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The Cross-border Effects of Restructurings

Principles for Improved Cross-border Restructuring Laws

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I. Introduction

This article will first describe the phenomenon of a restructuring and the general mechanism of common Private International Law (PIL) and the complementing mechanisms for the recognition of civil and commercial judgments. Beyond this background, the peculiar case of cross-border insolvency law is explained. This leads to the discussion of options for a better fitting cross-border regime for restructuring plans and schemes of arrangement including the court proceedings confirming them. It provides food for thought for a possible global regime on the law applicable to restructuring and insolvency proceedings, which is due to be discussed in UNCITRAL Working Group V from 2022 onwards.

II. The phenomenon of restructurings

The restructuring of an enterprise is not a fixed legal concept. Rather, the term "restructuring" describes a factual phenomenon. As the concept of an enterprise can be understood as a body of legal relationships between the debtor, their assets and third parties, the optimal configuration of these relationships is the permanent and primary task of the debtor's management activity. The tools to fulfil this task are found in and defined by law and principally implemented in market transactions. Assets can be acquired and sold, employment or loan contracts can be concluded and performed. The law also defines the ability of the debtor or a counterparty to amend or terminate legal relationships that they entered into. To use these tools in order to "restructure" the legal relationships of an enterprise in order to enable it to achieve its purpose is a daily occurrence in the management of a business.

When we talk about a "restructuring" in an insolvency context, we identify a situation in which the common means of law described so far are not able to prevent an insolvency of an enterprise. Loan contracts were concluded and cannot be amended unilaterally. Employment contracts cannot be terminated in time or at all. In such an emergency, relevant parties with a legal relationship with the debtor would need to voluntarily agree to a new due date, or a new principal amount payable or even to a termination of their (loan, employment or lease) contract.

As a number of counterparties to the debtor are potentially capable of solving the problem and a multitude of them might be in fact necessary to accept a share of the financial burden, communication and negotiations typically benefit from a structured approach. The mere multitude of counterparties also invites every one of them to rationally bet that the others would accept a higher share of the expected sacrifice (free-riding). Because any amendment would principally require the actual consent of all counterparties in a negotiation, any party is able to avoid participation by rejecting the debtor's offer to join the arrangement. As a result, each individual creditor is able to veto a solution that could be value-maximizing for the parties as a group; the tragedy of the anticommons unfolds.[1]

In response to these specific collective action problems, legal provisions that we call restructuring (or more generally insolvency plan) law aim at supporting the conclusion of a restructuring arrangement. Restructuring law in its true meaning is designed to prevent the tragedy of the anticommons by specifically addressing holdout incentives.[2] It is defined by its purpose: to facilitating the conclusion of arrangements modifying or terminating existing legal relationships with a view to a possible insolvency of the debtor. Specific restructuring tools would provide counterparties with incentives to agree ranging from tax incentives or (avoidance) safe harbours for participating parties to the ability of

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[1] *De Weijs* Eur Bus Organ Law Rev (2013) 14:201, 213.
[2] For a more detailed discussion, see *Madaus* Eur Bus Org Law Rev (2018) 19:615–647.

a court to effectively overcome the veto of a counterparty to a restructuring of their existing legal relationship with the debtor. The availability of court assistance in order to impose an arrangement on a dissenting party is indeed the panacea of modern restructuring law. And the mere availability of such judicial redress often suffices to achieve a fully consensual agreement as it defines a viable exit option for the debtor in the negotiations.

To conclude, there is nothing special in the "restructuring" of legal relationships; it happens every day based on the common legal options of any given enterprise. And even in times of existential crisis, when insolvency looms, counterparties may agree to act in concert and modify their pre-existing legal relationship with the enterprise, especially when negotiating beyond the tools and incentives of a modern special restructuring law. The outcome of such a restructuring is a workout and hence a contract modifying pre-existing legal rights. Only where the agreement is not based in the actual consent of all counterparties and hence a court is needed to find the legal duty of the dissenting party to accept the workout, doubt may arise as to the doctrinal nature of the enforced agreement. The outcome is undoubtedly the same: the modification of pre-existing rights based on the agreement.[3]

III. Cross-border effects of a modification of rights

If we understand any restructuring as a modification of pre-existing legal relationships of the debtor with counterparties or assets, such modifications are only legally effective if they are respected by the relevant legal system. The sale of an asset or the transfer of shares, the establishment of a security interest or the modification of a due date for payment must not only be agreed upon by the relevant parties. It must also find the support of the respective legal system and its courts. As soon as a cross-border component is added, things get complicated. The introduction of a counterparty domiciled abroad or a loan agreement featuring a choice of foreign law and courts requires all parties involved to determine which law applies and which courts are competent to decide about disputes.

