

Ep.77 Cross Border Recognition and Enforcement of Restructuring Plans

Intro Music: INSOL international, in conjunction with the Early Researcher Academics Committee, presents INSOL talks.

Defne Tasman (DT) (00.23): Welcome back to another episode of INSOL Talks. My name is Defne Tasman. I am a member of the INSOL ERA board and PhD researcher at the University of Antwerp in Belgium.

Jaime Vazquez (JV) (00.33): And my name is Jaime Vazquez. I am also a member of the insole ERA board, and I'm currently a PhD researcher at the Autonomous University of Madrid in Spain.

DT (00.42): Today we turn to one of the most complex and consequential issues in the international restructuring practice - the cross-border recognition of restructuring plans. The issue has become urgent since the Frankfurt Regional Court refused to recognise a UK part 26A plan. That judgment reopened a fundamental question for post-Brexit Europe. When a company restructures in London, can its plans still have legal force in Germany or anywhere else?

At stake is not just a technical question of private international law. It goes to the heart of cross-border legal certainty. Without automatic recognition of English decisions after Brexit means that companies and investors now face new risks when their restructuring spans both the UK, the EU and beyond. Understanding how courts respond to this issue, starting with Frankfurt, is crucial for anyone dealing with multi-jurisdictional distress. The fragmentation of recognition rules against third countries affect how investors behave, how multinationals manage crises, and ultimately, how Europe competes as a single capital market. We will explore this along three perspectives. The Frankfurt Court's view shaped by statutory precision and judicial restraint, the UK view grounded in functional pragmatism and the broader European context. By the end, we will understand not only what Frankfurt decided, but also what kind of Europe it points to one that guards or one that reaches out, and also what this means for cross-border restructurings worldwide.

JV (02.23): So today, to discuss the evolving landscape of cross-border restructuring and the recognition of restructuring plans, we are joined by three leading voices in the field. So we welcome Professor Stephan Madaus, Professor Riz Mokal and Professor Dominik Skauradszun. I apologize in advance if I have butchered any of your names. Each has contributed deeply to the European and international debate on how courts approach restructuring plans that cross national borders, a topic of particular relevance in the wake of Brexit and the recent Frankfurt decision.

So we've got with us Professor Stephan Madaus, who holds the chair of civil, procedural and insolvency law at Martin Luther University Halle-Wittenberg, where he also chaired the academic committee from 2018 and 2021. He also happens to be the president of the board of directors of III. Professor Madaus is a member of the European Commission Expert Group on Restructuring and Insolvency, and we've been told he has played a huge role in shaping the EU's approach to preventive restructuring. He focuses on the comparative analysis of relevant regulatory approaches in jurisdictions worldwide, as well as in the soft law of international organizations, and we are aware that his research explores how restructuring law can function as a distinct

contract based autonomous field, not merely an extension of insolvency law. I'm sure he'll have something to say about it later on.

Next up we have Professor Riz Mokal, who is a barrister at South Square in London and an honorary professor of law at the University College of London. He is on the board of directors of ILL as well as. Riz was formerly a senior counsel and head of the World Bank's Global Initiative on Insolvency and Creditor Debtor Regimes. So he has advised governments worldwide and contributed to the UNCTRAL Model Laws, including the ones on cross-border insolvency law and the enforcement of insolvency related judgments. He's worked on several landmark cases in the UK, including Gate Group and his broader functional theory of insolvency law have deeply influenced how UK courts conceptualized restructurings.

Last but certainly not least, we have with us Professor Dominik Skauradszun. He is an honorary professor of restructuring insolvency law at Nottingham Trent University, a professor of law at the Fulda University of Applied Sciences and a judge of appeal at the Higher Regional Court of Frankfurt. He specializes in civil, corporate and insolvency law and has extensive judicial and academic experience, having previously served as an attorney, trial judge and of counsel at a leading firm, among others. His recent writings on cross-border restructuring, recognition and the StaRUG have directly influenced German legal discourse, including the reasoning of the Frankfurt Court itself.

Welcome to talks, Dominik, Riz and Stephan. Thank you for joining us. Before we move on, it should be noted that each of you has kindly provided us with previous papers on the, on the matter, and the link to those materials can be found in the show notes.

DT (05.13): Now, without further ado, let us start with the Frankfurt decision that revived this debate. In July 2025. The regional Court of Frankfurt in Germany refused to recognize the sanction order issued by the English High Court in a part 26A restructuring plan. Dominik, the court's reasoning seems to echo the arguments that you have made in your writing. Could you take us through it, please?

Dominik Skauradszun (DS) (05.42): Absolutely. It's my pleasure. As for my perspective, the Frankfurt ruling simply portrays the current situation under German law. But before I outline the reasoning behind the Frankfurt ruling, I would like to thank you all for having me, having us, and for allowing me to chat with you about this hot topic, of course. First things first the trial structure. A creditor, formerly an affected party in the UK restructuring framework is pursuing its claim. A debtor, the former plan company defends itself by pointing to the legal changes due to the restructuring plan. In this case, the restructuring plan under part 26A of the UK Companies Act intended to postpone the claims maturity and therefore a deferral, and the defendant is of the opinion that the plan's confirmation the sanction order must be recognized in Germany.

