed by Dutch scholars in the seventeenth century[83] and later introduced and widely invoked in common

81 This aligns with Irit Mevorach and Adrian Walter's general idea of using safeguards under the MLCBI to address the peculiarities of pre-insolvency restructurings (see text to n 66).

82 Fletcher (n 27) paras 28-020-21.

83 For a discussion of the origins of the doctrine, see generally Hessel E. Yntema, 'The Comity Doctrine' (1966) 65 Mich L Rev 9; Joel R. Paul, 'Comity in International Law' (1991) 32 Harv Intl L J 1, 12-17.

law jurisdictions such as England and the US.[84] Despite having been frequently invoked in these jurisdictions, particularly in the US, the doctrine is also known for its ambiguity.[85] In *Hilton v. Guyot*, the US Supreme Court ("USSC") famously redefined the doctrine as follows:

> No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations." Although the phrase has been often criticised, no satisfactory substitute has been suggested.
> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[86]

Comity was also defined by US courts as a rule of 'practice, convenience, and expediency' rather than 'a rule of law'.[87] It has also been stated that US courts consider 'the interests of the United States, the interests of the foreign state or states involved, and the mutual interests of the family of nations in just and efficiently functioning rules of international law' while

84 For a discussion of the history of the introduction of the doctrine and further developments in the mentioned jurisdictions, see generally D. J. Llewelyn Davies, 'The Influence of Huber's De Conflictu Legum on English Private International Law' (1937) 18 Brit YB Intl L 49; generally Kurt H. Nadelmann, 'Introduction - The Comity Doctrine' (1966) 65 Mich L Rev 1; Paul (n 83) 17-24; William S. Dodge, 'International Comity in American Law' (2015) 115 Colum L Rev 2071, 2084-98.

85 Paul (n 83) 8-11; Dodge (n 84) 2073-76.

86 *Hilton v. Guyot*, 159 US 113, 163-64 (1895).

87 *Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1044 (5th Cir 2012) (*Vitro*) (citations omitted).

applying comity.[88] These definitions, particularly the one given by the *Hilton* court, have been scrutinised in the literature.[89]

The doctrine of comity has significantly shaped the evolution of modern cross-border insolvency law. It has been suggested that the concept of modified universalism, which is one of the key principles of modern cross-border insolvency law, is essentially an expansion of the doctrine of comity specific to cross-border insolvency.[90] In a cross-border insolvency context, too, the doctrine has been widely invoked particularly in common law jurisdictions.[91] As it will be observed in subsection C.II.2 of this work, US courts extensively refer to the doctrine while exercising their discretion to defer to foreign insolvency or restructuring proceedings. The following remarks by a US Circuit Court illustrate the importance of the comity doctrine in cross-border insolvency:

> The rationale underlying the granting of comity to a final foreign judgment is that litigation should end after the parties have had an opportunity to present their cases fully and fairly to a court of competent jurisdiction. The extending of comity to a foreign bankruptcy proceeding … has a somewhat different rationale. The granting of comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion.[92]

88 ibid 1053 (citations omitted).

89 For a critical analysis of this definition, see Paul (n 83) 8-11; Dodge (n 84) 2074-75.

90 Westbrook, 'Comity and Choice of Law' (n 12) 260.

91 Andrew Godwin, Timothy Howse and Ian Ramsay. 'The Inherent Power of Common Law Courts to Provide Assistance in Cross-Border Insolvencies: From Comity to Complexity' (2017) 26 Intl Ins Rev 5, 7-9.

92 *Cunard Steamship Co. v. Salen Reefer Services AB*, 773 F2d 452, 457-58 (2d Cir 1985). For a more detailed discussion of this case, see Douglass G. Boshkoff, 'United States Judicial Assistance in Cross-Border Insolvencies'(1987) 36 Intl Comp LQ 729, 731-35.