1. Applicable law

If the legality of a transfer of assets and shares is in question or the new due date meets legal objections, the established rules of Private International Law (PIL), or in common law terminology conflict of laws rules, provide a sophisticated regime for identifying the law of the country that must be applied to answer the question and resolve the dispute. PIL or conflict of laws rules include customary rules like the *lex rei sitae* for immoveables as well as moveable goods, or the *lex causae* for the modification of contracts, but these rules form part of the law of a country and may therefore well be country-specific, for instance, whether the law governing the affairs of a company shall be the law of the company's registration or real seat.[4] The underlying purpose of these rules is the wish to apply the law of the country with the *closest connection* to the legal issue in question.[5] In order to achieve this aim, PIL contains a differentiated set of rules for identifying the law applicable in a cross-border (conflict of laws) context. The transfer of goods would be governed by the law of their location (*lex rei sitae*), the transfer of shares in a company by the law applicable to the company (law of the registration or real seat). The validity of the new due date for performance under a contract would be determined by the law governing the original contract.[6]

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[3] While the doctrinal nature of a restructuring plan or scheme is widely disputed, the adopted plan is as widely construed as contract. See for US Chapter 11 *In re Dow Corning Corporation*, 456 F.3d 668, 676 (6th Cir. 2006): "In interpreting a confirmed plan, courts use contract principles, since the plan is effectively a new contract between the debtor and its creditors." For Germany see *Fritzsche*, Die juristische Konstruktion des Insolvenzplans als Vertrag, 2017, passim. An English scheme of arrangement is held to be a compromise and arrangement in their ordinary commercial meaning, see *Payne*, Schemes of Arrangement, 2nd 2021, 21.

[4] For the differentiated approach in Germany, see BGH NJW 2005, 1648 and BGH NJW 2009, 289.

[5] See e.g. *Hausmann* in Staudinger (2013) Art. 3 EGBGB para. 9.

[6] See for modifications in contracts e.g. *Spellenberg* in MüKoBGB, 8th ed. 2021, Rom I-VO Art. 12 para. 180, referring to Art. 3(5), 10 and 12 of the Rome I Regulation (Rome I Reg.), where this issue is not specifically addressed though).

Once the law applicable is identified, all institutions confronted with the same legal issue would need to answer the legal question based on the law of this country. Ideally, with conflict of laws rules pointing at the same country for everyone and the application of this country's law giving the *same answer across the world*, everyone in the world would need to accept the same legal fact: a valid transfer of assets or shares, a valid security interest or a new due date. PIL rules are thus designed to identify one law applicable to a legal issue and to ensure its worldwide application and thereby recognition and effect. Cultural differences are safeguarded by a public policy exception.[7]

2. International jurisdiction

Whenever a legal dispute that includes a cross-border aspect is taken to court, the international jurisdiction of the court must be established and two distinctions need to be considered. First, rules on the jurisdiction of courts and recognition of judgments in a cross-border context are separate from the rules for determining the law applicable to other legal matters.[8] Second, the set of conflict of laws rules governing procedural issues including jurisdiction (*lex fori*) is separate from the set of rules identifying the law applicable to the substantive legal matters in a case (*lex causae*).[9] While the *lex causae*, identified under conflict of laws rules of the *lex fori*, shall ideally be the same no matter which court is applying it in a case, the *lex fori* of several jurisdiction might provide for jurisdiction of their courts. So in theory, courts in several countries could be competent under their *lex fori* to hear and decide a case by applying the same *lex causae*, potentially law foreign to one or many of them. There is no nexus at all between the *lex fori* and the *lex causae*.

It follows from these insights that rules on international jurisdiction tend to be more policy-dependent. Traditionally, the country of the defendant would determine jurisdiction for a civil action ("*actor sequitur forum rei*"). Nonetheless, forum selection is a frequent option for the claimant, e.g. based on a choice of court clause or selective statutory venues. Countries with a more export-oriented court system provide for more welcoming, if not exorbitant, grounds for jurisdictions requiring only a sufficient or minimal connection of a case to the country. On the other hand, exclusive jurisdiction rules may reserve jurisdiction to the country with the closest connection to the case, typically the country of the law applicable.[10]

3. Recognition and enforcement abroad

There are two ways in which a legal act performed in one country can have the same legal effect in other countries and potentially all across the world.

a) Substantive legal effects

The first mechanism was already mentioned and follows from the mechanism of Private International Law. The coherent development of conflict of laws rules and principles has resulted in a global legal system that, when faced with the question of the validity of a specific legal act, would principally be able to identify the same one country whose law shall apply. In a second step, the application of this law to a case in a coherent way anywhere on the globe would result in the very same answer to the same legal question everywhere. Taken together, whenever a modification of substantive legal relationships between persons or of such persons to a good is valid according to the law applicable identified under PIL rules, this modification is coherently retraced and accepted anywhere. So, for instance, a modification of the due date in a contract governed by English law, which is valid under the rules of English law for modifying contracts is valid and moves the due date in the eyes of all lawyers across the globe. In case of a dispute, an interested party could bring the issue before

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[7] See e.g. Art. 21 of the Rome I Reg. See also *Chng* (2018) Journal of Private International Law, 14:1, 130-159.
[8] „Conflit de lois"/"Internationales Privatrecht" vs. „conflits de juridictions"/"Internationales Zivilverfahrensrecht"; see e.g. *Schack*, IZVR, 8th ed. 2021, para. 26.
[9] For more details, see *Niederländer* RabelsZ 20 (1955), 1-51, also *Geimer* in Geimer, Int. ZPR, 8th ed. 2020, para. 319.
[10] Rules in many frameworks provide for exclusive jurisdiction connected to the location of real estate or the domicile of customers, see e.g. Art. 24 and 18 of the Brussels Ibis Regulation or Judgment Regulation (JR).

competent courts and the court should identify the law applicable and decide the case accordingly. The recognition of modifications in substantive legal rights would be available and, if needed, enforceable.

b) Judgment recognition

The second mechanism for securing cross-border effects would connect to the fact that the parties to the legal dispute have initiated court proceedings and produced a court decision on the merits. If the legal system in a foreign jurisdiction trusts the court to apply the correct law in a fair manner, lawyer (including courts) in the foreign jurisdiction may abstain from their own assessment of the merits of the case and instead simply except the outcome of the previous litigation abroad. In this situation, it is the recognition of the judgment that provides cross-border effects to a legal act. A judgment holding that the due date was postponed or that the shares were transferred would be recognised based on trust, not based on a second assessment of the merits of the case under the law applicable.

