Article

South African Creditors May Wield the *Gibbs* Rule to Confront an Italian Pre-Insolvency Statutory Restructuring Composition

Alastair Smith
Research Associate,
Department of Mercantile Law,
University of Pretoria
alastair.smith@up.ac.za

André Boraine
https://orcid.org/0000-0003-4115-4287
Professor,
Department of Mercantile Law,
University of Pretoria
andre.boraine@up.ac.za

Abstract

This article summarises the judgment in *Cooperativa Muratori & Cementisti & others v Companies and Intellectual Property Commission & others*, in which the Supreme Court of Appeal confirmed the statutory denial of business rescue to external companies and refused to recognise and apply the Italian restructuring process in South Africa. The article then discusses the private international law (conflict of laws) on the discharge of a contract by a foreign sequestration or liquidation, and the statutory novation of the contract by a foreign pre-insolvency composition or restructuring. Central to the debate over characterisation and choice of law (between contract or insolvency) is the effect of the *Gibbs* rule, a long-standing feature of the law of the United Kingdom, South Africa, and several other countries, but increasingly controversial because of contemporary ideas of cross-border insolvency law. The article argues for an approach based on contract and company law rather than insolvency law, because pre-insolvency proceedings, by definition, do not involve a winding-up order or a liquidation process, and, if timely and successful, prevent both. The South African private international law on the recognition of a foreign pre-insolvency statutory composition or restructuring as a foreign judgment may thus need to be reconsidered.

Keywords: private international law (conflict of laws); discharge of contract by liquidation; statutory novation in pre-insolvency; composition/restructuring; recognition of final order as foreign judgment; the *Gibbs* rule

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Prelude: The Search for a Debt Restructuring Plan to Bind Creditors

Orientating the Reader with a Snapshot of the Case to be Discussed

In *Cooperativa Muratori & Cementisti & others v Companies and Intellectual Property Commission & others*[1] (*CMC SCA*), the Supreme Court of Appeal (SCA) heard a rare application to enforce a foreign pre-insolvency statutory composition with creditors or restructuring in South Africa. We refer to this Italian process as the composition. This foreign element rendered South African private international law relevant to this case.

To orientate readers, we first sketch the outlines of the field of law, explain some of the language, and summarise the basics of insolvency and corporate rescue in South Africa and the basics of one type of corporate rescue in the relevant foreign legal system, the Italian.

Debt Recovery, Rehabilitation, Winding-up, and Rescue[2]

This is a story about debt. Domestic South African law allows creditors to recover debt through the ordinary civil process of taking judgment against the debtor and levying execution on the debtor's property. Contrasted with these individual initiatives is collective debt collection through the law of insolvency and winding-up. Should the debtor's liabilities exceed the assets, or the company be unable to pay its debts, an appropriate sequestration or liquidation order is granted by the court. The appointed trustee or liquidator runs the collective process, preventing debt recovery by individual creditors. As the estate representative, the trustee or liquidator enforces debts owed to the debtor, collects the debtor's property by all available means, sells it, and uses the proceeds to pay proved creditors in the order of preference of their claims. When the insolvency process ends with the human debtor's rehabilitation, he receives a discharge of debts, sheds the disabilities of sequestration, and rejoins society on equal terms. Juristic persons such as companies enjoy no such renaissance after the liquidation process but are deregistered and thus vanish from the scene.

To avoid this descent into oblivion, companies with alert directors sensing financial troubles proactively explore statutory possibilities such as business rescue or a compromise with their creditors. Business rescue was introduced in chapter 6 of the Companies Act 71 of 2008 (the Companies Act) and enables the board of directors, by passing a resolution, to put the financially distressed company into business rescue proceedings and appoint a business rescue practitioner to run the rescue process. The aims of business rescue include developing and implementing a plan to rescue the

1 (1325/2019) [2020] ZASCA 151 (20 November 2020), 2021 (3) SA 393 (SCA).

2 For an introduction to the relevant South African law, see Robert Sharrock, Kathleen van der Linde and Alastair Smith, *Hockly's Insolvency Law* (9th edn, Juta 2012) passim and CJ Nagel and B Kuschke (eds), *Commercial Law* (6th edn, LexisNexis 2019), especially chapters 33–35 and their selected bibliographies.

company by restructuring[3] its affairs, business, property, debt and other liabilities, and equity so as to maximise the likelihood of its continuing on a solvent basis or, if this is impossible, to achieve a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company. The commencement of business rescue affects many aspects of the company's affairs and operations. So, for example, it automatically triggers a general moratorium on legal proceedings against the company. The business rescue practitioner displaces the management but may call upon their assistance in running the company. Specified rights are accorded to employees, creditors, and securities holders. Meetings and committees are provided for, and specifications for financing during the process. Drafting, passing, and implementing the business rescue plan is the goal of the process.

The overshadowed twin of business rescue—the compromise with creditors—ends chapter 6 in a single section, 155. This statutory compromise[4] is for companies not in business rescue. It enables the board of directors or the liquidator of the company to propose an arrangement or compromise of the company's financial affairs, which is circulated to all its creditors along with a notice of the meeting to consider it. It must include all information reasonably required to help creditors decide whether to accept or reject the proposal: Part A, the background information; part B, the proposals; part C, assumptions and conditions; and it must also feature a projected balance sheet for the next three years. A majority, at least seventy-five per cent in value of the creditors or class of creditors present and voting at the meeting, must approve the compromise for it to pass. Then it goes to the court to be sanctioned if it seems just and equitable. Once sanctioned, it binds all creditors or creditors of the relevant class.

Companies wracked by liquidation at home obviously do not choose that moment to expand overseas in search of foreign markets. The decision to expand overseas while beset by disaster would be regarded as foolish or suspect. In order to discuss the possibility of expansion abroad, we must therefore go back in time, to the happier stage of the company's life cycle at which the company is flourishing in its home jurisdiction and is looking to extend its reach into foreign markets.

The Company's Expansion from its Home Country into Foreign Countries

A company boldly venturing beyond its home borders and setting up offices and operations in foreign countries to gain access to markets abroad may have these foreign

3 For a discussion of restructuring from an English perspective, see Simon Beale and Paul Keddie, *Insolvency and Restructuring Manual* (3rd edn, Bloomsbury Publishing Plc 2018) paras 1.1.2, 1.6, and chapter 10. And on various aspects of the field, see Paul J Omar and Jennifer LL Gant (eds), *Research Handbook on Corporate Restructuring* (Edward Elgar Publishing 2021).

4 Compromise at common law also remains possible, but, being based on contract, requires unanimity by everyone, debtor and creditors. Not to be forgotten is Josae Maraia Garrido, *Out-of-Court Debt Restructuring* (World Bank Publications 2012).

entities either as subsidiaries in a corporate group or as local branches registered as external companies in the foreign countries.

Cross-border Insolvency Proceedings to Gather Assets

The varied fortunes of the home (parent) company and its foreign daughter companies may see the parent and daughters thrive or fail, independently or together, in their respective countries. It is conceivable that the estate representatives (the liquidators) of the failed foreign entity (whether parent or daughter) may visit a country in search of the company's property to collect and sell that property and take back the remaining proceeds of it to be included in the foreign liquidation proceedings. Alternatively, going in the opposite direction, the estate representatives of the failed local entity may go abroad to find and realise its foreign property with the similar aim of returning with the proceeds to boost the estate assets available for paying local creditors of the entity. The common theme is representatives (liquidators) of the debtor company searching for assets and money to pay debts.

Cross-border Proceedings to Enforce a Rescue Process and Agreement

Now pivot and imagine the parent company in financial trouble at home, trying to stop its slide into liquidation. It enters collective statutory proceedings to trigger a stoppage of debt collection. In this breathing space (a moratorium) it negotiates with its creditors to reach an agreement that may take various forms with various terms. One outcome may be that the company's debt is restructured and the company survives in a more modest form to continue trading after emerging from its rescue process.

An important phase of this rescue process is for the rescue representatives to visit each of the foreign countries in which the parent company has daughters and convince local creditors there to abide by the rescue of the parent so that the daughter may continue trading in the relevant foreign country. The foreign (parent's) rescue representatives and the daughter's directors and managers all seek local certainty and a fresh start. This time the debtor's representatives seek local recognition and acceptance of the foreign rescue from the local creditors rather than trying to round up property to sell and remove the proceeds thereof to swell the estate that is distributable abroad. But some of these local creditors may not approve of or wish to take part in or be bound by the foreign rescue and its outcome. They may prefer to stand outside the rescue process[5] and follow their

5 This point was recently explored and neatly illustrated in a Scottish case: *Petition of Chang Chin Fen against Cosco Shipping (Qidong) Offshore Ltd* 2021 GWD 32-427, [2021] CSOH 94, [2021] ScotCS CSOH_94 (24 September 2021) <http://www.bailii.org/scot/cases/ScotCS/2021/2021_CSOH_94.html> accessed 27 February 2022. Here are the basic facts as background: Prosafe (SE Prosafe) and Prosafe Rigs Pte Ltd (PRPL) were members of the Prosafe group of companies. Prosafe was incorporated under Norwegian law, PRPL under Singapore law, and PRPL was Prosafe's subsidiary. The company group owned and operated rigs for offshore oil and gas installations. PRPL concluded a shipbuilding contract with Cosco Shipping (Qidong) Offshore Ltd for a rig, the Safe Notos. Some of the consideration for building the rig was deferred, PRPL's payment to Cosco was guaranteed by Prosafe, and payment of the seller's

own methods of recovering their debts from the company. The crucial question is then whether the foreign rescue and its outcome can be enforced on these local opponents or abstainers—in the jargon borrowed from the law of the United States of America, whether these problematic locals can be 'crammed down.'[6] Failure to achieve the necessary acceptance by or at least the enforcement of the rescue upon local creditors cripples the daughter company. The daughter succumbs either to persistent local debt

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credit was secured by a second priority mortgage over the Safe Notos. The contract, guarantee, and mortgage were all expressly governed by English law. PRPL defaulted on payment. The Prosafe group was in financial trouble. PRPL and Prosafe sought a restructuring by means of schemes of arrangement under the Singapore Companies Act: these were known as the Singapore Schemes. The restructuring proposed turning the seller's credit into equity; but that did not suit Cosco. The majority of creditors had approved the restructuring. The present petitioner (the finance director for Prosafe and its group) relied on the Singapore statute's 'cram down' provisions to impose the debt for equity swap on Cosco. But Cosco had not submitted to the Singapore court's jurisdiction regarding the restructuring, and maintained that as the debts to Cosco were governed by English law, they stood outside the Singapore restructuring process, and any purported debt for equity swap would not be effective in extinguishing the debt. The Safe Notos was moored off the coast of Brazil, and the Brazil court had granted orders recognising the Singapore court orders under the UNCITRAL Model Law (on which, see the text accompanying n 12) and granting protection under a moratorium. But two other rigs belonging to PRPL were in the North Sea near Scottish territorial waters and might need to enter those waters. The petitioner was worried that Cosco might seek to enforce Prosafe/PRPL's debt under the seller's credit and parent guarantee against those two rigs when they entered Scottish territorial waters. Such action by creditors could prejudice not only the overall success of the Singapore restructuring plan but also the group and the interests of creditors as a whole, particularly because two creditors, one being Cosco, had not yet consented to the restructuring. Accordingly, the petitioner sought recognition of the Singapore Schemes in the Court of Session in Edinburgh under the Cross-Border Insolvency Regulations 2006, along with relief as though Prosafe had been wound up by the Scottish court under the Insolvency Act 1986 (c 45). So far as is relevant to the present discussion, counsel argued that Cosco was not subject to the Singapore court's jurisdiction, was not a party to the Schemes, and would not submit a proof of debt in them. Cosco's claims under the seller's credit and guarantee stood outside, and would remain outside, the collective process of those Schemes (*Re OGX Petróleo e Gás SA Nordic Trustee A.S.A. and another v Ogx Petroleo E Gas S.A. (Em Recuperação Judicial) & others* [2016] EWHC 25 (Ch), [2017] 2 All ER 217). So 'it [was] not appropriate for Cosco to be prevented by any order of the Singapore court from pursuing its ordinary remedies against Prosafe and PRPL' (*Cosco* para 38). On the relevant authority to be discussed below, this argument convinced the Lord Ordinary (Lord Ericht), who concluded (in para 64) that 'the liabilities under the Seller's Credit and the Guarantee stand outside the collective insolvency process of which the Moratoria are an integral part. That is sufficient for me to refuse to grant, in respect of those liabilities, the remedies sought in paragraphs 6 and 7 of the prayer in each Petition.'

6 'Ideally, a Chapter 11 plan will be approved by the requisite majority of creditors in each class. However, even where one or more of the classes rejects the plan, the debtor may still seek confirmation. Confirmation over the objection of a class of creditors is graphically known as "cramdown" (as in crammed down their throats)' (Jeffrey Ferriell and Edward J Janger, *Understanding Bankruptcy* (4th edn, Carolina Academic Press 2019) 759; *In re Wright* 492 F3d 829, 830 (7th Cir 2007) ('the court crams down the creditor's throat'). See, eg, Bob Wessels, 'Insolvency Law' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law, Second Edition* (Edward Elgar 2012) 383 at 386 para 3.5: 'Many legislations contain a proceeding (in addition to liquidation) which is based on the principle of a composition or an arrangement concluded between the debtor and his creditors, which is binding upon a given percentage of a dissenting minority of creditors (sometimes referred to as "cram-down").'

collection or to winding-up. And if the rescue effort is based on a grandiose worldwide settlement agreement intended to bind creditors of the company, both at home and in every jurisdiction where the company has subsidiaries or external companies, then the failure to achieve the necessary acceptance or at least enforcement in one jurisdiction may scupper the entire rescue mission, or at least demand a chastened reconsideration of what is achievable and what may still have to be worked for and re-earned in those jurisdictions that are the last redoubt of the sceptical opponents and abstainers.

The Crucial Requirement of Recognition of the Foreign Representatives

An important element of these cross-border initiatives—whether liquidation or corporate rescue—is recognition. Foreign creditors, debtors, or estate representatives cannot simply arrive in South Africa and order debtors to pay them, creditors to forgive them, or civil servants such as the staff of the Master's Office, Deeds Office, or the Companies and Intellectual Property Commission to do their bidding. Self-help is frowned upon by section 34 of the Constitution of the Republic of South Africa, 1996 on access to justice.[7] Instead, these foreigners must, without exception, apply for recognition to the High Court, which authorises and controls their freedom of manoeuvre in South Africa. The High Court applies the relevant principles of private international law (otherwise known as the conflict of laws) to matters containing a foreign element. Two roads are open to the foreign representatives seeking to have the foreign rescue process recognised in South Africa—the recognition of foreign judgments and the recognition under cross-border insolvency law.

