#insolvency #restructuring #5thsymposium

@walters_adrian; @HenkelProfessor; @LCoordes;
@YseultMarique @eugevaccari86

The 5th International and Comparative Insolvency Law Symposium

Royal Holloway, University of London

Saturday – 27 April 2024

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Crypto Insolvencies

Prof. Laura N COORDES

Arizona State University

Smart Restructuring Tokens – A Legal White Paper

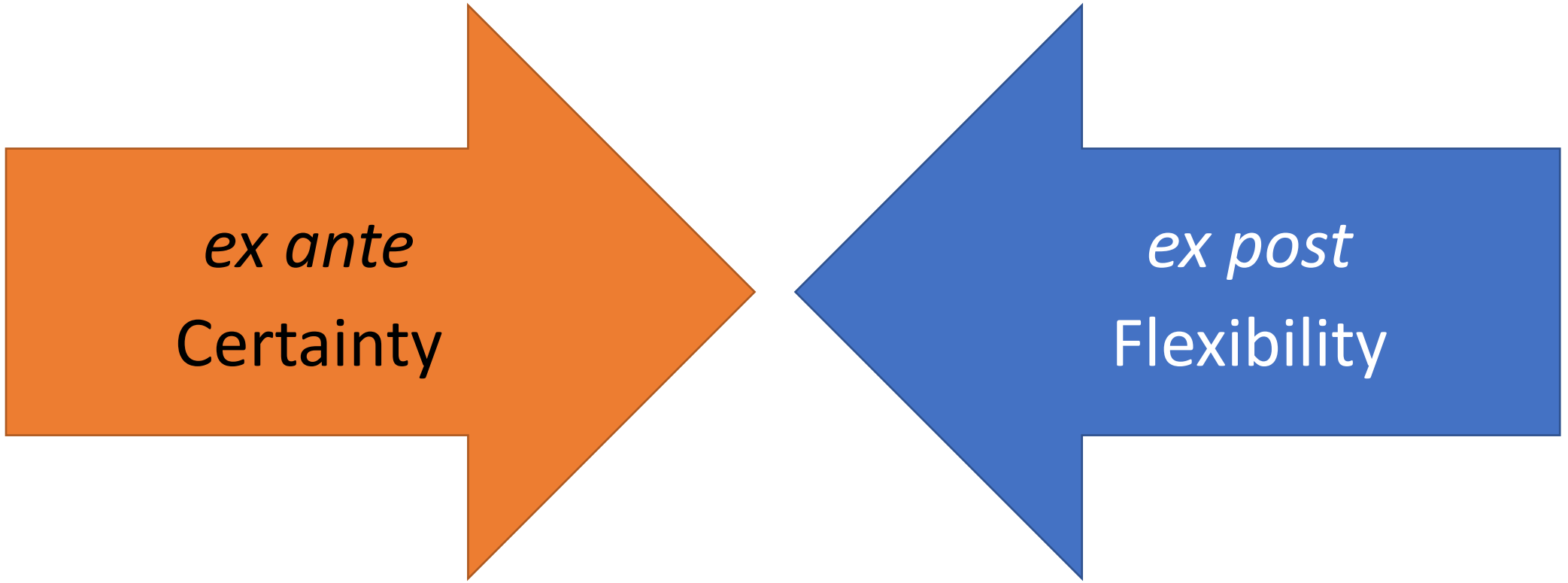
Michael Anderson Schillig

Christoph Kletzer

Andrei Balcau

5th International & Comparative Insolvency Law Symposium | 25th-27th April 2024

The Restructuring Dilemma



Chameleon Equity

Chameleon Tranche III

Chameleon Tranche II

Chameleon Tranche I

Equity

Chameleon Equity

Chameleon Tranche III

Chameleon Tranche II

Chameleon Tranche I

Equity

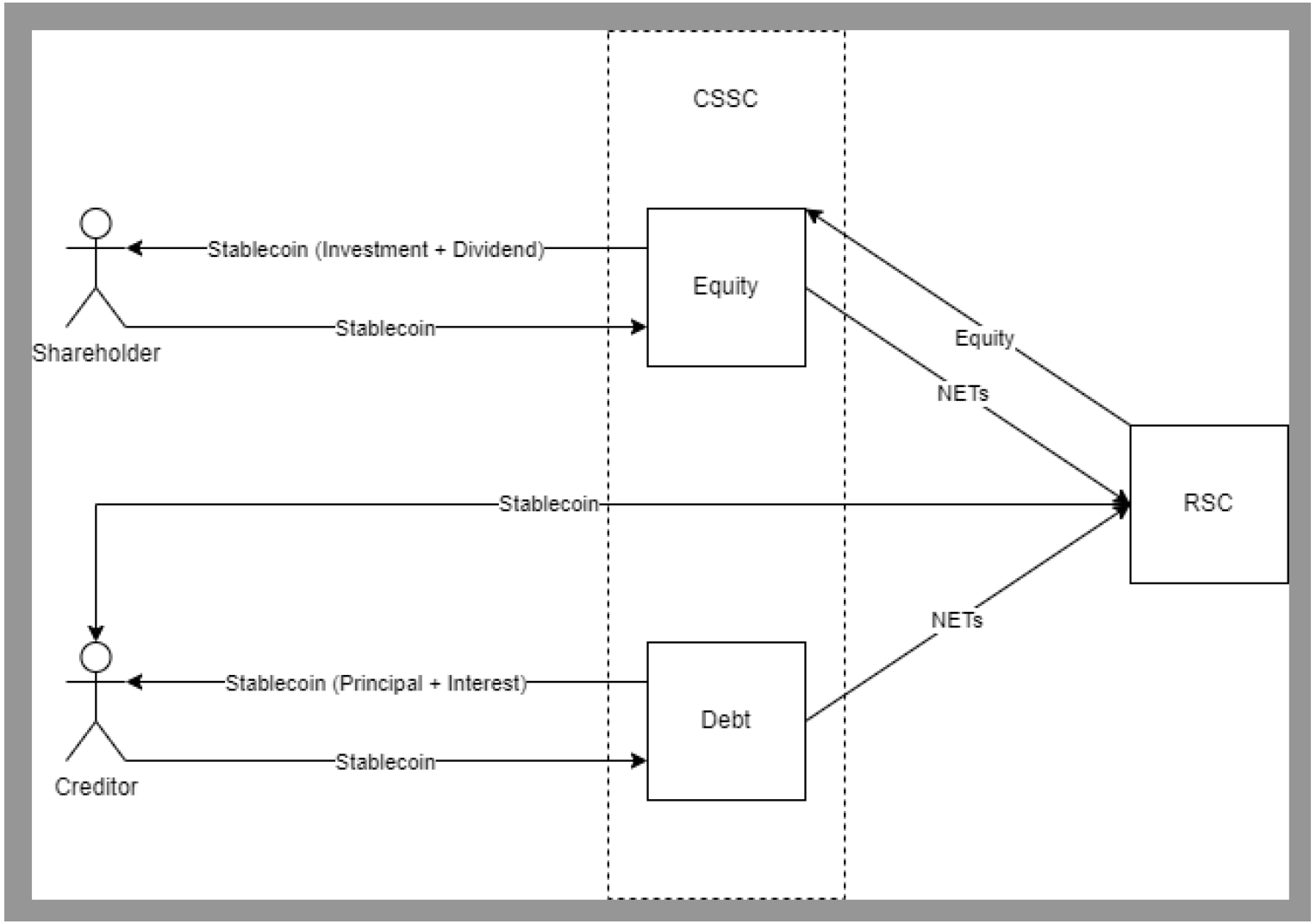
Bebchuck's Option Model

Assets	Liabilities	Post-restructuring entitlements as a function of V
V	Senior creditors 100	SCRs = V↔V≤100 | 100↔V>100
	Junior creditors 100	JCRs = 0↔V≤100 | V-100↔V≤200 | 100↔V>200
	Common shares 100	SOs = 0↔V≤200 | V-200↔V>200

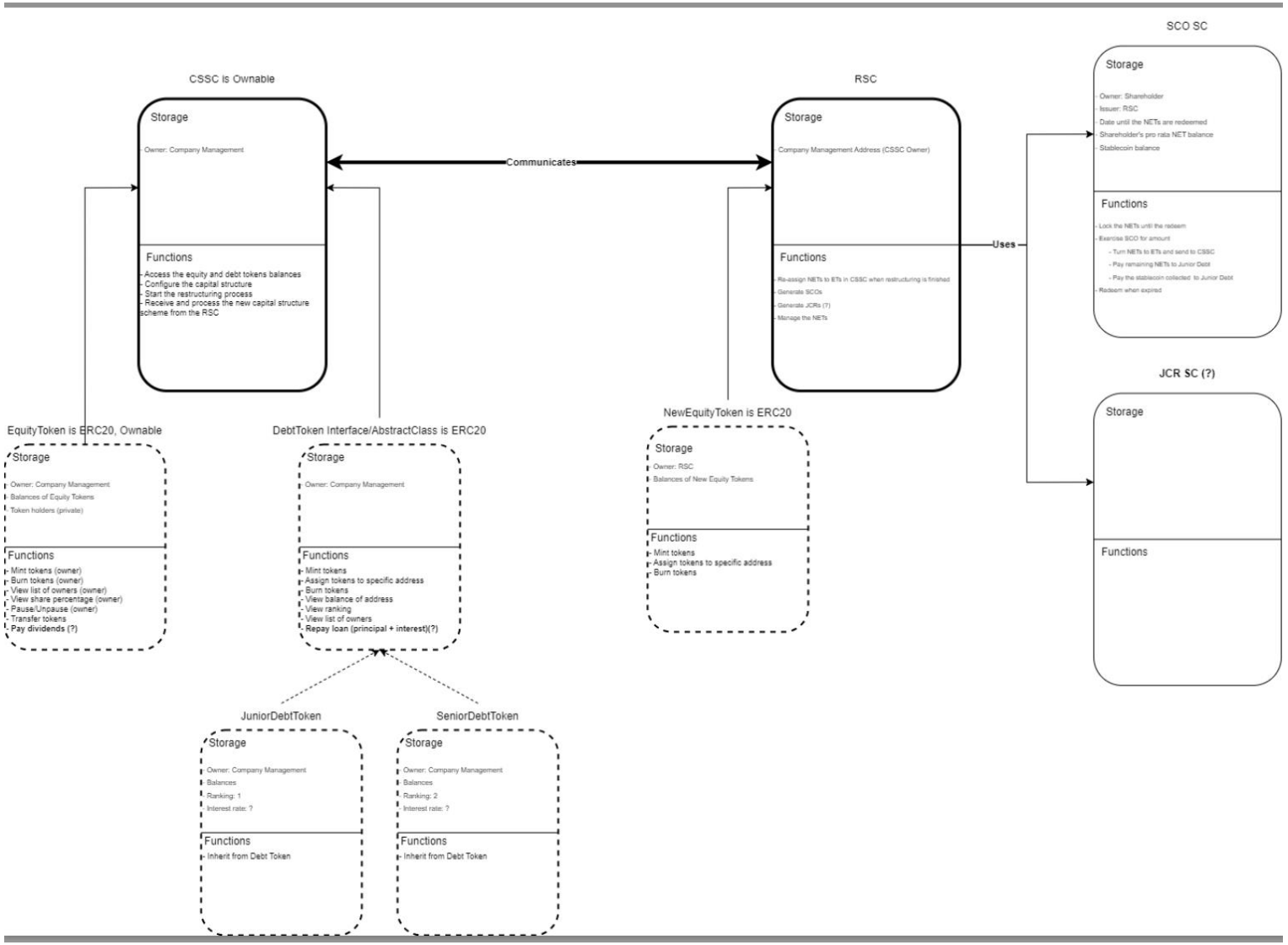
Capital Structure: Tokenised Senior, Junior and Equity

Assets	Liabilities $		Entitlement as a function of V
V	Secured	10	Suppliers (with retention of title)
	Preferential	10	Employees
	Senior	10	SCR = $0 \leftrightarrow V \leq 20 \vert V - 20 \leftrightarrow V \leq 30 \vert 10 \leftrightarrow V > 30$
	Junior	10	$JCR = 0 \leftrightarrow V \leq 30 \vert V - 30 \leftrightarrow V \leq 40 \vert 10 \leftrightarrow V > 40$
	Equity	10	$SO = 0 \vert V - 40 \leftrightarrow V > 40$

Capital Structure Smart Contract; Interaction with Restructuring Smart Contract



Smart Contract Architecture



Restructuring Trigger: Junior and Equity cancelled; JCRs and SOs issued; NETs credited to Restructuring Smart Contract

Assets	Liabilities $		Entitlement as a function of V
V	Secured	10	Suppliers (with retention of title)
	Preferential	10	Employees
	Senior	10	SCR = $0 \leftrightarrow V \leq 20 \mid V - 20 \leftrightarrow V \leq 30 \mid 10 \leftrightarrow V > 30$
	Junior	0	$JCR = 0 \leftrightarrow V \leq 30 \mid V - 30 \leftrightarrow V \leq 40 \mid 10 \leftrightarrow V > 40$
	NET	20	$SO = 0 \mid V - 40 \leftrightarrow V > 40$

CSSC: capital structure

Assets	Liabilities $		Entitlement as a function of V
55	Secured	10	Suppliers (with retention of title)
	Preferential	10	Employees
	Senior	10	SCR = $10 \leftrightarrow V > 30$
	Junior	10	$JCR = 10 \leftrightarrow V > 40$
	Equity	10	$SO = 15 = V - 40 \leftrightarrow V > 40$

Restructuring function called: RSC issues JCRs and SOs

Assets	Liabilities $		Entitlement as a function of V
45	Secured	10	Suppliers (with retention of title)
	Preferential	10	Employees
	Senior	10	SCR = $10 \leftrightarrow V > 30$
	Junior	0	$JCR = 10 \leftrightarrow V > 40$
	NET	20	$SO = 15 = V - 30 \leftrightarrow V > 30$

All SOs exercised;
JCRs redeemed

Assets	Liabilities $		Entitlement as a function of V
45	Secured	10	Suppliers (with retention of title)
	Preferential	10	Employees
	Senior	10	10
	Junior	0	10 in cash after redemption of JCRs
	Equity	10	15 (but net 5 after paying strike price of 10)

Half of SOs exercised and JCRs redeemed; remaining JCRs exchanged for NETs

Assets	Liabilities $		Entitlement as a function of V
45	Secured	10	Suppliers (with retention of title)
	Preferential	10	Employees
	Senior	10	10
	Junior	0	5 in cash after redemption of JCRs
	Equity	10	15 (old equity net 2.5 after paying strike price of 5; junior 7.5)

Capital Structure after First Round: Repeat upon further deterioration

Assets	Liabilities $		Entitlement as a function of V
45	Secured	10	Suppliers (with retention of title)
	Preferential	10	Employees
	Senior	10	SCR = $10 \leftrightarrow V > 30$
	Equity	10	$SO = 15 = V - 30 \leftrightarrow V > 30$

