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INFINITE JEST: THE OTIOSE QUEST FOR COMPLETENESS IN VALIDATING INSOLVENCY JUDGMENTS

BRUCE A. MARKELL*

INTRODUCTION

Transnational bankruptcy has a core problem: how to reconcile and harmonize the competing and differing laws of the various states in which financially distressed debtors operate or have assets. A significant step towards resolving the harmonization problem occurred in 1997 with the promulgation of UNCITRAL’s Model Law on Cross-Border Insolvencies (“Model Law”).¹ Now adopted by over forty countries,² including the United States,³ the Model Law provides a framework for cooperation.

This framework, however, is not based upon standardization of statutes, but on consensus as to the venue of centralized insolvency proceedings. The Model Law designates the state where the debtor’s center of main interests, or COMI, is located as the venue in which the main insolvency proceedings should occur.⁴ States where the debtor has an establishment—that is, “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services”⁵—can host “non-main” insolvency proceedings regarding the debtor,⁶ but those non-main proceedings should defer and be ancillary to the main proceeding.⁷

Or at least that was the theory. Underlying the Model Law was an implicit assumption that the court orders entered in the main proceeding would

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1. U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, at 19, U.N. Sales No. E.14.V.2 (2014), <http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> [hereinafter MODEL LAW]. Although the document bears a 2014 date, that reflects changes made to the *Guide to Enactment*. The text of the Model Law has not changed since 1997.

2. *Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)*, U.N. COMM’N ON INT’L TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html [<https://perma.cc/7HQ4-GLCZ>].

3. 11 U.S.C. §§ 1501–32 (2012).

4. MODEL LAW, *supra* note 1, at 4.

5. *Id.*

6. *Id.*

7. *See id.* at 88 (“The interests and the authority of a representative of a foreign non-main proceeding are typically narrower than the interests and the authority of a representative of a foreign main proceeding, who normally seeks to gain control over all assets of the insolvent debtor.”).

be respected in all other states in which the debtor had assets or operated, regardless of whether the debtor opened up an ancillary proceeding in those states.

That assumption has proved optimistic. In 2012, the United Kingdom's Supreme Court, in *Rubin v. Eurofinance SA*,⁸ declined to recognize a default judgment entered by a United States court notwithstanding that the United States insolvency was a "main" proceeding. *Rubin* came as somewhat of a surprise, given earlier decisions of the English courts,⁹ and strong arguments that the universalism contained in Model Law itself permitted the United States court to enter the default judgment.¹⁰

Rubin applied common law principles.¹¹ But the common law is not immovable. Statutes can and do change common law rules. That principle has caused UNCITRAL to reconvene its drafting group, and to begin work on a new model law that would address judgments entered in a main proceeding.¹²

That effort, the new Model Law on Recognition and Enforcement of Insolvency-Related Judgments ("Recognition Law"),¹³ is almost finished. It is also doomed. As this Article argues, the Recognition Law attempts to impose uniform, substantive rules of judgment recognition through imposition of reciprocity of recognition. The drafters of the Model Law thought any efforts to impose uniform substantive law among nations would be ineffective.¹⁴ But even if now, more than twenty years after the promulgation of the

8. [2012] UKSC 46, [2013] 1 AC 236 (appeal taken from Eng.).

9. See, e.g., *Cambridge Gas Transp. Corp. v. Official Comm. of Unsecured Creditors of Navigator Holdings PLC* [2006] UKPC 26, [2007] 1 AC 508 (appeal taken from Isle of Man); *McGrath v. Riddell (In re HIH Cas. & Gen. Ins. Ltd.)*, [2008] UKHL 21, [36] (Lord Hoffmann) (appeal taken from Eng.) (explaining that English judges had for many years recognized a principle that bankruptcies should be unitary and universal).

10. See, e.g., Jay Lawrence Westbrook, *Interpretation Internationale*, 87 TEMP. L. REV. 739, 746–47 (2015).

11. *Rubin*, [2012] UKSC 46, [91]; see also *id.* [108]–[110].

12. U.N. Secretariat, Recognition and Enforcement of Insolvency-Related Judgments: Draft Guide to Enactment of the Model Law, Note by the Secretariat, Comm'n on Int'l Trade Law, U.N. Doc. A/CN.9/WG.V/WP.151 (Sept. 20, 2017), <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=a/cn.9/wg.v/wp.151&Lang=E> [https://perma.cc/6TXQ-N9KE] [hereinafter Recognition Draft Guide to Enactment].

