Safeguards-in-Possession: Contestation and Control in Cross-Border Insolvency

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Drawing on the historical evolution of cross-border insolvency (CBI) and over 400 cases, this article shows that safeguards have remained central to CBI practice. Economic globalization has shifted CBI from a "distribution paradigm," centered on asset allocation, to an "operational paradigm," focused on preserving enterprise value amid complex legal regimes and competing interests. Safeguards have correspondingly evolved from passive devices into instruments of ongoing oversight, whose design and adjustment depend on actors' strategic choices. This produces the phenomenon of Safeguards-in-Possession (SIP), i.e. safeguards deployed strategically to probe the limits of global rescue. SIP's effects turn on the safeguards' attributes, functions, and intervening factors, with their trajectory determined by the actors exercising them.

Within the global rescue framework, the operational paradigm, read together with SIP theory, explains CBI practices that often appear volatile, fast-evolving, and unpredictable, while also offering a method for navigating them. By disaggregating safeguards into their functions and intervening factors, the framework calibrates safeguard assessment and supplies the institutional preconditions for SIP. The strategic interaction of actors deploying SIP generates the distinctive value of CBI under the operational paradigm's global rescue vision. Once that value is recognized, jurisdictions confronting novel problems need not resort to blunt, mistrust-driven responses. Instead, they can govern the boundaries of rescue through calibrated institutional design, thereby reshaping CBI practices. At this level, SIP operates not merely as an explanatory framework but as a method of institutional design. Thus, overlapping deployment of SIP generates temporary fragmentation in CBI practices, yet this contestation stabilizes through a cycle of disruption, reconstruction, and maintenance, ensuring both the resilience and authority of regimes founded on modified universalism.

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Table of Contents

Introduction

In recent years, cross-border insolvency (CBI) practice has witnessed the unusual coexistence of two trends: major advances in international coordination alongside pronounced conflicts over specific issues on the ground.

On the coordination front, the European Union took a significant step on March 10, 2026, by adopting a first-reading resolution on the Proposal for "the Coordination of Certain Aspects of Insolvency Law," [1] signaling deeper substantive alignment across EU insolvency regimes. Earlier, on January 20, after more than five years of negotiations, UNCITRAL Working Group V released the draft "Model Law on Applicable Law in Insolvency Proceedings" (MLAPL) for consideration.[2] This area had long been viewed as resistant to harmonization, [3] with related negotiations repeatedly stalled due to intense disagreement.[4] The MLAPL aims to address practical challenges arising from the conflict-of-law neutrality[5] embedded in the CBI model law framework[6] and touches virtually every aspect of CBI practice.[7] Coordinating applicable law rules will, without question, significantly enhance the depth and effectiveness[8] of cross-border cooperation.

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[1] See European Parliament, Legislative Resolution of 10 March 2026 on the Proposal for a Directive Harmonising Certain Aspects of Insolvency Law (2022/0408(COD), P10_TA(2026)0057).

[2] See United Nations Commission on International Trade Law (UNCITRAL), Applicable Law in Insolvency Proceedings: Draft Model Law - Note by the Secretariat, A/CN.9/WG.V/WP.207 (2026).

[3] See Reinhard Bork, *Advanced Introduction to Cross-Border Insolvency Law* (Edward Elgar 2023) 51.

[4] For example, the discussion regarding arbitration and insolvency. See, UNCITRAL, Applicable Law in Insolvency Proceedings: Note by the Secretariat, A/CN.9/WG.V/WP.179 (2022) paras 22-23; UNCITRAL, Report of Working Group V (Insolvency Law) on the Work of its Sixtieth Session, A/CN.9/1094 (2022) para 73.

[5] See Look Chan Ho, 'Conflict of Laws in Insolvency Transaction Avoidance' 20 *Singapore Academy of Law Journal* 343, *350* (2008); Neil Hannan, *Cross-Border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law* (Springer 2017) 172; Irit Mevorach, 'Applicable Law in Insolvency Proceedings and Existing UNCITRAL Texts' (International Colloquium on Applicable Law in Insolvency Proceedings, 11 December 2020).

[6] Including the 1997 UNCITRAL Model Law on Cross-Border Insolvency (MLCBI), the 2018 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ) and the 2019 UNCITRAL Model Law on Enterprise Group Insolvency (MLEGI).

[7] This difficulty helps explain why negotiations over the MLAPL have been so challenging, with states taking sharply divergent positions driven by competing interests. Notably, five of the MLAPL eleven articles deal with "exceptional rules" (with multiple options), underscoring the depth of disagreement.

[8] Including reconciling universalism and territorialism and facilitating the operationalization of the modified universalism. See, Harold S. Burman, 'Harmonization of International Bankruptcy Law: A United States Perspective' 64 *Fordham Law Review* 2543, 2550 (1996); Allan L. Gropper. 'The Curious Disappearance of Choice of Law as an Issue in Chapter 15 Cases' 9 *Brooklyn Journal of Corporate, Financial & Commercial Law* 152, 153-154 (2014).

Yet, the aspiration for global rescue in CBI frequently clashes with the defense of multiple interests, resulting in a practice that shifts unpredictably. In February 2026, a U.S. bankruptcy court held that a debtor-in-possession (DIP), acting as a trustee and exercising avoidance powers, is not constrained by arbitration agreements entered into by the debtor pre-bankruptcy.[9] Earlier, in the *Sunac* case, Hong Kong courts recognized that a build-in agency technique could *de facto* bypass the century-old Gibbs rule.[10] In 2025, a German court ruled that a U.K. SOA proceeding targeting the restructuring of only one class of creditors' debts fails to meet insolvency collectivity requirements, fueling renewed debate over the permissible scope of insolvency.[11] Since 2024, the use of third-party releases (TPRs) has developed rapidly in Hong Kong,[12] even as U.S. approaches to the same issue remain unsettled and contested.[13] These cases suggest that CBI practice is becoming increasingly volatile and difficult to govern, a stark contrast to the strides made in international coordination.

These developments raise a central question in global rescue. How far insolvency law can encompass diverse rescue tools and intervene in other legal regimes. In practice, this often hinges on safeguards, such as the public policy exception. This article addresses two challenges: conceptualizing these phenomena and offering an analytical framework, drawn from the history and practice of CBI, to navigate the complex realities of contemporary global rescues.

Building on this framework, the article traces a broader shift in CBI cooperation

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[9] See *ACJK, Inc. v Aetna Health Mgmt., LLC*, No 23-30045 (Bankr SD Ill, 23 February 2026) at 4.

[10] See *In re Sunac China Holdings Limited (2026 Sunac* case*)* [2026] HKCFI 68.

[11] See Frankfurt am Main Regional Court, Vorbehaltsurteil, Case No 2-12 O 239/24 (2025). For debates concerning the case, see Dominik Skauradszun *et al*, 'Why a Sanction Order Pursuant to Part 26A UK CA Cannot be Recognised in Germany: Part Two' in *International Corporate Rescue* (Chase Cambria 2025); Dominik Skauradszun u a, 'Zur fehlenden Anerkennungsfähigkeit eines englischen Part-26A-Restrukturierungsplans in Deutschland' 45 *Zeitschrift für Wirtschaftsrecht* 665 (2024).

[12] See *In re Yuzhou Group Holdings Company Limited (Yuzhou* case*)* [2024] HKCFI 3098; *In re Times China Holdings Ltd (Times China* case*)* [2025] HKCFI 3937; *In re Add Hero Holdings Ltd and In re China Aoyuan Group Limited (Add Hero* case*)* [2025] HKCFI 310.

[13] The debate initially focused on whether Chapter 11 plans could include non-consensual TPRs. That controversy largely came to an end when the U.S. Supreme Court barred the use of non-consensual TPRs. See *Harrington v. Purdue Pharma L.P. (Purdue Pharma* case*)*, 144 S. Ct. 2071 (2024). Some courts have observed that, after *Purdue Pharma*, the nonconsensual TPR is now *per se* unlawful. *In re Smallhold, Inc.*, 665 B.R. 704, 709 (Bankr. D. Del. 2024). The debate has since shifted to whether consent to consensual TPR may be established through an opt-out mechanism. Recent cases include, *In re Diocese of Buffalo, N.Y. (Buffalo* case*)*, 20-10322 (Bankr. W.D.N.Y. Feb. 27, 2026); *Epstein v. Container Store Group Inc (Epstein* case*)*, 25-618 (S.D. Tex. Feb. 12, 2026).

from a distribution-focused paradigm to an operational, corporate-rescue paradigm, where interest balancing is increasingly complex. Safeguards remain central, evolving from passive instruments to actively shaping outcomes. The Safeguards-in-Possession (SIP) framework developed here shows how actors can navigate, challenge, and recalibrate safeguards, whose overlapping use both fragments and reshapes practice while sustaining systemic resilience.

I. Safeguards-in-Reality: A Structural Transformation

CBI practice has long been contested between universalism and territorialism approaches. Universalism envisions a single court applying uniform rules to govern assets and liabilities globally.[14] Territorialism, by contrast, confines authority to individual jurisdictions.[15] Experience shows that universalism remains aspirational.[16] The principle of sovereign equality, combined with divergent political priorities and cultural expectations,[17] renders unilateral application of a single court or law impractical, often producing *de facto* territorialism[18] and race to the bottom.[19]

Against this backdrop, modified universalism, structured as a "general principle plus limited exceptions",[20] offers a pragmatically grounded framework. It allows concurrent proceedings while promoting maximal coordination and cooperation.[21]

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[14] UNCITRAL, Report of the Colloquium on Applicable Law in Insolvency Proceedings, A/CN.9/1060 (2021) 4.

[15] *In re Alison J. Treco & David Patrick Hamilton*, 240 F.3d 148, 153 (2d Cir. 2001); Jonathan L. Howell, 'International Insolvency Law' 42 *The International Lawyer* 113 (2008).

[16] See Louis Jacques Blom-Cooper, *Bankruptcy in Private International Law* (London 1954) 157; *McGrath & Ors v Riddell & Ors (McGrath* case*)* [2008] UKHL 21 [6][7].

[17] See Jingxia Shi, 'Cross-border Insolvency', in Rebecca Parry eds., *China's New Enterprise Bankruptcy Law: Context, Interpretation and Application* (Routledge 2016) 323.

[18] Jay Lawrence Westbrook, 'Locating the Eye of the Financial Storm' 32 *Brooklyn Journal of International Law* 1019, 1022 (2007).

[19] See Edward J. Janger, 'Universal Proceduralism' 32 *Brooklyn Journal of International Law* 819, 821, 848 (2007); Edward J. Janger, 'Virtual Territoriality' 48 *Columbia Journal of Transnational Law* 401, 407-11 (2010).

[20] Owing to its widespread acceptance in the international community, the framework may, to some degree, acquire the status of customary international law. See Irit Mevorach, 'Modified Universalism as Customary International Law' 96 *Texas Law Review* 1403 (2018).

[21] A/CN.9/1060 (2021) 4; *In re Global Brands Group Holding Limited (Global Brands* case*)* [2022] HKCFI 1789 [23].

