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UK contracts and modification under Foreign Law

Time to consign the *Gibbs* rule to legal history?

There is a long-established principle that the discharge of a debt under foreign insolvency law will not be given effect in the UK where the contract creating the debt is governed by UK law. This doctrine is reflected in *Gibbs v La Société Industrielle et Commerciale des Métaux*.[1] This case articulates the theoretical basis and possible justification for the rule; namely that the foreign law is irrelevant because it is 'not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound; it is the law of another country by which they have not agreed to be bound.' The principle, while predating the *Gibbs* decision is often known as the *Gibbs* rule. The principle was also acknowledged by the Privy Council in *New Zealand Loan and Mercantile Agency Company v Morrison*[2] and the House of Lords (now the UK Supreme Court) in *National Bank of Greece and Athens v Metliss*.[3]

More recently in *Goldman Sachs International v Novo Banco SA*[4] Lord Sumption, with the agreement of other members of the Supreme Court, said[5] that measures taken under a foreign law have only limited effect at common law on contractual liabilities governed by English law. 'This is because the discharge or modification of a contractual liability is treated in English law as being governed only by its proper law, so that measures taken under another law, such as that of a contracting party's domicile, are normally disregarded'.

Despite these endorsements however, at the highest level of the judiciary, the *Gibbs* rule has come under sustained attack particularly from those advocating a more universalist approach in relation to the restructuring of debt obligations. Giving effect to the *Gibbs* rule is considered to be in direct conflict with the intent and purpose of a modern debt restructuring and insolvency law regime. It is said to be parochial and narrow-minded with its exclusive focus on the bilateral contractual regime to the neglect of more multilateral universalist concerns.

This paper asks whether the *Gibbs* rule can and should survive. The paper suggests that the rule may survive as a residual common law principle but its application should be cut back,

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1 (1890) LR 25 QBD 399

2 [1898] AC 349.

3 [1958] AC 509. See also the approval of the Gibbs principle by Lord Hope in *Joint Administrators of Heritable Bank plc v Winding up Board of Landsbanki Islands HF* [2013] UKSC 13, [2013] 1 WLR 725 at [44] and the statement by Lord Hoffmann in *Wight v Eckhardt Marine GmbH* [2003] UKPC 37, [2004] 1 AC 147 at [11] that the question whether an obligation has been extinguished is governed by its proper law.

4 [2018] UKSC 34, [2018] 1 WLR 3683.

5 [2018] UKSC 34, [2018] 1 WLR 3683 at [12].

through UK implementation of the new UNCITRAL Model Law on Insolvency Related Judgments.[6] Such a development would cement the UK's position at the centre stage of international insolvency and restructuring law developments while, at the same time, removing any chauvinist tinge from the UK law. Criticisms alleging such a tinge has sometimes come in the direction of UK law from commentators and judges in the UK, and further afield.

After this brief introduction, the paper is divided into five additional parts and this is followed by a conclusion. The second part looks in more detail at the *Gibbs* rule and its backdrop and takes on board some of the criticisms. The third part addresses limitations of the *Gibbs* rule and how UK courts but not those in Singapore[7] appear to have set their face against further common law modifications of the rule. The fourth part addresses the European Insolvency Regulation as well as the effect of Brexit on the *Gibbs* rule. The fifth part considers the UNCITRAL Model Law on Cross Border Insolvency and its implications for the *Gibbs* rule. The sixth part addresses the new UNCITRAL Model Law on Insolvency Related Judgments and how its possible UK implementation will impact on the *Gibbs* rule. The final part concludes.

2. The Gibbs rule and its backdrop

At common law the position is long established and clear, though controversial: a discharge of debts effected by a foreign insolvency proceeding provides no defence to an English action on an English debt. The general principle of English private international law is that while a discharge of contractual obligations that is effective under the proper law of a contract is effective wherever the question may be litigated, a discharge other than by its proper law, will not be effective in the UK.

This is often referred to as the *Gibbs* rule after *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux*[8], a decision of the Court of Appeal in which it was applied. But *Gibbs* it seems was only applying established law. The action was for non-acceptance of certain quantities of copper purchased by the defendants, a French company, from the

6 (UK) Insolvency Service 'Implementation of two UNCITRAL Model Laws on Insolvency Consultation' (7 July 2022) and available at https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency/implementation-of-two-uncitral-model-laws-on-insolvency-consultation

7 See generally Kannan Ramesh, 'The Gibbs Principle' [2017] 29 *Singapore Academy of Law Journal* 42; Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (London, Sweet & Maxwell 2016) at pp 169-172 and Riz Mokal, 'Shopping and Scheming, and the Rule in Gibbs' *South Square Digest,* March 2017, 58-63.

8 (1890) LR 25 QBD 399

plaintiffs, who were merchants carrying on business in London. The relevant contracts were subject to English law. It appears that the buyer company had, since the making of the contracts and before the action, gone into liquidation in France. It also appeared that under the appropriate provisions of French liquidation law they were discharged from liability under the outstanding contracts.

The defendants argued the law of England, in accordance with international law principles on the subject, should recognise and give effect to the foreign bankruptcy or liquidation, and therefore the effect of the liquidation operated as a bar to the action in England.

The Court of Appeal however, would have none of this. Lord Esher MR observed that the 'law invoked is not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound; it is the law of another country by which they have not agreed to be bound.'[9] The other members of the court, Lindley and Lopes LJJ. were of a similar view; stating that the French law discharge could not operate as a discharge of an English law governed contract.[10]

Reference was made to the observations of Lord Kenyon almost a 100 years before in *Smith v Buchanan*[11] that it was 'sought to bind the plaintiffs by a law with which they have nothing to do, and to which they have not given any assent either express or implied.' *Smith v Buchanan* is a step back in time when an 'old colonial war', otherwise known as the American War of Independence, was very much within living memory. In this case, the debtor sought, in English proceedings, to rely on a discharge arising under the bankruptcy law of the US State of Maryland, contending that the English courts should 'give it effect by adoption and the curtesy of nations'. But the argument was roundly rejected. Lord Kenyon CJ said:[12] 'It is impossible to say that a contract made in one country is to be governed by the laws of another. It might as well be contended that if the state of Maryland had enacted that no debts due from its own subjects to the subjects of England should be paid, the plaintiff would have been bound by it'.

There is even older authority to substantially the same effect. In point is the 1726 case of *Burrows v Jemino*[13] where the English court accepted the proposition that a person discharged by an Italian court from liability under a bill of exchange drawn in Italy could not be sued in England. In short, the court concluded that a person could not be sued in England on

9 Ibid at 406.
10 Ibid at 409 and 411.
11 (1800) 102 ER 3 at 5.
12 Ibid at 4-5.
13 (1726) 93 ER 815.

the basis of its acceptance of a bill of exchange abroad after it had been discharged by the laws of that country.

But moving the dial forwards, the *Gibbs* rule has come under sustained criticism from a variety of quarters. One line of attack is to say that the decision belongs to an Anglocentric age that is now consigned to history.[14] This criticism may not be entirely fair however, since the *Gibbs* rule gives effect is to the discharge of a party under the proper law of the contract irrespective of whether the relevant foreign law is English law or a foreign law. More in point however is the proposition that the rule is out of touch with modern principle of modified universalism in respect of the recognition of insolvency and debt restructuring proceedings.

Judicial enthusiasm for the principle of modified universalism as a principle underpinning the common law has ebbed and flowed over the years.[15]Nevertheless, there is a strong current of authority supporting the proposition that English courts should, so far as consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution. In other words, the emphasis should be on reinforcing the primacy of main insolvency proceedings, taking place either where the country is incorporated, or where the company has its centre of main interests, and that courts in other countries should defer to the place exercising main insolvency jurisdiction.