Sample Smart Contract Code

```
 * @dev Mints `amount` equity tokens for addreess `to`.
 * MUST be called only by the owner of the capital structure implementation contract (the company management).
 * MUST revert with the {UninitializedEquity} error if the equity contract is not initialized.
 *
 * Returns a boolean value indicating if the operation succeeded or not.
 *
 * Emits an {EquityMinted} event.
 */
function mintEquity(address to, uint256 amount) external returns (bool);

/**
 * @dev Mints `amount` debt tokens of priority `priority` in the restructuring process for the address `to`.
 * MUST be called only by the owner of the capital structure implementation contract (the company management).
 * MUST revert with the {UnitializedDebtOfPriority} error if the debt contract of priority `value` is not
 * initialized.
 *
 * Returns a boolean indicating if the operation succeeded or not.
 *
 * Emits a {DebtMinted} event.
 */
function mintDebtOfPriority(uint8 value, address to, uint256 amount) external returns (bool);

/**
 * @dev Starts the restructuring process. Must be called only by the owner
 * of capital structure implementation contract (the company management).
 * Should revert with the {EquityNotInitialized} or {DebtOfPriorityNotInitialzied}
 * if any of the specific token contract is not initialized. Should revert with
 * {InvalidEquitySupply} or {InvalidJuniorDebtSupply} if either the equity supply is 0
 * or the junior debt supply 0 respectively.
 *
 * Returns a boolean indicating if the operation succeeded or not.
 *
 * Emits a {RestructuringStarted} event when the control is passed to the RSC.
 */
function startRestructuring() external returns (bool);

/**
 * @dev Completes the restructuring process.
 *
 * Must be called only by the RSC allocated to the CSSC.
 *
 * Returns a boolean value indicating if the operation succeeded or not.
 *
 * Emits a {RestructuringCompleted} event when the whole process is finished.
 */
function completeRestructuring() external returns (bool);
```

The Rights of Creditors and Third Parties concerning Cryptoassets in the European Insolvency Proceedings

Jura Golub

University of Osijek – Faculty of Law Osijek

AGENDA

1. Introduction
2. Taxonomy and Legal Nature of Cryptoassets
3. Article 8 of the EIR Recast
4. Concluding Remarks

Introduction

- Situations that may affect the rights of creditors and third parties:
  1. the insolvency of a debtor who has granted a secured right in the form of cryptoassets as collateral to a creditor;
  2. the insolvency of a custodian managing cryptoassets on behalf of an investor

- Are the provisions of Article 8 of the EIR Recast regarding third parties' rights *in rem* operative concerning cryptoassets?

Taxonomy & Legal Nature

Digital representation of value or rights which may be transferred and stored electronically, using DLT or similar technology

- Exchange tokens
- Utility tokens
- Security tokens
- Asset-referenced tokens

Rights *in rem* in EU law

- **Art 345 of the TFEU:** *„The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership"*
  - ➢ The concept of "ownership" is interpreted extensively, encompassing a broader corpus of property rights than those traditionally considered rights *in rem* in the private law of MS
  - ➢ European autonomous interpretation
- Art 70 (1) of the **MiCA Regulation**:
  - ➢ *Crypto-asset service providers shall make adequate arrangements to safeguard **the ownership rights of clients**, especially in the event of **the crypto-asset service provider's insolvency***
- *The difference between a right in rem and a right in personam is that the former, existing in an item of property, has effect erga omnes, whereas the latter can only be claimed against the debtor* (Order of the Court of 5 April 2001, *Gaillard*, C-518/99, ECLI:EU:C:2001:209, para 17)

Property law of the EU Member States

- Numerus clausus of proprietary rights and subjects of proprietary rights
- Some MS recognise various types of intangible objects that are characterised as movables, such as bonds, shares in companies, etc. (France)
- Some MS only recognises tangible objects as things (*res*) (Croatia, Portugal Hungary, Greece, Germany,…) -> can be the subjects of ownership, while intangible objects can be the subject of other proprietary rights

Concept of Control

Pandectistic theory

- Typical powers of the owner over the property:
  - right of possession (*ius possidendi*)
  - right of use (*ius utendi*)
  - right of enjoyment (***ius fruendi***)
  - right of disposal (***ius disponendi***)
  - right to exclude others (***ius excludendi tertii***)

UNIDROIT Principles on Digital Assets and Private Law

- Concept of factual control:
  - abiltiy to exclude
  - ability to benefit
  - ability to change control over digital assets

- **The ability to exclude is an inherent aspect of proprietary rights**

Article 8 of the EIR Recast

- Effect of insolvency proceedings on rights *in rem*
- Exception to the general rule of application of the ***lex concursus***
- The opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties

- *The proprietor of a right in rem accrued before the opening of the insolvency proceedings should be able to continue to assert, after that opening, his right to segregation or separate settlement of the collateral security*

  (Judgment of the Court of 16 April 2015, *Lutz*, Case C-557/13, ECLI:EU:C:2015:227, para 38)

Article 8 of the EIR Recast

- Tangible or **intangible**
- Moveable or immoveable
- Both specific assets and collections of indefinite assets as a whole which change from time to time

- Art 8(2): non-exhaustive list of rights that are characteristic of a right *in rem*
- Guiding criteria
- *„The basis, validity and extent of a right in rem should normally be determined according to the **lex situs**"*

  (Judgment of the Court of 16 April 2015, Lutz, Case C-557/13, ECLI:EU:C:2015:227, para 27)
- It refers to the application of all potential real property systems of the MS in which the assets is located

Assets Localization According to the EIR

- Art 2(9) of the EIR Recast
- Localization rules for specific types of assets
- *„Only assets locatable in accordance with the EIR could be subject to the effects of secondary proceedings"* (Judgement of 11 June 2015, *Comité d'entreprise de Nortel Networks and Others*, C-649/13, ECLI:EU:C:2015:384)

- By implication, all cryptoassets that cannot be located in another MS would be covered by the effects of the main proceeding (***lex fori concursus***)

9) 'the Member State in which assets are situated' means, in the case of:

(i) registered shares in companies other than those referred to in point (ii), the Member State within the territory of which the company having issued the shares has its registered office;

(ii) financial instruments, the title to which is evidenced by entries in a register or account maintained by or on behalf of an intermediary ('book entry securities'), the Member State in which the register or account in which the entries are made is maintained;

(iii) cash held in accounts with a credit institution, the Member State indicated in the account's IBAN, or, for cash held in accounts with a credit institution which does not have an IBAN, the Member State in which the credit institution holding the account has its central administration or, where the account is held with a branch, agency or other establishment, the Member State in which the branch, agency or other establishment is located;

(iv) property and rights, ownership of or entitlement to which is entered in a public register other than those referred to in point (i), the Member State under the authority of which the register is kept;

(v) European patents, the Member State for which the European patent is granted;

(vi) copyright and related rights, the Member State within the territory of which the owner of such rights has its habitual residence or registered office;

(vii) tangible property, other than that referred to in points (i) to (iv), the Member State within the territory of which the property is situated;

(viii) claims against third parties, other than those relating to assets referred to in point (iii), the Member State within the territory of which the third party required to meet the claims has the centre of its main interests, as determined in accordance with Article 3(1);

Concluding remarks

- For Article 8 of the EIR Recast to be operable, two fundamental prerequisites must be met:
  1) the ability to localize cryptoassets in another MS, different from the MS where the main proceeding is opened;
  2) the ability to qualify rights to such cryptoassets, according to the ***lex situs***, as rights *in rem*
- Specific localization rule - **the place of control** of cryptoassets?
- Otherwise, the application of the ***lex fori concursus***

Thank you for attention!

Jura Golub

Research Assistant

Faculty of Law Osijek, Croatia

jgolub@pravos.hr

Michael SCHILLIG
King's College London

Jura GOLUB
University of Osijek

Technology in Insolvency Procedures

Mr. José CARLES

CARLES | CUESTA

Path Reconstruction of Creditor's Right Protection under Bankruptcy Digitalization

Ruowei Du

Yantai University Law School
Yantai University Bankruptcy Law Research Center

Content

- Origin of the research

- I. Rethinking: Insufficient Protection for Creditors under Bankruptcy Digitalization
- II. Reasons
- III. Approach Comparison: China/ EU/ World Bank
- IV. General Principles
- V. Improved Measures

Origin

- *Rules of Online Litigation of People's Courts (Jun.2021)*
- *Rules for the Online Mediation by People's Courts（Dec.2021）*
- *Rules for the Online Operations of the People's Courts（Jan.2022）*

These three judicial interpretations issued by Chinese Supreme Court standardize the operation of Internet justice, scientifically streamline online proceedings, and establish a unified order for Internet justice covering all procedures across the country.

- The bankruptcy proceeding is

"combining court sessions with meetings, case handling with administrative services, and adjudication with negotiation"

——by Chinese judges

I. Rethinking: *"Access to Justice"* vs. Procedural Rights

Positive Effects:

- Right to be informed
- Right to vote
- Right of supervision

Negative Effects:

- Digital Divide——Procedural inequality

"The first level digital divide"——cross-border cases

"The second level digital divide"——Chinese cases

※ Simultaneous handling of corporate bankruptcy and individual bankruptcy

※ Cross-border Bankruptcy

I. Rethinking: Information Data Processing vs. Substantial Rights

Positive Effects:

- Debt Service Ratio
- Cost saving

The positive feedback that digital bankruptcy provides for creditors' substantial rights is achieved by enhancing the efficiency of the bankruptcy process, securing the realization of creditors' recoveries.

Negative Effects:

- Creditors' information security
- Technical bias
  - ※ Data outcome bias
  - ※ Algorithm design bias

II. Reasons

- A. The Court's Function Expansion Precedes Theoretical Justification
- B. The Rules Governing New Technologies Lagging behind

  a. The digitalization of bankruptcy lacks the support of superior law.

  b. The technical operation rules of the local court are not detailed enough.

  c. The self-discipline rules of the platform industry are not standardized.

- C. Incompatible Bankruptcy Digital Platforms

  Teble: The Platforms applied in some courts(including bankruptcy courts and bankruptcy tribunal)

Teble: The Platforms applied in some courts(including bankruptcy courts and bankruptcy tribunals)

	National Enterprise Bankruptcy Information Disclosure Platform	Guangzhou Intermediate People's Court	Yueyang Intermediate People's Court	Xiamen Bankruptcy Court	Yuhang District People's Court	Suzhou Bankruptcy Court	Binzhou Intermedia te Court	Wenzhou Intermedi ate Court	Foushan Intermediate Court
Node management	√	√	√	√	√	√	√	√	√
Internal/external interaction	√	√	√	√	√	√	√	√	√
Online meeting		√		√	√	√	√	√	√
Property research	√								
Fund supervision		√	√	√	√	√	√	√	√
Department linkage		√			√	√	√		√
Internet inquiry		√		√			√		
Asset disposal		√		√			√		
Partner(s)		Bank & Appraisal agency	Bank		Appraisal agency	Bank	Appraisal agency		Bank
Advanced technology		5G； Blockchain； Veriface； OCR			Blockchain		Blockchain		Blockchain； Veriface； OCR

III. Approach Comparison: China/ EU/ World Bank

China

- *Minutes of the National Court Bankruptcy Trial Work Conference(2018)*
- *Opinions on Advancing Timely and Efficient Hearing of Bankruptcy Cases(2020)*
- *Guiding Opinions on Lawful and Appropriate Adjudication of Civil Cases Involving the COVID-19 Pandemic (Second Edition) (2020)*

- Chinese legal documents impose higher demands on judges in the digital bankruptcy process.

Guidelines for Full-Process Online Handling of Bankruptcy Cases (Trial Implementation) (2023)| by Chongqing No.5 Intermediate People's Court

"Judges should intensify their use of case management systems, undertaking the following tasks:

（1） conduct case adjudication relying on information systems and electronic case files, cultivating digital (paperless) case management habits;

（2） supervise the review of creditor claims, appointment of other social intermediary institutions, online auction of bankrupt company assets, and recruitment of investors;

（3） inspect electronic case files for archiving;

（4） oversee the real-time updating of electronic case files and other online case support tasks by judicial assistants or clerks."

The protection of creditors' rights has been basically realized in five major links:

- The creditors can be promptly informed to participate in claims filing and stay updated on the review results.
- Conducting creditor meeting online and conducting votes electronically saves creditors' time and costs.
- Increased transparency in bankruptcy trustees’ accounts oversight.
- Disposal of bankrupt assets has become more efficient, ensuring timely reimbursement to creditors.
- Facilitate creditors' supervision and evaluation.

III. Approach Comparison: China/ EU/ World Bank

EU

- *Regulation (EU) 2015/848*
- *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL harmonising certain aspects of insolvency law (2022)*
- *Artificial Intelligence Act(2024)*

- EU Commision stresses the importance of appropriate legislation at EU level to improve the efficiency and effectiveness of insolvency proceedings.
- EU places particular emphasis on the protection of data assets and personal information in its drive towards digitalization of the justice sector.

"Raising the efficiency of restructuring, insolvency and discharge procedures and in particular the digitization of all insolvency procedures will help reduce the length of procedures and increase their efficiency, which would translate to lower costs of restructuring and higher recovery rates for creditors".

III. Approach Comparison: China/ EU/ World Bank

World Bank

- *Business Ready Methodology Handbook (2023)*

"As court automation increases efficiency and transparency while reducing administrative costs, the rapid development of information and communication technologies (ICT) opens new" opportunities to significantly improve the administration of justice."

Table 11. Subcategory 2.1.1–e-Courts

	Indicators	Components
1	Electronic Filing	i) Existence of fully operational e-filing and e-payment systems, in addition to a functional case management system for judges, lawyers, and insolvency administrators ii) Possibility to conduct auctions and hearings virtually
2	Electronic Payment of Court Fees	
3	Electronic Case Management for Judges and Lawyers	
4	Electronic Case Management for Insolvency Administrators	
5	Electronic Auction	
6	Virtual Hearing	

IV. Principles

- A. Balance Fairness and Efficiency Principle
- B. Transparency Principle
- C. Economic Bankruptcy Principle

V. Improved Measures

- **A. Standardization of Bankruptcy Digitalization Rules**

  a. Meeting Announcement

  b. Personal Information Collection and Identification

  c. Resolution Voting

- **B. Construction of Integrated Platforms**

  a. Maintaining an open mindset

  b. Increasing investment in technology

  c. Achieving platform compatibility

Thanks for your attention

Ruowei Du

drwei@ytu.edu.cn

Tools for predicting financial distress and implications for insolvency

Harry Lawless

Overview

- Key concepts
  - predictive tools
  - financial distress
- Tools for predicting financial distress
  - History
  - Overview
  - Measuring effectiveness
- Implementation
- Implications

Key Concepts

- Predictive tools
  - The methods we use to predict financial distress
  - Used in a variety of contexts
- Financial Distress
  - Why it matters
  - Varied and sometimes competing definitions
  - A concept overlapping with but broader than insolvency, encapsulating circumstances evincing the likelihood of future insolvency

Tools for Predicting Financial Distress

Financial Ratios (1930s) → Multivariate discriminant analysis (1960s) → Neural networks (1990s)

- Measuring Effectiveness
  - Accuracy
  - Timespan
  - Type 1 and type 2 errors

Implementation

- European Union Directive 2019/1023
- “inbound” and “outbound” models
- Areas of likely improvement:
  - Calibration
  - Efficiency and Scale

Implications for insolvency

- More business rescue, less business exit?
- Duties
- “Minority Report” problem

Thank you!