With the ongoing evolution of CBI practice and the frequent scholarly adoption of the concept, modified universalism has emerged as a generally recognized principle[22] (at least in formulation) guiding the resolution of CBI matters.

Under this framework, coordination and cooperation entail permitting foreign proceedings to legally intervene[23] in domestic affairs. Such intervention is structured through safeguards, which facilitate cooperation while preserving essential domestic concerns. [24] Functionally, safeguards operate as "gatekeeping" mechanisms, delineating the outer bounds of cooperative commitments. Often invisible like air, they are essential, enabling cooperation even when largely unnoticed. The evolution of CBI practice, particularly the aspiration for global rescue, has fragmented actors and interests. Safeguards have therefore been brought to the fore and strategically activated, allowing actors to test and shape the contours of global rescue. This section examines the practical reasons for activating safeguards and highlights their central role and defining attributes in contemporary context, providing foundational context for the analysis that follows.

A. From Distributional to Operational Global Rescue

CBI practice can be conceptualized in three broad stages, reflecting the presence and degree of cooperation. This evolution traces a shift from distribution-driven liquidation toward rescue-oriented administration. Throughout this process, safeguards have progressively assumed a central role, shaping and delimiting the

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[22] Interestingly, a review of all preparatory materials on insolvency produced by UNCITRAL Working Group V since 1995 reveals virtually no reference to the term "modified universalism." Across more than three decades of working documents, the term appears only sporadically, and then primarily in discussions of State positions or academic debates. See UNCITRAL, Draft Legislative Guide on Insolvency Law, A/CN.9/WG.V/WP.70 (Part II) (2003) 73; A/CN.9/1060 (2021) 4-5; UNCITRAL, Report of Working Group V (Insolvency Law) on the Work of its Sixty-Fourth Session, A/CN.9/1169 (2024) para 48. The modified universalism appears primarily in common law jurisdictions, reflecting their standard for CBI cooperation. See *McGrath* case [30]; *Global Brands* case [26]; *In re FDG Electric Vehicles Limited* [2020] HKCFI 2931 [9]. Thus, its limited invocation may also result from efforts to reconcile differing legal and cultural traditions across jurisdictions.

[23] See *CCIC Finance Limited v Guangdong International Trust & Investment Corporation* HCA015651/1999 [56].

[24] Charles Jordan Tabb, *Law of Bankruptcy* (West Academic 2020) 116; J. H. Dalhuisen, *Dalhuisen on International Insolvency and Bankruptcy* (Vol. 1) (Matthew Bender 1980) 388-390.

contours of cooperative engagement.

1. The Emergence of Global Rescue

In its early phase, CBI revolved around the question of cooperation, with debates focused on the extraterritorial reach of insolvency proceedings, particularly liquidations. Nineteenth-century understandings were framed entirely by traditional conflict-of-laws theory, and scholars quickly recognized that insolvency effects were dictated by mandatory law rather than by the obligations' nature or the parties' autonomy.[25] Cooperation thus depended wholly on a state's position and its trust in foreign proceedings.[26] Reciprocity signaled when to set aside territoriality but offered no guidance on procedural coordination. Accordingly, early conceptions of modified universalism largely bypassed reciprocity, and jurisdictions[27] advocating model-law-based instruments did not presume its existence.

The second phase introduced conditional cooperation. Technological progress, growing commercial interconnections, and cross-cultural engagement provided the conditions for cooperation and encouraged convergence on insolvency's fundamental values,[28] enabling international coordination. The focus thus shifted from whether to cooperate to how cooperation should be structured. The drafting of the MLCBI represented a pinnacle of this coordination, with its framework of "general principles and limited exceptions" capturing the core logic of modified universalism.

At this stage, CBI primarily served asset distribution, aiming to harmonize proceedings across jurisdictions to achieve unified administration and equitable allocation of the debtor's estate. Within this "distribution paradigm," the key concern was the allocation of existing assets. Asset values were largely fixed at the outset,

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[25] See, Ludwig von Bar, *The Theory and Practice of Private International Law* (George Robertson Gillespie trans., W. Green & Sons 1892) 613.

[26] ibid., 1016.

[27] See *Bakhshiyeva v Sberbank of Russia & Ors (Bakhshiyeva* case*)* [2018] EWCA Civ 2802 [42]; *Rubin & Anor v Eurofinance SA & Ors (Rubin* case*)* [2012] UKSC 46 [143][144].

[28] Jay Lawrence Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' 65 *American Bankruptcy Law Journal* 457, 458 (1991); *In re Apcoa Parking Holdings GmbH (Apcoa* case*)* [2014] EWHC 3849 (Ch) [45].

foreign proceedings exerted minimal influence on domestic interests, and courts typically performed only a single assessment when recognizing or assisting them. Safeguards were largely formalities, seldom invoked. With globalization still nascent, cooperation posed few challenges, and there was broad consensus on the use of safeguards for adequate protection and public policy. In hindsight, this phase came closest to realizing the ideal of modified universalism.

The third phase introduced complex and uncertain cooperation. In the twenty-first century, globalization has been accompanied by evolving social values and business practices.[29] Enterprise group structures and operations have grown highly intricate,[30] financing mechanisms have become more sophisticated,[31] and insolvency law itself has expanded its toolkit.[32] Stakeholders are better able to exploit procedural rules, while jurisdictions' regulatory capacity has been effectively diminished.[33] Enterprise group insolvencies thus now face dispersed jurisdiction, fragmented stakeholder interests, and wide-ranging effects.[34] Rapid liquidation and rescue carry substantial economic significance,[35] driving unprecedented demand for cooperation, yet striking inconsistencies persist in both the content and capacity of such cooperation.

In this phase, CBI cooperation extends beyond mere asset distribution, centering on global rescue. Preserving and restructuring ongoing business value requires

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[29] *Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda) (Singularis* case*)* [2014] UKPC 36 [152][161].

[30] Chinese enterprise groups illustrate complex cross-border structures. An offshore-listed holding company may control subsidiaries across multiple jurisdictions, including Chinese mainland, with domestic subsidiaries holding assets and conducting operations. Such structures can now extend to six layers or more. *In re China Huiyuan Juice Group Limited* (*Huiyuan* case) [2020] HKCFI 2940 [24].

[31] See Jared Ellias and Narine Lalafaryan, 'The Global Law of Debt' University of Cambridge Faculty of Law Legal Studies Research Paper Series No. 21/2025 (2025).

[32] *In re Agrokor D.D.* 591 B.R. 163 (Bkrtcy.S.D.N.Y. 2018), at 168; Kyriaki Karadelis, 'No guarantees: Tiger Resources Unpacked', 12 February 2021, <https://globalrestructuringreview.com/news-and-features/unpacked/2020/article/no-guarantees-tiger-resources-unpacked> accessed 13 March 2026.

[33] John H. Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (Cambridge University Press 2006) 266.

[34] Philip R. Wood, *Principles of International Insolvency* (Sweet & Maxwell 2007) 888.

[35] World Bank Group, *Business Ready 2024 Report* (World Bank Group 2024) 85.

sustained coordination across jurisdictions, but global rescue also dramatically expands the universe of actors and interests, creating the classic "greed and pride" problem described by Professor Pottow.[36] Global rescue can threaten specific interests, legal regimes, or the integrity of regulatory frameworks. Debtors, creditors, stakeholder groups, regulators, and state authorities may intervene at every stage, frequently invoking safeguards as instruments to protect their positions.

Accordingly, safeguards have moved from passive formalities to actively invoked instruments, reflecting a structural shift in CBI cooperation from a distribution to an operational paradigm. This transformation results from the convergence of evolving conditions, expanded insolvency powers, diversified actors, and the attendant fragmentation of interests.

2. The Centrality of Safeguards

A key issue is why the term "safeguards" is used and why it occupies the center of the debate. In practice, measures constituting "limited exceptions" go by many names - exceptions, escape clauses,[37] exemptions,[38] carve-outs,[39] opt-out[40] - but "safeguards"[41] best captures the concept when summarizing these limited exceptions.

First, in terms of terminology, international practice consolidates "limited exceptions" under the label of safeguards. UNCITRAL Working Group V, for example, classifies public policy exceptions and similar measures as forms of

[36] See John A. E. Pottow, 'Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to Local Interests,' 104 *Michigan Law Review* 1899 (2006).

[37] Chukwuma Samuel Adesina Okoli and Gabriel Omoshemime Arishe, 'The Operation of the Escape Clauses in the Rome Convention, Rome I Regulation and Rome II Regulation,' 8(3) *Journal of Private International Law* 513 (2012).

[38] A/CN.9/WG.V/WP.202 (2025) 7.

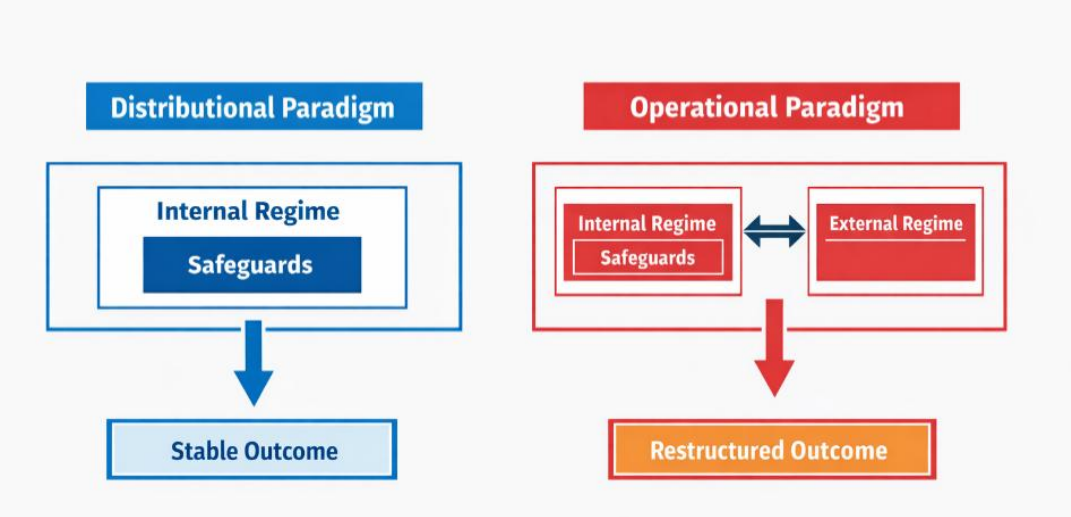
[39] Contact Group on the Legal and Institutional Underpinnings of the International Financial System, *Insolvency Arrangements and Contract Enforceability* (2002) 22-23.

[40] Ilya Kokorin, 'Contracting Around Insolvency Jurisdiction: Private Ordering in European Insolvency Jurisdiction Rules and Practices,' in Vesna Lazić and Steven Stuij, *eds.*, *Recasting the Insolvency Regulation: Improvements and Missed Opportunities* (T.M.C. 2020) 45.