Recognition follows from a degree of trust in the foreign judicial system, which could be expressed by ratifying a Convention on the Recognition and Enforcement of Judgments,[11] a bilateral treaty,[12] or any unilateral statutory provision.[13] A foreign judgment would be recognised unless the jurisdiction of the foreign courts is held to be exorbitant, especially when ignoring the exclusive jurisdiction of other courts,[14] or the procedure itself or its outcome are manifestly incompatible with local law (public policy exception).

c) Two mechanisms for global effects

The two mechanisms for achieving cross-border effects differ significantly but achieve the very same outcome. For the purpose of illustration, one could say that under the first mechanism a foreign lawyer would be asked to determine whether a German product, let's say a car, is good by reproducing the car using the same German blueprint. Under the second mechanism, however, the foreign lawyer would be asked to recognise a car already made abroad, possibly in Germany, without principally looking at the blueprint and the way it was built. Instead, the foreign lawyer would only assess the quality of the end product and accept or reject it based on the amount of principle trust in the German car-making ability and the building process. Both mechanism are capable of making German cars available across the globe but they work in quite different ways.[15]

IV. The peculiar case of cross-border insolvency law

The mechanisms and principles described are difficult to identify in today's cross-border insolvency law. When it comes to insolvency proceedings and their effect on the procedural and substantive rights of stakeholders, it is the obvious fact of a court procedure taking place, which has been dominating the design of cross-border insolvency rules. All aspects of the commencement, conduct, administration and conclusion of insolvency proceedings are governed by the *lex fori*, the *lex fori concursus*, including their "effects" on the substantive rights of parties.[16] These effects may range from the determination and verification of substantive rights (in order to participate in the proceedings and their

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[11] See the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, or the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[12] See e.g. the Treaty between 1977 Germany and Israel on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

[13] See e.g. § 328 ZPO (German Code of Civil Procedure).

[14] See Art. 45 JR.

[15] As the latter provides for more legal certainty, it is often held to be the preferred pathway, see e.g. *Schack*, IZVR, 8th ed. 2021, para. 24.

[16] See recommendation 31 of the UNCITRAL Legislative Guide on Insolvency Law (2005). See also Art. 7(1) (EIR); also see *Geimer* in Geimer, Int. ZPR, 8th ed. 2020, para. 3373; *Glöckler*, Anwendbares Recht und Anerkennung bei gesellschaftsrechtlichen Maßnahmen in Sanierungsplanverfahren, 2021, p. 175-180 (*lex fori concursus* seen as "*lex specialis*" to the *lex causae*).

distribution) to the suspension of the enforceability of rights for performance or payment.[17] Even further, the *lex fori concursus* would be able to govern the modification or even cancellation of rights based on a (reorganization) plan or a statutory discharge.[18] Following the assumption that all effects of insolvency proceedings, including those on substantive rights, are governed by the *lex fori* (*concursus*), a nexus emerges to the rules for international jurisdiction because the allocation of jurisdiction effectively determines the law applicable to infringe creditor and other stakeholder rights. The jurisdiction requirements found across the globe are, however, rather different and manifold. Commonly, (territorial) insolvency proceedings are available as long as some, even one, of the insolvent debtor's assets are located in a country.[19] Some regional frameworks require the debtor's enterprise to be administrated in the country (the debtor's centre of main interest – COMI),[20] but would allow for parallel proceedings in countries with an establishment of the debtor's enterprise.[21] Restructuring-oriented frameworks would provide for jurisdiction based on a "sufficient connection" of the debtor to a country, which can be established by the fact that the local law governs (most of) the contracts affected, the principal business activity of the debtor in the jurisdiction, the domicile of the majority of affected creditors or a choice of court clause in affected contracts.[22]

Overall, it is obvious that the rules of cross-border insolvency laws deviate significantly from the general principles of conflict of laws rules. As a consequence, insolvency law is commonly expressively excluded from Conventions or Treaties on the Recognition of Judgments.[23] A look at the reasons for these deviations explains the justification as well as the limits of this special regime.