The *Gibbs* rule is seen of as increasingly anachronistic because it puts the focus on a bilateral exchange between two parties. Modern insolvency law, on the other hand, is designed to deal with a multilateral situation where there a number of potentially competing parties to a necessarily limited asset pool. Collective action is preferred instead of individual action by individual creditors because it prevents 'overfishing' and the depletion of stock in the common

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14 See the judicial discussion in the Southern District of New York in *In re Agrokor* (2018) 591 BR 163.

15 On the UK generally, see the judgments of Lord Hoffmann in *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors (of Navigator Holdings Plc)* [2007] 1 AC 508 and in *Re HIH Casualty and General Insurance Ltd* [2008] I WLR 852 distinguishing between the universalism and territorialism of insolvency proceedings and referring to the principle of modified universalism as the 'golden thread' of the common law. It should be noted that while Lord Collins in *Rubin v Eurofinance* [2012] UKSC 46, [2013] 1 AC 236 at para 92 hails 'Lord Hoffmann's brilliantly expressed opinion in *Cambridge Gas* and his equally brilliant speech in *HIH'*, the UK Supreme Court in Rubin holds that Lord Hoffmann was wrong in *Cambridge Gas*. In *Rubin* it could be argued the UK Supreme Court paid lip service to the principle of universalism, or modified universalism, as an underlying principle of international insolvency law, but effectively denuded the principle of much practical power. The court seemed to foreclose the possibility of further judicial developments in this field leaving the matter within the exclusive domain of the legislature and reciprocal arrangements with other countries. See also to the same effect the Privy Council in *Singularis Holdings v PricewaterhouseCoopers* [2014] UKPC 36, [2015] 1 AC 1675 where *Cambridge Gas* was further discredited and Lord Neuberger at para 157 referred to 'the extreme version' of the 'principle of universality', as propounded by Lord Hoffmann in *Cambridge Gas*.

pool. Individual rights have to be curtailed and compromised so as to enhance the common pool. The proper law of particular debts may not be same as the location where main insolvency proceedings are being conducted. Reliance on the proper law of the debt partitions off particular claims from the universalist goals of the main insolvency proceedings. It fragments the common pool.

Put another way, contracting parties may be taken to contemplate that, upon the supervening insolvency of one party, a single law should govern the rights of all creditors, wherever in the world the assets of the debtor happen to be located, and irrespective of the proper law of the contract. *Gibbs* views legal analysis though a bifocal lens whereas modern insolvency is multifocal dealing as it does with multiple parties and multiple claims. The multi-party focus is now reflected not just in the common law but also in international instruments. These include the UNCITRAL Modern Law on Cross Border Insolvency and the European Insolvency Regulation.[16]

The UNCITRAL Model Law on Cross Border Insolvency aims to achieve greater efficiencies in the administration of international insolvency cases.[17] The Model Law has attained a measure of international acceptance with the US and UK among the implementing States as well as the other major common law jurisdictions of Canada and Australia.[18] In the UK, the Model Law has been implemented through the Cross Border Insolvency Regulations (CBIR) 2006.[19]

The Model Law adopts a 'modified universalist' principle.[20] It allows for the opening of more than one set of insolvency proceedings in States where the debtor has a business presence, and aims for maximum cooperation and coordination among the various proceedings. To this

16 Regulation 2015/848 recasting Regulation 1346/2000.

17 The Model Law (1997) is available at the United Nations Commission on International Trade Law (UNCITRAL) website - www.uncitral.org/. For analyses of the Model Law by those involved in its drafting – see A Berends, 'UNCITRAL Model Law on Cross-*Border Insolvency: A Comprehensive Overview' (1998) 6 Tulane* Journal of International & Comparative Law 309; J Clift, 'The UNCITRAL Model Law on Cross-Border Insolvency: A Legislative Framework to Facilitate Coordination and Cooperation' (2004) 12 *Tulane Journal of International & Comparative La*w 307.

18 But a somewhat different view see S Chandra Mohan, 'Cross-Border Insolvency Problems: Is the UNCITRAL Model Law the Answer?' (2012) 21 *International Insolvency Review* 199 who suggests that the belief that the adoption by the US and UK 'might encourage adoption by a wider circle of countries' has simply not materialised. For the current list of adoptions see the UNCITRAL website – www.uncitral.org/

19 SI 2006/1030. Reg 2 provides that '(1) The UNCITRAL Model Law shall have the force of law in Great Britain in the form set out in Schedule 1 to these Regulations (which contains the UNCITRAL Model Law with certain modifications to adapt it for application in Great Britain)'.

20 See generally Irit Mevorach, 'Modified Universalism as Customary International Law' (2018) 96 *Texas Law Review* 1403-1436; *The future of cross-border insolvency: overcoming biases and closing gaps* (Oxford, OUP 2018).

end, the Model Law provides for four main elements in the conduct of cross-border insolvency cases: access, recognition, relief (assistance) and cooperation.[21]

The underlying philosophy of the Model Law was expounded by the US court in *ABC Learning Centres Ltd*. It said:[22]

'The Model Law reflects a universalism approach to transnational insolvency. It treats the multinational bankruptcy as a single process in the foreign main proceeding, with other courts assisting in that single proceeding. In contrast, under a territorialism approach a debtor must initiate insolvency actions in each country where its property is found. This approach is the so-called 'grab' rule where each country seizes assets and distributes them according to each country's insolvency proceedings.'[23]

The *ABC Learning* analysis has also been adopted by courts in other countries including the UK[24] and Australia[25]. The Australian Federal Court in *Akers v Deputy Commissioner of Taxation*[26]has however, tempered the high flown rhetoric in *ABC Learning* in at least two respects. First, it suggested that the universalism of the Model Law was qualified[27] and also that this description could only be accepted 'for what it is worth'.[28] Secondly, it suggested that 'local' law may have to be applied in respect of the distribution of assets collected locally rather than the law of the main insolvency proceedings.[29] Allsop CJ said that 'the sacrifice of the

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21 UNCITRAL, '*Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency*' (2013) (Revised Guide), para 24.
22 *In re ABC Learning Centres Ltd.* (2013) 728 F3d 301 at 307. The court cited Andrew Guzman, 'International Bankruptcy: In Defense of Universalism' (2000) 98 *Michigan Law Review* 2177 at 2179.

23 For the universalism versus territorialism debate see JL Westbrook, 'A Global Solution to Multinational Default' (2000) 98 *Michigan Law Review* 2276; L Lo Pucki, 'The Case for Co-operative Territoriality in International Bankruptcy' (2000) 98 *Michigan Law Review* 2216; L Lo Pucki, 'Universalism Unravels' (2005) 79 *American Bankruptcy Law Journa*l 143; R Rasmussen, 'Where are all the Transnational Bankruptcies?: The Puzzling Case for Universalism' (2007) 22 *Brooklyn Journal of International Law* 983.

24 For case references see generally fn 14 above.
25 G McCormack and Anil Hargovan, 'Australia and the International Insolvency Paradigm' (2015) 37 *Sydney Law Review* 389-416.