Ruowei DU

Yantai University Law School

Harry LAWLESS

The World Bank Group


coffee break

Comparative Studies

Prof. Yseult MARIQUE

University of Essex

The failure of the rescue culture: don't mention the ‘S’ word.

Emilie Ghio *(University of Edinburgh)*

Donald Thomson *(Thorntons LLP; University of Dundee)*

The rescue culture

Law in books

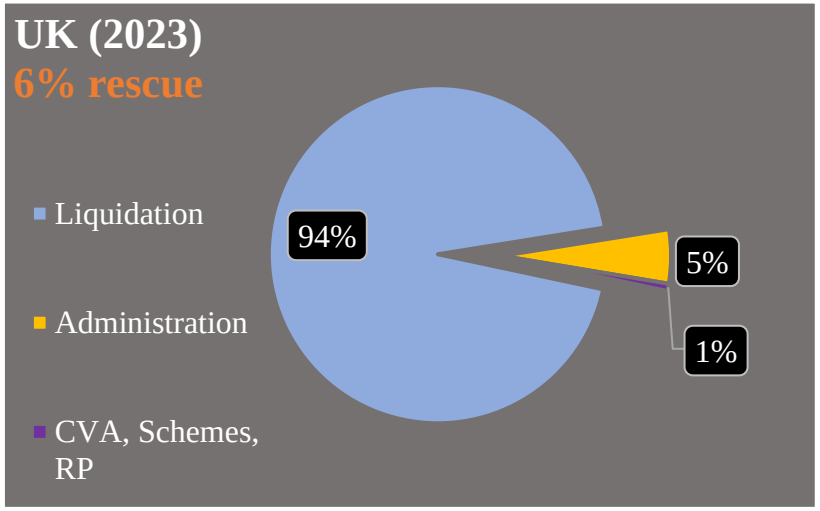
Nationally

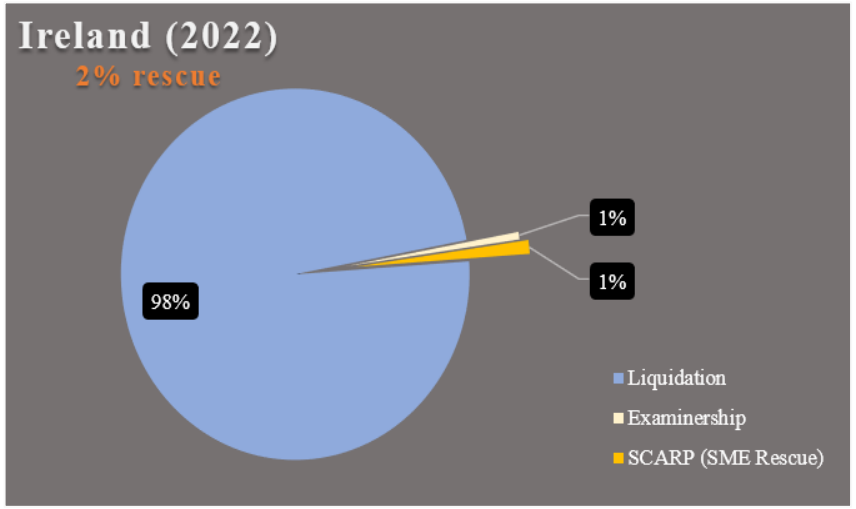
- **1942:** Italy, concordato preventivo
- **1955:** France, judicial settlement
- **1986:** UK, Administration; Company Voluntary Arrangements
- **1990:** Ireland, Examinership
- Wave of reforms in the early 2000s
- Again after the Global Financial Crisis of the late 2000s.

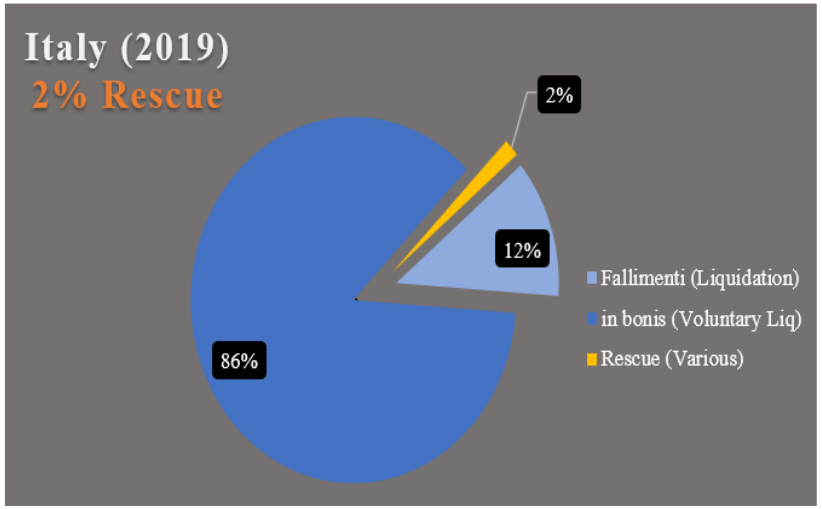
Regionally/internationally

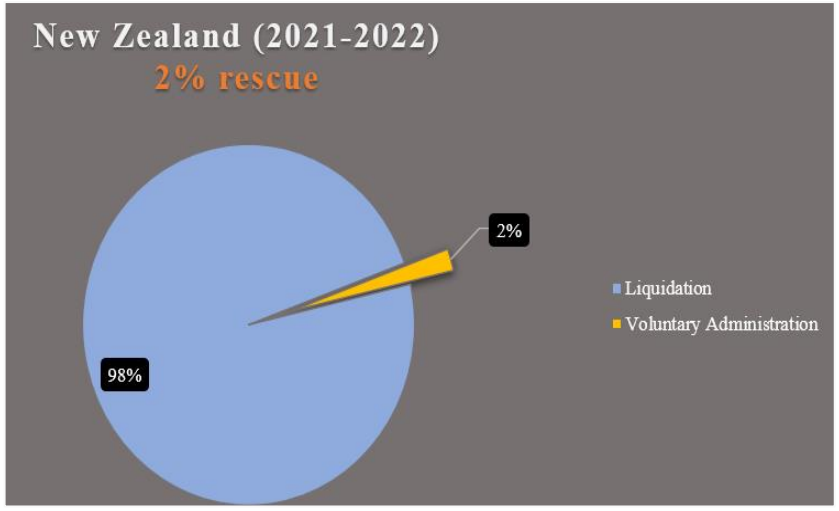
- **2011**: European Parliament Resolution (Recitals J and L)
- **2012**: EU Communication "Single Market Act II – Together for Growth" (Key Action 7)
- **2012**: EU Communication "A New approach to business failure and insolvency"
- **2014**: EU Recommendation on a New Approach to Business Failure and Insolvency
- **2015**: Capital Markets Action Plan
- **2019:** EU Directive on Preventive Restructuring Frameworks

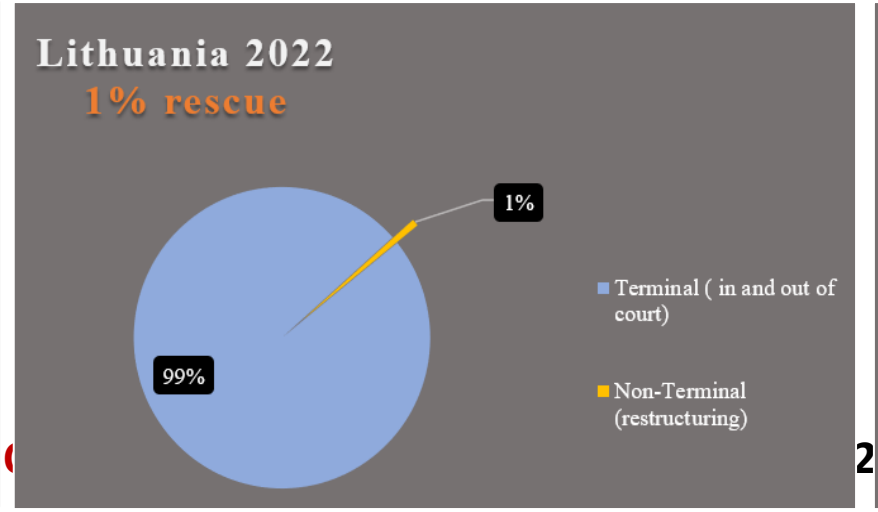
Law in action

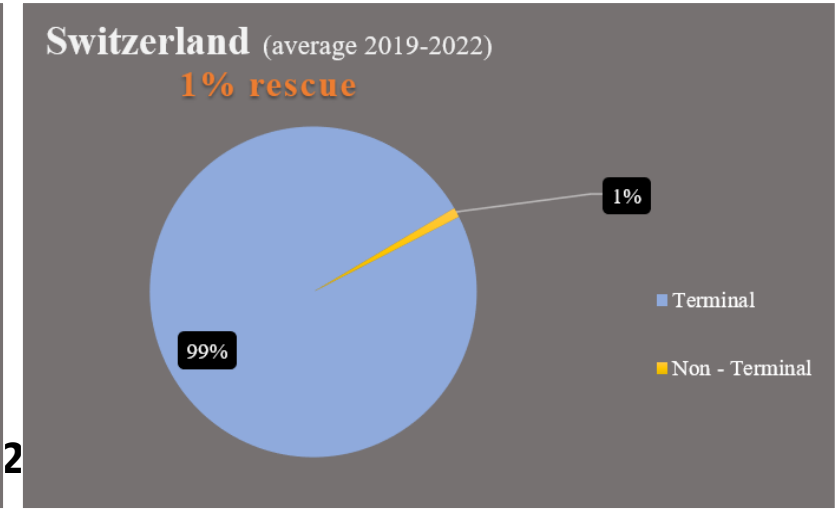












Nothing new -

- N. Segal (1994): “Many companies which are capable of being saved are forced into liquidation with loss to creditors. The goal of promoting rehabilitation and rescue is not being adequately served by the existing procedures.”

- M. Hunter (1999): “[f]igures suggest failure of rescue culture in the most productive part of the economy, and merit immediate attention to analyse the reasons for failure, the rescue procedures available to the debtor companies, and the reasons why they could not be, or were not, invoked.”

Neoclassical economic model

The majority of research investigating this failure has focused on **legal** and **economic** factors.

- Rescue procedures are costly.
- Creditors do not support rescue procedures and do not vote favourably.
- Rescue procedures are lengthy.
- No protection for the debtor early on, so creditors enforce their claims at an early stage and reduce the overall value of the company and its assets.
- Creditors do not engage in rescue procedures.
- Directors are displaced in some rescue procedures and therefore they do not file.

The neoclassical economic model is deficient

- Regular reforms to the insolvency system, e.g. shortened procedures, lowered costs, minimised court involvement, management remaining in control of the company and not being displaced, a moratorium on enforcement actions against the company.
- Yet, the persistent low uptake of rescue proceedings indicates that legal and economic factors are not sufficient to explain the failure of a true rescue culture to take hold.

So?

- "rescue **culture**" suggests that we may need to look beyond economic factors to socio-legal factors that go beyond economic arguments, such as the perception and understanding of, as well as attitudes towards, business failure.

International Project on the Stigma of Insolvency

30 contributors

21 jurisdictions

Doctrinal – Analysis of the rescue culture in different countries

Empirical – Data collection in relation to various aspects of the rescue culture.

Comparative

Obstacles to the establishment of a true rescue culture:

- stigma?
- knowledge?
- training?
- respomsibility?

Comparison with a view to identifying **common trends** and **best practices**

Reduce the number of avoidable liquidations

Different strands of the project

Rescue culture

Rescue mechanisms

Rescue uptake

MSMEs

Stigma

Directors

Knowledge

Responsibility

Stigma has regularly been raised as a factor of significant importance in explaining why debtors do not file for rescue.

Policy	Academia
World Bank: "[t]he heavy stigma of bankruptcy and the failure to discharge debts in many countries remain obstacles to entrepreneurship"	**Tibor Tajti**: "the ubiquity and the determinative role of the bankruptcy stigma."
Institute of Chartered Accountants of England and Wales: "[t]he stigma surrounding going out of business […] prevents many from looking for help at the time it would provide the greatest chance of turning a business around."	**Reinhard Bork**: "any earnest attempt to construct an efficient restructuring law must take it into account until there is evidence of a wide-ranging and sustained change in popular mentality."
European Commission: "[t]he stigma of business failure is one reason why many [companies] in financial trouble conceal their problems until it is too late."	**Paul Omar and Jennifer Gant**: ""[w]hile the rescue culture may have been implemented through these new [rescue] procedures, perceptions of insolvency remain tainted with blame and the stigma of irresponsibility."

1. Insolvency narrative

In your opinion, is there an insolvency narrative within the media in your jurisdiction, e.g. does insolvency feature in news reports or mainstream media?

Australia: Yes, frequently media reports will refer to a person as a former bankrupt or a failed company director.

Canada: Yes. Commercial insolvencies are frequently covered in print and other media.

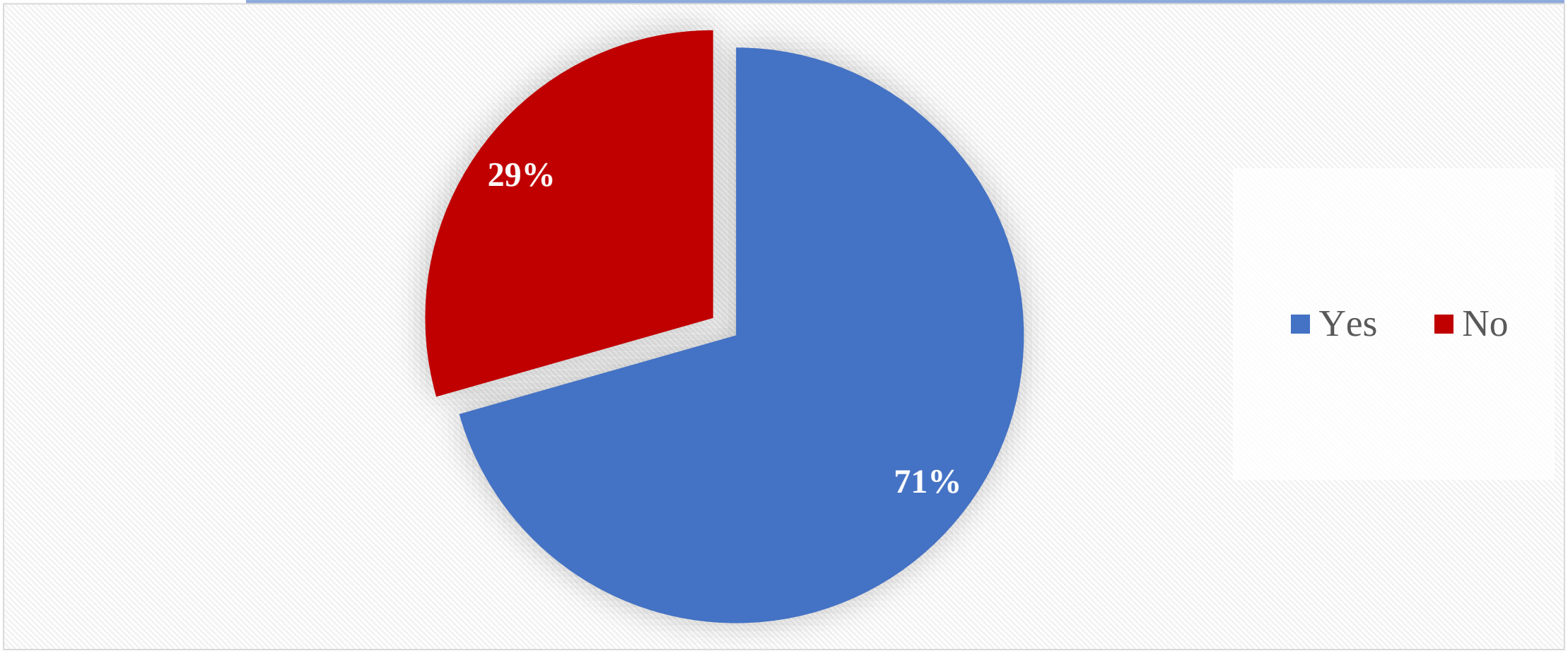
France: Insolvency matters are often discussed in the general media

Ireland: "Certain high-profile insolvency or examinership cases may receive media coverage, but there is no consistent discussion, or "narrative", surrounding insolvency and rescue in mainstream media in Ireland"

Lithuania: "I do not think that there is a narrative in the media."