2. Unity Versus Plurality

The principle of unity envisages a single set of proceedings governing the debtor's insolvency.[93] According to the principle, the court of the state with which the debtor has the strongest legal connection has such exclusive jurisdiction, and all other states recognise this exclusivity.[94] The competing principle is plurality, which allows multiple proceedings, such as when the debtor's assets are located in more than one state.[95] Although a single set of (unified) proceedings is desirable from a theoretical point of view,[96] several practical factors may necessitate additional proceedings.[97]

3. Universality (Universalism) Versus Territoriality (Territorialism)

The principle of universality envisages the universal effect of proceedings governing the debtor's insolvency to encompass its assets worldwide.[98] As the purpose of the principle of unity cannot be achieved without such universal effect, these two principles are closely connected,[99] together forming what is known as *universalism*.[100] The competing principle is territoriality, according to which the effect of insolvency proceedings opened in one state

93 Reinhard Bork, *Principles of Cross-Border Insolvency Law* (Intersentia 2017) para 2.2; Fletcher (n 27) para 28-004. See also van Zwieten (ed), *Principles of Corporate Insolvency Law* (n 29) para 16-04; Irit Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (OUP 2018) 3.

94 van Zwieten (ed), *Principles of Corporate Insolvency Law* (n 29) para 16-04 (fn 9 therein and accompanying text).

95 Bork, *Principles of Cross-Border Insolvency Law* (n 93) para 2.2; Fletcher (n 27) para 28-004. See also van Zwieten (ed), *Principles of Corporate Insolvency Law* (n 29) para 16-04, Mevorach, *The Future of Cross-Border Insolvency* (n 93) 4.

96 For a discussion of the advantages of the principle of the unity over the principle of plurality, see Bork, *Principles of Cross-Border Insolvency Law* (n 93) paras 2.3-4.

97 Bork, *Principles of Cross-Border Insolvency Law* (n 93) paras 2.5-6; Fletcher (n 27) para 28-004.

98 Bork, *Principles of Cross-Border Insolvency Law* (n 93) para 2.8; Fletcher (n 27) para 28-004; See also van Zwieten (ed), *Principles of Corporate Insolvency Law* (n 29) para 16-04; Mevorach, *The Future of Cross-Border Insolvency* (n 93) 3.

99 That said, they are not interchangeable. For a more detailed discussion, see Bork, *Principles of Cross-Border Insolvency Law* (n 93) para 2.12; van Zwieten (ed), *Principles of Corporate Insolvency Law* (n 29) para 16-04.

100 Jay Lawrence Westbrook, 'A Global Solution to Multinational Default' (2000) 98 Mich L Rev 2276, 2297. See also Mevorach, *The Future of Cross-Border Insolvency* (n 93) 3.

shall be confined to the assets located in that state.[101] *Territorialism* is a concept based on the principles of territoriality and plurality.[102] Despite being the historical approach[103] and the multi-fold advantages of universalism as will be summarised below, territorialism still preserves its relevance globally because states are often reluctant to relinquish all of their sovereign powers and prefer to maintain its certain elements.[104]

a) Advantages of Universalism

The system rooted in the concept of single proceedings coupled with universal effect offers numerous benefits such as value maximisation, just treatment of all creditors worldwide, enhanced chances of rescue, and a higher level of predictability and, thus, elevates the core objectives of insolvency law to a global scale.[105] As to the advantages in relation to restructurings specifically, Jay Westbrook notes that 'a sufficient guarantee of legal certainty' is of utmost importance for a successful restructuring plan, which is possible only in a single system settling the legal rights of all stakeholders with binding effect on all of them.[106]

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101 Fletcher (n 27) para 28-004; van Zwieten (ed), *Principles of Corporate Insolvency Law* (n 29) para 16-04.

102 Mevorach, *The Future of Cross-Border Insolvency* (n 93) 4. For a summary of both approaches (universalism and territorialism) and current theories emerging from their convergence, see Edward S. Adams and Jason K. Finche, 'Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism' (2008) 15 Colum J Eur L 43, 47ff; van Zwieten (ed), *Principles of Corporate Insolvency Law* (n 29) paras 16-04-07. See also Paul J. Omar, 'The Landscape of International Insolvency Law' (2002) 11 Intl Ins Rev 173, 176-181.

103 Adams and Finche (n 102) 47.

104 Frederick Tung, 'Is International Bankruptcy Possible' (2001) 23 Mich J Intl L 31, pt II; Adams and Finche (n 102) 53; Fletcher (n 27) para 28-020; van Zwieten (ed), *Principles of Corporate Insolvency Law* (n 29) para 16-05.