26 [2014] FCAFC 57 at para 111.
27 See generally L Clark and K Goldstein, 'Sacred Cows: How to Care for Secured Creditors' Rights in Cross-Border Bankruptcies' (2011) 46 *Texas International Law Journal* 513 at 518-519 describing 'modified universalism' as a practical alternative to the difficulty of implementing a fully universal system of international insolvency.
28 [2014] FCAFC 57 at para 120.
29 For a discussion of why 'developed States' may prefer 'universalist' insolvency norms see Lord Hoffmann in *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors (of Navigator Holdings Plc)* [2007] 1 AC 508 and for some reasons why developing countries might want to ring-fence assets for the benefit of local creditors see the paper by the former Singapore Chief Justice Chan Sek Keong, 'Cross-Border Insolvency issues affecting Singapore' (2011) 23 *Singapore Academy of Law Journal* 413 at 419.

rights … of local creditors upon an altar of universalism may be to take the general informing notion of universalism too far.'[30]

The European Insolvency Regulation (EIR) is an even more comprehensive and extensive legal instrument than the Model Law.[31] For instance, under the EIR recognition of insolvency proceedings opened in another EU Member State is automatic[32] whereas under the Model Law it is dependent upon an application to the court. Although the assumption under the Model Law is that main insolvency proceedings should take place where the debtor has its centre of main interests (COMI) and 'non-main proceedings in States where the debtor has an establishment, the Model Law does not directly allocate jurisdiction to open insolvency proceedings.[33] The existing national jurisdictional rules remain in place and the mere fact that a debtor may have assets, or even its COMI, in a particular State does not, in itself, confer jurisdiction on that State to open insolvency proceedings. It depends on the relevant national law applicable to that case. Under the EIR, insolvency proceedings have the same effect in other EU States as they have in the law of the insolvency forum[34], whereas under the Model Law the consequences of recognition depend on the law of the recognising State.

Through the CBIR, the UK has adopted the UNCITRAL Model Law but the consequence of Brexit means that it is no longer subject to the European Insolvency Regulation. It is however still subject to the Rome I Regulation (EU Regulation 593/2008 on the law applicable to contractual obligations) which has been 'onshored' in the UK and form part of the body of retained EU law.[35] Article 12(1)(d) provides that the law applicable to a contract under the Regulation shall govern the various ways of extinguishing obligations. At first glance this would seem to provide statutory confirmation for the rule in *Gibbs*. Article 12(1)(d) does not place any limits however, on the circumstances in which the applicable law might recognise the modification of contractual obligations under the debt restructuring or insolvency law of another country. For instance, Article 12(1)(d) would seem to leave English courts with a free hand to expand upon common law limitations on the *Gibbs* principle that are already

30 *Ibid* at para 118.
31 For comparisons between the UNCITRAL Model Law and the EIR see Reinhard Bork, 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 *International Insolvency Review* 246.
32 EIR, arts 19,20 and 32.
33 National implementing legislation makes it clear that existing jurisdictional rules remain in place – see section 1520(c) Bankruptcy Code in the US and Cross-Border Insolvency Regulations 2006, SI 2006/1030 sch 1, art 20(5) in the UK.
34 EIR, art 20.
35 The Regulation was 'onshored' in The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 SI 2019/834.

recognised; to develop further limitations and even to abrogate the *Gibbs* principle, more or less altogether.[36] These limitations will now be considered.

3. Limitations on the Gibbs rule

a. submission

In *Gibbs* there was an argument that the party now relying on the proper law of the contract had assented (in other words, submitted) to the jurisdiction of the court administering the foreign law insolvency proceedings and therefore could no longer rely on its proper law rights.[37] In general the court gave short shrift to the arguments asserting the primacy of the insolvency law forum though without specifically tacking the submission proposition.

In recent times argument, the submission argument has moved more centre stage. A submission exception to the *Gibbs* rule has been explicitly accepted in Hong Kong[38] and there is also authority, albeit more indirect, supporting its existence in England. The leading case is that of *Rubin*[39] which takes a broad approach to the conception of submission, stating that whether there is a submission is to be inferred from all the facts. The case specifically concerned the enforcement of foreign judgments and Lord Collins said that whether there has been a submission depends on English law. It did not necessarily follow that because the foreign court would not regard the steps taken abroad as a submission that they would not be so regarded by the English court. In the conjoined *New Cap* appeal, Lord Collins concluded that the party disputing enforcement had submitted to the Australian jurisdiction by choosing to prove in the Australian insolvency proceedings. The party should not be allowed to benefit in this way from the insolvency proceedings without the burden of having to comply with orders made in those proceedings.[40]

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36 It is submitted also that common law developments would not be precluded by the exclusion of renvoi in Article 20 of the Rome I Regulation. Such developments are impliedly authorised by Article 12.

37 (1890) LR 25 QBD 399 at 402.

38 See *Re China Lumena New Materials Corp (in provisional liquidation)* [2020] HKCFI 338 and *Re China Singyes Solar Technologies Holdings Ltd* [2020] HKCFI 46 where it was acknowledged that there was an exception to the *Gibbs* rule if the relevant creditor submits to the foreign insolvency proceedings.

39 [2012] UKSC 46, [2013] 1 AC 236 at [161].

40 [2012] UKSC 46, [2013] 1 AC 236 at [167]. It was held that the Australian judgment was subject to the Foreign Judgments (Reciprocal Enforcement) Act 1933 and the Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994, SI 1994/1901 and that enforcement should be by way of registration under the 1933 Act rather than by means of the common law.

The *Rubin/New Cap* holding on submission has been considered further by the Privy Council in *Stichting Shell Pensioenfonds v Krys,*[41] by the Court of Appeal in *Erste Group Bank AG v JSC VMZ Red October*[42] and most recently by the Privy Council in *Vizcaya Partners Ltd v Picard*.[43] In the *Shell* case it was held that a party had submitted to, and participated in, insolvency proceedings by lodging proof of a debt. Lords Sumption said:[44]

'A submission may consist in any procedural step consistent only with acceptance of the rules under which the court operates. These rules may expose the party submitting to consequences which extend well beyond the matters with which the relevant procedural step was concerned, as when the commencement of proceedings is followed by a counterclaim. In the present case the Defendant lodged a proof. It cannot make any difference to the character of that act whether the proof is subsequently admitted or a dividend paid, any more than it makes a difference to the submission implicit in beginning an ordinary action whether it ultimately succeeds. This result is neither unjust nor contrary to principle, for by submitting a proof the creditor obtains an immediate benefit consisting in the right to have his claim considered by the liquidator and ultimately by the court according to its merits and satisfied according to the rules of distribution if it is admitted.'

In the *Red October* case it was held that the claimant, by proving and participating in Russian insolvency proceedings, had submitted to the jurisdiction of the Russian courts. Therefore, the English court refused to allow service out of the English jurisdiction of English proceedings based on the tort of conspiracy and on s 423 of the Insolvency Act 1986 (avoidance of transactions intended to defeat the claims of creditors).

The Court of Appeal took the view that the bank's participation in the Russian insolvencies meant its submission to and acceptance of the jurisdiction of the Russian courts in respect of all matters arising in the insolvencies.[45]The *Red October* decision brings home the serious consequences of participating in foreign insolvency proceedings. Filing a claim results in a submission to the relevant foreign jurisdiction in respect of claims that the creditor may have against the assets of the insolvent party, including claims that the creditor did not prove. By its participation in the proceedings, the creditor may be assumed to have submitted to the

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41 [2014] UKPC 41, [2015] AC 616.

42 [2015] EWCA Civ 379

43 [2016] UKPC 5, [2016] Bus LR 413.

44 [2014] UKPC 41, [2015] AC 616 at [31]:

45 [2015] EWCA Civ 379 at [73].

jurisdiction of the foreign court in relation to all matters arising in the insolvency proceedings including presumably whether its English law claims had been modified or abrogated in those proceedings.

