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Giving Effect to Foreign Restructuring Plans in Anglo-US Private International Law

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Introduction

1 There is a line of J.D. Salinger's that could have been written about Ian Fletcher because it sums him up so well:

“You're a real prince. You're a gentleman and a scholar...”¹

2 Given that Ian has dedicated so much of his distinguished and dignified career to promoting international co-operation in cross-border insolvency cases, it is a pity that we are honouring him at a point in time when things are not going quite as smoothly as he would hope. I refer, of course, to recent developments in UK international insolvency jurisprudence that exhibit a marked reluctance on the part of our senior judges to embrace an expansive view of modified universalism as a basis for extending the effects of foreign insolvency proceedings to the UK.²

3 Ian has written frequently on what he rightly perceives as some of the more backward features of UK private international law as it applies in the cross-border insolvency space. He is acutely concerned, in particular, about asymmetries of treatment, that is, instances where the UK courts respond less favourably to inbound requests for assistance from foreign officeholders than would the foreign court were the boot on the other foot. In an article written after the UK Supreme Court decided *Rubin*, he expressed this concern in the strongest possible language that his legendary standards of politesse will allow him:

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¹ J. D. Salinger, *The Catcher in the Rye* (1951, Random House, New York), at 62.

² *Rubin v Eurofinance SA; New Cap Insurance Corpn Ltd v Grant* [2013] 1 AC 236 (UKSC); *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36.

“One further matter on which it is appropriate to comment is the contrast between the readiness of English courts to countenance the bringing of remedies established under English insolvency law against non-present parties who may elect not to submit to the jurisdiction for the purpose of contesting the proceedings on their merits, and the reluctance of the majority of the UK Supreme Court in the case of *Rubin v Eurofinance SA* to accord recognition and enforcement to the orders made against non-submitting defendants by foreign courts exercising jurisdiction in insolvency matters, where the remedy in question was closely analogous to those available to a trustee or liquidator under English law. The stultifying consequences of the Supreme Court’s ruling are immediately apparent: how can we reasonably expect foreign courts to recognise the orders issued by English courts against offshore defendants, when we ourselves are unwilling to accord reciprocal assistance to foreign courts seeking to administer their corresponding remedies in a case where, according to the principles of international jurisdiction to which the UK openly subscribes... the foreign court has properly exercised jurisdiction by virtue of the debtor’s centre of main interests being located in the country in question?”³

4 In this article in Ian’s honour, I sketch in bare outline a comparative analysis of one aspect of the asymmetry that troubles our honouree by considering the reception that the US and UK courts afford to foreign restructuring plans. Having first considered the smooth passage that US courts grant to UK “foreign company” schemes of arrangement, I suggest that the journey in the opposite direction is unlikely to be as smooth. Moreover, the difference in approach and emphasis between these two members of the common law family, I maintain, points to differences in how the UNCITRAL Model Law has been received into, and is interacting with, their respective pre-existing legal cultures.

The Magyar Telecom Restructuring

5 I take as my starting point the recent Magyar Telecom restructuring. Although it is but one data point, the case adds powerfully to the impression that US bankruptcy courts will domesticate UK restructuring plans as a matter of routine.⁴

6 Magyar Telecom BV (“Matel”) is the Dutch parent of Invitel, a Hungarian telecommunications company. Matel funded Invitel’s business through inter-company loans that were financed by the issue of EUR 345 million senior secured 9.5% notes.⁵ The notes were due for repayment in 2016. Matel issued the notes under the terms of an indenture that was expressly governed by New York law and that provided for the New York courts to have non-exclusive jurisdiction in relation to disputes between the parties arising out of, or based on, the indenture. Invitel’s

³ I. Fletcher, “The Extra-Territorial Scope of Fraudulent Trading” (2013) 26(3) *Insolvency Intelligence* 44-46, at 46.

⁴ My information about Magyar Telecom derives exclusively from the US Bankruptcy Court docket, which is publicly accessible via the PACER system, and from the reported decision of Richards J in *Re Magyar Telecom BV* [2014] BCC 448.

⁵ These were what are euphemistically referred to as “high yield” notes. Moody’s assigned the notes a B1 rating when they were issued in December 2009, see: <<http://bit.ly/1wer3sk>>. In plainer language, the notes were sub-investment grade “junk”.

business was hit by a perfect storm of competitive pressures and falling demand. The net result was that Matel could no longer meet its obligations to noteholders. It therefore needed a restructuring solution that would bind all of its noteholders, including noteholders based in the US. The preferred solution was a formal debtor-in-possession style of financial restructuring achieved through a debt adjustment process that would avoid the stigma and value destruction associated with insolvency proceedings.⁶

7 This preferred solution could not be implemented under Dutch law without recourse to a formal insolvency proceeding. Matel's directors and advisers considered a Chapter 11 filing in the US but ruled it out on grounds of cost, inconvenience, and the perception that a US filing would have negative implications for the group's relationships with customers and suppliers. The increasingly popular alternative that Matel chose was a restructuring using the vehicle of a UK "foreign company" scheme of arrangement under Part 26 of the Companies Act 2006.

8 It is well settled that the UK courts have jurisdiction to sanction a scheme of arrangement in relation to a foreign company that is capable of being wound up in the UK based on the company having a "sufficient connection" with the UK.⁷ The jurisdictional bar is not high. As a result, foreign company schemes of arrangement are now a recognized restructuring product and a growth industry for UK-based practitioners.⁸ "Sufficient connection" in several of these restructurings was premised on the parties' agreed selection of English law and jurisdiction in the framework financing documents.⁹ This jurisdictional hook was not available to Matel because New York law governed its financing documents. And, in any event, Matel needed to establish a more substantial connection with the UK than that afforded by an English choice of law clause for it to be able to export the effects of an English scheme to the US under the Model Law.

9 To satisfy the threshold UK jurisdictional requirement and, at the same time, establish a platform for global recognition and relief under the Model Law, Matel

⁶ It is conventional wisdom that informal contractual workouts or workouts given formal effect by statutory means outside of insolvency law are more value-preserving and therefore welfare-enhancing for debtors and creditors than formal insolvency proceedings: see generally, INSOL International, *Statement of Principles for a Global Approach to Multi-Creditor Workouts* (October 2000).

⁷ Section 895(2)(b), Companies Act 2006; sections 220, 221(1), Insolvency Act 1986; *In Re Drax Holdings Ltd* [2004] 1 WLR 1049.