One Road for the Foreign Representatives: Recognition of Foreign Judgments

One option for foreigners would be to seek recognition of a foreign judgment concerning the debtor. Trite requirements at common law are supplemented by a few statutes. Recognition of foreign judgments concerning debt is most conveniently sought by individuals seeking to enforce, say, a judgment for the payment of a contract price. Collective debt collection by way of an insolvency or winding-up order does not fit this mould so easily. For a sequestration order is not an ordinary court judgment entitling the creditor to execute against the debtor but 'a species of arrest or execution' affecting the two litigants' and third parties' rights, restricting creditors' ordinary remedies, imposing disabilities on the insolvent, and distributing the latter's property among the creditors.[8] And foreign rescue processes are similar in involving numerous creditors holding claims ranked in different classes.

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7 See Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (6th edn, Juta 2013) 712, 717–21.

8 *Ex parte BZ Stegmann* 1902 TS 40 at 47 (Innes JP); *Hassan & another v Berrange NO* 2012 (6) SA 329 (SCA) para 19 (Zulman JA); *Naidoo v Absa Bank Ltd* 2010 (4) SA 597 (SCA) para 4 (Cachalia JA). Comparably, in discussing Italian law, Rolandino Guidotti explains: 'Both Bankruptcy and Arrangement with Creditors are judicial procedures that are provided for by the court, which outlines the general structures of the process and controls its evolution. It is necessary to point out that the judicial authority, when carrying out this function, is not acting, as is usual in civil jurisdiction, to solve a contrast between two opposite parties. Instead this is a function of a managerial character in

A Second Road for the Foreign Representatives to Take: Recognition under Cross-border Insolvency Law

A different road for these foreigners to choose before the High Court is to seek recognition under the relevant principles of cross-border insolvency law in this inbound request for assistance. These principles originate from the writings of jurists in Europe down the centuries as accepted, developed, and enforced by national courts.[9] Some principles allow for a discharge of the insolvent's debts by rehabilitation to be recognised in foreign countries.

Less thoroughly explored was the idea of rescuing a corporate entity such as a company before it descended into liquidation. This idea came to prominence in the twentieth century,[10] and is the chief concern of the twenty-first. Liquidation, like tooth extraction in dentistry now, is almost an acknowledgement of failure to explore all possible options to keep the company alive and nurse it through its troubles to better health.[11]

In a significant development, the United Nations Commission on International Trade (UNCITRAL) created its Model Law on Cross-Border Insolvency in 1997[12] as an accommodating template for independent States to adopt and adapt into their domestic law on this subject. South Africa, an early adopter, must still finish the job of activating its version, the Cross-Border Insolvency Act 42 of 2000. Over-cautious tweaks restricting its application to foreign countries that acceptably recognise South African insolvency law have stalled full implementation for twenty-one years. The Minister of Justice is supposedly still busy drawing up the list of foreign countries.[13] Other dangers, distractions, disputes, and debacles have distracted attention from this under-appreciated but important task. For now, South Africa must still manage with common-law principles dating from the age of the steamship, while other countries like the United

a proceeding focused on its specific goals' (see Guidotti's chapter entitled 'National Report for Italy' in Jason Chuah and Eugenio Vaccari (eds), *Executory Contracts in Insolvency Law: A Global Guide* (Edward Elgar 2019) paras 15.16–15.17)

9 See Christopher Forsyth, *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (5th edn, Juta 2012) chapter 2.

10 Paul J Omar, 'Corporate Rescue through the Ages' in Paul J Omar and Jennifer LL Gant (eds), *Research Handbook on Corporate Restructuring* (Edward Elgar Publishing 2021) 1 at 7 ff (in para 3 on 'The "Invention" of Rescue in the Modern Age'). One of the early forms was judicial management in South Africa in the Companies Act 46 of 1926.

11 In discussing the reform of the Italian law, Guidotti (n 8) para 15.121 explains that 'the upcoming legislation: (a) will give priority to the proposals that intend to overcome the crisis and ensure the business continuity, even by means of a different entrepreneur, as long as these proposals ensure the best satisfaction for the creditors; (b) will consider the judicial winding-up (which should replace the current 'bankruptcy' procedure) *as a last resort*' [our emphasis].

12 <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency> accessed 27 February 2022.

13 Cross-Border Insolvency Act 42 of 2000 s 2(2)–(5).

States of America and the United Kingdom cruise ahead with legislative provisions adopted in the age of the spaceship.

A Sketch of the Relevant Italian Law on Corporate Rescue

Cooperativa Muratori Cementisti (CMC) is a construction company based in Ravenna, with operations in several countries.[14] In 2018 it experienced financial troubles and faced six pending local applications for liquidation[15] and so it began the process of negotiating a debt restructuring agreement in the form of an arrangement with its creditors in Italy under the Bankruptcy Law of 1942, as amended.[16] The 1942 statute was due to be replaced by the new Legislative Decree No 14 dated 12 January 2019 (the Insolvency Code) on 1 September 2021, but some of it has been deferred to 2022 and some to 2023, not only because of the socio-economic effects of the Coronavirus (Covid-19) but also to enable adaptation of the new law to the framework under Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019[17] on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).[18]

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14 ‘History’ (*CMC - Cooperativa Muratori Cementisti Ravenna*) <https://cmcgruppo.com/en/history> accessed 27 February 2022.

15 *CMC Di Ravenna SC & others v Companies and Intellectual Property Commission & others* (15454/2019) [2019] ZAGPPHC 529 (15 October 2019), 2020 (2) SA 109 (GP) para 12 (*CMC GP*).

16 Bankruptcy Law (*Legge fallimentare*) 1942 (Royal Decree 16 March 1942) arts 160, 161; *CMC GP* para 11; *CMC SCA* para 1. See in general Lucio Ghia, *The Italian Bankruptcy Law* (Studio legale Ghia 2013); Paolo Manganelli, ‘The Evolution of the Italian and U.S. Bankruptcy Systems: A Comparative Analysis’ (2010) 5(2) Journal of Business & Technology Law 237–262. For an introduction to Italian law, see Barbara Pozzo, ‘Italy’ in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law, Second Edition* (Edward Elgar 2012) 453ff. And on the significance of the 1942 law for increasing protection for investors, see Mattia Cattaneo and Michele Meoli, ‘Chapter 7: Investor Protection and IPO Survival in the Italian Stock Market’ in Mario Levis and Silvio Vismara, *Handbook of Research on IPOs* (Edward Elgar 2013) 141 at 144–45.

17 PE/93/2018/REV/1 OJ L 172 [2019] 18–55, ELI <http://data.europa.eu/eli/dir/2019/1023/oj> accessed 27 February 2022.

18 Andrea Cantarelli and Francesco Squerzoni, ‘The Italian Insolvency Code—A Work in Progress: Timing and News’ *JD Supra* (22 September 2021) <https://www.jdsupra.com/legalnews/the-italian-insolvency-code-a-work-in-3010353/> accessed 10 October 2021. For more details of the arrangement with creditors under the new Insolvency Code, see Leonardo Serra, ‘*Concordato Preventivo*’ *Altalex* (16 April 2019) <https://www.altalex.com/documents/altalexpedia/2019/04/16/concordato-preventivo> accessed 10 October 2021.

Bankruptcy and the arrangement with creditors under Italian law have been described as follows:[19]

> Presently, the most important and widely used procedures are Bankruptcy (i.e., *fallimento*)[20] and Arrangement with Creditors (i.e., *concordato preventivo*).[21]
> ...
> The goal of Bankruptcy under Italian law is only the liquidation of the assets of the company (*rectius*: Bankruptcy is a liquidation and a compulsory winding-up procedure).
>
> Accordingly, while the latest reforms focused on granting a second chance to a distressed company or some of its entities/divisions, Bankruptcy continues to be used to maximize the assets of the company for the benefit of its creditors.
>
> The primary goal of the Arrangement with Creditors is instead the preservation of the company or its business, even if liquidation remains a legitimate outcome of this procedure.[22]

The arrangement with creditors divides into the arrangement based on liquidation and the arrangement on a going concern basis (in a restructuring). The second type, arrangement on a going concern basis, is employed more rarely than the first, arrangement based on liquidation, and aims to help preserve viable but distressed companies or businesses by maintaining the business operation while a buyer is found or a restructuring plan approved so that bankruptcy may be avoided. The procedure is supervised by the court. The creditors are saved from having to wait for a long time while the complex bankruptcy procedure is carried out, and may therefore achieve, in a relatively short time, at least partial satisfaction of their debts.[23]

Only the debtor may apply for the arrangement with creditors. The management body of the company (usually the board of directors) takes the decision to enter these

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19 Guidotti (n 8) paras 15.08, 15.09–15.11. This summary of the arrangement with creditors is taken from Guidotti's summary and Manganelli (n 16); Elisa Barsotti, 'Concordato Preventivo' (*Studio Cataldi*) <https://www.studiocataldi.it/guide_legali/fallimento/concordato-preventivo.asp.> accessed 26 February 2022; Marco Violato, 'Il Concordato Preventivo' *Filodiritto* (28 January 2021) <https://www.filodiritto.com/il-concordato-preventivo> accessed 27 February 2022; Mauro Battistella, 'Restructuring and Insolvency Law in Italy' (CMS Expert Guides *CMS*, 1 September 2020) <https://cms.law/en/int/expert-guides/cms-expert-guide-to-restructuring-and-insolvency-law/italy> accessed 26 February 2022; and Baker McKenzie, 'Global Restructuring & Insolvency Guide: Italy' <http://restructuring.bakermckenzie.com/wp-content/uploads/sites/23/2017/01/Global-Restructuring-Insolvency-Guide-12-2016New-Logo-Italy.pdf> accessed 26 February 2022.

20 The regime of bankruptcy introduced by the Bankruptcy Law 1942 was mainly 'a tool for punishment, aimed at the liquidation of the distressed enterprise' (Manganelli (n 16) 238). On ordinary bankruptcy proceedings, see ibid 239–41, and on the reforms dating from 2006 onwards, 245ff. Also on ordinary bankruptcy, see Baker McKenzie (n 19) 3–13.

21 The *concordato preventivo* is described as a pre-bankruptcy composition, to be distinguished from an in-bankruptcy composition (*concordato fallimentare*): see Baker McKenzie (n 19) 1.

22 On the reforms to the pre-bankruptcy composition during the noughties, see ibid 2.

23 Barsotti (n 19); Violato (n 19).

proceedings and usually delegates one director to submit the plan. The application is made to the Bankruptcy Court of the district in which the debtor has its head office, its main place of business in Italy.[24]

The debtor retains possession of the assets and management of the enterprise and continues to run the business under the supervision of one or more receivers (judicial commissioners) appointed by the court to prevent misconduct.[25] The process includes four main steps (the first being optional).

First, the debtor may file an 'incomplete' petition (*concordato in bianco*) asking the court to set a deadline for presenting the complete petition and the further documents the law requires.[26] The debtor attaches the last three financial statements, and postpones the filing of the proposal, the plan, and the documents to be annexed thereto to a later time. The debtor must file these further documents within the term set by the delegated judge (between sixty and 120 days, extendible by a further sixty days at most). Within this time, creditors are not allowed to begin or continue enforcement and foreclosure proceedings over the debtor's assets: an automatic stay is thus granted.[27] This stay is 'extended for the whole period of the procedure if the debtor is admitted to the concordato.'[28] To prevent abuse of the pre-application period and thus over-easy access to the *concordato*, new restrictions require more information and impose stricter controls: the debtor must list all the creditors and relevant liabilities, and the court may appoint an interim commissioner to control the debtor to prevent its conduct jeopardising creditors' interests.[29]

Secondly, the debtor files the 'complete' petition for access to the procedure when it requests the court for admission to the procedure. The complete petition contains two elements: the proposal to the creditors, and the plan. The proposal may include qualitative and quantitative terms, with deadlines to satisfy creditors.[30] The petition must include the following attachments:[31]

- An updated report of the assets and liabilities, and of the economic and financial situation, of the company;

- A list and assessment of value of the assets and a list of the creditors with an indication of their relevant claims and security interests;

24 ibid.
25 Violato (n 19).
26 Barsotti (n 19).
27 Bankruptcy Law 1942 art 168. See Barsotti (n 19).
28 Baker McKenzie (n 19) 15. Proceedings in breach of this moratorium are void.
29 ibid.
30 On the possible contents of the plan, see Bankruptcy Law 1942 art 160. See further Barsotti (n 19).
31 Bankruptcy Law art 161; Baker McKenzie (n 19) 14.

- A list of creditors holding claims or rights, whether against the debtor or in rem (eg, interests on assets owned by or in the possession of the debtor);

- A statement of the creditors and the value of the assets of any shareholders who have unlimited liability for the debtor's debts; and

- A plan containing an analytic description of the means and timing necessary for the implementation of the proposal (provision introduced by the Development Decree).

The full petition describes all the activities the debtor intends performing if the creditors approve. Accompanying the plan, the report of an independent professional enrolled on the list of auditors must confirm the truth of the company records and the feasibility of the proposed plan.[32] When the arrangement is for continuing the company on an ongoing basis,[33] the statute requires extra guarantees of the plan's effectiveness and practicality, after which the plan must analytically indicate the expected costs and revenues, necessary financial resources, and respective financing mechanisms. Continuation of the business may envisage continuation by the same applicant entrepreneur but also continuation of the activity by a third-party transferee of the debtor's assets (an *assuntore*) who also assumes the debts; creditors of the debtor (or subsidiaries of such creditors) or new companies to be established during the course of the procedure, the shares of which are allocated to the creditors, can act as *assuntori*.[34] Alternative offers to the composition plan may be submitted, involving purchasing the company or one of its branches, for the best satisfaction of the creditors.[35] One or more creditors representing at least ten per cent of the receivables may submit a concurrent proposal for an arrangement with creditors, along with an appropriate plan.[36]

Debt may be restructured and credit satisfied in any form, and creditors divided into classes with differentiated treatment between the different classes as long as their priority of treatment under law is not disturbed. And the independent professional must certify that continuing the business under the planned arrangement (on a going concern basis) is instrumental to ensuring better satisfaction of the creditors.

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32 Bankruptcy Law 1942 art 161. The professional must verify the feasibility of the objectives of the plan, and thus whether it is liquidating or restructuring and whether it provides for the continuity of the business or not. See further Barsotti (n 19).

33 Bankruptcy Law art 186 bis. See further Barsotti (n 19) and Bob Wessels and Stephen Madaus (eds), *Rescue of Business in Insolvency Law* (European Law Institute Vienna 2017) para 540 <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Instrument_INSOLVENCY.pdf> accessed 27 February 2022. This innovation was introduced in Law 134/2012: see Violato (n 19).

