A Modular Approach to Restructuring and Insolvency Law: Executory Contracts and Onerous Property in England and Italy

1. Introduction

Insolvency laws are no longer solely designed to efficiently collect the assets of insolvent debtors and maximise the returns to their creditors.[1] They also aim to promote the rescue of corporations, albeit only those “worth saving”. A company that is “worth saving” is one with a business model that is still sound and viable.[2] At the same time, achieving rescue should not unduly affect the legitimate expectations and contractual rights of the contractual creditors. Balancing rescue and value maximisation goals is challenging.

Both Italy and the United Kingdom have recently introduced significant reforms to their corporate insolvency frameworks. Italy has enacted a new insolvency code, known as the *Codice della Crisi dell’Impresa e dell’Insolvenza*, which is due to enter into force on 15 July 2022. The U.K. has enacted several wide-ranging reforms, including the *Corporate Insolvency and Governance Act 2020* (SI 2020/1031) and the *Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021* (SI 2021/427). These laws have been formulated to promote a debtor-friendly, rescue-oriented approach to corporate restructuring and – to a lesser degree – liquidation.

When a corporation is in financial distress, its existing management needs to consider whether to perform or terminate executory contracts,[3] and whether to uphold or dislaim onerous and unprofitable property. This research project analyses the rules applicable to each of these scenarios in:

- pre-insolvency procedures (Pt 26 schemes in England; “*composizione negoziata della crisi*” in Italy);
- rescue-oriented procedures (Pt 26A restructuring plans in England and, to a lesser extent, company voluntary arrangements and administration; “*concordato preventivo*” in Italy); and

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[1] TH Jackson, *The Logic and Limits of Bankruptcy Law* (2nd edn, Harvard University Press 2001); DG Baird, ‘The Uneasy Case for Corporate Reorganizations’ (Jan. 1986) 15(1) J. Legal Stud. 127; TH Jackson and RE Scott, ‘On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors’ Bargain’ (1989) 75 Vand. L. Rev. 155.

[2] UNCITRAL, UNCITRAL Legislative Guide on Insolvency Law (2005) objective 3 “Striking a balance between liquidation and reorganisation”; Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 OJ L 172/18 (PRD 2019), recital 2: ‘[r]estructuring should enable debtors in financial difficulties to continue business, in whole or in part’.

[3] Executory contracts can be defined as those contracts between a debtor and one or more of its creditors under which the parties still have obligations to perform at the time the stay of individual enforcement actions is granted or applied (PRD 2019, art. 2(1)(5)).

- liquidation procedures (creditors voluntary liquidations and compulsory liquidations in England; "*liquidazione giudiziale*" in Italy).[4]

The project seeks to determine the extent to which the reformed English and Italian insolvency laws pursue a modular and proceduralist approach[5] to corporate restructuring and liquidation by offering a range of efficient and cost-effective solutions to financial distress that is capable of maximising the value of the debtor's estate whilst protecting vulnerable players and firm-specific investors. To make this determination, this paper focuses on the analysis of the statutory provisions relating to the treatment of executory contracts and the discharge of onerous property in insolvency and restructuring procedures.

This paper seeks to make such a determination by way of a normative theory that sketches a model that combines different principles and views of the purpose of corporate insolvency law. The research adopts an applied (law-in-context) doctrinal methodology and a legal realist perspective to investigate when and to what extent (if at all) statutory insolvency rules and practices promote a modular and socially just approach to corporate restructuring and liquidation. "Law-in-context" is understood as an approach that involves treating legal subjects broadly by using materials from other humanities and social sciences and from other disciplines that help to explain the operation in practice of the particular legal field or legal phenomena under investigation. To determine if the laws that are to be evaluated are "socially just", the author assesses the rules applicable to executory contracts and onerous property against a modular normative framework informed by proceduralist, team production, and vulnerability theories. This methodology is designed to test to what extent existing rules consider the position of those who make firm-specific investments and who are vulnerable and less resilient to corporate distress.

The analysis of the legal frameworks of the two jurisdictions considered in the study has been carried out using a functional comparative method of research.[6] This means that the author of this paper focused on the application of the rules in the considered legal systems to promote a socially just approach to the societal problems covered in this paper.

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[4] This is an arbitrary classification proposed by the author of this paper that is based on the following grounds. Pre-insolvency procedures are procedures that are not necessarily collective in nature, binding on all creditors, and available only to companies in a situation of insolvency or financial distress. Where rescue-oriented procedures can be used for a variety of purposes (including the company or business rescue or liquidation), liquidation procedures are aimed at liquidating the company's assets and distributing the proceeds to the entitled creditors.

[5] RB Davis et al., *Micro, Small and Medium Enterprise Insolvency: A Modular Approach* (OUP 2017) (arguing that a choice of procedures (or modules) results in wealth maximisation for the parties involved in the insolvency procedure; S Madaus, 'Leaving the Shadows of US Bankruptcy Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law' (2018) 6 EBOR L. Rev. 18.

[6] R Michaels, 'The Functional Method of Comparative Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2019), chapter 13, who refers to the following authors as advocates of this methodology of research: for the United States, J Reitz, 'How to do Comparative Law', (1998) 46 AJCL 617, 620–623; M Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century', (2003) 50 AJCL 671, 679; for France, M Ancel, 'Utilité et méthodes de droit comparé' (1971) 23(4) Revue Internationale de droit comparé 97, 101–103; M Ancel, 'Le problème de la comparabilité et la méthode fonctionnelle en droit comparé', in Festschrift für Imre Zajtay (1982), 1– 6; for England, H Collins, 'Methods and Aims of Comparative Contract Law', (1989) 11 O.J.L.S. 396–406; P de Cruz, *Comparative Law in a Changing World* (3rd edn, Routledge 2007), 236–238; for Germany, H Kötz, 'Comparative Law in Germany Today', (1999) 51 RIDC 753, 755; U Kischel, Rechtsvergleichung (2015) 6–7, 93; for Scandinavia, M Bogdan, *Concise Introduction to Comparative Law* (Europa Law Publishing 2013), 46; for a socialist perspective, I Szabó, 'Theoretical Questions of Comparative Law', in I Szabó and Z Péteri (eds), *A Socialist Approach to Comparative Law* (A.W. Sijthoff & Akadémiai Kiadó 1977), 9, 36–38; and, for rise and fall in Italy, PG Monateri, 'Critique et différence: Le droit comparé en Italie', (1999) 51 RIDC 989, 991.

This paper is the first (in both the U.K. and Italy) to challenge the perceived need for rescue-oriented reforms in this area. It does so by engaging with recent examples of corporate failures and the impact of recent legislative and policy developments. The significance of this paper lies in its originality and its topical nature. Whilst the scholarly debate is moving towards the adoption of communitarian approaches to corporate rescue,[7] this paper suggests that a revised, "mitigated" proceduralist framework is capable of promoting socially just outcomes, as well as the rescue of distressed yet viable businesses. The jurisdictions have been chosen for their traditionally divergent approach to the protection of creditors' rights in insolvency, with the English system being much more creditor-friendly[8] than the Italian one, as well as for the author's familiarity with these legal systems.

In this paper, parts 2 and 3 set the scene by devising the theoretical and legal framework of the study. Parts 4 and 5 assess the extent to which the rules on termination clauses and the discharge of onerous property in rescue and liquidation procedures in England and Italy comply with the theoretical framework described below. Part 6 concludes and provides a series of recommendations designed to guide legislators in their regulatory efforts.

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[7] K Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System* (Yale University Press 1997); V Finch and D Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn, CUP 2017); E Warren, 'Bankruptcy Policy' (Summer 1987) 54(3) U. Chi. L. Rev. 775.

[8] The distinction between pro-debtor and pro-creditor jurisdictions comes from PR Wood, *Principles of International Insolvency* (Sweet and Maxwell 1995). It is acknowledged that these labels tend to over-simplify an otherwise very complex classification problem. As a general rule, pro-creditor systems tend not to infringe significantly on the rights bargained by creditors in solvent times. At the opposite end of the spectrum, pro-debtor systems erode those rights whenever it appears to be appropriate to achieve the rehabilitation of the distressed business. Among others: M Pomerleano and W Shaw, *Corporate Restructuring. Lessons from Experience* (The World Bank 2005) 308. For a challenge to the standard characterization as US law being "pro-debtor" and UK law being "pro-creditor", see: G McCormack, 'Apples and Oranges? Corporate Rescue and Functional Convergence in the US and UK' (2009) 18 Int. Insolv. Rev. 109.

2. Theoretical Framework

This paper utilises a revised, "mitigated" proceduralist framework. This framework is made of four components: proceduralism, modularity, team production, and vulnerability theories. These approaches are investigated in turn in the following sub-sections.

2.1 Proceduralism

Proceduralism, also known as the creditors' wealth maximisation approach, is based on efficiency considerations.[9] This approach has been mistakenly criticised on the basis that its main proponents adopted a realist perspective, meaning they looked at the law as it was and developed a theory from practical observations.[10] This criticism is misplaced, as the main goal of these scholars was to develop a method that combined the Rawlsian veil of ignorance[11] theory with efficiency considerations to address the problems that insolvency laws have been designed to tackle.

From a normative standpoint, major concerns have been voiced about the fact that proceduralist visions seem to assume that insolvency law is primarily a debt collection mechanism for the benefit of contractual creditors. Equally, the claim that creditors' wealth maximisation is or should be the only legitimate goal of insolvency is contentious. Such an approach would fail to consider the claims of a wide variety of stakeholders impacted by the failure of a debtor.[12]

There are also some practical issues associated with implementing a proceduralist approach. The enforcement of a collectivist approach involves a pre-emptive condition that parties are willing to agree under certain conditions to freeze or postpone their individual collection rights. The proceduralist understanding of the concept of collectivity may prove difficult in its application in rescue proceedings where the main concern is to ensure that the interests of the general body of creditors take precedence over the individual rights of some of the claimants.[13]

Despite these criticisms, proceduralist scholars are right in claiming that almost all insolvency cases raise the same key issue: there is not enough money to fully repay all the creditors ("common pool problem"). To find solutions to this problem, proceduralist scholars virtually place a group of creditors behind a so-called "transparent veil of ignorance". These creditors know that they are creditors of the company (i.e., their legal status) and, usually, the ranking of their claim (e.g., whether their claim is secured, privileged, subordinated, or unsecured). These creditors are also free to agree on different ways to deal with their claims in insolvency. These

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[9] This framework was first developed by T Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91(5) Yale L.J. 857. It was further amended in the following papers, including DG Baird and T Jackson, 'Corporate Reorganisations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy' (1984) 51 U. Chic. L. Rev. 97; and T Jackson and R Scott, 'On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain' (1989) 75 Va. L. Rev. 115.

[10] N Grier, 'Well, What Would You Do? Reflections on the Need for a Theory of Bankruptcy Law' (2021) 32(4) I.C.C.L.R. 221, 223.

[11] J Rawls, *A Theory of Justice* (Harvard University Press 1971).

[12] For a summary of the most controversial theoretical criticisms raised by proceduralist theories in general and creditors' wealth maximisation visions in particular, see E Warren, 'Bankruptcy Policy' (Summer 1987) 54(3) U. Chi. L. Rev. 775; DR Korobkin, 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1992) 71 Tex. L. Rev. 541. In particular, Korobkin challenged these visions for their inability to recognise non-economic value aspects such as moral, political, social, and personal considerations: DR Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 Col. L. Rev. 717, 762.

[13] For an analysis of the evolution of the notion and concept of collectivity in Europe and in England: H Anderson, *The Framework of Corporate Insolvency Law* (OUP 2017) 3.09-3.12.

creditors are then asked: "If you were a creditor of a company that is important to you and it was on the brink of failure, what would you do?". According to proponents of this theory, any rational person in front of such a problem would choose the most efficient solution to deal with it: collective liquidation.

A race to a debtor's assets upon the initiation of an insolvency procedure would favour the fastest, most skilled, and most sophisticated creditors. However, the other claimants would receive nothing. Additionally, such a race would not maximise the value of an insolvent debtor's assets. If someone has to sell an asset as soon as possible, they might be willing to sell at undervalue, provided that the money offered is enough to repay the creditor who is selling it.

Consequently, proponents of this theory argue that a proper system of insolvency rules should aim to maximise the amount received for a debtor's assets and allow the proceeds received to be allocated to that debtor's creditors in a cost-effective[14] and strictly rateable[15] manner. Scholars hold that pre-insolvency entitlements should, in general, be unaffected by a debtor's insolvency, and no new rights should be recognised after, or as a result of, a debtor's insolvency. They also consider that if any other approach was followed, the law would create a perverse incentive to file for insolvency procedures. To promote the chances of maximising creditors' returns, the relative value of pre-insolvency rights should not be affected. If the distribution hierarchy in place before the opening of any insolvency proceedings was changed by insolvency rules, 'the exchange of values that took place before the insolvency proceeding (e.g. the interest rate charged by the lender for the loan) would lose its foundation'.[16] The creditor would be forced to renounce the agreed benefit (e.g. priority or securitisation of assets) without compensation for the reduced return on his investment.

It follows that insolvency law should be understood as a set of procedures designed to deal with the liquidation of the debtor's assets in a collective and efficient manner, as well as the distribution of proceeds to its creditors. Its purpose is not necessarily to promote rescue, though rescue should be sought if it will result in the maximisation of the returns to creditors. Its purpose is never to change the terms and conditions of existing contracts. In the end, why should companies be given a free card to sidestep contractual obligations? In addition, why should a company's failing management team rise, phoenix-like from the ashes, through the guise of a restructuring deal?[17]

It is undeniable that a purely proceduralist approach would be too efficient in removing companies from the market. It would also be too insensitive to the claims of other insolvency stakeholders, such as the society or societies that dissolution would affect, tort claimants, and some non-adjusting creditors.[18] Its singular focus prioritises creditors' returns at the expense of any diverging consideration, including public interest[19] or the preservation of value for creditors

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[14] TH Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91(5) Yale L.J. 857, 862; H Anderson, *The Framework of Corporate Insolvency Law* (OUP 2017) 3.

[15] R Mokal, 'The Authentic Consent Model: Contractarianism, Creditor's Bargain, and Corporate Liquidation' (2001) 21 Legal Studies 400, 421.

[16] P von Wilmowsky, 'Insolvency Law: Its Roles and Principles' in A Cordes and MS Beerbühl (eds), *Dealing with Economic Failure. Between Norm and Practice (15th to 21st Century)* (Peter Lang Editions 2016) 256.

[17] C Lamont, 'Re-structuring Leasehold Estates under Chapter 11 of the US Bankruptcy Code and in England and Wales – a Comparison' (2018) 31(3) Insolv. Int. 69, 70.

[18] V Finch and D Milman, *Corporate Insolvency Law. Perspectives and Principles* (3rd edn, CUP 2017) 31-33.

[19] M Stubbins, 'What Kind of World Are We Living in? Creditor Wealth Maximisation, Contractarianism or Multiple Value in the Post-Enterprise Act 2002 Insolvency Regime' (2019) 32(2) Insolv. Int. 78, 79.

and the economy.[20] Therefore, there is a need to consider the interests of those constituents who are overlooked by a purely proceduralist approach. Rather than developing a theoretical framework designed to redistribute wealth[21] (which is, thus, based on entirely irreconcilable theoretical underpinnings), it is possible to mitigate the distortive effects of proceduralism by relying on alternative yet compatible theoretical approaches: the modular approach combined with the team production and vulnerability theories.

2.2 Modular Approach

One of the ways of mitigating the most radical outcomes of a purely procedural approach without deviating from its foundational elements is the adoption of a modular view[22] of corporate insolvency law.

This view was indirectly advocated by the author in his doctoral thesis[23] and directly advocated by a book published by the Oxford University Press in the same year.[24] The proponents of a modular approach to corporate insolvency argue that the need for cost-effective and timely insolvency procedures requires deviating from the "one size fits all" assumption that has wrongfully informed regulatory insolvency reforms in recent years. Insolvency frameworks should be flexibly and modularly designed to distinguish between viable and non-viable businesses; address the issues of cross-over of commercial and personal insolvency; and recognise different cultural, social, and economic norms.

Such an approach is especially promising when it comes to protecting the interests of special categories of debtors, such as sole entrepreneurs and micro and small enterprises.[25] It has also been applied in the context of domestic[26] and cross-border insolvencies.[27] Micro and small enterprises are particularly vulnerable to economic downturns and changes in their consumers' priorities. However, they generally receive little specific support from corporate insolvency frameworks, as laws are not designed with them in mind.

For instance, Pt 26A restructuring plans – described below *sub 3.2* – seem to be very useful tools to restructure any type of company. However, anecdotal evidence suggests that they are very expensive to negotiate, with insolvency practitioners (IPs) charging fees of at least £100,000 for supporting debtors in the task of negotiating such plans.[28] Such figures are beyond the reach of

[20] C Lamont, 'Re-structuring Leasehold Estates under Chapter 11 of the US Bankruptcy Code and in England and Wales – a Comparison' (2018) 31(3) Insolv. Int. 69, 70.

[21] E Warren, 'Bankruptcy Policy' (1987) 54 U. Chic. L. Rev. 775; E Warren, *Chapter 11: Reorganizing American Businesses* (Aspen Publishers 2008).

[22] On the meaning of modularity, see: AB Dawson, 'Modularity in Cross-Border Insolvency' (2018) 93(3) Chi.-Kent L. Rev. 677, 688-693.

[23] E Vaccari, 'Insolvency Statutory Rules and Contractual Freedom: A Study on the Limits of Corporate Insolvency Law in the Anglo/American Tradition' (thesis, City, University of London 2018).

[24] RB Davis et al., *Micro, Small and Medium Enterprise Insolvency: A Modular Approach* (OUP 2017).

[25] Ibid. See also: J Sarra, 'Making Insolvency Law Responsive to the Needs of Financially Distressed Micro and Small Enterprises' in PJ Omar and JLL Gant (eds), *Research Handbook on Corporate Restructuring* (Edward Elgar Publishing 2021) 246.

[26] L Stanghellini, *Le Crisi di Impresa tra Diritto ed Economia. Le Procedure di Insolvenza* (Il Mulino 2007), with a particular focus on the economic impact of the implementation of law rules.

[27] AB Dawson, 'Modularity in Cross-Border Insolvency' (2018) 93(3) Chi.-Kent L. Rev. 677.

[28] This figure was mentioned by Christina Fitzgerald, VP of R3 (the trade association for the UK's insolvency and restructuring professionals), at the INSOL Europe Academics Colloquium, held in Dublin (2-3 March 2022).

many micro and small entrepreneurs.[29] Therefore, it is not surprising that several associations in the U.K. are working towards a "model" plan that could be adapted to the needs of such creditors at minimum costs. This model approach is an example of a modular attitude towards corporate insolvency.

The proponents of a modular approach to insolvency law design argue that the traditional changes[30] implemented to make insolvency regimes more MSME-friendly do not address the peculiar features and needs of such entities. They argue for a systemic, bottom-up[31] rethinking of MSME insolvency.