1. Court-based

The first and foremost peculiarity of cross-border insolvency law is the dominance of procedural aspects. The issues of jurisdiction and cross-border recognition are prevalent, the law applicable to substantive effects is obfuscated by an all-encompassing *lex fori*. This dominance is a direct consequence of the fact that insolvency proceedings have always been proceedings in court (or a similar public authority). Key aspects of insolvency law (a collective stay of individual enforcement, the administration of the debtor's assets, fair distribution) have been directly connected to the involvement of a court. The procedural effects of these decisions have formed traditional liquidation-oriented insolvency laws and the issue of any cross-border effect has always been framed as a matter of procedural laws, as a matter of the jurisdiction for and the recognition of court decisions. These decisions need to have (procedural) effects against all creditors regardless of the law governing their claims (*pari passu* principle).[24]

2. Debtor-centred

A second peculiarity contributed to the dominance of a procedural understanding of cross-border insolvency law: the debtor. Any insolvency rule is connected to the basic preliminary fact that a person or entity is insolvent or bankrupt as defined by law. Insolvency law may serve the fair treatment of all creditors and their claims, but it centres on a special situation where such a treatment is in danger: the insolvency of their common debtor. No matter the law of the creditors' contracts or

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[17] See recommendation 31lit. (d) and (n) of the UNCITRAL Legislative Guide on Insolvency Law (2005); see also Art. 7(2) lit. (f) and (g) EIR.
[18] See recommendation 31 lit. (f) and (s) of the UNCITRAL Legislative Guide on Insolvency Law (2005); see also Art. 7(2) lit. (j) and (k) EIR.
[19] See § 354 InsO (German Insolvency Code), also see § 109(a) US Bankruptcy Code (domicile or property).
[20] See Art. 3(1) EIR, also § 3(1) InsO.
[21] Art. 3(2) EIR.
[22] These criteria were developed by the English Courts when constructing the sufficient connection test for applying English schemes of arrangement to foreign companies under § 895 of the Companies Act 2006, see *Re Drax Holdings Ltd* [2004] 1 WLR 1049; *Re Primacom Holding GmbH* [2011] EWHC 3746 Ch; *Vietnam Shipbuilding Industry Groups* [2013] EWHC 2476 (Ch), 2013 WL 3994997. It remains to be seen whether courts in other jurisdictions with the same statutory test ("sufficient connection"), e.g. in the Netherlands or Singapore, will follow these examples.
[23] See e.g. Art. 2(1) lit. e) Hague Judgment Convention; Art. 1(2) lit. b) JR and Lugano Convention.
[24] See *Schack*, IZVR, 8th ed. 2021, para. 1271.

damages claims, no matter their domicile, it is the debtor who is at the heart of insolvency laws. Consequently, it appears obvious that the closest connection of legal issues resulting from a special process resolving the insolvency of a debtor is found in the debtor.

3. Universalism through judgments

The establishment of a separate regime for the cross-border recognition of insolvency proceedings principally only describes the second mechanism for producing cross-border effects described above. The frameworks introduce a mechanism for judgment recognition conditioned on a jurisdiction review and a public policy test regarding the fairness of the process and the general adequacy of the outcome.[25] To the extent that insolvency law effects a relevant modification of substantive rights, cross-border regimes have responded rather sensitive. English law developed the *Gibbs* rule stating that no foreign insolvency process is able to modify English law governed debt without the creditor's consent.[26] When revitalising this principle in 2018, the English courts explained that the principle also applies to a permanent stay of enforcement.[27] The *Gibbs* rule has drawn (justified) criticism for unilaterally protecting English law governed debt from foreign plans while no rule or principle would hinder English schemes or plans to modify foreign law governed debt but the underlying argument may well be traced back to the inclination of protecting the law applicable to the debt from unexpected and unjustified irrelevance.[28] Why would a *lex fori* (*concursus*) be able to overwrite the *lex causae* in a matter of substantive, not procedural law?

The answer can neither be found in the EIR nor the MLCBI. Articles 7 to 18 EIR contain conflict of laws rules, which both establish the dominance of the *lex fori concursus* (Art. 7) and reserve the application of other laws in sensitive matters (e.g. real estate, employee rights, claw back) without specifically mentioning substantive effects of plans. UNCITRAL is only now beginning to even look into this issue. Defining the limits and exceptions to a dominating *lex fori concursus* is a difficult task to do both doctrinally and politically. The main argument in favour of a *lex fori concursus* governing debt modifications in a cross-border context has been a practical one. The *lex fori concursus* is able to determine one single law governing all aspects of a court process that includes a variety of rights and claims governed by potentially different laws and needs to treat them equally. A debt-related collective court decision is only be able to equally encompass all these rights and claims in its proceedings if it is able to take effect irrespective of the *lex causae* of affected substantive rights. It is (only) the overwriting power of the *lex fori concursus* that averts the need for parallel court proceedings for debt relief in insolvency. This very power brings a consolidated debt relief in one court with global effects based on the recognition of the insolvency process and its debt-modifying annex decision. Once the ability of the *lex fori concursus* to overwrite all the various *lex causae* is globally accepted, the universalist's ideal of "one debtor, one court, one law"[29] is achieved for substantive debt relief. It is no surprise, therefore, that a hindrance like the *Gibbs* principle has been most fiercely criticised by proponents of a universalist approach to cross-border insolvency.[30]

V. The limits of the rational for cross-border insolvency law in restructuring-oriented proceedings

[25] See in particular the 2014 UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) and the 2019 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLJ).
[26] *Anthony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* [1890] 25 QBD 399.
[27] *Bakhshiyeva v Sberbank of Russia & Ors* [2018] EWHC 59 (Ch) (18 January 2018) at 142; confirmed in *OJSC International Bank of Azerbaijan, Re* [2018] EWCA Civ 2802.
[28] See *Bakhshiyeva v Sberbank of Russia & Ors* [2018] EWHC 59 (Ch) (18 January 2018) at 47.
[29] See *Mevorach*, The Future of Cross-border Insolvency, 2018, p. 3.
[30] See, in particular, *Ramesh* (2017) 29 Singap Acad Law J 42 (for the Supreme Court of Singapore); Judge *Glenn* of the US Bankruptcy Court in *In re Agrokor d.d., et. al.*, 591 B.R. 163 (Bankr. S.D.N.Y. 2018).