United States: "In general, no. Insolvency does not tend to feature in news reports or mainstream media."

Is there an insolvency narrative?



Insolvency narrative

In your opinion, is there an insolvency narrative within the media in your jurisdiction, e.g. does insolvency feature in news reports or mainstream media?

2. Stigma narrative

Would you say that stigma is part of the insolvency narrative in your jurisdiction? Has it appeared in legal texts, policy documents and/or academic sources over the years?

Canada: "Stigma has been mentioned repeatedly in the context of commercial insolvency."

Ireland: "In general, the concept of 'stigma' is not directly referred to in existing Irish legal texts or policy documents."

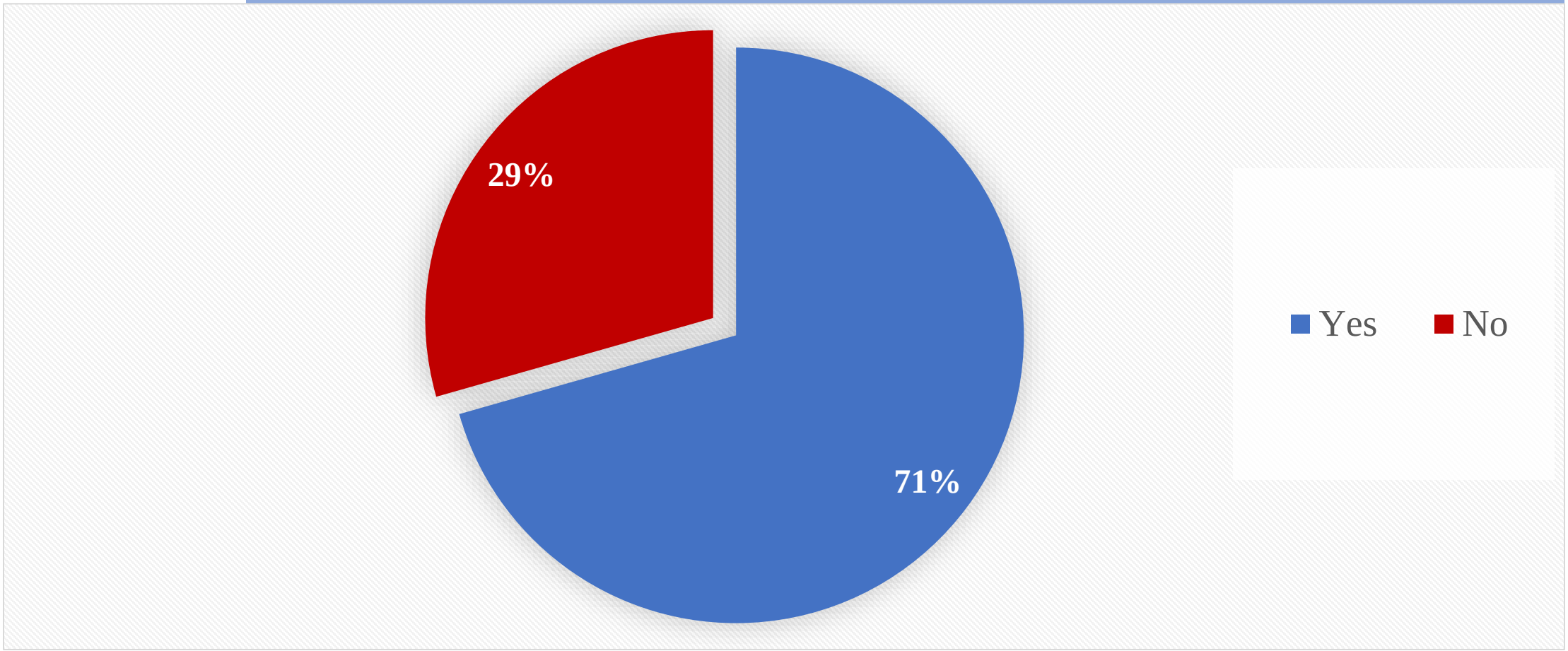
Italy: "The problem of the stigma in the Italian insolvency narrative is well-known."

Lithuania: "There is no implication on bankruptcy stigma in legislation, legal texts or policy documents."

Switzerland: "Stigma is clearly part of the insolvency narrative."

United States: "Stigma is not a significant part of the corporate insolvency narrative in the US. I am unaware of any legal texts or policy documents discussing corporate stigma."

Is there a stigma narrative?

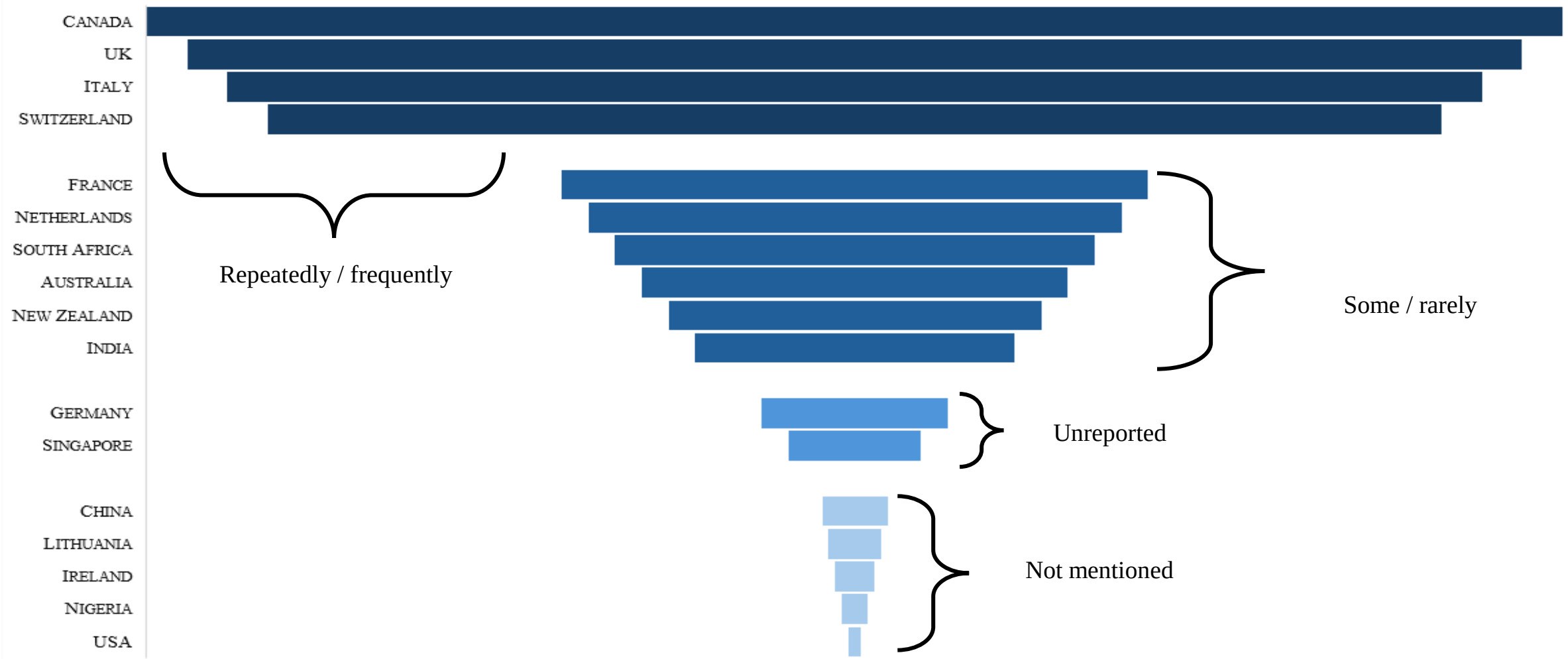


Stigma narrative

In your opinion, is there an insolvency narrative within the media in your jurisdiction, e.g. does insolvency feature in news reports or mainstream media?

The “cone of shame”

Scaled measure of perceived stigma narrative



Back to the rescue culture

Does stigma exist?

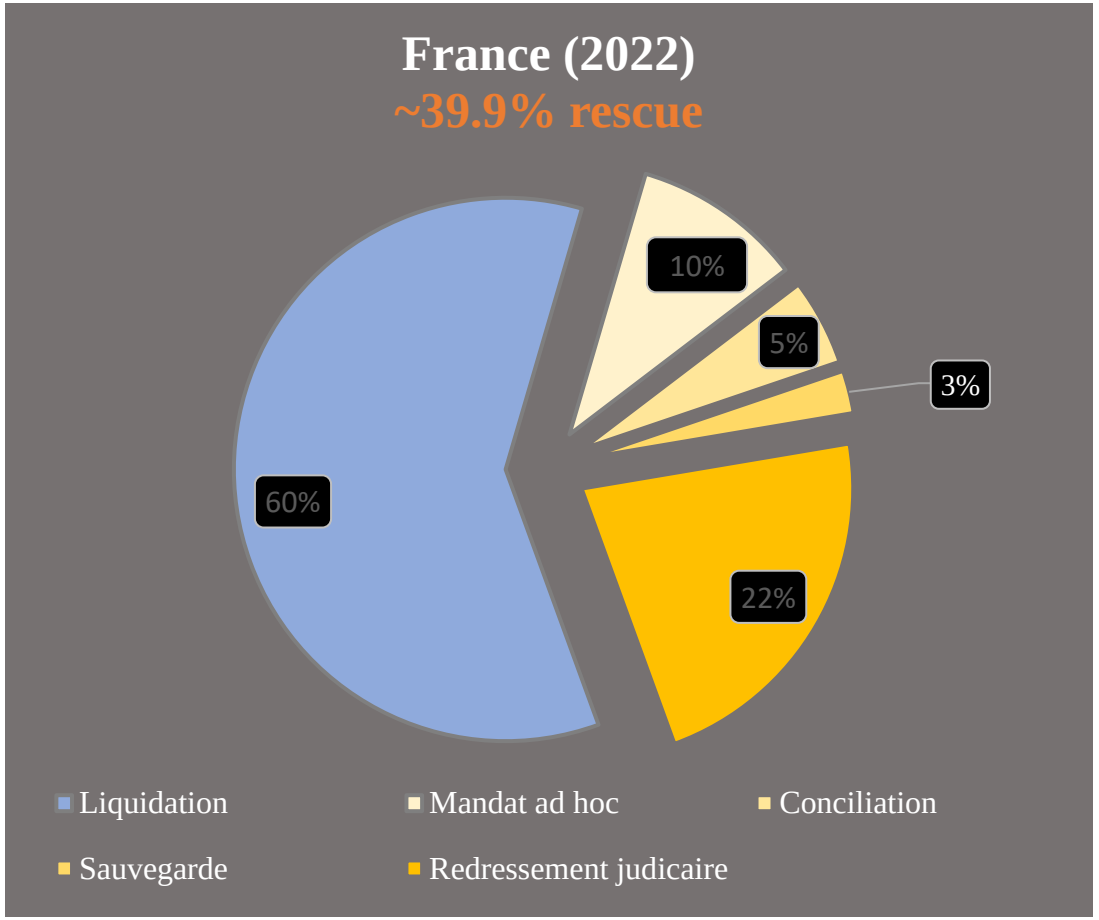
Yes

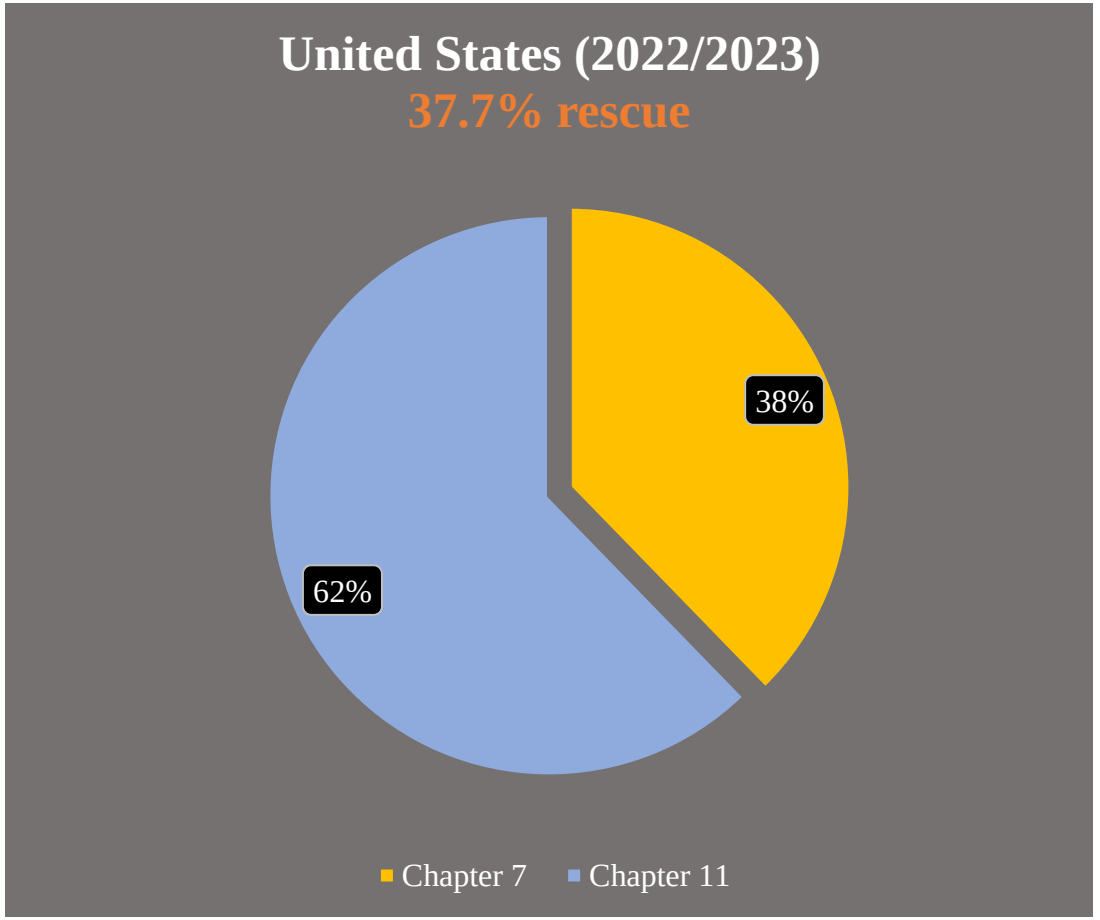
Does the level of stigma vary amongst jurisdictions