A modular approach to corporate insolvency starts from the assumption that individuals affected by the debtor's financial distress are best placed to select the most appropriate procedure to maximise the value of the debtor's estate and the returns to creditors in distribution following a company's dissolution. As a result, it is argued that legislators should devise two flexible tools to reorganise or liquidate MSMEs alongside a series of alternative out-of-insolvency measures (informal workouts). Legislators should then introduce a system of incentives for their correct use and a corresponding system of checks to avoid moral hazard. Proceduralist views of the purpose of insolvency law dictate that no normative preference should be given to either of these approaches.

The modular approach offers a core set of principles[32] that should inform the design of a system applicable to MSMEs. It then offers different "modules"[33] that 'legislative authorities may adopt or adapt to be responsive to the particular issues in their jurisdiction'.[34]

Modular approaches are being recognised at the international level. In 2017, the World Bank published a study on the treatment of MSMEs in insolvency, acknowledging the need for tailored approaches in the area.[35] This prompted the United Nations Commission on International Trade Law (UNCITRAL)[36] Working Group V to start working on simplified rescue and liquidation mechanisms for MSMEs; their work resulted in legislative recommendations for the treatment

[29] Micro and small entrepreneurs are usually treated alongside medium enterprises and identified with the acronym MSMEs.

[30] These are usual the removal of some procedural requirements, shortened statutory deadlines and dispensing with certain types of stakeholder engagement.

[31] Bottom-up approaches to regulatory reforms have been advocated in other areas of insolvency law, such as harmonisation of EU laws: E Ghio, E Vaccari et al., 'Harmonising Insolvency Law in the EU: New Thoughts on Old Ideas in the Wake of the COVID-19 Pandemic' (2021) 30(3) I.I.R. 427.

[32] These include a debtor-in-possession approach, giving the entrepreneur or entrepreneurs who run a distressed debtor the ability to restructure or liquidate its business; a mechanism that allows for the discharge of debts; and procedures that limit the involvement of courts and practitioners to cases where it is absolutely necessary or to settle disputes.

[33] These include the possibility for creditors to commence insolvency or restructuring proceedings should the entrepreneur fail to deal promptly with a situation of distress, the offering of a moratorium from executory actions against the debtor, and the provision of mechanisms to bind dissenting minorities (e.g., cross-class cram-down) or to promote negotiated solutions (e.g., mediation).

[34] J Sarra, 'Making Insolvency Law Responsive to the Needs of Financially Distressed Micro and Small Enterprises' in PJ Omar and JLL Gant (eds), *Research Handbook on Corporate Restructuring* (Edward Elgar Publishing 2021), 250.

[35] World Bank, *Report on the Treatment of MSMEs Insolvency* (Washington DC 2017).

[36] The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 1966 (Resolution 2205(XXI) of 17 December 1966) as the vehicle by which the United Nations could play a more active role in reducing or removing obstacles to the flow of trade: <https://uncitral.un.org/en/about> accessed 1 May 2022.

of such entities.[37] These recommendations adopt some of the core set of principles discussed above (such as the debtor-in-possession framework) but fall short of providing the comprehensive modular framework advocated by the proponents of this view.

2.3 Team Production Approach

One of the problems of the traditional approaches to the purpose of corporate insolvency law, such as the proceduralist approach described above, is that they apportion creditors' claims on the basis of pre-insolvency entitlements. They fail to consider the stakeholders' contribution to the distressed entity during and after the commencement of insolvency or restructuring procedures. Any "deviation" from proceduralist (or communitarian, contractarian, etc.) tenets is seen as an exception to a general rule.

It is possible to escape from this loophole by rewarding interested stakeholders for their contributions to and investments in the distressed entity after the opening of an insolvency procedure. To consider these contributions and investments in a principled manner, it is appropriate to rely on the team production theory.

The team production theory was introduced in the insolvency normative debate by Lo Pucki a while ago.[38] LoPucki's theory is founded on the original "team production theory of corporate law" introduced by Blair and Stout in 1999.[39] However, it is also heavily influenced by the contractarian, hypothetical bargain approach suggested by Korobkin.[40] It does not depart from one of the key pillars of the proceduralist approach, that is the preservation of freedom of contract and party autonomy. In line with contractarian approaches, LoPucki considers corporate reorganisation as 'a contract term by which creditors and shareholders agree to subordinate their legal rights to the preservation of the going concern'.[41]

Under the team production theory, a corporation is not "owned" by its shareholders or creditors (upon insolvency). A corporation is seen as a function whose membership is given to all individuals who make firm-specific investments. Should a company face an insolvency event, its directors would be left in full control (debtor-in-possession approach). If reorganisation was possible, its directors would be required to share the entitlements of the ailing corporation amongst all of its members. The directors would act as trustees and share the company's assets according to the entitlements of each interested party.

Under this theory, insolvency law is a set of rules and principles that should empower independent directors to (i) preserve and continue the distressed corporation to which they are party by reorganising it; or (ii) serve all of its constituencies *fairly* in a liquidation procedure. Insolvency law is not a governmental imposition but a contract term between team members

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[37] UNCITRAL Legislative Recommendations on Insolvency of Micro and Small Enterprises (2021) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/part_5_en.pdf> accessed 1 May 2022.
[38] LM LoPucki, 'A Team Production Theory of Bankruptcy Reorganization' (2004) 57(3) Vand. L. Rev. 741.
[39] MM Blair and LA Stout, 'A Team Production Theory of Corporate Law' (1999) 85 Vand. L. Rev. 247. Under the team production theory of corporate law, any corporation is a "team" of members. These members - who include stockholders, creditors, and executives, as well as employees, suppliers, customers, local governments, regulatory agencies, and others - delegate to a board of directors the ability to act for the benefit of the company to which they are party. Because they own the company, they are entitled to something more than compensation for their work.
[40] DR Korobkin, 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1992) 71 Tex. L. Rev. 541.
[41] LM LoPucki, 'A Team Production Theory of Bankruptcy Reorganization' (2004) 57(3) Vand. L. Rev. 741, 743.

that dictates that a company's creditors and shareholders agree to subordinate their legal rights to its preservation as a going concern.

The chief problem with team production theory is the lack of firm guidance in identifying fair approaches to determine the corporate constituents – the legal subjects who make firm-specific investments. Some examples might be self-explanatory. For example, a major shareholder would clearly constitute a legal subject that has made a firm-specific investment. However, more needs to be done so that it is easy to determine which parties will be considered a party that has made firm-specific investments. The vulnerability approach can aid in gaining the desired predictability.

2.4 Vulnerability Approach

People and companies differ in their resilience towards external disrupting factors. According to the proponents of a vulnerability approach to corporate rescue and insolvency, legislative frameworks should be geared towards protecting non-adjusting, vulnerable creditors rather than adjusting, non-vulnerable ones.

"Vulnerability" is understood as resilience and the ability to recover from losses and failure.[42] It is not the same as human vulnerability or emotional fragility, although vulnerable and fragile people are generally less resilient to failure. Resilience is not a condition; rather, it is a status that is acquired through institutional relationships regulated by the law. Vulnerability theorists hold an initial assumption that societal relationships and institutions are shaped and modified by the law in a variety of ways. They reject the liberal *de minimis* approach to regulation because they recognise that the state is actively involved in the preservation, modification, and allocation of vulnerability amongst legal subjects.

When vulnerability approaches are applied to proceduralist frameworks, there should be minimal deviations from value-maximising and uniform rules applicable to an insolvent debtor's creditors despite an increased focus on "fairness".

For instance, take the treatment of a company's employees when it faces insolvency. Communitarian scholars argue for the introduction of preferential treatment of their claims or, alternatively, for special protections and considerations under employment law.[43] These preferences would apply to any insolvency procedure. Distinctions are made between autonomous and independent categories of employees, thus justifying differential treatment between directors and salaried workers and between highly-skilled and low-skilled workers. However, these categories are identified in a collective, "liberal" way: the focus is never on an individual or a single company. Instead, it is always on the class or category of individuals or companies. However, several studies have already demonstrated that different "factions" of

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[42] MA Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) Yale Journal of Law and Feminism 1; MA Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4(3) Oslo L. Rev. 133, at 135. For an application of these theories to the field of corporate insolvency law, see: DR Korobkin, 'Vulnerability, Survival, and the Problem of Small Business Bankruptcy' (1994) 23(2) Capital University L. Rev. 413; JLL Gant, 'Optimising Fairness in Insolvency and Restructuring: A Spotlight on Vulnerable Stakeholders' (2022) 31(2) I.I.R. 1.

[43] CF Symes, *Statutory Priorities in Corporate Insolvency Law. An Analysis of Preferred Creditor Status* (Routledge 2016); V Finch, 'The Measures of Insolvency Law' (1997) 17(2) O.J.L.S. 227.

non-uniform creditors exist within the same category of creditors (e.g., unsecured creditors) and that some of these intra-factions may be subject to a higher degree of vulnerability.[44]

A vulnerability approach focuses on vulnerable people or a company's resilience to a debtor's failure. It focuses on the social and materially dynamic vulnerable nature of legal subjects (both individuals and companies). Whilst it is certainly true that certain legal subjects (e.g., banks, vulture funds, etc.) are more resilient than others, there is no attempt to single out groups, categories, or classes of contributors. As evidenced in the 2007-2009 financial crisis, the banking system may at times be vulnerable.

A vulnerability-led approach is certainly less predictable than a communitarian approach. This is because deviations from proceduralist tenets are not based on competing views of the principles and purposes of insolvency law. Vulnerability-informed deviations do not result in set rules applicable to uniform classes of creditors. They are based on a concrete, purposeful analysis of the situation of each claimant, and they do result in shared approaches to the analysis of the individual conditions of a debtor's stakeholders. They are founded on the need to promote equality rather than discrimination-based visions of an egalitarian society. 'Equality [is] a universal resource, a radical guarantee that is a benefit for all'.[45]

Advocating for vulnerability-informed approaches is not the same as actually protecting vulnerable players. This is in the same way that introducing a legal remedy under the law is not the same as actually making it available.[46] Vulnerability-informed approaches are only possible in fair corporate insolvency frameworks. Fairness is understood as a substantive and procedural concept.[47] It is submitted that procedural fairness is the propensity to rely on replicable and transparent procedures to deal with the interests of different parties in insolvency procedures. Substantive fairness is the propensity of the system to deviate from "horizontal equity"[48] under the law or when adjudicating disputes between parties with conflicting interests in an insolvency process.

Procedural fairness is a multi-faceted legitimising concept used to justify the design of decision-making processes.[49] According to this multi-faceted narrative, procedural fairness is based on three underpinnings: instrumentality, "dignitarian", and public accountability. The first element is the system's instrumental capacity to deliver substantive justice – namely, the correct outcome in the given case. The instrumental view of procedural fairness requires predictability and minimal deviations from agreed practices. The dignitarian element is seen as the right to a fair trial; that is, the right of the participant to be allowed to join the process *and* assert (in theory and in practice) their interests and preferences.[50] The third element of public accountability

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[44] D Cardinaels, 'Differentiation among Groups of Unsecured Creditors: A Solution to Reduce Vulnerability?' (2019) 32(3) Insolv. Int. 116. The author commends the analysis of the treatment of vulnerable unsecured creditors but disagrees with the solutions put forward to deal with information asymmetries for vulnerable players.

[45] MA Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) Yale Journal of Law and Feminism 1, 23.

[46] C Ondersma, 'Overlooked Human Rights Concerns in the Restructuring and Insolvency Context' in PJ Omar and JLL Gant (eds), *Research Handbook on Corporate Restructuring* (Edward Elgar Publishing 2021) 466.

[47] S Paterson, 'Debt Restructuring and Notions of Fairness' (2017) 80(4) M.L.R. 600.

[48] EE Zajac, *Political Economy of Fairness* (MIT Press 2001) 120.

[49] R Kirkham et al., 'The Procedural Fairness Limitations of Fitness to Practise Hearings: A Case Study into Social Work' (2019) 39 Legal Studies 339, 340.

[50] D Galligan, *Due Process and Fair Procedures* (OUP 1996); D Hovell, *The Power of Due Process: The Value of Due Process in Security Council Sanctions Decision-Making* (OUP 2016) 76; J Kirshner, 'The (False) Conflict between Due Process Rights and Universalism in Cross-border Insolvency' (2013) 72(1) Camb. Law J. 27.

requires the public to see the model as inherently fair. A corollary of this last element is the transparency of the decision-making process. Kirkham also observes that institutional design may promote thinner or thicker models of procedural fairness.[51] In thinner models, the focus is mainly on establishing procedurally fair rules on paper (in the statute books). Thicker models rely on mechanisms (such as alternative dispute resolution practices) to enhance the perception of procedural fairness among users.

An insolvency process is understood as procedurally and substantively fair if it considers issues of justice and respects the interests of affected parties by allowing affected parties access to and respect during the decision-making process. Fair frameworks are generally thicker than proceduralist ones, but thinner than communitarian models because they are not another way of talking about discrimination or fighting disadvantage.[52] Fair frameworks are responsive to vulnerability and they provide mechanisms to build resilience.

In evaluating an insolvency framework, a fair interpretation of its foundational rules results in the promotion of a certain degree of legal predictability against alternative normative approaches that include the communitarian argument for distributional fairness. Conversely, in systems geared towards the promotion of procedural fairness, the focus is on making decisions that look right, irrespective of the lack of participation from the interested parties.[53] Vulnerability, therefore, requires reliance on and promotion of substantive and procedural fairness.[54]

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[51] R Kirkham et al., 'The Procedural Fairness Limitations of Fitness to Practise Hearings: A Case Study into Social Work' (2019) 39 Legal Studies 339, 344-345.

[52] Vulnerability theories are not concerned with discrimination and disadvantage. They are concerned with the legal subjects' resilience to external pressures.

[53] R Kirkham et al., 'The Procedural Fairness Limitations of Fitness to Practise Hearings: A Case Study into Social Work' (2019) 39 Legal Studies 339, 339.

[54] J Sarra, 'Making Insolvency Law Responsive to the Needs of Financially Distressed Micro and Small Enterprises' in PJ Omar and JLL Gant (eds), *Research Handbook on Corporate Restructuring* (Edward Elgar Publishing 2021), 250-251.

3. Legal Framework

This section of the paper outlines the remedies available to corporate debtors in distress under Italian and English law. Whilst the new Italian Insolvency Code is not yet in force at the time of writing, in evaluating Italy's corporate insolvency framework, reference is made to the procedures available under the new Code in light of the changes announced by the Italian Government in the government act 374/2022.[55]

3.1 Italy

The last two decades have been characterised by frequent yet fragmented changes to the existing framework. Despite the relevance of some reforms,[56] these changes resulted in a system that lacked coherence and coordination between reformed and non-reformed provisions. As a result, the prevalence of litigation increased, the costs of formal insolvency procedures rose, and the judiciary struggled to develop uniform interpretations of insolvency law provisions.

On 11 October 2017, the *Senato della Repubblica* approved the final version of a law aimed at systemically reforming Italy's insolvency framework, which, in its fundamental elements, dates back to 1942. Law 155/2017 did not materially change the current legislation. It gave the Government the authority (and 12 months) to amend the law by means of one or more decrees; these had to conform to the guidelines described below. In accordance with that law, the Government published the legislative decree 14/2019 on 14 February 2019.[57]

The new *Codice della Crisi dell'Impresa e dell'Insolvenza* should have come into force in August 2020. This law will be referred to as C.C.I.I. or "new (Italian) Code" throughout this paper. However, for a variety of reasons (such as the Covid-19 pandemic, changes in political majorities, etc.), the entrance into force of the Code has been postponed on several occasions. The law decree 118/2021 postponed the reform's entry into force to 16 May 2022, and it was later further postponed to 15 July 2022.[58]

When it enters into force, the updated Italian corporate insolvency toolkit will be based on a mix of pre-insolvency procedures (*procedure di composizione negoziata della crisi*) and formal insolvency procedures commenced by a debtor, its creditors, or a judicial authority for the purpose of liquidating a debtor's assets or rescuing its business.

With reference to formal insolvency procedures available to companies in distress, the C.C.I.I. directly deals with the following:

- certified reorganisation plans (*piani attestati di risanamento*);
- debt restructuring agreements (*accordi di ristrutturazione dei debiti*);

[55] *Modifiche al Codice della crisi d'impresa e dell'insolvenza in attuazione della Direttiva (UE) 2019/1023* (A.G. 374) <https://www.diritto.it/wp-content/uploads/gi0199.pdf> accessed 1 May 2022. This is the most up-to-date statutory document at the time of writing (1 May 2022).

[56] See, amongst other legal instruments, the legislative decree 5/2006.

[57] For an outline of the reforms, see: E Vaccari, 'Corporate Insolvency Proceedings in Italy' in J Marshall et al. (eds), *European Cross Border Insolvency* (3rd edn, Sweet & Maxwell, 2021); F Lamanna and D Galletti, *Dall'Emergenza COVID al Correttivo del Codice della Crisi d'Impresa* (Giuffrè 2021); A Zorzi, 'The Italian Insolvency Law Reform' (2021) 32(5) EBLR 935.

[58] This is only two days before the extended deadline to enact the PRD 2019. For an outline of the most recent changes, see: M Mandico, 'L'ennesimo Correttivo al Codice della Crisi d'Impresa e dell'Insolvenza' (*Diritto.it*, 5 Aprile 2022) <https://www.diritto.it/lennesimo-correttivo-al-codice-della-crisi-dimpresa-e-dellinsolvenza/> accessed 1 May 2022.

- pre-insolvency compositions (*concordato preventivo*);
- corporate liquidations (*liquidazione giudiziale*);
- forced administrative liquidations (*liquidazione coatta amministrativa*).

The only formal insolvency procedure not included in the C.C.I.I. is the extraordinary administration (*amministrazione straordinaria*) procedure, which is available to large companies in distress. The new law also does not deal with the insolvency of banks and other financial institutions, which have always been subject to special rules and procedures.[59]

Corporate liquidation proceedings are governed by arts 121–283 C.C.I.I. The fundamental goal of corporate liquidation proceedings is to liquidate the assets of insolvent debtors in an orderly manner. These are practitioner-in-possession procedures.[60] The liquidator (*curatore*) appointed by a court upon a petition of any interested parties collects, sells, and distributes a debtor's assets to its creditors. Liquidation procedures are not available to small entrepreneurs and farmers. The commencement of corporate liquidation proceedings coincides with the debtor subject to the proceedings facing personal consequences, including obligations to cooperate with the relevant court, its creditors, and a liquidator, as well as to provide the required information to the same parties.

