Navigating the Rule in Gibbs in cross-border restructurings:

Alternatives to a solely English process

Synopsis

The rule in Gibbs may be infamous but it is not insurmountable.

While debate rages on (both in England and Wales, and the other common law jurisdictions in which the rule still holds sway) as to whether it should be discarded, debtors are left navigating the longstanding rule. Through two-step legal processes, recognition proceedings, parallel proceedings and an increased confidence in relying on the purported extra-territorial effects of foreign processes, debtors continue to successfully restructure English law-governed obligations even where the rule in *Gibbs* complicates matters. The purpose of this article is to discuss and evaluate the increasingly innovative tools and tactics that debtors are using to navigate, and mitigate the impacts of, the rule in *Gibbs*.

Introduction

For centuries, the choice of law for international commercial contracts has been English law. More than a mere historical default, English law remains a popular choice of governing law given its certainty, predictability and commerciality. However, the choice of English law also means the parties to those contracts become subject to the infamous rule in Gibbs.[1]

The rule in *Gibbs* needs little introduction. The 19th century authority, which (subject to certain exceptions) prevents the discharge or variation of English law-governed claims by a foreign insolvency or restructuring process, is a frequent topic of discussion in the international restructuring community. At its core, the rule in *Gibbs* promotes certainty: it allows parties contracting under English law to know that they will not have those obligations varied, compromised or discharged as a result of a foreign procedure, unless they voluntarily submit to that procedure. However much that certainty may be prized by some, the rule in *Gibbs* can complicate cross-border restructurings, particularly where (but for the English law-governed obligations) a debtor has little to no connection to England. Considering the global trend towards modified universalism,[2] where the principles of comity are to be encouraged,[3] the rule in *Gibbs* looks increasingly out of fashion.

The UK Government's consultation on the partial implementation of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (the **MLIJ**) has reignited the recurring debate as to whether the rule in *Gibbs* should be consigned to the history books. The partial implementation of the MLIJ would have resulted in the creation of "Article X", a new statutory provision that would have allowed the English Courts to recognise and give effect to insolvency-related judgments issued by foreign courts. Depending on precisely how Article X would be implemented, this new provision would have restrained (and potentially even abolished) the rule in *Gibbs*. To do so would have been in line with common law jurisdictions, such as Singapore, who have already left *Gibbs* in the past,[4] and may have paved the way for the rejection of *Gibbs* in others, such as Hong Kong, where it still exists.[5]

Following feedback from the consultation, the UK Government has shelved the implementation of MLIJ until it has consulted more generally on the rule in *Gibbs*. The future of *Gibbs* now hangs in the balance and time will tell whether the rule will survive both in England and abroad. However, until then (and irrespective of whether or not the international restructuring community agrees with the rule) it remains good law and must be adhered to.

However, to say that because of *Gibbs* a debtor with English law-governed claims must rely on a solely English restructuring process is an overstatement. Through two-step legal processes, recognition proceedings, parallel proceedings and an increased confidence in relying on the purported extra-territorial effects of foreign processes, debtors continue to successfully restructure English law-governed obligations even where the rule in *Gibbs* complicates matters. The purpose of this article is to discuss and evaluate the increasingly innovative tools and tactics that debtors are using to navigate, and mitigate the impacts of, the rule in *Gibbs*.

1. *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métau* (1890) 25 Q.B.D 399
2. *Cambridge Gas Transportation Corporation v The Official Committee of Unsecured Creditors (of Navigator Holdings Plc and others)* [2007] *1 AC 508, Rubin and another v Eurofinance SA and others* [2013] *1 AC 236 and Singularis Holdings Limited v PricewaterhouseCoopers* [2015] AC 1675
3. *Re Agrokor* 591 B.R. 163 (Bankr. S.D.N.Y. 2018) at [11] and [12]
4. *Re Pacific Andes Resources Development Ltd* [2016] SGHC 210.
5. *Re Rare Earth Magnesium Technology Group Holdings Ltd* [2022] HKCFI 1686; HCCW 81/2021.

Using an English Process

The first and most obvious method to address the rule in Gibbs issue is to simply use an English standalone restructuring process (i.e. not in conjunction with another process). After all, English processes, such as the scheme of arrangement and restructuring plan, are frequently used by non-English incorporated companies.