So this structure is typical of all cross-border restructurings, where recognition is sought in the target countries at a later time, and the Frankfurt court indeed declined to recognize to qualify part 26A as insolvency proceedings under German insolvency law. And I have to emphasize this right at the beginning: under German insolvency law. So it is not the English understanding that matters, but the German. And therefore the provision allowing German courts to automatically recognize foreign decisions in insolvency proceedings, this is section 343 of the Insolvency Code, it does not apply.

So in the eyes of the Frankfurt Court, part 26A does not qualify as insolvency proceedings because it lacks a collective nature, as the debtor can select certain creditors and shareholders,

but does not necessarily include them all. And the court then also refused to recognise the sanction order as a judgment. Delivered in a traditional, typical civil trial. The German Civil Procedure Code provides for such an automatic recognition, but only if none of the reasons for prohibiting recognition applies. And one of the reasons for non-recognition is missing reciprocity, and the court ruled that the defendant the plan company had to prove reciprocity, meaning that the English courts would recognise German plan confirmations that affect a creditor's claims. This proof had not been provided in this special type of civil trial. And lastly, the court wiped away any recognition under a special convention, a convention of 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

And the reason for this is, that this convention was replaced by the Brussels 1 regulation later, and did not revive after Brexit. For the sake of completeness, unfortunately, the court did not ask at first how to qualify part 26A. But this is the starting point in each and every case on private international law. So if it was to ask this first, part 26A would qualify as preventive restructuring framework and therefore the equivalent to the German StaRUG, the Act on the Stabilisation and Restructuring of Companies. And in this very act, there is simply no recognition provision. And this is no coincidence. The German lawmaker could not and did not want to develop a recognition mechanism for third countries outside the EU in 2020, the peak of the Covid-19 pandemic. And this is why, to my understanding, the judiciary is not permitted to jump in and imitate the legislator's role.

And lastly, the Frankfurt court unfortunately did not discuss whether the recognition mechanism under the General Civil Procedure Code is actually suitable for sanction orders like the one at hand, and the Civil Procedure Code, designed for the basic structure with one claimant and one defendant, is honestly inappropriate for a ruling on a multi-party restructuring, as it only offers the binary system recognition yes or no, whereas in restructuring law, a much more nuanced system is required for the individual rights affected by a restructuring plan, such as a right *in rem*, land charges or labour rights, just to name a few.

JV (11.03): Thank you so much, Dominik. Then now we will turn to our other German expert, Stephan, who has a divergent opinion. So, Stephan, we've been told you see the same judgment in a very different light. You have previously argued that this is a missed opportunity, and that the absence of an explicit German recognition rule does not mean there's a prohibition to recognize. So where does the German law leave room for recognizing foreign plans? And how far can judges go before crossing into legislation?

Stephan Madaus (SM) (11.32): Yeah. Excellent question. So, we were working based on assumptions for a long time, and now we are faced for the first time with an actual court case. And of course, this uncertainty is addressed now. So first of all, the good thing, the good news is uncertainty is being addressed. The bad news is that the news is out that Germany is a difficult venue for getting a restructuring recognized. And I would like to make a first clarification here. And it was already mentioned by Dominik, that we have a standalone, autonomous cross-border insolvency framework which provides for automatic recognition for insolvency proceedings. We call them foreign insolvency proceedings as qualified by German law, and we have established case law that ranges from Chapter 11 restructurings to restructuring proceedings in Thailand, Brazil or Singapore.

So, Germany is recognition friendly. We have a recognition friendly insolvency framework. And this does not stop with the Frankfurt decision to make that clear. And the dispute that we're talking about today is solely focusing on the question whether a special type of proceedings,

which in the EU is called preventive restructuring proceedings, fall within the scope of this framework, or whether they simply don't. And then we simply don't really know where to where they fall if they don't fall into that framework.

So that's the outset. A preventive restructuring is something that is rather new. So, we could agree on the phenomenon that this is something that was not in the room when the statutes were born that we're talking about today. So, when section 343 of the German Insolvency Code, which provides for the automatic recognition of foreign insolvency proceedings, uh, was drafted, no one thought about preventive restructuring. So, the term foreign insolvency proceedings was, of course drafted with different proceedings in mind. And so it is a matter of construction. Now, how to delineate the scope of this tool based on our understanding of what a foreign insolvency proceeding.

The Federal Supreme Court, the Bundesgerichtshof, clarified this for a scheme of arrangement in 2012, holding that a scheme of arrangement in 2012 did not qualify as a foreign insolvency proceeding because it wasn't fully collective, and at the time the only insolvency proceeding known to Germany was the one defined in the Insolvency Code, Insolvenzordnung, which was a fully collective proceeding and the one defined in the 2002 Insolvency Regulation, which was also fully collective process. So full collectivity seemed to be the obvious delineation and characterization of an insolvency proceeding, and the scheme wasn't one. Going down the timeline 12, 13, 14 years, of course, things have changed. The Frankfurt court unfortunately does not consider that argument. So the Frankfurt court is simply applying what it feels like a live case law from the decision of the Supreme Court in 2012. And looking at that definition, full collectivity is needed, and full collectivity is something that is certainly not present necessarily in part 26A restructuring plan.

