F. Ensuring Substantive Fairness in the Recognition of Restructuring Plans under the MLCBI

Part F will be dedicated to developing a framework to ensure substantive fairness in recognising restructuring plans under the MLCBI (substantive fairness framework under the MLCBI), which constitutes the main focus of this research. Section F.I will provide a normative justification and seek a legal basis for a substantive fairness review when considering the recognition of restructuring plans under the MLCBI. Section F.II will be dedicated to the essential aspects of the substantive fairness framework under the MLCBI. Section F.III will test the IBA plan against the framework suggested in this work. Section F.IV will outline several advantages of this framework. Section F.V will offer a summary of the points discussed in this Part.

I. Normative and Legal Foundations

This section will be dedicated to the justification of the need for a substantive fairness review in recognising restructuring plans in a system based on modifying universalism and seeking a legal basis for such a review in the text of the MLCBI. Subsection F.I.1 will be devoted to the justification, while subsection F.I.2 will examine the text of the MLCBI (as well as the MLIJ) to find a legal basis for a substantive fairness review.

1. Normative Justification

Below, this work will justify the need for a substantive fairness review in recognising foreign restructuring plans within a framework underpinned by modified universalism. It will first distinguish universalism from modified universalism in this context. Then, the matter will be examined under modified universalism, followed by an analysis of the correlation between the public policy exception and a substantive fairness review.

a) A Substantive Fairness Review under Universalism

This work will first examine whether a substantive fairness review is possible and necessary in achieving the cross-border effects of restructuring plans in a system underpinned by the principle of universalism. This work argues that such a review is unique to modified universalism and conducting it under universalism is neither feasible nor theoretically necessary or preferable.

To begin with, a system based on universalism does not require any recognition proceedings, as restructuring plans are automatically recognised and enforceable in such a system.[900] Hence, it is practically impossible to conduct a fairness review in this system. Any attempt to assess the fairness of foreign proceedings before granting recognition to foreign plans no longer upholds the underlying principle of *universalism* and effectively downgrades it to *modified universalism*.

Besides being a practical impossibility, a substantive fairness review is neither necessary nor preferable in this system from a normative perspective. In that regard, this work will analyse two scenarios of how universalism can be achieved:[901]

aa) A Single International Court and a Single International Law

In a first scenario, there is a single international court system and a single international law for cross-border restructuring cases. This means that the debtor's restructuring is administered by a transnational court applying a transnational law. Put another way, both the forum and the applicable law in question are not connected to any specific jurisdiction, and the proceedings are of a transnational nature. Hence, the restructuring plan cannot be categorised as a *domestic* or *foreign* plan in the eyes of any jurisdiction. The court and applicable law are neutral and all jurisdictions involved in the system have previously agreed to be bound by the outcome resulting from the application of that particular (transnational) law by that particular (transnational) court.[902] Accordingly, there is no need for two separate fairness reviews, one at the stage of plan confirmation and another

900 See sub-s B.II.3.b).

901 ibid.

902 Any system based on universalism requires consensus from all participants. See sub-s B.II.3.c).

at the stage of granting the cross-border effects. For the same reasons, public policy considerations do not arise in such a system

bb) A Uniform Set of Choice-of-Forum and Choice-of-Law Rules

A second scenario involves a system based on a uniform set of choice-of-forum and choice-of-law rules. To begin with, this does not represent true and full universalism, as is the case in the first scenario. Jay Westbrook notes that it 'would be far short of true universalism', potentially qualifying as 'the lowest form of universalism' or 'the highest form of … modified universalism'.[903]

In this scenario, a forum and a law belonging to a jurisdiction determined in accordance with such uniform rules govern the debtor's restructuring and all other jurisdictions automatically and fully defer to and, thus, accept the outcome achieved in that jurisdiction. Therefore, no ancillary recognition proceedings are required. Setting aside the possibility of secondary (territorial) proceedings and exceptions concerning applicable law, the existing regional framework under the EIR offers a notable illustration of how this scenario might operate in practice:[904] once a proper forum (a Member State where the debtor has its COMI) and a proper law (the *lex fori concursus*) are identified, the said court and law function as a single court and a law, respectively, governing the debtor's restructuring throughout the EU.

The main difference from the first scenario mentioned above is that the respective court and law belong to a certain state within the system (under the EIR, to a Member State in the territory of which the debtor's COMI is situated). Hence, the respective court and law are not neutral to all participants of the system but rather belong to one of them. Accordingly, the restructuring plan can be viewed as *domestic* in one jurisdiction and *foreign* in all other jurisdictions that make up this system.

903 Westbrook, 'A Global Solution' (n 100) 2318.

904 For the avoidance of doubt, this work does not argue that the EIR establishes a fully universalist system. Despite its universalist ambitions, the EIR contains several exceptions in that respect, ie, those related to applicable law and the possibility of opening secondary (territorial) proceedings. See sub-s B.III.1. It is merely proposed to set these exceptions aside in order to use the EIR as an example of how the scenario discussed in the present subsection might function in practice.

Nonetheless, a substantive fairness review in a cross-border context is neither necessary nor preferable also in this scenario. Another principle of cross-border insolvency law, namely, the principle of mutual trust, plays a significant role in this respect.[905] By agreeing to be bound by uniform choice-of-forum and choice-of-law rules on the cross-border effects of restructuring proceedings with certain other states within a group, states within that group are generally presumed also to agree to mutually trust one another's legal system. That trust extends, *inter alia*, to substantive laws and fairness frameworks thereunder.[906]

A substantive fairness review in a cross-border context is unnecessary because states are presumed to generally assess and approve the legal systems of all other states within the group before forming a group with them. Unlike the framework provided for by the MLCBI, access to recognition is confined to mutually trusted (thus, generally pre-assessed and pre-approved) jurisdictions within a closed group. Nor is such a review preferable because its application in each case (when successfully invoked) can gradually undermine mutual trust and eventually destroy the entire system built on such trust.

Unlike the first scenario, public policy issues may arise in such a scenario due to the involvement of private international law rules. However, this is not necessary because a system based on full mutual trust does not require the public policy exception for substantially the same reasons mentioned above. Accordingly, it depends on the level of trust. The EIR, for example, includes the public policy exception. As Reinhard Bork puts it, a framework containing the public policy exception is based on *sceptical* mutual trust.[907] For substantially the same reasons that will be articulated later,[908] it is argued that even the presence of the public policy exception does not necessitate or justify a substantive fairness review with respect to foreign restructuring plans in this scenario.

905 See sub-s B.II.5.
906 See text to n 123.
907 See text to n 126.
908 See sub-s F.I.1.c).

b) A Substantive Fairness Review under Modified Universalism

aa) Difference from Universalism

Above, this work concluded that conducting a substantive fairness review of a foreign restructuring plan is neither practicable nor necessary or desirable in a universalism-based system. However, the situation is quite different under the principle of modified universalism. To begin with, a system underpinned by modified universalism does not benefit from a single transnational court and a single transnational law governing the debtor's restructuring globally as in the first scenario discussed above. As to the second scenario of achieving universalism, i.e. a uniform set of choice-of-forum and choice-of-law rules, a system based on modified universalism does not benefit from mutual trust, which is a basic pillar of the respective scenario.

Consider the MLCBI as an example. It provides the right of access to recognition in the enacting state to proceedings from all jurisdictions without the reciprocity requirement. Both Chapter 15 and the CBIR have adhered to this position without modification. Hence, it is difficult to speak about any level of trust here since jurisdictions (to which access is granted) have not been pre-assessed and pre-approved. Besides, any trust, if present, is not mutual since the MLCBI framework grants one-sided access and does not require reciprocity.

Now, envision a framework under which a group of states agree on uniform choice-of-forum and choice-of-law rules on cross-border restructuring cases. However, this framework does not provide for automatic recognition within the group (unlike the EIR). It rather requires ancillary recognition proceedings in each state. The fact that the states within the group did not agree to the automatic, group-wide recognition of the effects of restructuring proceedings governed by the court and law of one of them, even determined in accordance with the previously agreed choice-of-forum and choice-of-law rules, indicates the lack of sufficient mutual trust in one another's legal system. It is hard to argue for a sufficient level of pre-approval in this scenario.

bb) Case for a Substantive Fairness Review under Modified Universalism

(1) Practical Feasibility

To begin with, evaluating the substantive fairness of foreign plans is practically possible under the principle of modified universalism. The concept is termed *modified* universalism because it does not mandate foreign states to automatically defer to the proceedings in the debtor's home jurisdiction.[909] Instead, it sets a framework where such deference takes place after an initial review of such proceedings by foreign states. Hence, the process of evaluating foreign proceedings is not at issue. The primary concern lies in the scope and extent of such an evaluation.

(2) Necessity

This work argues that evaluating foreign restructuring proceedings should also include a review of the fairness of the distribution under the plan when recognition is contested on the respective grounds. Without elaborating on the need for such a review in the recognition of foreign insolvency proceedings, this work considers that a substantive fairness review is of particular importance and, therefore, necessary in the recognition of foreign restructuring plans for the reasons articulated below.

(a) Challenges in a Purely Domestic Context

In section E.I, this work has already identified the fundamental differences between restructuring and insolvency proceedings in terms of achieving substantive fairness in a purely domestic context. In that section, this work concluded that due to uncertainty related to several aspects of restructuring proceedings (such as the value available for distribution, restructuring measures, post-restructuring roles, and classification) and their ability to alter the substantive rights of participants, ensuring substantive fairness in these proceedings is a much more complex and important issue. That is to say, the fairness of outcome is assessed and (attempted to be) ensured in courtrooms within the provided legal framework after judges consider the individual circumstances of each case where the issue arises.

909 For a more detailed discussion of the principle of modified universalism, see sub-s B.II.4.

(aa) Examples from the US and England

In section E.II, this work examined how the concept of ensuring fairness functions in practice, using the examples of the US and England. Those examples have strengthened the argument mentioned above regarding the importance and complexity of the matter. Despite both jurisdictions being considered to have well-established statutory and case law in the respective area dating back to the 19th century, not all matters regarding the fairness of outcome in restructuring proceedings are fully settled in a domestic context. That is to say, not all courts interpret the general statutory framework and apply it to the facts of cases in the same way, particularly in the US. For example, this work observed that US courts have been following different approaches and applying different tests over the years on what constitutes *unfair discrimination* when confirming non-consensual plans.[910] In addition, there is no full consensus on whether gifting is allowed in a class cramdown scenario.[911] Furthermore, courts had split over the years on whether the new value exception survived the BC.[912] Not all legal matters end up being heard by the USSC to ensure the uniform application of the law. Some of them do, but after a while, with cases being decided on a daily basis. That is to say, it took the USSC more than twenty years after the adoption of the BC to (implicitly) acknowledge the survival of the new value exception to the APR.[913] The issue of non-consensual third-party releases is another example.[914] Matters like the ones mentioned are at the core of fairness frameworks in restructuring proceedings and can directly and materially affect the outcome of a restructuring. A split on one or another matter exists not only in courts but also in scholarship. For example, this work also noted that some scholars question the fairness of outcome under the APR, which is strictly applied in a cramdown scenario under Chapter 11.[915]

The examples of those two jurisdictions illustrate that ensuring substantive fairness is a complex matter that may require a thorough judicial assessment and is not always guaranteed in a purely domestic context, even in jurisdictions with established restructuring frameworks.