In fact, for many years debtors have engaged in so-called "forum shopping" to identify a suitable forum in which to conduct their cross-border restructurings, and England has undoubtedly emerged as a preferred choice. English restructuring processes are robust, transparent and flexible, with commercial and pragmatic judges residing over them. They also have a relatively low jurisdictional bar for entry: provided a debtor has a "sufficient connection" to England and Wales, the most popular English restructuring tools are normally at their disposal.[6] Demonstrating a sufficient connection will typically be satisfied by the debtor having English law-governed claims that it wishes to compromise[7] and the English courts are open to debtor groups using newly-incorporated English entities to promote their English restructuring processes.[8] Moreover, it may be possible to use an English law process to compromise foreign law governed claims, so long as this is accepted in the jurisdiction of the governing law. English restructuring processes are therefore popular choices for debtors even where they have relatively little connection to England and Wales. A recent example of this is Adler, the German real estate group, who elected to use an English restructuring plan to implement its financial restructuring even though the business did not operate in England and the debt they intended to compromise was governed by German law.[9]

Using parallel processes

While using only an English process to compromise an English law-governed obligation will appease the rule in Gibbs, it is not always practical or appropriate.

If a debtor has only a small amount of its debt governed by English law and otherwise no connection to England and Wales, using just an English process to implement a holistic restructuring may not be feasible.[10] Equally, the nature of the restructuring may preclude the use of an English process in isolation. For example, if the restructuring involves a debt-for-equity exchange of a non-English company, there would likely need to be some process or proceeding in the jurisdiction of incorporation of the relevant debtor entity to effect the disenfranchisement of the existing shareholders.

An increasingly common solution is therefore to run parallel proceedings in England and in the other key jurisdiction(s). *Hong Kong Airlines*[11] (which used a Hong Kong scheme of arrangement in conjunction with an English restructuring plan), *Vroon*[12] (which used a Dutch WHOA alongside an English scheme of arrangement) and *Cimolai*[13] (which undertook an Italian *concordato* with parallel English restructuring plans) are all recent examples of the increased use of parallel processes in order to successfully address the rule in *Gibbs*. Depending on the facts, a full statutory English process may not even be needed. For example, the Steinhoff Group completed its latest restructuring by using a Dutch WHOA in tandem with a contractual consent request process. However, parallel processes have their drawbacks: they can be complex owing to the need to ensure that the multiple restructuring processes dovetail, and that complexity means they can also be costly. Running a parallel English process to compromise a relatively small amount of English law-governed debt is likely to be disproportionately and (at times) prohibitively expensive.

6. A "sufficient connection" test is adopted for both schemes of arrangement and restructuring plans under Part 26 and Part 26A respectively of the Companies Act 2006. Certain other processes, such as a company voluntary arrangement under Part I of the Insolvency Act 1986, have different jurisdictional tests, however, they are likewise relatively easily met.
7. *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch)
8. *Re NN2 Newco Ltd* [2019] EWHC 2532 (Ch) and *Re Lecta Paper UK Limited* [2020] EWHC 382 (Ch)
9. *Re AGPS BondCo Plc* [2023] EWHC 916 (Ch), which is, at the time of writing, subject to an appeal to be heard this autumn in front of the Court of Appeal.
10. *Re Hong Kong Airlines Ltd* [2022] EWHC 3210 (Ch) and *Re Smile Telecoms Holdings Limited* [2022] EWHC 740 (Ch) both demonstrate that only a portion (and not all compromised claims) need to be governed by English law. Nevertheless, attempting to use an English process where the amount of English law governed debt is negligible would be open to challenge and unlikely to be cost effective for the debtor.
11. *Re Hong Kong Airlines Ltd* [2022] EWHC 2975 (Ch) (convening judgment) and [2022] EWHC 3210 (Ch) (sanction judgment)
12. *Re Lamo Holding B.V.* [2023] EWHC 1558 (Ch) (sanction judgment)
13. *Re Cimolai SpA* [2023] EWHC 1819 (Ch) (convening judgment)

Submission to the foreign jurisdiction

A simpler way for a debtor to navigate the rule in Gibbs is to have the relevant stakeholders voluntarily submit to the jurisdiction of the foreign restructuring process. Submitting to the jurisdiction does not necessarily mean supporting or consenting to the foreign restructuring process. For example, a vote against a restructuring proposal would still amount to submission.[14] So too would raising a challenge or objection to the restructuring process, unless such action was limited to arguing that the foreign court did not have jurisdiction.[15]

A debtor relying on this approach will want advance notice of whether or not the relevant stakeholder(s) will submit to the applicable foreign jurisdiction – waiting until the voting process or their day in court to discover that a stakeholder will not be submitting to the jurisdiction of the foreign process would add unnecessary risk. A common tactic (at least from an English perspective) is therefore to include a submission to the jurisdiction provision in the support or lock-up agreements that creditors are asked to sign before the restructuring is formally launched.