So based on that very limited legal analysis, you can come up with a judgment as we see it now, although it's a preliminary judgment. The broader question is, and I think that's going to be the interesting question, is whether this presumption is right, whether the definition of an insolvency proceeding in our cross-border insolvency framework is still the one we received from our Supreme Court in 2012, or whether changes in the definition of insolvency proceedings in 2015, and insolvency regulation and changes in the understanding of the insolvency framework in Germany by the introduction of preventive restructuring proceedings in 2021, will cause or will need to cause the courts to reconsider this definition and loosen the requirement of collectivity, respectively. Because you need to remember that our proceedings, which are only partially collective, have been added to annex A in the Insolvency Regulation. And this is based on a notice from the German state. So at least looking at the understanding of the German Ministry of Justice. StaRUG proceedings can be insolvency proceedings as defined in the Insolvency Regulation, and the Commission had no objection to that.

So I think there's room here for debate on this very preliminary point already, whether this is an insolvency process or not. There is more room for debate to discuss whether this is a judgment, but I will do that later. Let's stick with the first point first.

DT (16.29): Perfect. Thank you, Stephan, for that explanation, and I think we can now look at it from this, from the UK side, and perhaps also from a broader international perspective, since questions of what qualifies as an insolvency proceeding matters far beyond Europe. So Riz, the Frankfurt judge described the UK plan as not collective enough to count as an insolvency proceeding, but rather selective and contractual, whilst English courts in cases such as Gate Group have taken a functional view, and that treats it as an insolvency proceeding. So did

Frankfurt misread the nature of the UK plan and, more broadly, what should count as an insolvency proceeding?

Riz Mokal (RM) (17.21): Thank you Defne. I just want to say I would disclaim endorsing the distinction implicit in the question between collective and functional, because English courts approach is to try to understand properly, and I'll say how in a minute, what collectivity means, what it requires. Its approach is not to give up on collectivity in pursuit of some unprincipled functionalism. So that's the starting point. The other unnecessary disclaimer I'm not a German lawyer. I will take my German colleagues interpretation of German law as read. Nothing that I say is intended to cast any light on whether the Frankfurt Court got it right or wrong, as a matter of German law.

What I want to do is to take a step back and look at how international insolvency approaches collectivity, and how it ought to approach collectivity. And that very much means collectivity as enshrined in the EU insolvency recast regulation and in the UNCITRAL Model Law. Indeed, in the Cape Town Convention, all international instruments which seek to characterise insolvency proceedings for their own purposes, by reference in part and in particular to collectivity. I should say that we argued the Gate Group case in the English High Court some years back, by a reference to each one of those instruments. We argued by reference in particular to the notion of collectivity that was implicit in the Lugano Convention and explicit in the EU insolvency recast regulation.

So it's for that reason that I say it would be wrong to contrast the English courts approach as some sort of functionalism, which gives up on properly, legally, properly construing what collectivity means. So, three points, one conceptual. I will make one rhetorical to set up a contrast, and one then following from those two normative. Here's a conceptual point. Focus on the notion of collectivity. That concept is not a binary concept. It's not the case that a proceeding is either collective, period or not collective, period. Instead, collectivity, by its nature, is a scalar concept, it is a matter of degree. Is there some academic point which I've come up with? Not at all. The EU Insolvency Regulation makes exactly this explicit. It speaks of proceedings and its recitals, and in the text involving all or a significant part of the creditors, all or a significant proportion of the liabilities. It speaks of proceedings which only address the financial creditors of a debtor.

Now think about this. There are already here three dimensions of collectivity. How many creditors are affected? All or only a few? What type of creditor is affected? Financial creditors. Other types of creditor? How much of the debt is affected? This is a purely functional approach. A significant proportion. A significant proportion is left undefined, so a significant proportion takes its meaning from a proper interpretation of the provisions in all of the context. So once you start being sensitive to the notion of collectivity, you see that it would simply be missing the point to treat it as one black box of a concept. If the legislation mentions collective, then it must necessarily mean all creditors, all types of creditors, all debt, all assets, all aspects. Does it have to include shareholders as well as creditors?

So, there are numerous dimensions of collectivity, and the simple fact that the legislation requires the proceeding to be collective leaves all those questions unanswered. And you put blinkers on your eyes if you read the word collective and then you by that fact alone, think well, that must mean collective in every conceivable dimension.

This brings me to the second. The rhetorical point. I've already become rhetorical, but how should we approach our interpretive task, whether we are looking at a domestic statute or an

international instrument? Here's the contrast that I want to set up. On one view, the legislator is a distant and inscrutable God. A God whose purposes are simply not discernible. We mere mortals cannot work out why the God uses particular language. We don't have it within our minds to do that. That's one interpretation. One way of approaching the interpretive task is another one. The legislator is a fellow fallible, imperfect being trying to create a tool in order to respond to real world problems, in particular those problems which arise from a debtor's actual or imminent inability to meet all of its obligations as they fall due. And it is for this purpose that this fallible being is using the concept of collectivity to define a proceeding.