105 Westbrook, 'A Global Solution' (n 100) 2292-94. See also Mevorach, *The Future of Cross-Border Insolvency* (n 93) 5ff. For a comparative analysis of the advantages of universalism and the disadvantages of the concurrent proceedings with territorial effect, see van Zwieten (ed), *Principles of Corporate Insolvency Law* (n 29) para 16-05.

106 Westbrook, 'A Global Solution' (n 100) 2285-86. For a discussion of the advantages of the universalist system concerning restructuring proceedings, see also Mevorach, *The Future of Cross-Border Insolvency* (n 93) 11-12; Westbrook, 'Comity and Choice of Law' (n 12) 266.

b) Main Features of Universalism

Jay Westbrook identifies two distinct pivotal aspects of universalism: a single court controlling and a single law governing each cross-border insolvency case.[107] According to him, either of these elements can be achieved by two different approaches: (i) the establishment of a single international court system and bankruptcy law (the more desirable option, according to him) or (ii) the development of a uniform set of choice-of-forum and choice-of-law rules.[108]

Reinhard Bork summarises the main features of the principle of universalism (which largely corresponds to Jay Westbrook's second approach outlined above) as follows: (i) exclusive international jurisdiction (to open main insolvency proceedings) of the state within the territory of which the debtor is domiciled; (ii) the law of this state to govern the proceedings; (iii) the worldwide effect of such insolvency proceedings; (iv) unlimited control of the insolvency practitioner over the assets, including those located in a foreign state; (v) extension of the effects of the proceedings to the complete legal relationship between the debtor and its creditors; (vi) acceptance the features mentioned above by all other states; and (vii) cooperation and assistance of foreign states.[109]

c) Implementation of Universalism: A Need for a Global Consensus

As noted above, a concept based on a single set of proceedings with universal effect offers numerous advantages. That said, to properly function in the real world, it requires the agreement of all states as dictated by the doctrine of legal sovereignty.[110] Claiming the universal effect of proceedings opened in one jurisdiction is only one element of universalism (outgoing universalism).[111] There is, however, another element that is not less important: acceptance of such universal effect by all other affected jurisdictions

107 Westbrook, 'A Global Solution' (n 100) 2292.
108 ibid. However, he describes any form of the latter approach as *lesser universalism* (ibid 2315-18).
109 Bork, *Principles of Cross-Border Insolvency Law* (n 93) para 2.16.
110 See text to n 82.
111 Bork, *Principles of Cross-Border Insolvency Law* (n 93) paras 2.8-9.

(incoming universalism).[112] As already mentioned, it is the latter that is challenging to achieve in reality.[113]

4. Modified Universalism

As noted above, achieving full universalism would require a global consensus, which is unlikely to occur in the near future.[114] Until such a consensus is reached (if ever), an interim principle is needed to guide administering cross-border insolvency cases. Several solutions have been suggested to address this need, with the most prominent one being *modified universalism* by Jay Westbrook.[115]

Under the principle of modified universalism, the debtor's default is dealt with from a global perspective (a single court and a single law), as in the case of universalism, on the one hand.[116] On the other hand, deference to the proceedings in the debtor's home jurisdiction occurs only after evaluating the respective proceedings (and applicable law thereto) and 'practical finding of fairness and rough similarity' by courts of all other affected jurisdictions.[117] This allows foreign courts to ensure, *inter alia,* that foreign creditors have been fairly treated in the debtor's home jurisdiction.[118]

As stated earlier, modified universalism is commonly perceived as an interim solution operational in the real world until full universalism is attained. That said, it has also been suggested that modified universalism be reconceptualised from an interim solution into a 'stand-alone norm' (by separating from universalism).[119]