13. U.N. Secretariat, Recognition and Enforcement of Insolvency-Related Judgments: Draft Model Law, Note by the Secretariat, Comm'n on Int'l Trade Law, U.N. Doc. A/CN.9/WG.V/WP.150 (Sept. 19, 2017), <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=a/cn.9/wg.v/wp.150&Lang=E> [https://perma.cc/5WFD-5AYP] [hereinafter Recognition Law].

14. As noted in one of the documents leading to the formation of the working group that drafted the Model Law:

However, while recognizing the desirability of a workable system of cooperation between States in insolvency matters, it has also been pointed out in international discussions that it may be unrealistic to suppose that any principle of universality of insolvency proceedings could be attained at the global, or even at regional, level in the foreseeable future. It has been said that it

Model Law, and after the global environment has become more receptive to such efforts, there are good reasons to believe the Recognition Law, if enacted, will be ineffective.

My pessimism is based on the assertion that, to be effective, laws such as the Recognition Law must assume similarities of purpose and effect in the underlying legal systems that do not presently exist among states. Put another way, the provisions and strictures of judgments entered in a main proceeding must correlate and map to similar provisions and judgments in the country in which the judgment is sought to be enforced. In short, the judgments must translate well.

As this Article will show, some critical insolvency judgments do not translate well. This failure of translation will be shown through an examination of common provisions in debtor-in-possession financing orders in United States proceedings under chapter 11, followed by an extrapolation of how a non-United States court would attempt to implement and enforce those provisions outside of the United States. The Article concludes that the disparities highlighted by this extrapolation illustrate and presage the ultimate futility in expecting the Recognition Law to achieve its stated aims.

I. THE PROBLEM AND THE RESPONSE THUS FAR

As indicated in the introduction, a central problem in transnational insolvencies is efficiency. Businesses expand across borders with little regard to the changes crossing such borders entail. These changes affect many things, but in particular affect the remedies available and results achieved when the business faces financial distress. There was a time when the only legal response was to coordinate parallel insolvency proceedings among each nation in which the business operated, and to attempt to mitigate the differences in administration, priority, and reorganization policy each presented.¹⁵

In 1997, UNCITRAL sought to address this in its Model Law not by suggesting a uniform, substantive, global bankruptcy code, but through a process by which transnational insolvencies could be centered in one country, regardless of its substantive law. Put another way, the Model Law sought to reduce inefficiency by forcing adopting countries to adopt rules that point

will continue to be unacceptable that interests and expectations arising under local law could be overridden by the effects of insolvency proceedings taking place elsewhere.

U.N. Secretariat, Possible Future Work: Cross-Border Insolvency, Note by the Secretariat, at 11, *Comm'n on Int'l Trade Law*, U.N. Doc. A/CN.9/378/Add.4, (June 23, 1993), <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=a/cn.9/378/add.4&Lang=E> [<https://perma.cc/VW47-P85B>].

15. *See generally id.*

to one country, and one country only, as the source of the laws for resolving the financial distress of a global business. The Model Law follows this goal and selects COMI as the touchstone for choosing the location of the central insolvency proceeding.¹⁶

The Model Law was, and is, an avatar of universalism, the theory that insolvencies should be resolved by a single law or, if that is impossible, by a single court applying its insolvency law to resolve all creditor claims, regardless of where they arose.¹⁷ In many respects, the Model Law worked well, especially in coordinating the administration of complex transnational business cases, and in allowing parties to gravitate toward countries whose laws were conducive or at least receptive to the restructuring terms agreed upon by the parties.¹⁸

But there are other phases of restructuring. Often, deals for the future turn on unwinding deals of the past. Avoiding, or as some call it, clawing back, pre-insolvency transactions that prefer some or were undervalued are often essential elements of a restructuring deal. Part of the universalist conception is that such actions should be centered in the home court chosen by the Model Law. And some believed that, either by construction of non-specific sections of the Model Law or by application of common law reasoning, the goal of selecting one court to administer avoiding actions could overcome objections based upon comity or presumptions against extraterritoriality.¹⁹

A. Rubin

The progress towards the goal of centralization stumbled when, on December 14, 2007, a process server shoved legal papers through a mail slot at the headquarters of Eurofinance SA, in London, England.²⁰ The papers related to a \$160 million lawsuit filed in the Southern District of New York.