By including a submission to the jurisdiction provision in favour of a foreign court a debtor can navigate the rule in *Gibbs*. However, this approach will only bind those who sign said lock-up agreement (i.e. those who are supportive anyway) and will not help a debtor who is facing a hostile and uncooperative counterparty. Moreover, while lock-up agreements are commonplace in England, they are not necessarily used in all jurisdictions. Therefore, if the foreign restructuring process is in a jurisdiction where there is little to no pre-emptive engagement with the relevant stakeholders before launching the process, there may be no opportunity to solicit the submission to jurisdiction ahead of time.

14. *New Cap Reinsurance Corporation Ltd and another v Grant and others* [2011] EWCA Civ 971

15. Section 33, Civil Jurisdiction and Judgments Act 1982, *Motorola Credit Corp v Uzan* [2004] EWHC 3169 (Comm) [52]-[53], *JSC Bank v Turkiye Bankasi* [2018] EWHC 835 (Comm).

Changing the governing law

The two-step process of first changing a financing's governing law to English law, to then allow a debtor to use an English restructuring process is a well-trodden path.[16] However, the same could be done in reverse. A debtor who has English law-governed contracts could change the governing law to a foreign law. Once changed, the rule in Gibbs would cease to apply.

A fundamental issue with this approach is that changing the governing law of a contract is not an action that a debtor can take unilaterally. Depending on the type of contract or financing, the relevant creditor consent threshold to effect such a change will vary, and although it is unlikely to require unanimity for bond financings, it is likely to require unanimity for loan financings, in which case a debtor would likely pursue a consensual restructuring instead. Whether this will be a viable option for a debtor will therefore depend entirely on: i) the type of claims to be compromised; and ii) whether the debtor is able to amass the creditor support needed to contractually change the governing law of those claims.

Relying on the extra-territorial effect of the foreign restructuring process

A number of foreign restructuring processes, such as the US Chapter 11[17] and the Dutch WHOA,[18] purport to have extra-territorial effect. As a result, from the perspective of that jurisdiction, such a process could successfully vary an English law-governed claim and, to the extent such a process includes a moratorium or stay on creditor action, restrain a creditor from taking action.

As a strict legal matter, a foreign restructuring process purporting to have extra-territorial effect will not impact the ability for a creditor to commence action before the English Court. From an English perspective, the rule in *Gibbs* would continue to apply, the purported extra-territorial effect would be ineffective, and the English law-governed claim would continue to be outstanding and enforceable on its original terms. However, even if a creditor would theoretically retain the ability to take action in England, the possibility of breaching a foreign court order will likely act as a deterrent. How effective this deterrent will be, and therefore how viable it is as a tool to navigate the rule in *Gibbs*, will depend on the facts and the connection the relevant creditor has with the foreign jurisdiction. For example, in most international financial restructurings a material proportion of creditors will have some nexus to the US. If a debtor purported to compromise English law-governed claims via a US Chapter 11 process, such creditors are unlikely to take action in England in fear of breaching the US court order pursuant to which the extra-territorial stay was granted.

Whether reliance on a purported extra-territorial application of a foreign restructuring process will be feasible will depend on the facts and the debtor's risk appetite. As a starting point, it requires the relevant foreign procedure to purport to be extra-territorial, which is not the case for all processes. It then relies on the relevant stakeholder having sufficient connection to the relevant jurisdiction to deter them from breaching that insolvency / restructuring process and finally the debtor being willing to take that risk.

16. *Re Apcoa Parking Holdings GmbH* [2014] EWHC 3849 (Ch)

17. For example, under Section 541(a) of the United States Bankruptcy Code, the debtor's estate is comprised of all of the debtor's property, "wherever located and by whomever held." 11 U.S.C. § 541. Similarly, a federal district court—and, by extension, a bankruptcy court—in which a United States Bankruptcy Code case is pending has exclusive jurisdiction over all property of the debtor and its estate, "wherever located." 28 U.S.C. §§ 1334(e), 157..

18. B. Wessels, International Insolvency Law Part I (Wessels Insolvency Law Vol. X), (4th edn. Kluwer 2015) [10145]-[10147] with reference to Netherlands Supreme Court 15 April 1955, NJ 1955/542, note HB (Kallir/Comfin).

Obtaining recognition of the foreign process in England

An alternative solution would be for the debtor to seek to have its foreign restructuring process recognised in England. Recognition of a foreign insolvency / restructuring processes in England is, however, a complex topic and what amounts to recognition may fall short of what a debtor would typically expect.