Certified reorganisation plans (*piani attestati di risanamento*)[61] are regulated by art. 56 C.C.I.I. The purpose of voluntary composition agreements implemented by a rescue plan is to re-establish the financial soundness of a debtor and to restructure its debts. These plans can only be proposed by companies that are eligible to utilise a liquidation procedure. These are all companies that are not small or farming enterprises. These companies need to be in a state of crisis or insolvency.[62] An independent professional has to confirm that the plan is based on verified data and is likely to result in the debtor's reorganisation. These plans bind only the parties that approve the arrangements, but the transactions carried out in accordance with the plan are exempt from avoidance rules.[63]

Debt restructuring agreements (*accordi di ristrutturazione dei debiti*) are agreements between a debtor facing a financial crisis or insolvency (*stato di crisi*) and creditors representing at least 60% of debt.[64] The percentage is reduced to 30% of debt if the plan does not propose to delay any payments owed to dissenting creditors and a court petition for an automatic stay is not made.[65]

The agreement, which is usually negotiated out of court before being sanctioned by a court, has to reduce and/or restructure a debtor's debt. The agreement must be found reasonable by an independent professional (generally an external auditor or an audit firm) who meets the criteria set out in art. 2(1)(o) C.C.I.I. Debtors will appoint these experts.

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[59] Banks and investment firms in distress are subject to the Consolidated Banking Act (*Testo Unico Bancario*), i.e., legislative decree 385/1993, arts. 69(bis)-105(ter); bank resolutions are regulated by legislative decree 180/2015, which implemented the Bank Recovery and Resolution Directive (Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014). Insurance companies are dealt with by the Code of Private Insurance (*Codice delle assicurazioni private*), i.e., legislative decree 209/2005, title XVI (arts. 220-*decies* to 282).

[60] art. 142, C.C.I.I.

[61] For a general overview of these procedures, see: A Zorzi, 'Piani di Risanamento e Accordi di Ristrutturazione nel Codice della Crisi', (2019) Il Fall. 993.

[62] art. 56(1), C.C.I.I.

[63] art. 166(3)(d), C.C.I.I.

[64] art. 57(1), C.C.I.I.

[65] art. 60, C.C.I.I.

Unlike certified reorganisation plans, a debt restructuring agreement occurs under the supervision of a competent court. Once it is ratified by a court, an agreement becomes effective and binding on all of the creditors who signed it. To make it binding on dissenting creditors, the agreement needs to be approved by 75% or more of the creditors in the class, provided that the agreement is reached in good faith and it is not being used to facilitate the liquidation of a debtor's business.[66]

Pre-insolvency compositions (*concordato preventivo*) are debtor-in-possession procedures supervised by a court administrator (*commissario giudiziale*) and carried out under the control of a designated judge from the place where a company had its centre of main interest. Creditors have to vote on a turnaround plan prepared by a debtor with the help of some legal advisers. They are regulated by arts 84–120 C.C.I.I. and are probably the most popular rescue mechanism under Italian law. Since 2005, it has been possible – albeit with different requirements – to bind dissenting classes of creditors (cross-class cram-down).

Negotiated composition procedures (*procedure di composizione negoziata della crisi*) were first introduced by law decree 118/2021. They are likely to take the place of the alert procedure in the C.C.I.I., as the latter never entered into force due to difficulties in implementing the alert mechanisms originally provided by the law. This procedure is available to companies in distress that are likely to become insolvent, even if there should be a reasonable chance of rescuing them or part of their business. The procedure may be commenced by an entrepreneur (which a farmer may constitute for the purpose of this procedure). This petitioner should petition the competent Chamber of Commerce (*Camera di Commercio*) through a virtual platform. If the Chamber of Commerce believes that a debtor can be rescued on the basis of the answers to an online questionnaire, it will appoint an independent expert who will attempt to facilitate an agreement between the applicant debtor and its creditors. A debtor utilising a procedure will continue to run the company for the duration of the procedure (up to 180 days). There is no automatic stay, but a debtor can request one by petitioning a competent court. If the negotiation is successful, the agreement is binding on all of the signatories to it unless the parties decide to sign a debt restructuring agreement that is approved by 75% of the creditors in each class.

3.2 England and Wales

In response to the recommendations made by the Cork Report,[67] the Insolvency Act 1986 (IA 1986) made significant amendments to the existing corporate insolvency law landscape in the U.K. The amendments were chiefly implemented to promote a "rescue culture". Other significant amendments were introduced by the Enterprise Act 2002 (EA 2002), the most significant of these being:

- an attempt to implement a legal model that correlated more with the happenings of the business and financial world in the face of commercial realities;
- the abolition of the preference for Crown debts, later partially re-introduced by the 2018 Budget for insolvencies beginning on or after 31 December 2020; and
- the (effective) removal of receivership.

More recently, the Government streamlined the procedure for Pt 26 schemes of arrangement with the Companies Act 2006 (CA 2006); introduced changes to pre-packaged procedures by

[66] art. 61, C.C.I.I.

[67] *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982) (Cork Report).

means of the Small Business, Enterprise and Employment Act 2015 (SBEEA 2015); and simplified procedural rules with the Insolvency Rules 2016 (IR 2016). However, by far the most significant reforms in recent times were those enacted by the Corporate Insolvency and Governance Act 2020 (CIGA 2020)[68] and the Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021 (Pre-Pack Regulations 2021). Whilst the latter dealt primarily with pre-packaged sales to connected parties, CIGA 2020 introduced the following permanent changes to the English insolvency landscape:

- a new Pt A1 statutory moratorium that can be used by companies together with or independently of restructuring tools, such as Pt 26 schemes of arrangement or new Part 26A restructuring plans;
- a new Pt 26A restructuring plan procedure that allows one class of creditors or members to approve a compromise or arrangement despite the objection of a dissenting class; and
- a general prohibition on relying on contractual termination clauses.

Companies in distress may be rescued, restructured, or liquidated by utilising one or more of the following:

- informal workouts,
- liquidation,
- administration (including light-touch administration) or pre-packaged sales,
- company voluntary arrangements,
- Pt 26 schemes of arrangement, and/or
- Pt 26A restructuring plans.

Liquidation is a procedure of last resort that is used to collect, realise, and distribute a debtor's assets and proceeds to its creditors. Liquidations are still used significantly more frequently than other insolvency mechanisms.[69] Under the current law, companies can be liquidated in three ways.[70] Solvent companies can be liquidated by means of a members' voluntary liquidation (MVL),[71] whilst insolvent ones can be liquidated through a creditors' voluntary liquidation (CVL) when the initiative is taken out-of-court by a debtor or through a compulsory liquidation (CL) commenced by a petition to a competent court.

A company's shareholders can trigger a CVL[72] by passing a special resolution (which requires a 75% majority of the company's shareholders to vote in favour of a proposed course of action). There is no moratorium, but parties may applyto a court for a stay of the proceedings. CLs[73] may

[68] For the changes introduced by the Act, and the impact on London as a global restructuring hub, see (among others): E Vaccari, 'WHOA, Brexit! What future for London as Europe's (largest) insolvency forum?' (2022) 37(2) J.I.B.L.R. 46. For the political background and the Parliamentary progress of the Act, see: S Allinson, 'The Corporate Insolvency and Governance Act 2020 and Other Developments: A Brave New Insolvency and Restructuring World?' (2020) 13(5) C.R.I. 155.

[69] The total number of company insolvencies registered in 2021 was 14,058. Only 911 of these procedures were either administrations or CVAs – i.e., rescue-oriented insolvency procedures. This means that 93.51% of English company insolvencies were aimed at liquidating a debtor's assets. This figure is likely to be higher, as some of the rescue-oriented procedures mentioned above may have resulted in the debtors utilising a procedure having their assets liquidated. Up-to-date company insolvency statistics can be found here: <https://www.gov.uk/government/collections/company-insolvency-statistics-releases> accessed 1 May 2022.

[70] Companies may also be wound up by the Department of Business, Enterprise and Regulatory Reform (BERR) or the Financial Services Authority (FSA) if doing so would be in the interest of the public.

[71] Pt IV, Ch. III, IA 1986.

[72] Pt IV, Ch. IV, IA 1986.

[73] Pt IV, Ch. VI, IA 1986.

be triggered by a variety of stakeholders (including a company's creditors and the Secretary of State), usually upon proof that the company is unable to pay its debts.[74] CLs provide for an automatic stay of executory actions against debtors utilising the procedure.

The traditional English law rescue procedures have always been company voluntary arrangements (CVAs) and administration in its different forms. CVAs,[75] first introduced by IA 1986, are agreements between a registered company facing financial difficulties (not necessarily insolvent), its shareholders, and its creditors. The agreement – typically, a reorganisation plan – usually involves delayed or reduced debt payment or capital restructuring. Whilst the procedure is similar to the Italian *concordato preventivo*, English CVAs cannot modify the rights of secured creditors except with the concurrence of the concerned creditor.[76] No statutory moratorium is granted, but since 2020, debtors have had the ability to apply for a short moratorium.[77]

Administration[78] was first introduced by IA 1986 as an alternative to liquidation. It allows an ailing but not necessarily insolvent company, partnership, orother entity to conceive a rescue plan whilst trading. Whilst subject to an administration procedure, a company is protected by a moratorium against creditors' actions.

An IP overseeing an administration procedure has to pursue one of the three objectives listed by s. 3(1), Sch. B1 IA 1986. An IP should try to achieve the earliest listed objective that may be achieved given the applicant company's circumstances. The objectives are as follows:

a) rescue the company utilising administration as a going concern;
b) achieve a better result for that company's creditors as a whole than would be likely if the company were wound up; or
c) realise its property and distribute the proceeds.

A company may enter into administration via a court-based procedure (through a company's creditors applying to a court) or via an out-of-court route (by the holder of a qualifying floating charge, a company itself, or a company's creditors). In the majority of these cases, to open the procedure, a court has to be satisfied that the company is or is likely to become unable to pay its debts[79] and that an administration order is reasonably likely to achieve the stated purpose. The applicant has to prove that, on a balance of probabilities, these thresholds are met.[80]

[74] The specific grounds to petition the court are listed in s.122 IA 1986.
[75] Pt I, ss. 1–7B IA 1986 and Pt II, rules 2.1–2.45 IR 2016.
[76] *Discovery (Northampton) Ltd v Debenhams Retail Ltd* [2020] EWHC 2441 (Ch). Secured creditors may not see their proprietary rights compromised (including the right of forfeiture). However, the scope of this prohibition does not extend to future rent. Future rent might not be a provable debt or even a debt at all, but it was at least a pecuniary liability to which the company might become subject in the future by reason of an existing obligation. As such, future rent can be compromised in CVAs.
[77] Pt A1, IA 1986.
[78] Sch. B1, IA 1986.
[79] The "inability to pay its debts" is defined by s.123 IA 1986 as both want of liquidity (i.e., cash flow insolvency) and balance sheet insolvency. In assessing the latter, the court is required to have regard to prospective and contingent liabilities (*BNY Corporate Trustee Services Ltd v Eurosail UK 2007–3BL Plc* [2013] UKSC 28).
[80] *Re AA Mutual International Insurance Co Ltd* [2004] EWHC 2430 (Ch).

Except where a light touch administration procedure is utilised,[81] a debtor company will be controlled by an administrator upon entering into a procedure. The appointed administrator will be a licensed IP.[82]

A *sui generis* form of administration is the pre-pack procedure. These are arrangements for the sale of a debtor's business that are negotiated with the prospective purchasers and agreed by major creditors prior to the formal commencement of a procedure. The sale is completed shortly after an administration order is made. The Pre-Pack Regulations 2021 have limited the possibility of making a substantial disposal of a company's assets to a connected party within the first 8 weeks of an administration procedure being in operation. A sale within the first 8 weeks of an administration procedure being utilised can only occur where prior approval from the creditors has been obtained or after having received a report on the proposed sale stating that the consideration and the grounds for the substantial disposal are reasonable.

Some rescue-oriented remedies are found outside of the English equivalent of the Italian Insolvency Code. These are Pt 26 schemes and Pt 26A plans.

Schemes of arrangement (Pt 26 schemes)[83] can be used by distressed entities, even if they have been 'designed and intended for the reorganisation of solvent companies'.[84] Despite being similar in content but lengthier and more expensive than CVAs, they present peculiar characteristics. Notably, for the purpose of a scheme, a company's creditors are divided into classes and approved plans are binding on all types of creditors.

Under English law, a company is entitled to enter into a scheme if it is capable of being wound up in England and Wales. This is possible if a company has a "sufficient connection" with those territories, a concept that courts have construed in a very broad manner.[85] This explains the popularity of schemes amongst foreign companies.

Introduced by CIGA 2020, Pt 26A plans are Pt 26 schemes available only to debtors in financial distress and designed to restructure businesses.[86] Unlike Pt 26 schemes, it is possible to approve a plan even if one or more classes of creditors vote against it, provided that some conditions are met.[87] Because Pt 26A plans are collective procedures available only to debtors in financial distress, English courts have held that they should be considered to be "traditional" insolvency procedures for the purposes of their recognition in other countries.[88]

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[81] E Vaccari, 'Corporate Insolvency Reforms in England: Rescuing a "Broken Bench"? A Critical Analysis of Light Touch Administrations and New Restructuring Plans' (2020) 31(12) I.C.C.L.R. 645

[82] For the proposed changes to the regulatory framework, see: The Insolvency Service, 'The Future of Insolvency Regulation' (21 December 2021) <https://www.gov.uk/government/consultations/the-future-of-insolvency-regulation> accessed 1 May 2022; C Sumner, 'A New Regulatory Landscape?' (2022) 15(1) C.R. & I. 32.

[83] Pt 26, CA 2006.

[84] A Keay et al., *Corporate Governance and Insolvency. Accountability and Transparency* (Edward Elgar Publishing 2022) 83.

[85] In *Re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch), the Court was required to determine if it had jurisdiction to sanction Pt 26 schemes of arrangement in respect of Dutch and Belgian companies with no establishment in England. It held that a sufficient connection had been shown in that the governing law of all the finance documents was English. Also: *Re Hibu Group Ltd* [2016] EWHC 1921 (Ch).

[86] s.901A, CA 2006.

[87] s.901G, CA 2006. These conditions are: (a) that none of the dissenting creditors would be worse off than in the event of the "relevant alternative"; and (b) that the plan has been approved by at least one class of creditors who have a genuine interest in the company.

[88] *Re gategroup Guarantee Ltd* [2021] EWHC 304 (Ch).

3.3 Concluding Remarks

This high-level analysis of the Italian and English corporate insolvency frameworks suggests that the recent changes introduced to the frameworks of Italy and England promote a modular approach to insolvency and restructuring, at least on paper. Nothing in the law suggests that revised proceduralist goals could not be pursued. The key challenge is to determine if and to what extent the new provisions in the areas considered in this study are capable of promoting the revised proceduralist goals advocated by this paper.

4. Termination Clauses

'*Ipso facto*' is a Latin phrase that translates to "by the fact itself".[89] In contractual practice, *ipso facto* clauses are negotiated to determine the automatic alteration of terms or termination of an agreement due to some event, such as a company's entrance into a formal insolvency procedure. These clauses operate to uphold the interests of non-defaulting parties, and apply even if the other party is still performing or can still perform as agreed under the contract.

These clauses have been traditionally enforced under English law[90] as a mechanism to respect party autonomy and freedom of contract.[91] In Italy, on the other hand, several limits to their enforceability have been introduced since 2006,[92] despite the existence of an equally broad principle of party autonomy and freedom of contract in the law.[93] *Ipso facto* clauses are still commonly included in a variety of contracts where performance remains outstanding at the time of insolvency. Notorious examples include leasing, all contracts relating to real estate, and financial contracts. *Ipso facto* clauses are also commonly found in property, supply, intellectual property, insurance, and other executory contracts.

The treatment of executory contracts and termination clauses in insolvency and restructuring procedures raises issues as to the degree of interference that states should exercise in dealing with such contracts and clauses. UNCITRAL has acknowledged the existence of conflicting priorities when dealing with executory contracts and the enforceability of termination clauses. In its Legislative Guide, it held that it *might* be necessary to perform some executory contracts whilst rejecting others to ensure that the proceeds received for a debtor's assets are maximised and – where relevant –a debtor has the best chance to be rescued.[94] Unfortunately, UNCITRAL provides guidance on the treatment of these contracts on the assumption,[95] which the author considers to be an erroneous one, that there is a need to find a balance between the conflicting principles of freedom of contract and promoting the rescue of insolvent yet viable debtors.[96]

With reference to executory contracts, UNCITRAL argues that no special rules are required for the situation where only one party has not fully performed its obligations (as these contracts are "executed").[97] In rescue scenarios, it advocates for general rules applicable to all kinds of contracts and exceptions for certain special contracts,[98] an approach followed by both the Italian and the English legislator, at least on paper and albeit different approaches to their treatment. With reference to termination clauses, UNCITRAL states that, at times, overriding such clauses may be crucial for attaining the objectives of the restructuring or (to a limited

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[89] L Powers et al., 'Insolvency Law and Management: *Ipso Facto* Clauses: A Law Reform Challenge' (2016) 27 J.B.F.L.P. 72. For a more detailed analysis of the rules on termination clauses in England and Wales, see: E Vaccari, 'Executory Contracts in Insolvency: the English Perspective' in J Chuah and E Vaccari (eds), *Executory Contracts in Insolvency Law: A Global Guide* (2nd edn, Edward Elgar Publishing 2022).

[90] *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38, [103] per Collins LJ.

[91] On "true" freedom of contract and its interaction with the anti-deprivation principle, see: E Vaccari, 'The Normative and Jural Meanings of the Anti-Deprivation Principle *vis-à-vis* Freedom of Contract' (2022) 31(2) I.I.R. 1.

[92] Legislative decree 5/2006.

[93] art. 1372(1), Civil Code.

[94] UNCITRAL Legislative Guide on Insolvency Law, Pt 1 and 2, [109].

[95] For an argument as to why they should not be seen as antagonising principles, see: E Vaccari, 'The Normative and Jural Meanings of the Anti-Deprivation Principle vis-à-vis Freedom of Contract' (2022) 31(2) I.I.R. 1.

[96] UNCITRAL Legislative Guide on Insolvency Law, Pt 1 and 2, [110].

[97] Ibid, [111].

[98] Ibid, [112].

extent) liquidation procedure.[99] However, it does not provide detailed guidance as to the situations in which these clauses should not be enforced.

General enforceability of *ipso facto* or termination clauses in insolvency is compliant with a proceduralist view of the purpose of the law in this area. By not deviating from what had been negotiated by the parties in their contracts, proceduralist insolvency rules uphold party autonomy and do not create any incentives for distressed debtors to file for an insolvency procedure. However, neither the English nor the Italian corporate insolvency frameworks adhere to a purely proceduralist approach in dealing with these contracts in insolvency procedures. Instead, both frameworks deviate significantly from proceduralist tenets in the area; this deviation will be explored below.