⁸ See further, J. Payne, "Cross-Border Schemes of Arrangement and Forum Shopping" (2013) 14(4) *European Business Organization Law Review* 563-589.

⁹ *Re Rodenstock GmbH* [2012] BCC 459; *Primacom Holding GmbH v Credit Agricole* [2013] BCC 201; *Re NEF Telecom Co BV* [2014] BCC 417; *Re Vietnam Shipbuilding Industry Group* [2014] BCC 433; *Re Tele Columbus GmbH* [2014] EWHC 249 (Ch). The High Court has also sanctioned a scheme where the financing documents were originally governed by German law but the choice of law and jurisdiction clauses were later amended with the sole aim of establishing English jurisdiction: see *Re Apcoa Parking Holdings GmbH* [2014] BCC 538.

registered as an overseas company under the UK Companies Act 2006 and moved its headquarters to London. In other words, this was an unadulterated forum shop involving a COMI shift. In accordance with the requirements of the Companies Act 2006, Matel asked the High Court to order the convening of creditors' meeting to consider its proposed scheme.¹⁰ The scheme was supported by 97 per cent of the noteholders by number representing around 99 per cent of the notes' value. Having easily exceeded the statutory threshold for creditor approval,¹¹ Matel then sought and obtained an order from Richards J sanctioning the scheme,¹² a process that has some similarity to plan confirmation under Chapter 11 insofar as a scheme does not become legally binding until the court sanctions it.¹³

10 There are two other noteworthy features of the scheme and the English proceedings. First, the UK court will only sanction a scheme if satisfied that it will achieve its practical purpose. In what I now understand to be established practice, Matel's application was teed up with the aim of persuading the court that a US court would likely give effect to the scheme under Chapter 15 of the US Bankruptcy Code. Matel adduced expert evidence of US law suggesting that the US courts would be favourably disposed towards the scheme, even though it modified and replaced rights governed by New York law.¹⁴ Moreover, the UK court also authorized Matel's managing director to act as foreign representative on behalf of the debtor-in-possession for the purposes of the application for recognition and relief in the US.¹⁵ The English court therefore proceeded on the assumption that the scheme would be given practical effect in the US.

11 Second, as well as affecting the rights of Matel and the noteholders *inter se*, the scheme also released the noteholders' rights against a number of Matel subsidiaries that had guaranteed its obligations under the notes. It is well established in UK law that a scheme can release rights against third parties where necessary for the effective implementation of the scheme.¹⁶ Had the guarantors been left exposed, it would have significantly undermined the practical value of the scheme, a point the court acknowledged.¹⁷ Although third party releases are a fairly routine feature of

¹⁰ Section 896, Companies Act 2006.

¹¹ *Ibid.*, section 899(1) (a majority in number representing 75% in value of the noteholders was required).

¹² *Re Magyar Telecom BV* [2014] BCC 448.

¹³ Section 899(3), Companies Act 2006. Compare 11 USC 1141. It follows that a scheme cannot be imposed on dissenting creditors unless the court sanctions it.

¹⁴ *Re Magyar Telecom BV* [2014] BCC 448, at paragraph 19. Although Richards J signalled a strong preference for independent expert evidence, he was prepared to proceed on the basis of evidence from a partner in the New York office of the law firm that represented Matel (at paragraph 27).

¹⁵ Presumably under the courts inherent powers. The statutory power of authorization in the British Model Law, which appears as a schedule to the Cross-Border Insolvency Regulations 2006 SI 2006/1030, applies only to "British insolvency officeholders" defined as the official receiver, the Scottish Accountant in Bankruptcy, and persons acting as insolvency practitioners.

¹⁶ *Re Magyar Telecom BV* [2014] BCC 448, at paragraph 33.

¹⁷ *Idem.*

UK schemes, this was apparently the first time practitioners had tried to export a scheme with this feature to the US.¹⁸

12 Judge Sean H. Lane of the United States Bankruptcy Court for the Southern District of New York was the bankruptcy judge assigned to hear the foreign representative's Chapter 15 petition for recognition and relief. An ad hoc creditors' committee supported the petition and was separately represented at the hearing. There was no opposition and, having heard from counsel for the foreign representative, Judge Lane disposed of the matter by means of a comprehensive bench ruling memorialized in the hearing transcript. It appears that the bench ruling was pre-prepared. Subject to double-checking with counsel that noteholders had received proper due process, the judge had more or less decided how he would proceed in advance of the hearing based on his consideration of the papers filed in support of the petition.

13 The ruling itself walks carefully through a step-by-step analysis of Chapter 15.¹⁹ As regards recognition Judge Lane found that the UK scheme was clearly a "foreign proceeding" within the meaning of section 101(23) of the Bankruptcy Code as it was a clearly proceeding for the "adjustment of debt" under the supervision of a foreign court that was "collective" because it involved all scheme creditors. Furthermore, the proceeding was a "foreign main proceeding" because, although incorporated in the Netherlands, Matel's:

"nerve center and locus of operations have been in the UK since before the commencement of the UK proceedings, and have remained there to date."

14 As the petitioner was a "foreign representative" authorized to act in such capacity by the UK court and the procedural formalities of section 1515 of the Bankruptcy Code were met, recognition of the scheme was straightforward.

15 The automatic stay in section 362 of the Bankruptcy Code applies automatically by virtue of section 1520(a). However, section 362 only applies while a bankruptcy case remains open. Accordingly, the foreign representative was seeking permanent injunctive relief. Judge Lane granted this relief on two grounds:

- (i) as: "any appropriate relief...necessary to effectuate the purpose of [Chapter 15] and to protect the assets of the debtor or the interests of creditors" under section 1521(a)(7); and
- (ii) as "additional assistance" under section 1507 having regard to the enumerated factors in that section derived from former section 304.

¹⁸ According to Matel's lawyers, White & Case, in a client newsletter of January 2014: <<http://bit.ly/1GjPx6P>>.

¹⁹ 11 USC 15.