The *Gibbs* principle was considered in passing by the Court of Appeal in *Red October*.[46] The court referred to the fact that the principle 'has been the subject of what many regard as justifiable criticism'.[47] It added an important caveat:[48]

'In our judgment … if there has indeed been a submission by the foreign creditor to the court of the debtor's insolvency for whatever purpose, (and, in particular, where the creditor has sought to obtain a benefit by such participation), then the creditor cannot in subsequent proceedings challenge the avoidance order made against it by the foreign insolvency court simply on the grounds that its contract was subject to English law and an English exclusive jurisdiction clause.'

In *Vizcaya Partners Ltd v Picard*,[49] on the other hand, it was held on the facts that there had been no submission and consequently no basis for the enforcement of a New York bankruptcy court judgment.

b. discharge of contractual obligations outside the proper law of the contract where this is part of the objectively reasonable expectations of the contracting parties

A broad exception to *Gibbs* rule along the above lines has been accepted in Singapore, but rejected in the UK in the first instance decision in *Global Distressed Alpha Fund v PT Bakrie*.[50] In the latter case case, it was held that the movement towards 'universalism' in insolvency and restructuring proceedings did not permit such an exception to the established doctrine. Therefore, in the absence of submission to the proceedings, the discharge of a debt under Indonesian law would be given effect in the UK where the contract creating the debt was subject to English law.

It had been argued that recognition of the discharge under Indonesian law would be consistent with the principle of universality because the debtor was an Indonesian company with its business operations centred in Indonesia. The court rejected this argument but, nevertheless, referred with apparent approval to various criticisms that had been levelled against *Gibbs*. For

46 [2015] EWCA Civ 379.
47 Para 75.
48 Para 76.
49 [2016] UKPC 5, [2016] Bus LR 413.

50 *Global Distressed Alpha Fund v PT Bakrie Investindo* [2011] EWHC 256 (Comm), [2011] 1 WLR 2038.

example, while a debt governed by English law will not be discharged by a foreign bankruptcy, the debtor's movable assets situated in England are taken to have vested in the foreign trustee in bankruptcy.[51] The debtor remains liable to pay its debts but has been deprived of some of the means that enable this to be done. Moreover, it was likely that the debtor's creditors would have foreseen the possibility that the restructuring of the Indonesian debts might take place in Indonesia which implies that recognition of the Indonesian bankruptcy discharge would not be unjust.

It is the case that certain other jurisdictions, with mature and developed insolvency and restructuring law regimes similar to the UK, have revisited their stance on the *Gibbs* rule. Singapore is a prime example. In *Pacific Andes Resources Development Ltd*[52] the High Court in Singapore disapplied the rule in *Gibbs* and opted for a development of the common law. It suggested a reformulation of the *Gibbs* rule as follows along the lines advanced by the late Professor Ian Fletcher[53]:

'In the case of a contractual obligation which happens to be governed by English law, a further rule should be developed whereby, if one of the parties to the contract is the subject of insolvency proceedings in a jurisdiction with which he has an established connection based on residence or ties of business, it should be recognised that the possibility of such proceedings must enter into the parties' reasonable expectations in entering their relationship, and as such may furnish a ground for the discharge to take effect under the applicable law.'

More generally, Fletcher has said that that '[t]he Gibbs doctrine belongs to an age of Anglocentric reasoning which should be consigned to history.' It should be acknowledged though that the *Gibbs* rule is not confined to situations where the governing law is English law. It also applies in circumstances where the governing law is foreign law and if the issue comes before an English court the court would have to apply the relevant foreign law.

Extra-judicially, the presiding judge in *Pacific Andes Resources Development Ltd,* Ramesh *J* has described the *Gibbs* rule as a 'tether' on the foot of good forum shopping.[54] A fundamental problem with the application of the *Gibbs* rule in international insolvency cases is that it characterises the discharge of debt as a contractual issue, rather than as a bankruptcy or

51 For instance, see the discussion in *Kireeva v Bedzhamov* [2021] EWHC 2281 (Ch) and on appeal in the same case at [2022] EWCA Civ 35.

52 [2016] SGHC 210 para 48.
53 *Insolvency in Private International Law* (2nd ed (2005), para 2.129
54 See Kannan Ramesh, 'The Gibbs Principle' [2017] 29 *Singapore Academy of Law Journal* 42 and see generally Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (London, Sweet & Maxwell 2016).

insolvency law issue. In his view, creditor autonomy is relevant in the context of insolvency proceedings only to the extent that it does not impede the collective goals of the insolvency or debt restructuring process.

In the recent English case, *Re Gategroup Guarantee Ltd,*[55] Zacaroli J suggested that the principal 'peculiarity' of insolvency proceedings which meant that special rules relating to jurisdiction and recognition were required is that they were a collective process, driven by the need to solve the problem that the debtor's assets are insufficient to satisfy the claims of all of its creditors. This raises at least the possibility of competition among the debtor's creditors and stakeholders.[56]

Under the *Gibbs* rule, debt restructuring, absent agreement from the relevant parties, becomes possible only in the place of the governing law even if this not the place where the debtor was incorporated or where the debtor has its main business operations. The process is even more fraught if there are different debt agreements with different governing laws for a single debtor.

Another way of looking at things however, is to say that it tends to channel debt restructuring and debt restructuring negotiations into major financial centres such as London and New York (and possibly even Singapore) whose law is chosen to govern major finance agreements. Therefore, these locations have become popular forum shopping venues. In the UK context, Snowden J in *Re Van Gansewinkel Groep BV*[57] commented:

'In recent years schemes of arrangement have been increasingly used to restructure the financial obligations of overseas companies that do not have their COMI or an establishment or any significant assets in England … The use of schemes of arrangement in this way has been prompted by an understandable desire to save the companies in question from formal insolvency proceedings which would be destructive of value for creditors and lead to substantial loss of jobs. The inherent flexibility of a scheme of arrangement has proved particularly valuable in such cases where the existing financing agreements do not contain provisions permitting voluntary modification of their terms by an achievable majority of creditors, or in cases of pan-European groups of companies where co-ordination of rescue

55 [2021] EWHC 304 (Ch).

56 Ibid, para 91.

57 [2015] EWHC 2151 (Ch), [2015] Bus LR 1046. Note too the same judge in *Re Global Garden Products Italy SpA* [2016] EWHC 1884 (Ch). See also the full discussion of the relevant considerations by Trower J in *Re Lecta Paper UK Ltd* [2020] EWHC 382 (Ch) and see generally LC Ho, 'Making and enforcing international schemes of arrangement' (2011) 26 *Journal of International Banking Law and Regulation* 434; J Payne, 'Cross-Border Schemes of Arrangement and Forum Shopping' (2013) 14 *European Business Organization Law Review* 563.

procedures or formal insolvency proceedings across more than one country would prove impossible or very difficult to achieve without substantial difficulty, delay and expense.'

The matter was further considered by Newey J in *Re Codere Finance (UK) Ltd*[58] who drew a distinction between 'good' and 'bad' forum shopping. Newey J said:[59]

'Plainly forum shopping can be undesirable. That can potentially be so, for example, where a debtor seeks to move his COMI with a view to taking advantage of a more favourable bankruptcy regime and so escaping his debts. In cases such as the present, however, what is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debts but rather with a view to achieving the best possible outcome for creditors. If in those circumstances it is appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping.'

Forum shopping and UK restructurings have also been considered in the context of the European Insolvency Regulation which will now be addressed.