4.1 Termination Clauses in Italy

The treatment of termination clauses in Italy has already been explored in detail elsewhere.[100] Reference is made to the new discipline found in arts. 172-192 C.C.I.I. (for liquidation procedures) and arts. 97 and 100 (for pre-insolvency composition or *concordato preventivo*). No special rules apply to certified reorganisation plans (*piani attestati di risanamento*) and debt restructuring agreements (*accordi di ristrutturazione dei debiti*), meaning that debt restructuring agreements negotiated by parties in solvent times (including termination clauses) can be effected. Special rules are provided for instances where an extraordinary administration (*amministrazione straordinaria*) procedure is used by a debtor.[101] These rules follow the same approach to executory contracts in pre-insolvency compositions, even if the procedure for suspending or terminating them is slightly different due to the different players and interests involved in extraordinary administrations.

4.1.1 The General Framework

The rules described below apply to contracts for the sale of goods or provisions of services that can become part of an insolvent estate.[102] These contracts need not be fully executed. A contract is not fully executed if a significant part of it (as opposed to a marginal part of it) still needs to be performed by either of the signatories.[103] A contract is fully executed if one party has

[99] Ibid, [116].

[100] For the rules in the C.C.I.I. see, among others: M Baranca, 'Gli Effetti della Liquidazione Giudiziale sui Rapporti Giuridici Pendenti', in M Giorgetti (ed), *Codice della Crisi d'impresa e dell'insolvenza. Commento al Decreto Legislativo 12 gennaio 2019, n. 14* (Pacini Giuridica, 2019); G Bevivino, *Le "Autonomie Private" nel Nuovo Diritto dell'Insolvenza* (Pacini Giuridica 2022), particularly chs. 4-5; R Guidotti, 'Executory Contracts in Insolvency: the Italian Perspective' in J Chuah and E Vaccari (eds), *Executory Contracts in Insolvency Law: A Global Guide* (2nd edn, Edward Elgar Publishing 2022). For the pre-existing rules see, among others: PF Censoni, 'Gli Effetti del Fallimento sui Rapporti Giuridici Preesistenti', (2006) I Dir. fall. 1150; G Tarzia, 'Gli Effetti del Fallimento sui Rapporti Pendenti dopo la Riforma ed il Decreto Correttivo', (2007) Fall. 1385; E Gabrielli, 'La Disciplina Generale dei Contratti in Corso di Esecuzione nel Fallimento', (2011) I Riv. dir. comm. 589; A Patti, *I Rapporti Giuridici Pendenti nel Contratto Preventivo* (Giuffrè 2014).

[101] art. 50, legislative decree 270/1999.

[102] For the list of goods not included in the liquidation procedure, see art. 146, C.C.I.I.

[103] art. 172(1), C.C.I.I. makes reference to the "primary obligations" (*prestazioni principali*) between parties. On this topic, see: M Baranca, 'Gli Effetti della Liquidazione Giudiziale sui Rapporti Giuridici Pendenti', in M Giorgetti (ed), *Codice della Crisi d'Impresa e dell'Insolvenza. Commento al decreto legislativo 12 gennaio 2019, n. 14* (Pacini Giuridica 2019) 160.

transferred their proprietary rights on the good to the other one, even if the debtor has not yet (fully) paid for those goods.[104]

The rules differ markedly depending on whether the aim of the procedure is to liquidate a company's assets or to rescue it or its business. In both cases, the statutory rules supersede any different agreement to the contrary made by the parties, meaning that there is no space for the enforceability of *ipso facto* clauses under Italian law (at least for liquidations and pre-insolvency compositions).

With reference to **pre-insolvency compositions**, art. 97(1) C.C.I.I.[105] dictates that pending contracts continue unaffected during the procedure, irrespective of any agreement to the contrary between two parties.[106] If a debtor wants to suspend or terminate an executory contract, they need to file a petition to a court and serve it on the party they have contracted with.[107] They also need to quantify the damages arising from the early termination, and how these will be paid.[108] It is not clear whether a contract termination would be effective from the date of a court order[109] or from the date of a debtor's petition.[110]

Some contracts (e.g., employment contracts, leasing contracts, and preliminary contracts for the sale of real estate properties) cannot be suspended.[111] Beyond these contracts, Italian courts have curtailed the right to suspend or terminate some contracts such as factoring or other types of preliminary contracts. A creditor can oppose such requests by claiming that they have suffered unfair harm. The final decision on whether to suspend or terminate a contract and on the measure of damages is taken by a competent court. The termination or suspension of a contract does not affect any arbitration clause included within it.[112]

If the changes to the Code that are currently being discussed by Parliament are implemented, a new article (art. 94-*bis*) focussing on the treatment of financial contracts will become operable. If the draft text associated with this article is approved without amendments, creditors will be prevented from unilaterally terminating or prematurely terminating these contracts on the grounds that either a debtor has entered into a pre-insolvency composition or pre-insolvency claims have not been paid in full.

As a general rule, claims for supplies of goods and services provided before the commencement of an insolvency procedure are treated as unsecured claims, whilst post-petition claims are treated as procedure expenses.[113] Special rules apply to leasing contracts. Notably, where early termination occurs, a leased good has to be returned to lessor, who will have to sell it. The balance from the sale will either be returned to the relevant lessee company or claimed by the

[104] Supreme Court (*C. Cass.*), 5 September 2000, no. 11627.
[105] The version in the current insolvency law was first introduced only by means of legislative decree 83/2012. For an outline of the treatment of executory contracts in pre-insolvency compositions, see: L Farenga, 'I Contratti Pendenti nel Concordato Preventivo alla Luce del Codice della Crisi d'Impresa e dell'Insolvenza' (2020) 2 Dir. Fall. Soc. Comm. 287.
[106] The same approach applies to contracts with public entities pursuant to art. 95(1) C.C.I.I.
[107] The failure to serve the notice on the other party may result in the order to suspend or terminate such a contract being voided: Court of Appeal (Venice), 20 November 2013.
[108] art. 97(3), C.C.I.I.
[109] Legislative decree 83/2015.
[110] Tribunal (Monza), 27 November 2013; Tribunal (Terni), 27 December 2013; Tribunal (Modena), 7 April 2014.
[111] art. 97(13), C.C.I.I.
[112] art. 97(8), C.C.I.I.
[113] art. 97(11), C.C.I.I.

lessor in the procedure as an unsecured claim. Special rules also apply to the termination of employment contracts.[114] These contracts are not discussed in this paper.

Debtors in pre-insolvency compositions may be authorised to pay pre-petition creditors. This is only possible if a debtor is undertaking a restructuring procedure, its creditors are essential for the continuation of its activities, and a payment of pre-petition creditors is designed to maximise the value of the relevant debtor's company for the benefit of all of its creditors.[115] In other words, this deviation from the principle of *pari passu* distribution is only possible in very limited circumstances and is subject to obtaining previous court authorisation. For some special contracts, court authorisation may be replaced by the authorisation of the professional supervising the procedure.[116]

In **liquidation procedures**, art. 172 C.C.I.I.[117] – which will not significantly change the pre-existing rules in the area[118] – states that the opening of liquidation procedures causes the automatic suspension of such contracts,[119] irrespective of any agreement to the contrary between the parties.[120] Such an outcome does not itself misalign with general contractual principles as art. 1461 Civil Code dictates that a party can unilaterally decide to stop performing their contractual obligations if the financial condition of a contractual counter-party has significantly worsened and there is a real doubt that they will perform their obligation under the contract. However, a non-performing party will be forced to meet their obligations if the counter-party provides sufficient guarantees that the contract will be performed as originally agreed.[121]

Commentators argue that termination clauses linked to a debtor's financial situation are equally ineffective under the law where they are triggered before the commencement of an insolvency procedure.[122] The only exception is provided by art. 211(8) C.C.I.I., which deals with the case that a debtor's activity continues during a liquidation. In these circumstances, any executory contract continues unaffected, and any agreement to the contrary between the parties is ineffective.

Insolvency practitioners (*curatori*) have the right to assume or reject these contracts. The continuation of them is subject to a creditors' committee's preliminary approval. Both their assumption and the rejection can be proven with acts or omissions that are incompatible with the alternative option.[123] In any case, the continuation of an executory contract always requires

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[114] art. 97(13), C.C.I.I.
[115] art. 100(1), C.C.I.I.
[116] art. 100(2), C.C.I.I.
[117] For a detailed overview of the discipline, see: A Villa, 'Commentario all'art. 172 C.C.I.I.' (consulted in draft form).
[118] G Fauceglia, *Il Nuovo Diritto della Crisi e dell'Insolvenza (d.lgs. 12 gennaio 2019, n. 14)* (Giappichelli Ed. 2019) 133. These rules had been significantly reformed in 2006.
[119] art. 172(1), C.C.I.I.
[120] art. 172(6), C.C.I.I. This provision became enshrined in the law in 2006 and it was expressly designed to prevent parties from contracting out of insolvency law: M Sciuto, 'Il Fallimento', in M Cian (ed), *Diritto Commerciale, vol. II, Diritto della Crisi d'Impresa* (Giappichelli Ed. 2018) 89.
[121] Translation from Italian: '*Ciascun contraente può sospendere l'esecuzione della prestazione da lui dovuta, se le condizioni patrimoniali dell'altro sono divenute tali da porre in evidente pericolo il conseguimento della controprestazione, salvo che sia prestata idonea garanzia*'. On this topic, see (among others: A Di Majo, *La Tutela Civile dei Diritti* (Giuffrè 1993) 272; F Addis, 'Le Eccezioni Dilatorie' in V Roppo (ed), *Trattato del Contratto* (Giuffrè 2006) 413.
[122] P Pajardi and A Paluchowski, *Manuale di Diritto Fallimentare* (7th edn, Giuffrè 2008) 463; L Guglielmucci, *Diritto Fallimentare* (8th edn, Giappichelli 2017) 130. These interpretations have not been tested in practice, and the author of this paper questions their legitimacy, as they go quite far beyond the prohibition dictated by the law.
[123] Supreme Court (*C. Cass.*), 15 January 2013, no. 787.

the approval of a debtor's creditors' committee.[124] If a contract is assumed or continued, an appointed *curatore* has no power to unilaterally alter any of the terms and conditions in it or to change their mind at a later stage.[125]

Creditors only have a right to petition a court to ask a *curatore* to reach a final decision on whether to continue such contracts. The court will give the *curatore* up to 60 days to decide. If the *curatore* does not state otherwise, the contract is automatically terminated after the deadline is passed.[126]

If an executory contract is continued during a liquidation procedure, any claims arising after the decision to give effect to that contract are considered to be expenses of the procedure. Consequently, these claims will be paid in full before other creditors are paid.[127] If an executory contract is terminated, a creditor can claim for any unpaid supply in the procedure, generally as an unsecured creditor (unless their claim was secured or subject to any statutory provision altering the status of their claim). A counter-party does not have any right to be compensated for damages arising from the early termination of an executory contract to which they are party.[128]

If a counter-party petitions a court to terminate a contract *before* the filing of a liquidation petition, the termination procedure will be unaffected by the relevant debtor's subsequent entry into liquidation. Any judgment issued at the end of such a procedure is valid and enforceable against a debtor's estate.[129] If a proceeding results in an award for damages against a debtor, the award will also be effective against an insolvent estate.[130]

4.1.2 The Special Rules

Over the years, the legislator has introduced several special rules. These apply mainly to executory contracts affected by the liquidation of one of the parties. Some of these rules are

[124] Supreme Court (*C. Cass.*), 15 June 2018, no. 15792. This qualification is problematic as a counter-party has no notice of a decision of a creditors' committee, and they may be disadvantaged for believing in good faith that a contract has been continued when it has not been.
[125] Supreme Court (*C. Cass.*), 2 December 2011, no. 25876.
[126] art. 172(2), C.C.I.I.
[127] art. 172(3), C.C.I.I. This represents one of the novel aspects of the Code, as the previous law did not distinguish between claims arising before or after the commencement of the procedure – meaning that they all had to be paid in full. For a favourable comment on the introduction of such provision, see (among others): GB Nardecchia, *Il Nuovo Codice della Crisi d'Impresa e dell'Insolvenza: Disciplina, Novità, Problemi Applicativi* (Neldiritto Ed. 2019) 107.
[128] art. 172(4), C.C.I.I. The questionable reason used to justify this exclusion is that liquidation is not *in itself* a source of liability: P Pajardi and A Paluchowski, *Manuale di Diritto Fallimentare* (7th edn, Giuffrè 2008) 461.
[129] art. 172(5), C.C.I.I. This rule was first introduced in 2006. To be enforceable against third parties, such a petition needs to be registered (*trascritta*) before the commencement of the insolvency procedure: Supreme Court (*C. Cass.*), 25 September 2017, no. 22280.
[130] E Staunovo Polacco, 'Sul Rapporto tra Verifica del Passivo e Giudizi Pendenti su Domande Pregiudiziali all'Accertamento dei Crediti' (*Ilcaso.it*, 31 January 2017) 9 <https://blog.ilcaso.it/news_562/31-01-17/Sul_rapporto_tra_verifica_del_passivo_e_giudizi_pendenti_su_domande_pregiudiziali_all-accertamento_dei_crediti> accessed 1 May 2022.

included in separate laws,[131] such as the rules on the treatment of public procurement contracts.[132] However, the majority of these rules are included in the Code.

The most significant rules concern real estate properties yet to be built, finance leasing contracts, sale with retention of title clauses, contracts with continuous periodic performance, business lease agreements, property lease agreements, procurement contracts, insurance contracts, and stock market contracts.

The majority of these rules are geared towards protecting the party that is allegedly the most vulnerable in the transaction. For instance, a *curatore* cannot withdraw from a preliminary contract for real estate properties if a buyer intends to use the relevant building as their main residence for themselves or a close relative or as the main seat of their enterprise.[133]

It is interesting to note that, where the legislator believes that both a debtor and a creditor are sufficiently protected and unlikely to suffer any adverse consequence from the termination of an executory contract, the initiative is left to the parties themselves. This is, for example, the case for contracts to build a property. As the law necessitates that these contracts must be guaranteed by a third party, the signatories are free to terminate (and, for terminating creditors, get their deposits back) or perform them.[134] The initiative is also left to contracting parties when it appears that the personal qualities of one of them were an essential element for entering into that contract. In other words, the law does not force creditors party to contracts of a personal nature to accept performance from a debtor that is essentially different from the party with whom they originally contracted[135] (although it is open to debate whether the appointment of a *curatore* always determines a change in the nature of a debtor). This broad exception has been criticised by some commentators, who observe that parties may qualify a contract as personal in nature and include an *ipso facto* clause in such contracts, thereby sidestepping the general discipline applicable to executory contracts in such procedures.[136]

Many of the rules in the Code are nothing more than common sense rules. However, these rules are needed because the parties cannot agree on a different set of rules amongst themselves (given the general statutory prohibition to enforce *ipso facto* clauses). As a result, the law dictates that if a leased good is returned, a debtor has the right to receive any money exceeding the amount originally owed to the lessor.[137] Equally, if a good subject to a retention of title clause is returned to the seller and owner, a debtor has a right to receive back the instalments paid for the good (except for amounts that are considered to be fair compensation for its use).[138] Finally, if a *curatore* decides to uphold the validity of an executory contract, any supplies of goods and services that occurred after the insolvency petition need to be paid in full, and the claims stemming from them are treated as an expense of the procedure.[139]

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[131] See, among others: R Vigo, *I Contratti Pendenti non Disciplinati nella Legge Fallimentare* (Giuffrè 1990). Among these rules, see art. 2288 Civil Code, which outlines the rules applicable in case one of the shareholders of a limited company becomes insolvent, and the rules on procurement contracts included in legislative decree 50/2016. Courts have also stated that recognising damages for the unilateral termination of these contracts would be in breach of the principle of *par condicio creditorum* (Supreme Court (*C. Cass.*), 6 February 2004, no. 2261).
[132] art. 172(7), C.C.I.I.
[133] art. 172(3), C.C.I.I.
[134] art. 174, C.C.I.I.
[135] art. 175, C.C.I.I.
[136] G Bevivino, *Le "Autonomie Private" nel Nuovo Diritto dell'Insolvenza* (Pacini Giuridica 2022) 134-137.
[137] art. 177, C.C.I.I.
[138] art. 178, C.C.I.I.
[139] art. 179, C.C.I.I.

The problem is that each of these provisions is characterised by a unique rationale. There have been cases of contracts that are similar to those subject to the special rules but were not clearly covered by any specific provisions. Whilst courts have given no clear guidance on whether the general or special rules should apply to these contracts, commentators have argued for a broad interpretation of the special rules so that they apply to them.[140] Furthermore, some commentators argue that the general framework described in the previous sub-section is nothing more than a "residual" framework as the majority of cases will fall within one of the (broadly construed) exceptions mentioned in the law.[141] This debate clearly sheds light on the risks surrounding the use of an overly-detailed discipline of such contracts.

4.1.3 Assessment of the Discipline of Executory Contracts

Italian law has fully embraced a debtor-friendly, communitarian policy in pre-insolvency composition and liquidation procedures, whilst it follows the proceduralist tenets in all other situations. This has resulted in the creation of distorted incentives for debtors to file for those procedures that give them a general power to abandon burdensome contracts whilst retaining those that are beneficial to them. The Italian framework includes a series of provisions designed to protect contractual parties that are in more vulnerable or less favourable bargaining positions. Little or no space is given to the interests of a stronger contractual counter-party or the interests of other stakeholders affected by such a decision.

The discipline of executory contracts in the C.C.I.I. clearly conflicts with the revised proceduralist tenets underpinning this research. The law has been written under the assumption that the legislator knows the best interests of the parties. The detailed list of exceptions to the general rules and the extensive discretionary powers granted to the courts suggest that such faith in all-encompassing codification is misplaced. Once again, it shows how challenging it is to achieve communitarian purposes in insolvency law.[142]

There are some fragments of proceduralism left in the law. The fact that statutory provisions do not affect arbitration clauses is a clear example of such a fragment. Other praiseworthy elements include the broad supervisory powers granted to the courts and to the creditors' committees to ensure that the decisions taken by debtors and the *curatori* are truly in the best interest of the parties that would be affected by them. Another praiseworthy element of Italian law is its attempt to adopt a consistent approach "across the board", thus preventing sophisticated players from agreeing to a different set of rules applicable only to financial or insurance contracts.

Despite these positive elements, the overall assessment of the provisions included in the old and the new Code – which has not introduced significant amendments in the area – is quite sombre and negative. Vulnerable parties are not actually protected by the statutory provisions because the rules deal with creditors collectively as a class, rather than separating them into separate classes based on their individual resilience to a debtor's failure. The framework does not attempt to protect firm-specific investments and completely disregards party autonomy and freedom of

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[140] L Guglielmucci, *Diritto Fallimentare* (8th edn, Giappichelli 2017) 117; G Tarzia, 'Gli Effetti del Fallimento sui Rapporti Pendenti dopo la Riforma ed il Decreto Correttivo', (2007) Fall. 1385, 1390.

[141] G De Nova, *Arbitrato, Contratto, Danno*, (Giappichelli Ed. 2019) 231.