910 See nn 744, 745, 746 (and accompanying text) and text thereto.
911 See nn 728, 729 (and accompanying text) and text thereto.
912 See n 724 (and accompanying text) and text thereto.
913 See n 725 (and accompanying text) and text thereto.
914 See n 387 and accompanying text.
915 See, eg, nn 708, 715 (and accompanying text) and text thereto.

(bb) Jurisdictions with Less Developed Restructuring Frameworks

Ensuring fair outcomes in restructuring proceedings is an even more challenging task for judges in most other jurisdictions. Unlike the US and England, not all jurisdictions have well-established legal traditions and principles, particularly when it comes to debt restructuring.[916] Hence, an unbiased, transparent, and generally competent judge of a district court of Ruritania, where debt restructuring was not an option until recently, does not benefit from advanced statutory texts, countless previously decided cases (thus, well-established principles developed in these cases), and credible academic sources while hearing the first restructuring case, unlike a judge of the EWHC or the US Bankruptcy Court for the SDNY. The same holds if one compares judges of higher instances in the respective jurisdictions.

(cc) Interim Conclusion

To sum up this point, guaranteeing substantive fairness is a challenging issue even in transparent domestic proceedings and this holds even for jurisdictions with a long tradition of debt restructuring. In addition, not all jurisdictions are well-equipped to accomplish this task. In fact, most are not. This perspective alone, without considering the effect of the involvement of cross-border elements, justifies the core argument of the present work that outcomes reached in domestic proceedings should not be considered untouchable. Hence, blindly accepting, in other jurisdictions, the outcome achieved in the debtor's home jurisdiction in cases where the fairness of such outcome is contested cannot be justified.

(b) Incorporating Cross-Border Elements

Ensuring substantive fairness in restructuring proceedings becomes even more challenging when cross-border elements are added to the picture. Purely domestic restructuring plans are unlikely to require any action abroad, i.e. recognition in foreign jurisdictions. Therefore, if such action is required, it is likely due to the involvement of cross-border elements in the plan. A typical scenario in this respect involves the discharge of a

916 This point was also highlighted in the context of defending the Gibbs rule. See FMLC (n 332) para 4.9.

foreign law-governed debt under the plan. At least two main factors can be highlighted which justify that ensuring substantive fairness in domestic restructuring proceedings with cross-border elements is a more complex and sensitive issue and, therefore, the alarm level should be higher.

(aa) Risk of a Bias Towards Foreign Parties

A first factor is a possible bias towards foreign parties. Such a bias, if present, is not always obvious and is difficult to detect through a procedural fairness review. As this work noted in the example of the restructuring frameworks in the US and England (E.II), plan proponents (who are the debtor in most cases) may be granted some flexibility in certain matters, such as selecting which liabilities to be affected by the plan and which ones to remain totally unaffected as well as classifying creditors of the same rank into separate classes and treating them differently under the plan. The debtor may abuse this flexibility, possibly with the (active or passive) help of local courts, to unfairly discriminate against foreign creditors. Proving such discrimination is often difficult through a procedural fairness review.

Consider another aspect of fairness in restructuring cases as an example: the debtor's valuation. As Douglas Baird points out, even in the case of a non-biased judge, there is a degree of inherent variance in the debtor's valuation.[917] The value confirmed by the judge within the range of such variance may significantly impact the outcome for different parties when the APR applies: a senior creditor can receive the entire equity in one scenario, and a junior creditor can also receive a stake in another.[918] Thus, one or another value accepted by the judge may be in favour of the interests of one party and against those of another party. It is nearly impossible to find out whether the judge's decision on the debtor's value was influenced by factors that should, in theory, be irrelevant. For example, consciously or unconsciously, favouring a local creditor over a foreign creditor, who happens to be the senior and junior creditors in the scenario mentioned above, respectively, may (which, in theory, should not) be an influencing factor. Whether that was the case is hard to reveal through a procedural fairness review.

917 Baird, 'Priority Matters' (n 30) 821-22
918 ibid.

(bb) Potentially Unfamiliar Foreign Legal Concepts

A second factor is the likelihood of dealing with sophisticated foreign creditors and debt instruments, i.e. foreign law concepts that are unknown to the local jurisdiction. One of the main reasons for selecting a certain law (e.g. English law) to govern a certain complex debt instrument is the capability of that law to deal with various complex legal features of the instrument in question. Here, the instrument is subject to another law that might simply be not familiar with the respective features. Even if the bias issue is set aside, this aspect suffices to speak about a higher level of alert.

Recall the example of a non-biased (also towards foreign creditors), transparent, and generally competent Ruritanian judge. This time, the judge not only hears for the first time a restructuring case without any clear statutory guidelines and case law principles on substantive fairness but also, within the case, reviews a plan that provides for the restructuring of the obligations of a local company that are governed by different foreign laws. These obligations include, *inter alia*, different series of bonds issued on various foreign stock exchanges (involving different beneficial and legal owners, a foreign bank as a trustee, and so forth) as well as several sophisticated syndicated and subordinated loans from sophisticated foreign lenders. The concepts mentioned are not known under Ruritanian law. In a nutshell, an extremely exceptional day in the judge's career. The example speaks for itself.

(c) Ensuring Substantive Fairness Through the Entire Process

As already noted, substantive fairness refers to the fairness of outcome. If one speaks about the fairness of outcome, fairness should continue to be guaranteed until the outcome is fully achieved. In a cross-border scenario involving the non-consensual discharge of a foreign law-governed debt, such an outcome is achieved when cross-border substantive effects (e.g. binding the dissenting foreign creditor by the plan in the eyes of all affected jurisdictions) are in place. Otherwise, the outcome would not be final, as the dissenting foreign creditor can enforce its original claim against the debtor in jurisdictions that have not granted the recognition of the plan. Put another way, in the eyes of the *lex fori concursus* the plan might be final and binding on everybody once it has been confirmed by a local court (after conducting its fairness review) in the debtor's home jurisdiction. But from a global perspective, under modified universalism, the plan is final

and binds everybody only when it has been given such effect in all affected jurisdictions. Hence, the process of ensuring substantive fairness should continue until such a global binding effect is obtained.

(d) Summary

To sum up, this work highlighted three points to justify the need for a substantive fairness review in contested cases under modified universalism: (i) the complexity of ensuring substantive fairness in domestic proceedings, particularly in jurisdictions with less developed restructuring frameworks; (ii) potential additional issues stemming from the involvement of cross-border elements, such as discrimination against foreign parties and challenges related to unknown foreign legal concepts; and (iii) the importance of ensuring fairness of restructuring plans until a globally binding effect is achieved.

c) Substantive Fairness and Public Policy

Below, this work will briefly examine whether ensuring substantive fairness of foreign plans at the recognition stage can be achieved under the public policy exception rather than conducting a separate substantive fairness review.

This work has already highlighted the importance of the protective role that the public policy exception plays in private international law generally (D.I.2) and under the MLCBI particularly (D.I.3). Hence, the cross-border effects of unfair (whether from a procedural or substantive perspective, or both) restructuring plans may be blocked under the public policy exception in some cases. As this work will discuss later,[919] fairness concerns may also affect the exercise of discretion under article 21 of the MLCBI pursuant to article 22. Hence, there may be an overlap. Nonetheless, this work argues in favour of a principle-based approach, given the significance of the issue identified thus far. Accordingly, it opposes assessing substantive fairness within the general public policy framework for the following reasons:

919 See sub-s F.I.2.b).

aa) Difference in the Purpose

To begin with, the public policy exception under the MLCBI and a substantive fairness review, despite the potential for overlap in the outcome of their invocation in some cases, have different functions. As already discussed in section D.I, the role of the former is to safeguard the most fundamental policies of the receiving state. The latter, as will be elaborated in greater detail as this work progresses, focuses on ensuring that the outcome under the foreign plan at hand is fair to a creditor (opposing creditor) opposing the recognition of the plan on the respective grounds. This work, thus, agrees with the arguments that the public policy exception under the MLCBI is not the appropriate safeguard to protect the interests of individual creditors in all cases.[920]

bb) Narrow Application of the Public Policy Exception

Additionally, as noted in this work, the public policy doctrine shall apply only in exceptional cases both in a general private international law context and the MLCBI framework.[921] A substantive fairness review, however, should be conducted in each case, subject to certain limitations, where the fairness of the plan is contested. Hence, the cross-border effects of foreign plans should be blocked in each case where such unfairness is established. That said, this work also argues against exploiting the substantive fairness framework under the MLCBI. This framework should have a limited application (but not as limited as the public policy exception) and the bar of what constitutes *unfair* in a cross-border context should not be low. This work will elaborate on these aspects of the respective framework in greater detail as Part F progresses.

cc) Proximity to the Forum

As noted, one of the dimensions of the public policy exception constitutes the proximity of the case at hand to the receiving state.[922] There may be cases with a weak connection with the state in which the recognition is

920 For a more detailed discussion, see sub-s D.I.3.c)bb).
921 See sub-ss D.I.2.c), D.I.3.c)aa).
922 See sub-s D.I.2.c)bb)(1).

sought. This could be due to factors such as the opposing creditor and the governing law of the contract belonging to a different jurisdiction and the recognition of the plan being sought merely to protect the debtor's assets in that state. Accordingly, courts of the respective state may not be keen to apply the public policy exception in such a case. For the purposes of a substantive fairness review, the proximity of the case to the state where the recognition is sought is irrelevant since the focus remains on the position of the opposing creditor.

2. Legal Basis under the MLCBI

This work will now examine whether the MLCBI, underpinned by the principle of modified universalism, provides for (or requires) a separate substantive fairness review, as justified in subsection F.I.1. This work will also refer to the text of the MLIJ to support its conclusions regarding the MLCBI.

a) Distinctive Approach to Restructuring Proceedings under the MLCBI

In general terms, the distinction between insolvency and restructuring proceedings extends to the cross-border effects of those proceedings under the MLCBI, as implemented in the jurisdictions examined in this work. That is to say, the automatic effects under article 20 of the MLCBI do not apply to restructuring proceedings under the British version.[923] The American version of article 20 (section 1520 of the BC), like the original version itself, applies also to restructuring proceedings. However, the effect of article 20 is limited in achieving the substantive goals of restructuring proceedings. That is to say, it is not possible to fully enforce foreign restructuring plans and, thus, bind dissenting creditors in the receiving state under this article. As already noted, this can be achieved under two articles of the MLCBI in the American version.[924] One option is through article 21 (section 1521 of the BC), which is of a discretionary nature. Additionally, any relief under article 21 is subject to article 22, which will be analysed in detail below. An alternative route is through article 7 (section 1507 of the BC), which is also discretionary and subject to the requirements of the American version of

923 For a more detailed discussion, see sub-ss C.II.1.a), C.II.1.b)cc).
924 See sub-s C.II.2.d).

this article. As can be generally observed, the MLCBI itself and its enacted versions tend to give local courts of the receiving state more control over the substantive cross-border effects of foreign restructuring plans. Given the analysis conducted in subsection F.I.1 of this work, it is not without reason.

b) The *Adequate Protection* Safeguard under Article 22 (1) of the MLCBI

Specifically, this work argues that a separate substantive fairness review may and should (given the use of *must*) be exercised under article 22 (1) of the MLCBI:

> Article 22. Protection of creditors and other interested persons
> 1. In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

To begin with, the text of the MLCBI does not provide further details regarding this *adequate protection* safeguard, leaving a degree of uncertainty surrounding its application.[925] The Guide to the MLCBI generally underscores that the underlying idea of article 22 (1) is to strike a balance between the relief sought and the interests of the affected persons by that relief.[926] Accordingly, the matter is largely left to judicial discretion.[927] That said, this work argues that the protection granted by article 22 (1) of the MLCBI is primarily substantive. Below, it will thoroughly examine article 22 (1) to justify this argument.