4. European Insolvency Regulation and its effect on the Gibbs rule

The (recast) Insolvency Regulation - Regulation (EU) 2015/848 'recasting' Regulation 1346/2000 - deals with jurisdiction to open insolvency proceedings where a debtor has its centre of main interests (COMI) in an EU State (except Denmark); the applicable law in respect of such proceedings and recognition and enforcement of insolvency proceedings that have been opened in other EU Member States.

The Regulation allocates jurisdiction to open insolvency proceedings and determines the applicable law in respect of such proceedings. The Regulation reflects a philosophy of 'Euro universalism'.[60] Main insolvency proceedings may be opened where in the EU State where the debtor has its 'centre of main interests' or COMI for short. Such main proceedings are stated to have universal scope and aim at encompassing all the debtor's assets within the

58 [2015] EWHC 3778 (Ch). Note too *Re Algeco Scotsman PIK SA* [2017] EWHC 2236 (Ch) where Hildyard J commented at [57] that although 'forum shopping' had been used as a pejorative description of a situation where a company resorted to an inappropriate court for inappropriate purposes, the company's resort to the English court in the present case was appropriate and understandable given the lack of any viable or efficient alternatives. The judge also reiterated what he said in *Re Apcoa Parking Holdings GmbH* [2014] EWHC 3849 (Ch) that whenever there is a change in jurisdiction clause for the purpose of opening the gateway to the English scheme jurisdiction, the court should be careful to scrutinise whether the change of law or jurisdiction or the resort more generally to the English court was inappropriate.

59 Ibid at para 18.

60 Recital 23 of the preamble.

EU. Secondary insolvency proceedings may be opened however, in any EU State where the debtor has an establishment but are limited in their application to the assets of the debtor located in the EU State where the debtor has an establishment.

The Insolvency Regulation, in both original and new versions, creates an incentive for parties, literally or figuratively, to race to the courtroom in different countries. In general, the law of the State that opens the insolvency proceedings applies in respect of those proceedings. This is the general rule stated in Article 7 of the Regulation. The law of the State of opening will determine the 'conditions for the opening of proceedings', their 'conduct' and their 'closure'[61]. These generalised issues are rendered more specific in Articles 7(2)(a) to 7(2)(m), which issues will 'in particular' be governed by the applicable law. The effect of Articles 8–18 however, is that other laws may apply to certain assets and transactions rather than the law of the opening State.

On a reasonable construction of the words used in Article 7, the modification of English law governed obligations under insolvency proceedings opened in other EU states should be automatically recognised and implemented throughout the EU (including the UK pre-Brexit) pursuant to the Insolvency Regulation. This conclusion was reached in *Bank of Baroda v Maniar*.[62] The court took the view that the effect of the Insolvency Regulation was to trump the rule that the modification of English law governed obligations was exclusively governed by English law. It cited leading text[63] to the effect that where main insolvency proceedings in another EU state are closed and the closure has, under the law of that EU state, the effect of discharging the debtor, that discharge must be recognised in the UK even if it is not an effective discharge under the law applicable to the contract which in this case, was English law.[64]

There is however, conflicting authority. In *Edgeworth Capital Luxembourg Sarl v Maud*[65] the judge seemed inclined to accept a more restricted interpretation of what is now Article 7. The case concerned a loan made to a company with its COMI in Spain and which entered into a formal insolvency process in Spain. The debtor's obligations under the loan agreement had been guaranteed and it was argued by the guarantor that its liability under the guarantee had

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61 The concept of closure of insolvency proceedings must be interpreted according to national law. There is no autonomous Europe-wide interpretation – see Case C-116/11 *Bank Handlowy and Adamiak [2013] Bus LR 956* at para [52].

62 [2019] EWHC 2463 (Comm).

63 *Dicey, Morris and Collins on the Conflict of Laws* (London, Sweet & Maxwell, 15th ed, 2012), at para 31-114.

64 The court declined to follow the more restricted approach suggested by Knowles J in *Edgeworth Capital Luxembourg Sarl v Maud* [2015] EWHC 3464 (Comm).

65 [2015] EWHC 3464 (Comm).

been discharged by the Spanish insolvency proceedings. The court held that the relevant Spanish law did not have this effect but it was suggested that even if it did, it did not produce any extraterritorial effects by virtue of the Insolvency Regulation.[66]

Such a suggestion seems difficult to square with the European Court decision in Case C-594/14 *Kornhaas v Dithmar*,[67] which gives an expansive interpretation to what is now Article 7. If a guarantor accepts liability under the guarantee and pays the principal debt then normally it is entitled to be indemnified by the debtor and has a right of reimbursement from the debtor's estate. This enlarges the scope of the claims against the estate. Articles 7(2)(g) and (h) provide that the courts of the State where insolvency proceedings are opened shall determine the claims that may be lodged against the debtor's estate as well as the rules governing the lodging, verification and admission of claims

Of course, with Brexit the UK is no longer an EU Member State and the modification of the *Gibbs* rule brought about by the Insolvency Regulation no longer applies. *Gibbs* has unfettered force and effect and the same seems largely true notwithstanding the UK's adherence to the UNCITRAL Model Law on Cross Border Insolvency which will now be addressed.

5. UNCITRAL Model Law on Cross Border Insolvency and its implications for the Gibbs rule

The Court of Appeal in *Bakhshiyeva v Sberbank of Russia*[68] rejected an attempt to sidestep the *Gibbs* rule through the use of the UNCITRAL Model Law as implemented in the UK by the Cross Border Insolvency Regulations 2006.[69] It was held that the court did not have the power to grant a permanent stay or moratorium when recognising foreign insolvency proceedings so as to prevent creditors from exercising their rights under a contract that was governed by English law. The *Gibbs* rule still applied and it was held that to make such an order would amount to varying or discharging substantive rights by the expedient of granting procedural relief. This course of action had no legislative authorisation.[70]

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66 See paras 43–45 of the judgment. See, however, the comments of Advocate General Bobek in Case C-212/15 *ENEFI v DGRFP*, EU:C:2016:841; [2017] IL Pr 201 on the width of what is now Article 7.
67 EU:C:2015:806; [2016] BCC 116.
68 [2018] EWCA Civ 2802, [2019] 1 BCLC 1, affirming [2018] EWHC 59 (Ch).

69 SI 2006/1030.

70 See however the comments of the Privy Council in *UBS AG New York v Fairfield Sentry Ltd* [2019] UKPC 20, [2019] 2 BCLC 1, [2019] BPIR 1054 at [14]: 'In any event, it is by no means clear that incorporation of the UNCITRAL Model Law would disincline, let alone forbid, a court from applying a

The Model Law provides for the recognition of foreign insolvency proceedings, either 'main' or 'non-main' and allows for consequential relief to be granted. Under Article 20 of the Model Law, recognition of foreign main insolvency proceedings has, prima facie, three automatic consequences. Firstly, there is an automatic stay on individual proceedings against the debtor or its assets; secondly, there is a stay on executions against the debtor's assets and thirdly, the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended. Article 20 is supplemented by Article 21 which applies whether the foreign proceedings are 'main' or 'non-main'. It allows appropriate relief to be given as a matter of discretion and various forms of 'appropriate' relief are specified, though in a non-exhaustive fashion.:

While Article 21 has been given a broad interpretation in certain contexts, the UK courts have taken a different view from the US courts and held that the Mode Law provisions do not authorise the application of foreign insolvency law. Only domestic law may be applied. In *Re Pan Ocean Co Ltd*[71] the court recognised that the words 'appropriate relief' in Article 21 had a wide literal meaning but the very width of their literal meaning led to the conclusion that a broad interpretation was inappropriate. It rejected the argument for a broad interpretation of 'appropriate relief' 21 that would permit the application of foreign insolvency law.