112 ibid para 2.10.
113 See text to n 104.
114 Westbrook, 'A Global Solution' (n 100) 2299; Bork, *Principles of Cross-Border Insolvency Law* (n 93) para 2.11.
115 Westbrook, 'A Global Solution' (n 100) 2299ff. Other solutions include (but not limited to) cooperative territoriality (see Lynn M. LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (1998-1999) 84 Cornell L Rev 696, 742ff), universal proceduralism (see Edward J. Janger, 'Universal Proceduralism' (2007) 32 Brook J Intl L 819, 834ff) and an approach based on the debtor's *ex ante* selection of the jurisdiction for the administration of its insolvency (see Robert K. Rasmussen, 'A New Approach to Transnational Insolvencies' (1997) 19 Mich J Intl L 1, 32ff).
116 Westbrook, 'A Global Solution' (n 100) 2301.
117 ibid.
118 van Zwieten (ed), *Principles of Corporate Insolvency Law* (n 29) para 16-06.
119 Mevorach, *The Future of Cross-Border Insolvency* (n 93) 108ff.

This work will later identify that the principle of modified universalism lies at the core of the MLCBI and, therefore, is of the utmost relevance for the purposes of this research. Hence, it is something to be returned to in greater detail as this work progresses.

5. Mutual Trust

One of the fundamental principles of a cross-border insolvency system based on universalism (through a uniform set of choice-of-law and choice-of-forum rules) is mutual trust.[120] Without mutual trust in one another's legal system, it is difficult to imagine a group of states agreeing to the automatic, group-wide recognition of the effects of insolvency (restructuring) proceedings opened in a state within the group, whether or not subject to certain exceptions. The EIR expressly states that mutual trust is the basis for the recognition of judgments within the EU, and this also applies to disputes among Member States regarding jurisdiction to open insolvency proceedings.[121]

The principle implies reciprocity since one is talking about *mutual* trust.[122] This explains why frameworks like the MLCBI, which do not require reciprocity and are not implemented in the form of agreement between states, do not refer to the principle. The ultimate effect is that the MLCBI does not provide for automatic recognition but rather requires ancillary recognition proceedings.

Mutual trust applies to substantive laws, too.[123] The principle, however, does not imply that the respective substantive laws should be identical. Rather, it refers to having a general trust in the fairness of the legal systems, both in substance and procedure.[124] That said, there may be irreconcilable differences within a framework based on mutual trust. Such differences, however, can be addressed with the public policy exception since the states in question are free to agree on the level of trust.[125] In that regard, Reinhard Bork distinguishes different levels of trust, such as *general* (*unconditional*)

120 Bork, *Principles of Cross-Border Insolvency Law* (n 93) para 2.33.
121 EIR (n 13) rec 65.
122 Bork, *Principles of Cross-Border Insolvency Law* (n 93) para 2.34.
123 ibid para 2.36.
124 ibid para 2.33.
125 This work will analyse the public policy exception in s D.I.

or *sceptical* (e.g. qualified by the public policy exception as mentioned above) trust.[126]

III. Modern Instruments of Cross-Border Insolvency

Provisions on the cross-border effects, whether incoming or outgoing, of insolvency proceedings are commonly found in domestic legislation[127] since it is the sovereign right of each state to determine the scope of such effects, particularly the incoming ones.[128] However, there are several international and regional legal instruments in place to address the different aspects of this matter. Section B.III of this work will briefly examine three notable frameworks in that respect. Subsection B.III.1 will touch on the EIR, which is a hard law EU instrument directly applicable in all Member States, with the exception of Denmark.[129] Subsections B.III.2 and B.III.3 will outline two UNCITRAL model laws ("Model Laws"): the MLCBI and the Model Law on Recognition and Enforcement of Insolvency-Related Judgments ("MLIJ"),[130] respectively.

1. The EIR

a) Objectives and Scope

The main objectives of the EIR, which was adopted in 2015, are to efficiently and effectively administer cross-border insolvency cases and prevent forum shopping across the EU.[131] In addition to traditional insolvency proceedings like bankruptcy and winding-up of insolvent companies, the EIR also encompasses restructuring proceedings, with a focus on those aiming

126 Bork, *Principles of Cross-Border Insolvency Law* (n 93) para 2.35.
127 See, eg, InsO (n 35) ss 335ff.
128 See text to n 82.
129 On the position of Denmark, see EIR (n 13) rec 88.
130 UNCITRAL adopted the Model Law on Recognition and Enforcement of Insolvency-Related Judgments ("MLIJ") with its Guide to Enactment ("Guide to the MLIJ") in 2018. See UNCITRAL, *Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment* (UN 2019) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml_recognition_gte_e.pdf> accessed 21 October 2025.
131 EIR (n 13) recs 3, 5.