34 Baker McKenzie (n 19) 14.

35 Law 132/2015, summarised by Violato (n 19).

36 ibid. On the competitive bid and the possibility of a pre-pack, see Wessels and Madaus (n 33) para 567.

The court examines the application and may request the debtor to make additions to the plan within fifteen days or even produce new documents.[37] The details of the plan may need to be explained in supplementary additions, and further substantial changes required.

The bankruptcy court controls the entire procedure.[38] So, for example, it decides on whether the arrangement with creditors is admissible or not. It appoints the delegated judge and judicial commissioner(s). It sets deadlines for submitting information and for preparing the proposal and the plan, for the debtor to perform each month under the judicial commissioner's supervision. It gives prior authorisation for any transaction outside the ordinary course of business, any major settlement, and any payment of any pre-petition claim.[39] It authorises the calling of meetings of creditors, the deposit of sums for administration fees, and the replacement of the delegated judge and commissioners if necessary. If the arrangement distinguishes between classes of creditors, the court assesses the correctness of the criteria for differentiation.

The delegated judge exercises various powers.[40] So, for example, on the judicial commissioner's proposal, he arranges the investment of the sum deposited to cover the procedural costs. He supervises the fulfilment of the arrangement with creditors. He issues the decree ending the procedure. He chairs creditors' meetings, verifies participants' legitimacy and regularity of intervention, directs the discussion, regulates the voting, and checks the results.

The judicial commissioner (*commissario giudiziale*)[41] is appointed by the court as an auxiliary and is not a bankruptcy trustee although a bankruptcy trustee may act as a judicial commissioner. The commissioner supervises the regularity of the debtor's performance of the arrangement and keeps the creditors informed. The commissioner draws up the list of creditors when the meeting is convened. He ascertains whether the debtor has concealed any of the assets, intentionally omitted to report claims, put forward non-existent liabilities, or committed other fraudulent acts. Such misconduct must be reported by the commissioner to the court, which then begins the procedure for revoking the debtor's admission to the arrangement with creditors and notifies the public prosecutor and the creditors.

The judicial commissioner also inventories the debtor's assets and provides a detailed report on the causes of the debtor's failure, its conduct, the proposal for agreements and the guarantees offered to creditors. These documents must be deposited at the registry at least forty-five days before the creditors meet.

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37 Barsotti (n 19).
38 ibid.
39 Manganelli (n 16) 248; Violato (n 19).
40 Barsotti (n 19).
41 See further Barsotti (n 19); Violato (n 19).

The meeting of creditors is convened to consider and vote on the debtor's proposal. Meetings may be held by electronic means,[42] and if so, 'the discussion on the proposals made by the debtor and eventually by the creditors is regulated by a provision of the delegated judge issued at least 10 days before the meeting.'[43] Approval rests on the support of both the majority of the impaired creditors and the classes of creditors admitted to the vote. Secured creditors may vote in respect of the part of their claims that will not be paid under the plan. A tax settlement with the tax authority may even be proposed.[44] The proposal and plan, and their seriousness and adequacy of objectives, are thus scrutinised by an independent expert, the court, the judicial commissioner(s), and the creditors. The accepted restructuring proposal 'binds all creditors (including [those] who have not accepted it).'[45] More particularly,

> Where different classes of creditors exist, a court may approve the arrangement notwithstanding that the majority in one or more classes of creditors has not voted to accept the plan, *provided that* the majority of the classes vote to accept the plan and the court finds that the dissenting creditors will receive an amount not less than the amount they would receive under "any other practicable alternative". Once approved by the requested majority and approved by the court, the plan becomes binding on *all* creditors (cram-down).[46]

'The Conversion Law no. 132/2015 abrogated the "implied consent rule", according to which failure to vote was equal to approval, so that now all votes required for the approval of the proposal shall have to be explicitly cast (Article 178 of the Italian Bankruptcy Law).'[47]

The agreement finally goes to the court for ratification.[48] If no objections have been raised, the court verifies the regularity of the process and the result of the creditors' vote. The court's ratification (homologation) cannot be appealed to a higher court.[49] If the court considers the plan and proposal unfeasible, or inadequately drafted or unreliable, 'it may reject the proposal or refuse to approve the *Concordato Preventivo* even if the creditors accepted the proposal. In these cases, it is highly likely that the company will be declared bankrupt.'[50] The company may also be wound up if the required majority of creditors does not approve of the proposed plan.

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42 Law Decree No 59 of 3 May 2016; Baker McKenzie (n 19) 14.
43 Baker McKenzie (n 19) 15.
44 Manganelli (n 16) 248.
45 ibid.
46 ibid 248–9 [original emphasis].
47 Baker McKenzie (n 19) 15.
48 See further Barsotti (n 19).
49 Courts may only determine whether the plan meets the legal and substantive requirements of the law, and may not evaluate the economic or general feasibility of the plan (Supreme Court of Cassation (*Corte Suprema di Cassazione*) 23 January 2013 (n 1521): Guidotti (n 8) (n 52).
50 Manganelli (n 16) 248.

The Developments in the CMC Arrangement with Creditors in Italy, and the South African Application to the Pretoria High Court

On 28 December 2018 the court at Ravenna issued an order (the December order) granting CMC a moratorium of sixty days to file a proposal for composition with its creditors, alternatively a possible restructuring agreement (see the wording used by the Pretoria High Court in *CMC Di Ravenna SC & others v Companies and Intellectual Property Commission & others* (*CMC GP*)).[51] The court also ordered CMC to submit possible authorisation requests and monthly reports, and appointed three judicial commissioners to supervise this process.[52]

CMC's directors further resolved to put its South African branch registered under the Companies Act 71 of 2008 (the Companies Act) into business rescue.[53] When the Companies and Intellectual Property Commission disapproved, CMC asked the Pretoria High Court to declare that CMC was in business rescue, alternatively, that the Italian rescue process applied in South Africa. Both these applications were refused by the High Court (per Potterill J) and the SCA (per Wallis JA),[54] in judgments that have opened up several aspects of this seldom litigated area of South African law.

We outline the tools of South African law to deal with this Italian composition and decide what would be the best outcome for the South African creditors. May the composition be implemented in South Africa

- under the rules on the recognition of foreign judgments;[55] or
- under the common-law rules on cross-border insolvency?[56]

To set the scene it is necessary to summarise the outlines of the SCA decision.

The Supreme Court of Appeal Rejects the Company's Applications

External Companies are not Allowed Business Rescue

CMC's business rescue application received short shrift. The definition of a 'company' in the Companies Act controls access to business rescue in chapter 6 of the Act. This definition expressly excludes external companies,[57] and its other requirements did not

51 *CMC GP* (n 2) para 41.

52 The progress of the Italian rescue process concerning CMC can be gathered from *CMC GP* (n 2) paras 11–32; *CMC SCA* (n 1) paras 13–18, 21–24; and Valentina Magri, 'Bondholders of CMC Distressed Building Company Say OK to Debt Restructuring Plan' *BeBeez* (10 March 2020) <https://bebeez.it/en/crisis-relaunch/bondholders-of-cmc-distressed-building-company-say-ok-to-debt-restructuring-plan/> accessed 27 February 2022.

53 Companies Act 71 of 2008 s 129.

54 Ponnan JA, Molemela JA, Eksteen AJA and Mabindla-Boqwana JA concurred.

55 This bullet is referred to in the text accompanying (n 69) below.

56 This bullet is referred to in the text accompanying (n 93) below.

57 Companies Act 71 of 2008 s 1 'company' *(a)*(i).

apply to CMC.[58] CMC thus strained to avoid the 'company' definition by using others in section 1 of the Act. Given the structure of the Act and the clear bar in the controlling definition, the argument failed.[59]

For the same reasons, a compromise between the company and its creditors[60] is also seemingly not available to external companies. The separate question of whether these two rescue remedies in chapter 6 of the Act should be available is explored in a previous article that builds on the *CMC* High Court decision.[61]

The foregone conclusion about business rescue disposed of, we proceed to the more interesting portion of the SCA judgment, the application to have the Italian composition process applied in South Africa.

The Italian Composition did not Apply in South Africa

Belatedly and apparently without properly involving its South African creditors in the appeal, CMC applied to lead further evidence that the Ravenna court had in fact approved the final composition which had not been appealed against in that country. CMC's pleadings before the SCA inaccurately reflected the Italian developments and were in some respects puzzling. This application to lead further evidence was refused by the SCA.

CMC persistently sought recognition and enforcement of the December order despite Italian developments. Yet the December order could not be enforced or recognised, nor could its recognition have had any effect in South Africa. The purpose of the recognition application, CMC claimed, was that the recognition order would place CMC's South African operations under the supervision of the Italian commissioners while the creditors' approval of the composition was obtained in Italy, and that CMC would be entitled 'to the same moratorium against claims by creditors in this country as the Italian proceedings afforded CMC in Italy.'[62]

This reasoning based on *Jones v Krok*[63] did not convince the SCA.[64] *Jones* had to be scrutinised because 'not all judgments by foreign courts are enforceable in South Africa solely on the grounds set out in that case.'[65] Judgments determining parties' rights or status could found a cause of action in South Africa—the *Jones* situation—but *Jones*

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58 ibid s 1 'company' *(a)*(ii)–*(c)*.

59 See Eric Levenstein, *South African Business Rescue Procedure* (LexisNexis November 2020) para 8.2 8-22–8-22(1).

60 Companies Act 71 of 2008 s 155.

61 André Boraine, 'Formal Debt-Relief, Rescue and Liquidation Options for External Companies in South Africa' (2020) 7(4) BRICS LJ 84.

62 *CMC SCA* (n 1) para 30.

63 1995 (1) SA 677 (A).

64 *CMC SCA* (n 1) para 31.

65 ibid.

did not deal with the enforcement in South Africa of other countries' statutes on company law or insolvency. Italian legislation did not apply in South Africa. The correct representatives of the composition were the judicial commissioners, who had not sought the South African courts' recognition to exercise their powers here as they should have. CMC's application to enforce the Italian process directly in South Africa was 'as misconceived as' its business rescue one.[66]

CMC probably chose the *Jones* route of having the Italian court order recognised as a foreign civil judgment for two reasons. First, CMC was denied statutory relief (in the form of business rescue or a compromise with its creditors in chapter 6 of the Companies Act) that would exert a collective effect preventing South African creditors' individual civil process against CMC. Secondly, an informal workout would be a compromise at common law requiring agreement from all the parties to the compromise,[67] the approving majority of creditors thus being unable to bind the dissenting minority of resistant or non-participating South Africans.[68] Instead, those local opponents of the Italian compromise may seek the winding-up of the South African branch of CMC since the appeal has failed, or else pursue the usual individual civil process against the local branch. Whether they will succeed is the quest of this article.

After the SCA's main reasons for judgment, we start discussing the bases for implementing the Italian composition in South Africa, beginning with its recognition as a foreign judgment.[69]

The Recognition of the Composition as a Foreign Judgment

The Requirements which the Foreign Judgment Must Meet for Recognition

Because of territorial sovereignty and the equality of states, a foreign judgment does not at common law apply under its own power in South Africa or justify levying execution on property situated in this country.[70] The judgment, though not directly enforceable in South Africa, constitutes a cause of action if the usual requirements are met.[71]

Seeking recognition of the December order restricted CMC's recognition application to the beginning of the composition process. Not even an update on interim developments sufficed to meet the requirement of finality and conclusiveness.[72] The CMC should

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66 ibid para 34.

67 *De Wit v Boathavens CC (King & another intervening)* 1989 (1) SA 606 (C) 611–12 (Berman J).

68 Eberhard Bertelsmann and others, *Mars: The Law of Insolvency in South Africa* (10th edn, Juta 2018) para 24.2 at 604 (*Mars*); *Prinsloo en 'n ander v Van Zyl NO* 1967 (1) SA 581 (T) 583 (De Villiers J).

69 See the first bullet in the text accompanying (n 55).

70 DE van Loggerenberg and E Bertelsmann, *Erasmus Superior Court Practice* (2nd edn, Juta 2015 online version) RS 12, 2020, A2-120B; Christian Schulze, *On Jurisdiction and the Recognition and Enforcement of Foreign Money Judgments* (Unisa Press 2005) 16.

71 *Jones* (n 63) 685A–E; *CMC GP* (n 2) para 42; cf *CMC SCA* (n 1) para 31.

72 *CMC GP* (n 2) paras 44, 45.

perhaps have heeded the High Court and updated its pleadings to ask the SCA to recognise the final composition order which it and its lawyers had known about since May 2020, and could and should have properly placed before the court.[73]

Launching the Recognition Application with a Final Foreign Judgment

How might the South African litigation on this basis have played out?

For one thing, CMC would need to cite and serve its creditors in South Africa and allow them the opportunity of submitting evidence and argument against recognising and enforcing the final judgment and order in this country.[74] Arguably, if CMC did not involve its creditors properly in this way, it would face liability for common-law remedies such as damages.[75] The Constitution is the supreme law of the Republic, and its obligations must be fulfilled,[76] and so it governs the law on recognising and enforcing the composition.

This Italian Composition is a Pre-Insolvency Proceeding

The debate about recognition and enforcement would then centre on the nature of this composition. The Italian court order initiating the composition was classified as not being a judgment determining a party's rights or status as the *Jones* judgment did.[77] Recognising a *Jones*-type of judgment that creates a cause of action was distinguished from possibly applying foreign company and insolvency law, and, in the discussion of the requirement that the foreign representative must seek recognition from the South African courts, the position of the judicial commissioners was distinguished from that of the trustees and liquidators in insolvency law.[78] This portion of the judgment was painted in the dark hues of insolvency law.

So the issue is how to classify (or characterise) this Italian composition in South African private international law. This composition is a form of pre-insolvency proceedings: in discussing further developments in the relevant process, the SCA mentioned the company's being admitted to 'the pre-insolvency arrangement procedure' and used the words 'pre-insolvency arrangement.'[79] Accountants mention the demise curve of the company's decline, along which pre-insolvency proceedings lie somewhere on the spectrum between informal workouts and formal insolvency proceedings.[80] Corporate

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73 *CMC SCA* (n 1) paras 18, 19.

74 Constitution of the Republic of South Africa, 1996 s 34; *CMC SCA* (n 1) para 26.

75 ZT Boggenpoel, 'Revisiting the *Tswelopele* Remedy: A Critical Analysis of *Ngomane v City of Johannesburg Metropolitan Municipality*' (2020) 137(3) SALJ 424.

76 Constitution of the Republic of South Africa, 1996 s 2.

77 *CMC SCA* (n 1) para 31.

78 ibid.

79 ibid para 16*(a)*, *(c)*.