16 Judge Lane found that permanent injunctive relief was appropriate under 1521(a) on a “likelihood of irreparable harm” standard. The risk that dissident scheme creditors could seek to leverage their position by bringing enforcement proceedings in the US where the UK restructuring commanded substantial creditor support was enough to meet the standard. All creditors interests were “sufficiently protected” by their treatment under the scheme and in the scheme proceedings. The court relied on the well-known *Metcalf* decision²⁰ to expand the injunctive relief so as to prevent creditors from suing the guarantors noting as follows:²¹

“Most of the requested relief is nearly identical to the relief available under Chapter 11 with respect to pre-packaged plans of reorganization. The Court is mindful that the releases afforded the subsidiary grantors [sic] have not been routinely granted in Chapter 11 cases. In the Second Circuit, however, a court may enjoin a creditor from suing a third party if the injunction plays an important part of the debtor’s reorganization plan... In this case, strong grounds exist, under English law, to sanction the scheme, including the release of subsidiary grantors [sic]. That is, the scheme cannot function without such releases. If scheme creditors could simply press their discharge [sic] scheme claims against the subsidiary grantors [sic], which includes the group’s operating companies, then nothing would have been achieved.”

17 In passing, Judge Lane observed that:

“schemes have routinely been recognized as foreign proceedings, including cases in this court.”

18 There was a “long list” of examples²² and he had no difficulty adding Matel to the list. The existence of this list, and the ease with which Matel navigated the Chapter 15 process in New York further reinforces an already positive feedback loop. As the positive noises coming out of the Southern District and the District of Delaware amplify, so will the comfort levels of UK judges asked to sanction future schemes that need to be exported to the US in order to have practical effect. Indeed, there is now a transatlantic ecosystem in which UK “foreign company” schemes of arrangement are thriving. And what is particularly noteworthy for comparative purposes is that this ecosystem has no trouble accommodating UK schemes that modify or discharge New York law governed obligations. Not surprisingly, the use of UK schemes to restructure New York law governed notes is catching on.²³

²⁰ *In re Metcalfe & Mansfield Alternative Investments* 421 BR 685 (Bankr SDNY 2010).

²¹ I have preserved the apparent typographical errors in the transcript. “Grantors” should be “guarantors” and “discharge” should be (I think) “discharged”.

²² The foreign representative’s supporting brief was replete with citations to unreported Southern District of New York and Delaware cases and also included a reference to *In re Board of Directors of Hopewell International Insurance Ltd* 238 BR 25 (Bankr SDNY 1999), an old section 304 case relating to a scheme approved under Bermudian legislation modelled on the English Companies Acts.

²³ *Re Zlomrex International Finance SA* [2014] BCC 440, Bankr SDNY 31 January 2014; *Re New World Resources NV* [2014] EWHC 3143 (Ch), Bankr SDNY 9 September 2014. Matel’s lawyers, White & Case, also represented the debtors in these cases. To use the argot of US sportscasters, they are “on a roll”.

19 It is important to emphasize that creditor support for the scheme was very broad and that the hearings in London and in New York were not contested. Greater challenges may face debtors who seek permanent injunctive relief under Chapter 15, where a significant minority of creditors voices opposition. But even then, the US court would frame its analysis by asking whether the interests of creditors are sufficiently protected (for the purposes of section 1522(a)) and whether, consistent with US notions of comity imported into section 1507 from former section 304, the foreign proceeding will assure creditors of due process and substantively fair treatment.²⁴ Indeed, the idea of comity is pervasive in Chapter 15,²⁵ and, as regards foreign proceedings taking place in a sister common law country, as long as the US court is satisfied that the foreign court has bankruptcy jurisdiction and the foreign proceeding is procedurally fair, the US court will usually defer.²⁶

20 The US has well-known mechanisms for cramming down dissenting creditors that are broader than those in an English scheme.²⁷ In this respect, and having regard to the fact that comity is central to the Chapter 15 analysis, it is perhaps not surprising that US courts are receptive to UK restructuring plans that achieve an outcome commensurable to one that could easily be achieved in a hypothetical Chapter 11 case. But US courts have also shown themselves willing to use comity within Chapter 15 to override US law²⁸ or, relatedly, to give effect to foreign law outcomes that may not have been so readily achieved in a parallel US Chapter 11.²⁹

²⁴ *Metcalfe*, above note 20; *In re Vitro S.A.B. de C.V.* 701 F.3d 1031 (5th Cir 2012).

²⁵ The US enactment of Articles 7 and 9 of the Model Law is particularly striking. Section 1507 empowers the US court to provide “additional assistance...consistent with principles of comity” having regard to the former section 304 factors. Section 1509. Section 1509(b)(3) provides that, on recognition of a foreign proceeding under section 1517, “a court in the United States shall grant comity or cooperation to the foreign representative. On the centrality of comity in Chapter 15 see further *Vitro* (n 24) 1043 (“[c]entral to Chapter 15 is comity...”), 1044 (“[w]ithin the context of Chapter 15...[comity] is raised to a principal objective”), 1045, 1047, 1053 (comity described as a “central tenet” of Chapter 15; reference also to Chapter 15’s “heavy emphasis on comity”); *In re Atlas Shipping A/S* 404 BR 726 (Bankr SDNY 2009), 738 (“[o]nce a case is recognized as a foreign proceeding, chapter 15 specifically contemplates that the court will exercise its discretion consistent with principles of comity”).

²⁶ *Metcalfe*, above note 20, at 698-699.

²⁷ In Chapter 11, it is possible to cram down entire classes who oppose a plan as long as at least one impaired class supports the plan and as long as the plan does not discriminate unfairly and is fair and equitable: 11 USC 1129(a)(10), (b)(1). In a scheme, it is clear from the language of section 899(1), Companies Act 2006 that where there is more than one class of creditors, all classes must vote in favour. In other words, it is possible to cram down class minorities but not whole classes that reject the scheme.

²⁸ *In re Ephedra Products Liability Litigation* 349 BR 333 (Bankr SDNY 2006) (Canadian claims resolution procedure given effect in the US even though it denied US plaintiffs’ constitutional right to a jury trial).

²⁹ *Metcalfe*, above note 20 (Canadian restructuring plan given effect in the US even though it contained comprehensive third party releases that were likely broader than would have been tolerated in a Chapter 11 plan under controlling 2nd Circuit precedent).

Travelling across the Atlantic in the Opposite Direction: *Rubin* and *Singularis*

21 How would a Magyar Telecom style restructuring be received the other way around? In other words, what if a non-US corporate debtor were to shift its COMI to New York, restructure its English law governed notes via a Chapter 11 plan, and then seek to export the effect of the plan to England and Wales under the British version of the Model Law in The Cross-Border Insolvency Regulations 2006?³⁰ The position is not nearly as clear-cut. And this remains true even if we posit a second less radical hypothetical involving a US incorporated entity, having its centre of gravity plainly in the US, that wishes to restructure a tranche of English law governed notes through Chapter 11.