at rescuing companies that are not yet insolvent and those providing for a debtor-in-possession regime.[132] It is also noteworthy that, in order to be considered within the scope of the EIR, proceedings in each Member State must be expressly designated as such in Annex A thereto.[133]

The EIR excludes, *inter alia*, proceedings that are confidential and those that are not confined to insolvency situations.[134] That said, another EU private international law instrument, namely, the Brussels I bis Regulation,[135] may facilitate achieving the EU-wide cross-border effects of such proceedings.[136] It, however, should be noted that the discussion of the EU perspective in section B.III of this work will be limited to the EIR, as the present section focuses on the instruments specific to cross-border insolvency. Accordingly, this work treats the EIR as the sole suitable EU instrument in this context and as the one most comparable to the Model Laws.

b) Choice-of-Forum and Choice-of-Law

The principle of universalism is central to the EIR, which establishes uniform choice-of-forum and choice-of-law rules for insolvency proceedings within the EU.[137] That is to say, the jurisdiction to open main insolvency proceedings with universal scope and encompassing the debtor's entire asset pool within the EU is allocated to a Member State in the territory of which the debtor has its COMI, i.e. the place where the debtor is regularly administered and which third parties can ascertain.[138] Although the debtor's registered office is presumed to be its COMI, this presumption

132 ibid recs 7, 10, art 1 (1).
133 ibid rec 9, arts 1 (1), 2 (4).
134 ibid recs 12-13, 16.
135 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels I bis Regulation).
136 A typical example in this context was the English scheme of arrangement which was arguably considered to fall within the scope of the Brussels I bis Regulation in the pre-Brexit era. See Dominik Skauradszun and Walter Nijnens, 'The Toolbox for Cross-Border Restructurings Post-Brexit - Why, What & Where?' (2019) 7 NIBLeJ 1 1 <https://www.ntu.ac.uk/media/documents/research-documents/1.pdf> accessed 21 October 2025, 2 (and cited sources in fn 4 therein). See also Paterson, 'A Qualified Defence of the Rule in Gibbs' (n 74) pt VI.
137 EIR (n 13) rec 23. For a more detailed discussion of the elements of universalism under the EIR, see Bork, *Principles of Cross-Border Insolvency Law* (n 93) para 2.17.
138 EIR (n 13) rec 23-28, art 3 (1).

can be rebutted.[139] The proceedings shall be governed by the *lex fori concursus*,[140] subject to several exceptions.[141] This law applies to an extensive, non-exhaustive list of matters, including the effects of the proceedings on the existing contracts of the debtor, the distribution of proceeds, the priority of claims, and subsequent creditor rights.[142]

Despite its universalist aspirations, the EIR provides several significant exceptions in that regard. That is to say, apart from the exceptions relating to applicable law, the EIR allows, subject to the fulfilment of certain conditions, opening of territorial or secondary proceedings in a Member State other than the one where the debtor's COMI is situated.[143] These proceedings, however, are confined to the assets in that other Member State.[144]

c) Cross-Border Effects Within the EU

Based on the principle of mutual trust,[145] the EIR grants automatic recognition within the EU to a judgment opening main insolvency proceedings in one Member State.[146] Such recognition generally yields the same effects as under the *lex fori concursus*, including conferring on the insolvency practitioner appointed in the main proceedings a wide range of powers exercisable in other Member States.[147] Other judgments related to the main insolvency proceedings are also recognised in all other Member States without any formalities.[148] The automatic recognition effect constitutes a crucial aspect of the universalist ambitions of the EIR. Nonetheless, the EIR provides an exception also with respect to this aspect of universalism, namely, the public policy exception.[149]

139 ibid rec 30, art 3 (1).
140 ibid art 7.
141 ibid arts 8-14, 16-18.
142 ibid art 7 (2).
143 ibid art 3 (2-3).
144 ibid art 3 (2).
145 See text to n 121.
146 EIR (n 13) art 19.
147 ibid arts 20-21.
148 ibid art 32.
149 ibid art 33.