925 Reinhard Bork, 'Article 22' 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 1.22.01, 1.22.03.

926 Guide to the MLCBI (n 17) para 196. See also Bork, 'Article 22' (n 925) paras 1.22.01, 1.22.03.

927 Bork, 'Article 22' (n 925) paras 1.22.01, 1.22.03.

aa) Language of Article 22 (1) of the MLCBI

To that end, this work first suggests focusing on the language used in the text of article 22 (1). This article provides for ensuring that the *interests* of all interested persons, with a specific emphasis on the creditors, are *adequately protected*.

Hence, the focus of the protection under article 22 (1) is the *interests*, not the *rights*, of the respective parties, particularly the creditors. The Oxford English Dictionary defines the noun *interest*, in its closest meaning to the context of article 22 (1) as follows: 'What is (most) advantageous or beneficial to a person or thing; an advantage, a benefit. Now esp. in **in a person's (best) interest**: to a person's advantage or benefit'.[928] As can be seen from this definition, the *interest* of a person in a particular context refers to the most advantageous or beneficial outcome in that particular context. With that definition in mind, parties involved in restructuring proceedings may have various, often conflicting, interests.[929] For example, shareholders may aim to retain their equity interests in the restructured company to the highest extent possible, if not entirely, which may result in reduced recovery for creditors. Creditors, on the other hand, may seek to achieve the satisfaction of their original claims to the greatest extent possible, if not fully, which may result in little or no equity for the existing shareholders in the restructured company. As this work observed in section E.II in the example of restructuring frameworks in the US and England, within the creditor side of the picture, too, different types of creditors may have competing interests, e.g. senior creditors versus more junior creditors or finance creditors versus trade creditors.

In order to *adequately protect* all those often-conflicting interests within a single restructuring case, the substantive outcome (rather than merely procedural aspects) should strike a fair balance among them. Hence, the *adequate protection* safeguard under article 22 (1) obliges the court of the receiving state, when giving effect to a foreign restructuring plan, to ensure that the distribution under the plan is fair and balanced *vis-à-vis* the interests of all affected parties, particularly the creditors. That is the exact aim of a substantive fairness review, too.

928 'interest, n, sense I.1.b' (*OED Online*, OUP December 2024) <https://www.oed.com/dictionary/interest_n?tab=meaning_and_use#260186> accessed 21 October 2025.

929 See Bork, 'Article 22' (n 925) para I.22.01, where it is also mentioned in a general context that those interests are often conflicting.

The language of the analogous[930] article of the MLIJ, namely, article 14 *(f)*, which provides for a ground to refuse the recognition and enforcement of a foreign insolvency-related judgment, is clearer and supports the analysis made above with respect to the language used in article 22 (1) of the MLCBI. That is to say, the language of paragraph *(f)* of article 14 leaves little room for doubts regarding the substantive nature of the protection under the respective paragraph with respect to the recognition and enforcement of foreign restructuring plans (court orders confirming such plans):

> *(f)* The judgment:
> (i) Materially affects the rights of creditors generally, such as determining whether a plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of debts should be granted or a voluntary or out-of-court restructuring agreement should be approved; and
> (ii) The interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued;

bb) Article 22 (1) in the Broader Context and Structure of the MLCBI

This work also suggests examining article 22 (1) within the broader context and structure of the MLCBI to justify its substantive nature. That is to say, article 6 of the MLCBI suffices to protect the public policy of the enacting state, which also encompasses assessing procedural fairness.[931] Additionally, courts may choose not to exercise their discretion to grant post-recognition relief under articles 7 or 21 in the cases involving procedural unfairness and other related issues, similar to the comity analysis of US courts.[932] Accordingly, there would be no necessity for an additional safeguard under article 22 (1) for merely procedural protection.

Again, the MLIJ, with its advanced context and structure, is of significant assistance. That is to say, the MLIJ contains separate provisions on the grounds for refusal, namely, public policy (article 7), procedural fairness (article 7), adequate notice (article 14 *(a)*), and fraud (article 14*(b)*). Accord-

930 See Rodriguez (n 594) para 2.14.44, where it is noted that article 14 *(f)* of the MLIJ 'is drafted in a manner and with the purpose to replicate Article 22 MLCBI …'.
931 See text to nn 475, 476.
932 See text to nn 379, 380.

ingly, the *adequate protection* safeguard under article 14 *(f)* provides for an additional layer of (substantive) protection, particularly to creditors.

cc) Chapter 15 Case Law

Below, the American approach (upon which the model suggested in this work is built) will be analysed to support the argument on the substantive nature of article 22 (1) of the MLCBI.[933] In *Jaffé v. Samsung Elecs Co*, the Fourth Circuit was not convinced of the appellant's arguments that the protection under section 1522 (a) of the BC (the American version of article 22 (1) of the MLCBI) is 'merely a procedural' one and cannot be considered a safeguard against foreign substantive bankruptcy laws.[934] Instead, the court held that 'The analysis required by § 1522(a) is therefore logically best done by balancing the respective interests based on the relative harms and benefits in light of the circumstances presented, thus, inherently calling for application of a balancing test'.[935]

In fact, US courts developed three main principles regarding the satisfaction of the *sufficient protection*[936] requirement under section 1522 (a) of the BC:

> the just treatment of all holders of claims against the bankruptcy estate, the protection of U.S. claimants against prejudice and inconvenience in the processing of claims in the foreign proceeding, and the distribution of proceeds of the foreign estate substantially in accordance with the order prescribed by U.S. law.[937]

Among the three principles noted above, the last one is of particular importance for the purposes of the point discussed. Setting aside its problematic

933 For an analysis of the US case law regarding article of 22 (1), see also Bork, 'Article 22' (n 925) paras 1.22.09-16.

934 *Jaffé* (n 536) 27.

935 ibid 27-28. For a critical analysis of this balancing test, see Allan L. Gropper, 'The Curious Disappearance of Choice of Law as an Issue in Chapter 15 Cases' (2014) 9 Brook J Corp Fin & Com L 57, 78-79

936 The American text uses the adverb *sufficiently* instead of *adequately* as appears in the MLCBI. Bork, 'Article 22' (n 925) para 1.22.09.

937 *Bakrie* (n 375) 876 (square brackets and citations omitted).

aspects,[938] this principle expressly points to the distribution in foreign proceedings, i.e. whether or not the distribution in the foreign proceedings is substantially in line with that provided under US law. The same requirement is also set forth in section 1507 (b) (4) of the BC, which should be met when granting additional assistance under section 1507.[939]

dd) Existing Literature

It should be noted that the idea of a systematic substantive fairness review under article 22 (1) of the MLCBI (or article 14 *(f)* of the MLIJ) has not been extensively discussed in the literature so far. A few scholars have, nonetheless, touched on the subject. For example, Stephan Madaus highlights article 14 *(f)* of the MLIJ for refusing recognition on substantive grounds as part of the *sufficient connection* framework suggested by him.[940] Jay Westbrook leaves the door open for such a substantive review under article 22 of the MLCBI.[941] Irit Mevorach and Adrian Walters generally point to, *inter alia*, the *adequate protection* safeguard under article 22 (1) of the MLCBI for ensuring the fairness of cross-border pre-insolvency restructuring cases but also stress that additional clarification may be required in that respect.[942] Gerard McCormack generally highlights the importance of adequate protection of the interests of creditors under article 22 (1) of the MLCBI while supporting the implementation of Article X of the MLIJ in the UK and, thus, discontinuing the application of the Gibbs rule in its current form.[943]

3. Summary

In section F.I, this work first elaborated on the necessity of a substantive fairness review in recognising foreign restructuring plans in a system based on modified universalism (F.I.1). It concluded that, unlike universalism,

938 See sub-ss F.II.2.a)dd), F.II.2.b)aa).
939 Therefore, a separate analysis regarding section 1507 will not be provided further in this work.
940 Madaus, 'The Cross-border Effects of Restructurings' (n 3) 484-86. For a more detailed discussion, see sub-s B.I.2.b).
941 Westbrook, 'Chapter 15 and Discharge' (n 312) 517.
942 Mevorach and Walters (n 34) 878, 890-91.
943 McCormack 'UK Contracts and Modification under Foreign Law' (n 166) pts 6-7.

such a review is not only practically possible but also necessary in contested cases under the realm of modified universalism. This work highlighted three points in that regard: challenges of guaranteeing substantive fairness in domestic proceedings, particularly in jurisdictions with less developed restructuring frameworks; potential additional issues arising from the involvement of cross-border elements (bias against foreign creditors and unfamiliarity with foreign legal concepts); and the importance of ensuring the fairness of restructuring plans until they have a binding effect globally. By emphasising the importance of a principle-based approach in this context, it was also concluded that the general public policy framework does not fully address the respective issue, and a separate review should be conducted for that purpose.

Then, the text of the MLCBI (F.I.2) was examined. This work argued that the *adequate protection* safeguard under article 22 (1) requires such a review. This was supported by the analysis of its language, place in a general structure of the MLCBI, and interpretation under American case law, as well as by a summary of existing literature.

II. Essential Aspects of the Substantive Fairness Framework under the MLCBI

This work will now delve into the core aspects of the substantive fairness framework under the MLCBI. To begin with, like a domestic context, much should be done by courts after considering the peculiarities of each case to ensure substantive fairness when recognising foreign restructuring plans under the MLCBI, given the language used in article 22 (1). Nevertheless, the substantive fairness framework under the MLCBI significantly differs from domestic fairness frameworks, as will be evident as this section progresses.

This section will elaborate on the core features of the framework suggested in the present work. Subsection F.II.1 will be devoted to preliminary issues related to the limited scope and application of the substantive fairness framework under the MLCBI. In subsection F.II.2, this work will justify the necessity of a benchmark law under this framework and elaborate on the selection of the best law for that purpose. Subsection F.II.3 will be dedicated to the comparison with the benchmark law, while subsection F.II.4 will discuss the establishment of unfairness after the comparison has been conducted. Subsection F.II.5 will provide a summary.

In section F.II, this work will exclusively focus on substantive fairness. Therefore, it is assumed that public policy, due process, fraud, and other similar issues are not involved.