The justification for a more differentiated approach may follow from a closer look at the subject matter and function of a court's involvement in tradition insolvency procedure compared to restructuring procedures, each in their purest form.

1. Debt-oriented vs asset-oriented

The core function of insolvency proceedings is to provide a response to a common pool problem and the resulting need for a fair distribution of insufficient assets amongst all creditors. Restructuring procedures, in contrast, address an anticommons problem independent of the solvency or insolvency of the debtor.[31] Both types of proceedings concern a different subject matter. Insolvency proceedings focus on the protection of assets and the realisation of their maximized value in order to distribute this value to creditors in a distribution under a statutory ranking of rights and claims. Typical features of these procedures are asset-focussed; from an automatic stay of enforcement actions upon their commencement to a mandatory appointment of an office holder for the administration of assets to the realisation of value, return of assets under a claw-back system, to the verification of claims in order to establish a distribution scheme. It is all about the assets, their administration, realisation, and the orderly distribution of their value on behalf of and to creditors. Each creditor's substantive right is only affected as far as it is paid in a distribution or subject to a statutory discharge. Restructuring proceedings, in contrast, a debt-oriented from day one. The administration of the debtor's business and assets is commonly left to the debtor (debtor in possession) and a stay, if available at all, is meant to safeguard negotiations from hold-out strategies. The plan includes the description of the need for a debt modification as well as the way the new debt structure shall look like. The fairness of the proposed burden sharing is tested in court if it is controversial amongst affected parties. The court safeguards rights of affected parties while also protecting the common interest against hold-out strategies. Any asset-related modification of (security or ownership) rights is part of the plan and thus part of an overall concept of debt modification. Modern schemes would even allow the debt modification scheme to reach across entities, in particular in a corporate group[32] or in favour of directors and shareholders.[33]

These principal differences have an impact on the functioning of traditional jurisdiction (and recognition) tests like those based on the debtor's COMI. Identifying the place where debtors administer their businesses may well make sense where a procedure aims at installing an office holder to use the debtor's head office structure in order to efficiently run the business and secure related assets. In principle, asset-oriented proceedings are well allocated where these assets are managed. For debt-oriented proceedings, however, this place bears little relevance as connecting factor. Parties to a debt relationship either explicitly agree or at least assume that their relationship is governed and thus modified only according to the rules of one country. This country's law is identified by the common set of conflict of laws rules, which offer a distinctive set of rules and mechanisms in order to reflect legitimate expectations between parties in a debt relationship. These expectations also govern any out-of-court workout attempt and have influenced the establishment of jurisdiction test for debt-oriented scheme-type court proceedings, which frequently feature a "sufficient connection" test instead of a COMI test as a jurisdiction threshold.[34] Here the law applicable to the debt that is supposed to be modified in court is the key factor (although not the only one).[35] Choice of law clauses are thereby capable of establishing jurisdiction.[36]

At the recognition stage, however, today's cross-border insolvency frameworks as established by the MLCBI or the EIR would nonetheless require that the debtor's COMI is found where the courts

[31] For more detail, see *Madaus* Eur Bus Org Law Rev (2018) 19:615–647.
[32] See *Kokorin/Madaus/Mevorach*, Texas Intl L J (2022), forthcoming.
[33] Such third-party-releases have been a widely disputed issue especially in the US, see e.g. Simon, *Bankruptcy Grifters*, 131 Yale Law Journal, forthcoming.
[34] See e.g. for the UK *Re Drax Holdings Ltd* [2004] 1 WLR 1049.
[35] See again English case law: *Re Drax Holdings Ltd* [2004] 1 WLR 1049; *Re Primacom Holding GmbH* [2011] EWHC 3746 Ch; *Vietnam Shipbuilding Industry Groups* [2013] EWHC 2476 (Ch), 2013 WL 3994997.
[36] *In the Matter of Rodenstock GmbH* [2011] EWHC 1104 (Ch), 2011 WL 1151484; *In the Matter of Apcoa Parking Holdings GmbH and Others* [2014] EWHC 1867 (Ch), 2014 WL 2530822; *Algeco Scotsman PIK S.A.* [2017] EWHC 2236 (Ch), 2017 WL 02672218.

sanctioned the debt restructuring plan.[37] While the COMI criterion may provide a certain amount of flexibility[38] when looking at the way the debtor has presented the place of business administration to third parties, especially when this administration is done in a more virtual than real setting,[39] the test looks at specific aspects of a case that do not capture the specifics of a debt restructuring. For restructuring plans, the place of business administration is not key. Attempts to introduce a contractual "COMI clause" have had limited success so far.[40] This has led to "co-debtor" schemes where a company in the jurisdiction of the court is only established in order to co-sign the debt and modify the assumed debt in a scheme that is then extended to also release the foreign original debtor in a third party release.[41] It is a clear indicator that the existing legal framework does not properly reflect the peculiarities of a (pure) debt restructuring if the only way to achieve the desired result is such a legal construct.[42]