22 Recent developments in the UK case law have crystallized the uncertainty. I refer in particular to *Rubin v Eurofinance SA*; *New Cap Insurance Corpn Ltd v Grant*³¹ and, to a lesser extent, to *Singularis Holdings Limited v PricewaterhouseCoopers*.³² Space does not permit me to go into all the ins and outs of *Rubin* and *Singularis*. Many readers will already be familiar with their gist.³³ Their greatest significance for present purposes lies in their devastating impact on the Privy Council's landmark decision in *Cambridge Gas Transport Corporation v The Official Committee of Unsecured Creditors of Navigator Holdings Plc*.³⁴ I suggest that *Rubin* and *Singularis* can be read as standing for the following interrelated propositions:

- (1) The court has no power under the 2006 Regulations to recognize and enforce foreign insolvency-related orders even where the foreign insolvency proceeding itself qualifies for statutory recognition.
- (2) Relief under the 2006 Regulations is "concerned with procedural matters"³⁵ and is limited to the type of relief that would be available in the case of a domestic insolvency.³⁶

³⁰ SI 2006/1030. Referred to hereinafter as "the 2006 Regulations". The 2006 Regulations apply in Great Britain and so cover Scotland, England and Wales. Separate regulations have been enacted for Northern Ireland that complete the UK-wide coverage.

³¹ [2013] 1 AC 236 (UKSC).

³² [2014] UKPC 36.

³³ *Rubin* has already generated an extensive academic and practitioner literature. For a flavour, see A. Briggs, "In for a Penny, in for a Pound" (2013) 26 *Lloyds Maritime and Commercial Law Quarterly*; W. Trower and C. Cooke, "Enforcement of Foreign Insolvency Judgments: a Missed Opportunity" (2013) 10(1) *International Corporate Rescue* 29; P. Omar, "The Limits of Co-Operation at Common Law" (2013) 10(2) *International Corporate Rescue* 106; K. Handley, "Cambridge Gas Rejected" (2013) 129 *Law Quarterly Review* 144-147; J. Kirshner, "The (False) Conflict Between Due Process Rights and Universalism in Cross-Border Insolvency" (2013) *Company Law Journal* 27-31; I. Fletcher, "Rowing Back From Rubin" (2014) 27(3) *Insolvency Intelligence* 43-47; H. Anderson, "Six of the Best" (2014) *Journal of Business Law* 194-206, at 202-204, 206.

³⁴ [2007] 1 AC 508.

³⁵ *Rubin*, above note 31, at 143 (Lord Collins).

³⁶ *Ibid.*, at 28 (Lord Collins) further reinforced as regards the 2006 Regulations by *Fibria Celulose S/A v Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch), [2014] Bus LR 1041, at paragraphs 77-108.

- (3) Foreign insolvency-related orders only qualify for recognition and enforcement if the foreign court was a court of competent jurisdiction under the traditional English common law rules of *in rem* and *in personam* jurisdiction applicable to foreign judgments. There is no bankruptcy exception to the traditional rules at common law. Special rules of international jurisdiction for insolvency-related orders require legislative intervention. Modified universalism does not provide a basis for “bankruptcy exceptionalism” at common law.³⁷
- (4) As the order giving effect to the US Chapter 11 plan in *Cambridge Gas* affected (i) property (shares) that, on ordinary conflicts principles, were situated in the Isle of Man, and (ii) parties who had not submitted to the jurisdiction of the US court, the US court had neither *in rem* nor *in personam* jurisdiction under the traditional rules.³⁸ The Isle of Man court therefore had no jurisdictional basis on which to exercise the common law power of judicial assistance and, to that extent, *Cambridge Gas* was wrongly decided.³⁹
- (5) A creditor who files a proof of debt in a foreign insolvency proceeding can be taken as having submitted to the jurisdiction of the foreign court responsible for the supervision of that proceeding merely by the act of filing the proof. The court therefore has power at common law to recognize and enforce insolvency-related orders made by the foreign court against that creditor on the basis that the foreign court has *in personam* jurisdiction.⁴⁰
- (6) There is a common law power to assist a foreign insolvency representative based on the principle of modified universalism.⁴¹ This is a power “to assist foreign winding up proceedings so far as [the court] possibly can”⁴² which “requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company’s assets are distributed to its creditors under a single system of distribution.”⁴³ However, the common law power appears to be limited in at least the following ways:
 - a. It only arises where the foreign court has bankruptcy jurisdiction based on domicile or place of incorporation.⁴⁴
 - b. It is not clear that it arises where the debtor is in a foreign reorganization or debt adjustment proceedings as opposed to a foreign bankruptcy or winding-up proceeding.
 - c. The UK court cannot grant relief under the common law power simply because there would be a statutory power to make an equivalent order in a domestic insolvency.⁴⁵ To the extent that *Cambridge Gas* suggested

³⁷ *Rubin*, above note 31, at 91, 106-132.

³⁸ *Ibid.*, at 103, 132.

³⁹ *Ibid.* See also *Singularis*, above note 32, at 89 (Lord Collins).

⁴⁰ *Rubin*, above note 31, at 156-167. *Rubin* apparently widened the traditional *in personam* basis of jurisdiction to a degree that some UK private international lawyers regard as controversial because it extends to cases in which the creditor’s proof has neither been admitted nor paid: see e.g. Briggs, above note 33. The Privy Council has subsequently confirmed that a creditor who files a proof submits to the *in personam* jurisdiction of the foreign court regardless of whether the proof is subsequently admitted or a dividend paid: *Stichting Shell Pensioenfonds v Krys* [2014] UKPC 41, [27]-[32].

⁴¹ *Singularis*, above note 32, at 19, 23 (Lord Sumption) and at 112 (Lord Clarke).

⁴² *Ibid.*, at 15 (Lord Sumption).

⁴³ *Ibid.*, at 16 (citing Lord Hoffmann’s opinion in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 at 30, 132-135 (Lord Mance); *Stichting*, above note 40 (also citing Lord Hoffmann’s opinion in *HIH*). For further acknowledgement that the principle of modified universalism is part of English law see *In re Tambrook Jersey Ltd* [2014] Ch 252, at 18 (Davis LJ).

⁴⁴ *Rubin*, above note 31, at 11, 13, 31, 46, 51, 121; *Singularis*, above note 32, at 10, 12, 23 (Lord Sumption), at 58 (Lord Collins), at 112 (Lord Clarke) and at 132 (Lord Mance); *Stichting*, above note 40, at 24 (Lord Sumption and Lord Toulson).