Now, I hope none of you, even my German friends, are tempted to take the first interpretive stance. If they take the second interpretive stance, then they accept that we don't just read the word collective and therefore, well, we can't possibly seek to parse what is implicit in the invocation of this term of collectivity. Instead they say, well, there must be a reason why the legislator has sought to cover all but only those proceedings, which are collective. So we need to understand what those reasons are. And those reasons may help us understand what collectivity means.

This brings me to my third normative point what collectivity should mean and what, given that we are dealing with fallible, purposive legislators, not inscrutable distant gods. What it does mean restructuring proceedings exist to help stakeholders deal with actual or imminent default to multiple creditors. The reason collectivity matters is this. That there is a multiplicity of defaults, and that that multiplicity of defaults needs to be addressed together in order to respond to the problem to which the proceedings should respond if it has to be collective. So the right test is this. Does the preceding address the defaults that matter for resolving the debtor's distress? If the answer to this question is yes, then the proceeding is collective and the only sense in which collectivity matters when it defines a restructuring proceeding. And what this means, and it's all familiar to us, is collectivities about class-based processes. It's about grouping creditors and, where appropriate, shareholders by rights and by treating them class by class, that is, collectively.

Let's make this concrete. If 90% of the debtor's debt is due now and cannot be paid, then it needs to be dealt with and the proceeding is collective., if and insofar as it can efficaciously deal with 90% of the debt. However, suppose that only 10% of this dataset is now due? The remaining ninety percent won't come due for another 10 years. But if this 10% of debt is not addressed now the debtor falls and everybody suffers. Well, here's a proceeding which responds to, efficaciously to, the need to restructure this 10% of debt in the usual way by putting those creditors appropriately, properly in classes, and by giving them due notice and a fair chance to participate. The right to vote. And then once this voting takes place, considers on a fairness basis and any other basis whether the restructuring should rewrite the debtors obligations to that 10 % of its of its creditors.

Well, this is a collective proceeding for the same reason that the preceding, which dealt with 90% of the debt, was collective. And it's a collective proceeding in the same rational way that matters when collectivity is used to define restructuring proceedings, to say, in the case that I set out well, it's only 10% of the debt which needs restructuring, 90% doesn't need restructuring for 10 years, but because the proceeding did not demand that that 90% of the creditors also be dragged into the courtroom, also be served with notices, also be required to cast votes, also be given, et cetera, et cetera. That is such a perverse approach to understanding collectivity. It's the approach of religious people cowering in front of an inscrutable God who has laid down the law on high, and they simply can't work out what collectivity requires, because they can't work out what the God demands of them.

One final clarification in relation to the restructuring plan. Of course, the plan can address 100% of creditors and it can address 100% of shareholders. It's just that it doesn't insist on being wasteful. It doesn't insist that if only 10% of the claims need to be addressed in the remaining 90% don't need to be touched for another 10 years, that everybody nevertheless should come in and be a participant in the proceeding. So on those basis, my response would be, if you take anything like a rational view in relation to collectivity, the restructuring plan and indeed the scheme of arrangement are collective in the only way that matters to us for our present purposes.

JV (28.49): Well. Thank you Riz. Those were some really thoughtful insights and we can clearly see your passion for the topic. I believe you've even added more depth to the discussion. This was incredible. We do have a different question, and this one does not relate to the notion of collectivity. It is more grounded on English law. So, the Frankfurt court denied recognition under the German Civil Procedure Code, spoke about equivalent conditions for enforcing a similar judgment, and that caused some debate. And we believe, and I'm sure some of our speakers do too, that the Rule of Gibbs is somehow implicit in that. So, we would like you to unpack how the Rule in Gibbs actually works today. Uh, because we know you're not his greatest admirer. So we thought it would be great to hear your perspective on it. Thank you.

RM (29.37): Thank you. Jaime. Okay, so the basics, uh, where does the rule come from, and what does it say? And what are its limitations? Many people may not appreciate the Rule in Gibbs is attributed to the Court of Appeals decision in a case of that name. That case was decided in 1890, but in fact, if you read the judgment, the Court of Appeal in that case is relying on and following an earlier case called Smith & Buchanan, which was decided 90 years earlier in 1800. And in route summary, the rule says just this *"If a debt is governed by England, then a foreign insolvency, restructuring bankruptcy judgment cannot discharge or amend that debt so far as the Courts of England are concerned."* That's the basic rule.

Now you are right. I'm not a fan of the Rule in Gibbs. In fact, I may be one of the few practitioners whose practices from the City of London and who, if you look at it from one point of view, benefits from the Rule in Gibbs, who is not a fan. I'm sorry to say that the converse is also true. I think that most of those who you will hear at events like this supporting the Rule in Gibbs, if you look at where they are based and what they do, I think you will find that they may not have one hundred percent impartial assessment of the Rule in Gibbs.