This unsatisfactory finding is supported when the common existence of parallel proceedings in cross-border insolvency law is added to the analysis. It is commonly accepted that parallel insolvency proceedings can be opened in several countries for the same debtor provided that the respective jurisdiction rule allows for it, which is commonly the case when assets are located there or even an establishment. The universal effect of any debt modification, identified above, is difficult to align with this system. Even under a regime prioritising main to foreign non-main or secondary proceedings, any territorial procedure is able to avoid any effects of the foreign (main) proceedings by applying its own local *lex fori concursus*. Secondary proceedings shield the local assets of the (same) debtor from a foreign *lex fori concursus* and reserve their value for distribution under local law. This protection does not work against the effect of any – main or non-main – proceedings on debt. To the contrary, the principal ability of any parallel proceedings to produce a debt modifying plan for the very same set of debt owed by the same debtor to the same set of creditors slips through the system. Any protection requires specific rules for debt modifications. The *lis pendens* doctrine[43] would probably by most fitting for debt-oriented court proceedings by only allowing for one (the first) procedure to continue but it is hardly in line with the general acceptance of parallel proceedings in cross-border insolvency law under modified universalism. In such a framework, any priority of a main proceeding needs to be specifically introduced, for instance by limiting debt modification effects of secondary proceedings,[44] or at least a plea for cooperation and coordination is meant to secure an outcome in the common interest.[45] None of these limitations would, however, be able to preclude the substantive effects of debt modifications under the law applicable to the debt (*lex causae*) described in the first mechanism above. In conclusion, the established system of main and non-main proceedings may work well for asset-oriented procedures but provides no viable solution for the mechanics of a debt restructuring.

2. Workout support

In a preventive restructuring context, the task of any court involvement is much more limited and focussed on overcoming unreasonable holdouts compared to the role of insolvency courts in an insolvency situation. A restructuring court is involved to secure the fairness of negotiations and burden sharing which may include issuing a stay or confirming a plan over the objection of some parties. The court functions as a backup in situations where a workout would typically secure a standstill

[37] Art. 2 lit. b) and 17(2) lit. a) MLCBI; see also Art. 3(1) EIR.
[38] See *Tirado* ARIL 2015, 819.
[39] COMI tends to „disappear" whenever a business is administered by virtual board meetings where directors in different countries meet on the phone or on „Zoom", when the task of administrating the business was „outsourced" to a management company (see *Thomas & Anor v Frogmore Real Estate Partners GP1 Ltd & Ors* [2017] EWHC 25 (Ch)) or a parent company (see *In re Oi Brasil Holdings Coöperatif* U.A 578 B.R. 169 (US SDNY 2017)), or when the individual debtor is working in a virtual space (e.g. the traveling influencer).
[40] See *Videology Ltd, Re Cross-Border Insolvency Regulations 2006* [2018] EWHC 2186 (Ch).
[41] See *Re Lecta Paper UK Ltd* [2020] EWHC 382 (Ch); *In the matter of Gategroup Guarantee Limited* [2021] EWHC 304 (Ch) at 166.
[42] The need to "relax" the COMI requirement for restructurings is also conceded by *Mevorach/Walters* Eur Bus Organ Law Rev (2020) 21:855, 886-890.
[43] Art. 29 JR.
[44] See Art. 47(2) EIR.
[45] See Art. 27, 30 MLCBI; see also Art. 41 to 47 EIR.

agreement or a consensual debt restructuring but protection against rogue negotiation strategies is needed. The court also protects justified holdouts whenever a debtor is gerrymandering the process. All court functions connect to the debt situation and their fair modification.[46] The restructuring frameworks of a country form a part of their debt regulations and are therefore included in their *lex causae*.[47]

VI. A possible new framework for cross-border restructurings

These insights should inform any reform of today's cross-border insolvency systems that aspires to also accommodate all restructuring cases, in particular preventive or solvent schemes.

1. Closest connection

Any conflict of laws framework seeks to identify the country with the closest connection to the legal matter in question. For any debt modification, this connection is principally found in the *lex causae*. The distinctive tests developed to identify the *lex causae* for a contractual dispute, a tort law dispute, a dispute relating to property or internal affairs of a company transport policy decisions that should principally be respected when a modification of rights and claims governed by a law identified under these rules is intended. The *lex causae* embodies the closest connection of substantive rights to a country.

a) Workouts and restructuring-only proceedings

The modification of rights in the course of a court procedure is probably not controversial as far as the court applies the *lex causae* when assessing the legality of such modifications. This is typically the case when the courts of the country identified by the *lex causae* decide purely domestic cases. The jurisdiction of these courts could be protected by the *lis pendens* doctrine against parallel debt modification proceedings abroad. A debt modification under the *lex causae* can, however, in principle also be done in a court of another country because there is, in principle, no nexus between jurisdiction and law applied in substance outside of cross-border insolvency principles. In essence, the principle identified in the *Gibbs* Rule to protect the application of English law would be generalised and protect any *lex causae*. Ad-hoc flexibility would follow from the availability of a choice of law amongst affected parties. In any workout situation, this flexibility is accepted and welcome.