1. Limited Scope and Application

As mentioned earlier, the substantive fairness framework under the MLCBI should differ from domestic fairness frameworks. This work will emphasise and justify certain differences as Part F progresses while elaborating on various aspects of the former. Below, it will focus on one significant distinctive feature: its limited scope and application.

a) Reasons for the Limited Scope and Application

This work will outline two, albeit related, reasons for such limited scope and application.

aa) Private International Law Context

A first reason is linked to the general private international law nature of the matter. It is essential to remember that the matter involves recognising and enforcing a restructuring plan confirmed by a court order, which has become final in another state. The court of the receiving state does (and should) not act as a court of higher instance to conduct a full merits review (révision au fond) of a final decision of a foreign court having proper jurisdiction to administer the restructuring of the debtor.

bb) Modified Universalism

Second, the need for the limited scope and application also stems from the principle of modified universalism. As this work already noted, modified universalism has been suggested as an interim solution until universalism is fully achieved.[944] Its main idea is to achieve the objectives of universal-

944 For a more detailed discussion of modified universalism, see sub-s B.II.4.

ism (a single court and a single law governing the worldwide insolvency or restructuring of the debtor) through the collaboration of courts from different states rather than through automatic effects as envisioned by universalism. The MLCBI serves as an example of a framework for this type of collaboration. Under modified universalism, states retain some power to assess foreign restructuring proceedings before allowing their cross-border effects. Nonetheless, those powers should not undermine the central idea of a single court and a single law. Here, too, a single court and single law govern the worldwide restructuring of the debtor. The distinction lies in how cross-border effects are achieved. Therefore, any attempt to a full révision au fond would be inconsistent with that central tenet of modified universalism and, thus, jeopardise its main advantages.[945] So would assessing fairness in all cases.

b) Factors Ensuring the Limited Scope and Application

Although the matter will be returned to as Part F progresses, this work will below discuss several factors that it suggests will ensure the limited scope and application of the substantive fairness framework under the MLCBI.

aa) Effect on Substantive Rights

A substantive fairness review under the framework suggested in this work should only intervene when the action sought in the receiving state affects substantive rights. An obvious example is recognising and enforcing a foreign restructuring plan involving a non-consensual discharge. A permanent impediment to the enforcement of such rights should also be considered as affecting substantive rights.[946] The recognition of foreign proceedings and their automatic effects (temporary stays or moratoriums) and other actions of a procedural nature should not *per se* trigger a substantive fairness review. This is because substantive rights are not affected at that point in the eyes of the receiving state. Accordingly, a substantive fairness review is unnecessary at the respective stage.

945 For a discussion of the advantages of a concept based on a single court and a single law, see sub-s B.II.3.a).

946 See *IBA* (n 245) and its discussion in sub-s C.I.3.a).

bb) Opposition at the Recognition Stage

A substantive fairness review should be conducted only when the recognition of the plan is opposed on substantive fairness grounds. Dissenting behaviour in foreign proceedings alone does not suffice. Article 22 (1) of the MLCBI does not expressly state it. Rather, it generally requires ensuring the adequate protection of the interests of all parties. That said, reviewing the substantive outcome of the foreign proceedings by the court of the receiving state on its own initiative (ex officio) would be inconsistent with the private international law nature of the matter in general and the principle of modified universalism in particular. Accordingly, it should be presumed that the interests of a dissenting creditor have been adequately protected in the foreign proceedings if the creditor does not oppose the relief sought under the MLCBI in the receiving state.

cc) Exclusion of Local Creditors of Foreign Proceedings

The substantive fairness framework under the MLCBI does not apply to a creditor whose initial claim is governed by the *lex fori concursus*. By agreeing to be bound by that law at the outset, the creditor also agreed to any subsequent discharge of the debt under the respective law. The substantive outcome of the foreign proceedings, therefore, is final for local creditors of those proceedings.

dd) Exhaustion of All Remedies in Foreign Proceedings

In order to have standing to oppose the recognition of the plan in the receiving state, a dissatisfied creditor must first object to the confirmation of the plan in the original (foreign) proceedings. Again, mere dissenting behaviour during the voting process is not enough. The dissatisfied creditor should exhaust all remedies in the foreign proceedings in order to claim the unfairness of the distribution under the plan. That includes, *inter alia*, contesting the plan at the confirmation hearing, appealing the court order confirming the plan, and making further appeals on the respective grounds (as the case may be). That is to say, the focus of a substantive fairness review is on the *fairness of outcome*. The dissatisfied creditor, therefore, should first try to achieve the best possible outcome in the original proceedings,

where courts are better equipped and have more extensive substantive and procedural powers for that. At that point, it is a matter of purely domestic substantive law, allowing the thorough assessment and assurance of fairness in the overall outcome, including with respect to that creditor. The recent case of *Adler*, where the EWCA dismissed a EWHC judgment sanctioning a Part 26A plan on the substantive fairness grounds upon the appeal of several dissenting foreign creditors, is a notable example of how the outcome can be more favourable for dissenting foreign creditors in domestic proceedings after successful contestation.[947] Accordingly, in order to question the outcome at the recognition stage, the dissenting creditor should first get a final verdict on the outcome in the domestic proceedings. Again, the respective court of the receiving state does not function as a higher court in this context.

As can be identified, this perspective is completely different from the English approach, according to which no protection is granted under the Gibbs rule to a creditor submitting to foreign proceedings.[948] The framework suggested in this work, by contrast, encourages dissenting creditors to actively engage and attempt to address any fairness concerns in domestic proceedings first. Besides the arguments mentioned above, this approach is also advantageous in terms of certainty and efficiency.

When considering this factor, parties with limited resources, such as SMEs and consumers, could be given an exception.

ee) Focusing on the Treatment of the Opposing Creditor

A substantive fairness review should assess the (un)fairness of the foreign plan only in relation to the opposing creditor. Whether the overall outcome reached in the foreign proceedings in question is fair should not be a matter to decide for the court of the receiving state. Nor is it the business of that court to evaluate the fairness framework under the *lex fori concursus* in general. This is something to be revisited as this work progresses.

947 *Adler* (n 622). For a more detailed discussion of the case, see sub-s E.II.2.c)bb)(2)(b).

948 See text to n 276.

ff) Burden of Proof

Another factor is related to the burden of proof. A substantive fairness review is an additional layer of protection for creditors and should be operational only when invoked by the opposing creditor. Therefore, it should be the opposing creditor who bears the burden of proving that the outcome under the plan is unfair in relation to that creditor. Arguing otherwise would unfairly disadvantage the debtor (the foreign representative). As identified earlier, the foreign representative already carries the burden of proving the fulfilment of requirements for recognition under Chapter 15.[949] With that in mind, requiring the foreign representative to prove that the substantive outcome of the foreign proceedings is fair in relation to the opposing creditor only because the latter argues otherwise would be illogical, unfair, and open to abuse. One should also remember that article 22 (1) aims to protect the interests of the debtor, too, i.e. to strike a fair balance between the respective interests.

Against this backdrop, a creditor opposing the relief sought on substantive fairness grounds should present credible evidence in that respect. Depending on the method of comparison, as will be discussed later in this work, the evidence should illustrate a significant deterioration of the position of that creditor in the respective foreign jurisdiction. These matters (comparison, the deterioration of position, and so forth), too, will be examined later in this work. At this point, it suffices to note that the burden of proof of unfair treatment should be on the opposing creditor. Once the opposing creditor has met this burden, it is up to the foreign representative to challenge the arguments and evidence of the opposing creditor. This factor will also help to prevent abuse by creditors with ill-founded claims, for example, those attempting to delay the cross-border effects of the plan in question. It goes without saying that time can be of the essence for a successful restructuring.

An exception for vulnerable creditors could be made regarding this factor, too.

gg) Costs

Finally, the unsuccessful party should bear all costs of a substantive fairness review, including the winning party's costs. Such costs may include court

949 See text to n 375.

fees, legal costs, and the costs associated with obtaining evidence, which can be quite high depending on the case. This factor, too, may significantly deter creditors with unfounded claims. Besides, it may have an *ex ante* deterrence effect on the plan proponent, who is typically the debtor. The possibility of losing the case due to a substantive fairness review at the recognition stage and, thus, having to bear all costs would discourage the plan proponent from devising a plan that may survive a domestic substantive fairness review but not a potential one at the recognition stage. Instead, it would encourage the plan proponent develop a fair plan that would survive the latter, too. Therefore, the deterrence effect on both sides will lead to the limited application of the substantive fairness framework under the MLCBI.

Again, a different treatment could be considered for vulnerable creditors.

2. Benchmark Law

This work argues that one of the key components of the substantive fairness framework under the MLCBI is a benchmark law. Below, this work will justify its necessity and elaborate on selecting the best law for that purpose.

a) Case for a Benchmark Law

Several factors necessitate a benchmark law for a substantive fairness review under article 22 (1) of the MLCBI, as will be summarised below:

aa) Difference Between a Full Révision au Fond and a Substantive Fairness Review

To begin with, the overall fairness of the *lex fori concursus* or the foreign proceedings at hand should not be a concern for the respective court of the receiving state. The establishment of a framework to ensure fairness in restructuring proceedings in a particular jurisdiction is determined by its national law. Ensuring of the overall fairness of restructuring proceedings within the legal framework of that jurisdiction is the responsibility of its national courts. As already noted, assessing fairness in this context should be distinguished from a full révision au fond. The court of the receiving state has only one task in this context: to assess and be satisfied with the

fairness of the distribution under the foreign plan at hand in relation to the opposing creditor. That said, there is no universally accepted test for assessing substantive fairness in a cross-border context. Hence, despite its limited nature, the respective task of the court of the receiving state may not be straightforward and may require a complex assessment.

bb) Relative Nature of Substantive Fairness

Even if the issues of assessing the overall fairness of the *lex fori concursus* and a full révision au fond are set aside, solely focusing on the jurisdiction of the original proceedings as part of a substantive fairness review will take the matter nowhere. Unlike procedural fairness, universal standards do not exist to assess the fairness of foreign restructuring laws in a substantive context. For example, the right to a fair trial (due notice, right to be heard, and so forth) is widely recognised and is found in many international conventions.[950] Hence, it is relatively straightforward to establish at least certain aspects of the procedural (un)fairness of foreign proceedings.

That cannot be said about substantive fairness. To begin with, there is no widely recognised standard to evaluate substantive fairness frameworks under restructuring laws across different jurisdictions. These fairness frameworks are designed with different policy considerations behind them. For example, some may favour debtors, while others may be creditor-oriented. These competing policies may also include favouring different types of claims, such as tax or employment claims, as well as prioritising trade creditors over financial creditors. The level of creditor support and the enforcement of private law priority rules (strict application versus flexible one) may also vary and so forth. In subsection E.II.4, this work has already summarised the differences in the main aspects of the fairness frameworks under Chapter 11, English law, and under the PRD. As already mentioned, these differences may lead to different outcomes in cases with similar, if not identical, facts. The fact that distribution rules are not similar in two jurisdictions, which, in turn, may lead to different outcomes when applied to the same facts, does and should not mean that one framework is fairer than the other. It is a matter of policy for each state to design a fairness framework that suits its needs and a judge of the receiving state should not be concerned with the assessment of policies of foreign states. Furthermore,

950 See text to n 578.

even in jurisdictions with a relatively long history of restructuring and creditor protection, such as the US (which has influenced many other jurisdictions), certain aspects of the fairness framework are far from ideal and have been roundly criticised in the literature.[951] Accordingly, it would be inaccurate to assert that the fairness of outcome is a guaranteed matter in all Chapter 11 proceedings. Additionally, the recent academic debate on two competing priority rules under the PRD (the RPR versus the APR) once again demonstrates that the fairness of outcome in restructuring proceedings is a relative matter. That is to say, supporters of each priority model present arguments in favour of their preferred model and against the other model based on, *inter alia*, fairness concerns. As mentioned above, the design of a fairness framework under restructuring law is a policy matter for each state, and whether the adopted framework in one state will lead to fair outcomes can be evaluated from different angles. This work, thus, argues that there is no absolute affirmative answer to that question. Consequently, no jurisdiction exists where there is an absolute guarantee of the fairness of outcome under the existing restructuring framework.

cc) Comparison with Another Jurisdiction

The question then arises as to how the court of the receiving state should assess the fairness of the foreign plan with respect to the opposing creditor. As Sarah Paterson correctly puts it, substantive fairness in the context of debt restructuring is a notion that is generally linked to 'some sort of imbalance' and to the comparison of different indicators (comparison of the treatment of participants, comparison of efforts and gains, and so forth).[952] This work also observed it in the examples of restructuring frameworks discussed in section E.II, e.g. horizontal and vertical comparisons and rewarding post-restructuring contributions. The need for a comparison also holds for assessing substantive fairness at the recognition stage, particularly considering the relative nature of substantive fairness in restructuring, as stated above.