Yes

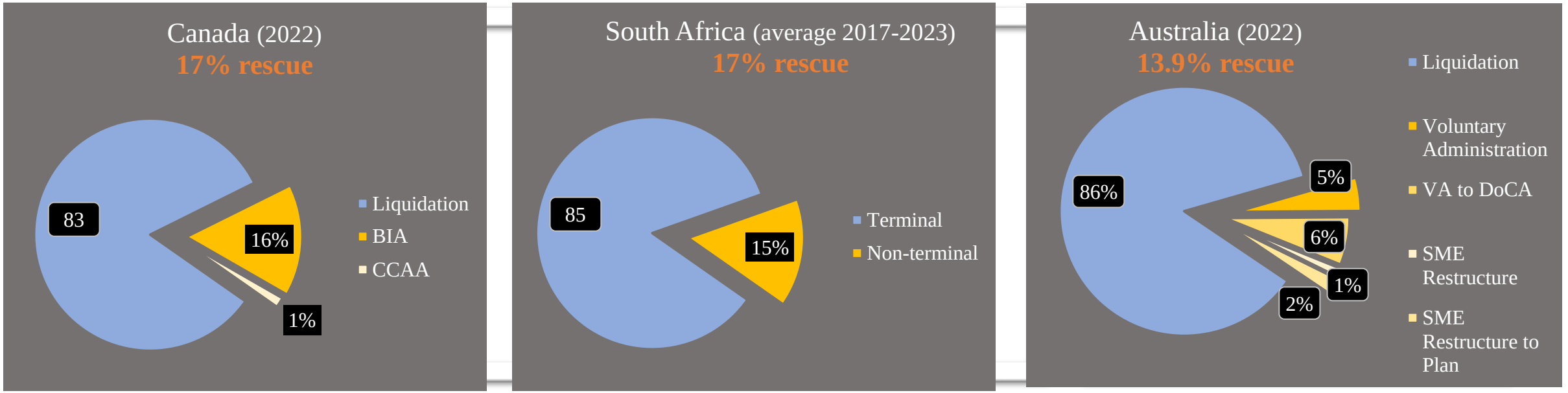
Is there a correlation between the varying levels of stigma and the varying uptake of rescue procedures in surveyed jurisdictions?

~ 30-40% uptake

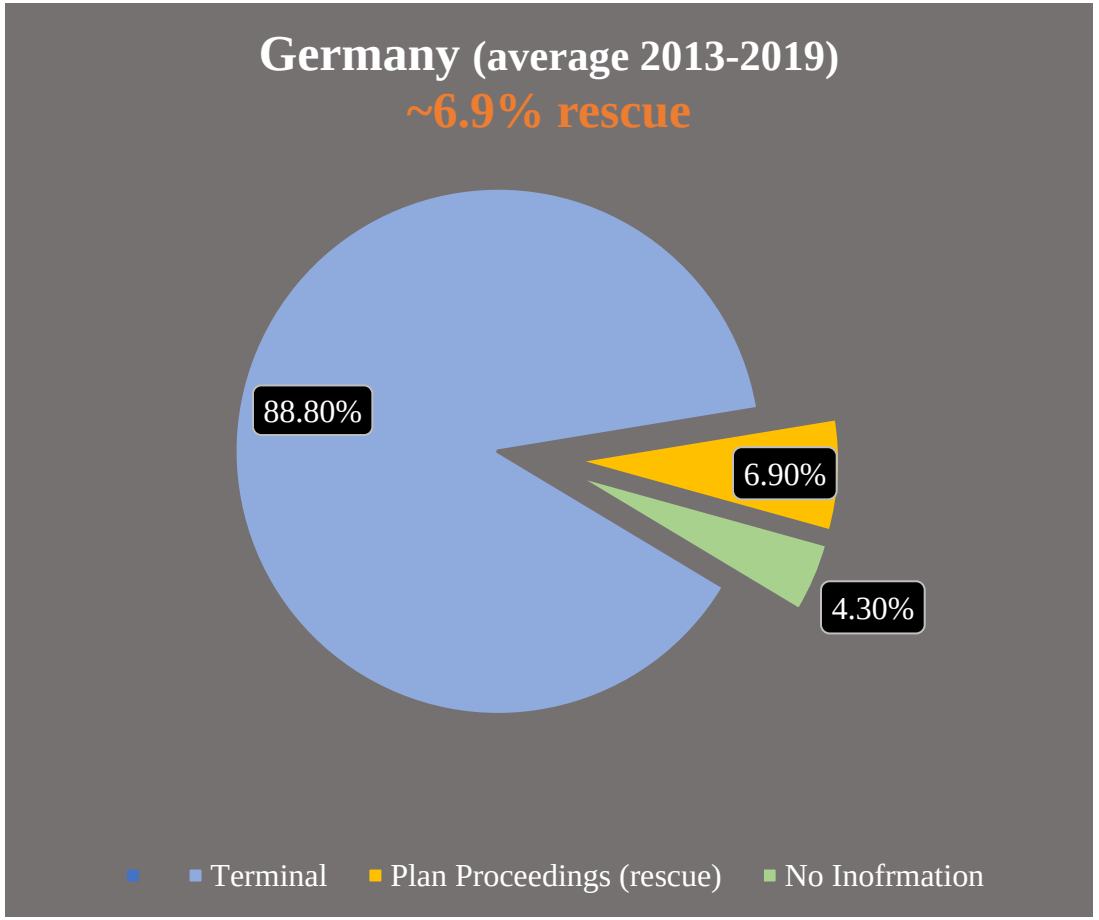

France (2022)
~39.9% rescue
10%
5%
3%
60%
22%
Liquidation
Mandat ad hoc
Conciliation
Sauvegarde
Redressement judicaire

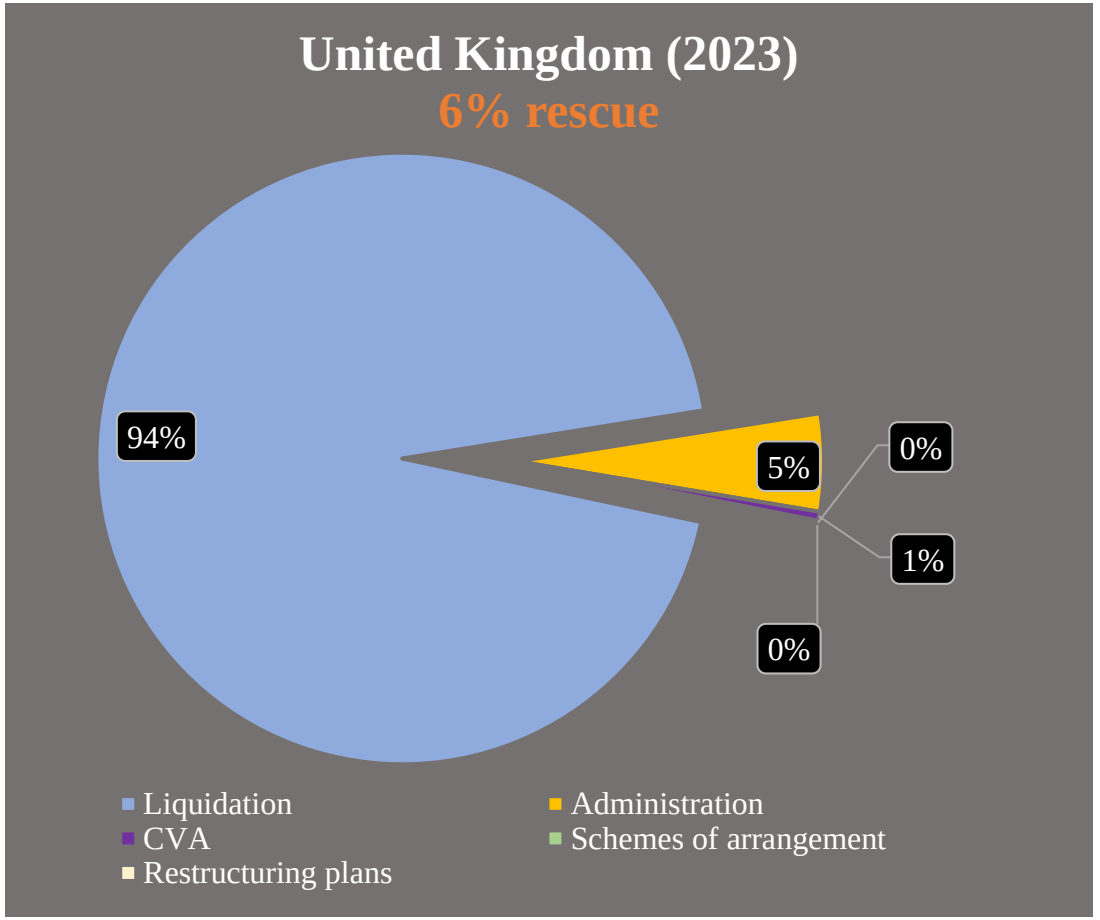

United States (2022/2023)
37.7% rescue
38%
62%
Chapter 7
Chapter 11

~ 10-20% uptake


Canada (2022)
17% rescue
83
16%
1%
Liquidation
BIA
CCAA
South Africa (average 2017-2023)
17% rescue
85
15%
Terminal
Non-terminal
Australia (2022)
13.9% rescue
86%
5%
6%
1%
2%
Liquidation
Voluntary Administration
VA to DoCA
SME Restructure
SME Restructure to Plan

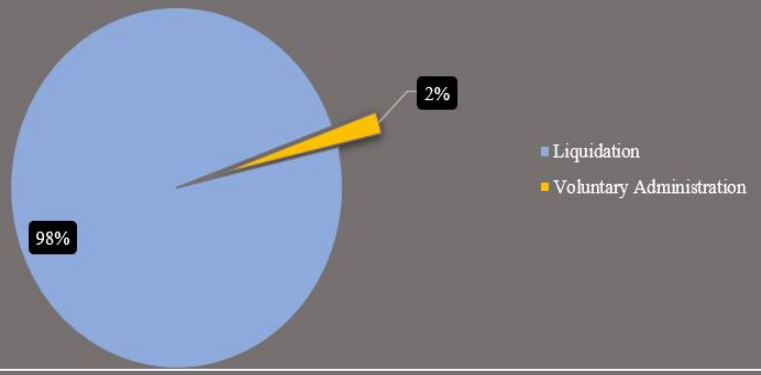
~ 5-10% uptake


Germany (average 2013-2019)
~6.9% rescue
88.80%
6.90%
4.30%
Terminal
Plan Proceedings (rescue)
No Inofrmation

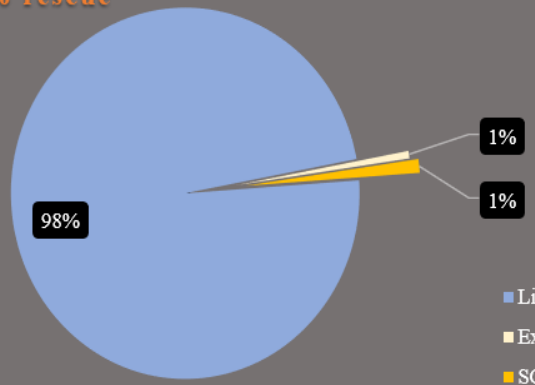

United Kingdom (2023)
6% rescue
94%
5%
0%
1%
0%
Liquidation
Administration
CVA
Schemes of arrangement
Restructuring plans