80 Irit Mevorach and Adrian Walters, 'The Characterization of Pre-Insolvency Proceedings in Private International Law' (2020) 21 European Business Organization LR 855 at 855, 857.

debtors sensing distress can use debt restructuring proceedings to avoid insolvency.[81] Their negotiations focus on their financial creditors, with minimal court involvement and reputational damage, so value is preserved from vanishing in insolvency. Revenues typically exceed expenses, but overleveraged balance sheets prevent paying financial creditors' maturing loans.

Mevorach and Walters contend that 'a single legal and institutional framework of transnational law that treats insolvency and restructuring law as a unified body of law (call it "the law of transnational distress") and that covers the entire continuum may be the preferred approach' to pre-insolvency proceedings.[82]

Madaus, by contrast, emphasises the differences between insolvency proceedings and restructuring proceedings.[83] Insolvency solves a common-pool problem by realising assets insufficient to meet all creditors' claims, as a 'collectivized debt collection device.'[84] Restructuring responds to the tragedy of the anticommons in which common goods are not fully used as they should be. The focus of statutory restructuring is on stakeholders' court-assisted new agreements about future entitlements to future revenue streams. As Moss QC describes the difference, the governing principle in liquidation is the collective enforcement of creditors' pre-existing rights, and the aim of a corporate reorganisation is the alteration of 'the substance of the creditors' existing rights' so that the company may emerge from the reconstruction as a going concern.[85] Contextualising this contractual alteration in South African terms in relation to the compromise in section 155 of the Companies Act, we note that a compromise predicates an agreement about the existence or enforcement of rights, and novates the existing debt if the company is involved.[86] The comparable statutory composition under sections 119 to 123 of the Insolvency Act 24 of 1936 is a statutory novation with the effect of *res judicata* if accepted.[87] The insolvent and his concurrent creditors are not bound by a strictly contractual nexus because the contract usually lacks consensus and binds those creditors who did not agree to it (because they were absent or disqualified for not proving their claims) or who opposed it (as the outvoted minority).[88] By way of comparison, we note Madaus's discussion of compulsive or court-assisted contracts in German law, and his

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81 ibid 858.

82 ibid 884.

83 Stephan Madaus, 'Leaving the Shadows of US Bankruptcy Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law' (2018) 19 European Business Organization LR 615.

84 Johan Eklund, Nadine Levratto and Giovanni B Ramello, 'Entrepreneurship and Failure: Two Sides of the Same Coin?' (2018) 54(2) Small Business Economics 373, 378; cf *Mars* (n 68) para 1.1 at 3 (the Insolvency Act 24 of 1936 mainly aims at providing a 'collective debt-collecting instrument').

85 Gabriel Moss QC, as mentioned in *Re OJSC International Bank of Azerbaijan; Bakhshiyeva v Sberbank of Russia & others* [2018] EWCA Civ 2802 (18 December 2018), [2019] 2 All ER 713 para 80 (*IBA CA*) (Henderson LJ).

86 Piet Delport, *Henochsberg on the Companies Act 71 of 2008* (LexisNexis October 2020) 554.

87 Jennifer A Kunst, André Boraine and David A Burdette, *Meskin's Insolvency Law* (LexisNexis November 2020) para 13.1.3 (*Meskin*); *Mars* (n 68) paras 24.1, 24.3.3, 24.3.4.

88 *Ilic v Parginos* 1985 (1) SA 795 (A) 803–04 (Smalberger AJA).

submission that a restructuring plan not accepted by all but judicially confirmed to bind all, 'can be construed as a compulsive agreement based on a statutory duty to conclude (specified in restructuring law) and enforced by the confirming court.'[89]

Modern insolvency laws, he explains, have 'been combined with tools that … allow for a restructuring of the business of the failing debtor, often combining the common tools of insolvency law, e.g. a collective stay, with new tools to facilitate a restructuring agreement.'[90] Now these tools have been provided in pre-insolvency proceedings to debtors not yet insolvent. The resultant mixture of insolvency and restructuring law has been guided by practical needs rather than doctrinal approaches. So 'restructuring law ought properly to be based on contract and company law principles—with the law supplying deadlock resolution procedures to overcome the problem of holdout vetoes standing in the way of a new bargain—rather than on the distributive norms of liquidation law.'[91] We note that the 'holdout' creditors may include not only voting opponents but also stayaways preferring other means of achieving a better outcome against the debtor.

Such a statutory pre-insolvency restructuring is therefore neither a pure contract like an informal workout nor an insolvency and liquidation proceeding. Instead, in South African terms it is a statutory novation where no winding-up order has yet been granted in favour of or against the debtor.

The SCA did not advise CMC that its recognition application was at that stage based upon outdated court papers but might still receive a favourable hearing if later renewed on the basis of the final judgment and order from the Italian court approving the composition/restructuring plan, with perhaps some pointers to indicate how CMC should go about bringing its case before the court. Instead, that gate was closed and no directions for travelling along that route were given. The takeaway is that, perhaps because of the collective aspects of the Italian statutory composition process such as the moratorium, the SCA reaches for its insolvency spectacles[92] when examining such proceedings, even before a winding-up order is granted in the debtor's home country or in South Africa.

So it is to cross-border insolvency law in South African common law that we now turn, the second of our two bases for recognising the composition,[93] where the detailed

89 Madaus (n 83) 626–67, citing his book *Der Insolvenzplan: Von seiner dogmatischen Deutung als Vertrag und seiner Fortentwicklung in eine Bestätigungsinsolvenz* (Mohr Siebeck 2011) 261ff.

90 Madaus (n 83) 615.

91 Mevorach and Walters (n 80) 876.

92 This text is referred to in the text accompanying (n 212) below.

93 See the text accompanying (n 56).

discussion in two books is taken as read, allowing a sketch with minimal referencing here.[94]

Recognising the Foreign Insolvency Representative in South African Common Law

Corporate cross-border insolvency law deals with the situation where a corporate debtor owns property, owes liabilities, or has business interests in more than one jurisdiction. A liquidation order is granted against the debtor, usually where its registered office is located, or where, in the language of article 2*(b)* 'foreign main proceedings' read with article 17(2)*(a)* of the UNCITRAL Model Law on Cross-Border Insolvency (1997), its centre of main interests (its COMI) is located. The estate representative then has to consider the possibility of following up such property or interests in the foreign jurisdiction, with a view to attaching the assets for the benefit of local creditors but subject to the laws of the foreign jurisdiction. Inward-bound requests for recognition seek help from local courts. Outward-bound requests for recognition seek recognition first from the local courts in preparation for then approaching foreign courts for recognition and authority to unearth assets located in foreign states. And concurrent proceedings occur where insolvency proceedings regarding the same debtor are taking place at the same time in at least two countries.

Without a statutory dispensation for dealing with cross-border insolvency matters in South Africa, its courts consider inbound applications from foreign estate representatives on the basis of comity and apply convenience and equity when exercising their discretion whether to recognise these representatives and accord them active assistance in dealing with local assets and engaging in local proceedings. In addition, South Africa is one of the states following a territorial approach to securing their local creditors' interests, since a foreign insolvency order granted by one jurisdiction does not enjoy universal recognition automatically. As an alternative to this recognition, the estate representative would have to consider opening another (concurrent) insolvency proceeding in another jurisdiction and in terms of its laws.

The Crux of the Case: The Effect of the Foreign Composition in South Africa

The Different Functions of Insolvency and Restructuring

Much of the South African common law of cross-border insolvency is devoted to the dynamics of insolvency and liquidation law: asset retrieval, realisation, and distribution.

94 See *Meskin* (n 87) ch 17 and *Mars* (n 68) ch 30. See also the discussion by Alastair Smith, 'Some Aspects of South African Cross-Border Insolvency Relief: The *Lehane* Matter' (2016) 19(1) PELJ <https://perjournal.co.za/article/view/1221> accessed 27 February 2022.

Cross-border debt restructuring proceedings have different dynamics. CMC's expert on Italian law told the Pretoria High Court[95] that the December order envisioned CMC's proposed plan to restructure debt, perhaps sell assets or shares, and offer financial instruments to satisfy creditors. The plan must subdivide creditors into classes and state how those classes of debt would be satisfied, and show the secured and unsecured creditors' details and how their claims would be met. On 12 June 2019 the Ravenna court had required the communication of the pre-insolvency arrangement to creditors by 31 July, for consideration at a creditors' meeting by 13 November at the latest. The composition apparently dealt with CMC's assets and liabilities worldwide and the worldwide claims of creditors including those in South Africa.[96] The central question would become the effect of a foreign discharge or modification (in the composition proceedings) upon the South African creditors' contractual rights and thus the competence to enforce those rights against the company in South Africa.

In discussing the relevant law, we will begin with the English law and then consider the South African law since the precedents relied on by the South African courts were English.

The Extinction of Contractual Obligations in Private International Law

In English law, the validity of both the creation and the extinction of contracts is determined according to the law governing the contract. At common law, the law governing the contract is usually determined by the 'proper law' of the contract,[97] the appropriate law,[98] usually the law chosen by the contractants. (The European Union's 'Rome I' regulation, as it is abbreviated, speaks of the 'applicable law' of the contract.[99]) The proper law 'not merely sustains but, because it sustains, may also modify or dissolve the contractual bond.'[100] In Scots law, the discharge of the old contract by novation is governed by the law of the original contract, and the creation of the new contract 'it

95 *CMC GP* (n 2) para 43.

96 *CMC SCA* (n 1) para 19.

97 See, eg, *Burrows v Jemino* (1726) 2 Str 733, 93 ER 815; Ian F Fletcher, *Insolvency in Private International Law: National and International Approaches* (2nd edn, OUP 2005) para 2.125; *National Bank of Greece and Athens SA v Metliss* [1958] AC 509; *Wight & others v Eckhardt Marine GmbH* [2003] UKPC 37 (14 May 2003), [2004] 1 AC 147 para 11 (Lord Hoffmann) (a discharge under a scheme of arrangement).

98 AE Anton and PR Beaumont, *Private International Law: A Treatise from the Standpoint of Scots Law* (2nd edn, W Green 1990) 262. Scots law is an independent, mixed legal system (see Hector L MacQueen, 'Mixed Jurisdictions and Convergence: Scotland' (2001) 29(2) International Journal of Legal Information 309).

99 See Lord Collins of Mapesbury and others, *Dicey, Morris and Collins on the Conflict of Laws* vol 2 (15th edn, Sweet & Maxwell 2012) 1775ff.

100 *Kahler v Midland Bank Ltd* [1950] AC 24, 56 (Lord Radcliffe).

would seem, should be governed by the proper law of the new contract and this will not necessarily be the proper law of the original contract.'[101]

The relevant principles are similar in South African private international law. As a general principle, the proper law of the contract is the law chosen by the parties, expressly or tacitly.[102] And that law determines the validity of the discharge of the contract.[103]

From these general principles we move on to a major event in the span of the contract: the bankruptcy of one of the contractants.

The Two English Rules on the Effects of Supervening Bankruptcy on the Contract

The effect of bankruptcy on the parties' existing contractual obligations is determined by two rules.[104]

The primary rule is that 'on the assumption that a foreign discharge, in order to be effective in England, must be a valid discharge under the law applicable to the contract', 'a discharge of a contractual debt under the bankruptcy law of the country whose law governs the contract is a valid discharge in England',[105] provided that the discharge completely extinguishes the contractual debt and does 'not merely interfere with the remedies or course of procedure to enforce' the debt.[106] Scots law similarly recognises a foreign discharge in bankruptcy as effective if it takes place under the proper law of the obligation.[107]

And what happens if the proper (applicable) law of the contract differs from the law of the bankruptcy proceedings?

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101 Anton and Beaumont (n 98) 300nn56–57, citing the English case *Re United Railways of Havana and Regla Warehouses Ltd* [1960] Ch 52, 91 (Jenkins LJ).

102 Elsabe Schoeman, Christa Roodt and Marlene Wethmar-Lemmer, *Private International Law in South Africa* (Wolters Kluwer 2014) 50–52.

103 M Dendy, 'Conflict of Laws' in WA Joubert (founding ed), *The Law of South Africa* vol 7(1) (3rd edn, LexisNexis 2019) para 364; JCW van Rooyen, *Die Kontrak in die Suid-Afrikaanse Internationale Privaatreg* (Juta 1972) 207ff (the extinction (*tenietgaan*)) of the contract generally regarded as being controlled by the *lex causae*, in English, the proper law (at 2)).

104 See Andrew Grossman, 'Conflict of Laws in the Discharge of Debts in Bankruptcy' (1996) 5(1) International Insolvency Review 1, 15–19.

105 Collins and others (n 99) para 31–093 at 1760; Fletcher (n 97) para 2.125. Compare the words of Harris J on the Hong Kong scheme of arrangement: 'As Ms Yang's debt is governed by Hong Kong law a Hong Kong scheme would be effective to compromise it' (*Re Ping an Securities Group (Holdings) Ltd* [2021] HKCFI 651 (12 March 2021) para 18).

106 *Ellis v M'Henry* [1871] UKLawRpCP 11 (30 January 1871), (1871) LR 6 CP 228, 234 (Bovill CJ).

107 See Anton and Beaumont (n 98) 740, citing cases as early as *Rochead v Scot* (1724) Mor 4566 (30 June 1724) <http://www.bailii.org/scot/cases/ScotCS/1724/Mor1104566-093.html> accessed 27 February 2022.

The corollary to (or converse of) the primary rule in English law keeps the focus on the proper law of the contract and yields the secondary rule that 'a discharge of a contractual debt under the bankruptcy law of any other foreign country outside the United Kingdom is not a valid discharge in England.'[108] As Bovill CJ added in *Ellis v M'Henry*: 'Secondly, as a general proposition, it is also true that the discharge of a debt or liability by the law of a country other than that in which the debt arises, does not relieve the debtor in any other country.'[109] Bovill CJ's statement of the law[110] was quoted and then said to '[remain] good law' in *Société Eram Shipping Co Ltd v Cie Internationale de Navigation & others*.[111] Scots common law is similar.[112] The secondary rule bears the nickname of a decision by the English Court of Appeal.

This secondary rule derives its name, the *Gibbs* rule, from *Antony Gibbs & Sons v Société Industrielle et Commerciale des Métaux.*[113] The English plaintiffs sold copper to the French defendant company under English law. The defendant later entered French liquidation proceedings. At the liquidator's insistence, the plaintiffs proved a claim in those proceedings, where part of their claim was ruled inadmissible by the liquidator in French law, and their proceedings in the French court to establish their claim for the full amount were pending. In England, the Court of Appeal held that the French liquidation proceedings, even if they provided a discharge in bankruptcy, did not release the defendant company from its liability for performing the English sale. So the plaintiffs could sue the defendant in England for contractual damages.