Another question concerns the proper reference point for comparison in assessing the substantive fairness of the foreign plan in relation to the opposing creditor. Confining the reference point to within the foreign jurisdiction in question (comparing the actual outcome for the opposing

951 See text to n 708.
952 See n 644 and accompanying text.

creditor with possible outcomes of alternative scenarios available in that jurisdiction, comparing the treatment of the opposing creditor with the treatment of other participants in the foreign proceedings, and so forth) is not preferable. This would be identical to a fairness review in a domestic context and ultimately involve a full révision au fond. Therefore, the respective reference point should not be within the foreign jurisdiction in question. Besides, the private international law nature of the matter also underlines the need to extend the reference point beyond that foreign jurisdiction.

One feasible solution, therefore, could be to compare the treatment of the opposing under the foreign plan at hand with a hypothetical treatment of that creditor in a restructuring in another jurisdiction. Hence, the reference point for comparison is a hypothetical treatment of the opposing creditor in another jurisdiction. This solution addresses the concerns noted above. First, a fairness review in that scenario is confined to the position of the opposing creditor only. Thus, assessing the fairness of the overall outcome of the foreign proceedings and a full révision au fond can be avoided. Second, there is no need to evaluate the fairness framework under the *lex fori concursus*.

It should also be noted that the concept of comparing with another jurisdiction is not new in the context of cross-border insolvency and restructuring. In the literature, 'rough similarity' has been referred to as a pre-requisite for deference to a foreign jurisdiction under the principle of modified universalism.[953]

dd) Chapter 15 Case Law

This work will below turn to the American approach first to support the conclusion mentioned above and then highlight the shortcomings of the American approach. As already noted, such a comparison is required under Chapter 15.[954] That is to say, one of the principles followed by courts in determining a fair balance between the respective interests under section 1522 (a) of the BC is the substantial conformity of the distribution in the foreign proceedings with the one provided for under US law.[955] The

953 Westbrook, 'A Global Solution' (n 100) 2301. See also van Zwieten (ed), *Principles of Corporate Insolvency Law* (n 29) para 16-06 (fn 20 therein and accompanying text).

954 See sub-s F.I.2.b)cc).

955 See text to n 937.

following sentence from a decision of the Fifth Circuit provides a concise summary of Chapter 15 case law in that respect: 'In considering whether to grant relief, it is not necessary that the result achieved in the foreign bankruptcy proceeding be identical to that which would be had in the United States. It is sufficient if the result is comparable'.[956] This perspective under Chapter 15 case law supports the general idea of comparison with another jurisdiction in cross-border cases.

Nonetheless, the American approach has two shortcomings. A first issue is the lack of clarity. A second problematic aspect is related to requiring conformity of the distribution in the foreign proceedings with US law, which will be discussed below. Returning to the first issue, American courts do not expressly refer to a substantive fairness review but rather conduct their analysis on substantive matters mainly within a procedural framework, as already underscored in this work.[957] Given that this work has already made the case for a separate substantive fairness review in contested cases, that cannot be considered an entirely preferable approach.

As to the requirement of the substantial conformity of the distribution in the foreign proceedings with US law under the American version of article 22 (1) of the MLCBI specifically, no guidelines or principles exist under case law on how to conduct such a comparison and when the distribution under a foreign plan should be considered *substantially* in accordance with US law. This has the potential to lead to inconsistency in the application of the respective requirement in contested Chapter 15 cases. This work will attempt to address the respective matters, too.

b) Governing Law of the Contract as a Benchmark Law

After justifying the need for a benchmark law to compare the treatment of the opposing creditor under the foreign plan, this work will now focus on selecting the most suitable law for that purpose. As already noted, under Chapter 15, similarity is required with US substantive law, i.e. the law of the receiving state.[958] According to this work, the respective aspect constitutes one of the shortcomings of the American approach with respect to the assessment of substantive fairness under the American version of article 22 (1) of the MLCBI. That is to say, this work argues that a benchmark law for

956 *Vitro* (n 87) 1044 (citations omitted).
957 See sub-s C.III.2.b).
958 See sub-ss C.III.2.b), F.I.2.b)cc).

that purpose should be the governing law of the contract rather than the law of the receiving state.

aa) Justification

(1) Non-Discrimination of Creditors

To begin with, these two laws may, and perhaps do, overlap in most cases. In some cases, however, they may not. For example, as noted earlier in this work, there may be cases where the recognition of a foreign plan is sought to protect the assets of the debtor in the receiving state with the governing law of the contract belonging to a third country, i.e. a country other than the receiving state and the debtor's home country. Perhaps there are other scenarios, too. This work argues in favour of a principle-based approach in relation to the respective aspect of the substantive fairness framework under the MLCBI. That is to say, a substantive fairness review should be conducted not only with respect to local creditors of the receiving state but rather in relation to any creditor who has standing. This position is also supported in the Guide to the MLCBI, which recommends not confining article 22 (1) of the MLCBI to local creditors of the enacting state and, thus, not discriminating against foreign creditors.[959] Prioritising the law of the receiving state for the purposes of article 22 (1) has the potential (and should be seen as) to favour local creditors.

(2) Purpose of Article 22 (1)

Why should the governing law of the contract be a benchmark law? To answer this question, one should look at the purpose of the *adequate protection* safeguard under Article 22 (1) of the MLCBI. As already identified, it aims to strike a fair balance between the respective interests. On one side of the picture, there is the debtor seeking the recognition of a plan confirmed in its home jurisdiction. On the other side, there is a dissenting

959 Guide to the MLCBI (n 17) para 198. This argument is further strengthened by contrasting article 22 (1) with article 21 (2), which expressly refers to local creditors of the receiving state. See Bork, 'Article 22' (n 925) paras 1.22.02, 1.22.05, 1.22.06 (US cases discussed therein). For a similar view, albeit in a different context, that the protection under the US version of article 22 should not be limited to US creditors and should extend to all creditors globally, see Gropper (n 935) 72.

creditor claiming that the distribution under the plan is unfair in relation to that creditor and a benchmark law is necessary to find out whether this opposition is well-grounded. The law most suitable for balancing these conflicting positions is the law that the respective parties (the debtor and the opposing creditor) agreed to be bound by from the outset.

(3) Debt-Oriented Nature of Restructuring Proceedings

More generally, the debt-oriented nature of restructuring proceedings speaks for the governing law of the contract, too. As stated in different contexts earlier in this work, one factor differentiating restructuring proceedings from asset-oriented insolvency proceedings is the debt-oriented nature of the former.[960] To reiterate, unlike insolvency proceedings, marshalling and realising the entire asset pool of the debtor to satisfy creditors is not the aim of restructuring proceedings. Rather, it focuses on restructuring the debtor's debts so that the debtor can continue to trade, with the existing assets mainly remaining untouched. Hence, if one talks about a benchmark law that will be used to compare the treatment of the opposing creditor in the proceedings that primarily affect claims against the debtor rather than its assets, the governing law of the contract is a better fit than the law of the state where the recognition is sought due to the existence of assets or any other reason.

bb) Consideration of a Potential Counter-Argument

A potential counter-argument may be made against the idea of the governing law of the contract as a benchmark. That is to say, one may argue that by agreeing to engage with a foreign party (the debtor) the opposing creditor assumed the risk of being bound by the restructuring law of a foreign country (the debtor's home jurisdiction) and the governing law of the contract should not be relevant. In fact, this is one of the core arguments of critics of the Gibbs rule.[961] Using the same argument, potential opponents may question the necessity of a benchmark law or a substantive fairness review under the MLCBI at all. Therefore, the justification of the

960 See sub-s B.I.3.a).
961 See n 319 and text thereto.

need for a substantive fairness review in recognising foreign plans[962] and a benchmark law for that purpose[963] generally suffice to address this potential counter-argument. However, a few additional points will be highlighted below that signify the role of the governing law of the contract in this context.

(1) Potential COMI Shift

As already noted, the location of the debtor's COMI plays a decisive role in determining whether a restructuring proceeding commenced in a given jurisdiction may be recognised as a foreign main proceeding under the MLCBI. However, it shall not be forgotten that the COMI of the debtor is not fixed and can be subject to changes several times without the consent of creditors.[964] Accordingly, a German creditor engaging with a debtor which, at the time of the conclusion of the contract, had its COMI in Japan may end up being bound by the restructuring law of Albania due to the subsequent COMI shift from Japan to Albania. Can it be argued that the German creditor in that scenario assumed the risk of being bound by the restructuring law of Albania? According to this work, that is not the case. In addition, modern restructuring lawyers have been devising various methods to artificially bring restructuring cases into jurisdictions where the desired outcome for plan proponents (who, in most cases, are the debtor) will be yielded (forum-shopping). For example, this may involve creating a *substitute obligor* or *co-obligor* company in the desired jurisdiction, similar to what happened in the *Adler* case.[965] It can be concluded that, in this context, the only law that both parties (the debtor and the opposing creditor) agreed to be bound by and cannot be subsequently changed without their mutual consent, particularly without the consent of the opposing creditor, is the governing law of the contract.

962 See sub-s F.I.1.

963 See sub-s F.II.2.a).

964 This point was also highlighted in the context of defending the Gibbs rule. See Paterson, 'A Qualified Defence of the Rule in Gibbs' (n 74) s VII.A. See also FMLC (n 332) para 4.9.

965 *Adler* (n 622) [29]-[33]. The issue was not considered in that case, as it had not been raised in the appeal. See ibid [34]-[35]. For a more detailed discussion, see Madaus, 'The Cross-border Effects of Restructurings' (n 3) 481; van Galen, 'The Scheming Brits' (n 291) pt V.