< 5% uptake

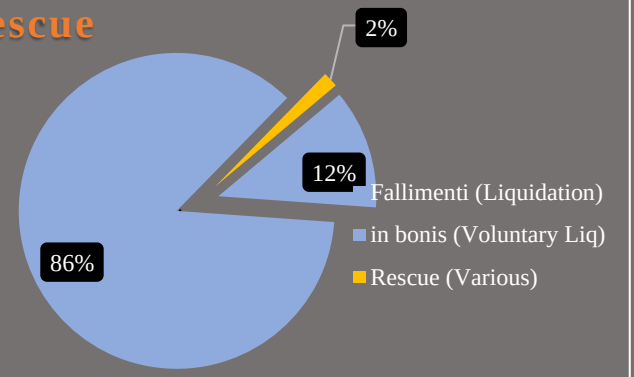
New Zealand (2021-2022)
2% rescue



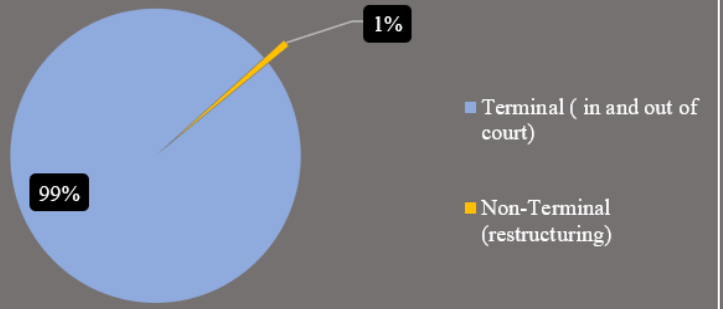
Ireland (2022)
2% rescue



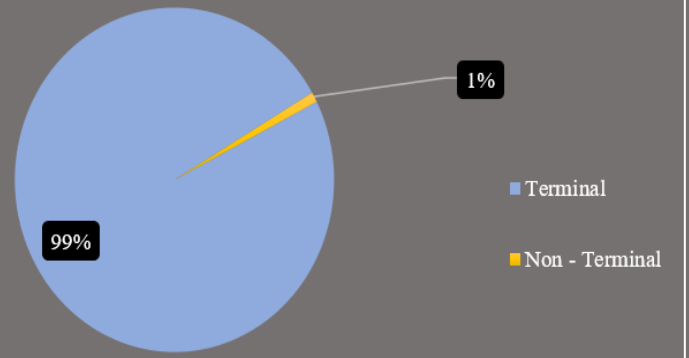
Italy (2019)
2% Rescue



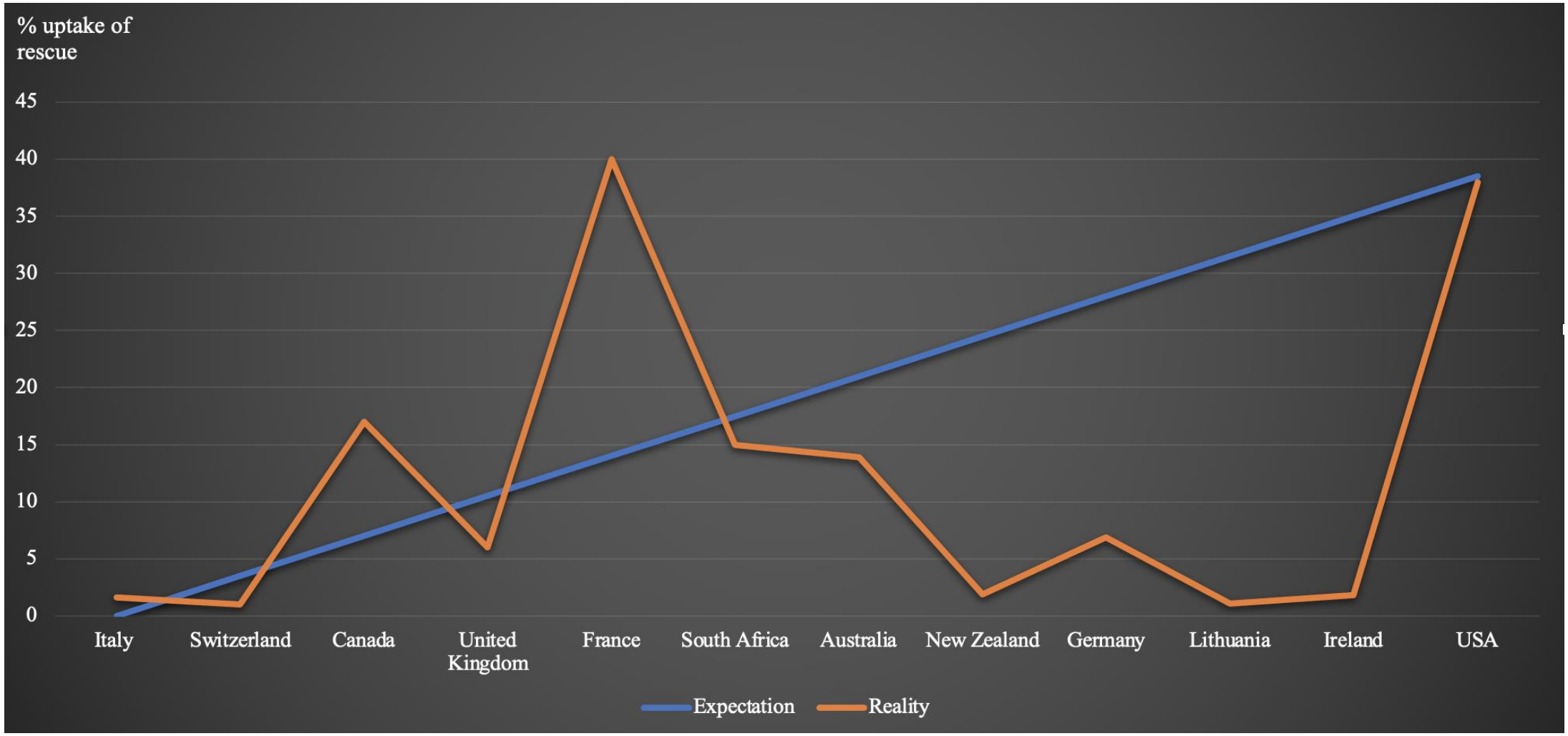
Lithuania 2022
1% rescue

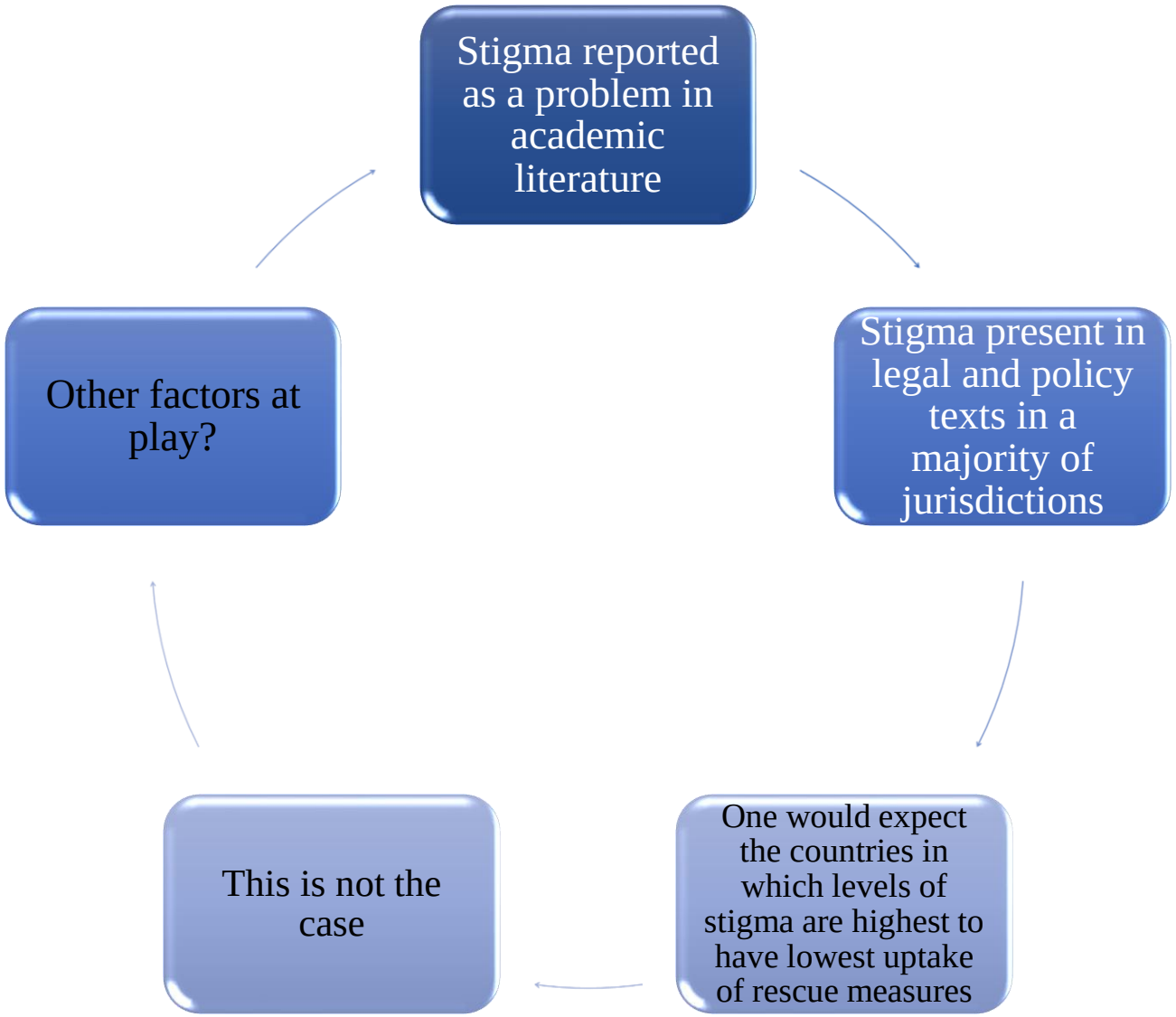


Switzerland (average 2019-2022)
1% rescue



Expectation versus reality




Stigma reported as a problem in academic literature
Stigma present in legal and policy texts in a majority of jurisdictions
One would expect the countries in which levels of stigma are highest to have lowest uptake of rescue measures
This is not the case
Other factors at play?

Different strands of the project

Rescue culture

Rescue mechanisms

Rescue uptake

MSMEs

Stigma

Directors

Knowledge

Responsibility

THANK YOU!

- **Australia**: Catherine Brown; Amanda Bull; Jason Harris
- **Canada**: Anna Lund
- **China**: Shuai Guo; Rebecca Parry
- **France**: Vasile Rotaru; Adrien Bézert
- **Germany**: Stephan Madaus
- **India**: Neeti Shikha
- **Ireland**: Jonathan McCarthy
- **Italy**: Francesca Burigo; Eugenio Vaccari
- **Lithuania**: Ieva Strunkiene
- **Netherlands**: Gert-Jan Boon
- **New Zealand**: Lynne Taylor
- **Nigeria**: Bolanle Adebola; Kayode Olude
- **Singapore**: Ding Jun Toh
- **South Africa**: Andre Boraine; Juanitta Calitz
- **Switzerland**: Rodrigo Rodriguez; Laura Knöpfel
- **United Kingdom**: Emilie Ghio; Donald Thomson
- **United States**: Laura N. Coordes

If it Ain't Broke, Don't Fixt It: No Need to Adopt the COMI Approach to Cross-Border Recognition in Common Law

C. Z. Qu

Charles Darwin University School of Law

The issue and thesis

The Issue

Should the Hong Kong Court adopt the common law Centre of Main Interest (COMI) approach for making decisions on cross-border recognition?

The trigger of the debate

The Hong Kong Companies Court announced, *obiter dictum*, the adoption of the common law COMI approach in ***Re Global Brands Group Holdings Ltd (in liq)*** [2022] 3 HKLRD 315 (*Global Brands*), and the *dictum* has been followed in at least two subsequent decisions.

The thesis of this presentation

Rule 179/193 is flexible enough for assisting non place of incorporation proceedings and there is no need for Hong Kong to adopt the common law COMI approach.

1. The relevance of the issue: a conceptual roadmap
2. The recognition rule for Hong Kong: background and latest development
3. Rule 179/193 is not meant to be hard and fast
4. Judges have non-statutory powers to assist non place of incorporation proceedings
5. Conclusion

1. The relevance of the issue: a conceptual roadmap

The red-chip group structure

Liquidation or restructuring

For liquidation

For restructuring using schemes – rule in *Gibbs*

The need for a stay or parallel scheme

Cross-border recognition & assistance

The rule in *Gibbs v Société Industrielle des Métaux* (1890) 25 QBD 399 (CA) :

'A discharge from any debt or liability under the bankruptcy law of a foreign country outside the United Kingdom is a discharge therefrom in England if, and only if, if it is a discharge of the law applicable to the contract': *Dicey, Morris & Collins*, 16th edn, Rule 211.

'A discharge under bankruptcy proceedings in a foreign country does not operate as a discharge of an obligation whose applicable law was that of some other country than the *forum concursus*.': Ian Fletcher, *Insolvency in Private International Law* (2nd edn, OUP 2005) [2.126].

<u>Typical outbound requests</u>

- Stay of proceedings
- A parallel scheme
- Presenting a petition for scheme

<u>Typical inbound requests (in recent years)</u>

- Request & receive from 3rd parties docs & information
- Locate, protect, secure and take into possession of control of assets
- Take possession & control of books, papers, and records of the co
- Bring legal proceedings in the officeholders' name or in the name of the co

Basis of recognising officeholder's authority

Place of incorporation

COMI

2. The rule of recognition: background and the latest development in Hong Kong

Before ***Re Global Brands Group Holdings Ltd (in liq)*** [2022] 3 HKLRD 315: Rule 179 (now Rule 193-(1)) : ***Kam v Kam*** (2015) 18 HKCFAR 501 (CFA) [19]**;** ***A Co v B*** [2014] 4 HKLRD 374, [4] ; ***Re Joint Liquidators of Supreme Tycoon Ltd*** [2018] HKLRD 1120; *Re* ***China Huiyuan Juice Group Ltd*** **(中國滙源果汁 集團有限公司)** [2021] 1 HKLRD 255, [19]; ***Re Up Energy Development Group Ltd*** [2022] 2 HKLRD 993, [46]

↓

Global Brands (where the request is from the place of incorporation):

1. The common law COMI approach should be adopted.
2. A recognition/assistance request from outside the COMI will not be granted unless (i) the assistance requested is a 'managerial assistance' or (ii) in the type of situation which Abdullah JC in *Re Opti-Medics (in liq)* [2016] 4 SLR 312 describes as justifying assistance on practical grounds.

↓

Re Joint and Several Provisional Liquidators of RZ3262019 Ltd [2022] HKEC 5037 (where, again, the request is from the place of incorporation, the same judge as in *Global Brands*)

1. ***Global Brands*** should be followed.

2. The request should be granted because the provisional liquidators were represented as '**Authorised Agents**' in the orders sought – the officeholders stood in the shoes of the directors.

↓

Re Guangdong Overseas Construction Corp (in liq) [2023] 3 HKLRD 262 (where (i) the request was from the Mainland, which is both the COMI and place of incorporation and (ii) the court was differently constituted): *Global Brands* was followed

Rule 179 – Subject to the Insolvency Regulation, the authority of a liquidator appointed under the law of the place of incorporation is recognised in England (*Dicey, Morrison, and Collins on the Conflict of Laws*, 15th edn).

RULE 193—(1) The authority of a liquidator appointed under the law of the place of incorporation is recognised in England. ... (*Dicey, Morrison, and Collins on the Conflict of Laws*, 16th edn).

3. Rule 179/193 - (1) is not meant to be hard and fast

- The statutory rules on judges' power to wind up foreign companies rest on the premise that an insolvency proceeding opened in the forum state with respect to a foreign company is capable of being recognised by the court in the place of incorporation.
- Where an ancillary liquidation or parallel scheme is required, the court seised of the control of the principal winding up/scheme has the power, and indeed the need, to recognise the ancillary liquidation or parallel scheme (***North Australian Territory Co Ltd v Goldsbrough Mort & Co*** (1889) 61 LT 716).
- A decision to recognise foreign proceedings may be based on the place where the debtor's business is carried on (see cases referred to in Richard Sheldon QC (ed), *Cross Border Insolvency* (4th edn, Bloomsbury Professional) [6.70] (e.g., ***Queensland Mercantile and Agency Co Ltd v Australian Investment Co Ltd*** (1888) 15 R 935, 939; ***BCCI (Overseas) Ltd (in liq) v BCCI (Overseas) Ltd – Macau Branch (in liq)*** [1997] HKLRD 304 (CA) and the author's comments). See also Philip ST J Smart, *Cross-Border Insolvency* (Butterworths) 168, *ff*; *Dicey Morris & Collins on Conflict of Laws* (16th edn, Sweet & Maxwell) [30R-142], *ff*.
- The Court has non-statutory power to assist officeholders appointed outside the place of incorporation.

4. Judges have non-statutory power to assist non place of incorporation proceedings

Re Dickson Group Holdings Ltd [2008] Bda LR 34

- The company was incorporated in Bermuda, listed in Hong Kong.
- The operation of its business was in Hong Kong and the Mainland.
- The company was ordered to wind up in Hong Kong.
- The liquidator proposed to restructure the debtor through a scheme in Hong Kong and a parallel scheme in Bermuda.
- The assistance sought in Bermuda: a leave to convene a creditors' meeting for the Bermuda scheme.

Issue (inter alia)

Should the authority of the liquidators be recognised in Bermuda?

Decision

Yes

Cont.