One might query whether the *Gibbs* rule properly applied in the circumstances of that case because the plaintiffs' proving a claim in the French liquidation and pursuing the company for the full amount in the French court constituted their submission to the French liquidation proceeding. As an exception in this regard, the *Gibbs* rule does not apply to a creditor who submits to the foreign proceedings, as Hildyard J held in *Re OJSC International Bank of Azerbaijan; Bakhshiyeva v Sberbank of Russia & others*

108 Collins and others (n 99) para 31–093 at 1760; Fletcher (n 97) para 2.126.

109 *Ellis* (n 106) 234 (quoted in *Hardy Exploration & Production (India) Inc v Government of India* [2018] EWHC 1916 (Comm) (25 July 2018), [2019] 2 WLR 159 par 53 (Deputy Judge Eggers QC); *SAS Institute Inc v World Programming Ltd* [2020] EWCA Civ 599 (12 May 2020) para 65 (Males LJ)); see, eg, *Smith & another v Buchanan & another* (1800) 1 East 6, 102 ER 3.

110 *Ellis* (n 106) 234.

111 [2003] UKHL 30 (12 June 2003), [2004] 1 AC 260 para 16 (Lord Bingham).

112 *Joint Administrators of Heritable Bank plc v Winding-up Board of Landsbanki Islands HF* [2011] ScotCS CSIH 61 (28 September 2011), 2012 SC 209 para 19; confirmed on appeal in *Joint Administrators of Heritable Bank plc v Winding up Board of Landsbanki Islands hf* [2013] UKSC 13 (27 February 2013), [2013] 1 WLR 725 para 44 (Lord Hope), applied in *Cosco* (n 4) para 49 (Lord Ericht).

113 [1890] UKLawRpKQB 117 (1 July 1890), (1890) 25 QBD 399 <http://www.commonlii.org/uk/cases/UKLawRpKQB/1890/117.html> accessed 5 November 2021. See *KfW (a German public law institution) & another v Singal* [2020] EWHC 2214 (Comm) (18 August 2020) para 54 (Judge Hancock QC).

(*IBA ChD*).[114] This creditor is understood to have accepted that the law of those proceedings determines the rights he chooses to pursue there. What is important to note is that the *Gibbs* plaintiffs expressly reserved all their rights regarding the pending English action.[115] Such an express reservation exempts the claimant from the inference of submitting to the foreign insolvency proceeding, as decided in *Rubin & another v Eurofinance SA & others (Picard & others intervening).*[116] The submission is to the system of law.[117]

The current English position, according to Fletcher,[118] is that the foreign liquidation or other insolvency procedure to extinguish or cancel the debtor's obligations 'is considered to effect the discharge only of such of the company's liabilities as are properly governed by the law of the country in which the liquidation takes place or, alternatively, of such as are governed by some foreign law under which the liquidation is accorded the same effect.' So, in English law, a debt owed by or to a dissolved company is considered to be extinguished only by what English private international law considers the proper law of the debt.

The principle that 'the discharge under a foreign bankruptcy law, like the discharge of contracts generally, is governed by the law applicable to the contract' was confirmed on the authority of *Gibbs* and several decisions by 'courts of the highest authority' in *Global Distressed Alpha Fund 1 Limited Partnership v PT Bakrie Investindo*[119] and the cases cited by Teare J, read together with those cited by counsel to Hildyard J in *IBA ChD*.[120]

As Westbrook explains, 'an English choice of law in a contract makes the obligations of that contract non-dischargeable in a foreign insolvency case.'[121] Strictly interpreted,

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114 [2018] EWHC 59 (Ch) (18 January 2018), [2018] 4 All ER 964 para 46; approved in *IBA CA* (n 85) para 28.

115 *Gibbs* (n 113) 400 (Lord Esher MR).

116 [2012] UKSC 46 (24 October 2012), [2013] 1 AC 236 paras 157–67 (Lord Collins). See *In re Agrokor dd et al* 591 BR 163, 193 (Bkr SDNY 2018) (Judge Martin Glenn); also Edward Bailey and Hugo Groves, *Bailey & Groves: Corporate Insolvency - Law & Practice* (5th edn, LexisNexis Butterworths 2017) Part A Ch 1 D para 1.23n8. For a series of earlier English decisions on the creditor's being bound by his conduct in voluntarily appearing in the foreign proceedings, particularly where he has received a dividend there, see Grossman (n 104) 19–21. This exception regarding the effect of the creditor's participating in the foreign insolvency is discussed in detail by Richard Sheldon (ed), *Cross-Border Insolvency* (4th edn, Bloomsbury Professional 2015) paras 13.13–13.27.

117 *Delaney v Great Western Milling Co Ltd* [1916] HCA 46 (1 September 1916), (1916) 22 CLR 150, 169 (Isaacs J).

118 Ian F Fletcher, *The Law of Insolvency* (5th edn, Sweet & Maxwell 2017) para 30–061 (quoted in *IBA ChD* (n 114) para 45; *IBA CA* (n 85) para 27; *Cosco* (n 5) para 48).

119 [2011] EWHC 256 (Comm) (17 February 2011), [2011] 2 All ER (Comm) 385 paras 12, 13.

120 *IBA ChD* (n 114) para 54.

121 Jay Lawrence Westbrook, 'Comity and Choice of Law in Global Insolvencies' (2018) 54(2) Texas International LJ 259, 261.

the English rule is 'both a choice of law rule and a choice of forum rule': 'any bankruptcy proceeding seeking to alter an English law contract must take place in England.'[122] 'In short, it is not enough that a discharge be obtained under the law of the domicile, the "seat" of a corporation, a defendant's residence or place of business.'[123]

How do these English rules apply in South African law?

South African Law Absorbed the Rules on the Effect of a Supervening Bankruptcy on a Contract

The rules were applied, mostly by the courts of the independent Boer republics and British colonies before the Union of South Africa in 1910. A summary a century ago mentioned *Gibbs*[124] but omitted many of the relevant South African cases.[125]

The primary rule was applied in *In re Percy Hope*.[126] The Supreme Court of the Transvaal had to decide whether a Natal creditor of a firm that had been rehabilitated in Natal had the right to prove in the insolvent estates of the firm and one of its members in the Transvaal. That raised the further question of whether the rehabilitation in Natal, the place of the contract, had extinguished the debt owed to the Natal creditor or merely barred the remedy by an action in Natal. Rehabilitation under both Natal and Transvaal law extinguished and discharged the debt. 'As the debt is extinguished *ex lege loci contractus* [that is, according to the law of the place of the contract], it must also in this State be considered as discharged', held Kotzé CJ,[127] citing Story[128] and Burge.[129] A few years Kotzé CJ, again citing Story and Burge, applied the *Hope* decision in *Dyer v Carlis*.[130] And the primary rule was confirmed in *Tilley v Town, Creewel & Co*,[131] in which the company sold goods to Tilley, whose estate was sequestrated some months later. The company did not prove a claim on the insolvent estate. Tilley's offer of composition was accepted by the only creditors who did prove claims, and he was discharged by the High Court. '[In] the case of *Ferguson v Stanton* (3 HCG 289),' said Laurence J in the High Court of Griqualand, 'it was held that a rehabilitation or discharge is an effectual bar to an action being brought on a contract made in the same

122 ibid 270.

123 Sheldon (n 116) para 13.7.

124 *Gibbs* (n 113).

125 Reg E de Beer, 'Notes on Private International Law' (1911) 28(2) SALJ 188, 197–201 (inter-state effect of discharge from insolvency)).

126 (1885-1888) 2 SAR TS 25.

127 ibid 26.

128 Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic: in regard to Contracts, Rights, and Remedies, and especially in regard to Marriages, Divorces, Wills, Successions, and Judgments* (1st edn, Hilliard, Gray) 1834; Melville Madison Bigelow ed (8th and last edn, Little, Brown 1883) §§ 338–43.

129 William Burge, *Commentaries on Colonial and Foreign Laws: Generally, and in Their Conflict with Each Other, and with the Law of England* vol 3 (Saunders and Benning 1838) 924–25.

130 (1897) 4 Off Rep 67.

131 (1888-1889) 5 HCG 68.

country where the discharge has been obtained.'[132] Laurence J had been one of the three judges in *Ferguson v Stanton*,[133] which will be summarised below.[134]

The subrule that the discharge by bankruptcy does not offer a defence if the rehabilitation merely bars the remedy and does not extinguish the debt was applied in *African Banking Corporation v Owen*.[135] Owen's account with the bank was overdrawn in Natal, where his estate was sequestrated. Four years later, when the bank sued him in the Transvaal for the overdrawn amount, he pleaded that the debt had been contracted more than four years before, and that under section 149 of the Natal Insolvency Law 7 of 1887, no legal proceedings could be taken against him after the expiry of four years, as calculated from the date of sequestration. On appeal in the Supreme Court of the Transvaal, Kotzé CJ cited *Hope*[136] and *Dyer*[137] and he analysed section 149 of the Natal Insolvency Law reading: 'It shall not be lawful for any person to make application for the process of any Court, or for leave to issue execution against any insolvent, or to proceed in any manner against such insolvent, in respect of any debt or demand proved or provable against his insolvent estate, at any time after the lapse of four years from the date of the surrender or sequestration of his estate as insolvent.' In the absence of decisions by the Supreme Court of Natal on this point, Kotzé CJ held that section 149 was 'more in the nature of a prescription, than a provision, which entirely extinguishe[d] the debt contracted in Natal by the insolvent before sequestration.'[138] The bank was therefore entitled to judgment in the Transvaal.

The *Owen* decision was followed in *Langerman v Van Iddekinge*,[139] the court holding[140] that the similarly worded section 17 of the Insolvency Act 38 of 1884 (Cape Colony)

> deals with procedure; it only deals and only purports to deal with the remedies in connection with an application for civil imprisonment, leave to issue execution and with any proceeding which a creditor may have, or thinks he has, against the insolvent. It does not, therefore, touch the existence of the debt in any way, but, as only dealing with the remedies, it can only be held, as was held in the case of *Owen*, to bar the remedy.

While we are on the subject, two further points about the lack of a discharge by bankruptcy could be mentioned here. If the debtor is an unrehabilitated insolvent then the contracts concluded before the sequestration of his estate may be sued upon in the country to which he has since moved, and he cannot raise the defence that the

132 *Tilley* (n 131) 69.
133 (1884) 3 HCG 289.
134 See the text accompanying (nn 145 to 159 below).
135 (1897) 4 Off Rep 253.
136 *Hope* (n 126).
137 *Dyer* (n 130).
138 *Owen* (n 135) 255.
139 1916 TPD 123.
140 ibid 125 (De Villiers JP).

obligations have been discharged by bankruptcy.[141] Nor is a debtor who has been declared bankrupt in another country allowed to keep his local assets and refuse to pay his local creditors simply because of the foreign bankruptcy.[142]

Now we move to the secondary rule, which may have such an important effect on discharge by bankruptcy or liquidation.

The secondary rule, the *Gibbs* rule[143] stated and illustrated above,[144] was applied in *Ferguson v Stanton*.[145] So in South African terms we may call it the *Ferguson* rule, noting that this decision predates the more famous *Gibbs*. Under a contract concluded in Griqualand West, Ferguson, a merchant in Kimberley (in Griqualand West), had supplied goods to Stanton in the Orange Free State, where Stanton's estate had later been sequestrated and he had been rehabilitated, an event he raised as a defence to Ferguson's application to attach moneys in Stanton's bank account in Barkly West (in Griqualand West).

The High Court of Griqualand applied *Alexander & Co v Lioni*.[146] Most of the law report of this case is devoted to the statement of the facts and counsels' arguments. The plaintiffs, Alexander & Co, excepted to the defendant, Lioni's, special plea as being bad and insufficient, and disclosing no defence. The exception was sustained by the court in a terse judgment. The plaintiffs had, under a contract concluded in Cape Town, sold and delivered goods to the defendant, a general dealer in Griqualand West. The defendant had later surrendered his estate in that province for the benefit of his creditors, including Alexander & Co.[147] That company proved a claim at the meetings of creditors and in the liquidation and distribution account was awarded the sum of £73 19s 2d. Alexander & Co then sued Lioni in the Cape court for £621 10s 11d, the balance of the account for the goods sold. Lioni pleaded that Alexander & Co's action was not justified. Counsel for Alexander & Co argued: 'There was no case on the books to show a debtor who had not obtained his discharge could set up his insolvency in a foreign country as a defence to a suit in this colony',[148] and counsel relied on *Frith & others v Wollaston*,[149] where the Court of Exchequer in England had held that the insolvency legislation of the Cape of Good Hope only suspended the creditor's remedy but did not discharge the debt. Counsel for Lioni argued, among other things, that the 'discharge in Griqualand West

141 *Cape of Good Hope Bank v Mellé* (1892–1893) 10 SC 280, followed in *Cloete v Botha* 1907 ORC 1.

142 *Reynolds v Howse and Early* (1883–1884) 3 EDC 304, 313 (Buchanan J), relying on *Alexander & Co v Lioni* 1875 Buch 79. See *Mars* (n 68) para 8.5 at 192, para 30.10 at 744, cf para 30.3 at 733.

143 See the text accompanying (n 113).

144 See the text accompanying (nn 108 to 113).

145 *Ferguson* (n 133).

146 *Alexander & Co* (n 142).

147 At the time, Griqualand West was a separate province 'which had not then been annexed to this Colony, but was subject to the same insolvency laws' (*Mellé* (n 141) 285 (De Villiers CJ); *Ferguson* (n 133) 292 (Buchanan JP)).

148 *Alexander & Co* (n 142) 80.

149 (1852) 7 Exch 194, 155 ER 913. Compare the discussion in *Mars* (n 68) para 25.12 at 652n458.

of the insolvent would bar the creditor from suing for the debt here',[150] and counsel cited Burge.[151] The Supreme Court of the Cape of Good Hope held in favour of the plaintiffs, Alexander & Co, and ruled that they were entitled to the amount claimed, less the dividend paid by Lioni's estate in Griqualand West. This decision in *Alexander & Co* was interpreted by Laurence J in *Ferguson* as being based on the fact that Lioni had not been rehabilitated in Griqualand West, rehabilitation operating 'as an absolute discharge' thus destroying the creditor's right.[152]

The *Ferguson* court also quoted[153] Burge,[154] stating the two rules[155] derived from 'decisions under the jurisprudence of England, Scotland, France, the Colonies, and the United States.' The second rule was that '*if the country in which the discharge was obtained were not the locus contractus, the debt is not discharged, and a foreign tribunal will not give effect to the discharge*.'[156] Jones J held was 'clearly of opinion that a rehabilitation in the Orange Free State is no defence to an action on a debt contracted in this province, and for which the creditor has a remedy by the local law.'[157] And as Laurence J concluded, 'a discharge, however complete and absolute, in a foreign country, constitutes no defence to an action in this Court on a contract made here; and the applicant seems therefore to be entitled to an order for the attachment applied for.'[158] The judge had held that the position would have been different if the proper law of the contract had been that of the Orange Free State.[159]

150 *Alexander & Co* (n 142) 80.
151 Burge (n 129) 924, 928.
152 *Ferguson* (n 133) 293.
153 ibid 292.
154 Burge vol 3 (n 129) 924, 925.
155 See the text accompanying (nn 105 to 107 and 108 to 113, respectively).
156 Jones J's emphasis.
157 *Ferguson* (n 133) 292, quoted by Van Rooyen (n 103) 211.
158 ibid 294.
159 ibid 293–94; Van Rooyen (n 103) 211n281.