(2) Recent Proposals for Flexible Choice-of-Forum Rules

Recently, a group of scholars proposed replacing the COMI concept under the MLCBI with even more flexible concepts regarding the selection of a forum for the debtor's insolvency proceedings.[966] Their preferred approach, which they refer to as the *Commitment Rule*, suggests that the debtor should be allowed to commit *ex ante* to a specific forum in its articles of association for possible insolvency proceedings.[967] The authors agree that such commitment may generally be changed *ex post* by the debtor by altering the articles of association and offer certain safeguards in that respect.[968] Their next best approach (if the COMI concept is retained) suggests that the debtor should be allowed to initiate insolvency proceedings in any foreign jurisdiction (without having its COMI or an establishment in that jurisdiction) that provides such an opportunity for foreign companies.[969] Proceedings in the debtors' home jurisdiction and any other foreign jurisdiction selected by the debtor should have similar cross-border effects under the MLCBI, provided that the debtor illustrates that creditors as a whole benefit from the selection of the forum, say the authors.[970]

Without further analysing those approaches, this work argues that, in light of such proposals, the respective potential counter-argument becomes even less convincing.[971] The idea of the governing law of the contract as a benchmark law in considering the recognition of restructuring plans, on the contrary, gains more relevance.

cc) Reconciling the Gibbs Rule and Modified Universalism

Under a framework where the governing law of the contract serves as a benchmark, the rhetorical questions of Lord Esher in *Antony Gibbs* ('Why should the plaintiffs be bound by the law of a country to which they

966 Anthony J Casey, Aurelio Gurrea-Martínez, and Robert K Rasmussen, 'A Commitment Rule for Insolvency Forum' (23 January 2024) ECGI Law Working Paper No. 754/2024 <https://ssrn.com/abstract=4704029> accessed 21 October 2025.
967 ibid s 3.1.
968 ibid sub-s 3.1.2.
969 ibid s 3.2.
970 ibid.
971 For similar concerns, albeit in the context of defending the Gibbs rule, see Paterson, 'A Qualified Defence of the Rule in Gibbs' (n 74) s VII.A.

do not belong, and by which they have not contracted to be bound')[972] and Lord Collins in *Rubin* ('why should the seller/creditor be in a worse position than a buyer/debtor?')[973] would become less relevant. That is to say, the framework suggested in this work favours neither the debtor nor the dissenting foreign creditor and provides some protection for each. On the one hand, the dissenting foreign creditor is bound by the outcome of the restructuring proceedings in the debtor's home jurisdiction and does not have vetoing power from the outset. On the other hand, the protection granted to the creditor under the governing law of the contract is not completely disregarded, at least in achieving the cross-border effects of the plan.

Accordingly, the framework suggested in this work aligns the main advantage of the Gibbs rule with modified universalism. However, this approach departs from the Gibbs rule (mainly from its oft-criticized aspects) in a substantial way. First, this framework does not oppose the discharge of a foreign law-governed debt in restructuring proceedings in the debtor's home jurisdiction. Second, unlike the Gibbs rule, it does not ultimately require parallel or main proceedings under the governing law of the contract. Third, the approach suggested in this work does not give vetoing power to foreign creditors from the outset. Rather, it encourages them to fight for the best possible outcome in the debtor's home jurisdiction instead of merely relying on the protections granted by the governing law of the contract.

dd) Support in the Literature

The idea of the governing law of the contract serving as a benchmark law enjoys scholarly support. While considering a distinctive framework for cross-border restructuring cases, Stephan Madaus highlights the necessity of respecting 'substantive limits' of the governing law of the contract in restructuring proceedings, thus securing a 'sufficient connection' to that law.[974] According to him, such sufficient connection is required in the cases when it is not possible to determine a law with the 'closest connection' (e.g. the law governing an absolute majority of the debts to be restructured or

972 See text to n 271.
973 See text to n 350.
974 See text to n 70.

agreed by most of the affected creditors) to govern the restructuring of the debtor.[975]

As already noted, this work suggests using the governing law of the contract as a benchmark under a framework underpinned by modified universalism (the MLCBI), thus, for all eligible cross-border restructurings. This work will also elaborate on the extent to which the governing law of the contract should be given consideration.

ee) Difference from Virtual Territoriality

Although there is a similarity in the idea that the governing law of the contract should be considered in a restructuring context, the framework suggested in this work should not be confounded with Edward Janger's *virtual territoriality* approach[976] as part of a broader concept of *universal proceduralism*,[977] which he suggested as an alternative to modified universalism.

(1) Overview

Virtual territoriality provides for 'one case under many laws' for the global insolvency (restructuring) of the debtor.[978] That is to say, the *lex fori concursus*, which is determined through the harmonised choice-of-forum rules, should be confined to the procedural matters of the case only, while general rules of private international law should determine the law applicable to the substantive matters.[979] Put another way, virtual territoriality suggests that the court administering the case in the debtor's home country should, to the extent possible, directly apply the law governing each debt affected by the plan to the substantive issues (e.g. priority of claims) relating to that debt.

975 See text to n 69.
976 See generally Edward J. Janger, 'Virtual Territoriality' (2010) 48 Colum J Transnatl L 401
977 See n 115 and accompanying text.
978 Janger, 'Virtual Territoriality' (n 976) 408.
979 ibid 408-09, 432ff.

(2) Distinction and Critical Analysis

The concept of virtual territoriality substantially differs from the framework suggested in this work in several ways. Firstly, assessing fairness during the recognition stage, with the governing law of the contract as a benchmark, is suggested not as a replacement for but rather to take place within modified universalism. The difference lies not only in the name of the concept but also in its essence. As mentioned earlier, virtual territoriality supports, to the greatest possible extent, the direct application of the governing law of the contract by the court of the debtor's home jurisdiction to substantive matters concerning the restructuring of the debt in question. This work does not go that far. Nor does it support this approach since virtual territoriality takes away most of the advantages that modified universalism offers.[980]

Below, this work will briefly scrutinise the concept of virtual territoriality.

(a) Doctrinal Aspect

To begin with, virtual territoriality reinforces the Gibbs rule while eliminating the ultimate need for restructuring proceedings to take place in the jurisdiction whose law governs the contract. While this is a step forward, virtual territoriality does not fully address the rule's significant weaknesses. Therefore, the main doctrinal issue with the Gibbs rule[981] holds for virtual territoriality. That is to say, like the Gibbs rule, virtual territoriality treats discharge in restructuring proceedings as a merely contractual matter between the contracting parties. Hence, the insolvency-related background of and broader policy considerations behind restructuring frameworks are mostly disregarded.

(b) Practical Difficulties

Even if its doctrinal aspect is set aside, implementing virtual territoriality would pose significant practical challenges. Virtual territoriality, as the name suggests, combines multiple *parallel* proceedings into one without

980 Jay Westbrook also criticises an approach under which the governing law of the contract determines the bankruptcy law applicable to the contract. See Westbrook, 'Comity and Choice of Law' (n 12) 266.

981 See sub-s C.III.1.b).

significantly addressing the issues posed by such parallel proceedings while raising problems of its own.

Imagine a restructuring plan in the debtor's home jurisdiction that involves, *inter alia*, the non-consensual discharge of debts governed by ten different foreign laws. These laws provide for restructuring frameworks that are similar in some ways but fundamentally different in other aspects, such as priority rules. Based on a comparative analysis of Chapter 11, English law, and the PRD in subsection E.II.4, it is quite possible to argue that this scenario could occur in the real world. Consequently, reconciling the respective rules of those ten foreign laws in one plan, which is necessary due to the implementation of virtual territoriality, would be difficult and possibly unachievable. Otherwise, the proceedings would no longer be collective.

Apart from the reconciliation problem mentioned above, it would be exceptionally challenging for the court in the debtor's home jurisdiction to examine and apply (to the extent possible) ten foreign laws in the above scenario. To begin with, section E.II of this work illustrated that not all significant matters are settled and competing approaches are in place regarding one or another aspect of restructuring frameworks at a domestic level. As identified in section E.I, such uncertainty is inherent to restructuring frameworks to maintain their flexibility. Hence, it would not always be straightforward to even determine what the position with respect to a certain matter under foreign laws in question is before applying those foreign laws in *one case* under virtual territoriality. A foreign court is not the best venue to resolve an uncertainty under one law.

In addition, having to examine and apply multiple foreign laws (as many as ten in the above scenario) would lead to the need for numerous expensive expert opinions on various legal and evidential matters, potentially conflicting with one another. As can be concluded, the process of examining, applying, and reconciling various foreign laws in one case would be both costly and time-consuming. Another set of potential practical challenges pertains to differences in language, legal systems, and legal traditions, among other things. Thus, the primary issues associated with parallel proceedings, such as costs, time, and efficiency, would still exist in virtual territoriality. It goes without saying that costs and efficiency are crucial in restructuring proceedings.

(3) Advantages of the Substantive Fairness Framework under the MLCBI Compared to Virtual Territoriality

The framework suggested in this work is different from virtual territoriality in terms of in what form (benchmark) and when (at the recognition stage) the governing law of the contract should intervene. Each of these two factors offers several advantages, which will be summarised below.

(a) Benchmark Function of the Governing Law of the Contract

The primary function of the governing law of the contract is to serve as a benchmark for comparing the treatment of the opposing creditor rather than governing the substantive issues of the restructuring of the debt in question. Accordingly, a deviation from the governing law of the contract to a certain extent (beyond minor) is acceptable,[982] considering the benefits of the concept of a single set of proceedings with universal effect governing the global restructuring of the debtor under modified universalism.[983] Such a deviation is also justifiable when considering the background circumstances (the debtor's distress) and the alternative to an unsuccessful restructuring (most likely, the debtor's liquidation) and the law applicable in that alternative (the *lex fori concursus*).

Besides, the benchmark function will not require a detailed examination of the governing law of the contract as opposed to the direct application of that law.

(b) Intervention at the Recognition Stage

In addition, the governing law of the contract weighs in not from the outset but only at the recognition stage. A single law (the *lex fori concursus*) applies to both procedural and substantive matters in the original proceedings, as modified universalism suggests. As a result, the uncertainty and practical difficulties as well as cost and efficiency concerns associated with the detailed examination and application (and reconciliation, if necessary) of multiple foreign laws, do not arise during the confirmation of the plan.

At the recognition stage, some of the concerns mentioned above may not arise at all, while others may arise to a much lesser extent. That is to say,

982 For a more detailed discussion, see sub-s F.II.4.
983 For a more detailed discussion, see sub-ss B.II.3.a), B.II.4.

there will be no need to reconcile different foreign laws, as the plan will be assessed solely with respect to the opposing creditor. Accordingly, the comparison will be conducted solely with the governing law of the contract between the debtor and the opposing creditor. If the recognition is opposed by several creditors whose claims are governed by various foreign laws, there will be multiple separate substantive fairness reviews with respect to each opposing creditor, again, without reconciling those laws.

In addition, the substantive fairness framework under the MLCBI has only limited application. In order to have standing, the opposing creditor should fulfil the requirements outlined earlier in this work. If its benchmark function (as opposed to its direct application) and, thus, the possibility of a deviation from the governing law of the contract and *ex ante* effects[984] are also added to the picture, it can be assumed that a substantive fairness review will not be invoked extensively and will be confined to the cases with gross violation of foreign creditors' substantive rights in the original proceedings. The IBA restructuring proceedings demonstrated that several foreign dissenting creditors subsequently agreed to receive new entitlements under the IBA plan and, thus, did not oppose its recognition abroad.[985] Finally, in most cases, although not necessarily, recognition will be opposed in the jurisdiction whose law governs the respective creditor's claim. Accordingly, the judge will make a comparison with the law of its own jurisdiction.

Against this backdrop, it is noteworthy that any potential recognition abroad and, consequently, any comparisons with the laws governing the claims of dissenting creditors should be reflected in some form in the original proceedings. However, this should primarily be a matter for the plan proponent and the supporting majority. As the key stakeholders of a successful restructuring with worldwide effects, they must devise a plan capable of withstanding potential substantive fairness reviews during recognition in foreign jurisdictions. The judge in the original proceedings should not be preoccupied with potential future comparisons with different foreign laws and should instead apply a single law.