⁴⁵ *Singularis*, above note 32, at 18 (Lord Sumption) and at 134 (Lord Mance).

otherwise, it was wrong.⁴⁶ Territorially limited statutory powers applicable in domestic insolvencies cannot be applied indirectly “by analogy” at common law in international insolvencies to which those statutory powers do not directly apply “as if” the foreign insolvency were a domestic insolvency. Similarly, the UK court cannot use the common law power to dispense with UK statutory requirements unless UK law provides a basis for dispensing with those requirements. Accordingly, the UK court cannot apply UK statutory procedures “by analogy” at common law to achieve a result that could have been achieved under the foreign insolvency law.⁴⁷ Those procedures (insofar as they are capable of applying to the foreign debtor) must be followed so as to replicate the foreign law outcome in domestic law. To allow judges either (i) to extend territorially limited local statutes to foreign parties or (ii) to disapply or disregard extraterritorially applicable statutory requirements would amount to impermissible judicial legislation.⁴⁸

- d. The UK court cannot grant assistance under domestic law that would give the foreign representative greater rights than would be available under the foreign insolvency law.⁴⁹
- e. In granting assistance, the UK court can only ever act within the limits of its own statutory and common law powers.⁵⁰

23 Let me return to the two hypotheticals I raised in paragraph 21. On the law as it stands, would the UK court simply give effect to the US restructuring plan in these cases and grant a stay that would prevent holdout creditors from seeking to enforce English law governed rights in the UK?

24 In the case of the non-US debtor that does a COMI shift, assistance at common law is a non-starter. The recent case law does not depart from the view that a corporate entity can only properly be wound up in the country of its incorporation.⁵¹

⁴⁶ *Ibid.*, at 18 (Lord Sumption), at 83 (Lord Collins) and at 134 (Lord Mance).

⁴⁷ *Ibid.*, at 38, 83, 91-93 (Lord Collins).

⁴⁸ *Ibid.*, at 64, 82-83, 107-108 (Lord Collins).

⁴⁹ *Ibid.*, at 29 (Lord Sumption), at 33 (Lord Collins), at 14 (Lord Clarke), at 117-118 (Lord Mance) and at 51 (Lord Neuberger) (by implication). This limitation was outcome determinative in *Singularis* because the Cayman liquidators were seeking assistance under Bermudan law that would not have been available to them under Cayman law.

⁵⁰ *Ibid.*, at 19 (Lord Sumption), at 38, 51-60 (Lord Collins), at 112-113 (Lord Clarke) and at 132-134 (Lord Mance). Even Lord Hoffmann, whose *Cambridge Gas* and *HHH* opinions pushed the envelope of judicial assistance at common law, doubted whether a UK court could directly apply provisions of foreign insolvency law as opposed to fashioning assistance using provisions of domestic insolvency law: *Cambridge Gas*, above note 34, at 22. In *Singularis*, a majority of the Judicial Committee of the Privy Council held that Bermudan courts have a highly circumscribed common law power, deriving by analogy from other extant common law powers, to compel parties to produce information that will assist insolvency officeholders in discharging their functions. It followed that this domestic law power was available (at least in theory) to assist foreign liquidators in identifying and locating assets.

⁵¹ Although the point was not taken in *Rubin* or *Singularis* (no doubt because there were bigger fish to fry), the Chapter 11 debtor in *Cambridge Gas*, above note 34, was a Manx entity with its principal place of business in Switzerland. If *Cambridge Gas* had been a Model Law case, there is cause to doubt whether the debtor would have been eligible for recognition on the basis of either COMI or establishment.

25 Otherwise, to the extent that the UK court would characterize a US confirmation order as a “judgment”, the answer appears to be:

“only if, the US court had *in personam* jurisdiction over the holdouts as a matter of UK private international law.”

26 This answer is the same whether the foreign representative seeks relief under the 2006 Regulations or under the common law of judicial assistance because, either way, *Rubin* privileges the common law rules on the recognition and enforcement of judgments. So where there are holdouts who have no US presence, the foreign representative would need some basis for arguing that the holdouts had submitted to the US bankruptcy court’s jurisdiction either by filing a proof of claim or by participating directly in some cognizable way in the US bankruptcy proceedings. How far the UK courts would be prepared to expand the concept of “submission” to deal efficiently with such holdouts while doing so in a manner consistent with the basic structure of the common law rules on recognition and enforcement of judgments is uncertain.⁵²

27 But let us assume for the sake of argument that the UK court (i) would not necessarily always classify a foreign restructuring plan as a “judgment” and (ii) would at least have jurisdiction at common law to assist the US-incorporated Chapter 11 debtor. Even then the foreign representative would face two formidable obstacles to relief under the common law of judicial assistance:

- a. The inability of the UK court on *Singularis* logic to apply the UK scheme of arrangement or company voluntary arrangement procedures “by analogy” to achieve the same result in English law as can be achieved in the US under a confirmed Chapter 11 plan.
- b. The persistence of the rule in *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* [(1890) 25 QBD 390] that contractual obligations are only effectively discharged in England under the law applicable to the contract.⁵³ Under this rule a US bankruptcy discharge has no effect, as a matter of English law, on an English law governed contractual obligation.⁵⁴ The rationale of the rule is that the parties to a contract should not be discharged from their obligations by a law to which they did not agree to be bound.⁵⁵ The rule creates a bankruptcy safe harbour and is easy to criticize.⁵⁶ As insolvency

⁵² In *Cambridge Gas*, above note 34, at 10, Lord Hoffmann expressed surprise at the Manx courts’ finding that Cambridge Gas had not submitted to the jurisdiction of the New York court. Indeed, the case would have been much less controversial had it been litigated and decided on the footing that the Chapter 11 proceedings were binding on Cambridge Gas *in personam*. For possible lines of argument, see Handley above note 33.

⁵³ (1890) LR 25 QBD 399 (CA). For modern applications that confirm that the rule is alive and well see *Wight v Eckhardt GmbH* [2004] 1 AC 147 (PC); *Global Distressed Alpha Fund 1 Ltd Partnership v PT Bakrie Investindo* [2011] 1 WLR 2038; *Dubai Islamic Bank PJSC v PSI Energy Holding Company BSC* [2013] EWHC 3186 (Comm).

⁵⁴ The rule is not entirely parochial. An English court will apply it to contract obligations expressly governed by a foreign law: see e.g., *Wight*, above note 53, at 11, 15.