Ferguson was mentioned by Nadelmann,[160] along with the Canadian case *International Harvester Co v Zarbok*[161] and the Indian case *Magadhu Pillai Rowther v Asan Muhammadhu Rowther*.[162] The *Gibbs* rule is also applied in Hong Kong.[163]

Do these rules on supervening bankruptcy apply in the pre-insolvency context of the restructuring and rescuing of a company before it slides into winding-up and liquidation?

The Relevance of the Two Rules to Foreign Pre-insolvency Proceedings Today

There seems to be no contemporary reported South African case directly and expressly relevant. The saga of *Sackstein NO v Proudfoot SA (Pty) Ltd* featured a *post*-liquidation rescue of the parent company in Namibia,[164] and is therefore not directly relevant to the *pre*-insolvency *CMC* case in which the Italian company, though beset by six pending local liquidation applications, was not in liquidation.

Lacking a contemporary South African case expressly and directly relevant to the recognition of a foreign pre-insolvency composition, we therefore turn to the source from which South Africa derived its precedents on the primary and secondary rules—English law. What has current English law to tell us about the relevance of the two rules as they apply to the pre-insolvency rescue and restructuring of a foreign company?

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160 Kurt H Nadelmann, 'Recognition of American Arrangements Abroad' (1942) 90 Univ Pennsylvania LR 780, 789.

161 1918 CanLII 149 (SK QB), [1918] 3 WWR 38 (Sask KB) <https://canlii.ca/t/g74w5> accessed 27 February 2022 (Bigelow J holding that a discharge in bankruptcy by a foreign court from liability on a promissory note made by the bankrupt while domiciled in such foreign state and payable therein is a good defence to an action in Canada upon the note); see further LW Houlden and Geoffrey B Morawetz, *Bankruptcy and Insolvency Law of Canada* (4th edn, Carswell 2021) Part VI (ss 168.1–182) H§68 Effect of Foreign Discharge.

162 [1919] 51 IC 38 (22 January 1919) <https://indiankanoon.org/doc/745471/> accessed 27 February 2022 (the Madras High Court (Phillips and Krishnan JJ) holding that the defendant's discharge from insolvency in Ceylon, the place of the contract, was recognised as valid in British India). See also VC Govindaraj, *The Conflict of Laws in India, Inter-Territorial and Inter-Personal Conflict* (2nd edn, OUP 2019) 19.

163 See, eg, *Re the Joint and Several Provisional Liquidators of FDG Electric Vehicles Limited (Provisional Liquidators Appointed)* [2020] HKCFI 2931 (19 November 2020) para 15 (Harris J). On a recent development between the Hong Kong Special Administrative Region and Mainland China, see 'HKSAR and Mainland Sign Record of Meeting Concerning Mutual Recognition of and Assistance to Insolvency Proceedings (with Photos)' *The Government of the Hong Kong Special Administrative Region: Press Releases* (14 May 2021) <https://www.info.gov.hk/gia/general/202105/14/P2021051400219.htm> accessed 27 February 2022.

164 (119/02) [2003] ZASCA 8, (7 March 2003) 2003 (4) SA 348 (SCA); *Meskin* (n 87) para 17.3.2.6; *Mars* (n 68) para 30.12 at 751–53.

The Two Rules on the Discharge of Contracts as they Apply to the Rescue of Companies in English Law

In England the relevant common law was recently summarised by the Supreme Court of the United Kingdom in *Goldman Sachs International v Novo Banco SA (Banco de Portugal intervening); Guardians of New Zealand Superannuation Fund & others v Novo Banco SA (Banco de Portugal intervening)*:[165]

> The rescue of failing financial institutions commonly involves measures affecting the rights of their creditors and other third parties. Depending on the law under which the rescue is being carried out, these measures may include the suspension of payments, the writing down of liabilities, moratoria on their enforcement, and transfers of assets and liabilities to other institutions. At common law measures of this kind taken under a foreign law have only limited effect on contractual liabilities governed by English law. This is because the discharge or modification of a contractual liability is treated in English law as being governed only by its proper law, so that measures taken under another law, such as that of a contracting party's domicile, are normally disregarded: *Adams v National Bank of Greece SA* … [1961] AC 255. By way of exception, however, the assumption of contractual liabilities by another entity by way of universal succession may be recognised in England: *National Bank of Greece and Athens SA v Metliss* … [1958] AC 509.

It is significant that the *modification* of the contractual liability is also regarded as being governed only by its proper law, an echo of Lord Radcliffe's ruling in *Kahler v Midland Bank Ltd*.[166] This passage from *Goldman Sachs* was quoted with approval by the Court of Appeal in *Re OJSC International Bank of Azerbaijan; Bakhshiyeva v Sberbank of Russia & others* (*IBA CA*) when it affirmed Hildyard J's decision in *IBA ChD*.[167] Equipped with this general ruling, we turn to the facts and reasons of the *IBA* case, which involved a foreign restructuring and the rights of English creditors under the *Gibbs* rule.

The *IBA* case illustrated and confirmed the operation of the *Gibbs* rule in a corporate rescue setting. To recap for the sake of clarity: *CMC* concerned an Italian pre-insolvency composition. To consider the potential effect of the *Ferguson* rule[168] on this Italian rescue sought to be enforced in South Africa, we compare, as persuasive authority, the recent English *IBA* case, which concerned a foreign (Azeri) pre-insolvency restructuring proceeding and claims under a contract governed by a different system of law (English law) in which the *Gibbs* rule applies.

In *IBA* the largest commercial bank in the country, OJSC International Bank of Azerbaijan, based in Baku, embarked on a debt restructuring proceeding under Azeri

165 [2018] UKSC 34 (4 July 2018), [2018] 4 All ER 1026 para 12 (Lord Sumption JSC).
166 See the text accompanying (n 100).
167 See *IBA CA* (n 85) para 29.
168 See the text accompanying (n 145).

law, and its plan was approved by a majority of creditors and the Nasimi District Court. The respondents were creditors of the bank under a term facility agreement and notes in terms of a trust deed, both expressly stating that they were governed by English law. The respondents did not vote or take part in the creditors' meeting, or submit to Azeri law or acquiesce in its application to them.[169] Under Azeri law, the plan bound all affected creditors, including those voting against the plan and those not voting at all.

The applicant in *IBA* was the bank's foreign representative and on application was granted recognition by the High Court in England, and the restructuring agreement was recognised as a foreign main proceeding, under the United Kingdom's version of the UNCITRAL Model Law, the Cross-Border Insolvency Regulations 2006 (the CBIR).[170] Such recognition imposed a comprehensive moratorium preventing creditors from commencing or continuing any action against the bank or its property without the court's permission. Before the Azeri restructuring proceeding was due to end, the applicant, relying on article 21(1) of the CBIR, applied to the English court to continue the moratorium and thus prevent the respondents from enforcing their loans.

This application for an extension was contested by the respondents, who argued that the plan had not discharged their claims against the bank and so they were still entitled to enforce their claims based on English law. Under the *Gibbs* rule, a foreign insolvency proceeding could not discharge a debt governed by English law.

The applicant responded that the *Gibbs* rule should be restricted. The strict definition of legal rights (which *Gibbs* prevents from being altered except in terms of their governing law) should be differentiated from their enforcement. Next, 'the practice of remitting assets found in this jurisdiction to the control of the "rule" in the context of a foreign liquidation recognised [in England] provides a parallel precedent for so confining and restricting the "rule".'[171] And 'such a restrictive approach gives proper effect to and is now necessary to accomplish the terms and objectives of the Model Law and the CBIR, and of the concept of "modified universalism" which they reflect and are intended to promote.'[172]

The central issue was whether the English court had jurisdiction to extend a moratorium imposed under the CBIR without a time limit, certainly beyond the termination of the foreign proceeding (the Azeri restructuring).

Hildyard J discussed the *Gibbs* rule, the authority usually cited 'for the general proposition that a debt governed by English law cannot be discharged or compromised

169 *IBA ChD* (n 114) paras 11, 18.
170 Cross-Border Insolvency Regulations 2006, SI 2006/1030 <https://www.legislation.gov.uk/uksi/2006/1030> accessed 5 November 2021.
171 *IBA ChD* (n 114) para 75.
172 ibid.

by a foreign insolvency proceeding.'[173] 'Indeed, the proposition goes further', added the judge: 'discharge of a debt under the insolvency law of a foreign country is only treated as a discharge therefrom in England if it is a discharge under the law applicable to the contract.'[174]

The next point to mention from the *IBA ChD* judgment is the conflict over the classification of the situation to which the *Gibbs* rule applies. The judge held that the rule's proposition 'would be considered entirely obvious by a contract lawyer characterising the question as a contractual one (as to the law applicable to the variation or discharge of a contract) and applying ordinary conflict of laws principles.'[175] With the rise of cross-border insolvency cases and the principle of modified universalism, though, the current situation was now classified by the adherents of that approach 'not as a contractual [issue], where primacy is given to freedom of choice, but as an insolvency one, where primacy is given to orderly *pari passu* distribution and some form of universalism to achieve it.'[176]

The judge analysed the UNCITRAL Model Law and its associated documents in detail. His judgment runs to 170 paragraphs, and that of Henderson LJ, giving the judgment of the Court of Appeal, to 103. The niceties of the precise application of the CBIR are not relevant for this article, because South Africa's version of the Model Law—the Cross-Border Insolvency Act 42 of 2000—is still not fully in effect: The Minister of Justice has not yet designated the states to which the Act, under its provisions on reciprocity,[177] will apply. Here we would submit that the South African common law, with its blend of universalism and territorialism[178] inclining towards territoriality,[179] does not go so far as to embrace the principle of modified universalism on which the contemporary English common law of cross-border insolvency and the UNCITRAL Model Law and

173 ibid para 44.

174 ibid.

175 ibid para 47.

176 ibid para 49.

177 Cross-Border Insolvency Act 42 of 2000 s 2(2)–(5). By contrast, it is noteworthy that in the Comair business rescue, the business rescue practitioners have been recognised as the foreign representatives, the SA business rescue has been recognised as a foreign main proceeding where the debtor's COMI is located, and the foreign representatives are entitled to full and additional relief under the US version of the UNCITRAL Model Law: 11 USC Ch 15 (see *Comair Limited in Business Rescue* Case Number: 21-10298 (Bankr SDNY) (13 April 2021) (Judge James L Garrity Jr), <https://www.comair.co.za/Media/Comair/page/business-rescue/13-April-2021-Dkt-012-US-Bankruptcy-Court-Chapter-15_Order-Recognizing-Foreign-Proceeding.pdf> accessed 27 February 2022.

178 *Mars* (n 68) para 30.2.

179 *Meskin* (n 87) para 17.1 n7, citing *Ward v Smit & others: In re Gurr v Zambia Airways Corporation Ltd* (51/96) [1998] ZASCA 16 (23 March 1998), 1998 (3) SA 175 (SCA) 179I (Scott JA); 'the grab rule' (Westbrook (n 121) 263).

its adoptions in '50 States in a total of 54 jurisdictions' are based,[180] and which 'may be emerging as customary international law (CIL)' enabling the filling of gaps in international instruments and influencing current documents.[181]

Among other things, Hildyard J held that the UNCITRAL Model Law 'does not address substantive domestic insolvency provisions. Still less does it seek to achieve a substantive uniformity or reconciliation between different jurisdictions and their substantive laws.'[182] And when discussing the COMI and modified universalism, and on the authority of *Singularis Holdings Ltd v PricewaterhouseCoopers*,[183] Hildyard J held that English common law

> does not yield to, adopt or enforce the law of a COMI elsewhere than here, and the law of the COMI cannot be enforced in this jurisdiction, unless and to the extent that by treaty and/or statute that law is absorbed into and becomes in effect part of British law. Such assistance as a British Court can provide in accordance with the theory and objectives of modified universalism is restricted to what by its own common law it has jurisdiction to do, or by what under such an express treaty or statute it is empowered to do.[184] … Thus, in essence, the Model Law and the CBIR provide a framework of procedural mechanisms to facilitate the more efficient and constructive disposition of cases in which an insolvent debtor has assets or debts in more than one state: see Sheldon *Cross-Border Insolvency* (4th edn) at [3.9].[185] … This is confirmed by para 7.1 of the *Explanatory Memorandum*: "The Model Law is, however, designed to respect the differences amongst national procedural laws and does not attempt a substantive unification of insolvent laws."[186]

Compare, too, the 'UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (2014)': 'With its scope limited to some procedural aspects of cross-border insolvency cases, the Model Law is intended to operate as an integral part of the existing insolvency law in the enacting State.'[187]

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180 United Nations Commission on International Trade Law, 'Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)' <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status> accessed 27 February 2022; *IBA ChD* (n 114) paras 1, 58, 75.

181 Mevorach and Walters (n 80) 885–86.

182 *IBA ChD* (n 114) para 83.

183 [2014] UKPC 36 (10 November 2014), [2015] AC 1675 para 19 (Lord Sumption JSC), as also quoted in *IBA CA* (n 85) para 44. *Singularis* was discussed in Alastair Smith, 'Assisting Foreign Insolvency Practitioners in Cross-Border Insolvency: Some Foreign Insights into South African Law *Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda)* [2014] UKPC 36 (10 November 2014), [2015] 2 WLR 971' (2016) 37(1) Obiter 167–86 <https://journals.co.za/doi/pdf/10.10520/EJC191672> accessed 27 February 2022.

184 *IBA ChD* (n 114) para 86.

185 ibid para 87.

186 ibid para 88.