Reasons

1. Guiding principles (two principles on cross-border insolvency + two fundamental principles of insolvency law)

- Two principles on cross-border insolvency

'All these learning suggests the following principles which I adopt (a) the fact that this Court would in similar circumstances entertain primary winding-up proceedings in respect of a foreign company is an important factor in deciding whether or not to recognize a foreign principal winding up proceedings in relation to a local company which is not being wound up at all its own domicile [*sic]; and* (b) the main practical consideration is whether or not a foreign primary proceeding is the most convenient means of winding up the company's affairs, having regard to all relevant commercial and/or public policy concerns in the case at hand.': at [19].

Cont.

- Two fundamental principles of insolvency law

‘(a) the universalist principle under which all reasonable efforts ought normally to be made to subject a company’s liquidation to a single coherent regime so that all creditors share ratably [*sic*], irrespective of the accidental location of creditors outside the jurisdiction of the primary liquidation court; and (b) the presumption that most creditors dealing with the company before it became insolvent would reasonably have contemplated that their rights in any insolvency would be dealt with in accordance with the law of the company’s place of incorporation, irrespective of the accidental location of assets outside that jurisdiction.’: ibid.

Cont.

2. Commercial reality

- The company's centre of gravity is more in Hong Kong than Bermuda (so the Court is content to accord a leading role to the court in Hong Kong).
- The assistance requested: to assist the Hong Kong court to restructure the debtor through a parallel scheme, and
- The debtor is eminently salvageable and no question of the need for a winding up in Bermuda would arise.

3. Public interest concerns

No suggestion of any prejudice to local interests.

Cont.

In re Fu Ji Food & Catering Servs Holdings Ltd Case No: 222 of 2010, Grand Court of the Cayman Islands. See Antony Smellie, 'A Cayman Islands Perspective on Transborder Insolvencies and Bankruptcies: The Case for Judicial Co-Operation' (2011) 2 *Beijing Law Review* 145-154

- The financially distressed debtor was incorporated in Cayman Islands and listed in Hong Kong.
- The company had subsidiaries in Hong Kong and the Mainland, operating substantial business in the Mainland.
- The company was placed into provisional liquidation in Hong Kong to allow capital restructuring.
- The company needed a stay of proceedings by the Cayman Courts.
- The ability of the provisional liquidators to act for the company in Cayman Islands needed to be recognised by the Cayman Courts.

Decision

Orders sought granted.

Reasons

1. The court has inherent jurisdiction to require or provided judicial assistance.
2. The company has real and substantial connection with Hong Kong; the restructuring scheme is viable and beneficial.

Cont.

3. Granting the recognition and assistance sought presented no public policy objections in the circumstance, ‘but complied with the need to ensure the protection of the legitimate interests of all stakeholders in keeping with the principle of universality.’: Smellie at 151.

Obiter dictum: difficulties might arise in situations where, at the time when the recognition request is made, an insolvency proceeding had already been opened in Cayman Islands but the difficulties in such a situation could be addressed on a case-by-case basis: Ibid.

Cont.

Re China Agrotech Holdings Ltd [2017 (2) CILR 526]

- The company was incorporated in the Cayman Islands.
- The company had significant connections to Hong Kong, where its shares had been listed and where it was registered (as a non-Hong Kong company) and administered.
- The Hong Kong court ordered the company to wind up on the petition of a Hong Kong-based creditor.
- The liquidators proposed to restructure the debtor through a scheme of arrangement in Hong Kong and a parallel scheme in the Cayman Islands.
- The liquidators sought orders from the Grand Court to give them powers and authority to act for the debtor for the limited purposes of presenting a petition for a creditors' scheme in the Cayman Islands.
- Statutory jurisdiction to recognise and assist in Cayman Islands: the Companies Law, s 240, which says that this jurisdiction is only available where the foreign representative is appointed in the place of incorporation.

Issues (inter alia)

1. Does the court have the power to grant recognition and assistance to officeholders appointed outside the place of incorporation (the power or jurisdiction issue)?
2. Are the Hong Kong officeholders entitled, under Cayman private international law, to act on behalf of the debtor in presenting the petition (for a scheme)?
3. If the answer to the second question was 'no', should the court grant the order sought by exercising its discretion (the discretion issue)?

Cont.

Decision

1. Yes
2. No
3. Yes.

Reasons

1. The court's power of recognition under s 240 'has not pre-empted or removed the non-statutory, common law-based jurisdiction.': at [22].
2. Under Cayman law, the corporate organs entitled to act for the company are still the board and the general meeting, notwithstanding the winding up ordered by the Hong Kong court. The winding-up order, as an order of foreign court, 'is not binding or enforceable in Cayman… .': at [29].
3. Even though the relevant private international law rule did not empower foreign liquidators to represent the company, the courts had powers at common law to recognise the foreign liquidators' powers or status provided that the requisite conditions were satisfied.

Cont.

The conditions (apart from the debtor's connection with Hong Kong) include:

(i) whether there were issues involving competing claims by creditors (locating in different jurisdictions) which would result in different levels of recovery or returns depending on whether the liquidators were granted the relief they seek,

(ii) the likelihood of a winding-up application in the Cayman Islands,

(iii) whether there were any local reputational, regulatory and policy reasons requiring a local proceeding, and

(iv) The location of the debtor's COMI.

These are satisfied. The answers to the above questions are:

(i) No such issues.

(ii) No likelihood.

(iii) No.

(iv) The debtor's COMI is in Hong Kong (but the COMI factor is not determinative for the court).

5. Conclusion

1. The need to assist non place of incorporation proceedings has not arisen before the Hong Kong Court in the recent cases discussed.
2. The reasons that the Companies Court gave for preferring the common law COMI approach are unconvincing.
   - ***Global Brands*** (recall the Companies Court's decision to adopt the COMI approach)
   - Even if the common law COMI approach is adopted, it does not follow that a request from outside the COMI should necessarily be declined (foreign non main proceedings (the UNCITRAL Model Law); secondary proceedings (European Insolvency Regulation), and ancillary liquidation/parallel schemes)
   - The 'managerial assistance' theory is problematic.
   - What Aedit Abdullah JC's words on 'practical ground' say is that his Honour's decision would have been justifiable also on the basis of Rule 179.
   - That the place of incorporation is often a letterbox jurisdiction (***Global Brands***): but the judge has non-statutory power to deal with this situation
   - The need to align with the Supreme People's Court's rules on assisting officeholders appointed under the Hong Kong Law: (i) the Hong Kong Court needs to be guided by common law or applicable statutory rules, (ii) the Hong Kong Court should follow the binding authorities (e.g., ***Kam v Kam*** (2015) 18 HKCFAR 501 [19]), and (iii) the SPC Rules are functionally inadequate.
3. The Court has non-statutory powers to assist non place of incorporation insolvency proceedings.
4. There is no need for the Hong Kong Court to adopt the common law COMI approach.

The Anti-Deprivation Rule In Practice – Commonwealth Divergence

Matthew Chippin – PhD Researcher, School of Law, University of Leeds

5th International & Comparative Insolvency Law Symposium | 25th-27th April 2024

What is the anti-deprivation rule?

1. The anti-deprivation rule is a rule of public policy which prevents the taking of assets from the estate upon an entity's insolvency.

2. The anti-deprivation rule, although not explicit in statute, is an implicit prohibition which emanates from the long history of the development of common law bankruptcy and insolvency statutes.

3. The rule, although not specified in the relevant legislation of Canada or the United Kingdom, is a rule of public policy ultimately emanating from the statute.

Lomas & Ors v JFB Firth Rixson Inc & Ors [2012] EWCA Civ 419, *Chandos Construction Ltd. v. Deloitte Restructuring Inc.*, 2020 SCC 25, para. 33.

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The English vs. Canadian Anti-Deprivation Rules

The English anti-deprivation rule:

If, upon insolvency, whether intentionally or not, a transaction removes value from the estate, and such a transaction is not caught within an existing statutory provision, then the anti-deprivation rule will apply unless the transaction was entered into in good faith and for good commercial reasons.

(*Belmont Park Investments PTY Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc* [2011] UKSC 38, *Lomas v. JFB Firth Rixson*, [2012] EWCA Civ 419.

.

The English vs. Canadian Anti-Deprivation Rules

The Canadian anti-deprivation rule:

If an impugned clause or transaction is triggered by an event of insolvency and, the effect of the clause or transaction removes value from the insolvent estate then such clause or transaction is invalid.

(*Chandos Construction Ltd. v. Deloitte Restructuring Inc.*, 2020 SCC 25, 34.)

Methodologies

- The main approach of this research is based upon a version of the **legal traditions approach** to comparative law
- The legal traditions approach was pioneered by Prof. H. Patrick Glenn of McGill University and has been adopted by others
- Although functionalism is the dominant approach in the European comparative law, the legal traditions approach is far more commonplace within North American comparative law.
- This approach suggests that law is part of a society's fabric and, as such, to fully understand a country's legal system one must look at aspects of society beyond the law.
- The legal traditions approach argues that law is more than just a series of rules but a set of coexisting legal cultures which account for a society's entire legal mechanism.

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Methodologies

- Under the legal traditions approach, some degree of interdisciplinary study is required, and, in the case of legal divergence, legal historical methodologies were chosen.
- This is largely because such a study of how the rule has diverged is based upon historical circumstance
- Alongside legal history, this research utilizes, to a lesser degree, jurisprudential ideologies of legal positivism and legal realism
- This is done as legal realism has had a tremendous impact upon legal scholarship in the United States and Canada (also in Sweden, where there is a unique legal realist school!)

Choice of jurisdictions

- The United States has been chosen in this study as it offers another North American perspective to better understand the divergence in the Canadian anti-deprivation rule.
- Canada
- England

The difference in Canadian and English contexts

- In utilizing the US as a comparison, the context under which the Canadian bankruptcy and insolvency system developed has great similarities to the American context.
- Importantly, the impact of both **Federalism** and **Economic Crisis** present on the frontier seem to have fostered a divergent environment from Britain.
- In this way, both Canadian bankruptcy as well as transactional avoidance legal frameworks seem to have developed similarly to the US.
- Most notably, both the US and Canada had long periods of each respective Federal government choosing not to exercise their powers over bankruptcy and insolvency powers – this ultimately led to States (in the US context) and Provinces (in the Canadian context) developing both bankruptcy as well as anti-avoidance systems.
- Interestingly, the provincial and state anti-avoidance regimes were very similar to the wording of the *Statue of Elizabeth 1571.*

The English anti-deprivation rule in *Belmont Park*

- The leading English case on the anti-deprivation rule is *Belmont Park Investments PTY Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc* [2011] UKSC 38
- The case involved synthetic collateralised debt obligations (synthetic CDO) which contained a clause whereby, upon default, the noteholders of the credit default swaps (CDS) were given priority over other creditors.
- The question was whether this agreement violated the anti-deprivation rule.
- Under an effects-based rule, which does not impute the intention of the contracting parties, such an agreement would be deemed an afront to the rule.
- However, the UKSC found that the anti-deprivation rule should adopt a purpose-based standard, one which looks to good commercial purpose and party intent.
- The *pari passu* rule was not triggered here as it can only apply once the insolvency proceeding has started, the clause in the CDS agreement applied once the entity went insolvent.

The English anti-deprivation rule in *Belmont Park*

- Lord Collins identified historic cases where the anti-deprivation rule was held to invalidate contractual provisions, contrasting these with cases where the provisions were allowed. He deduced that, in such cases where the rule had previously applied, there was a deliberate attempt to evade the insolvency laws by the party seeking to take advantage of the deprivation. (*Belmont Park,* para. 60).
- As such, the court determined the anti-deprivation rule should:
- (a) adopt a purpose-based standard, based upon the intention of the parties AND
- (b) was inapplicable in this case as the synthetic CDS agreement was negotiated in good faith and served a justifiable commercial purpose.

The Canadian anti-deprivation rule in *Chandos*

- The leading anti-deprivation rule case in Canada is *Chandos Construction Ltd. v. Deloitte Restructuring Inc.*, 2020 SCC 25.
- The case concerned a sub-contract agreement between Chandos Construction and Capital Steel, 2 Canadian companies.
- The sub-contract agreement provided that if one of the parties to the agreement were to go insolvent, they would forfeit 10% of the subcontract price to the other party.
- Capital Steel then filed for assignment in bankruptcy and Chandos wanted to assert its right of set-off for the 10% forfeiture penalty pursuant to their right under s. 97(3) of the *Bankruptcy and Insolvency Act.*
- Essentially, under the circumstances, because the subcontract price was $1,373,300.47, clause VII Q(d), if applicable, would mean Chandos had a $10,511.66 claim against, rather than a $126,818.63 debt to, Capital Steel.

The Canadian anti-deprivation rule in *Chandos*

- The SCC was tasked with whether to apply an effects or purpose-based standard.
- The court conducted a similar analysis to the UKSC in *Belmont Park* but found that in the Canadian context, the anti-deprivation rule had applied as an effects-based rather than purpose-based rule in the Canadian context.
- As such the SCC was then tasked with whether to apply the new standard from *Belmont Park* or to keep the effects-based standard as had applied in previous case law.
- Interestingly, in *Re Hisn Chong Construction Company Limited*, [2019] HKCA 1350 the Hong Kong Court of Appeal abandoned the previous effects-based standard for a purpose-based one

The Canadian anti-deprivation rule in *Chandos*

- The SCC rejected the purpose-based standard from *Belmont Park* for two reasons:

1. Remember the anti-deprivation rule stems from statute and not the common law. Parliament never intended for the anti-deprivation rule to be a purpose-based rule. As such, it is bound by s. 71 of the *Bankruptcy and Insolvency Act.* Namely, that: "…once a court ascertains that Parliament intended, by virtue of s. 71, that all of the bankrupt's property is to be collected in the trustee, it is not for the court to substitute a competing goal that would give rise to a different result." (Chandos para. 33)
2. The SCC made a policy-based argument that a purpose-based anti-deprivation rule would create less commercial certainty.

The Canadian vs. English anti-deprivation rules

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- There are 3 main differences in the logic employed by Canadian vs. English courts:

1. The SCC seems to tacitly accept the notion that the anti-deprivation rule is a rule of general anti-avoidance. This contention was explicitly rejected by the English courts in a later anti-deprivation case of *HMRC v. The Football League* [2012] EWHC 1372 (Ch).
2. The UKSC, and subsequent English decisions give priority to the individualist conceptions of commercial law over the collectivist principles of insolvency laws. The SCC employed the opposite approach.
3. The SCC's decision relied more upon legal realist conceptions while the UKSC's decision is more positivist in its approach. This is especially apparent in the SCC's policy arguments as to why an effects-based rule is better.

- In the end, it is argued here that the discrepancy in these decisions is the result of two fundamentally divergent legal traditions.

- Matthew Chippin, PhD Researcher, School of Law, University of Leeds
- lwmec@leeds.ac.uk

The Duet between Winding up of Foreign Companies and Recognition in Cross-Border Insolvency

Contention

- The law on winding up of foreign companies has not kept pace with developments in cross-border insolvency law.
- It gave too much weight to the place of incorporation, and it may not reflect commercial realities.
- A new approach to the winding up of foreign companies is needed.