I'm not a fan for a number of reasons, but first and foremost, it is hypocrisy. English courts are comfortable discharging or amending the debt governed by laws of other jurisdictions. Don't let anybody tell you otherwise. This is a deeply hypocritical approach. Sometimes somebody will say, but of course, English courts, when they are going to rewrite German debt, for example, get a statement from a German law expert that this restructuring by the English court of German law, government debt would be recognized by German courts. That's wrong. That's misleading. English Courts will need to be satisfied that if they were to make an order restructuring foreign law governed debt, then that order is likely to be efficacious in any jurisdiction in which that order is sought to be enforced. So, if that means that the debt is governed by German law, but the debtor doesn't have assets in Germany, it has assets in the US. English courts are not going to be concerned with what the German lawyer says. English courts are going to be concerned with what the US lawyer says, because the test is one of efficacy of the order once made, and efficacy is not the same as ownership by virtue of governing law.

So it's indefensible. It's deeply hypocritical. It's deeply wrong simply on that basis alone. The Rule in Gibbs is also regressive. It's anti-English. It goes against case law going back to the 1670s, and

certainly case law, which was well established by the 1760s, which showed the English courts cooperating with foreign courts, which were courts of domicile of the debtor and which were running proper bankruptcy, insolvency proceedings in relation to those debtors which were domiciled there. And there are some beautiful examples of, of that. And so, Gibbs actually went back on an English law tradition which had predated it by at least a 100 years, a bit longer, I think, and at least 140 years, I would say.

And then third, the practical harm what actually happens these days is something like the following. English law governed debt, it is properly discharged by the, by a competent court, say a COMI court. And then distressed debt specialists will buy this up by a part of the English debt. And then they set up positions by reference to the Rule in Gibbs. And they seek to obtain a ransom by saying, well, pay us off by paying us more, because otherwise we'll go and challenge this decision, this restructuring order in the English courts. Hey, the Rule in Gibbs. And so I take one example. This is one example of a much broader phenomenon, but in a variety of reasons, including these three. It's not defensible. It's a blemish on English law and English practice.

Having said all of that, let's come back to the reciprocity requirement. From the time of Smith & Buchanan onwards from 1800, again repeated by the Court of Appeal in Gibbs in 1890, to today there is one very clear exception. The exception is this. The Rule in Gibbs operates on the basis of presumed consent. The rule is based on what it says, the application of the law to which the creditors have consented. And the idea is this if the law is governed by, if the governing law is English law, then the creditors have consented only to the jurisdiction of the English court. So the implication of this line of reasoning, which, as I said, goes back to 1800, is that if creditors holding English law debt, have consented to the jurisdiction of the foreign court, then the Rule in Gibbs itself expressly. This is not a matter of interpretation, not a matter of recent development. From the very beginning. The Rule in Gibbs doesn't apply because of the very logic which is the implicit intentions of the creditors and the consent of the creditors to the jurisdiction of a court, if the creditor has consented. That's it.

They can't then come to the English court and challenge judgment properly given by that competent court. So my question in thinking about the reciprocity requirement would be this. Are creditors who are now complaining in the Frankfurt Court, creditors who have consented to the jurisdiction of the English court. For example, by participating in the English restructuring proceedings, I will, I simply do not know. I will take no position on it. But this would be one way of testing the reciprocity requirement, because the reciprocity arises thus, if it was English law government debt. Frankfurt court gave a judgment rewriting English law governed debt, and the creditors holding that debt participated in the Frankfurt Court's proceedings. They then come to the English court. The English court will say, sorry, your debt has been properly restructured. Gibbs doesn't help you.

JV (37.17): Thank you so much Riz. This was a highly insightful presentation. I believe we have all broaden our understanding of English law. And I want to jump in now because you just mentioned recognition and how it plays a key role when evaluating it from the English courts perspective. So I'm sorry to put you on the spot, Dominik, but we are very curious about how reciprocity works in Germany. So proving reciprocity can be challenging, especially for foreign market actors in light of the current civil procedure. So from a judge's perspective, what criteria guide your assessment to mutual recognition? And more generally, how do you balance the need for predictability and cross-border coherence and continuance with the limits of German law?

DS (38.01): Jaime, asking this question is like poking a hornet's nest, because the Frankfurt ruling was criticized for this in particular. First, as judges, we must decide where the burden of proof lies. So regarding reciprocity, both the German Federal Court of Justice and the prevailing opinion in the German legal literature consider it to be the responsibility of the person seeking recognition to prove that reciprocity is granted. Secondly, proof must be provided of the actual practice of recognition. The actual practice. How do English courts operate when asked to recognize German plan confirmations as the equivalent? So this brings us to the problem that there may currently be no established practice, since the law in question is new, so we do not know whether English courts recognize the equivalent when the claim was restructured under this dialogue, for instance. So what if case law has not yet been established. In this case, the party on which the burden of proof lies must prove that recognition is granted based on codified law or previous precedent. And here again, the Rule in Gibbs with all subcategories becomes simply important.