187 UN Commission on International Trade Law, 'UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (2014)' para 21 at 25 (underlining supplied by counsel for Franklin Templeton, as quoted in *IBA ChD* (n 114) para 89). This Guide is available at

Moss QC's distinction between liquidation and schemes of reconstruction[188] was accepted by the Court of Appeal.[189] Reconstruction is aimed at the company's continuing 'as a going concern, and the terms will typically involve significant changes to the creditors' substantive rights.'[190] Hildyard J[191] adapted (the square brackets therefore being his) a passage from *Fibria Celulose S/A v Pan Ocean Co Ltd & another; Pan Ocean Co Ltd & another v Fibria Celulose S/A* (*Pan Ocean*),[192] to emphasise the expectations of those who deal with a foreign country in insolvency but have expressly chosen English law as the law of their contract with that company:

> In some cases, it can be argued that anyone who does business with a foreign company which might thereafter enter a process of insolvency, governed by the insolvency law of its country of registration, should expect that the insolvency will be governed by that law. Indeed, statements to that effect have been made in [*Atlas Bulk*][193] para 26 and *AWB Geneva SA v North America Steamships Ltd, Canada* [2007] 1 CLC 749 at 31. However, in the present case, the parties had deliberately chosen English law as the law of the contract. Whereas the parties might have expected that an [Azeri] court would apply [Azeri] insolvency law to the insolvency of the company, they might have been very surprised to find that an English court would [in effect] apply [Azeri] insolvency law to the substantive rights of the parties under a contract which they had agreed should be governed by English law.

This adapted ruling from *Pan Ocean* was accepted as correct by the Court of Appeal.[194]

<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf.> accessed 27 February 2022.

188 See the text accompanying (n 85).

189 *IBA CA* (n 85) para 93, quoted in *Cosco* (n 5) para 54.

190 ibid. In *Cosco* (n 5) para 61, Lord Ericht pointed out what the Singapore Schemes could not achieve: 'The purpose of the Schemes is to bind dissenting creditors. That is not in itself objectionable. It is a common feature of insolvency and other company law procedures in this and other countries that a majority can, under the supervision of the court, impose the will of the majority upon a dissenting minority. However, the particular feature of these Petitions is that so far as English law is concerned, that purpose will not be achieved: the Scheme will not bind Cosco. The majority cannot, as far as English law is concerned, impose its will on Cosco under the proposed Singapore law Schemes, nor swap Cosco's debt for equity nor extinguish Cosco's rights under the Seller's Credit and Guarantee. So far as English law is concerned, the Seller's Credit and Guarantee simply fall outside the Singapore Scheme.'

191 *IBA ChD* (n 114) para 158(3).

192 [2014] EWHC 2124 (Ch) (30 June 2014), [2014] Bus LR 1041 para 112 (Morgan J).

193 *Atlas Bulk* was the court's abbreviation denoting *Larsen v Navios International Inc* [2011] EWHC 878 (Ch) (13 April 2011), [2012] 1 BCLC 151.

194 *IBA CA* (n 85) para 93.

Hildyard J concluded[195] that *Pan Ocean*, following *Rubin*,[196] and consistently with *Gibbs*,[197]

> affirms that the Model Law and the CBIR do not empower the English court, in purported appliance of English law, to vary or discharge substantive rights conferred under English law by the expedient of procedural relief which as a practical matter has the same effect, and has been fashioned with the intention, of conforming the rights of English creditors with the rights which they would have under the relevant foreign law.

(In *IBA* the relevant foreign law was Azeri law.) The main thrust of Hildyard J's conclusion was approved by the Court of Appeal.[198] Henderson LJ concluded that in the present context it would 'be wrong in principle to use the powers in art 21(1)(a) and (b), or any other provisions of the Model Law as incorporated in the CBIR, so as to circumvent the English law rights of the English creditors under the *Gibbs* rule.'[199]

'As a result, the Model Law in the UK offers nothing beyond a temporary reprieve in collections pending negotiations and thus rewards with preferential treatment those who refuse to participate in achieving reasonable restructurings in foreign proceedings.'[200]

It was forecast that the *IBA* matter would be appealed to the Supreme Court of the United Kingdom.[201] The Azeri foreign representative was refused permission to appeal to that court, though, 'because the application does not raise a point of law of general public importance which ought to be considered at this time.'[202]

With these insights gleaned from the judgments of the High Court and the Court of Appeal—and the Supreme Court—in the *IBA* case, how do we assimilate their approach in considering the law of South Africa?

The Application of the *IBA* Rulings in South African Common Law

It is true that *IBA* concerned the interpretation and application of the UNCITRAL Model Law and the CBIR in England, but *CMC* concerned the application of the common law

195 *IBA ChD* (n 114) para 146.
196 *Rubin* (n 116).
197 *Gibbs* (n 113).
198 *IBA CA* (n 85) para 94.
199 ibid para 95, mentioned in *Cosco* (n 5) para 50. Lord Ericht then explained (ibid para 51): 'The circumstances of the *OJSC* case were broadly similar to those of the current petitions, except that the current petitions are brought before, rather than after, the end of the foreign restructuring.'
200 Westbrook (n 121) 262.
201 See, eg, Ian G Williams and Adrian J Walters, 'Modified Universalism in Our Time? A Look at Two Recent Cases in the U.S. and U.K.' (2018) 37(7) American Bankruptcy Institute Journal 24, 25.
202 See The Supreme Court, 'Permission to Appeal results – June, July and August 2019' <https://www.supremecourt.uk/docs/permission-to-appeal-2019-060708.pdf> accessed 27 February 2022: *Bakhshiyeva (in her capacity as the Foreign Representative of the OJSC International Bank of Azerbaijan) (Appellant) v Sberbank of Russia and others (Respondents)* UKSC 2019/0012, Neutral Citation No [2018] EWCA Civ 2802 (Lord Reed, Lord Briggs, Lady Arden), Refused 26 June 2019.

in South Africa. However, we submit that the ruling that the UNCITRAL Model Law and the CBIR do not displace the rights which English creditors enjoy by virtue of the *Gibbs* rule in English law would, with the necessary adjustments, apply with even greater force in South African law, where the *Ferguson* rule according substantive rights to South African creditors applies in practice and the Cross-Border Insolvency Act does not. Still less would the Italian commissioners therefore be entitled to deprive the Italian company's South African creditors of the substantive rights the latter enjoy under the *Ferguson* rule. The only exception might be if the South African court adopted the *Rubin* exception recognised by the English courts,[203] in terms of which, with the necessary adjustments, the South African creditors would not enjoy the protection of the *Ferguson* rule if they had proved a claim in the foreign insolvency proceedings (in *CMC* the Italian composition). The *Rubin* exception would in turn not apply if, like the English plaintiffs in *Gibbs*,[204] these South African creditors had expressly reserved the rights which they enjoy under the *Ferguson* rule.

In broad terms, then, applying the general principle of South African private international law that the creation, variation, and discharge of the contract are all governed by its proper law,[205] the result would be that, if the proper law of the contract between a South African creditor and CMC were Italian, the Italian final composition would statutorily novate the contract accordingly (compare *IBA CA*[206] on the position if the relevant contracts in that case had been governed by Azeri law). If, as would probably be more likely, though, the relevant proper law were South African, then, under the *Ferguson* rule, the Italian composition would not novate the contract, whose terms would therefore continue as before.

'*Gibbs* may be old law, but it remains good law, for now.'[207] 'For now' means until the Supreme Court of the United Kingdom reconsiders its decision to refuse the IBA foreign representative leave to appeal as described above,[208] or the Parliament of the United Kingdom approves the UNCITRAL Model Law on the Recognition and Enforcement of Insolvency-Related Judgments (2018).[209] This is the law under *Ferguson* too.

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203 See the text accompanying (nn 114 to 117).

204 *Gibbs* (n 115).

205 See the text accompanying (nn 102 to 103).

206 *IBA CA* (n 85) para 30.

207 Philip Wells and Lucy Aconley, 'How to Get Recognised: Cross-Border Recognition of Insolvency and Restructuring Proceedings post-Brexit' (2021) 3 Butterworths Journal of International Banking and Financial Law 187, 189.

208 See the text accompanying (n 202).

209 See UN Commission on International Trade Law, 'UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment' (2018) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml_recognition_gte_e.pdf> accessed 27 February 2022.

Recognising a Foreign Restructuring in South African Law

A Question of Mastery, and the Need for a New Pair of Spectacles

Amidst the clamour over characterisation and choice of law in the *CMC* situation, we should like to mention that it seems to be mistaken to reason, in effect, that, because statutory debt restructuring proceedings allow the use of tools having a collective effect such as the moratorium and the majority's ability to bind the minority (even stayaways) to the restructuring plan,[210] and because those collective tools are derived from or reminiscent of or consonant with insolvency law, therefore insolvency law is necessarily the best or only method of dealing with pre-insolvency proceedings, where by definition a winding-up order or a liquidation process is not yet underway—and, if the opportune pre-insolvency proceedings achieve their intended purpose, may never come to pass.[211] Tools are there to be used appropriately and at the proper time by the experts treating the problem, and should not in themselves classify and determine the problem. To illustrate this point with an analogy from a field other than law: one would not contend that brain surgeons should start taking over the work of heart surgeons simply because, in the history of medicine, brain surgeons used scissors and forceps before heart surgeons did so, or that scissors and forceps themselves should classify and decide the problem. Different needs and different skills using the same or similar tools are at stake.

To return to our previous observation,[212] it should not be its insolvency law spectacles that the South African court reaches for when examining the *CMC* situation, but its contract and company law bifocals, because no winding-up order or liquidation process is in force. That the issuing of the comparable sequestration order is a Rubicon moment is borne out by the leading case on South African insolvency law, *Walker v Syfret NO*,[213] where Innes J described that order as crystallising the insolvent's position, the hand of the law being laid upon the estate, and at once the rights of the general body of creditors having to be taken into consideration. So, too, in the present context of pre-insolvency composition, until the Rubicon of the winding-up order is crossed, the debtor's position is not crystallised, the hand of the (insolvency and liquidation) law is not laid upon the estate, and the rights of the general body of creditors (to share in the common pool of

210 Note that the moratorium and the mechanism to bind all affected persons (even stayaways) to the plan approved by the majority are both mentioned as features of business rescue as a modern and effective corporate rescue mechanism: *Meskin* (n 87) para 18.2nn3 and 10–11, respectively.

211 The first prize for a successful business rescue remains the rehabilitation of a financially distressed company by, among other things, providing for the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis (Companies Act 71 of 2008 s 128(1)*(b)*(iii)).

212 See the text accompanying (n 92).

213 1911 AD 141, 166. See *Mars* (n 68) para 1.1 at 4; *Meskin* (n 87) para 5.20, adding, 'In the case of the liquidation of a company by the Court, the *concursus* is instituted upon the commencement of the winding-up, which is deemed to commence "at the time" of presentation to the Court of the application for the liquidation, ie, when it is lodged with the Registrar of the Court, provided, of course, that the order for winding-up is granted' (Companies Act 61 of 1973, s 348).

assets inadequate to satisfy those creditors' claims in full) need not be taken into consideration but only those creditors selected by the company in terms of its restructuring process and plan to enjoy rights to a future stream of the debtor's income.[214]

Wearing its contract and company law bifocals, the South African court should examine the final Italian pre-insolvency statutory composition/restructuring judgment and order. Collective aspects of the process and order, such as the moratorium and the majority's binding the minority (even stayaways), should not deter or prevent the application from being brought for the recognition of the final judgment and order as a final judgment according to the usual principles. The multiplicity of parties to this recognition and enforcement application should not prove to be an obstacle either: after all, although no collective features in the insolvency and liquidation sense were mentioned in *Government of the Republic of Zimbabwe v Fick & others*,[215] the existence of several claimants (later, judgment creditors)—the '[numerous] farmers'[216] and '76 others who were also affected by Zimbabwe's agrarian reform policy'[217]—did not prevent their case from being heard by the Constitutional Court in South Africa.

In relying on the final Italian judgment and order of composition as a cause of action in the South African court, counsel for the Italian commissioners, having properly notified all CMC's South African creditors and invited their testimony and argument,[218] could rely on *Hope*[219] and *Dyer*[220] and *Tilley*[221] summarised above[222] and argue that the obligations under the contracts whose proper law was Italian law had been statutorily novated,[223] whether the affected South African creditors had supported or opposed the composition or even stayed away completely. Similarly, invoking the *Rubin*[224] exception[225] as persuasive authority, counsel would point to the South African creditors who (like the second respondent)[226] took part in the Italian composition proceedings, particularly if they proved a claim there and possibly if they also contested their claim in the Italian courts (like the English plaintiffs in the French court in *Gibbs*).[227] Counsel would argue that those participants were also bound by the composition and thus

214 For the different functions of insolvency and restructuring law, see the text accompanying (nn 83 to 85).
215 (CCT 101/12) [2013] ZACC 22 (27 June 2013), 2013 (5) SA 325 (CC).
216 ibid para 13 (Mogoeng CJ).
217 ibid para 14.
218 See text accompanying (n 74).
219 *Hope* (n 126).
220 *Dyer* (n 130).
221 *Tilley* (n 131).
222 See the text accompanying (nn 126 to 130).
223 See the text accompanying (nn 87 to 88).
224 *Rubin* (n 116).
225 See the text accompanying (nn 114 to 117).
226 See *CMC GP* (n 2) para 46.
227 See the text accompanying (n 113).

prevented from suing in South Africa for the balance of their claims, unless (like the *Gibbs* plaintiffs)[228] those creditors had expressly reserved their rights to sue CMC in South Africa under South African law. This line of argument would not be undermined by the authority of *Alexander & Co v Lioni*, where the Supreme Court of the Cape of Good Hope allowed the plaintiffs to keep the amount that they had been paid in the Griqualand West liquidation and distribution account and sue Lioni for the balance in the Cape: the point of distinction would be that it was rehabilitation (not sequestration) that would have discharged Lioni's debts, and he had not been rehabilitated in Griqualand West.[229]

However, the South African creditors whose contracts with CMC were governed by South African law would not be bound by the Italian composition and would, therefore (like the successful parties in *Gibbs* and *Ferguson*),[230] remain free to pursue civil process against CMC or apply for its winding-up and liquidation in this country.

Combatting the *Gibbs/Ferguson* Rule with Legislation or Parallel Local Proceedings—Or Perhaps Not

Changing the South African substantive law that is based on the relevant English principles (including the *Gibbs* rule) might well require legislation.[231] The fact that, after two decades, the Minister of Justice has still not drafted the list of countries to which the Cross-Border Insolvency Act 42 of 2000 will apply[232] does not inspire confidence that parliament and the government will alter the relevant substantive common law in this area of South African private international law in the near future.