[41] UNCITRAL, Applicable Law in Insolvency Proceedings: Note by the Secretariat, A/CN.9/WG.V/WP.202 (2025) 12.

safeguards in its documents.[42] Employing "safeguards" to denote limited exceptions or conditions of cooperation therefore reflects established practice and avoids the cognitive cost of introducing a new concept.

Second, in practice, the shift from a distribution to an operational paradigm has not diminished safeguards' centrality. In the distribution paradigm, cooperation emphasizes the internal order of the insolvency regime through "general principles plus safeguards," protecting relatively narrow objectives, enjoying broad consensus, and yielding predictable outcomes. By contrast, the operational paradigm allows other regimes, such as contractual (pre-insolvency) rescue tools,[43] to intervene, typically through safeguards being triggered, adjusted, excluded, or created. These interventions can preserve, disrupt, or ultimately restructure the insolvency regime itself, with effects feeding back to the intervening regimes (Figure 1). Outcomes are inherently uncertain, driven by the ongoing interaction of legal regimes. Across paradigms, safeguards remain at the heart of the debate.



(Figure 1 Safeguards in Distribution and Operational Paradigms)

[42] UNCITRAL, Report of Working Group V (Insolvency Law) on the Work of Its Sixty-Second Session, A/CN.9/1133 (2023) para 38; UNCITRAL, Report of Working Group V (Insolvency Law) on the Work of Its Sixty-Third Session, A/CN.9/1163 (2023) para 77. Safeguards are likewise employed in specific contexts, spanning nearly every facet of domestic and cross-border insolvency. See *e.g.* UNCITRAL, A/CN.9/WG.V/WP.42 (1995) para 100 (judicial communication); A/CN.9/WG.V/WP.183/Add.1 (2022) para 59 (primacy of international obligations); A/CN.9/WG.V/WP.183 (2022) 14 (applicable law).

[43] Irit Mevorach and A. Walters, 'The Characterization of Pre-insolvency Proceedings in Private International Law' 21 *European Business Organization Law Review* 855 (2020).

Significantly, the paradigm shift alters the role of safeguards. No longer mere formal prerequisites for recognizing foreign proceedings, they have become central tools for actors to evaluate and shape the impact of global rescue. Safeguards thus emerge as the locus of dispute and strategic contestation,[44] with actors invoking, interpreting, or challenging them in ways aligned with their interests.

Third, from a normative standpoint, modified universalism seeks to balance the objectives of insolvency law with the desirability of limited exceptions,[45] mediating between exception-driven policy concerns and the core aims of insolvency proceedings.[46] In CBI coordination, safeguards ensure that overarching principles are realized while recognizing the validity of institutions, rules, or measures safeguarding particular values.[47] Accordingly, safeguards protect specific institutions and the interests they embody, often described as useful, appropriate, or necessary.[48]

On balance, the term "safeguards" best captures the combined considerations of terminology introduction, normative function, and practical reality, and is adopted here as the analytical term.

B. The Attributes of Safeguards in Expanding Stakes

Global rescue efforts inevitably provoke actors' tensions. As a result, safeguards, once conceived as normative pillars of modified universalism, are often reduced to jurisdiction-specific measures.[49] Nonetheless, they share fundamental traits. Framed as "limited exceptions," safeguards are derivative, *Janus-faced*, and discretionary. Recognizing these attributes is critical to understanding the complexities of CBI.

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[44] For a full discussion, see Part III.

[45] UNCITRAL, Legislative Guide on Insolvency Law (2005) para 91; UNCITRAL, Applicable Law in Insolvency Proceedings: Note by the Secretariat, A/CN.9/WG.V/WP.198 (2024) 21.

[46] Harold S. Burman, 'Harmonization of International Bankruptcy Law: A United States Perspective' 64 *Fordham L. Rev.* 2543, 2549, 2561 (1996); *In Re Maxwell Communication Corp. Plc*, 170 B.R. 800 (S.D.N.Y. 1994), at 816; A/CN.9/1094 (2022) paras 75, 94.

[47] Irit Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press 2018) 23.

[48] A/CN.9/WG.V/WP.202 (2025) 38.

[49] In short, modified universalism posits, normatively, a general principle with limited exceptions. In practice, it operates through general principles, recognized safeguards, and jurisdiction-specific safeguards.

1. Derivative Nature

Exceptions presuppose underlying principles, making derivation an intrinsic feature of safeguards. Identifying these principles hinges on the core objectives of the insolvency regime.[50] Safeguards protect specific value while allowing departures from a principle's form or substance.[51] Their invocation signals that the underlying principle still governs.

Defining these attributes is crucial. A jurisdiction that initiates CBI matters consistent with general principles enjoys *prima facie* legitimacy, making safeguards unnecessary.[52] Clarification also distinguishes the principle's conditions of application from the operation of safeguards.[53] For example, if application for judicial assistance fails to meet scope requirements, safeguards do not apply.

Centre of main interests (COMI) lies at the core of general principles,[54] both in theory and in practice. Insolvency proceedings should, in principle, be commenced in the debtor's COMI jurisdiction,[55] governed by its law,[56] and treated as the foreign main proceeding for judicial assistance.[57] Safeguards denote deviations from these

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[50] Reinhard Bork, *Principles of Cross-Border Insolvency Law* (Intersentia 2017) 235-236.

[51] Irit Mevorach, 'Cross Border Insolvency Law of Enterprise Groups: The Choice of Law Challenge' 9 *Brooklyn Journal of Corporate, Financial & Commercial Law* 107, 111-112 (2014).

[52] For example, when an insolvency proceeding is initiated in the debtor's COMI, safeguards need not be considered. Accordingly, UK courts recognize that moving COMI to the United Kingdom alone suffices to establish jurisdiction. *In re Project Lietzenburger Strabe Holdco SARL (Project* case*)* [2024] EWHC 468 (Ch) [220][221].

[53] Notably, the intervention of other legal regimes in an insolvency regime can create or exclude safeguards and may alter the conditions governing the application of both general principles and safeguards.

[54] Adrian Walters, 'Modified Universalisms and The Role of Local Legal Culture in the Making of Cross-Border Insolvency Law' 93 *American Bankruptcy Law Journal* 47, 64 (2019); Ilya Kokorin, Stephan Madaus & Irit Mevorach, 'Global Competition in Cross-Border Restructuring and Recognition of Centralized Group Solutions' 56 *Texas International Law Journal* 109, 118 (2021); Jenny Clift, 'Choice of Law and the UNCITRAL Harmonization Process' 9 *Brooklyn Journal of Corporate, Financial & Commercial Law* 29, 37-38 (2014); Jan Brodec, 'Applicable Law in International Insolvency Proceedings (focused on relation of Articles 3 and 7 of the Insolvency Regulation)' 66 *Acta Universitatis Carolinae-Iuridica* 131, 141 (2020).

[55] Reinhard Bork, *Advanced Introduction to Cross-Border Insolvency Law* 38.

[56] John A. E. Pottow, 'Procedural Incrementalism: A Model for International Bankruptcy' 45 *Virginia Journal of International Law* 935, 997 (2005) ("The choice-of-law rule in the Model Law is centre of main interests.").

[57] As COMI determination involves both factual and normative judgments, this article does not engage that issue, which does not affect the analysis of safeguards here.

principles, such as permitting non-COMI or parallel proceedings,[58] applying non-COMI law,[59] or denying recognition under the applicable regime.[60]

2. Janus-faced Nature

Discussion of safeguards reveals their regulatory function and inherent value, highlighting tensions among jurisdictions and insolvency actors. Casting the analysis as a Janus-faced dilemma underscores the unique significance of safeguards in the global rescue. For example, allowing forum shopping typically requires that the debtor have a sufficient connection to the jurisdiction,[61] and that the court be satisfied the exercise of jurisdiction will be of utility. This implicates the international effectiveness of the proceeding,[62] particularly whether its post-approval outcomes will be recognized across jurisdictions.

Likewise, permitting TPRs places significant pressure on the guarantee regime, though their scope is carefully circumscribed. Liabilities unrelated to creditor claims are excluded. By allowing released parties to avoid liability for fraud, intentional torts, or punitive damages, TPRs depart from core bankruptcy norms and risk encouraging forum shopping, a dynamic reflected in mass-tort restructurings and the rise of the "bankruptcy grifter." [63] Hong Kong schemes respond with explicit carve-outs for

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[58] *Project* case [232]; *In re West African Gas Pipeline Company Ltd (West African* case*)* [2021] EWHC 3360 (Ch) [19].

[59] MLAPL.

[60] Safeguards inherently reflect a jurisdiction's implementation of applicable rules or regimes. Purely domestic safeguards, such as those embedded in a national insolvency proceeding, are not the focus here. Yet, for analytical completeness, they may serve in the recognition and relief as benchmarks for due process and public policy. Only in this sense is reference to domestic safeguards warranted.

[61] *In re China Beidahuang Industry Group Holdings Limited (Beidahuang* case*)* [2023] HKCFI 3232 [35].

[62] See *In re KCA Deutag UK Finance PLC (KCA* case*)* [2020] EWHC 2977 (Ch) [16]; *In re Da Yu Financial Holdings Limited (Da Yu* case*)* [2019] HKCFI 2531 [21]; *In re Mongolian Mining Corporation (Mongolian* case*)* [2018] HKCFI 2035 [12]; *In re China Lumena New Materials Corp* (*Lumena* case) [2020] HKCFI 338 [8]; *In re China Singyes Solar Technologies Holdings Limited* (*Singyes* case) [2020] HKCFI 467 [7]; *In re China Oil Gangran Energy Group Holdings Limited* (*Gangran* case) [2021] HKCFI 1592 [14]; *In re Hidili Industry International Development Limited (Hidili* case*)* [2022] HKCFI 1833 [15]; *In re Da Sen Holdings Group Limited (Da Sen* case*)* [2022] HKCFI 185 [12]; *In re Rare Earth Magnesium Technology Group Holdings Limited (Rare Earth* case*)* [2022] HKCFI 1686 [17]; *In re Century Sunshine Group Holdings Limited et al.* [2023] HKCFI 2041 [33]; *In re Helenbergh China Holdings Limited* [2024] HKCFI 2628 [33].

[63] See Ralph Brubaker, 'Third-Party Non-debtor Releases for "Bankruptcy Grifters": A Response to Professor Simon,' in Rolef de Weijs ed., *Third Party Releases by Means of Bankruptcy Law: Guarantees and (Mass) Tort*

fraud, willful default, gross negligence, breaches of scheme or restructuring documents, and claims arising outside the restructuring context. [64] These limits preserve the functional utility of TPRs while maintaining accountability for misconduct and non-restructuring liabilities, demonstrating that safeguards inherently embed general-principle considerations, forming the point for the analysis in Part II.