The court considered the preliminary materials leading to the elaboration of the Model Law and it appeared from these documents that a recognising court should not be allowed to grant relief that it could not grant in a domestic insolvency.[72] The downside to a broad judicial discretion about which law to apply, tempered only by considerations of 'justice', is increased uncertainty and this militates against effective transaction planning and the accurate pricing of risk.

The court in *Re Pan Ocean Co Ltd* also said its conclusions on Article 21 were supported by the decision of the UK Supreme Court in *Rubin v Eurofinance SA*[73] that the only relief available under the Model Law was of a procedural nature. In *Pan Ocean*, the relief requested went well beyond matters of procedure and affected the substance of the rights and obligations of parties under a contract. The case concerned a contract of carriage which a Brazilian company had entered into with a Korean shipper. The contract was governed by English law and contained a clause allowing the Brazilian party to terminate the contract in certain events, including if the shipper entered insolvency proceedings. The shipper entered insolvency proceedings in

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foreign insolvency law. It appears to the board that the United States courts have interpreted the relevant statutory provisions as permitting the application of foreign insolvency law in both their now-superseded s 304 of the US Bankruptcy Code (*In re Metzeler* 78 BR 674 , 677 … and chapter 15 of the US Bankruptcy Code, which is based on the UNCITRAL Model Law'.

71 [2014] EWHC 2124 (Ch).

72 Ibid at paras 81-87.

73 [2013] 1 AC 236 at para 143.

Korea and the Brazilian party wished to activate the termination provision. The shipper's insolvency representative, on the other hand, sought to keep the contract alive because it was quite profitable for the shipper. It appeared that under Korean insolvency law, unlike the UK,[74] termination clauses of this type could be overridden. The court concluded that even if it had the power to do so, it would not be appropriate in this particular case to give effect to the provisions of Korean insolvency law. The parties would be surprised if an English court applied Korean insolvency law to their substantive rights under a contract which they had agreed should be governed by English law.[75]

In this respect, one may conclude that the US courts have been more 'internationalist' in their interpretation of Chapter 15 than their UK counterparts but their interpretation can be explained on the basis of the particular legislative context in the US.

The *Pan Ocean* decision was reaffirmed in *Bakhshiyeva v Sberbank of Russia*[76] where, as we have seen, the Court of Appeal rejected an attempt to sidestep the *Gibbs* rule. The Court of Appeal suggested that if the power to grant a stay under Art 21 had been intended to override the substantive rights of creditors under the proper law governing their debts, this should have been made explicit. There was no warrant for treating the Art 21 powers as other than procedural in nature with the main object of providing a temporary 'breathing space'. Article 21 powers should not be used so as to circumvent the English law rights of the English creditors.[77]

This analysis was carried a stage further by a Scottish court in *Chang Chin Fen v Cosco Shipping (Qidong) Offshore Ltd.*[78] It was held that the rule in *Gibbs* precluded recognition of a temporary stay on enforcement under a Singapore restructuring procedure where the debt in question was governed by English law, notwithstanding the operation of the UNCITRAL Model Law. The English law liabilities did not, as far as English law was concerned, form part of the restructuring. Moreover, pursuing them would not, as far as English law was concerned, disrupt the implementation of the restructuring as they did not form part of that restructuring.[79]

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74 What is now s 233B of the UK Insolvency Act 1986 also allows contractual termination clauses to be overridden if a company becomes subject to a relevant (UK) Insolvency. The change in the law was effected under the UK's Corporate Governance and Insolvency Act 2020. It would not appear to apply however, if a company becomes subject to a non-UK Insolvency procedure.
75 [2014] EWHC 2124 (Ch) at para 112.

76 [2018] EWCA Civ 2802, [2019] 1 BCLC 1, affirming [2018] EWHC 59 (Ch). The case is also known as *Re OJSC International Bank of Azerbaijan*.

77 Para 93.
78 [2021] CSOH 94
79 [2021] CSOH 94 at [63].

6. New UNCITRAL Model Law on Insolvency Related Judgments and how its possible UK implementation will impact on the Gibbs rule

UNCITRAL has completed two further initiatives to further cross insolvency co-operation; the Model Law on Recognition and Enforcement of Insolvency-Related Judgments[80] and secondly, an even newer Model Law on Enterprise Group Insolvency.[81]

On insolvency-related judgements, UNCITRAL has noted that according to the UK Supreme Court in *Rubin*[82], long standing common law rules for the recognition of foreign insolvency judgments remained undisturbed by UK's adoption of the original Model Law.[83] The UK Supreme Court said that a change in the settled law governing the recognition and enforcement of judgments had all the hallmarks of legislation, and was a matter for legislative decision rather than judicial innovation. According to Lord Collins:[84] 'the introduction of judge-made law extending the recognition and enforcement of foreign judgments would be only to the detriment of United Kingdom businesses without any corresponding benefit ... a person in England who might have connections with a foreign territory which were only arguably 'sufficient' would have to actively defend foreign proceedings which could result in an in personam judgment against him, only because the proceedings are incidental to bankruptcy proceedings in the courts of that territory ... [I]t might suggest that foreigners who have bona fide dealings with the United States might have to face the dilemma of the expense of defending enormous claims in the United States or not defending them and being at risk of having a default judgment enforced abroad.'

UNCITRAL suggested that the case had brought to light problems of a global nature. The Model Law did not provide an explicit solution with respect to the recognition and enforcement of insolvency-derived judgements.[85] This had led to significant uncertainty and might have a

80 https://uncitral.un.org/en/texts/insolvency/modellaw/mlij on which see generally R Mason, 'Cross-border insolvency: recognition of insolvency-related judgments and choice of law characterization' (2018) 27 *Norton journal of bankruptcy law and practice* 639-672.

81 https://uncitral.un.org/en/MLEGI

82 [2012] UKSC 46, [2013] 1 AC 236.

83 For criticism see Jay Lawrence Westbrook, 'Ian Fletcher and the Internationalist Principle' (2015) 3 *Nottingham Insolvency and Business Law E-Journa*l 565 'Despite our high and continuing respect for the British courts, many of us on the west side of the Atlantic have been distressed by In re Rubin and its progeny'. See also Jay Lawrence Westbrook, 'Interpretation Internationale' (2015) 87 *Temple Law Review* 739.

84 [2013] 1 AC 236 para 130.

85 See UNCITRAL, 'Recognition and enforcement of foreign insolvency-derived judgements' (6 October 2014) A/CN.9/WG.V/WP.126 and UNCITRAL, 'Background information on topics comprising the current mandate of Working Group V and topics for possible future work' (8 October 2013) A/CN.9/WG.V/WP.117.

chilling effect on the prospects of the Model Law gaining international acceptance.[86] Therefore, it was considered by UNCITRAL to be an opportune time to tackle the recognition and enforcement of these types of judgements in the new Model Law on Recognition and Enforcement of Insolvency-Related Judgments. This new Model Law[87] provides rules for uniform adoption by States on recognition and enforcement of judgments, thereby addressing the gap in the Model Law which focuses explicitly on proceedings and did not refer to judgments within these proceedings.[88]

In the new Model Law, 'insolvency-related judgment' is defined as meaning: (i) a judgment that (a) arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed; and (b) was issued on or after the commencement of that insolvency proceeding.[89] It does not include a judgment commencing an insolvency proceeding. But the definition of insolvency related judgment is much broader than the concept of insolvency-related judgment in the EIR.[90] The difference between the two instruments may prove problematic for EU Member States who are contemplating the implementation of the new Model Law.[91]

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86 See generally KW Tan, 'All that glisters is not gold?: deconstructing Rubin v Eurofinance SA and its impact on the recognition and enforcement of foreign insolvency judgments at common law' (2020) 16 *Journal of Private International Law* 465–492.