In *IBA* a point raised in argument was that, as an alternative to legislative change regarding the *Gibbs* rule, 'the appropriate remedy for a foreign office holder to adopt would be to apply for a parallel scheme of arrangement in this jurisdiction.'[233] This alternative disclosed the further problem that the English creditors in *IBA* would have to have been treated as a separate class and be offered terms they would be prepared to accept.[234] In making this observation, Henderson LJ held that this was 'another way of saying that the English creditors' strongest bargaining position would have been their English law rights, protected by the *Gibbs* rule.'[235]

Even the need for parallel proceedings has been criticised by a Hong Kong court as 'an outmoded way of conducting cross-border restructuring': 'Requiring foreign office-

228 See the text accompanying (n 115).
229 See the text accompanying (nn 146 to 152).
230 See the text accompanying (nn 113 and 145 to 159), respectively.
231 Compare counsel's argument in *IBA CA* (n 85) para 67.
232 See the text accompanying (n 177).
233 *IBA CA* (n 85) para 67, counsel referring to *Re Drax Holdings Ltd, Re Inpower Ltd* [2003] EWHC 2743 (Ch) (17 November 2003) [2004] 1 All ER 903, discussed in *IBA CA* (n 85) para 68.
234 *IBA CA* (n 85) para 88.
235 ibid.

holders to commence parallel proceedings is the very antithesis of cross-border insolvency cooperation.'[236] Although the *Gibbs* rule can thus be worked around, it 'does present practical inefficiencies, as demonstrated by the antiquated need for parallel schemes in jurisdictions where the scheme company has a mere letterbox presence.'[237] And such parallel schemes of arrangement '[enrich] the professionals involved but [diminish] value that would otherwise be available for other creditors and interested parties.'[238]

South Africa provides no parallel business rescue or compromise with creditors that CMC as an external company can apply for: the 'company' definition in section 1 unavoidably bars access by external companies to business rescue and compromise with creditors in chapter 6 of the 2008 Companies Act.[239]

Conclusion

We wish that an external company could at least be allowed a compromise with its creditors under section 155 of the 2008 Act, if not a business rescue.[240] As these remedies are seemingly not available to the external company, we submit that this company's debt could be dealt with if a South African high court considered recognising the Italian final composition as a foreign judgment and giving effect to it in this country in the manner described in this article.

Alternatively, the question would be whether the representatives of the restructured company could successfully apply for recognition under the South African common law on cross-border insolvency. The recognition as such should not prove too difficult;[241] what is much more uncertain is the basis on which the South African courts would then ensure the protection of local creditors while at the same time assisting the foreign representatives of the restructured company with their mission to throw a net over as many South African creditors as possible. The uncertainty would arise from the fact that the protection of local creditors would have involved the court's order making certain provisions of the *South African* law of insolvency and winding-up applicable to the

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236 *Re Da Yu Financial Holdings Ltd* [2019] HKCFI 2531 (17 October 2019) para 49 (Deputy High Court Judge William Wong SC).

237 Look Chan Ho, '*Gibbs* is No Bar to Hong Kong Schemes Compromising Debts Governed by Mainland and Foreign Laws' (2020) 8 Butterworths Journal of International Banking and Financial Law 557, 558.

238 Varoon Sachdev, 'Choice of Law in Insolvency Proceedings: How English Courts' Continued Reliance on the *Gibbs* Principle Threatens Universalism' (2019) 93(2) American Bankruptcy Law Journal 343, 360.

239 See the text accompanying (nn 57 to 61).

240 See the detailed argument by Boraine (n 61).

241 See Patrick O'Brien, 'Transnational Aspects in South African Insolvency Law' in RH Zulman (chairman), *Reform of South African Insolvency Law* (Conference Rand Afrikaans University, Johannesburg 28 August 1995) para 4.3 and cases discussed there.

collection and realisation of the debtor's property located in South Africa.[242] Secured or statutorily preferent claims are restricted to creditors whose entire cause of action arose in the Republic or who were inhabitants (*incolae*) of the Republic, and after that, dividends are due and payable to ordinary concurrent creditors. Only after charges, costs and proved claims have been paid may any remaining assets and moneys be removed from the Republic with the Master's written consent or the consent of the court. Onto this set of instructions would have to be grafted, somehow, the terms of the Italian final court order providing for the restructuring of the company according to *Italian law*—all without a South African business rescue or compromise with creditors as the nursery.

The previous discussion outlined the different functions of insolvency and restructuring.[243] Insolvency focuses on the realisation and distribution of the inadequate common pool of assets among the ranked creditors in a *post*-liquidation setting. By contrast, restructuring focuses on the tragedy of the anticommons and provides for the rights of (perhaps selected) creditors to a future stream of the company's income in a *pre*-liquidation setting.

In the current situation involving cross-border aspects, it is clear that the court order would then, somehow, have to be a hybrid order. This strange phenomenon would incorporate elements of insolvency and restructuring. And, by definition, there would be no possibility of business rescue or compromise under South African law. What would be the outcome of such a hybrid order?

We submit that local insolvency rules would typically absorb restructuring principles. Complying with the court's instructions for realising and distributing the South African assets would normally leave the foreign representative with nothing, unless the company's estate in South Africa turned out to be solvent. As a result, there would usually be no assets or moneys left in South Africa which could then go towards providing the stream of future income envisaged in the foreign restructuring. A similar outcome would flow from the institution of a South African winding-up of the debtor, the external company. Given the absence of business rescue and a composition with creditors for this company, there seems, without a miraculous windfall of many millions, no happy new life for this company in this country.

If there is no South African winding-up in place involving the foreign company,[244] then a major theme of this article is that the rules of insolvency law should not apply to the

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242 Compare the discussion in *Mars* (n 68) paras 30.8–30.9 and *Meskin* paras 17.3.2.4–17.3.2.5.

243 For the different functions of insolvency and restructuring law, see the text accompanying (nn 83 to 85).

244 The possibilities of winding up the external company are discussed in detail by Boraine (n 61). A snapshot must suffice here: A solvent external company cannot be liquidated under the 2008 Companies Act ss 79 to 83, because of the exclusion in the 'company' definition in s 1. The issue is whether the solvent external company may be wound up under the transitional arrangements in the 2008 Companies Act Sched 5 Item 9(1). Those arrangements preserve the relevant provisions of the 1973 Companies Act Chapter XIV, which govern both solvent and insolvent companies. Pending a

pre-insolvency restructuring. At this point, we propose a radical reimagining of the South African common law of pre-insolvency law. We will use the analogy of a dance taking place under a tent that we will name 'the South African law of transnational distress.'[245] The principles regarding the recognition of the pre-insolvency proceedings may find shelter under this tent rather than being exposed outside, in that other harsher field of South African private international law, the recognition of foreign judgments. This reclassification exercise would thus require the rearrangement of the categories of local private international law. It might prove a drastic, or unconvincingly slick manoeuvre for traditionalists who cling to the trite because it has been tested and who thus exclude themselves from the current international debate over the place of pre-insolvency principles within private international law. Without such a manoeuvre the process cannot proceed and the local assets of the restructured company are usually consumed by the local creditors. If those who control the dance taking place inside the tent—the South African high courts—allow the foreign representatives to take to the floor, though, then the dance may proceed and the *Ferguson* rule will determine that those local creditors with Italian contracts are caught by the Italian restructuring and those with South African contracts are free to negotiate with the foreign company on mutually agreeable terms for their future relationships unless, by submitting to the Italian proceedings, they ensnared themselves in the *Rubin* exception.

If denied this recognition in the reimagined South African law of transnational distress, the representatives of the foreign company may have to consider other formal avenues such as liquidation or perhaps sequestration. The details of such remedies are uncertain.

Beyond these formal remedies lies the further possibility of negotiating an informal workout[246] with the South African creditors. They would need to be offered terms by CMC that would match or improve on the rights and the freedom of manoeuvre they enjoy under the *Ferguson* rule. That rule, ideally suited to a territorialist approach to cross-border matters and so in conflict with the zeitgeist of modified universalism,[247]

judgment to clarify the position, a purposive interpretation of Chapter XIV includes external companies. A point of contention would be reading the definition in the 2008 Act s 1 'company' together with the provisions in the transitional arrangements preserving the relevant provisions of the 1973 Act Chapter XIV which apply to a 'company.' The interpretation could indicate that parliament intended closing the door on liquidation procedures for external companies. What is already clear is that external companies are denied business rescue and the compromise with creditors under the 2008 Act Chapter 6; and the provisions on judicial management (1973 Act Chapter XV) and the compromise and arrangement with creditors that were possible (1973 Act s 311) were repealed by the 2008 Act. A sequestration of the external company's SA estate under the Insolvency Act 24 of 1936 may in theory be possible, but the details of implementing the machinery of such relief in relation to such a company remain unclear. So the South African cupboard of formal rescue remedies for external companies seems rather bare.

245 The name of our tent is based on the excellent term, 'the law of transnational distress', used by Mevorach and Walters in the text accompanying (n 82).

246 See the text accompanying (n 67).

247 See the text accompanying (nn 178 to 181).

does provide at least the comfort of certainty[248] and protection to the South African creditors of international companies.

Yet that comfort comes at a cost. Foreign companies are welcomed by many people in various quarters in South Africa and around the world to invest in a South Africa that is open for business[249] and provides a convenient gateway to the rest of Africa.[250] In TS Eliot's words from the poem 'Little Gidding', 'the end of all our exploring/Will be to

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248 Compare Safiyya Khan and Matthew Thorn, 'Re *OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802' (International Restructuring Newswire | Knowledge | Global Law Firm | *Norton Rose Fulbright*, April 2019) <https://www.nortonrosefulbright.com/en-za/knowledge/publications/b933d9a7/re-ojsc-international-bank-of-azerbaijan> accessed 27 February 2022 ('The rule provides certainty to parties that choose English law that their contracts will not be modified or extinguished by any law other than the one they chose. Supporters argue that a creditor in the London financial markets may be less likely to trade with a foreign debtor if those English debts could be compromised by foreign restructuring measures not recognised in the EU.'). Compare counsel's explanation of Cosco's choice of English law to govern its contracts (*Cosco* para 42): 'He further submitted that in any event, a foreign insolvency process is not capable of modifying or extinguishing liabilities under a contract governed by English law (*Antony Gibbs & Sons v La Societe Industrielle et Commercial des Metaux* (1890) LR 25 QB 399 as reaffirmed in *OJSC International Bank of Azerbaijan*). Cosco, a Chinese shipbuilder contracting with Norwegian and Singaporean companies had good reason to choose that the Seller's Credit and Guarantee be governed by English law. The objective of the present proceedings, as demonstrated by the Petitioner's affidavit in the Singapore Moratoria applications, was to try to bind Cosco into the Singapore Schemes.'

249 See, eg, 'South Africa is Open for Business' *Mail & Guardian* (13 November 2020), <https://mg.co.za/special-reports/2020-11-13-south-africa-is-open-for-business> accessed 27 February 2022.

250 This concept of South Africa's being a gateway to Africa is analysed in Peter Draper and Sören Scholvin, 'The Economic Gateway to Africa?: Geography, Strategy and South Africa's Regional Economic Relations' (Occasional Paper No 121 Economic Diplomacy Programme, *South African Institute of International Affairs*, September 2012) <https://www.researchgate.net/publication/341215129_The_economic_gateway_to_Africa_geography_strategy_and_South_Africa's_regional_economic_relations> accessed 27 February 2022, and MM Sandretto, 'South Africa: Still the Gateway to Africa?' (*How we made it in Africa*, 8 November 2016) <https://www.howwemadeitinafrica.com/south-africa-still-gateway-africa/56591/> accessed 27 February 2022. Challenges to South Africa's being the gateway to Africa are traced in Staff Writer, 'SA is Losing Its Shine as the Gateway into Africa' *BusinessTech* (26 September 2017) <https://businesstech.co.za/news/business/200960/sa-is-losing-its-shine-as-the-gateway-into-africa/> accessed 27 February 2022; Ronak Gopaldas, 'The Race to Become Africa's Preferred Gateway is Heating up' (*Observer Research Foundation (ORF)*, 28 June 2018) <https://www.orfonline.org/expert-speak/41964-race-become-africa-preferred-gateway-heating/> accessed 28 February 2022; Irma Venter, 'South Africa Not the Gateway to Africa, Warns Research House' *Creamer Media's Engineering News* (18 June 2019) <https://www.engineeringnews.co.za/article/south-africa-not-the-gateway-to-africa-warns-research-house-2019-06-18/rep_id:4136> accessed 27 February 2022 (the idea that South Africa is the gateway to Africa being described as 'a mere "influence illusion"'); Chris Barron, 'SA Loses Crown as Gateway to Africa' *Sunday Times* (7 March 2021) 6 <https://www.proquest.com/newspapers/sa-loses-crown-as-gateway-africa/docview/2497913020/se-2?accountid=14648> accessed 28 February 2022.

arrive where we started/And know the place for the first time.'[251] Foreign investors now know that the *Ferguson* rule normally[252] gives South African creditors the upper hand in their negotiations with a foreign company trying to restructure its debts. And so this aspect of life in South Africa may strike potential foreign investors as a closed shop, where corporate rescue is for locals and foreign investors may be headed for winding-up if they get into financial trouble, or reduced to haggling in the shadows of the law with wily locals armed with the *Ferguson* rule and holding out for what suits them rather than the foreign investors. The entire formal attempt to restructure the South African side of an international company in time to avoid winding-up hangs by a thread, depending on a favourable court decision that is by no means certain or guaranteed as regards the recognition of the foreign composition or restructuring sought to be enforced in South Africa.

> Most important is finality as to prior debts and other obligations. Reorganization is not realistically possible if the result of a judicially approved restructuring of debt is not enforced in every relevant jurisdiction. Absent enforcement, holdouts win and in consequence others will refuse to play.[253]

If the attempt at recognition and enforcement of the foreign composition or restructuring fails, foreign investors now also know in advance that this country provides no parallel formal pre-insolvency proceedings to counter the *Ferguson* rule. Anachronistically denying[254] external companies both a business rescue and a composition with creditors, combined with retaining the *Ferguson* rule, itself both a choice of law and a choice of forum,[255] produces a potent blend of territorialism and exclusiveness.

Potential foreign investors—and distressed external companies already in South Africa—should heed Westbrook's words when applied to South Africa: 'If the Gibbs rule is retained in England, one solution for a distressed company might be to relocate all its assets from England to other jurisdictions with less parochial rules.'[256]

Either way, the decisions not to invest in South Africa, or to move the external company's assets to other countries, are both, for all the rights and protection enjoyed by local creditors, ultimately South Africa's loss.

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251 See 'Four Quartets 4: Little Gidding - Poem by T.S. Eliot' (*PoetryVerse*) <https://www.poetryverse.com/ts-eliot-poems/four-quartets-little-gidding> accessed 26 February 2022.

252 The exception would be the *Rubin* exception, when the South African creditors would have given up their advantage by submitting to the foreign proceedings.

253 Westbrook (n 121) 266.

254 On the importance of corporate rescue as a current international concern, see, eg, Levenstein (n 59) Part II: International best practice, rescue instruments, the development of corporate rescue culture and common rescue themes; *Meskin* (n 87) para 18.2.

255 See the text accompanying (n 122).

256 Westbrook (n 121) 272.

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