⁵⁵ *Gibbs*, at 406 (Lord Esher); *Bakrie*, above note 53, at 12.

law is designed to achieve a collective resolution of creditors' claims binding on all, the logical choice of law to govern the international effects of a bankruptcy discharge would be the *lex fori concursus*, assuming that the relevant country is an appropriate bankruptcy forum from an international jurisdictional perspective.⁵⁷ Nevertheless, the *Gibbs* rule reflects a deference to party autonomy and to transaction planning that remains a powerful feature of UK law – a feature evident also in the UK's tolerance of various species of *ipso facto* clause⁵⁸ that are neutered by bankruptcy law in other jurisdictions (notably the US).

28 So far then the road to common law assistance for both a non-US and a US Chapter 11 debtor appears to be blocked. The non-US debtor does not qualify for assistance because it is not in an insolvency proceeding in its place of incorporation. The US debtor qualifies but the UK court will not grant assistance that is inconsistent with, or disregards, UK law.

29 Is the position any more favourable under the 2006 Regulations? You could be forgiven for thinking that by enacting the Model Law, the UK has embraced a commitment to an international norm of cooperation that should be capable of overriding domestic law. *A fortiori*, our courts are directed by Article 8 to interpret the British version of the Model Law having regard to its international origin and to the need to promote uniformity in its application. That, you might also think, provides scope for UK courts to use modified universalism to move beyond the confines of the common law power and to break the shackles of the *Gibbs* rule. There is a perfectly respectable argument that the statutory power in Article 21(1)(a)(1) of the British version of the Model Law to:

“grant any appropriate relief, including staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's...obligations or liabilities...”

should enable the UK courts to issue a permanent stay in order to prevent holdout creditors from undermining Chapter 11 proceedings. However, there are plenty of reasons to think that the argument would not succeed.

30 First, the recent trajectory of UK jurisprudence serves to remind us that the Model Law, while an important step forward, is a limited endeavour. The *Rubin*

⁵⁶ See *Bakrie*, above note 53, at 14 (citing Fletcher's own forceful criticism of the rule); G. McCormack, “Universalism in Insolvency Proceedings and the Common Law” (2012) 32 *Oxford Journal of Legal Studies* 325-347, at 334-336; A. Walters and P. Moffatt, “Recognising the Effects of Foreign Insolvency Proceedings” (2011) 32 *Company Lawyer* 161-162; F. Toube, “Isolationism Revived” (2011) 24(5) *Insolvency Intelligence* 77-79. On the wider problem of choice of law in the international insolvency context of which the *Gibbs* rule is symptomatic see J. L. Westbrook, “Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum” (1991) 65 *American Bankruptcy Law Journal* 457-490.

⁵⁷ US courts have extended comity to foreign bankruptcy discharges and declined to adjudicate claims that ought properly to be dealt with in the foreign proceeding: see e.g., *Barclays Bank Plc v Kemsley* 992 NYS 2d 602 (2014) (New York Supreme Court) and cases therein cited.

⁵⁸ *Fibria*, above note 36; *Belmont Park Investments Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 AC 383 (UKSC).

court's theory of the British version of the Model Law is that it enables the UK courts to grant relief that is available under existing domestic law.⁵⁹ The 2006 Regulations may broaden the scope for recognition but, on this theory, the UK court will not use the powers therein simply to extend the foreign law effects of the foreign proceeding to the UK. Indeed, if those foreign law effects are inconsistent with settled English law, the UK court will likely deny relief.⁶⁰ The Model Law contains no choice of law rules and, according to the Guide to Enactment, one of the Model Law's underlying principles is that recognition does not directly import the consequences of the foreign law into the insolvency system of the enacting state.⁶¹ Support is readily available for the view that domestic limits placed on the relief available under the 2006 Regulations are entirely consistent with limitations inherent in the Model Law itself.⁶²

31 Second, as with any country's enacted version of the Model Law, the 2006 Regulations have to be accommodated within the domestic legal system. The Model Law is a transplant and local enactment is merely the first stage of its reception into the host legal system. The point is so far from being novel as to be trite.⁶³ In the UK system, the British version of the Model Law is forced to cohabit and interact with pre-existing law, including the various other pre-existing regimes for international cooperation in cross-border insolvency cases. This does not rule out the possibility of successful translation.⁶⁴ However, there may well be different visions of what "success" entails and there are embedded features of the UK's current legal landscape that are reinforcing the Model Law's inherent limitations. As a consequence, and to mix metaphors, the software (the Model Law) is working differently in the UK's operating system than it currently does in the US.

32 One such feature of the UK's current legal landscape is a strong judicial preference for the specific over the general and for rules over standards. This manifests itself in various ways. Sweeping general language such as "any appropriate relief" in the British Model Law has proved insufficient to oust dyed-in-the-wool common law rules. This is the thrust of *Rubin*. But it reflects the wider canon of statutory construction that Parliament is taken to enact legislation with full

⁵⁹ *Rubin*, above note 31, at 28 and 143 (Lord Collins).

⁶⁰ *Fibria*, above note 36, at 77-108.

⁶¹ United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*, (2014, United Nations, Vienna), at 83 (paragraph 178) and 89 (paragraph 194).

⁶² *Ibid.*, and see *Fibria*, above note 36, at 88-90, 107. At the time of writing, an appeal was pending in the *Fibria* case. For reasons expounded further in the text, the present author will be surprised if the appellants succeed in persuading the higher courts that the Model Law permits the application of Korean law in a manner that would be inconsistent with English law.

⁶³ There is, of course, an extensive comparative law literature on legal transplantation of foreign law, much of it a reaction to A. Watson, *Legal Transplants: An Approach to Comparative Law* (1974, Scottish Academic Press, Edinburgh).

⁶⁴ See e.g., E. Orucu, "Law as Transposition" (2002) 51 *International and Comparative Law Quarterly* 205-223.

knowledge of the common law.⁶⁵ So, to extend the metaphor, general discretionary language has so far not been effective to “uninstall” rules that are long embedded within the system.

33 At the same time, our current crop of senior judges has shown no appetite for rewriting or reinvigorating the common law in environments where statute has extensively encroached. This is *Rubin* again. It is also *HIH*, a case that has attracted interest internationally principally because of Lord Hoffmann’s minority opinion,⁶⁶ but which actually decides that the UK court could remit assets to Australia for distribution in accordance with Australian priorities because Parliament (via section 426 of the Insolvency Act 1986) clearly sanctioned the outcome.⁶⁷ Meanwhile, in *Singularis* their Lordships were divided only as to the degree of caution (mildly cautious or very cautious) that the judiciary ought to exercise in developing the common law.⁶⁸ Indeed, *Singularis* provides a case study of judicial discipline in the face of felt constraint.