3. Discretionary Nature

Whether and to what degree the interests safeguarded by a measure take precedence over general-principle considerations is ultimately determined by each jurisdiction, making discretion an inherent feature of safeguards. Their application involves evaluative judgments, necessarily engaging subjective factors and requiring case-by-case analysis. In practice, safeguards' content, form, and implementation reflect domestic choice.[65]

Safeguard discretion operates along three axes. First, discretion over the conditions of application,[66] which may be subjective, objective, or mixed. Second, discretion over the intensity of application, spanning mandatory, recommended, or permissive.[67] Third, discretion over outcomes, including partial or full application.[68] As noted in Part IV.A, this discretion also underpins the fragmentation of CBI governance.

In short, the "general principle and limited exceptions" of modified universalism is a practical construct reliant on safeguards, functionally activated as cooperation shifts from a distributional to an operational paradigm. Safeguards are a prerequisite for collaboration, yet their derivative and dual character reveals tensions with general principles, and their discretion reflects varying jurisdictional willingness to cooperate. Confronting complex, conflicting interests in practice, safeguards require deliberate

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(Eleven International Publishing 2022) 18-20.

[64] See *in re Golden Wheel Tiandi Holdings Co. Ltd.* [2025] HKCFI 3268 [21]; *Times China* case [23].

[65] UNCITRAL, Report of Working Group V (Insolvency Law) on the Work of Its Sixty-Fifth Session, A/CN.9/1198 (2024) para 28.

[66] A/CN.9/1060 (2021) [27].

[67] MLAPL.

[68] ibid.; A/CN.9/WG.V/WP.202 (2025) 38.

choices. Providing an analytical framework for their function and evaluation facilitates rigorous analysis and informed decision-making.

II. Safeguards-in-Evaluation: A Functional Framework

Part I analyzed the position, functional shifts, and attributes of safeguards. In contemporary CBI cooperation, safeguards operate as "gatekeepers": determining whether to permit cooperation, assessing the conditions for doing so, responding to changing circumstances, and communicating these determinations to participants (with clarity and consistency). Normatively, these considerations can be distilled into the functions of safeguards and the factors that intervene in their evaluation.

A. The Functions of Safeguards

Safeguards exist to secure specific interests, making their protective function primary. This function is outcome-oriented at the normative level.[69] Yet, in pursuit of cooperation, participants may make necessary concessions, reflected in the conditions for applying safeguards, highlighting both their protective role and their focus on rule design.

1. Protective Function

Since the early 21st century, corporate rescue has become an increasingly shared objective across jurisdictions. This requires that well-designed legal instruments be capable of constraining dissenting minority creditors.[70] At its core, any safeguard functions to assess or respond to the reasonableness of foreign insolvency proceedings' cramdown powers, whether in relation to the insolvency itself, such as debt discharge,

[69] Jay Lawrence Westbrook 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' 471.

[70] See *Assets Limited v Perusahaan Perseroan (Persero) et al* [2001] EWCA Civ 1696 [2]; *In re Gategroup Guarantee Ltd* (*Gategroup* case) [2021] EWHC 304 (Ch) [100].

[71] or to the interaction of insolvency with other legal regimes, such as arbitration.[72] This defines the protective function of safeguards.

Jurisdiction. Safeguards can authorize parallel proceedings beyond a debtor's COMI, reflecting a form of good-faith forum shopping[73] that exploits jurisdiction-specific tools or seeks to avert liquidation to preserve corporate value for all creditors. Jurisdictions like the United Kingdom and Singapore typify this approach.[74] Consequently, forum shopping strategies have diversified through acquisitions, contractual amendments to governing law, or other mechanisms.[75] Some jurisdictions even allow debtors to invoke local jurisdiction without a physical presence,[76] markedly expanding jurisdictional reach and heightening forum shopping pressures.

Applicable law. Harmonizing choice-of-law rules is widely viewed as a mechanism to limit forum shopping[77] and bolster legal certainty.[78] Safeguards in applicable law matters may displace *the lex fori concursus*, allowing law to track the nature or value of specific transactions. These exceptions, historically covering labor contracts, rights *in rem*,[79] and avoidance,[80] enhance legal certainty, reduce risk, and lower transaction costs.[81] The MLAPL has extended such safeguards to system,

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[71] Kannan Ramesh, 'The Gibbs Principle: A Tether on the Feet of Good Forum Shopping' 29 *Singapore Academy of Law Journal* 42, 49 (2017); *In re LDK et al. (LDK* case*)* HCMP 2215/2014, HCMP 2216/2014 & HCMP 2218/2014 [48][49].

[72] A/CN.9/WG.V/WP.202 (2025) 17.

[73] *In re Codere Finance (UK) Ltd (Codere* case*)* [2015] EWHC 3778 (Ch) [17][18].

[74] *ibid.; In re Pacific Andes Resources Development Limited et al.* [2016] SGHC 210 [51].

[75] *Apcoa* case [218]-[241]*; In re Wollongong Coal Limited and Jindal Steel & Coal Australia Pty Ltd (Wollongong* case*)* [2020] NSWSC 73 [52]-[56]; *In re DTEK Finance BV* [2015] EWHC 1164 (Ch) [11]-[15].

[76] *In re Tele Columbus AG (Tele* case*)* [2024] EWHC 181 (Ch) [60]-[65].

[77] Elina Moustaira, *International Insolvency Law: National Laws and International Texts* (Springer 2019) 16.

[78] Hannah L. Buxbaum, 'Rethinking International Insolvency: The Neglected Role of Choice of Law Rules and Theory' 36 *Stanford Journal of International Law* 23, 39 (2000); Thomas M. Gaa, 'Harmonization of International Bankruptcy Law and Practice: Is It Necessary? Is It Possible?' 27 *The International Lawyer* 881 (1993); Steven L. Harris, 'Choosing the Law Governing Security Interests in International Bankruptcies' 32 *Brooklyn Journal of International Law* 905, 908-909 (2007).

[79] A/CN.9/WG.V/WP.179 (2022) para 33; A/CN.9/WG.V/WP.183/Add.1 (2022) para 44.

[80] Jay Lawrence Westbrook, 'Choice of Avoidance Law in Global Insolvencies' 17 (3) *Brooklyn Journal of International Law* 499, 509 (1991).

[81] UNCITRAL, Legislative Guide on Insolvency Law (2005) para 89.

market or facility and close-out netting arrangement,[82] preserving economic value and mitigating losses or systemic risk[83] from inconsistent law application.

Interestingly, some safeguards operate in a manner that effectively reverts to *lex fori concursus*. Though theoretically rooted in COMI law, the general principle is often defined as the law of the State in which the insolvency proceedings are commenced,[84] so *lex fori concursus* may diverge from COMI law.[85] This structural adjustment gives choice-of-law safeguards a bidirectional character. They both constrain parallel proceedings[86] and curb creditor or debtor manipulation of choice-of-law rules.[87] Overall, these safeguards aim to preserve legal predictability and reduce unexpected or unjustified interference.[88]

In choice-of-law, the Gibbs Rule stands as the quintessential safeguard. Though *lex fori concursus* ordinarily governs debt discharge,[89] the Gibbs Rule mandates that discharge be recognized only if conducted under the law governing the debt.[90] Initially aimed at protecting creditors and ensuring legal certainty, the rule has evolved into a tool for preserving financial stability, reducing financing costs, and

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[82] Article 9, MLAPL.

[83] A/CN.9/WG.V/WP.202 (2025) 33.

[84] Article 2, MLAPL; UNCITRAL, Applicable Law in Insolvency Proceedings: Draft Guide to Enactment of the UNCITRAL Model Law on Applicable Law in Insolvency Proceedings, A/CN.9/WG.V/WP.205 (2025) 13, 21.

[85] A/CN.9/WG.V/WP.202 (2025) 38.

[86] A/CN.9/1169 (2024) para 48.

[87] UNCITRAL, Applicable Law in Insolvency Proceedings: Note by the Secretariat, A/CN.9/WG.V/WP.176 (2021) para 24; A/CN.9/WG.V/WP.194 (2024) para 24; A/CN.9/WG.V/WP.183/Add.1 (2022) para 31; A/CN.9/WG.V/WP.202 (2025) 34.

[88] A/CN.9/WG.V/WP.202 (2025) 9; A/CN.9/WG.V/WP.187 (2023) 16; Steven L. Harris, 'Choosing the Law Governing Security Interests in International Bankruptcies'.

[89] Article 6, MLAPL.

[90] The Gibbs Rule is a conflict-of-law rule regarding debt discharge in jurisdictions represented by the United Kingdom (Gibbs jurisdictions). See *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399, [1890] *UKLwRpKQB* 117. From its foundation to its evolution, it secures the certainty and predictability of governing law, inherently safeguarding creditor interests. See Ludwig von Bar 613; Joseph Story, *Commentaries on the Conflict of Laws* (Hilliard, Gray, and Company 1834) 275-276; *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34 [12].

preventing foreign court expropriation.[91] Its protective function has been reinforced through practice, closely linking it with jurisdiction[92] and judicial assistance.[93] Given the pivotal role of Gibbs jurisdictions in corporate groups and financial markets, the rule's mandatory application complicates and increases the cost of coordinating parallel proceedings, representing a high-water mark of choice-of-law safeguards.

Judicial assistance. Safeguards may permit courts to deny recognition for foreign insolvency proceedings in specific circumstances. Public policy, well established beyond CBI, has generated a rich body of case law reflecting jurisdictions' varied efforts to protect matters of fundamental local importance.[94] Recently, under the global rescue, the emphasis has shifted to safeguarding creditors' rights to object in foreign proceedings, with the key benchmark being whether dissenting creditors have both the right and practical means to object.[95] Such protections require that the scope of judicial assistance conform to the forum's law and public policy.[96] This effectively requires recognizing the legal effects of foreign courts, creating an interconnection between choice-of-law and judicial-assistance safeguards.

2. Coordinative Function

The coordinative function embodies the internal tension of safeguards. It sets conditions for achieving their protective purpose, balancing safeguard protection

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[91] See, Teodor Teofilov, 'Tokyo: Judges on Restructuring Without Borders - Protectionism vs Universalism', 26 October 2023, <https://globalrestructuringreview.com/article/insol-international-tokyo-judges-restructuring-without-borders-protectionism-vs-universalism> accessed 31 January 2026.

[92] Sufficient-connection jurisdiction may be established solely under the Gibbs rule. *In re Rodenstock GmbH* [2011] EWHC 1104 (Ch) [67]-[69]. The mere fact that the loan documents are governed by the forum's law suffices to confer jurisdiction over the SOA. *In re Winsway Enterprises Holdings Limited (Winsway* case*)* HCMP 453/2016 [27]; *Century Sunshine* case [50].

[93] In Gibbs jurisdictions, notably the English courts, remedies under MLCBI cannot be used to sideline or circumvent the Gibbs rule. *Bakhshiyeva* case [89]-[91]. Contractual obligations governed by Gibbs-jurisdiction law likewise fall outside the scope of collective proceedings. *Chang Chin Fen v Cosco Shipping (Qidong) Offshore Ltd* [2021] CSOH 94 [56]-[61]. Accordingly, where dissenting creditors could influence a restructuring, the only way to restructure debts governed by Gibbs-jurisdiction law is to initiate parallel proceedings in that jurisdiction. *In re Kaisa Group Holdings Ltd* HCMP 708/201[27]; *Winsway* case [29].