16. MODEL LAW, *supra* note 1, at 4.

17. See generally Jay Lawrence Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross Border Insolvency*, 87 AM. BANKR. L.J. 247 (2013); Westbrook, *supra* note 10.

18. Westbrook, *supra* note 10, at 756–57.

19. See Edward R. Morrison, *Extraterritorial Avoidance Actions: Lessons from Madoff*, 9 BROOK. J. CORP. FIN. & COM. L. 163, 177–78 (2014) (“The foregoing analysis suggests that neither the presumption against extraterritoriality nor international comity should be a barrier to clawing back pre-petition fraudulent transfers by a domestic debtor . . .”).

20. Declaration of Paul Grove at 1–2, *Rubin v. Roman (In re The Consumers Trust)*, Ch. 11 Case No. 05-60155 (REG), Adv. No. 07-03138 (REG) (Bankr. S.D.N.Y. July 18, 2008), ECF No. 8. Service was accomplished “by placing the document [the complaint] through the letter box of the main entrance door of the registered office of [Eurofinance] in full view of any Director or office of the company returning to the registered office.” *Id.* at 1–2.

Eurofinance, a company registered in the British Virgin Islands, was alleged to have been a key participant in a scheme to bilk United States consumers.

Eurofinance never responded to the papers dropped off at its London office. At the request of one Rubin, the estate representative, Eurofinance's default was taken, and it was served with that default by mail sent to the same address at which the papers had been left.²¹ Rubin then moved for and received summary judgment on all claims, with service of the motion again achieved by shoving papers through the same mail slot.²² The New York bankruptcy court found that Eurofinance had been personally served in accordance with United States bankruptcy law, and thus found it had jurisdiction over Eurofinance.²³ The court then entered a judgment in favor of Rubin and against Eurofinance and others, in excess of \$160 million.²⁴

The judgment was brought overseas and sought to be enforced. That is when the universalist agenda began to unravel.

Sued on its home turf in an action to enforce the New York judgment, Eurofinance responded. It claimed that the default and summary proceedings in New York were without jurisdiction. And the United Kingdom Supreme Court ultimately agreed.²⁵ Speaking primarily through the judgment of Lord Collins, the court rejected the notion that the Model Law applied to the issue. It declined to imbue the Model Law's general rules of cooperation and empowerment with the specific power to impose a COMI court's own views of when jurisdiction may be exercised.

Lord Collins found that notions of when jurisdiction to decide is appropriate were outside of the Model Law.²⁶ He thus effectively held that all orders and judgments entered by an insolvency court could be categorized either as based upon in personam or in rem jurisdiction.²⁷ In personam judgments reflected the court's power to affect the personal liability of the litigants; in rem judgments related to the litigant's property.

21. Certificate of Serv. at 1–2, *Roman*, Ch. 11 Case No. 05-60155 (REG), Adv. No. 07-03138 (REG), ECF No. 36.

22. Declaration of Paul Grove at 4, *Roman*, Ch. 11 Case No. 05-60155 (REG), Adv. No. 07-03138 (REG), ECF No. 42.

23. *Roman*, slip op. at 23 (“Because Defendants were served with the summons and complaint by personal delivery by process servers, in accordance with Bankruptcy Rule 7004(a)(1), which incorporates Fed. R. Civ. P. 4(f) and 4(h), which incorporate The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, 20 U.S.T. 361, service of process was sufficient.”).

24. Judgment at 4, *Roman*, Ch. 11 Case No. 05-60155 (REG), Adv. No. 07-03138 (REG), ECF No. 46.

25. *Rubin v. Eurofinance SA* [2012] UKSC 46, [132], [2013] 1 AC 236 (appeal taken from Eng.).

26. *Id.* [133]–[144].

27. *Id.* [102]–[105].

In this scheme of things, *Rubin* held that judgments in clawback or avoiding powers actions are based upon in personam jurisdiction. Under United Kingdom common law, however, foreign judgments based on in personam jurisdiction cannot be enforced “unless the traditional common law principles governing the jurisdictional competence of the foreign court in respect of in personam orders (through presence in the jurisdiction or submission) or in rem orders (confined to assets in the jurisdiction) were satisfied.”²⁸ As Eurofinance was not present in the United States, and had not submitted to jurisdiction there, the Supreme Court declined to recognize the authority of the United States judgment to establish Eurofinance’s in personam liability on the claims alleged.