87 See generally on the new Model Law and possible consequential changes to UK national law G Moss QC, 'UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments' (2019) 32 *Insolvency Intelligence* 21; I West, 'UNCITRAL Cross-Border Insolvency Model Laws: And Then There Were Two ...' (2019) 16 *International Corporate Rescue* 82.

88 According to the UNCITRAL website (https://uncitral.un.org/en/texts/insolvency/modellaw/mlij) 'Few existing international instruments deal with the recognition and enforcement of judgments generally and those that do exist exclude from their scope matters relating to insolvency and thus recognition and enforcement of insolvency-related judgments. In addition, some uncertainty exists with respect to the interpretation of articles 7 and 21 of the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) in terms of providing the necessary authority for such recognition and enforcement as a form of relief available on recognition of a foreign insolvency proceeding. The Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ) is designed to address those situations and provide States with a simple, straightforward and harmonized procedure for recognition and enforcement of insolvency-related judgments, thus complementing the MLCBI to further assist the conduct of cross-border insolvency proceedings.'

89 Article 2(d) of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments.

90 See generally Case C-641/16 *Tunkers France v Expert France [*2018] IL Pr 75*;* Case C-47/18 *Skarb v Stephan Riel* (ECLI:EU:C:2019:754, [2019] IL Pr 851.

91 See also the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial matters - https://www.hcch.net/en/instruments/conventions/full-text/?cid=137

Article 2(e) excludes from this Convention however, 'insolvency, composition, resolution of financial institutions, and analogous matters'.

See generally Irit Mevorach, 'Overlapping international instruments for enforcement of insolvency judgments: undermining or strengthening universalism?' (2021) 22 *European Business Organization Law Review* 283-315.

The new Model Law could provide a mechanism for recognition of foreign insolvency-related judgments – including confirmation of restructuring plans – in the UK. The new Model Law was adopted by UNCITRAL in July 2018; it has yet to be implemented into national law by any jurisdiction. The UK Insolvency Service has now issued a consultation as to whether and how to implement the new Model Law.[92] Recognition of the debt modifications or abrogation effected under a foreign restructuring plan should be possible under the new Model Law, thereby limiting the rule in *Gibbs*. The new Model Law however, includes broad grounds on which recognition of a foreign judgment may be refused as a matter of judicial discretion including where affected stakeholders have not submitted or consented to the jurisdiction of the foreign court.[93]

The question arises what precise method of implementation of the new Model Law might be adopted in the UK and how to tackle the occasional jibe that the UK is trying to have the best of both worlds or have its cake and eat it. While modified universalism was said to be the golden thread of the common law, the common law has also adhered to the territorialist *Gibbs* rule that the discharge of English law contractual obligations was governed by English law.

The US Bankruptcy Judge in the *Agrokor* Model Law recognition application observed:[94] 'The Gibbs rule remains the governing law in England despite its seeming incongruence with the principle of modified universalism espoused by the Model Law and a broad consensus of international insolvency practitioners and jurists….The essence of the *Gibbs* rule…is territorialism.'

The UK court in *Bakhshiyeva v Sberbank of Russia*, noted the tension between the *Gibbs* rule and modifed universalism. It said that 'the introduction of a new Model Law concerning the recognition and enforcement of insolvency related judgments as proposed by UNCITRAL may solve the problem if ever adopted'. Now that the new Model Law has been adopted, there is an appropriate opportunity to address the issue.

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92 (UK) Insolvency Service 'Implementation of two UNCITRAL Model Laws on Insolvency Consultation' (7 July 2022) and available at https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency/implementation-of-two-uncitral-model-laws-on-insolvency-consultation. The Private International Law (Implementation of Agreements) Act 2020 permits the Government to implement the new Model Law by way of statutory instrument, following consultation: section 2(13) and para 2 of Schedule 6.

93 Article 14(g).

94 *In re Agrokor* (2018) 591 BR 163 at 192. For different perspectives on the US/UK judicial divide, see A Walters, 'Modified Universalism & The Role of Local Legal Culture in the Making of Cross-Borders Insolvency Law' (2019) 93 *American Bankruptcy Law Journal* 47; S Block-Lieb, 'Reaching to Restructure Across Borders (Without Over-Reaching), Even after Brexit' (2018) 92 *American Bankruptcy Law Journal* 1.

The *Gibbs* rule produces the asymmetric result that some foreign courts (including those in the US) will recognise a UK scheme or restructuring procedure that compromises foreign law rights, but the UK courts will not (without submission or consent) recognise a foreign scheme that purports to compromise UK law rights.

There are a number of cases where UK schemes of arrangement have been recognized under Chapter 15 of the US Bankruptcy Code implementing the Model Law in the US. The scheme of arrangement under Part 26 UK Companies Act 2006 may serve as a debt adjustment procedure but it is not an insolvency procedure per se. Nevertheless, this fact has not been seen as serving as a barrier to US Chapter 15 recognition.[95]

As a consequence of US implementation of the Model Law, s 101(23) of the US Bankruptcy Code defines 'foreign proceeding' as including proceedings in a foreign country 'under a law relating to insolvency or adjustment of debt' whereas in the UK, the equivalent implementing provision, the Cross-Border Insolvency Regulations 2006 (CBIR), SI 2006/1030, Sch 1, reg 2(i) does not specifically define foreign proceedings to include proceedings for the adjustment of debts.

As a result of this wider US definition, UK schemes of arrangement that restructure US law governed debts have routinely been recognised as foreign proceedings in the US provided that the jurisdiction requirements of the Model Law have been met i.e. COMI or an establishment in the UK. The US version of the Model Law provides the sole gateway for recognition of such proceedings in the US.[96]

The Model Law on Insolvency-related judgments (MLIJ) implementation proposed by the UK Insolvency Service takes the form of a simple 'Article X' adoption.[97] This means simply amending the CBIR so that it will now state expressly that the relief available under Article 21 of the Model Law includes recognition and enforcement of a judgment.[98] The relief available is however, subject to an adequate protection condition.

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95 See Adrian Walters, 'Giving Effect to Foreign Restructuring Plans in Anglo-US Private International Law' (2015) 3 *Nottingham Insolvency and Business Law E-Journal* 376 at 380 citing the observation of NY Bankruptcy Court Judge Sean Lane that 'schemes have routinely been recognized as foreign proceedings, including cases in this court.' See also JL Westbrook, 'Ian Fletcher and the Internationalist Principle' (2015) 3 *Nottingham Insolvency and Business Law E-Journal* 565 at 567 discussing the 'active current American practice enforcing English schemes of arrangement in the United States.'

96 See *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* (2008) 389 BR 325.

97 See *UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment* at p 67.

98 See generally *Guidance Note on Enacting Two or More Of The UNCITRAL Model Laws On Insolvency,* prepared by the UNCITRAL secretariat in consultation with experts and available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v2104338_guidance_note_uncitral_model_laws_on_insolvency.pdf

Under Article 21(2), courts have discretionary power to order the transfer of assets to a foreign insolvency representative. There is, however, a proviso that the interests of domestic creditors should be 'adequately protected'. This is supplemented by Article 22 which provides in granting or denying relief, 'the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.'[99]

In the US, the Model Law implementation supersedes 'the old' s 304 US Bankruptcy Code under which a US bankruptcy court could exercise various powers in a 'case ancillary to a foreign proceeding'. The substance of the old s 304 is, however, preserved in the new section 1507 under which US courts can authorise the transfer of assets to foreign insolvency representatives provided that the interests of the creditors and other interested parties, including the debtor, are 'sufficiently protected'. It is a moot point to what extent 'sufficient protection' differs from 'adequate protection' under UK law.