[94] A/CN.9/WG.V/WP.176 (2021) para 33; A/CN.9/WG.V/WP.202 (2025) 36; *In re Agrokor DD (Agrokor* case*)* [2017] EWHC 2791 (Ch) 128.

[95] *Agrokor* case [116][117].

[96] *Singularis* case [19][113].

against other competing considerations. When conditions are unmet, safeguards remain dormant and the jurisdiction defaults to cooperation, except for select choice-of-law safeguards.

Jurisdiction. Forum shopping in jurisdictional contexts requires a debtor's sufficient connection to the chosen forum. Courts evaluate both the adequacy of that connection and the utility of exercising jurisdiction,[97] exercising caution[98] to ensure legitimacy [99] and prevent overreach. [100] Such jurisdiction is constrained by considerations of not "step too far" ,[101] indiscrimination, and foreseeability.[102] The utility issue often framed as a *quasi*-jurisdictional hurdle,[103] which prevents futile judicial action [104] and informs assessments of international efficacy. [105] Some jurisdictions condition parallel proceedings on necessity and legitimacy, denying approval where these criteria are unmet. [106] Costs, enforcement risks, [107] and the

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[97] These terms, common in jurisdictions such as the United Kingdom, are used here normatively to highlight the legitimacy and necessity of exercising jurisdiction.

[98] *Apcoa* case [248]-[251].

[99] See *In re Drax Holdings Ltd et. al.* [2003] EWHC 2743 (Ch) [24].

[100] *LDK* case [44]; *Tele* case [60]-[65].

[101] *Apcoa* case [248]-[251].

[102] ibid., [252]-[254]; *Wollongong* case [57]-[64].

[103] *In re Ambatovy Minerals Societe Anonyme & Anor* [2025] EWHC 279 (Ch) [93]]94][97]; *In re Indah Kiat International Finance Company B.V.* [2016] EWHC 246 (Ch) [86][87]; *In re Freeman Fintech Corporation Limited (Freeman* case*)* [2021] HKCFI 310 [9]; *Winsway* case [37].

[104] *In re North Mining Shares Company Limited (North Mining* case*)* [2023] HKCFI 2439 [36].

[105] See *Tele* case [68]. To promote corporate rescue, some common law jurisdictions hold that international efficacy need not be absolutely certain. It suffices that key restructuring jurisdictions offer a realistic prospect of recognition. Gibbs jurisdictions have reached a consensus on this principle. *Sunac* case [53]; *In re Reliance National Insurance Company (Europe)* [2025] EWHC 789 (Ch) [99]; *Indah* case [88]; *Project* case [219]; *In re Lamo Holding BV* [2023] EWHC 1558 (Ch) [129][130]; *Lumena* case [10]-[14]; *Kaisa* case [28]; *Mongolian* case *[20]*; *Yuzhou* case [2024] HKCFI 3098 [45][46]; *Apcoa* case [259]; *Gangran* case [22]; *Rare Earth* case [26][27]. The reasonable-prospect test gauges the degree of persuasion rather than imposing a statutory requirement. *DTEK* case [27]. In certain circumstances, however, international efficacy remains a non-waivable requirement. *Codere* case [8].

[106] *Gangran* case [34]; *In re Grand Peace Group Holdings Limited* [2021] HKCFI 1563 [5]-[7].

[107] *Gangran* case [26]-[28].

advancement of modified universalism[108] further shape these assessments. Hong Kong and Cayman Islands courts exemplify this approach,[109] highlighting the coordinating role of safeguards in jurisdictional practice.

Applicable law. Safeguards permitting the application of foreign law inherently reflect a cooperative function,[110] with their protective value functioning as a form of coordination. By contrast, the Gibbs rule illustrates a constriction of coordination,[111] particularly in the objectives of limiting parallel proceedings.[112] Yet even where its protective function is strong, the Gibbs rule preserves substantial room for coordination. It recognizes that foreign courts may discharge debts governed by the law of the relevant foreign jurisdiction,[113] and its application is constrained by limitations on scope[114] and conditions,[115] reflecting opportunities for cooperative engagement.

Judicial assistance. In judicial assistance, restrictive interpretations and narrow application of the public policy exception have long been settled practice, reflecting a commitment to international coordination and cooperation.[116] The extensive theoretical and practical literature need not be repeated here.

In sum, safeguards exist to protect particular regimes or values, and their application conditions reveal the extent to which actors are willing to accept rule

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[108] *Da Yu* case [50]; Kyriaki Karadelis, 'Justice Nick Segal in Session', 9 January 2019, <https://globalrestructuringreview.com/article/justice-nick-segal-in-session> accessed 13 March 2026.

[109] *Hidili* case [29].

[110] A/CN.9/1060 (2021) para 26.

[111] Courts in Gibbs jurisdictions readily acknowledge the tension between the Gibbs rule and the principle of modified universalism. *Bakhshiyeva v Sberbank of Russia & Ors (Sberbank* case*)* [2018] EWHC 59 (Ch) [1][2].

[112] Ilya Kokorin, 'Parallel Restructurings: Challenges and Opportunities' 2024/12 *Tijdschrift voor Insolventierecht* (TvI) 103, 108-109 (2024).

[113] *Bakhshiyeva* case [30].

[114] *Beidahuang* case [11][36]; *North Mining* case [38] (voluntary submission to jurisdiction). *In re CIFI Holdings (Group) Co. Ltd. (CIFI* case*)* [2025] HKCFI 3250 (changing governing law). *Bakhshiyeva* case [93]; *Sberbank* case [73]-[75][158] (limited application in liquidation context).

[115] *Bakhshiyeva* case [86] (an English court could grant the stay sought by IBA only if it is both necessary to protect IBA's creditors and an appropriate means of doing so.).

[116] UNCITRAL, Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency (2021) 20-23.

attenuation to facilitate cooperation or achieve specific objectives.

B. Intervening Variables affecting Safeguard Assessment

Intervention factors drive the complexity and unpredictability of CBI. They shape whether, how, and to what effect safeguards fulfill their protective role. In practice, these factors fall into three broad categories: structural, procedural, and factual.

1. Structural Variables

Structural intervention factors directly permit the circumvention or exclusion of safeguards, changing their scope. They may stem from a jurisdiction's intentional choice or technical proposals by stakeholders. Because such interventions amount to a waiver, they provoke extensive stakeholder debate and demand compelling justification.[117] Analyzing these factors lays bare the intrinsic tension embedded in safeguards.

Jurisdictions generally seek structural interventions for economic advantage. The World Bank's Business Ready highlight the role of insolvency regimes in assessing the business environments.[118] When the comparative benefits exceed the costs of non-cooperation, jurisdictions may adopt measures such as adopting a model law.[119] Jurisdictions may also passively encounter structural interventions, arising when practitioners challenge or circumvent existing safeguards, frequently by invoking other legal regimes. Such interventions are grounded in thorough legal analysis and possess both legitimacy and practical viability. Courts' assessments of these interventions directly affect whether safeguards preserve their protective role. Notable examples include the use of build-in agency technique to evade the Gibbs rule[120] and the U.S. Chapter 11 practice of denying non-consensual TPRs.[121]

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[117] See Melvin A. Eisenberg, *Legal Reasoning* (Cambridge University Press 2022) 99.

[118] World Bank Group, Business Ready (2025) 21.

[119] See, Government of UK, 'Consultation Outcome: Implementation of two UNCITRAL Model Laws on Insolvency Consultation', 10 July 2023, <https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency/implementation-of-two-uncitral-model-laws-on-insolvency-consultation> accessed 12 March 2026.

[120] *Sunac* case.

[121] *Purdue Pharma* case.

2. Procedural Variables

Procedural interventions adjust the conditions for applying safeguards without undermining their core operation. Such determinations remain within the purview of individual jurisdictions, consistent with the discretionary character of safeguards. In practice, for instance, laws governing systems, markets, or facilities may derive from the jurisdiction of the system's location, the law chosen by the system itself, or the law selected by its participants. [122]

The conditions for applying a given safeguard can differ or even directly conflict across jurisdictions. The Gibbs rule, still highly influential in CBI, requires that debt discharge be governed by its applicable law, but jurisdictions diverge on whether that law is substantive or procedural. [123] Hong Kong courts reject,[124] U.S. courts[125] and the Cayman Islands affirm,[126] with the latter stressing respect for foreign determinations and prohibiting collateral attacks. [127] The United Kingdom, as the rule's origin, evaluates based on the law's concrete effect. [128] These divergences render jurisdictional determinations a procedural variable of the safeguard.

3. Factual Variables

Factual interventions influence safeguards' effectiveness in practice. Though structural and procedural variables hinge on a safeguard's legal character, legal considerations are only one element. Commercial realities must also be weighed. In CBI, such factual interventions fall into four main categories.

First, costs and asset allocation. Initiating parallel proceedings hinges on cost,

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[122] A/CN.9/WG.V/WP.202 (2025) 31.

[123] Theoretically, the debate reflects the conflict-of-laws logic underlying the Gibbs rule. A debt discharged under its governing law must fully extinguish contractual rights and foreclose all remedies. See Joseph Story 278-279.

[124] *Rare Earth* case [29]-[37]; *In re Sunac China Holdings Limited* [2023] HKCFI 2850 [35]-[37].

[125] *In re E-House (China) Enterprise Holdings Limited*, Case No. 22-11326 (JPM) [7]; *In re Modern Land (China) Co., Ltd.*, 641 B.R. 768 (Bkrtcy.S.D.N.Y. 2022), at 776-777; *In re China Aoyuan Group Limited, et al.*, Case No. 23-12030 (JPM); *In re Sunac China Holdings Limited*, Case No. 23-11505 (PB); *In re Modern Land (China) Co., Ltd.*, Case No. 22-10707 (MG), *Hearing re Recognition of Foreign Proceeding*, at 19-21.

[126] See *Armitage v the Attorney-General* (1906) P 135, 141-142.

[127] *In re E-House (China) Enterprise Holdings Limited* FSD 165 OF 2022 (NSJ) [94].

[128] Agrokor *case* [113]-[115].

including the expenses of launching proceedings across jurisdictions,[129] and whether the debtor holds assets or conducts business locally.[130] If costs outweigh the debt's value,[131] the debtor will typically forego a parallel plan.

Second, creditor attitudes. The degree of creditor commitment[132] and their commercial judgment[133] shape the need for parallel or ancillary proceedings. A plan supported by an absolute majority[134] or unopposed[135] generally obviates such measures, whereas high enforcement risk[136] triggers them.

Third, the content or design of the debt restructuring plan. Including certain claims may create enforcement risks,[137] while provisions guaranteeing full cash repayment[138] typically secure creditor support.

Fourth, the existence of legal mechanisms, such as the UK's SOA procedures or cross-class cramdown,[139] acts as a *quasi*-factual intervention. Participants are drawn to tools that confer advantages over those in other jurisdictions.