[142] E Warren, 'Bankruptcy Policy' (Summer 1987) 54(3) U. Chi. L. Rev. 775, 813: 'I readily admit that I do not offer a single rule that will resolve all disputes. Instead, I call attention to the difficult distributional issues in bankruptcy, and I identify factors that influence how those distributional issues are resolved'.

contract in pre-insolvency composition and liquidation procedures.[143] This may give rise to significant incentives for debtors to use insolvency provisions in an abusive manner or, at the very least, strike hard bargains with their creditors.

4.2 Termination Clauses in England and Wales

The author has already comprehensively analysed the treatment of termination clauses under English law.[144] This paper summarises the findings of the chapter mentioned in the footnote whilst highlighting the extent to which the English legal system complies with the revised proceduralist theoretical framework advocated in this paper.

Currently, the treatment of executory contracts in insolvency is regulated by ss.233-233B IA 1986.

The treatment of these clauses has changed significantly since the introduction of s.233 IA 1986. In the subsequent changes to the discipline, the legislator opted not to provide a comprehensive overhaul of the existing provisions. This is despite shifting the approach to the treatment of these clauses. The current discipline is fragmented, and special rules apply to:

- essential contracts for the supply of gas, water, electricity, and communication services in selected insolvency procedures (administrations, administrative receiverships, CVAs, and liquidations);
- additional rules for contracts for "essential supplies" in administrations and CVAs;
- remaining contracts for the supply of goods and services in all insolvency and restructuring procedures (except for Pt 26 schemes).

4.2.1 Contracts for the Supply of Essential Services

Contracts for the supply of gas, water, electricity, and communication services are considered "essential" under the law and are regulated by **s.233 IA 1986**. This provision introduces special rules applicable to these contracts in instances where a debtor files to be subject to administrative receivership, CVA, administration or liquidation. With the exception of CVAs and some types of administrations, these procedures are liquidation-oriented.

As a general rule, the commencement of one of these procedures does not automatically invalidate any *ipso facto* clause included in an executory contract. On the contrary, such clauses are in principle enforceable unless and until the office holder requests the continuation of these contracts. However, even in instances when a supplier is allowed to terminate existing contracts, the supply of gas and electricity to a debtor's premises are ensured as contracts for gas and electricity cannot be terminated due to provisions contained in the Gas Act 1986 and the Electricity Act 1989 respectively.[145]

This approach is very much in line with the revised proceduralist tenets advocated by this article. It may be challenged that this approach falls short of considering the interests of firm-specific investors and vulnerable players. However, the law has introduced some qualifications to this

[143] Despite its prominent recognition in the Civil Code, art. 1372(1): '*Il contratto ha forza di legge tra le parti*' (the contract has the force of law between the signatory parties).
[144] E Vaccari, 'Executory Contracts in Insolvency: the English Perspective' in J Chuah and E Vaccari (eds), *Executory Contracts in Insolvency Law: A Global Guide* (2nd edn, Edward Elgar Publishing 2022).
[145] As observed in *Laverty v British Gas Trading Ltd* [2014] EWHC 2721 (Ch), which dealt with the treatment of the charges for these deemed contracts in the insolvency procedure.

rule. Pursuant to s.233(2) IA 1986, if an office holder was to request the continuation of such contracts, the supplier:

> '(a) may make it a condition of the giving of the supply that the office-holder personally guarantees the payment of any charges in respect of the supply, but
>
> (b) shall not make it a condition of the giving of the supply, or do anything that has the effect of making it a condition of the giving of the supply, that any outstanding charges in respect of a supply given to the company before the effective date are paid'.[146]

It is argued that this approach strikes a proper balance amongst the conflicting interests of a debtor's stakeholders involved in these insolvency procedures, even if a supplier has no incentive to make firm-specific investments in the relevant debtor. This is not a big issue as the majority of transactions associated with contracts for essential supplies involve parties that want to reduce their vulnerability rather than make firm-specific investments. In any case, firm-specific investors are likely to be considered post-petition suppliers. As their supplies will be considered procedure expenses, they are likely to be paid in priority to other similarly-ranking creditors (who did not make any firm-specific investment).

In these scenarios, creditors will generally try to terminate executory contracts with debtors, who are more likely to be the vulnerable parties in these transactions. Accordingly, the law provides adequate protection to the usually vulnerable debtors by giving them the right to request the continuation of a contract according to its original terms.

The legislator also considered the position of suppliers by introducing a statutory right to request personal guarantees from office holders for the provision of supplies post-insolvency. The request for guarantees is usually appropriate to protect the suppliers should they be vulnerable to a debtor's failure to pay for additional supplies. The only issue in such an approach is the absence of a closing provision that considers the case that the continued supply will cause undue hardship to a supplier. This is not a remote possibility; this is evident from the fact that the energy market in the U.K. has been marred by numerous failures of energy suppliers following the rise in energy costs.[147] In any case, English courts have consistently authorised termination of such contracts when they were satisfied that continuation would cause undue hardship to the relevant supplier.[148] The legislator may not have wanted to include express provisions in the law to deal with undue hardship because such instances were covered under case law.

It could be argued that the scope of the provision mentioned above was too narrow with reference to debtors entering into rescue-oriented or liquidation procedures that required the

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[146] This was possible before the changes introduced by s.97 Insolvency Act 1985 (now s.233 IA 1986). See, among others: *Wellworth Cash & Carry (North Shields) Ltd v Northeastern Electricity Board* [1986] BCC 99, holding that the electricity company may make a condition of further supply that all arrears were paid in full, even if the company's business depended on the continued supply of electricity, the liquidator concluded that the continuation of the business was in the best interest of the creditors, and even though such order would result in priority for the electricity board contrary to the *pari passu* principle.

[147] R Moore, 'Energy Suppliers that Have Gone Bust' *Company Rescue* (22 February 2022) <https://www.companyrescue.co.uk/guides-knowledge/news/energy-suppliers-that-have-gone-bust-4704/> accessed 1 May 2022.

[148] For the meaning of "undue hardship", see Lord Denning MR's statement in *Liberian Shipping Corporation v A. King and Sons Ltd* [1967] 2 QB 86, 98G: '"undue" … simply means excessive. It means greater hardship than the circumstances warrant. Even though a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault'. This interpretation was approved in a recent insolvency case: *Kazakhstan Kagazy Plc v Zhunus* [2021] EWHC 3462 (Comm).

continuation of a company's activity for the purpose of maximising returns to its creditors. Take the example of a debtor that requires a constant supply of raw materials, such as aluminium, for the production of their goods. The supply of these raw materials would not be covered by the provision in s.233 IA 1986.

4.2.2 Contracts for the Supply of Essential Services After 2015

The legislator could have extended the scope of the provision to other restructuring and insolvency procedures and to supplies qualified as essential by a debtor, subject to the supervision of the court.[149] Instead, the legislator opted to introduce an entirely separate regime applicable to all contracts for the supply of "essential" goods and services entered into on or after 1 October 2015. This regime is now included in **s.233A IA 1986**.

The first issue with this new provision is that the legislator limited its scope to the same contracts covered by s.233 IA 1986.[150] This solution sits at odds with the recommendation in the Cork Report, which observed that 'the situation [that should be covered by the law] is not confined to public utilities. It may arise whenever there is an outstanding account with a private supplier'.[151] At the same time, it expanded the scope of the concept of *ipso facto* clauses in executory contracts to include not only those that terminated any supply but also those that allowed for "any other thing" to take place.[152] As evidenced elsewhere, this concept is too broad as it 'includes exercising any other contractual rights triggered by or exercisable upon the commencement of an insolvency procedure'.[153]

In addition, s.233A 1986 reversed the approach to the treatment of such contracts by introducing a general ban on the enforceability of termination clauses in the event that a debtor enters into a potentially rescue-oriented insolvency procedure (administration or a CVA). This "communitarian" approach to the treatment of termination clauses is qualified in different ways. First, it does not apply if the termination is caused by the commencement of any other procedure or by events that occurred after the commencement of such a procedure.[154] Second, it allows suppliers to terminate the contracts upon authorisation of an office holder, a court (in case of hardship), or if the post-insolvency supply went unpaid for more than 28 days after the date the payment was due.[155] Third, it allows suppliers to terminate contracts if a debtor's office holders do not provide personal guarantees within 14 days of a request being made.

Such an approach is inherently flawed and incompatible with the theoretical underpinnings of this paper. There is no special consideration for stakeholders, who make firm-specific investments. Additionally, whilst it is not doubted that debtors are adequately protected, the same cannot be said for vulnerable parties, regardless of whether they are debtors or creditors.

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[149] Such a solution was first suggested in the 2016 consultation on the reforms to the English corporate insolvency framework: The Insolvency Service, *A Review of the Corporate Insolvency Framework. A Consultation on Options for Reform* (May 2016) chapter 8 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/525523/A_Review_of_the_Corporate_Insolvency_Framework.pdf> accessed 1 May 2022.

[150] s.233A(7), IA 1986.

[151] Cork Report, Ch. 33, para 1453.

[152] s.233A(2), IA 1986.

[153] L Hotton and J Norris, 'UK Corporate Insolvency and Governance Act: Effects on *ipso facto* Clauses' (2020) 35(8) B.J.I.B. & F.L. 550, 552.

[154] s.233A(2), IA 1986.

[155] s.233A(4), IA 1986.

Additionally, such protection extends to cases where debtors are not vulnerable, and there is no principled justification for such a benevolent approach towards a debtor.

Where a supplier is vulnerable, their main source of protection stems from their ability to request additional personal guarantees from a debtor's office holders. However, the overarching obligation to continue supplying a good or service subject to court-based remedies in case of hardship shows a lack of consideration for the potential vulnerability of suppliers. The possibility of terminating an obligation to supply if a debtor fails to provide guarantees or to pay in a timely manner is not an effective remedy for an already vulnerable party. There is no definition of hardship, and suppliers will have to demonstrate that their protection outweighs the general interests of a debtor's creditors. Finally, it is not clear why protection is limited to certain insolvency procedures (administrations and CVAs), and no attempts are made to link the *ipso facto* regime to the achievement of certain goals for the benefit of a debtor's creditors collectively.

4.2.3 Contracts for the Supply of Goods and Services Today

Despite these concerns, CIGA 2020 – which introduced **s.233B to IA 1986** – further promoted communitarian views in relation to the treatment of these contracts.[156] This provision applies to almost any type of insolvency and rescue procedure, with the exception of Pt 26 schemes.

The revised statutory scope is problematic in itself. There is no attempt to link the ban on *ipso facto* clauses to the achievement of a special goal through a procedure. If trading is needed to increase a debtor's value and to grant higher returns to its creditors (as in the trading liquidations of *Thomas Cook* and *British Steel*, for instance) in any insolvency or rescue procedure, then the ban could be justified. However, a blanket provision applicable to most insolvency and rescue procedures that is not linked to achieving a specific goal falls short of being justified.

The new provision significantly expands the general ban on the termination of supplies of goods and services. In fact, the ban on termination clauses now applies retrospectively and covers all types of supplies of goods and services, not simply essential ones. Additionally, the new law does not allow suppliers to terminate contracts:

- for breaches that occurred after the opening of a "relevant insolvency procedure" or to ask for personal guarantees from an office holder (even if post-petition supplies rank higher than any remuneration owed to them);
- if the supplies went unpaid for 28 or more days after the payment was due;
- if the termination is based on events that occurred *before* the commencement of the relevant insolvency procedure, but the supplier did not trigger termination before the start of an insolvency period.[157]

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[156] For an overview, see (among others): L Hotton and J Norris, 'UK Corporate Insolvency and Governance Act: Effects on *ipso facto* Clauses' (2020) 35(8) B.J.I.B. & F.L. 550; N Cooper, 'Termination Rights in the Event of Insolvency: Where Are We now with *ipso facto* Clauses? Are They Still a Potent Weapon in a Creditor's Armoury?' (2021) 18(3) Int. C.R. 190. Against the need for such changes, see (among others): F Toube, 'A Brave New World? Should the UK Ban *ipso facto* Clauses in Non-executory Contracts?' (2018) 31(3) Insolv. Int. 78 (arguing that a general ban would sit at odds with the established principles of anti-deprivation, *pari passu* treatment of creditors, and freedom of contract. These principles underpin the English corporate insolvency law framework).
[157] s.233B(4), IA 1986.

Clearly, this new law will affect professional practice, as well as the drafting of these contracts.[158] It also has an impact on the choice of English law as the governing law of commercial contracts. In the past, English courts have held that these provisions apply extra-territorially.[159] However, contracting parties usually choose English law to protect their autonomy and freedom in determining the content of their contracts. Therefore, this may push some contracting parties to not choose English law as the governing law of their contracts.

Coincidently, it is to be acknowledged that the prohibition on relying on *ipso facto* clauses excludes several types of suppliers and contracts (e.g., contracts for the supply of goods or services from banks, insurers, and financial providers, IP contracts, and contracts for the lease of land),[160] largely mirroring the exclusions under the U.S. Bankruptcy Code. Up until 30 June 2021,[161] as part of some special measures introduced to deal with the harshest effect of the COVID-19 pandemic, small suppliers[162] were also exempt from this regime, meaning that they could rely on *ipso facto* clauses that did not fall within the scope of ss.233-233A IA 1986. More worryingly, the law does not cover a series of contracts that achieve the same goals as executory long-term supply contracts but are structured on an *ad hoc* basis by reason of the nature of the goods or services supplied or to give more flexibility to the parties involved in the contract.

4.2.4 Assessing the Discipline of Executory Contracts

This analysis shows that, overall, the radical deviation from traditional proceduralist rules on the treatment of these clauses since 2015 is unwarranted. The rules in this area are not justified by the vulnerable position of a beneficiary of the protection and do not protect those who may want to make firm-specific investments in a debtor. Whilst they may protect vulnerable stakeholders, protection largely stems from the operation of the law rather than the outcome of a principled policy choice. Additionally, the disparate treatment of contracts that produce similar effects to executory ones is not justified or justifiable. To conclude, neither s.233A nor s.233B comply with the theoretical framework advocated by this paper.

4.3 Concluding Observations on Termination Clauses

Many commentators have welcomed the more interventionist approaches of Italy and (more recently) the U.K. and other Governments around the world to the treatment of *ipso facto*

[158] Among others, see: J Porteous and M Padian, 'The impact of the Corporate Insolvency and Governance Act 2020 on Drafting Loan Documentation and Practice' (2021) May F. & C.L. 4.
[159] *Official Receiver v Sahaviriya Steel Industries UK Ltd* [2015] EWHC 2877 (Ch). Whether foreign courts will enforce such an order when a supplier is a foreign entity is another matter: W Willson and P Fradley, '*Ipso Facto* Clauses: The International Dimension' (2021) 36(2) B.J.I.B. & F.L. 103, 104.
[160] Pt 2 (paras 3-10) and Pts 3-4, Sch. 4ZZA IA 1986. For an outline, see (among others): P Wood, 'Corporate Insolvency and Governance Act 2020 – Freezes on Contract Terminations' (2020) 5 C.R. & I. 167, 167-168; A Goldthorp and N Grandage, 'The Impact of the Corporate Insolvency and Governance Act 2020 on Credit Insurers and Suppliers' (2021) 36(7) B.J.I.B. & F.L. 508.
[161] Originally, this temporary ban should have lasted until 30 September 2020, but it was later extended to the end of June 2021 by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2021 (SI 2021/375).
[162] To be "small", a supplier has to meet at least two of the following criterion: (a) employ less than 50 people, (b) have a balance sheet with assets worth up to £5.1 million, (c) have a turnover of up to £10.2 million.

clauses in insolvency.[163] This paper does not disagree with introducing special rules applicable to executory contracts with *ipso facto* clauses. It just observes that the current approach implemented in Italy and England is fundamentally flawed and unprincipled, as it does not attempt to strike the right balance between the parties involved in these disputes.

The Italian and U.K. legislators chose to prioritise the interests of debtors in transactions negotiated at arm's length by parties with often similar bargaining powers. As a result, debtors are given an unwarranted right to cherry-pick those contracts that are in their best interest and not in the best interest of a procedure as a whole. Little concern is given to the position of the other contracting parties, including vulnerable players and firm-specific investors.

A revised proceduralist framework would apply the same rules to all insolvency procedures. The exclusion of Pt 26 schemes when not used by insolvent debtors may be warranted. However, the exclusion of certified reorganisation plans (*piani attestati di risanamento*) and debt restructuring agreements (*accordi di ristrutturazione dei debiti*), as well as Pt 26 schemes involving distressed debtors, does not appear to be sound.

In principle, a revised proceduralist framework would uphold any bargains negotiated by two parties. However, it would include mechanisms to deviate from such bargains when the effects of upholding executory contracts are incompatible with achieving fair outcomes that protect vulnerable players and firm-specific investors.

Instead of a blanket prohibition to enforce *ipso facto* clauses, it is suggested that legislators could opt for a limited suspension of such clauses.[164] However, such suspensions should be limited to a period not exceeding 14 days (subject to a court extension). Within that period, a debtor and their legal representatives should decide whether to deviate from any contractual provisions. A deviation can only be warranted in very limited circumstances, such as when it is "essential" to achieve the purpose of a procedure chosen by a debtor or protect vulnerable players and firm-specific investors. These requirements should be interpreted in a restrictive way, and the petitioner should prove that alternative remedies are not available or equally effective. Non-deviation from contractual provisions may result in the termination of a contract if that contract includes a termination clause.

A debtor's decision should be served on all interested parties. Any request to deviate from contractual provisions should be subject to approval from a competent court or (preferably) an independent professional body. Such a body should grant a debtor's request if it appears to be fair and in the best interests of vulnerable parties and firm-specific investors, as well as if an affected creditor is granted sufficient protection from unfair harm.[165] Such a framework should ensure that appeals to these bodies do not result in delaying or speculative tactics. Courts should

[163] See, among others: S Menon et al., '*Ipso facto* Protection: as Dead as the Language and Rightfully So?' (2019) 34(6) B.J.I.B. & F.L. 370; P Wood, 'Corporate Insolvency and Governance Act 2020 – Freezes on Contract Terminations' (2020) 5 C.R. & I. 167, 168-169.

[164] This is in line with the general power granted by Italian law to unilaterally suspend the performance of a contract if a counter-party's financial condition has worsened significantly and there is a strong likelihood they will not be able to perform their contractual obligation or obligations: see art. 1461 Italian Civil Code. Rather than on equitable reasons (as argued by F Vassalli, *Diritto Fallimentare* (Giappichelli Ed. 1999) 153), the suspension is based on the enforcement of general rules of contract (E Gabrielli, *I Contratti in Generale* (Utet Giuridica 2006) 34; B Meoli, *Le Vicende del Contratto nella Crisi d'Impresa* (Giappichelli Ed. 2013) 126.

[165] Currently, Italian courts refrain from looking at the merit of the dispute – they just look at whether the proposed termination or continuation is coherent and functional to achieve the goals of the procedure: Tribunal (Udine) 25 September 2013; Tribunal (Cuneo), 14 November 2013; Tribunal (Rovigo), 6 March 2014.

be given the power to issue fines for contempt of court or procedure when petitions are not based on reasonable grounds.