The United Kingdom Supreme Court rested on distillations of the common law as applied to judgments from courts outside of the United Kingdom.²⁹ An irony of the opinion is that the method of service of process used—physical delivery of papers to the registered office of a company—would have been sufficient to confer jurisdiction and recognize the liability created by a default judgment had the matter arisen solely in the United Kingdom.³⁰ Put another way, *Rubin* acknowledged the lack of reciprocity in methods of conferring jurisdiction.

As the court itself acknowledged:

[R]eciprocity has not played a part in the recognition and enforcement of foreign judgments at common law. The English court does not concede jurisdiction in personam to a foreign court merely because the English court would, in corresponding circumstances, have power to order service out of the jurisdiction.³¹

Rubin did acknowledge that the common law could, and had been superseded by legislation.³² But the Model Law did not qualify, and there were no other candidates, and so Rubin declined to recognize the New York court’s default judgment.

28. Nick Segal et al., *Assistance to Foreign Insolvency Office-Holders in the Conflict of Laws: Is the Common Law Fit for Purpose?*, *INSOLVENCY INTELLIGENCE*, Oct. 2017, at 117, 124.

29. *Rubin*, [2012] UKSC 46, [7]–[8]. In particular, the court relied upon Rule 43 (formerly Rule 36) as stated in 1 DICEY, MORRIS AND COLLINS ON THE CONFLICTS OF LAWS 689–90 (Lawrence Collins et al. eds., 15th ed. 2012), a treatise for which Lord Collins, the author of the principal judgment in *Rubin*, was a contributor and editor.

30. See Civil Procedure Rules 1998, SI 1998/3132, r. 6.3(1)(c), 6.9 (Eng.).

31. *Rubin*, [2012] UKSC 46, [127] (citation omitted). This language has been adopted almost word for word in *Dicey*. DICEY, MORRIS AND COLLINS ON THE CONFLICTS OF LAWS 191 (Lawrence Collins & Jonathan Harris eds., 15th ed. 4th Supp. 2017).

32. *Id.* [6] (indicating that with respect to companion case, prior statutory instrument would override common law rules (but noting that the statute substantially mirrored the common law rules)).

B. The Proposed Solution—Reciprocity

Rubin set off alarms with respect to the advance of universalism. No longer could parties be secure in their belief that the COMI court could adjudicate all matters relating to the insolvency. If a non-COMI court could challenge the COMI court’s insolvency jurisdiction on non-insolvency grounds, then the universalist goal of unified proceedings was in jeopardy.

UNCITRAL took note. It felt that *Rubin* and some other decisions had “led to uncertainty concerning the ability of some courts, in the context of recognition proceedings under the [Model Law], to recognize and enforce judgments given in the course of foreign insolvency proceedings, such as judgments issued in avoidance proceedings.”³³

To address this uncertainty, UNCITRAL undertook to draft the Recognition Law, a new convention related only to insolvency-related judgments. But how to address *Rubin*? The current response to is to take up the Supreme Court’s indication that common law rules can be altered by statute. As the Recognition Law would be a statute, all that remained would be the drafting of appropriate rules.

The Recognition Law addresses *Rubin* by choosing unified rules for recognition among insolvency and non-insolvency judgments. In other words, reciprocity reigns. The Recognition Law attempts to achieve this reciprocity through article 13(g). That article states that:

Subject to article 7 [public policy exception], recognition and enforcement of an insolvency-related foreign judgment may be refused if:

. . . .

(g) The originating court did not satisfy one of the following conditions:

(i) The court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued;

(ii) The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that the defendant argued on the merits before the court without contesting jurisdiction within the time frame provided in the law of the originating State, unless it was evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;

(iii) The court exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction; or

(iv) The court exercised jurisdiction on a basis that was not [inconsistent] [incompatible] with the law of this State³⁴

33. Recognition Draft Guide to Enactment, *supra* note 12, at 2.

34. Recognition Law, *supra* note 13, at 10–11 (second and third alterations in original).

Key to the *Rubin* rejection is clause (iii). It incorporates a reciprocity notion. Paraphrased, it eliminates the ability to refuse recognition if, all other avenues of jurisdiction unavailing, the foreign court's jurisdiction for its order rests "on a basis on which a court in this State could have exercised jurisdiction."