2. The MLCBI

a) Objectives and Scope

UNCITRAL adopted the MLCBI as a soft law instrument of cross-border insolvency law in 1997.[150] It comes into effect when a state[151] adopts it as domestic law.[152] The MLCBI provides a comprehensive framework for administering cross-border insolvency cases. Such cross-border cases may occur, for example, when the debtor has assets in multiple states or some creditors from a state other than that where the insolvency proceedings have been initiated.[153] The primary goals of the MLCBI include enhancing cooperation between courts and other bodies of the enacting state and all other affected states, increasing legal certainty for global commerce, ensuring just and effective management of cross-border insolvency proceedings with a focus on protecting creditors and other involved parties, maximising value of the debtor's estate, and expediting rescue of distressed businesses.[154] The MLCBI focuses on the following four key aspects: access to the courts of the enacting state (for representatives of foreign insolvency proceedings, creditors, etc.); recognition of specific foreign court orders; assistance to foreign proceedings; and cooperation among the courts of the affected states and coordination of concurrent proceedings.[155] A *foreign proceeding* is defined under the MLCBI as 'a collective judicial or administrative proceeding … pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation'.[156] As can be seen, the definition is broad and expressly pertains to proceedings aimed at the debtor's restructuring.

150 See n 17 and accompanying text.
151 Throughout this work, such a state will be referred to, depending on the context, as the *enacting state* or the *receiving state*.
152 Guide to the MLCBI (n 17) paras 19-20.
153 ibid para 1.
154 MLCBI (n 17) preamble.
155 Guide to the MLCBI (n 17) para 24. For a more detailed discussion, see ibid paras 25-45. See also Gerard McCormack and Wan Wai Yee, 'The UNCITRAL Model Law on Cross-Border Insolvency Comes of Age: New Times or New Paradigms' (2019) 54 Tex Intl L J 273, 276-77; Walters, 'Modified Universalisms' (n 17) 57-58.
156 For the full definition of *foreign proceeding*, see MLCBI (n 17), art 2 (a).

b) Choice-of-Forum

The MLCBI defines a foreign proceeding taking place in the state where the COMI of the debtor is located as a *foreign main proceeding*.[157] As to the COMI, the MLCBI provides for a rebuttable presumption in favour of the debtor's registered office.[158] A *foreign non-main proceeding* is defined as a foreign proceeding, which is not a foreign main proceeding, commenced in a state in the territory of which the debtor has an establishment.[159]

Like the EIR, the MLCBI does not attempt to harmonise substantive laws applicable to cross-border insolvency cases.[160] Neither does it, unlike the EIR, establish uniform choice-of-law rules in that respect.[161]

c) Recognition and Its Effects

Under the MLCBI, subject to the fulfilment of the conditions as to *foreign proceeding* and *foreign representative*[162] as well as a few procedural requirements regarding the application itself, foreign proceedings shall be recognised as such (either as a foreign main proceeding or a foreign non-main proceeding) upon application of the foreign representative to the designated court of the enacting state.[163] Once recognition is granted with respect to a foreign main proceeding, it produces several automatic, albeit limited and procedural in nature, effects under article 20 of the MLCBI, such as a stay of actions and execution concerning the debtor's assets in the territory of the enacting state.[164] Additionally, the court may, upon request, grant additional post-recognition relief under article 21 of the MLCBI, which sets out a non-exhaustive list of such reliefs. Furthermore, the court may provide assistance under other laws of the enacting state pursuant to article 7 of the MLCBI.

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157 ibid art 2 (b).
158 ibid art 16 (3).
159 ibid art 2 (c). For the definition of *establishment*, see ibid art 2 (f).
160 Guide to the MLCBI (n 17) para 3.
161 Irit Mevorach, 'On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency' (2011) 12 EBOR 517, 523-24; Walters, 'Modified Universalisms' (n 17) 59.
162 For the definition of *foreign representative*, see MLCBI (n 17) art 2 (d).
163 ibid arts 15-17.
164 ibid art 20.