If debtors decide to deviate from agreed contracts (e.g., by demanding their early termination) or clauses (e.g., by demanding that an *ipso facto* clause is not enforced), they should quantify the damage suffered by their counter-party. A petitioning body will award damages in the measure they think fit. Such an award could only be given preferential status in exceptional circumstances (e.g., should a different approach cause unfair harm to a vulnerable supplier).[166]

Such a decision should be subject to an appeal on the limited grounds of unfair prejudice or material irregularity. Unfair prejudice and material irregularity are the grounds for appealing a CVA.[167] They have been advocated as the proper grounds to challenge any decisions in CVAs for their ability to obtain fair outcomes and protect vulnerable players and firm-specific investors without deviating from a revised proceduralist approach. For instance, unfair prejudice is not necessarily evident where sub-groups of creditors are treated differently,[168] thereby allowing for specific creditors, vulnerable parties, and firm-specific investors to receive a tailored treatment. Courts have clarified that there is no unfair prejudice if a reasonable and honest person would have acted in the same manner as a respondent.[169] Material irregularity is considered a last-resort remedy. It only comes into consideration in cases where there would have been a material difference in the outcome of the case had the correct information been supplied.[170] This is the case when the decision is influenced by one of the parties behaving fraudulently.[171]

No special rules should be introduced to extend the duration of existing contracts or force a supplier of essential services to provide goods and services. Contract extensions should be negotiated by the parties to a contract. If they cannot be negotiated, it is to be accepted that a debtor may be liquidated. If a debtor has a viable business, it is unlikely that no supplier will provide essential services, especially if a struggling debtor and its representatives give sufficient guarantees for their payment.

Equally, a revised proceduralist framework would not introduce specific rules applicable to specific contracts because these general rules are flexible enough to reach fair outcomes in all of the situations currently singled out by the Italian and English legal frameworks. As evidenced by the problems in the interpretation of the special rules introduced by the Italian legislator,[172] it is preferable to provide general rules and to allow parties to deviate from them in alignment with clear guidelines that are designed to protect vulnerable players and firm-specific investors.

Finally, a revised proceduralist framework would clarify concepts such as "hardship" and provide a range of extra-judicial remedies for vulnerable parties. More should be done to protect the interests of those suppliers who make firm-specific investments in a debtor. For this purpose,

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[166] Against, see: L Farenga, 'I Contratti Pendenti nel Concordato Preventivo alla Luce del Codice della Crisi d'Impresa e dell'Insolvenza' (2020) 2 Dir. Fall. Soc. Comm. 287, 292-293, arguing that as a breach occurs after a procedure is commenced, any damage arising from a breach should be treated as a procedure expense. This interpretation is not persuasive as the damage attains to an executory contract entered into before the commencement of a procedure. Deviations from contractual rules, when quantifying damages, should be kept to a minimum to avoid the creation of incentives to file for insolvency procedures.

[167] s.6(1)(a)-(b), IA 1986.

[168] *Lazari Properties 2 Ltd v New Look Retailers Ltd* [2021] EWHC 109.

[169] *Prudential Assurance Co. Ltd v PRG Powerhouse Ltd* [2007] EWHC 1002 (Ch).

[170] *Cadbury Schweppes Plc v Somji* [2001] 1 W.L.R. 615; *Re Trident Fashions Plc (in admin.) (No.2)* [2004] EWHC 293 (Ch); *Carraway Guildford (Nominee A) Ltd v Regis UK Ltd* [2021] EWHC 1294.

[171] *Cadbury Schweppes Plc v Somji* [2001] 1 W.L.R. 615.

[172] The reader is referred to sub-section 4.1.2 above.

the author of this paper disagrees with the assessment of the Italian Supreme Court[173] that the recognition of damages for early termination is in itself a breach of the *par condicio creditorum*. In certain cases, termination may result in such a breach. However, in the majority of cases, the recognition of damages is simply the natural outcome of the early unilateral termination of a contract. An innocent party should be given the right to claim damages against the insolvent estate as innocent parties can in England. Nevertheless, interested parties could be given a limited right to petition a court to have such damages voided on the grounds of unfair prejudice or material irregularity.

It is acknowledged that where the contractual terms that were initially agreed by two parties are deviated from, the proposed revised proceduralist framework would result in less predictable outcomes, at least until the competent bodies have developed a uniform approach to dealing with certain requests. It may also result in more litigation, although the countries considered in the study may well decide to refer these disputes to extra-judicial independent bodies of professionals. However, there is no valid argument for prioritising speed and predictability over fair outcomes in complex disputes. Additionally, it is submitted that only a marginal number of cases may end up requiring a fine balancing exercise between competing interests. In many disputes, the issues at stake are quite apparent and will not require any intervention from independent professional bodies or courts.

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[173] Supreme Court (*C. Cass.*), 6 February 2004, no. 2261.

5. Onerous Property

Debtors in insolvency and restructuring procedures may wish to disclaim not simply contracts but also property should its maintenance within the estate be deemed to constitute a liability. Many jurisdictions around the world have introduced provisions that allow debtors to disclaim such property.[174] UNCITRAL has also recognised the benefit of providing some guidance on the treatment of burdensome, no-value, and hard to realise assets.[175]

Whilst consistent with the idea of maximising value and reducing procedural costs, the recognition of a generalised re-distributive power to disclaim onerous property runs against the basic principles of contract law, as well as the proceduralist tenets on the purpose of insolvency law. If a debtor can unilaterally disclaim a real estate or other type of good and, together with the property, any obligation arising from owning or possessing it (e.g., payment of a lease or mortgage), then that debtor may unilaterally disclaim executory contracts and property.

To address these concerns, UNCITRAL suggests that, whilst such a power should be exercisable with reference to a broad range of goods, courts should be asked to approve such disclaimers. In particular, UNCITRAL observes that such a power should not be exercised when it would run against public interest, such as when environmentally dangerous or hazardous assets are "dumped" on the society at large.[176] However, no guidance is offered for cases where assets cannot be disclaimed to the state, and a debtor has no money to pay for environmental liabilities.

Some instances in which assets are disclaimed are less controversial than others. For secured contracts, when a security interest exceeds the value of a burdened asset, there might be valid reasons to relinquish the asset to a secured creditor. In the other cases where assets are disclaimed due to their maintenance costs or unsaleable nature, the debtor or office holder's actions should be subject to closer scrutiny from creditors, third parties and, ultimately, courts. This is to ensure that the decision to disclaim a good is in the best interests of all of a debtor's stakeholders.

This section analyses how the Italian and English frameworks treat onerous property in insolvency. It will illuminate what limitations are needed (if any) on the use or impact of these provisions.

5.1 Onerous Property in Italy

The Italian insolvency Code is based on the principles of universality and collectivity. This means that as soon as a debtor becomes subject to a liquidation procedure, that debtor will lose the availability (and ownership) of its pre-insolvency assets, as well as those acquired by that debtor after the commencement of the liquidation procedure.[177] The latter assets automatically become part of a debtor's insolvent estate due to the initiation of an insolvency procedure.[178] There is no need for an express declaration stating that those goods belong to a debtor's insolvent estate rather than that debtor.[179]

[174] P Omar, 'Disclaiming Onerous Property in Insolvency: A Comparative Study' (2010) 19 I.I.R. 41.
[175] UNCITRAL Legislative Guide on Insolvency Law, Pt 1 and 2, [88].
[176] Ibid.
[177] art. 142(1) and (2), C.C.I.I.
[178] Supreme Court (*C. Cass.*), 7 June 2002, no. 8274; Supreme Court (*C. Cass*), 16 February 2005, no. 3117.
[179] In the past, if a good came to existence after the commencement of an insolvency procedure, an appointed *curatore* had to "accept" it before it became part of an insolvent estate. This led some commentators to believe

Unlike English law, Italian law does not feature a comprehensive notion of "property". However, some guidance is provided by arts. 146-147 C.C.I.I., which state that some goods are not affected by liquidation procedures. These are mainly goods of a very personal nature or necessary to complete family-related obligations. Finally, some exceptions are also outlined in special laws.[180]

The provisions applicable to the treatment of onerous contracts (and goods) in insolvency are mainly included in art. 142(3) C.C.I.I. This short provision allows *curatori* to disclaim (*derelizione*) some goods (but not services) owned by debtors before the commencement of a procedure. The same power is given with regard to goods acquired during a liquidation procedure. Before a *curatore* can disclaim any assets, they must obtain the previous approval of a creditors' committee and demonstrate that the cost of acquiring or maintaining those goods is likely to exceed the money that would be received from their sale.

Similarly to the U.K., no special rules apply to the disclaimer of onerous contracts or property in other insolvency or restructuring procedures. This means that the disclaimer of onerous property is only possible in liquidation procedures.

It is interesting to note that the reformed law includes a power that was not available to liquidators under the pre-2022 law: this is the power to disclaim existing goods. Under the old version of this law, a liquidator only had the power to liquidate goods that were acquired by an insolvent estate after the commencement of a procedure. This marks a significant departure from the more limited exceptional powers recognised under the old law.

In reality, the change is less radical than it appears. Under the old Italian insolvency law, liquidators had the power to disclaim any type of goods in the process of drafting a liquidation plan. This was and still is possible when the sale of these goods is not manifestly convenient for a debtor's creditors as a whole.[181] Therefore, it seems that the inclusion of such a power in art. 142 C.C.I.I. is simply designed to allow liquidators to exercise this disclaimer right at an earlier stage, thus avoiding additional unnecessary procedural costs.[182]

A case recently decided by the Supreme Administrative Court[183] seems to suggest that liquidators cannot disclaim environmental liabilities under Italian insolvency law. In that case, the petitioner (a *curatore*) asked to be authorised to disclaim a site because a local council issued an order for the payment of clean-up costs after the commencement of the procedure. The petitioner relied on art. 42(3) of the old Italian insolvency law. That law authorised liquidators to disclaim goods acquired after the opening of a procedure, as mentioned above. It did not allow the *curatore* to disclaim goods that were held by the debtor at the time the liquidation was opened. Consequently, the Supreme Administrative Court held that the debtor was liable for the clean-up costs, and it was not relevant that they only possessed rather than owned the waste they were required to remove.

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that there was no automatism in the assumption of post-petition goods to the procedure. For an analysis of these positions, see: A Maffei Alberti, *Commentario Breve alla Legge Fallimentare* (4th edn, Giuffrè 2013) 268.

[180] For a more comprehensive list, see: R Della Santina, 'La Derelizione dei Beni nelle Procedure Concorsuali e gli Obblighi di Ripristino Ambientale' (*IlCaso.it*, 8 September 2021) [3] <https://blog.ilcaso.it/news_1143/08-09-21/La_derelizione_dei_beni_nelle_procedure_concorsuali_e_gli_obblighi_di_ripristino_ambientale> accessed 1 May 2022.

[181] art. 213(2), C.C.I.I., mirroring the analogous provision in art. 104-*ter*(8) of the old Italian insolvency law.

[182] This is the more likely reason for the change to art. 142, C.C.I.I. It follows that the legislator could have decided to not repeat this provision in art. 213(2), C.C.I.I. This repetition is unnecessary, as it simply reinstates that liquidators can exercise a power generally recognised by the law during liquidation procedures.

[183] *Consiglio di Stato*, 26 January 2021, no. 3.

In the absence of a clear decision from the courts, some commentators argue that the current law does allow liquidators to disclaim onerous property, but not the fines, clean-up costs, and environmental liabilities arising from this property.[184] In their view, the ability to disclaim would only be available in relation to future costs and environmental liabilities. However, the preferable interpretation, and the one supported by the majority of the commentators, is that the liquidator can rely on the powers granted by the law to disclaim property and any liabilities attached to it.[185] Therefore, it follows that liquidators are given wide powers to deviate from contracts negotiated by debtors before they are subject to a procedure.

5.2 Onerous Property in England and Wales

Liquidators (but not administrators)[186] in England and Wales can unilaterally (i.e., without the need for a court sanction)[187] disclaim onerous property pursuant to s.178 IA 1986.[188] Similar disclaimer rights are also granted to trustees in bankruptcy,[189] and these rights have been sanctioned by Parliament for many years.[190] As a result, compared to Italian practitioners, English office holders have made much more consistent use of these provisions, and English courts have had many more occasions to fine-tune the limits and content of these powers than their Italian counterparts.

5.2.1 "Property" that Can be Disclaimed

The notion of "property" of an insolvent estate is outlined by s.436 IA 1986.[191] It provides a broad definition[192] as it includes money, goods, things in action (i.e., intangible goods), land, and every other type of property wherever situated. It also includes obligations and every description of interest, regardless of whether it is present, future, vested, or contingent arising out of or incidental to property. As observed by Lord Wilberforce, 'property, or a right affecting property, [...] must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability'.[193]

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[184] V Giorgi, 'Rinuncia all'Acquisizione e Siti Contaminati: Derelizione dei Beni o 'Abbandono' dei Creditori?' (2019) I Dir. fall. soc. comm. 141.

[185] F Lamanna, 'Il Consiglio di Stato Considera il Curatore Sempre Tenuto a Smaltire i Rifiuti Inquinanti Prodotti dal Fallito' *IlFallimentarista.it* (23 March 2021) <https://ilfallimentarista.it/articoli/blog/il-consiglio-di-stato-considera-il-curatore-sempre-tenuto-smaltire-i-rifiuti> accessed 1 May 2022; M Fabiani and F Peres, 'La Posizione del Curatore e gli Obblighi di Ripristino Ambientale' (2021) 5 Il fall. 1; G Gabassi, 'Gli Obblighi Ambientali del Curatore Fallimentare. Note a Margine di Cons. St. 3/2021' *DirittodellaCrisi* (14 April 2021) <https://dirittodellacrisi.it/articolo/gli-obblighi-ambientali-del-curatore-fallimentare-note-a-margine-di-cons-st-3-2021> accessed 1 May 2022; L D'Orazio, 'Il Curatore Fallimentare e lo Smaltimento dei Rifiuti. Un Sospiro di Sollievo' (2018) 5 Fall. 601.

[186] s.178(2), IA 1986 and *Re P&C and R&T (Stockport) Ltd* [1991] BCC 98 (Ch). For a discussion on the evolution of the law, see: P Omar, 'Disclaiming Onerous Property in Insolvency: A Comparative Study' (2010) 19 I.I.R. 41, 42-43. The same power is also granted to trustees in bankruptcy cases: ss.315-321 IA 1986.

[187] *Firmin v Aardvark Tmc Ltd* [2013] EWHC 1774 (Ch).

[188] For an exhaustive analysis: I Fletcher, *The Law of Insolvency* (5th edn, Sweet & Maxwell 2017) 742–747.

[189] ss.315-321, IA 1986.

[190] The first right of disclaimer was given by s. 23 of the Bankruptcy Act 1869.

[191] See, among others: E Ghio and E Vaccari, *English Corporate Insolvency Law: A Primer* (Edward Elgar Publishing 2022), ch. 2.

[192] Commenting on that notion, Sir Nicolas Browne-Wilkinson V-C said: 'it is hard to think of a wider definition of property' (*Re Paramount Airways Ltd* [1990] B.C.C. 130, 148).

[193] *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, 1247G–1248A.

For instance, licences[194] and leases fall within the notion of property provided by the IA 1986.[195] A bare right of appeal does not[196] because it is not a right that can be claimed by action[197] but a right that is conferred by the operation of statute. Equally, it is not possible to disclaim personal rights.

Typically, disclaimers are issued in respect of leased property. Disclaimer is also used in relation to freehold or leasehold property, rights of actions, property licences, and shares. Environmental obligations are also often disclaimed, as licences for treating waste (among others) result in high compliance costs for the licensees.

The disclaimer of a property may entail the disclaimer of the executory contracts attached to them.[198] However, the power to disclaim may not be used when rights or liabilities have already been accrued by a debtor. It also cannot be used to disclaim the executed part of a contract or fully executed contracts.[199]

The notion of "onerous property" includes any:

- unprofitable contract (not necessarily of executory nature);
- other unsaleable or not readily saleable property; and
- property that may impose a liability to pay money or perform anonerous act on a debtor.[200]

5.2.2 Procedure to Disclaim

Whilst assets with no value may simply be abandoned, an asset may not be abandoned if an obligation to perform a specific act is attached to it, such as an obligation to maintain a leasehold property or pay rent, or where ownership places certain types of personal liability on an office holder. If disclaimer is not possible, the liquidator will have to deal with that property (and its maintenance costs) until they find a buyer or someone willing to take it for free. In certain cases, this would result in prolonging the procedure, increasing its costs, and consequently reducing the amount available for distribution to creditors. This explains the need – in certain instances – to rely on disclaimer provisions.

A liquidator may exercise their right to disclaim at any time, but the other contracting party may solicit a decision by asking for a clear determination within a 28-day period. If a liquidator does not exercise this right within the statutory period, they lose the right to terminate (i.e.,

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[194] This term is selective since licences in the proprietary context, lacking proprietary content, are not normally regarded as property for these purposes. In specialist contexts (*Manchester Airport Plc v Dutton* [2000] Q.B. 133; *Bruton v London & Quadrant Housing Trust* [2001] 1 A.C. 4-6) might be given proprietary effect and thus be amenable to disclaimer as "property". For an analysis, see: P Omar and J Buchan, 'Bucolic Dream or Arboreal Fantasy? The Willmott Saga, Insolvency Disclaimers and the Contract/Property Dichotomy' (2016) 3 Conv. 197.

[195] *Re Mineral Resources Ltd* [1999] B.C.C. 422, 428; *Re Celtic Extraction Ltd (in liq.)* [2001] Ch. 475 (CA).

[196] *Re GP Aviation Group International Ltd* [2013] EWHC 1447 (Ch).

[197] The traditional definition of thing in action was given by Channel J in *Torkington v Magee* [1902] 2 KB 437, according to whom it is an expression used to describe 'all personal rights of property which can only be claimed or enforced by action and not by taking physical possession'.

[198] P Omar, 'Disclaiming Onerous Property in Insolvency: A Comparative Study' (2010) 19 I.I.R. 41, 42. If what is disclaimed is a medium- to long-term contract and the medium used for the disclaimer is a termination clause, then, under English law, the procedure to be followed is the one described *sub* 5.2.

[199] K van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018) 128.