As noted above, this is a proposition *Rubin* explicitly rejected under English common law. *Rubin* held that reciprocity with respect to foreign insolvency judgments was neither recognized nor relevant. If the Recognition Law were adopted as a binding statute, however, future courts would have to ask if the basis of the foreign court's assertion of jurisdiction—in *Rubin*'s case, the manner of service—could be a basis of the domestic court's recognition of its own judgments. That is, would stuffing the papers in the mail slot at Eurofinance have established jurisdiction over Eurofinance if the process had issued out of an English court? If so, then recognition would follow.

II. LOST IN TRANSLATION—WHY RECIPROCITY WON'T WORK

Whatever the merits of merging recognition rules between domestic and foreign judgments may be, the incorporation of a reciprocity rule has several practical and theoretical problems.

A. Problems in Translation: Theory

The theoretical problems are akin to problems that arise in translation. Any rule incorporating reciprocity must assume that the type of order sought to be enforced is a type of order that the enforcing state can understand. Only if there is understanding can the enforcing court make a reasoned decision that the order sought to be enforced was issued in a manner consistent with the enforcing court's own jurisprudence. By understanding, I mean comprehension not only of the words used, but the concepts behind the words used.

A problem with translation is that it rarely captures the exact meaning of a word or phrase, and thus there may be systemic indeterminacy over the correct selection of an isomorphic translation. This may be particularly true in technical and arcane areas such as insolvency law, but also is the case with ordinary language. Willard Van Orman Quine famously illustrated this concept in *Word and Object*.³⁵ In that work, Quine posits a linguist attempting to understand words in a language for which there is no competent or ready translation. Quine's linguist spots a rabbit running by, and then hears a native speaker of the language utter "Gavagai." The linguist could translate this to

35. WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* 23–72 (new ed. 2013) (1960).

“Lo, a rabbit.”³⁶ That translation, however, does not exclude others. Depending on context, the utterance could mean “food on paws” or “Look at the time; I have to run” or “furry animal.”³⁷ The means by which we could test which translation is correct would require the linguist to know all possible uses of “Gavagai.” And as Roger Gibson has noted, this problem is magnified when the words connect to abstract ideas instead of direct sense experiences. As he said:

Thus, translating some native utterance as, say, “Pelicans are our half-brothers” is a much more contextual affair. It involves utilizing what Quine calls analytical hypothesis (i.e. hypotheses that go beyond all possible behavioral data). . . . [Quine’s] claim is not that successful translation is impossible, but that it is multiply possible. The philosophical moral of indeterminacy of translation is that propositions, thought of as objectively valid translation relations between sentences, are simply non-existent.³⁸

Bankruptcy statutes provide this “multiply possible” sort of translation. As an example, imagine two countries where the citizens use words that most would translate to what English speakers would call a “lien.” Imagine further that although the words refer to property interests, they vary in whether the holder of the lien has a proceeds or after-acquired property interest, or whether she can assign her interest in the lien to another. In such cases, the enforcing court may not be able to determine whether the court system in which it sits would issue such an order: the words and concepts in the order sought to be recognized may be unknown, and thus the court cannot reach a principled decision as to whether it is the type of order it might issue.

Such differences may actually have parallels in reality. In the United States, for example, a security interest in collateral is created exclusively for the benefit of the secured creditor;³⁹ in the United Kingdom, however, a

36. *Id.* at 25.

37. Quine offers a few others:

For, consider ‘gavagai.’ Who knows but what the objects to which this term applies are not rabbits after all, but mere stages, or brief temporal segments, of rabbits? In either event the stimulus situations that prompt assent to ‘Gavagai’ would be the same as for ‘Rabbit.’ Or perhaps the objects to which ‘gavagai’ applies are all and sundry undetached parts of rabbits; again the stimulus meaning would register no difference. When from the sameness of stimulus meanings of ‘Gavagai’ and ‘Rabbit’ the linguist leaps to the conclusion that a gavagai is a whole enduring rabbit, he is just taking for granted that the native is enough like us to have a brief general term for rabbits and no brief general term for rabbit stages or parts.

Id. at 46.