34 In this climate, it is far from certain that our courts would be prepared to grant a permanent stay under Article 21(1)(a) of the British Model Law when to do so would result in a functional discharge and thus produce an outcome contrary to the *Gibbs* choice of law rule. The first obstacle is the theory that the UK courts grant relief under domestic law rather than extend the effects of foreign law. The second obstacle is the lack (in contrast to other cross-border insolvency legislation on the books) of any choice of law framework in the 2006 Regulations that expressly alters English choice of law rules.⁶⁹

35 Even if we were to assume for a moment that the 2006 Regulations empower the courts to assist the foreign representative by doing whatever it can do in a domestic insolvency (as per Lord Hoffmann’s now discredited view from *Cambridge Gas* as to the scope of the UK courts’ inherent powers), it is doubtful whether a court would apply an English discharge “by analogy” with what would happen were a parallel proceeding to be initiated in the UK. In the absence of clear language in the 2006 Regulations permitting the blanket relaxation of domestic statutory

⁶⁵ See e.g., *Belmont*, above note 58, at 102 (Lord Collins) and at 150 (Lord Mance).

⁶⁶ See e.g., a symposium edition of the Texas International Law Journal discussing the role of national priority rules in cross-border insolvency introduced by Professor Westbrook at (2011) 46 Texas International Law Journal 437.

⁶⁷ *HIH*, above note 43, at 37, 44 (Lord Phillips), at 59-62 (Lord Scott) and at 66, 69, 74-77 (Lord Neuberger).

⁶⁸ *Singularis*, above note 32, at 19, 25 (Lord Sumption), at 65-83 (Lord Collins), at 109-113 (Lord Clarke), at 130-135 (Lord Mance) and at 149-157 (Lord Neuberger).

⁶⁹ Readers might object that the British Model Law does change English choice of law rules in some respects. For example, Article 13(3), which prevents a creditor’s claim from being challenged solely on the grounds that it is a claim by a foreign tax or social security authority, clearly modifies the rule in *Government of India v. Taylor* [1955] AC 491. A response is that the objection proves too much and that, had Parliament intended to abrogate *Gibbs*, it would have chosen to do so in language equally as plain as that found in Article 13(3).

procedures, UK judges may well feel unable to take short cuts. To be sure, the 2006 Regulations do grant foreign representatives access to provisions of domestic insolvency law, such as transaction avoidance provisions, without requiring them to initiate a domestic insolvency proceedings. However, it is plausible to assume that the courts will be cautious when asked to generalize from particular provisions of the Regulations, especially as general relief “by analogy” would be a device for working around *Gibbs*.

36 Furthermore, there are at least two reasons why our courts may not be prepared to overrule *Gibbs* as a precursor to granting Article 21 relief in the absence of further statutory intervention. A narrow reason is UK commercial law’s cherished commitment to party autonomy, freedom of contract, and transactional certainty.⁷⁰ A broader reason is that the effect of a foreign discharge is merely one choice of law issue. It is therefore plausible that courts will say that the adoption of a general *lex fori concursus* rule is properly left to Parliament as part of a systematic consideration of choice of law rules.

37 For present purposes, I am neutral as to the merits (positive or normative) of any of the arguments I have articulated.⁷¹ My point is a narrow one. The arguments are sufficiently plausible that it is questionable whether an English lawyer could safely advise a US Chapter 11 debtor to proceed without initiating a parallel English scheme or company voluntary arrangement as a mechanism for modifying or discharging English law governed rights. Moreover, UK practitioners have no great incentive to lobby for change in this climate of uncertainty given the fees that can be generated off the back of what is perfectly proper and prudent advice.

Conclusion

38 As things stand, there can be little doubt that the UK’s and US’s treatment of each other’s restructuring plans is asymmetric. The US version of the Model Law is a single legislative gateway to assistance that embodies a statutory commitment to comity as an animating principle. If the foreign court has jurisdiction, it appears that the US court will grant comity to a foreign proceeding even if the effects of that proceeding under foreign law are effects that could not be achieved domestically under US law. The limits on comity are the safeguards in Chapter 15 itself – the narrow basis for non-recognition on public policy grounds in section 1506 and the “sufficient protection” caveat in section 1522. As long as US interests are guaranteed due process within the foreign proceeding, the US court will give the green light. Indeed, as Judge Lane’s bench ruling in *Matel* suggests, US courts

⁷⁰ A central theme of *Belmont*, above note 58.

⁷¹ *Fibria*, above note 36, is the latest test case. If the administrators succeed on appeal in that case, and the courts develop a theory of the 2006 Regulations as embodying a more potent version of modified universalism than does the common law, the landscape could change.

are happy to accord comity to UK standards of due process without any fuss. There appears to be a broad continuity between practice under Chapter 15 and practice under prior US law.⁷²

39 In the UK, the British Model Law is a latecomer. It is not a single gateway. It is the latest addition to a so-called “menu” of options available to foreign representatives that is, in truth, a complex patchwork of overlapping statute and common law. It coexists with the European Insolvency Regulation and with older modes of assistance available under the common law and to courts in countries that receive “favoured nation” treatment via section 426 of the Insolvency Act 1986. These regimes do not all apply in all cases. Nor are they necessarily mutually exclusive. A US bankruptcy trustee may request assistance at common law and/or under the 2006 Regulations, while an Australian liquidator has the common law, section 426 and/or the 2006 Regulations at her disposal.⁷³ How these various regimes are supposed to interact is a live issue. And even if one (or more) does not apply in a given case, judges are likely to look at the body of law as a whole to elucidate the workings of the individual parts.

40 So far the reception of the Model Law into UK law appears to have been relatively weak. Comity is not writ large in the 2006 Regulations. In *Rubin* comity was the proverbial dog that simply did not bark.⁷⁴ The 2006 Regulations also represent a kind of continuity. Or rather, they have not been a powerful enough vehicle for disruption and discontinuity within the pre-existing system. This is in part a reflection of the Model Law’s self-proclaimed limitations – it is a Model Law and not a treaty after all. But it is also a reflection of local conditions and, in the hands of cautious judges who are (quite reasonably) concerned with domestic legal constraints on their room for manoeuvre, the Model Law has not quite found its feet. It is very striking that the common law power of judicial assistance was centre stage in *Rubin* with the Model Law making only a cameo appearance. This was a consequence of the first instance judge more or less assuming that he had no power to act under the Model Law in a manner that was inconsistent with the common law

⁷² See e.g., *Canada Southern Railway Co. v Gebhard* 109 US 527 (1883) (US Supreme Court); J. Westbrook, “Chapter 15 and Discharge” (2005) 13 *American Bankruptcy Law Review* 503-520.