[200] s.178(3), IA 1986.

repudiate) a contract unilaterally by notice, thus enabling a counter-party to elect to hold a contract open for future performance.[201]

A disclaimer is issued by describing the property to be disclaimed on a statutory form, having the liquidator authenticate and date the form, and serving it on the parties with an interest in the property within 7 business days. Disclaimer is not without costs, even if it can be beneficial for the insolvent estate. Where a contract is repudiated, the non-breaching party has the right to ask for damages for non-performance. These claims rank as unsecured entitlements against the insolvent estate.[202]

Where a liquidator has disclaimed property, the rights, interests and liabilities of the insolvent debtor in relation to that property are terminated from the date of the disclaimer. The property passes to a joint owner or, alternatively, to the Crown. A disclaimer is final, meaning that if any disclaimed property turns out to be profitable at a later stage, the liquidator that has disclaimed it has no claim to that sum because they had relinquished any proprietary interest in the good.[203]

A person with an interest in property may apply to a court for an order to take possession of it. This could result in an order vesting the disclaimed property in the applicant or for the delivery of the property to the applicant.[204] Courts may make such an order where it would be just to do so for the purpose of compensating the person subject to the liability in respect of the disclaimer. The effect of an such order is considered for assessing damages under s.178(6) IA 1986. If there is no under tenant or mortgagee willing to do so, a court may vest a company's estate or interest in a piece of property in 'any person who is liable … to perform the lessee's covenants in the lease'[205] and may do so freed and discharged from all estates and encumbrances created by a company.

Disclaimer of a property does not affect the rights and liabilities of any other person or entity other than those who are party to a contract.[206] This provision came under scrutiny in *Hindcastle*,[207] where the House of Lords provided guidance on conflicting precedents.[208] On that occasion, the Court held that, should a liquidator of an assignee decide to disclaim a lease, an original tenant and their guarantor remain liable under the law. This also means that if a licensor disclaims a licence agreement, the relevant licensee will retain the right to use any intellectual property rights arising from it. In this case, a licensee is only released from their obligation to pay a licensor for their use![209]

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[201] s.178(5), IA 1986 and *Stead, Hazel & Co v Cooper* [1933] 1 KB 840.

[202] s.186, IA 1986.

[203] *Sleight v The Crown Estate Commissioners* [2018] EWHC 3489 (Ch). This decision was issued against a trustee in bankruptcy, but the same principles apply to liquidators in corporate insolvency cases.

[204] s.181, IA 1986.

[205] s.182(3), IA 1986.

[206] s.178(4)(b), IA 1986.

[207] *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] A.C. 70.

[208] These two precedents were *Hill v East & West India Dock Co* (1884) 9 App. Cas. 448, which ruled that the original tenant remained liable for rent notwithstanding the disclaimer, and *Stacey v Hill* [1901] 1 Q.B. 660, where the court reached the opposite conclusion. The fact that these two decisions were inconsistent was first identified by Sir Robert Megarry VC in *Warnford Investments Ltd v Duckworth* [1979] Ch 127. As this case did not progress to higher courts, the House of Lords had no opportunity to set the records right until much later. For an analysis of this saga, see: P Williams, 'Disclaiming Responsibility: Part 1' (2015) 19(2) L. & T. Rev. 58.

[209] JR Tumbridge et al., 'Licensing Disputes and Insolvency: Perspectives from the United States and United Kingdom' (2011) 22(4) I.C.C.L.R. 148, 151. In this case, an exclusive licensee can appeal to a court to have the property vested in them.

5.2.3 Assessing "Traditional" Disclaimers

Besides the cases where collaterals are returned to a charge holder, granting the power to disclaim onerous properties marks a significant departure from proceduralist tenets. However, under English law, such a power can only be exercised in a limited set of circumstances and by liquidators only. For instance, courts have consistently held that a liquidator cannot disclaim a contract merely because the company to which they were appointed could have made or could make a better bargain.[210]

At the same time, it is undeniable that some disclaimer rights are quite favourable to debtors. For instance, properties subject to a leasehold can be disclaimed under the conditions laid out in s.179 IA 1986. Courts held that a liquidator's ability to disclaim a lease could only be challenged if that liquidator acted with *mala fide* or the decision was perverse,[211] thereby giving liquidators significant leeway to exercise their power to disclaim a lease. Additionally, disclaimers can only be challenged *ex post* by interested or affected parties, but no preliminary authorisation from a court is needed to effect a disclaimer.

In an effort to achieve a balance between distributive and proceduralist policies, the legislator has made it so that administrators and office holders, including debtors in debtor-in-possession procedures, have no power to disclaim properties or assign leases beyond the limits imposed by a contract originally signed by those party to it.[212] It is argued that such an approach ensures distributive justice from the point of view of the creditors, who have contractually protected themselves by relying on the terms encapsulated in their contracts with a debtor. However, it has also been observed that the provisions on the termination of executory contracts under CIGA 2020 may have had the effect of allowing debtors to relieve themselves of onerous executory contracts whilst retaining those that are more profitable for them.[213] So why not extend a limited right to disclaim onerous properties to the office holders and debtors running these procedures?

5.2.4 Disclaiming Environmental Liabilities

> *«A company can go bust and disclaim its permit as onerous property and say, "We're bust! We don't need to do all of the stuff that it says in the permit!" And the Agency goes mad when that happens because it means that they end up having to manage these sites».*[214]

A particularly controversial type of disclaimer is the one that involves environmental liabilities. Disclaimers of environmental obligations move the risk of environmental clean-up or other action from a debtor's creditors to the public, thus benefiting parties that are usually not vulnerable (secured creditors).[215] The Canadian Supreme Court recently took a stance on this

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[210] *Re SSSL Realisations (2002) Ltd* [2006] EWCA Civ 7. See in particular [36]–[54] for the principled approach to disclaiming unprofitable properties.

[211] *Re Hans Place Ltd* [1992] BCC 737 (Ch); *Mahomed v Morris (No. 2)* [2001] BCC 233 (CA).

[212] For an outline of the procedure, see: A Jones, 'For the Greater Good? Directors' Duties to Manage Environmental Liabilities during Insolvency Proceedings' (2021) 34(4) Insolv. Int. 108, 114.

[213] P Wood, 'Corporate Insolvency and Governance Act 2020 – Freezes on Contract Terminations' (2020) 5 C.R. & I. 167, 168.

[214] LA Brown, 'Bad Debt and Green Issues: Managing Environmental Risks in Borrowers' Corporate Insolvencies' (2018) 20(3) Env. L. Rev. 137, 146 (abstract from an interview with an "elite" banking respondent).

[215] A Keay and P Walton, 'British Steel: Is It a Wind up?' (2019) 12(4) C.R. & I. 125.

issue and prevented the sale of an insolvent company's assets when environmental liabilities needed to be discharged. In that case, the liquidator proposed to allocate the money available for distribution to the debtor's secured creditors. The Court held that it should have been preferable to use the money to discharge the debtor's environmental liabilities.[216] Other common law countries follow the Canadian view that, where the insolvency estate has sufficient funds, these should be used in priority to meet environmental liabilities.[217] This is in contrast with English case law, which does not consider the disclaimer of environmental liabilities as an obstacle for terminating the procedure.[218]

The issue with environmental liabilities is strictly linked to the power to disclaim the contracts and properties from which they derive. Originally, the power to disclaim onerous property was interpreted restrictively where the decision to divest could have potentially negative consequences for the environment.[219] This approach has been reversed, and courts have eventually granted liquidators a rather generous right to disclaim environmental costs and waste management licences.[220]

Celtic Extraction is the seminal case in the area. The dispute revolved around whether a liquidator could disclaim a waste management licence[221] by serving a notice on the Environment Agency. Due to the broad definition of "property" provided by s.436 IA 1986, there was little doubt that a licence constitutes property. This then meant that ss.178-179 IA 1986 (which allow liquidators to disclaim property of debtors to which they are appointed) contradicted s.35(11) Environment Protection Act 1990 (EPA 1990). The latter states that a licence and the obligations arising from it remain in force until a licence is revoked or surrendered to the Agency and such a surrender is accepted pursuant to the conditions laid out in s.39 EPA 1990.

Previously, in *Environmental Agency v Stout*,[222] the High Court denied a liquidator the power to disclaim a waste management licence by relying on the construction rule that *lex specialis*

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216 *Orphan Well Association v Grant Thornton Ltd* (2019) SCC 5 (Sup Ct (Can)), as commented by T Farber, 'Insolvency and Environmental Law Collide in Canada: Supreme Court of Canada Rules in Favour of Environmental Protection over the Interests of Secured Creditors' (2019) 16(4) Int. C.R. 225.

217 *Tubbs v Futurity Investments* [1998] 1 N.Z.L.R. 471.

218 *Re Wilmott Trading Ltd* (No.1) [2000] B.C.C. 321.

219 *Re Mineral Resources Ltd* [1999] 1 All ER 746, where Neuberger LJ held that the broad scope of the powers conferred by s.178 IA 1986 could not prevail over special provisions in the law, such as s.35(11) EPA 1990.

220 *Re Celtic Extraction Ltd (in liq.)* [2001] Ch. 475 (CA) (which was effectively an appeal from *Re Mineral Resources*). For an analysis, see (among others): A Pickin, 'Getting Rid of Waste Management Licences' (1999) 12(10) Insolv. Int. 79; P De Prez and D Case, 'The Power of Disclaimer and Environmental Licences' (2000) 2(Apr) Insolv. L. 87. For first instance decisions in the same vein, see: *Re Wilmott Trading Ltd* (No.1) [2000] B.C.C. 321 (holding that a company can be dissolved even if they continue owning a waste management licence); and *Environment Agency v Hillridge Ltd* [2003] EWHC 3023 (Ch) (holding that disclaiming a waste management licence effectively results in a licensee's interest to a fund set up for remediation being disclaimed). For a Scottish disclaimer case, see: *Joint Liquidators of the Scottish Coal Co Ltd, Noters* [2013] CSOH 124 (outlining the conditions and the procedure that the joint liquidators of an open cast mining company needed to follow to abandon or disclaim company property, including water use licences). However, in Scotland, disclaimer powers are much narrower than in England due to differences in the insolvency laws (notably, there is no equivalent of s.178 IA 1986 under Scottish law). For more on this, see: *Joint Liquidators of the Scottish Coal Co Ltd, Noters* [2013] CSOH 108.

221 Such a licence is a prerequisite to operating in the wastes industry (for waste transfer stations, waste incinerators, waste treatment plants, recycling centres, scrap yards, and landfill sites) and may also be required by companies not directly involved in the wastes industry but who otherwise treat, keep or dispose of their process waste on-site.

222 *Re Mineral Resources Ltd* [1999] B.C.C. 422.

derogat legi generali.[223] The Court found that s.178 IA 1986 was a general enactment that was subject to the narrower scope of the specific enactment in s.35(11) EPA 1990. Additionally, the Court relied on public policy considerations to hold that the protection of environmental policy is a matter of paramount importance. As it is in the public's interest to maintain a healthy environment,[224] a general power to disclaim environmental liabilities would undermine the public policy of making a polluter liable for damage to the environment.

Alternatively, Neuberger J (as he then was) could have relied on the public policy argument made by the Court of Appeal in *Sargent*.[225] The Court dismissed the public policy argument in *Environmental Agency v Stout* because, in the context of a licence with potential long-term liabilities, it did not feel that it could impose such a burden on that liquidator. The liquidator in the case acted in the best interests of the parties he represented and had done nothing to make the third parties expect that the contract would be performed. However, the expectation that a contract will be performed arises from that contract itself. For the special protection afforded by the law, the public policy argument should be independent of the subjective state of the wrongdoer. Finally, the court could have relied on another general principle of construction of the law, i.e., that *lex posterior derogat legi priori*.[226]

As mentioned at the beginning of this sub-section, rather surprisingly, in the appeal of this and another similar case, the Court of Appeal held that the "polluter pays" principle[227] does not prevail over the provisions in the IA 1986. It dictated that there is no statutory or equitable rule that can force a liquidator or polluter to pay where there is no money to meet any environmental liabilities.[228] Whilst the appellate court was certainly right in stating that debtors cannot print money, this is not to say that the only other solution available to them was to grant the disclaimer. For the reasons outlined below, it is submitted that the appeal in *Celtic Extraction* was wrongly decided. At the same time, the same reasons show that the first instance decision in

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[223] See also: *R v Secretary of State, ex parte Hickey* [1995] 1 All ER 479, holding that where a general enactment covered a situation for which a specific provision was made by another enactment, the situation was to be dealt with by the specific enactment.

[224] *Re Mineral Resources Ltd* [1999] B.C.C. 422, 431 and 438.

[225] *Sargent v Commissioners of Custom & Excise* [1995] 1 WLR 821 CA).

[226] This principle was considered by the court in *Re Mineral Resources Ltd* [1999] B.C.C. 422, 432. However, it was found that the alternative construction rule was to be preferred in the instant case, as it was more in line with the persuasive authority of *Panamericana de Bienes y Servicos SA v Northern Badger Oil & Gas Ltd* (1991) 81 DLR (4th) 280, 299.

[227] Environmental Protection Act 1990, enacted to give effect to Council Directive 72/442/EEC of 15 July 1975 on Waste [1975] (OJ L 194). This principle demands that the costs of environmental remediation have priority as expenses of a liquidation if the costs relate to a property that was realised and not disclaimed by an appointed liquidator: *Joint Liquidators of Doonin Plant Ltd, Noters* [2018] CSOH 89 (whilst this is a Scottish case, the same principles would apply in an English case). For an analysis of this principle, see: A Keay and P De Prez, 'Insolvency and Environmental Principles: A Case Study in a Conflict of Public Interests' (2001) 3(2) Env. L. Rev. 90.

[228] *Re Celtic Extraction Ltd (in liq.)* [2001] Ch. 475 (CA), [39]. On this topic, see, generally: H Hill, 'Bankruptcy vs Environmental Protection: A Case Study in Normative Conflict' (1998) 11 C.J.L.J. 245; C Shelbourn, 'Waste Management and the Insolvent Company' (2000) J.P.L. 134; J Armour, 'Who Pays When Polluters Go Bust?' (2000) 11 L.Q.R. 200; A Keay and P de Prez, 'Insolvency and Environmental Principles: A Case Study in a Conflict of Public Interests' (2001) 3(2) Env. L. Rev. 90; A Keay and P de Prez, 'Should Insolvent Companies Pay? The Search for Environmental Principle' (2001) 9(1) Env. Liability 11; C Shelbourn, 'Waste Management Sites, Insolvency and Long-term Financial Provisions - The Story Continues ...' (2004) (June) J. Plan. Environ. Law 697; B Mamutse and V Fogleman, 'Improving the Treatment of Environmental Claims in Insolvency' (2013) 5 J.B.L. 486; B Mamutse, 'Environmental Liabilities in Insolvency – An Area Ripe for Reform?' (2016) 8(3) International Journal of the Law in the Built Environment 243; IL Fannon, 'Managing Waste: The Gap Between the EU Directives and Corporate Law in Member States – A Mess of Case Law Needing Clean-up' (2016) 24(6) Env. Liability 203.

Mineral Resources and the current statutory framework applicable to these types of disclaimer are far from being without problems.

5.2.5 Assessing "Environmental" Disclaimers

First, both cases have been framed as a conflict between opposing principles: the protection of the environment on the one hand and the need to ensure fair, efficient, and orderly winding-up procedures on the other.[229] Despite what has been argued in other papers,[230] this is not and should not have been the case, as environmental protection and insolvency law are not in normative collision. As the author demonstrated elsewhere,[231] conflicts like these are oftentimes more apparent than real. Adopting the normative approach to insolvency law advocated by this paper might avoid this conflict altogether.

Secondly, courts are entitled to use the discretion granted by s.112 IA 1986 to make any order as they think fit (including refusing disclaimer orders), especially when a proposed course of action would be in the public's interest.[232] In *Environmental Agency v Stout*,[233] the Court refused to exercise their discretion on public policy grounds, believing that they did not have the power to do so. However, other more recent cases[234] relied on "public interest" justifications for exercising (or refusing to exercise)[235] the discretionary powers granted to courts by s.112 IA 1986. Whether a case meets the public policy threshold is a matter to be decided by a court.

Thirdly, the parties involved in these disputes should be open to exploring alternative approaches. This may involve placing a duty of care on guarantors and parent companies for the liabilities arising from breaches of environmental regulations.[236] Still on the topic of alternative remedies, a company's shareholders could promote derivative actions[237] and claims of unfair

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[229] To be fair, the Court of Appeal held that this conflict was only apparent as it took the view that the EPA 1990 restricted the termination of a waste management licence by an act of the parties but did not prevent termination by external statutory force. It is submitted that this interpretation is untenable because s.178 IA 1986 was already in force at the time the EPA 1990 was enacted, and if the Legislator wanted to exclude the EPA 1990 from the scope of insolvency laws, it should have clearly stated its intention to do so.

[230] H Hill, 'Bankruptcy vs Environmental Protection: A Case Study in Normative Conflict' (1998) 11 C.J.L.J. 245.

[231] E Vaccari, 'The Normative and Jural Meanings of the Anti-Deprivation Principle vis-à-vis Freedom of Contract' (2022) 31(2) I.I.R. 1.

[232] In *Re Mineral Resources Ltd* [1999] B.C.C. 422, 438-439, the Court refused to exercise its discretion. However, in the more recent case of *Re Paperback Collection and Recycling Ltd* [2019] EWHC 2904 (Ch), the Court held that they could exercise their discretion not to stay criminal proceedings for environmental offences against a company in liquidation because the public interest in the prosecution of serious environmental offences outweighed the disadvantage to the company's creditors of the cost of defending the proceedings and the payment of a fine if convicted. Other cases relied on "public interest" justifications for exercising (or refusing to exercise) the discretionary powers granted to courts by s.122 IA 1986 – see, among others: *Re Bernard L Madoff Investment Securities LLC* [2009] EWHC 442 (Ch), where the discretionary powers were exercised; and *Whitehouse v Wilson* [2006] EWCA Civ 1688, where such powers were not exercised.

[233] *Re Mineral Resources Ltd* [1999] B.C.C. 422, 438-439.

[234] *Re Bernard L Madoff Investment Securities LLC* [2009] EWHC 442 (Ch); *Re Paperback Collection and Recycling Ltd* [2019] EWHC 2904 (Ch).

[235] *Whitehouse v Wilson* [2006] EWCA Civ 1688.

[236] *Lungowe v Vedanta Resources Plc* [2019] UKSC 20 and *HRH Okpabi v Royal Dutch Shell* [2021] UKSC 3, discussing the possibility that parent companies are held accountable for the environmental damages caused by their subsidiaries.

[237] ss.260 –264, CA 2006.

prejudice[238] when a company is still trading. Office holders could promote actions against delinquent directors for misfeasance or fraudulent or wrongful trading.[239]

Parties should also consider taking personal liability actions against a company's previous directors as the law includes a requirement for them to consider the impact of their company's operations on the community and the environment under s.172(d) of the CA 2006.[240] Courts have recognised that it is possible to hold directors and shareholders personally accountable 'where an offender does acts in the name of a company that (with the necessary *mens rea*) constitute a criminal offence'.[241] However, on other occasions, they relied on a strict interpretation of *Prest v Petrodel*[242] to hold that company directors, who had been convicted of consenting to or conniving to effect the company's failure to comply with the condition of an environmental permit, were not personally liable under confiscation procedures for the costs of cleaning up the company's polluted site.[243]

Finally, thanks to the changes recently introduced by the Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Act 2021 (which apply retrospectively),[244] the Secretary of State, the Department, or the official receiver is allowed to investigate the conduct of former directors of dissolved companies without it being necessary to first restore the company to the register (which was required to carry out an investigation in the past). The fact that it is no longer necessary for a dissolved company to have been subject to insolvency proceedings for the power to investigate to apply[245] should facilitate these proceedings and promote greater compliance with statutory rules from the directors.