Although factual interventions do not affect the applicability of safeguards, they can markedly amplify or attenuate their practical effects, shaping the choices of jurisdictions and participants in each case.

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[129] Kyriaki Karadelis, 'No guarantees: Tiger Resources Unpacked'.

[130] *In re Cimolai SPA & Ors* [2023] EWHC 1819 (Ch) [13]-[15].

[131] *Da Sen* case [23].

[132] *DTEK* case [32]; *KCA* case [32]-[34].

[133] *Kaisa* case [6]; *Da Yu* case [19]; *Add Hero* case [85].

[134] *In re Powerlong Real Estate Holdings Limited* [2025] HKCFI 271 [58]; *In re Zhongliang Holdings Group Company Limited* [2024] HKCFI 808 [39]; CIFI case [62]; *North Mining* case [37]; *In re Petropavlovsk Plcs* [2023] EWHC 264 (Ch) [23]; *In re Hong Kong Airlines Ltd (Hong Kong Airlines* case*)* [2022] EWHC 3210 (Ch) [51]-[54]; *Singyes* case [18].

[135] *Lumena* case [11]-[14]; *Hong Kong Airlines* case [31].

[136] *In re Sino-Ocean Group Holding Limited*, Claim No. CR-2024-005890, Skeleton Argument on Behalf of Long Corridor Asset Management Limited, para 38(4).

[137] *Add Hero* case [9].

[138] *Petropavlovsk* case [25].

[139] *In re AGPS Bondco Plc* [2023] EWHC 916 (Ch) [100][101]; *Gategroup* case [211][212]; *Codere* case [13].

III. Safeguards-in-Possession: Mobilization in Practice

In CBI, practical effects are paramount. Safeguards, through their protective and coordinating functions, operate under the influence of intervention factors. Once the safeguard's type, conditions, and relevant interventions are fixed, it produces a signaling effect, shaping the expectations and strategies of actors. Normatively, safeguards convey predictability and commercial certainty.[140] Operationally, they require clarity and consistent application.[141] Ambiguous conditions or inconsistent outcomes weaken this effect. In practice, once a safeguard is set, practitioners expect stable application, act strategically when its terms are clear, and adjust their strategies in response to intervention factors.

Once safeguards are assessed, the signals they emit become action-guiding cues for courts and participants. As the DIP model preserves debtor agency in domestic insolvency, safeguards enable actor-driven agency in cross-border restructuring. They are no longer passive reservations reassuring domestic stakeholders. They function instead as Safeguards-in-Possession (SIP), deployable instruments through which actors test, negotiate, and recalibrate the terrain of global rescue. Realizing this dynamic requires participants first to unravel cryptic safeguards, thereby activating the logic of SIP.

A. Unraveling Cryptic Safeguards

Identifying the finalized safeguards requires insolvency participants to evaluate, against the relevant intervention factors, the types of safeguards available and the conditions of their application. The framework advanced in Part II performs a doctrinal demystification. By disaggregating safeguards and decoding the signals they convey, it transforms what appears opaque into an analyzable institutional mechanism. The framework accordingly offers a practical basis for assessing safeguards in operation.

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[140] Neil Hannan 224.

[141] Jay L. Westbrook, 'Choice of Avoidance Law in Global Insolvencies' 17 *Brook.J.Int'l L* 499, 530 (1991); *In re OQ Chemicals Holding Drei GmbH & Anor* [2024] EWHC 2036 (Ch) [30]; *In re Ambatovy Minerals Societe Anonyme & Anor* [2025] EWHC 279 (Ch) [59][60]; *Reliance* case [99]; *Petropavlovsk* case [12][13][24].

Although this subsection is organized primarily for analytical clarity, unraveling cryptic safeguards provides the necessary predicate for effective, and occasionally sophisticated, engagement with safeguards in practice. The trajectory of CBI practice has been shaped largely by practitioner strategy. Such strategy rests on a precise grasp of safeguards and a keen appreciation of the intervention factors that structure their operation. These capacities, in turn, supply the essential foundation for SIP.

B. Strategy Formulation under SIP

SIP is inherently strategic. In global rescue scenarios, it seeks to neutralize safeguards wherever possible. When safeguards are unavoidable, it exploits procedural rules and their conditions to gain leverage, while systematically identifying all favorable factual circumstances.

This part surveys recent cases addressing responses to safeguards and analyzes how actors in CBI deploy SIP to formulate and recalibrate strategies in pursuit of specific objectives. To maintain analytical coherence, the discussion adopts the debtor's perspective, treating the debtor as the operative agent of SIP. On that premise, the part examines the principal contexts in which SIP manifests in practice.

1. Navigating Safeguards

The cross-border restructuring of enterprise group provides the paradigmatic setting for comprehensive strategies designed to navigate safeguards. Enterprise groups commonly operate through entities incorporated in multiple jurisdictions, each imposing distinct safeguards and conditions for their invocation. Achieving an effective restructuring thus requires the debtor to formulate strategies structured around these safeguards while assessing the intervention factors that may condition their application.

(1) Passive Accommodation

Strategies for navigating safeguards operate along two dimensions including passive accommodation and strategic deployment. Passive accommodation is exemplified by responses to the Gibbs rule and the attendant enforcement risk posed by dissenting creditors. To contain these risks while minimizing transaction costs, practice has converged on a tripartite structure: a proceeding in the holding company's

jurisdiction of incorporation, parallel proceedings in key Gibbs jurisdictions, and ancillary proceedings in non-Gibbs jurisdictions.[142] The schemes advanced in these coordinated proceedings are typically drafted to be materially identical and mutually conditional.[143]

(2) Strategic Deployment

Safeguards may also be strategically deployed (SIP). One prominent technique leverages the territorial reach of a Scheme of Arrangement (SOA) to neutralize dissenting creditors. Once sanctioned, an SOA is generally understood to bind all scheme creditors within its jurisdictional scope, irrespective of participation, objection, or the governing law of the underlying claims.[144] Debtors accordingly introduce parallel schemes in jurisdictions where the enterprise maintains assets or substantive operations,[145] which are key jurisdictions capable of anchoring the restructuring's practical enforceability. The restructurings of Evergrande Group[146] and Yuzhou Group[147] expressly relied on this approach.

The logic admits a further inference. Once a scheme has been initiated and sanctioned in a key jurisdiction, parallel proceedings elsewhere may be unnecessary. *The Aoyuan* case illustrates the point. The High Court of Hong Kong sanctioned the scheme notwithstanding objections from UK creditors.[148] Because the debtor lacked attachable assets there and parallel schemes in the key jurisdiction had already been approved, dissenting creditors lacked any realistic enforcement avenue.[149] The case

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[142] *LDK* case [19][20]; *Mongolian* case [5]; *Da Yu* case [51].

[143] *LDK* case [42][62][63]; *West African* case [18]; *Sino-Ocean* case [2][5]; *Hong Kong Airlines* case [20].

[144] See *New Zealand Loan and Mercantile Agency Co v Morrison* [1898] AC 349, in [1897] *UKLawRpAC* 59, 349-358; *Da Sen* case [24]; *In re China Bozza Development Holdings Limited* [2023] HKCFI 1620 [28]; *In re Unity Group Holdings International Limited* [2022] HKCFI 3419 [27].

[145] *Winsway* case [36].

[146] *In re China Evergrande Group, et al.*, Case No. 23-11332 (MEW), Exhibit D.1 Evergrande Explanatory Statement, at 145-146, para 12.6.

[147] *In re Yuzhou Group Holdings Company Limited*, Case No. 24-11441 (LGB), Exhibit D: Explanatory Statement, at 15-16.

[148] *Add Hero* case [95].

[149] ibid.

thus reflects a particularly astute exploitation of the territorial operation of SOAs in CBI practice.

A second technique capitalizes on the exception of the Gibbs Rule. In the *Sino-Ocean* case, [150] the debtor grouped Class A creditors holding Hong Kong law-governed claims within an English Restructuring Plan and secured approval through the plan's cross-class cramdown mechanism, thereby extending the restructuring's reach beyond the rule's traditional constraint.

2. Challenging Safeguards

Like a DIP, safeguards can be tactically deployed to circumvent or neutralize their original constraints. When opportune, actors may craft strategies to sidestep or limit their application. The 2026 *Sunac* case's build-in agency technique [151] exemplifies this approach, reportedly inspired by a UK court's interpretation of the Gibbs rule, where modifications to a foreign company's share capital are likely to be recognized by the company's court of incorporation under UK law, the UK court may approve the Scheme. [152]

Sunac promptly capitalized on this opportunity. Experts in *the Sunac* case noted that "a power of attorney created by Clause 11.2 of the Scheme, will be recognised in the Mainland by a court applying conventional Mainland conflict-of-laws rules." [153] Leveraging the power of attorney and deeds of release, the company discharged or modified Mainland-law contractual obligations. Where creditors pursued enforcement in the Mainland, the debtor could demonstrate, via the agency acts, that the parties

[150] *Sino-Ocean* case [35][36].

[151] Through explicit powers-of-attorney or agency clauses in SOA restructuring documents, the debtor acts as each creditor's agent to execute contracts, including deeds of release. The debtor validates the plan's practical effect by obtaining corresponding court recognition of these agency acts under the SOA procedure. *Sunac* case [55].

[152] See *In re Smile Telecoms Holdings Limited* [2022] EWHC 740 (Ch) [73].

[153] In short, the validity of a build-in agency technique is determined by the applicable law. Articles 16 of the Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships and article 17 ("Issues concerning application of law in connection with civil relationships involving the Hong Kong Special Administration Region and the Macau Special Administration Region are subject to these Interpretations by analogy.") of its Judicial Interpretation (I) provide that agency is generally governed by the law of the place of the act, with parties free to select the applicable law. Here, the debt-restructuring acts incorporating the build-in agency technique occurred in Hong Kong, and the SOA procedure is itself governed by Hong Kong law. Accordingly, both the build-in agency technique and the agency acts are evaluated under Hong Kong law, which confirms that the SOA procedure's validity is unaffected by the build-in agency structure.

had reached a debt adjustment or settlement.[154] Because the technique is valid under Mainland law, the Hong Kong SOA effectively restructured Mainland-law obligations without initiating parallel Mainland proceedings, thereby practically circumventing the Gibbs rule. While the apparent tension between the agency route and the Gibbs rule leaves unsettled whether Hong Kong courts will ultimately endorse this approach,[155] the decision constitutes a significant breakthrough, offering clear guidance for debtors seeking to restructure Mainland-law debts through Hong Kong Schemes.