DT (39.29): Thank you Dominik. Now we have already discussed this with, uh, Riz already, but I'm curious about Stephan's view on this. Stephan. In your work, you suggest that the problem may be deeper, that the wrong lens is being used. UK plans and the StaRUG are preventive restructurings, not classic insolvency proceedings. And that reminds me of a 2018 post-Brexit report written by professors Garcimartin and Veder, where they proposed developing a bilateral parallel instrument between the EU and the UK, mirroring the EIR and maintaining mutual recognition. And then later, you and professor Wessels carried that thought within the EU context, questioning whether the existing EU instruments can really host these new frameworks at all, suggesting that we may ultimately need a standalone cross-border restructuring regime. So should we still judge these proceedings through concepts like collectivity or shift toward a different framework, perhaps closer to contract law?

SM (40.43): Thank you. Defne. Yeah, I've been struggling with these kind of questions and answers for quite a while, and I think in my answer I have to first refer to Riz's statement on collectivity. I think in these broad terms, no one disagrees. You know, no one would disagree that there's a greater truth to that. But I think there's still a need for different or room for differentiation, because I think or I would at least propose that within this huge realm of collectivity, understood as Riz understands it, as probably any coordinated endeavour to avoid a future or imminent or less imminent, but future insolvency. This is quite a huge tent. You know, it potentially has the power to include many of the company law instruments, from raising capital in a moment of crisis, or to restructure bonds under specific bond rules. So I'm not saying this is not correct. I'm just saying there's a huge tent that is being brought up and there is room for differentiation within this tent, because I think we can and I propose in my writing that we should differentiate here, because this differentiation does not come only from an academic perspective, because it's nice to nice to put things in boxes.

Your question shows that this comes from a very practical perspective, because when we think about developing legal frameworks that assist in practice in mutual recognition of the things we want to have recognized, because we want to have them being effective in an efficient matter, we need to have frameworks that address the situation properly and give judges a tool and to their into their hands which they feel comfortable with. So I think there is a deeper need for that. And I have proposed to differentiate restructuring proceedings quite principally from what we would traditionally call an insolvency proceeding, as it was understand mostly in, in the 2002 insolvency regulations. So a very traditional liquidation, insolvent liquidation is something different than a restructuring, which is a debt adjustment that is not often, or at least not to a large degree,

considering, the place of assets, the treatment of assets, the realization of assets and things like that.

So I think there's a way and a reason, but also functional reason to differentiate these traditional insolvency proceedings from what we do in the debt restructuring, because the tools we use in debt restructuring are used for the purpose Riz is explaining us, which is to adjust the debt burden by addressing the debt burden with those creditors who need to sacrifice in the interest of the debtor, but also in the interest of other creditors in order to see the debtor continue and to pay everyone from future cash income. So, I think one is a holdout problem, the other is a problem. So the traditional insolvency is a problem of collective action regarding a very limited pool of assets. So it's asset oriented. The other one is more debt oriented.

So, this is what I have proposed. And this is not just my normative work. I think it also shows in the way member states have responded to the preventive restructuring directive, because what we have seen is and we've seen it before from the UK side, but we have seen is the feeling that it would be useful to create a safe space for at least one type of debt restructuring proceedings, which should not fall within the huge tent of insolvency proceedings, because they might benefit from a more flexible, different regime, especially in a cross-border situation. So, the UK has always been adamant that the scheme is not an insolvency proceeding, as we define it in insolvency regulation, uh, which created a strange looking recital in the current Insolvency Regulation, and this is this recital is theirs, although the Brexit has happened.

In the Netherlands, in Germany, we created the very same debt adjustment process in the StaRUG, in the WHOA, in two Flavors. One is the flavour for insolvency, for the big insolvency tent, the other is the flavour for whatever the other thing is. In Gate Group, they were very carefully in differentiating the restructuring plan from a scheme, and the restructuring plan is insolvency and the scheme is not. So I'm not saying that all of this is correct. I'm just saying that there is obviously something out there that tells us that we would need or benefit from differentiating. I propose that we differentiate restructuring proceedings that happen as an annexe to fully blown insolvency proceedings. They have been part of the insolvency tent forever. They should stay there. They are part of Article 7 in the Insolvency Regulation. They are covered in the UNCITRAL Model Law and even more in the Model Law in judgment as an annexe.

But then there are preventive standalone schemes and restructuring proceedings. And I would propose that these are a different beast as we see. And the question is where to put them. And I would think that we might benefit from flexibility here, and this has been part of my writing. So we might benefit from offering, and we do, putting these in the insolvency tent as long as we need them in the insolvency tent, and they benefit from the insolvency tent, but they also benefit from standalone cross-border framework as far as they are not an annex to insolvency proceedings, and as far as they do not share most of the characteristics of what we would call traditional insolvency proceedings.

To be honest, so far we have had this dual track so we could basically use the insolvency track, we could use the judgment recognition track. And this is more, even more attractive now that we have the Hague Convention being applicable to the United Kingdom, which would allow us cross-border recognition of civil law judgments directly with the United Kingdom, in a very direct way.