Restructuring law, however, is characterised by the need to accommodate for a structured, coordinated debt modification with potentially more than one creditor and, thus, potentially more than one type of debt involved. This can potentially lead to the identification of different country's laws as *lex causae* for different types of debt, e.g. English law and New York law governed bonds. Cross-border restructuring law must provide a rules for such cases and it seems adequate to see the case with a *closest* connection to one country only in two settings. First, a clear majority of the debt restructured under a proposed plan is governed by the same law. Second, the parties agree in a choice of law or a choice of court agreement at least with a qualified majority to pursue a debt restructuring in one country. Such agreements could be pre-existing in the debt contracts (choice of law/jurisdiction clause) or agreed to *ad-hoc*.

Global effects of modifications under the *lex causae* are already secured by the principles of Private International Law as described above in the first mechanism (III. 2.). It is exactly this pathway to cross-border efficacy of a debt restructuring that is currently argued for post-Brexit schemes of

[46] It is certainly admitted that the characterisation of such court procedures as "workout support" vs. "chapter 11-lite" (see for the latter *Mevorach/Walters* Eur Bus Organ Law Rev (2020) 21:855, 867) reflects a principle difference in their general understanding and already implies different conclusions.
[47] Restructuring frameworks are not a set of rules separate from the l*ex causae* as indicated by *Skauradszun/Nijnens* (2019) 7 NIBLeJ 1, 20.

arrangements.[48] It is available for workouts as for schemes or restructuring plans. A judgment recognition could nonetheless provide a higher degree of legal certainty, especially when parts of the debt are governed by a different *lex causae*. As the debt modification is done according to the law *most closely connected* to it, often even in the courts of this country, recognition abroad should, in principle, be facilitated and only depend on limited public policy concerns (no *révision au fond*). This leads to a first principle: debt-modifications in a court-based restructuring under the law of the closest connection determined by the *lex causae* (and potentially already identified in a jurisdiction test) justifies facilitated global recognition.

b) Insolvency proceedings with restructuring options

Things are more complicated once insolvency proceedings have commenced. When a restructuring plan is only an *ad-hoc* solution in an already opened insolvency process, the specific function of insolvency law identified above hinders a dominance of the *lex causae* when allocation insolvency proceedings. An asset-oriented allocation is justified and parallel proceedings with a focus on asset management are a core function of modified universalism. As a result, the *lex fori concursus* may well identify the law of a state whose law does not govern most of the affected debt. In such cases, there is no closest connection to the forum state for debt modifications. Policy makers should consider, however, whether the established asset-oriented allocation of insolvency proceedings is even justified when insolvency laws offer special procedural options for insolvent debtors *ex ante*, which focus on securing a restructuring while limiting effects on assets (e.g. by a debtor in possession option). Such types of procedures appear debt-oriented and could potentially benefit from an allocation rules that connects them closely to the *lex causae* with a view to their global recognition. Chapter 11-like procedures could include a ground for jurisdiction based on the *lex causae* of restructured debt regardless of the debtor's COMI as identified above. Consequently, the recognition of judgments confirming debt modifications under a law closest connected to the *lex causae* would be facilitated and only depend on a very limited public policy objection. That means that, for instance, the restructuring of English law governed loan debt should be possible in English courts (regardless of the debtor's COMI and protected from parallel proceedings) in scheme proceedings (above a)) as well as restructuring-oriented insolvency proceedings (administration with a CVA) and automatically recognised abroad on both the substantive level (mechanism one), as far as possible, and the judgment recognition pathway (mechanism 2).

2. Sufficient connection

There are cases where the debt structure is multinational without any clear connection to one country's laws. There are also insolvency proceedings commenced under established jurisdiction rules (COMI etc.) with a restructuring plan option. Here an unconditional need for a debt modification under the *lex causae* would require parallel debt-oriented proceedings in respective jurisdictions[49] unless the seized court is able to apply foreign restructuring laws. The latter seems feasible for a debt modification under a foreign law's force majeure or hardship clause or a foreign law's termination right, but many restructuring options, such as schemes, require a direct court involvement that may not be assumed by foreign courts. Strictly adhering to the closest connection would cause fragmentation and thus not lead to the most efficient system for cross-border restructuring, especially since the role of the *lex causae* can be respected in a more enabling framework.[50]

It is a policy decision whether to extend the ability of a jurisdiction to restructure debt in their courts beyond cases that are connected *closest* to them. This decision may be informed by a wish to serve as a restructuring "hub" in a region, as the Netherlands or Singapore, or even globally, as the US or the United Kingdom. It may also be driven by the fact that the debt structure of local businesses would often be dominated by foreign law governed loans or simply by the practical wish to enable a debt

[48] See e.g. *Stephenson* Int Corp Rescue 2021, 1, 2.
[49] See *Meeson* 17 Int Corp Rescue 2019, 165; *Mann/Ridgers/Thorp*, INSOL World 2020 Q1, 8.
[50] This broader approach alleviates concerns against a doctrinal separation of restructuring and insolvency law based on the availability of efficient cross-border systems, see *Mevorach/Walters* Eur Bus Organ Law Rev (2020) 21:855, 876-885.

restructuring under local law regardless of the law applicable to the restructured debt. Consequently, the relevant policy decision is made implicitly whenever a debt-oriented court procedure is made available irrespective of the closest connection of the law applicable to the debt because the legislative intention to potentially cover all debt is only securely achieved by enabling the *lex fori* to overwrite the *lex causae*.[51] With a view to recognition, the legal framework implementing the policy decision should ideally be guided by the idea of more efficient procedural options under the primacy of the *lex causae* for debt restructurings. The *lex fori* would be able to provide for an efficient process to produce a plan or scheme also for foreign debt (and debtors) but would not be able to overwrite substantive limits to a modification under the *lex causae*. Stakeholder could thus avoid the forum of the *lex causae*, especially when the courts or the required conduct of proceedings under local law is inefficient, but they could not avoid the substantive regime of the *lex causae*. If, however, legislators decide to fully disregard any *lex causae* implications, recognition in the states of the *lex causae* may not be assumed. The second principle appears: Debt-modifications in a court-based restructuring under a law only *sufficiently* connected to the *lex causae* (and potentially already identified in a jurisdiction test) justifies only a conditioned global recognition. This also leads to the third and last principle: Debt-modifications in a court-based restructuring under a law *not even sufficiently* connected to the *lex causae* (and potentially already identified in a jurisdiction test) cannot expect global recognition.