984 For a more detailed discussion, see sub-s F.IV.4.
985 See *IBA* (n 245) [21].

3. Comparison with the Benchmark Law

Below, this work will focus on the process of comparing the actual treatment of the opposing creditor under the foreign plan with the hypothetical treatment under the restructuring framework of the governing law of the contract. To begin with, selecting a suitable method for the comparison is one of the most complex issues associated with the substantive fairness framework under the MLCBI. On the one hand, the method selected should accurately illustrate the difference in the treatment of the opposing creditor. On the other hand, it should not be overly burdensome considering the objectives of the MLCBI. Specifically, one of the central objectives of the MLCBI is administering cross-border cases in an efficient manner.[986] As this work already noted, under modified universalism, the designated court of the receiving state can evaluate foreign plans in deciding whether to recognise them. Any type of review, including a substantive fairness review, however, should not overshadow the respective objective.

Hence, there should be a balance between efficiency and accuracy. Below, this work will outline several comparison methods and discuss the advantages and possible shortcomings of each, given the need for maintaining the balance mentioned. It should be noted that one aspect will remain constant in all methods: the actual distribution under the plan at hand. The *lex fori concursus* (or the opposing creditor's position under the *lex fori concursus*) in a general context should not be examined for the purpose of the comparison, as a substantive fairness review focuses on the fairness of the distribution under the plan, which is already known. The difference in methods concerns the reference point for comparison, i.e. the governing law of the contract (benchmark law).

a) General Restructuring Framework of the Governing Law of the Contract as a Benchmark

A first method is to generally review the restructuring framework of the benchmark law to determine the degree of conformity of the distribution under the plan with the distribution rules under that framework, focusing on the position of the opposing creditor. This method primarily corre-

986 MLCBI (n 17) preamble *(c)*.

sponds to the approach taken in Chapter 15 cases.[987] The main advantages of this method are its efficiency and cost-effectiveness. Determining the content of the benchmark law and the position of the opposing creditor under that law will take less time and lower expenses than the third method that will be discussed below. This method will work best when the position of the opposing creditor under the benchmark law is relatively clear. This can occur, for example, when the opposing creditor's claim cannot be adjusted through restructuring mechanisms or when the position of the creditor is straightforward to determine (e.g. due to the priority of the claim) by analysing distribution rules and principles under the benchmark law without resorting to hypothetical proceedings.

That said, this may not always be the case. As this work outlined in section E.I and explored in section E.II, most restructuring laws deliberately establish a broad framework for distribution and the ultimate decision within that framework is made by the court, considering the specific circumstances of each case. Hence, in some cases, as opposed to the cases described above, analysing the benchmark law will only yield a broad picture as to the position of the opposing creditor. The broader the picture, the lower the accuracy will be. That may be considered as the main shortcoming of this method. That said, as already noted, the accuracy of the comparison is not the only factor to consider and should be balanced against efficiency and costs.

b) Overriding Mandatory Provisions of the Governing Law of the Contract as a Benchmark

A second method is similar to the first one but has one important distinctive feature. The difference lies in limiting the comparison to the overriding mandatory provisions of the benchmark law.[988] Thus, the comparison will aim to determine the extent of a derogation only from the overriding mandatory provisions of the benchmark law that affect the opposing creditor in the context of debt restructuring. An additional challenge associated

987 See sub-ss F.I.2.b)cc), F.II.2.a)dd).

988 For a discussion of the role of overriding mandatory provision in private international law, see sub-s D.I.2.a)bb). For an example of its use in a private international law instrument, see Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), art 9.

with this method might occur in determining provisions of the benchmark law with an overriding mandatory status. The advantages of the first method also remain true for this method. However, this method limits the scope of the substantive fairness framework under the MLCBI by setting a higher threshold for determining a deviation from the benchmark law. Depending on one's perspective, it can be criticised or supported for that. Ultimately, it is a matter of policy choice.

c) Hypothetical Proceedings under the Governing Law of the Contract as a Benchmark

A third method involves comparing the treatment of the opposing creditor under the foreign plan with the treatment that creditor would receive in hypothetical restructuring proceedings under the benchmark law. This method is advantageous because it provides a relatively accurate picture of how much the actual treatment deviates from the benchmark law for the opposing creditor. It is in line with the spirit of substantive fairness review as it compares different scenarios of the treatment of the opposing creditor and, thus, corresponds to, *mutatis mutandis,* fairness tests used in different jurisdictions (such as the BIT[989], the *no worse off* test,[990] and the EU BIT[991]) to assess the fairness of the plan in relation to dissenting creditors.[992]

The method is not without shortcomings. Achieving greater accuracy requires increased complexity, time, and costs, therefore leading to less efficiency. To begin with, even in a domestic context, it is a complex matter to determine what the relevant alternative is and to calculate the hypothetical outcome of that alternative.[993] The same holds, *mutatis mutandis,* for the current method. The first difficulty that may arise is determining which restructuring framework under the benchmark law should be selected as the most suitable comparator. This may occur when multiple restructuring mechanisms (within insolvency proceedings or as stand-alone procedures)

989 See text to nn 691, 692.
990 See text to nn 803, 804.
991 See text to nn 854, 855.
992 To briefly and generally recap, the aim of those tests is to determine what the outcome for a dissenting creditor would be without the proposed plan and compare this outcome with the treatment of the creditor under the proposed plan. It is also noteworthy that the baseline for comparison may differ depending on the test.
993 See text to n 809.

exist in the benchmark jurisdiction, such as in England.[994] After determining the appropriate comparator, difficulties may arise when calculating the hypothetical recovery rate for the opposing creditor. This calculation is typically not straightforward and may involve complex legal and factual issues.

Additionally, the hypothetical recovery rate may sometimes be presented as a range due to the same considerations mentioned in connection with the second group of cases when discussing the first method above. However, the accuracy will be much higher in this method. Finally, although the comparison mainly focuses on the opposing creditor, it should consider all relevant circumstances that would affect the outcome in the hypothetical proceedings. For example, to determine whether the opposing creditor would represent a minority or majority in the corresponding class in the hypothetical proceedings, the potential behaviour of the other creditors should be taken into account based on their actual behaviour in the foreign proceedings in question.

4. Establishment of Unfairness

a) Material Difference

In order to establish unfairness, a comparison should first identify a deviation from the benchmark law that adversely affects the position of the opposing creditor. However, a substantive fairness review does not conclude merely upon finding such a deviation, regardless of which of the methods discussed above (or any other possible ones) is applied. That is to say, a mere deviation from the benchmark law does not suffice to establish unfairness for the purposes of the substantive fairness framework under the MLCBI.

The fact that the treatment of the opposing creditor differs from that which would be received under the benchmark law should not come as a surprise. Substantive laws of different states may vary and can lead to different outcomes when applied to the same facts. That is the reason why choice-of-law rules exist in the first instance.[995] A single court and a

994 See text to n 750. In jurisdictions with a single centralised restructuring framework (like Chapter 11 under US law) the issue will not arise.

995 Fletcher (n 27) para 28-013.

single law approach to cross-border restructurings under the principle of modified universalism acknowledges the risk of such a difference in the substantive treatment of a creditor, which is outweighed by the benefits of the respective approach.[996] Accordingly, jurisdictions applying modified universalism, whether through regional or international frameworks or in their domestic legislations, also accept the possibility of such differences.

As previously mentioned in various contexts in this work, an initial evaluation is conducted under modified universalism before deferring to a single court and single law governing the worldwide restructuring of the debtor. This work has also concluded that such an evaluation should also include a separate review of the (substantive) fairness of the plan in relation to the opposing creditor. According to this work, the most feasible approach in that regard is to compare the treatment of the opposing creditor under the plan with the hypothetical treatment under the governing law of the contract. Considering any adverse difference in treatment as constituting an unfair outcome for the opposing creditor would be tantamount to denying modified universalism and, consequently, all its benefits. Furthermore, as noted in various contexts throughout this work, discharge in restructuring proceedings is not merely a contractual matter between the parties to a contract. Accordingly, some degree of derogation from the governing law of the contract must be tolerated. That said, there should be a balance between the advantages of a single forum and single law approach and the sacrifices of foreign creditors.

Hence, unfairness should be established only when there is a *material* difference in the respective treatments that adversely affects the opposing creditor. Once the court of the receiving state has established the material difference in question, it should complete the respective substantive fairness review in favour of the opposing creditor and deny the recognition and enforcement of the plan with respect to that creditor.

b) Flexible Approach

What constitutes *material* should be left to the discretion of the court and will likely depend on the facts of each case. However, one point should be emphasised in this context: *material* denotes significantly more than merely *minor*. For example, this work does not consider the difference as material

996 For a discussion of the benefits, see sub-s B.II.3.a).

in a scenario where the opposing creditor receives eighty-five per cent of the outstanding debt under the plan, while that creditor would be paid in full under the benchmark law. Accordingly, the court should determine the extent to which it is reasonable to expect the opposing creditor to forgo what that creditor is entitled to receive under the governing law of the contract for the sake of modified universalism and its associated benefits.

Drawing a strict line in this context is not a straightforward matter, nor is it desirable given the need to maintain flexibility. A general threshold might be around thirty per cent, though this figure could be higher in some cases and lower in others, depending on the facts. This work has, in various contexts, emphasised the role of individual circumstances in restructuring proceedings and possible reasons for that. The recognition stage is no exception in this regard. Furthermore, factors such as variance in the accuracy of comparison, the potential need to consider the protection-worthiness of the opposing creditor, and the possibility of applying different methods underscore the necessity of a flexible approach. Accordingly, the question of whether a difference is material should be resolved on a case-by-case basis, taking into account the specific circumstances of each case.

Nonetheless, this work considers that some general patterns can be determined in case law for the sake of clarity, certainty, and consistency in application. Below, it will make some suggestions in that respect. First, it is important to consider the type of creditor involved. When dealing with sophisticated institutionalised creditors, the permitted level of derogation should be higher than for trade creditors or consumers. Several factors can justify this differentiation, including differences in risk appetite, bargaining power at the time of contract conclusion, tolerance for potential loss, and worthiness of protection, among others. Second, the tolerance for deviation from the overriding mandatory provisions of the benchmark law should be lower than that for non-overriding provisions. Third, the extent of tolerable derogation may depend on the range of the hypothetical recovery rate, where applicable. If the actual recovery rate falls within the hypothetical recovery range but is close to its lower end, it generally should not raise concerns, provided the range is not too wide. But if the actual recovery rate falls below the hypothetical recovery range, the wider the range, the less deviation from the lower end should be tolerated. For instance, the difference may be considered material where the actual recovery rate is thirty per cent and the hypothetical range is fifty to ninety per cent, but not material if the hypothetical range is fifty to sixty per cent. These factors should, of course, be balanced against one another.

5. Summary

Section F.II was devoted to an in-depth analysis of the key aspects of the substantive fairness framework under the MLCBI. This work first underscored its limited scope and application, outlining several factors to ensure this objective (F.II.1).

Then, it made the case for a benchmark law to compare the treatment of the opposing creditor under the plan, which is one of the essential components of the substantive fairness framework under the MLCBI and elaborated on the selection of this law (F.II.2). It concluded that the most suitable law for this purpose is the governing law of the contract, due to factors such as the need to protect all creditors, the purpose of article 22 (1) of the MLCBI, and, more generally, the debt-oriented nature of restructuring proceedings. This work also reviewed the existing literature to support the respective conclusion and to underscore the differences from the concept of virtual territoriality.