3. Examples of Evaluating Intervention Factors

The emergence of intervening factors prompts actors to either navigate or challenge existing safeguards. Case law evaluating such factors is extensive, and recent decisions demonstrate their capacity to reshape CBI practice. A particularly instructive example is the Cooperation Mechanism on Cross-Boundary Insolvency between the Hong Kong SAR and Chinese mainland (HK-Mainland mechanism),[156] and its effects on the restructuring strategies of Chinese enterprises. The mechanism is especially significant for understanding the evolving operation of cross-border debt restructurings, including its interaction with the Gibbs Rule.[157]

Before the HK-Mainland mechanism's adoption, the High Court of Hong Kong questioned whether courts in Chinese mainland would recognize the discharge of Mainland-law-governed debt through a Hong Kong SOA.[158] The introduction of HK-Mainland mechanism fundamentally altered the signal. As a structural intervention factor, it conveyed an institutional commitment to cross-border coordination. In its wake, Hong Kong courts acknowledged that a Hong Kong scheme could compromise

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[154] See *Xiong & Alpha Enterprise Holdings Ltd.*, Supreme People's Court (2021) Zuigao Fa Zhijian 209.

[155] *Sunac* case [55].

[156] The HK-Mainland mechanism rests primarily on three instruments: Record of Meeting of the Supreme People's Court and the Government of the Hong Kong SAR on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong SAR; Opinions of the Supreme People's Court on Launching the Pilot Program of Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings in the Hong Kong SAR; and the Practical Guide on Procedures for a Mainland Administrator's Application to the Hong Kong SAR Court for Recognition and Assistance.

[157] For an overview of the development of Mainland-Hong Kong insolvency cooperation, the design of the cooperation framework, and relevant case analyses, see Jingxia Shi, 'Cross-Border Insolvency Cooperation Between Mainland China and Hong Kong SAR: The 2021 Arrangement and Its Improvement'19 *University of Pennsylvania Asian Law Review* 372, 397-407 (2024).

[158] *Huiyuan* case [35]; *Lumena* case [10].

debts governed by Mainland law.[159] The development effectively signaled a recalibration in the practical operation of the Gibbs rule, prompting a wave of restructurings[160] that relied on Hong Kong schemes to address Mainland-law-governed obligations.

In 2026 *Sunac* case, the debtor invoked the HK-Mainland mechanism to secure Mainland recognition of an SOA encompassing TPRs.[161] As the first case of its kind, it demonstrates the mechanism's emerging capacity to accommodate TPRs.

C. SIP in Global Rescue: Piercing Legal Uncertainty

SIP theory legitimizes both the unpredictability of CBI practice and the divergent ways actors engage with it. More significantly, it illuminates the core dynamics underlying otherwise opaque proceedings, identifying critical points where intervention can succeed. This article demonstrates that insight through a focused analysis of recent third-party release practices.

In CBI, TPRs have long operated in a legal gray zone, leaving practice largely unconstrained.[162] That equilibrium was upended by two landmark developments:

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[159] *Gangran* case [23].

[160] *Beidahuang* case [11]; *North Mining* case [38].

[161] *Sunac* case [27].

[162] Different jurisdictions adopt divergent approaches to TPR, reflecting underlying trade-offs. In the United States, before *Purdue Pharma*, TPR are recognized when necessary to facilitate restructurings, provided procedural fairness and creditor rights are protected. *In re Olinda Star Ltd.*, 614 B.R. 28, 48 (Bankr. S.D.N.Y. 2020); Lindsey D. Simon, *Mass Tort Reckoning: The Ongoing Influence of Bankruptcy Grifters in the United States*, in Rolef de Weijs ed., *Third Party Releases by Means of Bankruptcy Law: Guarantees and (Mass) Tort* 10; Michelle M. Harner, *Final Report of the ABI Commission to Study the Reform of Chapter 11* (American Bankruptcy Institute 2014) 253, 256. English schemes of arrangement have emerged as unusually receptive to TPR, but the courts have sought to cabin this receptiveness within a principled framework. See Jennifer Payne, *Schemes of Arrangement: Theory, Structure and Operation* (Cambridge University Press 2021) 26. Chinese mainland's practice exhibits slight variations, but in principle it does not prohibit third-party releases. Relevant cases include, *In re Jinliang Wu & China Cinda Asset Management Co., Ltd., Sichuan Branch* (Sichuan High People's Court), (2021) Chuan Zhi Fu 49 [(2021) 川执复 49 号]; *In re Chongqing Guojin Building Materials Co., Ltd.*(Fuling District People's Court, Chongqing), (2019) Yu 0102 Po 6-12 [(2019) 渝 0102 破 6-12 号] (The plan in this case was approved through a cramdown.); *In re Bank of Communications Co., Ltd., Heilongjiang Branch & Shenzhen Brand Industrial Group Co., Ltd.* (Supreme People's Court), (2019) Zui Gao Fa Min Zhong 173 [(2019) 最高法民终 173 号]; *In re Industrial and Commercial Bank of China, Xuchang Wuyi Road Branch & Xuchang Maple Flower Wood Co., Ltd. & Henan Huali Paper & Packaging Co., Ltd.* (Xuchang Intermediate People's Court, Henan), (2018) Yu 10 Min Chu 167 [(2018) 豫 10 民初 167 号]. *In re Yunyin Xie & Faxiang Song* (Jiangxi High People's Court), (2014) Gan

Hong Kong courts' formal characterization of TPR in *Yuzhou* case,[163] and the U.S. Supreme Court's categorical prohibition of domestic non-consensual TPRs in *Purdue Pharma* case.[164] These structural interventions forced rapid reactions, particularly from actors aiming to disable Chapter 15's non-consensual TPRs function.[165] Ironically, the Hong Kong proceeding in Yuzhou Group concurrently sought U.S. Chapter 15 recognition, resulting in a confrontation ultimately resolved through a debtor-revised recognition order.[166]

Within a year, U.S. courts quickly relaxed Chapter 15's treatment of non-consensual TPRs, shifting CBI practice once more. In *Crédito Real*[167] and *Odebrecht Engenharia e Construção S.A.*,[168] the courts confirmed that Chapter 15 is not disabled by *Purdue Pharma* from recognizing and assisting foreign proceedings containing non-consensual TPRs. Opposition gradually waned, restoring procedural equilibrium. This tension, domestic prohibition paired with cross-border allowance, prompted some U.S. companies to initiate proceedings with TPRs abroad and then seek Chapter 15 recognition, effectively circumventing the domestic ban, a strategy confirmed by U.S. approval of the UK proceeding in *the Fossil Group* case.[169] Following the domestic non-consensual TPRs ban, opt-out releases in consensual TPRs became the next locus of dispute, with state positions diverging, and in some cases conflicting.[170] A definitive resolution of this emerging conflict may ultimately be necessary.

Min Er Zhong Zi 47 [(2014) 赣民二终字第 47 号]; *In re Liuzhou Zhengling Group Co., Ltd. & 53 Affiliated Companies* (Guangxi Zhuang Autonomous Region High People's Court), (2018) Gui Po 1 [(2018) 桂破 1 号].

[163] *Yuzhou* case.

[164] *Purdue Pharma* case.

[165] See *In re Yuzhou Group Holdings Co.*, No. 24-11441 (Bankr. S.D.N.Y. Sept. 6, 2024), *Limited Objection of United States Trustee to the Verified Petition Under Chapter 15 for Recognition of a Foreign Main Proceeding and Related Relief*, at 5-12.

[166] See *In re Yuzhou Grp. Holdings Co.*, No. 24-11441 (Bankr. S.D.N.Y. Sept. 6, 2024), Ex. A, *Revised Recognition Order*, para 9.

[167] See *in re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R.*, No. 25-10208 (Bankr. D. Del. Apr. 1, 2025) (Opinion of Thomas M. Horan, J.).

[168] See *Memorandum Opinion Granting Motion for Recognition of Foreign Main Proceedings and Overruling UST Objections*, *in re Odebrecht Engenharia e Construção S.A. - Em Recuperação Judicial, et al.*, No. 25-10482 (Bankr. D. Del. 2025), at 15.

[169] Marco Schaden, 'US-headquartered Fossil Group secures Ch15 recognition of UK restructuring plan,' 12 November 2025, <https://globalrestructuringreview.com/article/us-headquartered-fossil-group-secures-ch15-recognition-of-uk-restructuring-plan> accessed 14 March 2026.

[170] *Buffalo* case; *Epstein* case.

The recurring patterns of these cases and practices may seem disorienting, leaving their next course uncertain. Viewed through the global rescue operational paradigm and SIP theory, however, a coherent line of explanation emerges, illuminating these otherwise opaque phenomena.

TPRs must be understood within the global rescue framework. As Part I explains, the operational paradigm defines contemporary CBI under the global rescue vision. Permitting TPR in this context demands a justification distinct from domestic practice. Cross-border restructurings involving TPRs are typically financial, not mass-tort, in nature, and thus do not implicate the core interests that any single jurisdiction seeks to protect. They serve essential functions, including preventing intra-group ricochet or contribution claims[171] that could unravel the agreed compromise, destabilize the restructuring or sustainable offshore capital structure,[172] or impose substantial transactional and enforcement costs.[173]

Second, divergent actor responses to TPRs have produced cyclical practice, but this debate has increasingly clarified the distinctive value of TPRs under global rescue, enabling jurisdictions to manage them effectively. Once the unique value and limiting conditions of TPRs in a global rescue context are established, practice no longer relies on blunt, all-or-nothing rules. A functional approach emerges. Non-waivable core interests in domestic releases remain protected, while other aspects may be conditionally permitted and calibrated case by case. In this sense, the United States' contrasting treatment of cross-border and domestic releases reflects a deeper institutional logic.

IV. Global Governance through Safeguards-in-Possession

In CBI, modified universalism is often cast as a vision[174] of maximal cooperation

[171] *Yuzhou Group. Holdings Co* No 24-11441 (Bankr SDNY, 6 Sept 2024), Ex D, Explanatory Statement, at 22-25.

[172] *In re Shimao Group Holdings Limited* [2025] HKCFI 1751 [14].

[173] Ilya Kokorin, 'Third-Party Releases in Insolvency of Multinational Enterprise Groups' 1 *European Company and Financial Law Review* 107, 116 (2021).

[174] *Bakhshiyeva* case [31].

and minimal fragmentation.[175] But safeguards are discretionary, and SIP's orientation hinges on who wields it, inevitably producing fragmentation and reducing formal safeguards to the disparate measures actually deployed across jurisdictions. Yet, in practice, overlapping SIP applications yield relatively stable outcomes over time, reshaping the operational landscape of CBI. The question, then, is whether SIP can govern such practice. A proper answer begins by acknowledging SIP's dual normative role in global rescue and proceeds to integrate safeguard attributes with evaluative insights to design approaches that meaningfully support CBI.

A. SIP as Vectors of Fragmentation

Safeguards inherently protect specific interests, reflecting either broadly shared or jurisdiction-specific values to preserve particular stakes or respond to practical realities. [176] SIP exacerbates the risk of conflict and fragmentation. In practice, fragmentation arises chiefly from three sources, i.e. the discretionary attribute of safeguards, the multiplicity of SIP agents, and the overlapping applicable rules for one specific SIP.