Winding up and recognition of foreign proceedings

- Winding up of foreign companies and recognition of foreign liquidations share the same roots.
- Lord Sumption in *Singularis*: the power of English courts to assist a foreign liquidation was founded partly on statute and partly on judicial practice; the statutory foundation was the power to wind up foreign companies.
- Many early English cases involved issues of recognition of liquidation of foreign-registered companies in the colonies and their winding up in England. Similar for the courts in the colonies.
- Exercise of the power to wind up foreign companies generated a body of practice which came to be known as ancillary liquidations.
- Thus, ancillary liquidation of foreign companies and recognition of foreign liquidations were seen as closely related, and sometimes two sides of the same coin.

Two basic propositions

- The law was encapsulated in two basic propositions.
- First, the effect of a winding up order was to create a statutory trust of the world-wide assets of the company to be dealt with in accordance with English statutory rules of distribution.
- Second, while a winding up in the country of incorporation would normally be given extra-territorial effect, a winding up elsewhere has only local operation.
- The first proposition applies to a foreign company. But it is liable to conflict with the second proposition. English courts give precedence to the second by limiting the functions of the liquidator in a winding up of a foreign company to getting in English assets.

Incorporation doctrine

- The common basis for both propositions is that the law of the company's place of incorporation governs matters concerning the incorporation, corporate powers, corporate contracting, management, etc of the company.
- Thus, winding up in the company's place of incorporation would be recognized as the principal liquidation, and winding up of a foreign company is ancillary to and may be a way of assisting the principal liquidation, in addition to assisting local creditors.
- Place of incorporation underlined and linked up the two spheres of cross-border insolvency: the opening of local liquidation, and the recognition of foreign liquidations.

From place of incorporation to COMI

- The UNCITRAL Model Law on Cross-border Insolvency (MLCBI) is based on the twin foundations of recognition and co-operation.
- MLCBI does not allocate jurisdiction. But it limits international effectiveness of local proceedings by restricting recognition to centre of main interests (COMI) and establishment.
- Next, it relegates place of incorporation to a rebuttable presumption in the ascertainment of COMI. COMI gives more weight to economic substance over incorporation.
- In the MLCBI universe, there is substantial alignment between recognition and the opening of local proceedings.
- Two caveats:
  - Recognition of COMI shifting to letterbox jurisdictions post-liquidation
  - Not applicable where foreign recognition of local proceedings is unnecessary

Quasi-MLCBI universe

- This refers to a jurisdiction which has not adopted the MLCBI, but chooses to adopt a common law COMI as the criterion for recognition of foreign proceedings.
- HK is a prominent example.
- Until recently, HK courts grappled with the misalignment between the law on winding up, which was based on the incorporation doctrine, and the law on recognition of foreign proceedings, which was based on the common law COMI.
- Many cases concerned corporate groups (with Mainland Chinese capital) that adopted a triple structure.
- At the top is a company incorporated in an offshore jurisdiction A, and usually listed in the HKEX. Almost invariably jurisdiction A is a letterbox jurisdiction.
- In the middle is one or more companies incorporated in offshore jurisdiction B.
- At the bottom are operating subsidiaries incorporated in Mainland China and sometimes HK.

HK – recognition of foreign proceedings

- When a group becomes insolvent, in some cases the management applied for a provisional soft-touch liquidation in the offshore jurisdiction to seek restructuring. In others, it was done to frustrate a pending winding up application in HK.
- HK courts actively developed the common law to recognise and assist foreign proceedings.
- Harris J began to point out that the recognition at common law which was based on the incorporation doctrine was at odds with commercial practice, as the place of incorporation was a letterbox jurisdiction. He developed common law COMI over a series of cases. In *Global Brands*, Harris J gave precedence to COMI, and restricted assistance given to place of incorporation to managerial assistance.
- This has implications on winding up of foreign companies.

HK – winding up of foreign companies

- Concurrently with recognition and assistance, HK courts have to contend with applications to wind up foreign companies.
- English courts, under the influence of the incorporation doctrine, laid down three core requirements for winding up foreign companies.
- The peculiar triple structure means that, if the three core requirements are applied strictly, creditors of the holding company will usually face difficulties.
- Unsatisfactory, as neither the holding company nor any company in the group has any connection to jurisdiction A, other than incorporation of holding company. Almost invariably the COMI of the holding company will be in HK or Mainland China.
- In *GTI* and subsequent cases, Linda J began to adopt a more liberal approach towards the three core requirements.
- The offshore jurisdiction in GTI criticized Linda Chan J for failing to pay regard to comity.

Rejecting incorporation doctrine

- HK's experience showed the misalignments between local proceedings and recognition of foreign proceedings. But the issue goes deeper.
- The key question is the nature of the winding up jurisdiction.
- The incorporation doctrine was defective from birth and should be consigned to dustbin of history.
- First, incorporation doctrine failed to appreciate that insolvent winding up was not an internal affair, and that winding up was not a matter of status, unlike dissolution.
- Second, there is no inherent reason why a company would have more connections with its place of incorporation compared to another jurisdiction.
- Third, when connections arise between a foreign company and the local forum, the question is the circumstances under which it would be proper for the local forum to wind up the foreign company.

Framework

- Starting point is to understand the purposes of insolvent winding up.
- If an application satisfies one or more purposes of insolvent winding up, a winding up order may be made, unless the foreign elements render that improper or inappropriate. Eg, because the company, petitioning creditor or subject-matter of the dispute has little or no connection to the forum.
- An issue that has arisen is the absence of any asset in the jurisdiction. Where a creditor's petition relies on an alleged cause of action in winding up, the correct way to analyse is to ask whether the insolvency law of the forum is the applicable law, ie, a choice of law problem. If the answer is yes, then a winding up order may be made. This is similar to the position in a domestic insolvency where a winding up order may be made notwithstanding an absence of asset.
- If it would be appropriate to make a winding up order, issue of concurrent proceedings is only a factor in the exercise of discretion.
- Local proceedings do not necessarily lead to increased costs. A foreign representative conducting an insolvency proceeding in an unfamiliar place would would face many difficulties. How would the forum exercise supervisory jurisdiction over the conduct of the foreign representative? These and many issues have not been addressed in the academic literature or case law.

Conclusion

- The incorporation doctrine has cast a long shadow in cross-border insolvency law.
- MLCBI took the correct step by anchoring recognition on COMI.
- Opening of local proceedings is the other half to recognition. The law on the winding up of foreign companies should similarly break free from the incorporation doctrine.

Emilie GHIO and Donald THOMSON

University of Edinburgh and Thorntons LLP

Charles Z QU

Charles Darwin University

Matthew CHIPPIN

University of Leeds

Meng Seng WEE

National University of Singapore

#insolvency #restructuring #5thsymposium

@walters_adrian; @HenkelProfessor; @LCoordes;
@YseultMarique @eugevaccari86

Sovereign Debt

Prof. Dr. Christoph PAULUS
White & Case, Berlin | South Square

Sovereign Debt Mechanisms and Institutional Asymmetries: An Analysis from the Global South's Perspective

Charles Ho Wang Mak

Lecturer in Law at the Robert Gordon University

Debt Service Suspension Initiative ('DSSI')

- Agreed upon by the G20 countries with the endorsement by the Paris Club
- Address the debt sustainability problems faced by those low and lower-middle-income countries during the COVID-19 crisis
- Neither an aid consortium nor a restructuring club
- Only deals with state-to-state debt owed by bilateral official creditors
- In November 2020, the G20 and the Paris Club countries endorsed the Common Framework for debt treatments beyond the DSSI ('Common Framework'), which seeks to 'facilitate timely and orderly debt treatment for DSSI-eligible countries, with broad creditors' participation including the private sector'

Institutional Imbalances and Debt Relief Challenges for Sovereign Debtors from the Global South

- The voluntary nature of the DSSI does not serve the interests of sovereign debtors from the Global South who are suffering as a result of the pandemic
- The comparability of the treatment feature of Common Framework affects the interest of sovereign debtors from the Global South to a certain extent
- The debt owed by the government to private-sector creditors will be dealt with indirectly via the Paris Club
- As long as debt-trap diplomacy persists, the power of low-income developing and emerging countries, such as the Global South, would dwindle

Restrictions of Specialised Courts in Resolving Sovereign Debt Disputes

- Absence of a centralised decision-making organ for both public and private sovereign debt restructurings

- Arguable whether the district courts in New York have the capacity and interest to decide for a sovereign debt dispute that might affect the development of a country in the Global South

Negative Impacts of Vulture Funds on Sovereign Debtors from the Global South

- The current institutional architecture governing sovereign debt failed to address the negative impacts posed by vulture funds and large private-sector creditors, which can disproportionately affect sovereign debtors, particularly those from the Global South

- Nobel Prize-winning economist Stiglitz asserts that '[t]he vulture funds have raised greed to a new level'

- Vulture funds cases demonstrate the skewed perspective that creditors' property rights are more important than the human rights of Global South citizens

Thank you

María Belén Paoletta & Ivan Levy

belenpaoletta@derecho.uba.ar // il2362@columbia.edu

Revisiting International Law

Safeguarding Human Rights in Sovereign Debt Restructuring Processes

María Belén Paoletta & Ivan Levy

belenpaoletta@derecho.uba.ar // il2362@columbia.edu

Main Premises

- In **disputes under International Law**, States often omit to present important arguments about how adverse judgments could harm the economic, social, and cultural rights of their citizens.

- The **behavior of certain holdouts**, can also contribute to this ecosystem.

- Ultimately, the **current hard-law international architecture** is neither optimal nor encouraging to robustly link sovereign debt restructurings and human rights.

Evaluation of States' Human Rights Arguments in International Disputes

- **Abaclat and others v. Argentina**
  - Jurisdictional objection: the sovereign bonds in dispute, which were later defaulted, did not constitute a protected "*investment*" in the terms of the Argentina-Italy BIT and the ICSID Convention.
  - "*The bonds did not contribute to Argentina's economic development*."
  - While Argentina did explain the social unrest which raised due to its 2001 crisis, it did not invoke international human rights obligations and standards, as well as their interplay with its sovereign debt.
  - The Argentina-Italy BIT contained a specific provision on applicable law which included Principles of International Law.
- **Ambiente Ufficio and others v. Argentine Republic**
  - The contribution of each bondholder "would still be of too small a magnitude to qualify as a 'contribution' to the economic development of the Respondent" in any relevant way.
  - Missed once again the opportunity to raise the matter of human rights against the economic development in the case of sovereign debt restructuring.
- **Poštová banka and Istrokapital v. Greece**
  - Greece also raised the argument that the sovereign bonds had not fostered economic development.
  - Ultimately, the tribunal upheld the objection raised by Greece but for a completely different issue: the tribunal considered that the Slovakia-Greece BIT, by not expressly including "bonds" in its investment definition.

Brief Remarks on the Role of “Vulture Funds”

- The Human Rights Council adopted:
  - in October 2014 Resolution No. 27/30
  - in June 2013 Resolution No. 23/11
  - In July 2012 Resolution No. 20/10

- Overall, all these instruments highlight that the challenges arising from the modus operandi of vulture funds stem from the strategies they deploy to gain disproportionate benefits, coupled with the diminished ability of States to respectively fulfill their human rights obligations.

International Architecture on Sovereign Debt Restructurings and Human Rights

- The main responsibility of clearly illustrating this linkage falls under the States' umbrella.
- Human Rights Council Resolution No. 27/30 that the global financial system lacked a robust legal structure for the systematic and foreseeable restructuring of sovereign debt.
- The same year, in response to the increasing demand for an international framework on the matter, the United Nations General Assembly adopted Resolution No. 68/304 which is a soft-law piece that called for the establishment of a legal structure designed to streamline sovereign debt restructuring processes while dissuading creditors from engaging in disruptive litigation.
- In 2015, one of the most significant contributions in this scenario was evidenced with the United Nations General Assembly Resolution No. 69/319, which underscored the basic principles to be considered in sovereign debt restructuring processes.
- Human Rights Council published its final report in 2019 on the activities of vulture funds and their impact on human rights under Resolution No. 41/51.
- And what happens with the principles of good faith and non abusive exercise of rights?

Final Remarks

- Firstly, States have, thus far, failed to develop an appropriate international ecosystem to successfully manage debt restructuring processes.
- Secondly, States have also failed to avail of their opportunity to raise human rights implications of debt restructuring in international arbitration.
- In addition, from the publicly available decisions, it is evident that arbitral tribunals have not availed themselves of their iura novit arbiter to fill the gap created by the States' legal arguments.
- Finally, the role of vulture funds in attempting to maximize their gains while potentially affecting certain general principles of law, such as good faith, non-abuse exercise of rights and equality of creditors, puts the States between a rock and a hard place.

María Belén Paoletta & Ivan Levy
belenpaoletta@derecho.uba.ar // il2362@columbia.edu

Revisiting International Law

Safeguarding Human Rights in Sovereign Debt Restructuring Processes

Thank you!

The Sovereign Debt issue in SADC: Management and Restructuring

Nthope Mapefane
Lecturer: International Economic Law
University of Pretoria, Mercantile Law Dept
nthope.mapefane@up.ac.za

The Sovereign Debt issue in SADC: Management and Restructuring

Introduction

i. The Changing Debt Landscape

- Shaped by a complex interplay of domestic and external factors, including the impact of the COVID-19 pandemic, regional conflicts, import price surges, global interest rate rises, structural economic challenges, debt composition and terms, and governance and transparency issues

ii. African Sovereign Debt Management

- Effective sovereign debt management holds significant importance for African countries. The SADC region, SDM plays a crucial role in fostering economic stability and sustainable development.
- Effective management of their debt, member states can mitigate the risk of debt distress, which can otherwise hinder economic growth and development prospects. This is particularly pertinent for African countries, given their vulnerability to external shocks and limited fiscal space.

iii. Historical Background of Debt Situation in SADC

The Sovereign Debt issue in SADC: Management and Restructuring

- The most notable of these relief programmes were the Highly Indebted Poor Countries Initiative (HIPC) from 1996-1999 and the Multilateral Debt Relief Initiative (MDRI) in 2005.

Current Debt Situation in SADC

- Debt levels in the SADC region have escalated significantly in recent years, posing substantial concerns for economic stability and development
- The average debt-to-GDP ratio for SADC countries stands at approximately 60%, exceeding the internationally recommended threshold of 40% (IMF)
- E.g. Mozambique and Zambia, exhibit alarmingly high debt levels, surpassing 100% of their GDP
- Challenges associated to debt:

v. Comparative Analysis of Global Approaches to Debt Renegotiation

- African countries often have diverse debt profiles, including both bilateral and multilateral creditors, as well as commercial lenders.
- This diversity complicates renegotiation efforts as each type of creditor may have different terms, conditions, and priorities

The End,

Thank you

Charles HO WANG MAK
Robert Gordon University

Maria Belén PAOLETTA and Iván LEVY
University of Buenos Aires

Nthope MAPEFANE
University of Pretoria

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@walters_adrian; @HenkelProfessor; @LCoordes;
@YseultMarique @eugevaccari86

Closing Remarks

Prof. Laura COORDES (Arizona State University)
Prof. Christoph HENKEL (Drake University Law School)
Prof. Adrian WALTERS (Chicago-Kent Law School)

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