d) Modified Universalism and the MLCBI

The MLCBI contains certain safeguards regarding the actions noted above. To begin with, like the EIR, it contains the public policy exception to all possible actions under the MLCBI, including the ones mentioned above.[165] Apart from that, post-recognition relief under article 21 is of a discretionary nature and subject to the *adequate protection* safeguard pursuant to article 22 (1) of the MLCBI. As it can be seen, modified universalism underpins the MLCBI.[166] On the one hand, it provides for deference to main proceedings in the debtor's home jurisdiction even without requiring reciprocity. On the other hand, such deference does not occur automatically but through the cooperation of the court in the enacting state, with some safeguards in place.[167]

As stated earlier, this work focuses on a cross-border system based on the MLCBI. Hence, the safeguards outlined above are at the core of the present research and will be discussed in greater detail as this work progresses.

165 ibid art 6.

166 For a more detailed discussion, see Jay L. Westbrook, 'Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court' (2018) 96 Tex L Rev 1473, 1478ff; Irit Mevorach, 'Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism?' (2021) 22 EBOR 283, 289-93; Gerard McCormack, 'UK Contracts and Modification under Foreign Law: Time to Consign the Gibbs Rule to Legal History?' (2024) 2023 (4) J Bus L 290 (a repository copy: <https://eprints.whiterose.ac.uk/198398/3/Modification%20of%20English%20law%20contracts.pdf> accessed 21 October 2025), pt 2. See also McCormack and Wan (n 155) 276; Walters, 'Modified Universalisms' (n 17) 64 (and cited sources in fn 77 therein).

167 That said, it is worth noting that *cooperation* is not exclusively attributable to a system based on modified universalism and may play a pivotal role also in the case of several territorial proceedings concerning the same debtor. Bork, *Principles of Cross-Border Insolvency Law* (n 93) para 2.45; Stephan Madaus, 'Article 25: Cooperation and Direct Communication Between a Court of This State and Foreign Courts or Foreign Representatives' 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 1.25.02.

3. The MLIJ

a) Objectives and Scope

The MLIJ was adopted by UNCITRAL in 2018.[168] As its title suggests, the MLIJ provides a harmonised framework for the recognition and enforcement of insolvency-related judgments.[169] The MLIJ has several objectives, such as enhancing certainty, avoiding concurrent proceedings, promoting comity and cooperation, maximising the asset pool of the debtor, and complementing the MLCBI (as the case may be).[170]

Like the MLCBI, the MLIJ is a soft law instrument requiring enaction into domestic legislation to be applicable.[171] Unlike the MLCBI, it has not been implemented in any jurisdiction thus far.[172] One possible reason for this is that in some jurisdictions (like the US[173]), the recognition of foreign insolvency-related judgments falls within the scope of the adopted version of the MLCBI, making additional implementation of the MLIJ unnecessary. Accordingly, the MLIJ is particularly relevant for jurisdictions where the MLCBI is not interpreted broadly, like England.[174] In fact, the MLIJ is, *inter alia*, a response to the uncertainty of whether insolvency-related judgments can be recognised and enforced under article 21 of the MLCBI.[175] Hence, the MLIJ also contains an article (Article X) that gives the states enacting the MLCBI an option to address this uncertainty in relation to article 21 of the MLCBI.[176]

In order to fall within the scope of the MLIJ, an insolvency-related judgment needs to be handed down in proceedings taking place in a state other

168 See n 130 and accompanying text.
169 Guide to the MLIJ (n 130) para 1.
170 For the full list, see MLIJ (n 130) preamble.
171 Guide to the MLIJ (n 130) para 15.
172 Unlike the MLCBI, there is no information regarding the implementation of the MLIJ on the website of UNCITRAL.
173 For a more detailed discussion of the implementation of the MLCBI in the US, see sub-s C.II.2.
174 For a more detailed discussion of the implementation of the MLCBI and a government consultation on the implementation of the MLIJ (Article X) in Great Britain, see sub-s C.II.1.
175 Guide to the MLIJ (130) para 2. For a discussion of the relationship between the MLIJ and the MLCBI, see ibid paras 35-41. For a discussion of overlaps and inconsistencies concerning these two frameworks, see Mevorach, 'Overlapping International Instruments' (n 166) 298-304.
176 Guide to the MLIJ (n 130) paras 126-27.