1.Nature-driven Fragmentation

Fragmentation inherent to the nature of safeguards. Their discretionary scope (covering conditions, intensity, and effect) inevitably produces fragmentation. Within the functional framework, the exercise of discretion itself acts as an intervention factor, further amplifying this fragmentation. Sections I.B.3 and II.B.2 provide multiple illustrations.

2.Multiplicity of SIP agents

Second, fragmentation stemming from overlapping agents of a single SIP. Overlapping agency risks "scope creep," expanding the reach of safeguards and producing contradictory outcomes as actors attempt to limit, sustain, or reinforce that reach. The Gibbs rule offers a paradigmatic example of this fragmentation.

Because the creditor, debtor, and Gibbs jurisdictions each serve as agents under

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[175] Irit Mevorach, *The Future of Cross-Border Insolvency* 21-22.

[176] *Global Brands* case [24].

the Gibbs-Rule-in-Possession, the rule's reach expands across jurisdictional and judicial-assistance domains. The Gibbs rule can provide a jurisdictional base for SOA, reflecting the UK's endorsement of global rescue. Historically, UK courts treated assistance under modified universalism as obligatory, encouraging active assistance for foreign insolvency proceedings[177] and signaling strong practical confidence to debtors.[178] Yet adherence to the Gibbs rule (as one of the reasons) led UK courts in *Rubin* case to deny such rescue efforts,[179] emphasizing that MLCBI assistance is strictly procedural and cannot circumvent the rule.[180] This demonstrates fragmentation arising from overlapping SIP agents. The UK's restrictive stance contrasts sharply with the US and Singapore's permissive interpretations,[181] producing interpretive fragmentation of MLCBI.

3. Overlapping Applicable Rules for a Single SIP

A third source of fragmentation arises when an actor invokes the same safeguard under multiple, potentially divergent rules. While conflict is not inevitable, fragmentation can result from overlapping international regulation,[182] from multiple legal bases within a jurisdiction (e.g., domestic law, bilateral treaties),[183] or from

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[177] *Singularis* case [23]; *Rubin & Anor v Eurofinance SA & Ors (Anor* case*)* [2010] EWCA Civ 895 [62]; *McGrath* case [36]; *Cambridge Gas Transport Corp v. Official Committee of Unsecured Creditors* [2006] UKPC 26 [16].

[178] *Anor* case [62].

[179] *Rubin* case [128]. Ireland similarly declines to endorse this approach. *In re Flightlease (Irl) Ltd & Cos Act* [2012] IESC 12.

[180] *Bakhshiyeva* case [88]-[91]; *Sberbank* case [158]; *Fibria Celulose S/A v Pan Ocean Co. Ltd & Anor* [2014] EWHC 2124 (Ch) [105]-[108]; *In re Stanford International Bank Ltd* [2010] EWCA Civ 137 [23].

[181] *In re PT Garuda Indonesia (Persero) Tbk* [2024] SGHC(I) 1 [6][16]-[19]; *Finanz AG Zurich v. Banco Economico SA*, 192 F.3d 240 (2d Cir. 1999), at 249; *In re Avanti Communications Group PLC*, 582 BR 603 (Bankr SDNY 2018), at 618; The Ministry of Law, 'Ministry's Response to Feedback from Public Consultation on the Draft Companies (Amendment) Bill 2017 to Strengthen Singapore as an International Centre for Debt Restructuring', 27 Feb. 2017, p 23, <https://www.mlaw.gov.sg/files/Annex_A-Goverment_Response_to_Public%20Consult_Feedback_for_Companies_Act_Amendments.pdf> accessed 13 March 2026.

[182] See Irit Mevorach, ;Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism?' 22 *European Business Organization Law Review* 283 (2021).

[183] For instance, "Article 5(2) of the Enterprise Bankruptcy Law of the People's Republic of China provides the legal basis for Chinese courts to engage in judicial cooperation in CBI. In the bilateral treaties on civil and commercial judicial assistance that China has concluded with over 30 countries, the provisions on mutual recognition and enforcement of civil and commercial judgments do not exclude insolvency matters. Therefore, Chinese courts can engage in judicial cooperation on CBI issues based on these bilateral treaties. For example, in 2001, the Intermediate People's Court of Foshan City, Guangdong Province, recognized the insolvency ruling of the Milan Court in Italy, based on the Treaty on Civil Judicial Assistance between China and Italy." Gao Xiaoli, 'China's Practice of Judicial Cooperation in Cross-border Insolvency.' 4 December 2024,

judicial assistance processes that treat proceedings as ineligible for insolvency and assess them under conventional civil or commercial review,[184] thereby subjecting safeguards from other legal regimes to insolvency evaluation.

B. SIP as Enablers of Resilience

When evaluating whether safeguards and SIP generate fragmentation in insolvency practice, an often-overlooked premise is that we operate within the reality shaped by modified universalism's "general principles and limited exceptions." In effect, CBI under this framework permits such fragmentation.[185]

Critical legal theory conceives[186] law as structuring a coherent system, within which multiple groups pursue competing interests, producing divergent outcomes.[187] Legal arrangements crystallize this system,[188] around which groups continually negotiate boundaries to protect their stakes. Through such subtle balancing,[189] the system's dominance is maintained or reinforced.[190]

In CBI, law constructs the system of modified universalism, within which jurisdictions, creditors, debtors, third parties, and international organizations interact. SIP shapes this system, and its overlapping agency can intermittently unsettle its internal balance, producing temporary vagueness and uncertainty.[191] Yet through cycles of disruption, reconstruction, and stabilization, modified universalism's dominance is preserved. These dynamics operate in practice, often irrespective of conscious recognition.

<https://cicc.court.gov.cn/html/1/219/208/203/12545.html> accessed 14 March 2026.

[184] See Frankfurt am Main Regional Court, Vorbehaltsurteil, Case No 2-12 O 239/24 (2025).

[185] John A. E. Pottow, 'Beyond Carve-Outs and toward Reliance: A Normative Framework for Cross-Border Insolvency Choice of Law' 9 *Brooklyn Journal of Corporate, Financial & Commercial Law* 197, 205 (2014).

[186] David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016) 38.

[187] David Kennedy and Martti Koskenniemi, *Of Law and the World: Critical Conversations on Power, History and Political Economy* (Harvard University Press 2023) 211.

[188] *ibid., 233.*

[189] David Kennedy 50.

[190] David Kennedy and Martti Koskenniemi 219-221.

[191] *ibid.,* 34, 87.

C. Toward a Theory of Calibrated SIP

Once the role, function, assessment, and practical value of safeguards under SIP-based CBI are well understood, their design can be refined to better serve practice. To illustrate this, the article presents a SIP analysis table for use by all actors. Crucially, in any case, multiple safeguards operate in a decentralized manner, with each capable, on its own, of influencing the final outcome.

Type	Assessment	Intervention	Considerations	Strategic Response
Safeguard A	Scope	Structural	Technique enabling circumvention	Formulate integrated strategies leveraging all safeguards
	Conditions	Procedural	Jurisdictional variations	
	Signal	Factual	Case-specific facts can be leveraged	
Safeguard B	…	…	…	
Safeguard C	…	…	…	
…	…	…	…	

（Table 1 SIP System Mapping Table）

The table presents a structured taxonomy of safeguards, parsed along five analytically distinct dimensions, i.e. type, assessment, intervention, considerations, and strategic response. This framework foregrounds the actor-dependent nature of safeguards, highlighting that their operational significance emerges not from formal design alone but from the interaction of structural form, procedural conditions, and factual contingencies.

First, structural scope and systemic leverage. Structural attributes, captured under the Scope dimension, delineate the formal reach of safeguards while simultaneously exposing potential avenues for circumvention. Table 1 illustrates that even mechanisms conceived as robust may be selectively leveraged depending on the deploying actor's objectives. Such structural characteristics underscore a core tension in CBI: legal authority confers conditional empowerment, not deterministic control, and institutional design is inseparable from strategic exercise.

Second, procedural conditions and contextual modulation. The Conditions dimension emphasizes the procedural and jurisdictional heterogeneity that modulates

safeguard effectiveness. Safeguard A demonstrates that the same institutional instrument may yield divergent operational outcomes contingent upon local procedural norms and judicial discretion. This observation situates safeguards within embedded procedural ecosystems, where formal legality interacts with interpretive latitude to shape actualized effects.

Third, factual intervening factors and actor-dependent realization. The Factual dimension captures the influence of factual intervening factors on safeguard implementation. Critically, the effects of these factors are contingent on the deploying actor. A safeguard exercised by a court, administrator, or debtor can produce materially different consequences, from stabilizing enterprise value to generating transient fragmentation. This actor-sensitive perspective reconceptualizes safeguards as dynamic instruments, whose efficacy is co-constituted by design, context, and strategic deployment.

Fourth, strategic response and integrative coordination. Strategic response encompasses the deliberate orchestration of multiple safeguards to achieve operational and institutional objectives. No safeguard functions in isolation. Optimal deployment requires anticipation of procedural constraints, factual contingencies, and the interaction effects of overlapping instruments. This dimension frames safeguards as interdependent nodes within a broader governance architecture, mediating between normative legal authority and the exigencies of CBI practice.

Taken together, the table reveals safeguards as actor-sensitive governance instruments whose value emerges through deployment rather than design alone. Their overlapping and strategically guided use generate temporary fragmentation, which resolves through cycles of disruption, adaptation, and maintenance. This dynamic produce both institutional resilience and authoritative continuity, demonstrating how modified universalism is operationalized in practice. Safeguards thus serve simultaneously as protectors and in disguise as disruptors of adaptive governance, reconciling legal authority with practical flexibility in complex CBI regimes.

Conclusion

CBI cooperation has evolved from a distributional to an operational paradigm, with safeguards shifting from passive prerequisites to active instruments. Their deployment exposes inherent tensions under the global rescue framework. When actors deploy SIP, their considerations and strategies diverge, generating temporary conflict. Yet this process ultimately delineates the boundaries of global rescue and transitions jurisdictions from all-or-nothing approaches to conditional acceptance. This exemplifies the value of SIP theory in the operational paradigm. By shaping modified universalism, SIP offers both explanatory insight and practical leverage. It grants actors broad discretion to protect interests, but that discretion is not inherently benign. In particular, one must examine the extent to which large-enterprise insolvencies may exploit modified universalism to override legal constraints under the guise of crisis management.[192]

Without careful regulatory design, sustained SIP practice risks eroding cooperation and triggering a race to the bottom, reducing general principles to exceptions and pushing modified universalism toward *quasi*-territorialism. While a comprehensive solution lies beyond this article, multilateral coordination or normative-functional design of SIP may help mitigate the risk. Promisingly, scholarship is already exploring these avenues,[193] reinforcing SIP theory's conceptual foundation while exposing its current structural limits.

[192] See Melissa B. Jacoby, 'Shocking Business Bankruptcy Law' 131 *Yale Law Journal Forum* 409 (2021).

[193] John A. E. Pottow, 'Beyond Carve-Outs and toward Reliance: A Normative Framework for Cross-Border Insolvency Choice of Law'.