Finally, this brings us to reciprocity. I think that the Frankfurt court completely overlooked the Hague Convention, the 2019 Hague Convention, because it establishes reciprocity. Now, since July, with the United Kingdom, and if you look at the reciprocity of judgment recognition, it's

established. So this is something that is known to the court. There is no expert needed to tell a court that since July at least, recognition is granted by the Hague Convention between Germany and the UK for cross-border judgments. So I think, um, there's a lot to work on. I think we would benefit from a special second regime for restructuring proceedings, and not because they are principally different and would not fit within the insolvency tent. But because I think, um, there is a need out there to offer them a second regime.

Finally, how to differentiate them just quickly? I'm not sure we need to. I think we can have both layers, um, and have the parties decide. I think that's something that is out there in the market. We should be recognition friendly. I think this is good for the competition, the global competition of the for the better restructuring market and with the proper safeguards, I think we can offer them both. And people parties decide as we have them now, whether they want to choose the one flavour or the other.

JV (48.24): Well, Stephan, thank you so much for sharing with us. It's such an interesting proposal on how to deal with restructuring proceedings. I'm sure everybody here will have learned something from that, but I believe it's very fair to say that we all agree on something, and it is the need to address the existing situation in a proper and efficient way. So we would like to ask you all three. Defne and I are curious, what thought or insight would you leave our audience with? Um, it can be anything that we've discussed. It can relate to how to better deal with proceedings. We leave it up to you before we take the questions for the for from our audience.

DS (49.02): And just quickly, a recognition mechanism concerning non-EU countries could and should be developed in the future, that's for sure. However, we should remind ourselves that this mechanism must be appropriate for all third countries, not only those we have a very good relationship with, such as England. And Stephan, The Hague Convention 2019 is not necessarily the general solution, since Article 5 must be fulfilled and therefore at least one of the options mentioned there.

SM (49.34): Is it my turn already? No Riz go first, right?

RM (49.37): I was hoping I could get the last word, Stephan. I agree that we should be within the limits properly set by what we seek to accomplish. We should be maximally flexible. We should be modular to raise a term, and we should let the people with the best information as to the facts of a particular case, namely, the parties to that case, decide what set of tools they wish to deploy in order to seek to address the problems that they seek to address.

So, pitched at that general level. I don't think anybody would disagree with you. I certainly don't. I think that there is a problem in the way that you set out the distinction between liquidation and reorganization or restructuring. And that's because you have restructuring proceedings being used as a precondition to an orderly, winding up and orderly liquidation. You have liquidation proceedings, deploying compositions, restructurings, for exactly the same purpose. You have liquidation proceedings, which are begun in order to bring about a going concern sale of the business, complete with either the shares of the debtor entity are sold off or there is an ovation of the debt claims to the purchaser of the assets, etc., etc.

In other words, this need to put into neat little boxes, these functionally different but substantively overlapping proceedings. They are functionally different, but they substantively overlap because they address some scenarios which could be addressed through one or other of those proceedings. Won't work. So maximal flexibility subject to proper conditions. I am with you. Give stakeholders all of the tools that we think they should have to address those problems.

Completely with you. Also welcome you now not suggesting that something like collective action problems define liquidation proceedings and the collective, um, anti-commons problem defines restructuring proceedings. I welcome that that, uh, evolution. I'm with you on that, but I think you're still trying to buttonhole things which are going to break free.

DT (52.24): Stephan, if you could say one more line very quickly, please, before we move on to the Q&A.

SM (52.30): Yeah. I'm afraid we will continue our debate, which is a very, very fruitful debate amongst all three of us on detail, which might be too academic for some in the audience, but I am happy to agree on principles. So what we talked about, Gibbs, what we talked about the Frankfurt decision. I think we need to remind ourselves of the spirit that is still universalism and the ability to circulate judgments, with proper safeguards, of course. And we will develop rules, hopefully in the EU, in Germany, maybe in other jurisdictions that enable us and judges to mutually recognise what happens in other courts.

JV (53.11): Thank you so much. Stephan and I have decided to be optimistic too, and see the silver lining in the discussions. I think it's fair to say that despite your very different perspectives, all three of you converge on a central point, which is the need for a constructive solution that works in practice for the different actors involved. So we would like to end up on that note.

That being said, we thank you all very much again. The discussions were extremely enriching, and we began with a single core decision and then ended up somehow questioning the frameworks that shape cross-border insolvency and restructuring law. So thank you so much for your time and for your insights. We now welcome questions from the audience. Please raise your hand or pose them in the chat.

DR (53.51): I see that Mr. James Ooh has his hand raised. Please go ahead. Mr Ooh.