38. Roger F. Gibson, *Quine*, in *THE WORLD’S GREATEST PHILOSOPHERS* 253, 258 (Robert L. Arrington ed., 2003).

39. See U.C.C. § 9-615 (AM. LAW INST. & UNIF. LAW COMM’N 2010) (secured creditor receives all proceeds until debt is paid).

small portion of certain after-arising floating charges have to be shared with unsecured creditors.⁴⁰ The United States recognizes an endless chain of proceeds interests so long as the interest is identified;⁴¹ some civil law countries do not recognize certain proceeds interests after the first disposition.⁴² The United States allows generic description of collateral⁴³ and provisions that automatically grant security interests in collateral;⁴⁴ other nations do not, and do not embrace expansive after-acquired property clauses.⁴⁵

As a result, if an insolvency-related judgment places a “continuing lien” on all a debtor’s assets in, for example, a debtor-in-possession financing agreement, there will be translation problems as to the exact meaning of the lien creditor’s property interest if the judgment purports to extend to property found in a country that does not share the same conceptions of “lien.” Asking a court not sitting in the judgment’s country of origin to interpret such a judgment requires a leap of faith that there is enough in common between the law of the nation creating the judgment and the law of the country asked to recognize and enforce it.⁴⁶

40. This is calculated as follows: Fifty percent of first realization up to £10,000 and twenty percent of £10,000 to £600,000 is paid to unsecured creditors with the balance going to the floating charge. *See* Enterprise Act 2002, c. 40, § 252 (Eng.) (amending Insolvency Act 1986, c. 45 (Eng.), to add section 176A); Insolvency Act 1986 (Prescribed Part) Order 2003, SI 2003/2097, ¶ 3 (Eng.).

41. *See* U.C.C. § 9-102(a)(12) (definition of collateral to include all proceeds); *id.* § 9-315(a) (continuing nature of security interest in proceeds).

42. Heywood Fleisig et al., REFORMING COLLATERAL LAWS TO EXPAND ACCESS TO FINANCE 33, WORLD BANK GROUP [WBG], No. 37096 (2006), <http://hdl.handle.net/10986/7100> [<https://perma.cc/4F92-NV5J>] (noting that many civil law countries only permit proceeds interests to extend to first generation proceeds, and so proceeds of first generation proceeds are not encumbered with the initial lien).

43. *See* U.C.C. § 9-108.

44. *See id.* § 9-204(a).

45. *See* Fleisig et al., *supra* note 42, at 26–28.

46. The recent movie *Arrival* also contains an example of mistranslation. In the movie, aliens land on earth, and human scientists have to discover how to communicate with them. That leads to this exchange:

Col. Weber: I don’t want to take away from your success, but Dr. Banks, is it really the right approach? Try to teach them how to speak and read? That’s gonna take long.

Dr. Louise Banks: You’re wrong! Its faster.

Col. Weber: Everything you do here, I have to explain to a room full of men, whose first and last question is how can this be used against us. So you’ll have to give me more than that!

Dr. Louise Banks: Kangaroo.

Col. Weber: What is that?

Dr. Louise Banks: In 1770, Captain James Cook’s ship ran aground off the coast of Australia and led a party, where they found the aboriginal people. One of the sailors pointed to the animals that hop around and put their babies in their pouch, And he asked what they were. The Aborigines said “kangaroo.”

Col. Weber: And your point is?

This confusion can extend to issues regarding the conferring of jurisdiction as well. The United States, as well as England, generally recognizes service of process by mail or post. But there are wrinkles. If the defendant in the United States is an insured banking institution, there are special rules regarding the mandatory use of special types of mail and required forms of address on that mail.⁴⁷ Does that mean, for example, that if the United States were to adopt the Recognition Law, that a United States court could decline to recognize a United Kingdom court's assertion of jurisdiction over a United States bank (say, JP Morgan Chase or Citibank) operating in England and served there by regular mail? The problem is complicated in that the type of post required in the United States—certified mail—may not even exist in the United Kingdom.⁴⁸

The general point is that reciprocity requires agreed equivalence of the concepts or rights to be reciprocated in order to determine whether recognition is appropriate. That may exist with simple judgments to pay money. But those judgments were never the target of the Recognition Law; there are presently well-understood measures for enforcements of such judgments.⁴⁹ The same logic applies to judgments entered with the knowledge and consent of the defendant. When the issue is shifted to concepts or fundamental tenets of domestic insolvency law that may be unique or particular to a nation, however—such as those found in United States' debtor-in-possession financing—the translation from one country to another may prove nettlesome.