Under such a cross-border framework, jurisdiction would not strictly depend on a *closest* connection to one country but could instead also be recognised if a *sufficient* connection to the country exists. The restructuring plan or scheme would then be completed under the *lex fori*. Any debt modification under the plan would have immediate global effects only as far as the plan modifies local law governed debt (mechanism one). Cross-border effects for foreign law governed debt would depend on a judgment recognition abroad (mechanism two). At the recognition stage, the weaker connection (sufficient, not closest) would both justify and require a right of host jurisdictions to refuse the recognition of the decision to confirm the plan if the plan content circumvents *substantive* limits to the modification of debt under the *lex causae*. If, for instance, a certain type of debt (employee claims, financial contracts, tax claims, etc.) is exempted from debt restructuring under the *lex causae*, the use of foreign courts would not be able to overwrite this exemption. The legitimate expectations of (non-consenting) parties in the lex causae would be respected. Such a wider substantive ground to refuse recognition could become the standard in the "adequate protection" test similar to the one now provided in Art. 14(f) MLJ. It is a more-focussed version of the idea of justifying substantive effects of the *lex fori* on foreign rights by treating those rights "as if" the foreign law had applied.[52] Substantive limits of the *lex causae* become the benchmark for the *lex fori* in order to secure recognition abroad. Defining the scope of "substantive limits" will be key under this approach and deserves a separate analysis. It will probably require more than only a no-creditor-worse-off test[53] to stay within the limits. Stakeholder should be able to avoid an inefficient, clogged or slow judicial or procedural system, but not key substantive policy choices of the jurisdiction with the closest connection to their debt instrument. Accordingly, the recognition test could (1) require the parties to assume that all procedural formalities (notice, timeframes, meetings) for a debt restructuring in the country of the *lex causae* are (hypothetically) met and that the facts of the case (majorities, scenario predictions, valuations) are proven and generally accepted by all parties before (2) the possibility and outcome of a debt modification under the *lex causae* is reviewed.

VII. Conclusion

[51] The right of the *lex fori* to substantively modify foreign debt regardless of the requirements of the *lex causae* is therefore also implicitly found in the new German StaRUG provisions as the German legislator enable the plan to impair all debt in §§ 2 to 4 StaRUG irrespective of the *lex causae*. A need for an analogy to § 335 InsO (*Skauradszun* NZI 2021, 568, 572) does not arise.
[52] The idea was developed in English insolvency proceedings with a view to avoid foreign secondary proceedings, see *Collins & Aikman Europe SA Collins & Ors, Re Insolvency Act 1986* [2006] EWHC 1343 (Ch) (09 June 2006). It is also inherent to the idea of virtual territoriality for all insolvency proceedings, see *Janger*, Columbia J Transnatl L 48:401 (2010).
[53] *Janger*, Columbia J Transnatl L 48:401, 432 (2010).

If we understand debt restructurings as a subgroup of every day modifications of legal relationship governed by the *lex causae* rather than as a phenomenon of bankruptcy, the understanding of the role of the court and the function of court proceedings changes accordingly. The mandate to equally apply the same treatment to all creditors under a *lex fori (concursus)* is replaced by the principle that any modification of substantive rights is governed by the *lex causae*.

The factors identifying the *lex causae* prove the closest connection of a right or claim to a specific country and any cross-border restructuring regimes should be designed based on this connection. Debt restructurings under the restructuring (and insolvency) law of the *lex causae* would be effective globally due to the principles of Private International Law for modifications of substantive rights. When such a debt restructuring is also confirmed by a court, the recognition of such judgments abroad should be facilitated. Any debt restructuring under other rules than the *lex causae*, in particular under a *lex fori (concursus)*, should not be inadmissible but require a degree of connection to the *lex causae*. If and as far as *lex fori* and *lex causae* indicate the same country or at least most of the restructured debt is governed by the laws of the forum state, restructuring proceedings should be available and the resulting debt modification recognised globally. If only a sufficient connection is established between the state of proceedings and the state of the *lex causae*, jurisdiction is an option and recognition may be conditional. Without any sufficient connection, debt-oriented proceedings shall not commence and any debt modification not assume to be recognised.

A cross-border restructuring law regime developed according to these principles does not yet exist. Today's cross-border insolvency system does not capture the needs and specifics of all restructurings. Law reform is needed. UNCITRAL's Working Group V and in the next EIR recast 2025 will assess these issues. A specific cross-border restructuring framework with more flexibility (no COMI, more choice) would be able to complement the existing cross-border insolvency framework by offering tailor-made rules for the restructuring options.