⁷³ The legislative history clearly indicates that section 426 was to remain available on current terms and that foreign representatives in designated countries or territories would therefore be able to seek relief under section 426 and/or the 2006 Regulations: Insolvency Service, *Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain* (August 2005), at paragraphs 40-43; Insolvency Service, *Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain: Summary of Responses and Government Reply* (March 2006), at paragraphs 66-76.

⁷⁴ In this respect, Lord Collins’s treatment of *Metcalfe*, above note 20, at 144 in *Rubin* is misleading. He dismisses the salience of the decision on the ground that the US Bankruptcy Court “applied the normal rules in non-bankruptcy cases for enforcement of foreign judgments in the United States.” *Metcalfe*, as any US lawyer would tell you, is simply an application of the principle of comity enshrined within Chapter 15 (see above note 25). The question that ought to have been raised on a fair reading of *Metcalfe* is: “as the US recognizes and enforces foreign insolvency-related judgments under Chapter 15, can we not do the same under the 2006 Regulations?”

rules on the recognition and enforcement of judgments. The Model Law was sidelined in *Rubin* from the outset.⁷⁵

41 Similarly, our judges proclaim allegiance to a principle of modified universalism but have not as yet worked out what that means in the Model Law context. In the system as a whole the principle takes on various guises. In its European Insolvency Regulation guise, the principle is relatively aggressive. There is a clear choice of law framework and the regime is underpinned by a powerful treaty-driven *grundnorm*. We ceded sovereignty. We must apply EU law. In its section 426 guise, it is also fairly aggressive. In *HIH* the court deferred to the *lex fori concursus*⁷⁶ because it felt able to do so by virtue of statutory mandate. As the British Model Law lacks comparable features, it is perhaps not surprising that its reception is weaker and its version of modified universalism less potent.

42 There is a good argument that Article 8 provides some impetus for judges to push through local barriers. However, it is an interpretive principle that, rightly or wrongly, is easily glossed. In *Fibria Celulose S/A v Pan Ocean Co Ltd*⁷⁷ few could argue that Morgan J failed to “have regard” to the Model Law’s international origin even though he disagreed with the view of the US Court of Appeals for the Fifth Circuit⁷⁸ that a court acting under Article 21 can grant relief under foreign law. He would say that he did his best having regard to his duty to uphold the law. Set alongside clear statutory choice of law rules in other parts of the UK’s statutory “menu” that dictate or permit particular outcomes, Article 8 looks somewhat aspirational and hortatory.⁷⁹

43 Some divergence in the implementation and reception of a weak harmonizing instrument like the Model Law is inevitable. It is part and parcel of the whole experiment. The US has taken the lead on issues such as reception of foreign law. But other countries are not strictly bound to follow. And, in the US too, issues have arisen concerning the interaction of Chapter 15 with pre-existing law in the Bankruptcy Code of which it forms part. This interaction is producing some idiosyncratic results attributable mainly to local drafting problems.⁸⁰

⁷⁵ *Rubin v Eurofinance SA* [2009] BPIR 1478, at 50-73.

⁷⁶ Or, at the very least, to Australian choice of law rules: see E. Janger, “Reciprocal Comity” (2011) 46 *Texas International Law Journal* 441-448, at 453.

⁷⁷ *Fibria*, above note 36.

⁷⁸ *In re Condor Insurance Ltd* 601 F 3d 319 (2010).

⁷⁹ And possibly, to some eyes, a vehicle for the export of US norms bearing in mind that the US is unquestionably the largest producer of Model Law jurisprudence. The fact that the US has never acquired “favoured nation” status under section 426 is perhaps a silent commentary on UK resistance to certain aspects of US legal culture.

⁸⁰ See e.g., *Drawbridge Special Opportunities Fund LP v Barnet* 737 F 3d 238 (2nd Cir 2013) (foreign entity seeking recognition under Chapter 15 must have a residence, domicile, place of business, or assets in the US under section 109(a) of the Bankruptcy Code as well as satisfying the requirements for recognition based on COMI or establishment); *In re Fairfield Sentry Limited, Krys v Farnum Place, LLC* 768 F 3d 239 (2nd Cir 2014) (BVI court’s approval of sale of US-law governed claim in BVI

44 If there is a lesson, it is that policymakers need to be very clear about their goals in implementing the Model Law in terms of the desired effect on outcomes in concrete cases and, having articulated those goals, to pay very close attention to issues of local reception and local systemic “fit”. If, as a matter of policy, we want to promote outcome x in specific instance y , a comprehensive review of local law may sometimes be necessary to ensure that the transplant will do the job. More aggressive harmonization at the UNCITRAL level may derail the whole Model Law project (countries will be less inclined to sign up).⁸¹ Convergence therefore likely depends on a saleable shared vision of the Model Law as it currently stands and effective local implementation of that vision.

45 The UK faces an image problem. Do we want to be perceived as a sanctuary for scammers (*Rubin*) and a haven for holdouts? Do we want to be perceived as offering (continuing to offer?) a distinctly third class and more expensive service to foreign representatives from outside the EU and from countries that are not members of the section 426 club? Is there any policy reason why we should not at least give our judges a clear section 426-style mandate in the 2006 Regulations to provide assistance in accordance with foreign law at their discretion in appropriate cases? Or at least in cases originating from countries where we can be confident of reciprocal treatment? Perhaps we do not care too much about our image. But, given the generous assistance our restructuring industry receives from US bankruptcy courts, US judges and policymakers may well be justified in concluding that our lack of bilateral reciprocity “just isn’t cricket”.

liquidation was not entitled to comity and was subject to review and approval under domestic US bankruptcy law).

⁸¹ Though Working Group V at UNCITRAL now has recognition and enforcement of foreign insolvency-derived judgments squarely on its agenda: see United Nations, General Assembly, UNCITRAL Working Group V, *Insolvency Law, Recognition and enforcement of foreign insolvency-derived judgements, Note by the Secretariat*, A/CN.9/WG.V/WP.126 (6 October 2014), available at: <<http://bit.ly/1Fp0SW7>>.