Guest Speaker (53.59): Thank you, thank you Defne. So my question here for today is about the Evergrande Group reorganization plan, which has been approved in Hong Kong. And I also through Google research, I found the liquidators appointed by the Hong Kong Court has initiated some like debt collection or assets recovery proceedings in London, probably also in other European countries. So, I want to hear, because it's more than three hundred billion dollars total in total liabilities. And the ex-wife of the founder, Miss Ding Yumei, owns a luxury mansion and several apartments in London. So I really want to know what's going on there. And so it's like a more it involves multi jurisdictions, including mainland China, Hong Kong which is still a common law jurisdiction, and London and probably other European countries. And also I noticed there is a very good insolvency law professor, Mr. Guo Shuai, from the China University of Political Science and Law, if I may. He is a like a specialist on this topic as far as I know. Probably professor Guo Shuai can also shed some light on it. That's my question. Probably too long. Sorry, sorry. I apologize.

DT (55.30): Thank you so much for your question. So who would like to take the lead?

DS (55.35): I'm perfectly qualified to do nothing about this individual case, but it allows me to say again that the solution we are looking for must be appropriate for all third countries outside the EU. Also, to those frameworks we have a little experience with.

SM (55.54): And I can happily add the German perspective, which is since Evergrande is, as far as I understand it has turned into a liquidation and assuming that it is a liquidation, it would squarely fall within the scope of the German cross-border insolvency framework, no doubt about

it. So it would be recognized under Section 343 automatically, with all its consequences in Germany, with some safeguards, proper safeguards are in place. So there's not just the public policy objection safeguard, but some other safeguards based on private international law as far as it comes to German real estate or German employment contracts or stuff like that. But, you know, just to reiterate the point, there is a tool for recognition and there are proper safeguards to save to secure proper interests in Germany.

RM (54.40): What is dreaded by all panellists has happened. Agreement has broken out. I agree with what Dominik and Stephan have said. It holds *mutatis mutandis* in relation to England. Nothing more to say.

DT (56.55): Okay. We see a lot of questions coming in the chat box. Thank you everyone. We have one from Marcus Repps and he says if one had included all creditors of the very planned entity with the recent Frankfurt decision have had a different outcome. I think Dominik, maybe this is a question for you.

DS (57.16): Yeah, certainly. So then I would still say that we qualify Part 26A as the equivalent to the German StaRUG. And since this is the only relevant act and there is no provision available for recognition regarding decision stemming from a non-EU country, the result is still the same. But I am perfectly aware that Stephan um respectfully disagrees on this.

SM (57.47): Yeah, I'm afraid I do. And it's published so it's not a secret. Two things. First, collectivity is defined by principle, not by the specific case. So if a proceeding is collective or not is generally defined, there is no strict rule for that, of course, but it's understood to be generally defined by what a proceeding can do in principle, not what it does in a specific case. But apart from that, I think also from the experience of 2020 when the StaRUG was born. There is no hard will of the legislator. There was no factual, hard will of the legislator not to legislate cross-border preventive restructuring proceedings. Um, as far as they were not listed in Annex A, so I think there is nothing in that legislative process, in my opinion, that hinders German judges from constructing those provisions that we have in a constructive way. So to understand, for instance, foreign insolvency proceedings, in a more modern way, or to use, if necessary, the provision in the Civil Procedural Code to provide recognition to English or foreign civil judgments. So I think there is no limit there in the way Dominik understands it. And so I think while we find nothing in the StaRUG, I would take a hard look again, if it's a restructuring plan from England at 343 in the Insolvency Code.

DS (59.11): And just briefly full agreement that we interpret foreign proceedings in general and not on a case by case study.

JV (59.19): Well, thank you so much for sharing your insights. I believe you have one more question here. And it's from our own Shuai. So he's asking you whether in the context of cross-border recognition, you should pay attention to the different levels of code involvement and creditor protection that exists between different proceedings. He mentioned schemes of arrangement, preventive restructuring, pre-packs, so we want to know any thoughts on this.

RM (59.44): I don't want to replay, in relation to court involvement, the very debate that we have just had in relation to collectivity. The level of court involvement is also a scalar matter. It's not a binary matter. And it may be that a particular statute says the court has to be involved in the following ways x, y, z. If that is the case, that is the case. By contrast, if the statute says it should be a court supervised proceeding, well, then court supervision is to be interpreted. I would say in exactly the purposive way, treating the legislator who used this to seek to define the proceeding

as seeking to address a problem, not simply laying down a gnomic requirement which has to be made and no thinking involved, thank you very much. So I would say *mutatis mutandis*.

DT (1.00.42): Okay, thank you Riz. And with that, also looking at the time, we're a bit past our time, but we would like to thank our experts, Dominik, Riz and Stephan for sharing your valuable insights with us. Thank you so very much. And of course, thank you to everyone who joined us today and for your questions. We hope to see you again at our next INSOL ERA event. And please make sure to tune in again for the next episode of INSOL Talks.

Outro Music (1.01.09): If you have enjoyed this podcast, make sure to subscribe on your favourite podcast provider so you don't miss an episode. Contact us on LinkedIn and Twitter at INSOL International using the hashtag #INSOLTalks. The information provided is intended for a general audience and reflects the personal views of the participants. This podcast is distributed under a Creative Commons Attribution non-commercial no. Derivatives four-point zero International License. Thank you for listening.