It may also be possible to promote personal liability actions against the IP in charge of a procedure, although (as mentioned above) courts have consistently held that a liquidator's power to disclaim a lease can only be challenged if they acted with *mala fide* or their decision was perverse.[246] Additionally, the House of Lords[247] held that as directors of a limited company can only be liable for losses where they had assumed personal responsibility for the advice they provided and the plaintiffs had relied on that assumption of responsibility, IPs would not be liable

[238] ss.994 –999, CA 2006
[239] ss.212-214, IA 1986.
[240] P De Prez and D Case, 'The Power of Disclaimer and Environmental Licences' (2000) 2(Apr) Insolv. L. 87, 91-92 (which focuses mainly on director's disqualification and criminal liabilities); A Jones, 'For the Greater Good? Directors' Duties to Manage Environmental Liabilities during Insolvency Proceedings' (2021) 34(4) Insolv. Int. 108.
[241] *Jennings v CPS* [2008] Cr App R 29, at [16]; *R v Seager (Mornington Stafford)* [2009] EWCA Crim 1303 at [76].
[242] *Petrodel Resources Ltd v Prest* [2013] UKSC 34. This is the seminal authority in the UK for piercing (in case of concealment) or lifting (in case of evasion) the corporate veil.
[243] *R v Powell (Jacqueline)* [2016] EWCA Crim 1043.
[244] This is quite surprising, considering that the Government suspended the enforceability of the provisions on wrongful trading at the beginning of the Covid-19 pandemic: s.12 CIGA 2020, extended to 30 April 2021 by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020 (SI 2020/1349). Please note that for a short period between the two regulations (1 October – 25 November 2020), the wrongful trading provisions (s.214 IA 1986) were applicable.
[245] The Act is designed to tackle "phoenixism" practices. Phoenixism involves a company being dissolved and ceasing to trade without going through an expensive insolvency process to avoid costs and investigations on its directors' conduct whilst leaving some of its creditors unpaid and a new company being created and assuming the original company's business without its outstanding liabilities.
[246] *Re Hans Place Ltd* [1992] BCC 737 (Ch); *Mahomed v Morris (No. 2)* [2001] BCC 233 (CA).
[247] *Williams v Natural Life Health Foods* [1998] B.C.C. 428; *Fraser Turner Ltd v PricewaterhouseCoopers LLP* [2019] EWCA Civ 1290 (with reference to the duties of the administrators).

in civil law for advice given when directing the activities of a company unless personal responsibility had been assumed for that advice.[248]

Fourthly, it is not helpful to reach a conclusion on whether disclaimer powers should be granted by considering the implications of their exercise on the allocation of damages. The distribution of limited resources in insolvency cases is a policy decision. In all insolvency proceedings, a debtor's creditors will get a significantly lower return than originally expected. This will be particularly evident following the completion of an insolvent liquidation. This is the nature of insolvent liquidations. Arguing that environmental rules should prevail, as they did in *Re Mineral Resources*, because the 'Agency would not be able to recover for the benefit of the public a sum which it could be reasonably confident in recovering'[249] is misleading as someone has to bear a loss. It would have been much more helpful to consider if the Agency could and should bear the loss (therefore framing the debate in terms of vulnerability allocation) or whether the disclaimer or any other course of action would have had the direct effect of breaching environmental obligations.

Irrespective of the outcome of cases like the ones discussed above, and in the hope that the matter is dealt with by Parliament and the Supreme Court, it is undeniable that judges have been failed by the legislator. They have been asked to find policy solutions for poorly framed provisions without the help of clear statutory guidance. Judges cannot operate in the absence of a clear normative framework because they may fail to either identify the proper legislative purpose of existing laws or to properly use the powers bestowed on them to achieve that purpose. In *Hindcastle*,[250] it was held that the legislative purpose of s.178 IA 1986 is to facilitate the winding up of a company's affairs by freeing that company from liabilities that would otherwise impede its winding up.[251] However, disclaimer is and should be considered one of the instruments available to courts to facilitate these procedures. It should not be considered in isolation or as the only option available to the judiciary.

Studies have shown that lenders prioritise financial considerations over environmental protection and use IPs to reduce direct liability exposure to environmental obligations.[252] More worryingly, it has been observed that these disclaimer powers can be used in conjunction with administration proceedings to facilitate the sale of profitable parts of a distressed company,[253] thus giving rise to dubious rescue practices due to their potential impacts on public health and unfair competition. Sometimes, liquidation is used as a rescue mechanism, as observed in the *British Steel* case.[254] As noted elsewhere, allowing disclaimers in these circumstances results in offering 'debtors perverse incentives to use liquidation to shed clean-up obligations'.[255]

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[248] C Shelbourn, 'Waste Management and the Insolvent Company' (2000) Feb. J.P.L. 134, 140.
[249] *Re Mineral Resources Ltd* [1999] B.C.C. 422, 423.
[250] *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1996] B.C.C. 636.
[251] Ibid, 644E–F.
[252] J O'Donovan, *Lender Liability* (Sweet & Maxwell 2005) 544; LA Brown, 'Bad Debt and Green Issues: Managing Environmental Risks in Borrowers' Corporate Insolvencies' (2018) 20(3) Env. L. Rev. 137. Lenders consider environmental compliance to be a risk that should be managed in their contracts and disclaimed where possible: J Jarvis and M Fordham, *Lender Liability: Environmental Risk and Debt* (Earthscan 2001) 77.
[253] See the case of *Re UK Coal Operations Ltd* [2013] EWHC 1774 (Ch), as described by B Mamutse, 'Environmental Liabilities in Insolvency – An Area Ripe for Reform?' (2016) 8(3) International Journal of the Law in the Built Environment 243, 245.
[254] *Re British Steel* [2019] B.C.C. 974.
[255] P Omar, 'Disclaiming Onerous Property in Insolvency: A Comparative Study' (2010) 19 I.I.R. 41, 47.

5.3 Concluding Observations on Onerous Property

Some argue that disclaimers of onerous property can be justified if maintenance of the property further diminishes the pool of assets available for distribution.[256] This is because 'creditors may not be said to have bargained for such burdens or obligations and fairness principles would require exclusion of the asset from the estate, reverting to the former owner or holder of a superior interest'.[257] The author of this paper does not accept this as a valid justification for a power of disclaimer because the focus of this explanation is only on a debtor's creditors. Disclaimers should be justified in a more holistic manner.

Disclaimers of onerous property should be justified in any insolvency or restructuring procedure by the need to protect vulnerable players or prioritise the treatment of firm-specific investors. The only way to assess whether parties use disclaimer powers for that purpose is to give courts the power to sanction any such transactions. For instance, even if a disclaimer is in breach of a contract negotiated by the parties to it, it may still be approved by a court if the effect of the disclaimer is that a third party (e.g., a guarantor) assumes any liability arising from the contract to be disclaimed and it is appropriate for such a party to assume liability. Interested parties may also ask to have a property vested in them. Such requests should be approved if they are in the best interest of the procedure and if no other stakeholder objects to such a request on the grounds of unfair prejudice or material irregularity.[258]

The existence of broad-ranging disclaimer powers has resulted in courts being given the *onus* to decide policy issues, particularly in the UK. Some commentators claimed that courts may have inadvertently given the wrong guidance to debtors.[259] In reality, courts have been given no guidance and the wrong powers to deal with the disclaimer of onerous property (and related executory contracts) possessed by companies that are subject to an insolvency procedure.

A revised proceduralist framework would uphold the basic principle that the disclaimer of onerous property is not a remedy generally available to those party to a company's insolvency. Drawing from the Italian experience (even if the most recent evolution of the law seems to suggest a different approach to this matter), disclaimer should not be seen as a measure to hasten procedural administration but as a last resort remedy for dealing with a burdensome asset. Parties should be allowed to rely on readily available alternatives to disclaimers to ensure that maintenance costs and liabilities arising from non-disclaimed property will be covered. These mechanisms could include funds to cover environmental liabilities subsidized by collective levies, personal liability awards from actions against directors and shareholders, a parent company's liability in tort, and similar liabilities. They could include a lender's liability for a borrower's environmental obligations; this is especially likely if the appointed IP is found to be acting as an agent of the appointing lender.[260] They should ensure that property or a contract is not disclaimed merely because a company could have made or could make a better bargain.

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[256] P Omar and J Buchan, 'Bucolic Dream or Arboreal Fantasy? The Willmott Saga, Insolvency Disclaimers and the Contract/Property Dichotomy' (2016) 3 Conv. 197.

[257] Ibid, 197.

[258] For the reasons for opting for these grounds of appeal, the reader is referred to sub-section 4.3 of this paper.

[259] J Armour, 'Who Pays When Polluters Go Bust?' (2000) 11 L.Q.R. 200, 204; P Omar, 'Disclaiming Onerous Property in Insolvency: A Comparative Study' (2010) 19 I.I.R. 41, 47.

[260] J O'Donovan, *Lender Liability* (Sweet & Maxwell 2005) 544. As observed elsewhere (LA Brown, 'Bad Debt and Green Issues: Managing Environmental Risks in Borrowers' Corporate Insolvencies' (2018) 20(3) Env. L. Rev. 137, 138), 'as long as the lender does not attempt to control the IP during proceedings, there is very little opportunity for liability to pass by way of an agency relationship'. This is so unless mechanisms are introduced to facilitate the proof that the practitioner is acting as an apparent agent for the lender/principal. The current criteria for establishing

When disclaimer is the only or preferred option, the treatment of these assets requires compliance with dignitarian elements. Compliance with these elements results in a notice being provided to all interested parties and judicial supervision. It follows that, in a revised proceduralist framework, the specific remedy of disclaimer should be replaced by a general remedy available in all types of insolvency and restructuring procedures that combines the features of s.186 IA 1986, which gives courts the power to rescind contracts, and s.112(2) IA 1986, which gives courts the power to make any such order they consider appropriate. Together with interested parties, office holders and debtors-in-possession should be allowed to apply to a competent court to seek guidance on the treatment of onerous property. Courts should be free to assess the best option in the given circumstances, meaning that no remedy should be pre-emptively preferred or excluded by the law. The law should only spell out the criteria that courts should consider in reaching a decision in a given case.

Some types of disclaimer should be subject to "light touch" supervision, such as when their effect is to transfer collateral to a security holder. In these cases, contracts are upheld, and the court's intervention should be limited to ensure that vulnerable players and firm-specific investors are not unduly harmed (e.g., in cases where a transferred asset is needed to rescue the recipient company). Normally, courts should be given a general power to dismiss a petition to disclaim an onerous contract, allocate liabilities arising from such a contract to a wider range of players (including parent companies), issue interim orders, vest property in interested parties, allow a disclaimer and award damages (even with preferential status) when this appears the only viable solution in the given circumstances, or issue any other order they consider apt.

Regarding damage awards, it should be noted that granting a general remedy to non-breaching parties for damages for non-performance is not an effective solution to the problems associated with the treatment of onerous property.[261] This is because unsecured entitlements have very slim chances of being paid in any type of insolvency or restructuring procedure. Even granting preferential treatment to such claims would not be justifiable as it would represent a non-warranted and unprincipled departure from the proceduralist tenets, which underpin the theoretical framework advocated by this paper. A preferential status should be considered only if the damaged party is a vulnerable one (which is unlikely to be the case for taxpayer-funded state agencies).[262]

Statutorily prioritising one option over alternative ones results in unprincipled and unfair outcomes that vilify the pivotal role of the principle of party autonomy and freedom of contract and do not protect vulnerable players or firm-specific investors. There is and should be no power to disclaim onerous property during insolvency procedures.

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apparent or ostensible authority are quite stringent: *Rama Corporation Ltd v Proved Tin & General Investments Ltd* [1952] 2 Q.B. 147. It is possible, however, to prove that a lender acted as principal for an IP where they heavily interfered with the conduct of an insolvency procedure: *Standard Chartered Bank v Walker* [1982] 1 W.L.R. 1410.

[261] For details on the calculation of such damages and their non-preferential status, see: *Re Park Air Services Plc* [2000] 2 A.C. 172 (HL).

[262] Against, see: *Joint Liquidators of Doonin Plant Ltd, Noters* [2018] CSOH 89, where the Court held that remediation costs were to be treated as liquidation expenses, and the liquidator was directed to apply any surplus fund to that purpose. This decision is not incompatible with *Re Celtic Extraction Ltd (in liq.)* [2001] Ch. 475 (CA), where the Court of Appeal refused to recognise preferential status to the costs of continued compliance with licences. See also: Business Law Bulletin, 'How Should an Insolvent Polluter Pay?' (2018) 157 Bus. L.B. 1; L Tainsh, 'Statutory Environmental Liabilities are Dischargeable as a Liquidation Expense' (2018) 190 S.P.E.L. 1535; and B Mamutse, 'Lessons from Scotland: Environmental Regulators' Claims as Contingent Debts or Liquidation Expenses in Insolvency Proceedings (and the Future Toppling of a Celtic giant?)' (2020) 33(2) Insolv. Int. 41.

6. Concluding Remarks

As Stephen Hawking once noted: 'a good [scientific] theory [...] satisfies two requirements: it must accurately describe a large class of observations on the basis of a model that contains only a few arbitrary elements, and it must make definite predictions about the results of future observations'.[263] However, what works for science might not necessarily work for other social sciences such as law. Past performance should not necessarily inform the evolution of the law. Despite this, the cases discussed in this paper shed some important light on the nature of the normative conflicts that occur in (some) insolvency cases.

Commentators generally agree that the current English framework is not underpinned by a prevailing theoretical framework, thus leaving wide scope to the legislator to cherry-pick policy objectives based on which objectives it believes should be upheld at the time of their implementation.[264] Similar considerations are clearly applicable to the Italian approach to corporate insolvency and restructuring.[265] Consequently, there is scope to follow Korobkin's advice that protecting the most vulnerable whilst minimizing losses to the less vulnerable requires allowing courts to deviate from established procedural rules to achieve fair outcomes.[266]

Insolvency is a zero-sum game: someone has to bear the loss stemming from a company's financial struggles (or a larger portion of it). Allocative rules in insolvency should respect the pre-insolvency entitlements and the revised proceduralist framework advocated by this paper as much as possible. When considering whether to disclaim executory contracts or onerous property, courts have the difficult task of apportioning loss,[267] and they must base their decision solely on which interest is more deserving.

Given the considerations mentioned above, a revised proceduralist framework for the **treatment of (termination clauses in) executory contracts** in insolvency should ensure a uniform treatment (general enforceability of contracts and *ipso facto* clauses) across all insolvency and restructuring procedures.

Despite this general provision, contracts and *ipso facto* clauses should be automatically suspended for a period of up to 14 days upon the commencement of a procedure (subject to an extension by a court). In this period, a debtor and its representatives can decide to do two different things. Firstly, they could uphold a contract and give effect to an *ipso facto* clause if such a clause is included in it. In this case, any interested party can appeal such a decision on the

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[263] S Hawking, *A Brief History of Time* (Bantam Books 1988) 11.

[264] A Keay and P Walton, *Insolvency Law and Practice: Corporate and Personal* (4th edn, LexisNexis 2017) 24; K Van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018) 89; G McCormack, 'Apples and Oranges? Corporate Rescue and Functional Convergence in the US and UK' (2009) 18 Int. Insolv. Rev. 109, 116.

[265] S Bonfatti, 'Rescue Culture in Italy: the Introduction of Key Incentives to Companies in Crisis to Restructure their Business and Future Perspectives' (2018) 29(3) I.C.C.L.R. 195 (arguing, however, that Italy has finally embraced a "rescue culture").

[266] DR Korobkin, 'Vulnerability, Survival, and the Problem of Small Business Bankruptcy' (1994) 23(2) Capital University L. Rev. 413, 439.

[267] Some commentators argue that, when insolvency law clashes with environmental principles, the question of how to distribute the effects of a debtor's default is not an appropriate one for judicial determination: KR Heidt, 'The Changing Paradigm of Debt' (1994) 72 Wash. U.L.Q. 1055, 1092; J Armour, 'Who Pays When Polluters Go Bust?' (2000) 116 L.Q.R. 200, 204; B Schermer, 'Response to Professor Gross: Taking the Interests of the Community into Account in Bankruptcy — a Modern-Day Tale of Belling the Cat' (1994) 72 Wash. U.L.Q. 1049, 1052; B Mamutse and V Fogleman, 'Improving the Treatment of Environmental Claims in Insolvency' (2013) 5 J.B.L. 486, 508. This paper argues that judges should be given that power – the legislator should only be tasked with providing better policy guidance.

grounds of unfair prejudice or material irregularity within 28 days of receiving notice of the decision or becoming aware of it. The alternative option is for a debtor and their legal representative to deviate from a contract or the effect it in breach of the *ipso facto* clause. In this case, due to the significant deviation from proceduralist tenets, it is suggested that a court or professional independent body shall check that the deviation is "legitimate". A deviation is legitimate only if it is "essential" to allowing the purpose of the procedure chosen by the debtor to be achieved and protecting vulnerable players and firm-specific investors. A court should also award damages to a counter-party (if any). Interested parties should be entitled to appeal such an order on the grounds of unfair prejudice or material irregularity within 28 days from a notice of the decision being issued or within 28 days of becoming aware of the decision.

It is submitted that the framework should include no special rules applicable only to certain types of contracts (e.g., financial or insurance contracts), to extend the duration of existing contracts or to force a supplier of essential services to provide them.

On the basis of the considerations mentioned above, a revised proceduralist framework for the **treatment of onerous property in insolvency** would equally provide for a uniform treatment across all insolvency and restructuring procedures.

Such a framework should not give debtors or their legal representatives a general power to disclaim onerous property or burdensome contracts. However, interested parties should be given the right to petition a court to disclaim assets owned by a debtor. Courts should be granted the power to assess the situation holistically and issue any order they consider appropriate (this order may be for damages).

It is envisaged that courts will carry out a "light-touch supervision" if the disclaimed assets are vested on secured creditors and there is no apparent damage to the interested parties. Contrarily controversial disclaimers (e.g., for environmental liabilities) should only be authorised if they are "essential" for achieving the purpose of the procedure chosen by a debtor and protect vulnerable players or firm-specific investors.

As for executory contracts, interested parties should be given the right to appeal an order on the grounds of unfair prejudice or material irregularity within 28 days of receiving a notice of the order being made or becoming aware of the order.

It is hoped that this paper has been persuasive in canvassing the limits of discretional judicial power, advocating for key principles in the process of apportioning loss, and making a strong case for revising the Italian and English insolvency and restructuring laws according to these principles.