In the UK, there was some consideration of Article 21(2) and the 'adequate protection' provisions[100] in *Bakhshiyeva v Sberbank of Russia.*[101] Hildyard J suggested that, in a restructuring rather than insolvency context, to remove or vary individual rights for the greater good and in the name of universalism would not comport with the 'adequate protection' criterion. He did not see how the rights of a creditor under English law could ever be 'adequately protected' by an intervention that, in effect and intention, negates or varies the rights.[102]

In exercising their new found freedoms under Article 21 of the Model Law, UK courts could make use of the US jurisprudence and also the principle protecting rights over property which is encapsulated in Article 8 of the European Insolvency Regulation.[103] Very broadly, Article 8

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99 According to a US congressional report the change to 'sufficient protection' from 'adequate protection' was made to avoid 'confusion with a very specialized legal term in United States bankruptcy' – see HR Rep No 31, 109th Congress 1st Session at para 115. Section 361 US Bankruptcy Code uses the concept of 'adequate protection' and while the concept itself is not defined, examples of 'adequate protection' are provided. It appears that the US Congress left the concept of 'adequate protection' deliberately vague so as to facilitate 'case-by-case interpretation and development. It is expected that the courts will apply the concept in light of [the] facts of each case and general equitable principles' – see HR Rep No 595, 95th Congress, 1st Session 339 (1977).

100 For discussion see also I Fletcher, *Insolvency in Private International Law* 2nd ed (OUP, 2005) at pp 247–262.

101 [2018] EWHC 59 (Ch).

102 Para 158. See also the Court of Appeal judgment: [2018] EWCA Civ 2802, [2019] 1 BCLC 1, at [93]. Note too the comments of Morritt VC in *Re HIH Casualty and General Insurance Ltd* [2006] EWCA Civ 732 at [54]: 'This is not the occasion on which to determine what degree of protection would be 'adequate'. Nor are we concerned with whether that test is the same as that contained in the US Bankruptcy Code which requires the protection to be 'sufficient'.' See also David Richards J at first instance – [2005] EWHC 2125 (Ch) at [147]–[154].

103 Regulation 2015/848

aims at protecting property rights of creditors over assets of the debtor situated in State A from being affected by the opening of insolvency proceedings in State B.[104]

In its consultation, the Insolvency Service has outlined a very cautious approach. It said:[105] 'Implementing article X will provide a new route for foreign insolvency-related judgments to be recognised in the UK. We expect it will set aside the ruling in Rubin v. Eurofinance….Recognition of the judgment in this manner will be at the court's discretion. In applying article X, we expect that UK courts will continue to have regard to other UK law and to apply the safeguards specified in the Cross-Border Insolvency Regulations. For this reason we do not anticipate, and it is not our intention, that the addition of article X will affect the application of the rule in Gibbs….'

In the long run, it remains to be seen whether this cautious approach will ultimately prevail and whether UK insolvency law can still be characterised as having a chauvinistic tinge.

7. Conclusion

In spite, or perhaps because, of Brexit and moving outside the regulatory embrace of the EU, the UK seeks to remain at the forefront of international insolvency developments. For instance, it has sought to maintain its high position in the World Bank *Doing Business reports and rankings.*[106] Even though it is not obliged to do so, it has effectively implemented the main provisions of the EU Restructuring Directive[107] with a new restructuring plan procedure in the Corporate Insolvency and Governance Act 2020. In the same breath, the 2020 Act brings UK

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104 The 'fundamental policy . . . to protect the trade in the State where the assets are situated and legal certainty of the rights over them. Rights *in rem* have a very important function with regard to credit and the mobilization of wealth. They insulate their holders against the risk of insolvency of the debtor and the interference of third parties. They allow credit to be obtained under conditions that would not be possible without this type of guarantee' -Virgos-Schmit Report para 97. This Report, which was never published in the *Official Journal* is on a preliminary draft Convention which led eventually to the Insolvency Regulation. While unofficial, the report has been treated as an authoritative source. It can be found at http://www.aei.pitt.edu/952.

105 (UK) Insolvency Service 'Implementation of two UNCITRAL Model Laws on Insolvency Consultation' (7 July 2022) and available at https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency/implementation-of-two-uncitral-model-laws-on-insolvency-consultation 'Article X'.

106 See UK Insolvency Service, *A Review of the Corporate Insolvency Framework: A Consultation on Options for Reform* (May 2016). It should be noted that the World Bank has now discontinued the Doing Business project and replacing it with a Business Enabling Environment (BEE) project – see https://www.worldbank.org/en/programs/business-enabling-environment

107 Directive (EU) 2019/1023. The Restructuring Directive is intended 'to be fully compatible with, and complementary to' the European Insolvency Regulation 'by requiring Member States to put in place preventive restructuring procedures which comply with certain minimum principles of effectiveness' – see recital 13.

law much closer to the much-lauded Chapter 11 of the US Bankruptcy Code.[108] The new procedure builds on the success of the existing scheme of arrangement procedure in Part 26 UK Companies Act 2006 which, at least in pre-Brexit days, contributed to London becoming the restructuring capital of Europe.[109]

But apart from possible resentment in some quarters at apparent UK success, there has been the occasional complaint that the UK was trying to have the best of both worlds or have its cake and eat it. While modified universalism was said to be the golden thread of the common law, it has also adhered to the territorialist *Gibbs* rule that the discharge of English law contractual obligations was governed by English law.

Moreover, the historic scale of the UK capital markets means that many foreign-incorporated borrowers owe debts under loan agreements that are governed by English law and many also have assets in the UK. The vicissitudes of global trade and economic fortune result in some becoming financially distressed and seeking to restructure both their foreign law debts and their UK law debts. The question arises whether these debts may be restructured in the same set of proceedings or whether parallel proceedings in different jurisdictions become necessary. A universalist, even a 'modified' universalist approach would seek to obviate or reduce the necessity of separate proceedings.

Continued adherence to the *Gibbs* rule in an unfettered form leads to a multiplicity of proceedings and incentivises hold-out behaviour by certain creditors that obstruct value-enhancing restructurings. This paper makes the case for a targeted implementation of the new Model Law on Insolvency Related Judgments while also advocating adequate protection for creditors in an insolvency or debt restructuring process. Such creditors should not be sacrificed on the altar of universalism without adequate protection of their interests. At the same time, the loss of perceived existing entitlements afforded by the *Gibbs* rule should be offset by greater long-term gains if the UK adheres to a modified universalist approach and adopts the new Model Law

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108 See G McCormack, *INSOL International Special Repor*t 'Permanent changes to the UK's corporate restructuring and insolvency laws in the wake of Covid-19' (London, INSOL International, October 2020) and for a general discussion of the issues see J Payne, 'Debt Restructuring in English Law: Lessons From the United States and the Need for Reform' (2014) 130 *Law Quarterly Review* 282.

109 See generally J Payne, 'Cross-Border Schemes of Arrangement and Forum Shopping' (2013) 14 *European Business Organization Law Review* 563. See also G McCormack, 'Jurisdictional competition and forum shopping in insolvency proceedings', (2009) 68 *Cambridge Law Journal* 69; Adrian Walters/Anton Smith, 'Bankruptcy tourism under the EC Regulation on insolvency proceedings: a view from England and Wales', (2010) 19 *International Insolvency Review* 181.