than the enacting state.[177] Under the MLIJ, an *insolvency-related judgment* is defined as 'a judgment that a. Arises as a consequence of or is materially associated with an insolvency proceeding …; and b. Was issued on or after the commencement of that insolvency proceeding', excluding, however, judgments initiating insolvency proceedings.[178] As to the definition of an *insolvency proceeding*, the MLIJ defines it in a manner similar, if not identical in key aspects, to the definition of a *foreign proceeding* under the MLCBI,[179] thus, encompassing restructuring proceedings.[180] Furthermore, the Guide to the MLIJ makes it clear that the definition of an *insolvency-related judgment* encompasses a judgment 'confirming or varying a plan of reorganization' or 'granting a discharge of the debtor or of a debt'.[181] It should also be noted that article 14 *(f)* of MLIJ expressly refers to the respective types of judgment.

The MLIJ allows the enacting states, which have implemented the MLCBI, to opt for a provision that enables them to refuse to recognise and enforce judgments from states whose proceedings are not eligible for recognition under the MLCBI, e.g. due to a lack of COMI or an establishment, subject to some exceptions.[182]

b) Recognition and Enforcement

An insolvency-related judgment shall, upon request, be recognised and enforced by the designated court of the enacting state, subject to the fulfilment of certain conditions concerning the effect and enforceability of the judgment in the originating state, the applicant's standing, and a few procedural requirements.[183] As to the effects of such recognition and enforcement, the MLIJ presents two options: the insolvency-related judgment shall be given

177 MLIJ (n 130) art 1 (1).
178 For the full definition of *judgment* and *insolvency-related judgment*, see MLIJ (n 130) art 2 (*(c)*, *(d)*).
179 See n 156 (and accompanying text) and text thereto.
180 For the full definition of *insolvency proceeding*, see MLIJ (n 130) art 2 *(a)*.
181 Guide to the MLIJ (n 130) para 60 (e). See also Michael Veder, 'Article 2: Definitions' 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) paras 2.2.34-35.
182 MLIJ (n 130) art 14 (h). See also Guide to the MLIJ (n 130) paras 39, 116-120.
183 MLIJ (n 130) arts 9-11, 13.

the same effect it has in the state where it has been issued or would have had if it had been handed down by a court of the enacting state.[184]

c) Safeguards and Their Relevance for the Research

The MLIJ also sets out several grounds to refuse the recognition and enforcement of insolvency-related judgments, such as public policy, fraud, lack of due notice, and inadequate protection of the interests of the involved parties.[185] While not currently in effect in any jurisdiction, the MLIJ is a valuable source for this work. Later in this work, it will become clear that the MLIJ employs more detailed and advanced language and structure regarding the respective safeguards and, therefore, will be helpful in interpreting similar ones under the MLCBI. Accordingly, some of the grounds for refusal under the MLIJ will be revisited later in this work.

IV. Summary

Part B of this work provided an introduction to cross-border restructuring. It began by briefly examining the legal nature of restructuring proceedings (B.I). It summarised two main doctrinal approaches to the nature of restructuring proceedings and their cross-border effects. The analysis revealed that most scholars generally view restructuring proceedings as insolvency proceedings and, therefore, within the scope of cross-border insolvency frameworks. That said, the contractual nature of restructuring proceedings is also highlighted in the literature. This work presented its perspective on the matter by underscoring the *sui generis* nature of restructuring proceedings. It also stressed that achieving the cross-border effects of restructurings through cross-border insolvency frameworks might be feasible. However, this work highlighted the importance of exercising caution in that regard, in particular, taking into account the debt-oriented nature of restructuring proceedings and, thus, fairly balancing the interests of the parties to the debt in question.

Part B also briefly examined the underlying principles (B.II) and three notable frameworks (B.III) of cross-border insolvency, which will be re-

184 ibid art 15. For rationale behind both options, see Guide to the MLIJ (n 130) para 121.

185 MLIJ (n 130) arts 7, 14.

ferred to throughout this work in various contexts. The examination showed that the scope of the frameworks is broad enough to encompass restructuring proceedings. It has also been noted that these frameworks (particularly the Model Laws) contain certain safeguards that might be of importance for striking a fair balance between the respective interests.