Dr. Louise Banks: It wasn't until later that they learned that "kangaroo" means "I don't understand." So . . . I need this so that we don't misinterpret things in there, otherwise it is going to take 10 times as long.

Col. Weber: I can sell that for now. But I need you to submit your vocabulary of words before the next session. Remember what happened to the Aborigines. A more advanced race, nearly wiped them out.

[Col. Weber leaves]

Ian Donnelly: It's a good story.

Dr. Louise Banks: Thanks. It's not true, but it proves my point.

ARRIVAL (Xenolinguistics 2016). The quotation can be found at: [https://en.wikiquote.org/wiki/Arrival_\(film\)](https://en.wikiquote.org/wiki/Arrival_(film)) [<https://perma.cc/42V5-RUGF>].

47. FED. R. BANKR. P. 7004(h) (with certain exceptions, "[s]ervice on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution").

48. This of course assumes that no other means of recognition, such as consent, exist to recognize the judgment.

49. See generally Bruce A. Markell, *Comity, Chapter 15, and the Enforcement of Foreign Country Money Judgments in the United States*, in ANNUAL REVIEW OF INSOLVENCY LAW 2015, at 697 (Janis P. Sarra & Barbara Romaine eds., 2016).

B. Problems in Translation: Practical Problems

This translation problem can also be illustrated by practical means. Take again, for example, debtor-in-possession financing in the United States.⁵⁰ In the forty years since the enactment of the 1978 Bankruptcy Code, debtor-in-possession financing agreements have taken a life of their own.⁵¹ In a recent case, *In re Toys “R” Us*, the main debtor-in-possession motion for financing comprises over 500 pages.⁵² It incorporated new liens,⁵³ releases, complicated funding conditions,⁵⁴ and all sorts of specialty provisions developed over time in the United States, including the debtors’ concession on the validity of the lenders’ pre-petition claims and liens,⁵⁵ a limit on other parties challenging those claims and liens,⁵⁶ indemnification of all the lender’s agents,⁵⁷ and carve outs from the lender’s security interests to pay estate professionals.⁵⁸ The court granted interim⁵⁹ and final approval⁶⁰ to the agreement.

The agreement also purported to affect the assets and liabilities of non-United States entities,⁶¹ even non-United States debtors. If the Recognition Law were applicable, how would a non-United States, civil law, non-English speaking court interpret such provisions? Say, for example, that one of the

50. The main provision upon which such financing is made is 11 U.S.C. § 364 (2012).

51. See, e.g., Jay Lawrence Westbrook, *Secured Creditor Control and Bankruptcy Sales: An Empirical View*, 2015 U. ILL. L. REV. 831, 848; Charles J. Tabb, *Credit Bidding, Security, and the Obsolescence of Chapter 11*, 2013 U. ILL. L. REV. 103, 104–05.

52. Debtors’ Motion for Entry of Interim and Final Orders (i) Authorizing the N. Am. Debtors to Obtain Postpetition Fin., (ii) Authorizing the N. Am. Debtors to Use Cash Collateral, (iii) Granting Liens and Providing Superpriority Admin. Expense Status, (iv) Granting Adequate Prot. to the Prepetition Lenders, (v) Modifying the Automatic Stay, (vi) Scheduling a Final Hearing, & (vii) Granting Related Relief Filed, *In re Toys “R” Us, Inc.*, No. 17-34665 (KLP) (Bankr. E.D. Va. Sept. 9, 2017), ECF No. 29 [hereinafter DIP Motion]. The credit agreement itself consisted of 348 of the total 511 pages. *Id.* at 164–511.

53. *Id.* at 19–21 (summary).

54. *Id.* at 13–14 (summary).

55. *Id.* at 15–18 (summary).

56. *Id.* at 15 (summary).

57. *Id.* at 21–22 (summary).

58. *Id.* at 11 (summary).

59. Interim Order (i) Authorizing the N. Am. Debtors to Obtain Postpetition Fin., (ii) Authorizing the N. Am. Debtors to Use Cash Collateral, (iii) Granting Liens and Providing Superpriority Admin. Expense Status, (iv) Granting Adequate Prot. to the Prepetition Lenders, (v) Modifying the Automatic Stay, (vi) Scheduling a Final Hearing, & (vii) Granting Related Relief, *In re Toys “R” Us, Inc.*, No. 17-34665 (KLP) (Bankr. E.D. Va. Sept. 20, 2017), ECF No. 98.