Finally, it examined other important components of the substantive fairness framework under the MLCBI: the process of comparison with the benchmark law (F.II.3) and the establishment of unfairness (F.II.4). It was concluded that the unfairness of the plan should be established when there is a material adverse deviation from the position of the opposing creditor under the governing law of the contract.

III. Application of the Substantive Fairness Framework under the MLCBI to the IBA Plan

After discussing the key components of the substantive fairness framework under the MLCBI in the previous section, the IBA plan will be tested below against this framework. More specifically, this work will analyse the fairness of the IBA plan with respect to one of the English law creditors who opposed a permanent moratorium in England, namely, Sberbank of Russia ("Sberbank").[997] This work will analyse the outcome of the attempts to secure the recognition of the substantive effects of the IBA restructuring proceedings in both jurisdictions (England and the US). This analysis is

997 This selection stems from the fact that Sberbank, as opposed to the other opposing creditor, was the sole lender and was not involved in any ancillary issues. See *IBA* (n 245) [12], [21].

predicated on the fact that no public policy and procedural fairness issues arose with respect to the IBA restructuring proceedings and, therefore, will exclusively focus on substantive fairness. This is because the applicable Azerbaijani law generally ensures procedural justice for participants of proceedings,[998] and the respective matters were found to be an issue by neither the English nor the US courts in considering the recognition of the IBA restructuring proceedings.[999]

1. England

There is not much room for analysis of the outcome in England, as it was based on the strict application of the Gibbs rule,[1000] with which this work disagreed. The reason that the substantive effects of the IBA plan in relation to Sberbank were impossible to achieve in England was not the unfairness of the IBA plan with respect to Sberbank. It was merely because the English courts did not have jurisdiction on the matter since an Azerbaijani restructuring plan discharged an English law-governed debt. Accordingly, substantive fairness was not a central issue before the English courts. Such an approach is not in line with the framework suggested in this work.

2. The US

In the US, the Gibbs rule (or a similar rule) did not apply. However, in order to examine the outcome in the US under the framework suggested in this work, several pre-conditions should have been met.[1001] To begin with, Sberbank should have exhausted all remedies in Azerbaijan, which it did not[1002] in order not to engage the exception to the Gibbs rule (submission).[1003] Besides, Sberbank should have opposed the recognition of the IBA plan in the US and provided some evidence to support the argument that the distribution under the IBA plan was unfair to Sberbank. These

998 See sub-s C.I.1.d).
999 See sub-s C.I.3.
1000 See sub-s C.I.3.a).
1001 See sub-s F.II.1.b).
1002 *IBA* (n 245) [12].
1003 For a more detailed discussion of the exception, See nn 276, 277 (and accompanying text) and text thereto.

pre-conditions were not satisfied either. Assume a scenario where Sberbank did meet all those pre-conditions.

It was argued that the English law-governed claims would have constituted a separate class if the IBA had chosen to promulgate a Scheme (the appropriate route) in England.[1004] Assuming this argument to be accurate, the English law creditors of the IBA would then have been able to veto the Scheme since a cross-class cramdown is not possible under a Scheme if used as a stand-alone procedure.[1005] Hence, the English law claims would have remained unaffected (unless the respective class had assented), meaning a potential hundred per cent recovery for Sberbank (with its claim potentially remaining untouched) in the hypothetical English proceedings. Without further analysis and based on the assumption mentioned above, this number is taken as a benchmark for comparison.

It should then be compared to the actual treatment of Sberbank under the IBA plan. This work was unable to obtain this information from public sources, so it will make assumptions here as well. Given the elaborations made in subsection F.II.4, if Sberbank was offered more than seventy per cent of the outstanding amount of its original debt under the IBA plan, the plan would likely pass a substantive fairness review under the framework suggested in this work. It, however, should be noted that this work does not endorse all aspects of the applicable Azerbaijani law since it grants excessively broad powers to the debtor and lacks clarity on substantive protection of dissenting creditors.[1006] That said, as mentioned earlier, the actual distribution under the foreign plan rather than the content of the foreign law in question is a factor that matters for the purposes of the substantive fairness framework under the MLCBI.

IV. Advantages of the Substantive Fairness Framework under the MLCBI

This section will outline several advantages of the framework suggested in the present research. It is noteworthy that due to the shared idea of respecting the governing law of the contract (despite fundamental differences on

1004 *IBA* (n 245) [88].

1005 See text to n 781. For the purposes of this section, English law is examined as it stood in 2017, the year when the IBA restructuring proceedings were launched and the recognition in England was sought. Hence, the analysis does not include Part 26A plans.

1006 For a more detailed discussion of the applicable Azerbaijani law, see sub-s C.I.1.

how, at what stage, and to what extent), some of these advantages are, in a similar form, also attributable to the Gibbs rule[1007] or the concept of virtual territoriality.[1008] However, unlike them, the framework suggested in this work offers these benefits within a system underpinned by modified universalism, i.e. without recourse to multiple parallel proceedings or direct application of multiple laws in one case.

1. Certainty

One key benefit is, albeit relative, certainty. Creditors get assurance that, in case of the debtor's restructuring, their entitlements under the law they agreed to be bound will be respected to some extent, irrespective of a jurisdiction where the restructuring is conducted and a substantive law governing the restructuring. Otherwise, the restructuring will not have global effects. Such a relative degree of certainty minimises the risk associated with lending to foreign debtors, and its *ex ante* effects (e.g. reduction of risk premiums in the form of lower interest rates) will lead to greater cooperation in global commerce.

2. Forum Shopping

Another benefit is related to the issue of forum shopping.[1009] The framework suggested in this work would cause a decline in the number of cases involving bad-faith forum shopping. Whatever jurisdiction is selected, for whatever reasons, for the debtor's restructuring, the governing law of the contract will follow (as a benchmark) the proceedings. Accordingly, forum shopping aimed at materially worsening the position of foreign creditors will likely lead to problems in global recognition, outweighing its benefits for the initiating party.

1007 eg, certainty. See n 332 (and accompanying text) and text thereto.

1008 eg, addressing forum shopping. See Janger, 'Virtual Territoriality' (n 976) 432.

1009 For a discussion of forum shopping in the insolvency and restructuring context, which also includes historical comparisons, see Paulus, 'European and Europe's Efforts' (n 851) 96-98.

3. Fraud

Additionally, the framework suggested in this work would effectively address fraud and similar procedural irregularities, such as latent or unconscious discrimination against foreign creditors (or favouring local parties). This kind of irregularities in foreign proceedings is extremely difficult to uncover or prove through a procedural fairness review. The primary advantage of the substantive fairness framework under the MLCBI is that it solely focuses on the fairness of outcome. All the irregularities mentioned occur, in one form or another, to influence and achieve the *desired* outcome. Therefore, if an outcome is significantly tainted by such irregularities, in most cases, it will be uncovered as a result of a substantive fairness review without the need to expressly prove their existence.

4. Fairness in Domestic Proceedings

Finally, the prospect of a substantive fairness review at the recognition stage may, in most cases, influence the earlier stages of restructurings involving foreign law-governed debts. That is to say, it may encourage stakeholders to come up with a plan that would pass not only a fairness assessment of a local court but also a possible substantive fairness review of a foreign court.

Imagine a restructuring case of an American company under Chapter 11. The company has only four creditors. Two of the claims are governed by Albanian law, while the other two are US (New York) law-governed claims. The Albanian law-governed claims have more junior status than those governed by US law under the BC. The Albanian law law-governed claims together constitute a separate class. So do the US law-governed claims. The debtor has assets in Albania, the value of which suffices to fully satisfy the Albanian law creditors. The recovery rate for each of the Albanian law creditors under Albanian law is approximately fifty per cent. The debtor's going-concern value suffices to partly satisfy only the US law creditors and no party disputes this. Based on these facts, now consider two scenarios of a plan confirmation under Chapter 11.

In a first scenario, the class of the Albanian law creditors receive nothing and that of the US law creditors gets the whole going-concern value under the plan. The former rejects the plan, while the latter votes for it. Under

the APR, which applies in such a non-consensual plan scenario,[1010] a US court will not reject the plan based on the mere opposition of the Albanian law creditors. However, such a plan would unlikely survive a substantive fairness review of an Albanian court under the framework suggested in this work. The Albanian law creditors, therefore, would not be bound by the plan confirmed in the US in the eyes of Albanian law. Therefore, the Albanian law creditors would likely seek to enforce their claims against the debtor's assets in Albania, which, in turn, might jeopardise the entire restructuring process. The American court confirming the plan should not be blamed for this potential failure because it is strictly bound by the APR.

In a second scenario, the class of the Albanian law creditors is offered twenty per cent of the outstanding amount of the original claims (which comes at the expense of the US law creditors consensually giving up some portion of their entitlements) under the plan. The classes exhibit the same voting behaviour as in the first scenario mentioned above. Again, a US court will not reject the plan on fairness grounds. This time, however, the plan would likely pass a substantive fairness review in Albania, too. Therefore, the prospect of the failure of the entire endeavour would be avoided.

This hypothetical example based on a basic model illustrates how the possibility of a substantive fairness review of a foreign court can encourage parties to come up with a fairer plan in domestic proceedings and, thus, create a fair balance among the respective interests. However, it is not the only benefit in this context. By negotiating a fairer plan, parties would also avoid a time-consuming, costly, and uncertain non-consensual plan scenario in most cases. Besides, the more equitable the plan is, the less opposition it would face during the confirmation and recognition stages. This would significantly improve the overall efficiency of restructuring proceedings.

To summarise the point, the mere possibility of a substantive fairness review in a foreign jurisdiction may lead to a fair outcome from the outset. The *ex ante* effect mentioned would also eventually reduce the number of cases with actual substantive fairness reviews at the recognition stage.

1010 See sub-s E.II.1.b)bb).

V. Summary

Part F focused on the development of a framework to ensure substantive fairness in recognising restructuring plans under the MLCBI. First, it made the case for a substantive fairness review under modified universalism in general and the MLCBI in particular (F.I). The *adequate protection* safeguard under article 22 (1) of the MLCBI was highlighted in that regard. It was concluded that the fairness of foreign plans should be separately evaluated in contested cases.

This work then analysed the key aspects of the substantive fairness framework under the MLCBI (F.II). After arguing for its limited scope and application, this work examined the essential components of the framework. This included a benchmark law for comparing the treatment of the opposing creditor under the plan, the process of comparison with the benchmark law, and the establishment of unfairness. This work concluded that the most suitable law for the benchmark role is the governing law of the contract, and that unfairness should be established when the position of the opposing creditor under the benchmark law has materially deteriorated under the plan.

Against the backdrop of those insights, this work assessed the fairness of its exemplary case, the IBA restructuring proceedings, in a cross-border context with respect to one of the dissenting creditors (F.III). The recognition proceedings in the US were examined, as the American approach (as opposed to the English approach) generally allows the application of the framework suggested in this work. It was concluded that, based on the assumptions made in that section, the IBA plan could be considered fair in relation to the dissenting creditor.

Finally, this work touched on the advantages of the framework suggested in the present research (F.IV). This work highlighted its *ex ante* effects, including encouraging stakeholders to agree upon a fair solution at the earlier stages of restructurings.