60. Final Order (i) Authorizing the N. Am. Debtors to Obtain Postpetition Fin., (ii) Authorizing the N. Am. Debtors to Use Cash Collateral, (iii) Granting Liens and Providing Superpriority Admin. Expense Status, (iv) Granting Adequate Protection to the Prepetition Lenders, (v) Modifying the Automatic Stay, (vi) Scheduling a Final Hearing, & (vii) Granting Related Relief, *In re Toys “R” Us, Inc.*, No. 17-34665 (KLP) (Bankr. E.D. Va. Oct. 24, 2017), ECF No. 711.

61. DIP Motion, *supra* note 52, at 19.

lenders wished to foreclose upon the liens granted in the financing and sought to realize upon property located in Peru (which, for argument's sake, assume was purchased by a Peruvian company from a Canadian affiliate of the debtor after the financing had been approved). Add to the complexity that the Peruvian entity counterclaimed for damages against agents of the lender, claims which (if brought in the United States) would be barred by the indemnification provision.

If the Peruvian court did not have a robust history of debtor-in-possession financing, or did not recognize indemnification of non-debtor parties in domestic insolvencies, or did not recognize indemnification when the party having to indemnify against its own acts was not personally notified with the proceedings leading to the order, how would it apply the reciprocity notion to determine recognition? The lender's lawyers would have to engage in a series of remote hypotheticals, such as: if our country had a history of such insolvency financing, and if our statute was logically congruent with the United States' statute, our country's courts would have adopted the non-unanimous view that a director has the benefit of this foreign order as against local claimants.

That, I suggest, is a hard sell for two reasons. First, even if the local law permitted post-petition financing, it might not have evolved to the point at which indemnifications and proceeds interests were common. So the decision for reciprocity would be a decision of first-instance, without concrete facts or a case in which to situate the relevant facts regarding financing that contains releases. That is the practical problem. It might be resolved by a resolute court not afraid to make decisions about bankruptcy law without a bankruptcy case in front of it.

I suspect that this practical problem partially arises, however, from the theoretical problem that the terms and provisions from the United States bankruptcy order simply do not translate uniquely into the domestic legal system in which the dispute arises. Unless the local court simply adopts United States law (and United States interpretations) as its own, there will be differences in the shape and function of the various provisions used. Different laws and local customs make for different lending agreements, and for gaps in understanding the terms used.

C. COMI and Court Autonomy

There is another aspect here, suggested by the very existence of different laws and customs. To truly achieve seamless universalism, the court asked to recognize a foreign insolvency judgment based upon reciprocity would have to know and understand, and be able to compare its system to,

the insolvency system generating the order sought to be enforced. Short of provisions that are “manifestly contrary” to the public policy of the nation in which the order is sought to be recognized,⁶² this essentially reduces to treating the enforcing court as simply another court in the court system of the nation having the debtor’s center of main interests. It creates a sort of purgatory class of orders—orders which the court of recognition cannot know it would issue, but which are claimed to be within its powers, presented in an after-the-fact context. Moreover, these orders have been issued by courts over which the recognizing court system has no power or control. The implications of the deference deserve more study.

CONCLUSION

Hamlet, when presented with the skull of Horatio, a former court jester, described the deceased as a “fellow of infinite jest, of most excellent fancy.”⁶³ But of course, the lifeless skull belied the seemingly infinite nature of Horatio’s jests. People die; projects end.

The modified universalism of the Model Law may have met a similar limit in *Rubin*, but not from the content of the insolvency law of the country in which enforcement is sought, but from that country’s other laws, such as law regarding the enforcement of judgments generally. Although the Recognition Law seeks to bridge this gulf by requiring recognition based upon reciprocity in non-insolvency law—it requires enforcement of an insolvency-related law if a court in country in which enforcement is sought could issue or recognize the type of judgment before it in similar circumstances—this may not be enough.

The variety of reciprocity applications assumes that the law of the place of enforcement is familiar with or understands something like the foreign order sought to be enforced. Given the wide disparity in sophistication of insolvency law and practice among nations, and given the lack of homogeneity of experience with or presence of certain concepts common in many insolvency related judgments in the United States and elsewhere, reciprocity may prove an otiose tool to achieve harmonization.

62. Recognition Law, *supra* note 13, at 7.

63. WILLIAM SHAKESPEARE, *HAMLET*, act 5, sc. 1.