Take for example recognition under the Cross-Border Insolvency Regulations 2006 (**CBIR**). The CBIR is the UK's implementation of the UNCITRAL Model Law on Cross-Border Insolvency and is arguably the most common tool for debtors seeking recognition of foreign restructurings in England. The process for recognition is relatively straightforward and, compared to running a parallel English restructuring process, inexpensive. However, despite other jurisdictions implementing the UNCITRAL Model Law in a way that allows for more expansive recognition of foreign restructuring processes,[19] recognition under the CBIR will only result in temporary and procedural relief. Put another way, recognition under the CBIR may result in a stay that will temporarily prevent a creditor from taking hostile action in England, but it will not effect a permanent variation or discharge of an English law-governed claim.[20] Moreover, there is mixed case law as to whether an English court will use its discretion to grant even temporary relief where the foreign process for which recognition is sought purports to compromise English-law governed claims.[21] For those debtors looking to navigate the rule in *Gibbs*, this is a material drawback. It is for this reason that debtors will often pursue a parallel English procedure while trying to use the CBIR to obtain temporary relief while the restructuring process is ongoing.

The CBIR is not the only recognition tool available to a debtor who wishes to have their foreign restructuring process recognised in England. The most significant and noteworthy alternative comes from section 426 of the Insolvency Act 1986 (**s.426**).[22] This process allows the English Court to assist to a foreign court by recognising a foreign process and, in doing so, offer a more expansive form of recognition compared to the CBIR.[23] In theory, s.426 allows the English Court to apply the relevant foreign law in a way that results in the substantive variation or discharge of an English law-governed claim to ensure the treatment of the claim is consistent with that specified in the foreign restructuring process.[24] The s.426 process is a powerful tool, but it is only available in respect of processes or proceedings commenced in a "relevant country or territory" (namely certain commonwealth or ex-commonwealth countries)[25] and only where the relevant process is contained in insolvency law.[26] As a result, and while potentially a powerful tool to sidestep the rule in *Gibbs*, s.426 is only available on specific facts.

Therefore, while recognition of a foreign restructuring process in England can provide the debtor with certain benefits (such as temporary respite from hostile creditor action), it will not typically result in substantive variation or discharge of English law-governed claims. In the majority of instances it is unlikely to fully address the issues arising from the rule in *Gibbs*.

An alternative approach worth noting is having the foreign restructuring procedure recognised not in England but in a jurisdiction where such recognition allows for relief that could have extra-territorial effect. One such example is obtaining recognition in the US through Chapter 15 of the US Bankruptcy Code.[27] Recognition in the US will not, from an English perspective, satisfy or remove the rule in *Gibbs*. In fact, on a strict legal basis, it may not even assist from a US perspective as Chapter 15 recognition may be confined to the protection of assets located in the US and accordingly may not purport to prevent a stakeholder taking action in England.[28] It is therefore certainly not a backdoor to circumvent *Gibbs*. However, as discussed above in the context of the extra-territorial effect of foreign restructuring processes, any foreign relief that purports to have extra-territorial effect will likely give challenging creditors pause for thought before they seek to take action in England.

19. See for example, the US and Singapore.
20. *Re OJSC International Bank of Azerbaijan [2018] EWHC 59 (Ch) at* [155]
21. See the Scottish case of *Re Prosafe SE; Chang Chin Fen v Cosco Shipping (Qidong) Offshore Ltd* [2021] CSOH 94 and see the Cimolai restructuring referred to above.
22. Recognition can also be sought as a matter of common law but the English Courts powers as a matter of common law are limited.
23. For example, section 426(5) of the Insolvency Act 1986 provides that the English Court may apply the law of the other jurisdiction, or English law (emphasis added) when granting assistance to the relevant foreign court.
24. See *Re Business City Express Ltd* [1997] 2 BCLC 510 and also *Arctic Aviation Assets DAC & Ors* [2021] IEHC 268 where expert evidence was provided in support of the proposition that repudiation of onerous contracts (English law-governed guarantees) under Section 537(1) of the Irish Companies Act would be recognised and given effect in England pursuant to s.426.
25. See the Cooperation of Insolvency Courts (designation of relevant countries and territories) Order 1986.
26. The reference to "insolvency law" is important as compromise procedures and proceedings are sometimes contained in corporate legislation. See for example the English scheme of arrangement and restructuring plan which are found in Part 26 and 26A respectively of the Companies Act 2006. Interestingly, the Cayman Islands Companies Act (2021 Revision) has recently been amended to replicate the Cayman Island scheme of arrangement provisions (similar to the position in Ireland set as described in *Arctic Aviation Assets DAC & Ors* [2021] IEHC 268), thereby at least in theory opening the door to recognition of such an arrangement through s.426.
27. Chapter 15, Title 11, United States Code, being the domestic legislation that implemented the UNCITRAL Model Law on Cross-Border Insolvency.
28. In re *JSC BTA Bank*, 434 B.R. 334 (Bankr. S.D.N.Y. 2010) (holding that the automatic stay arising upon recognition of a foreign proceeding as a "main proceeding" under section 1520(a)(1) of the U.S. Bankruptcy Code "applies to the debtor within the United States for all purposes and may extend to the debtor as to proceedings in other jurisdictions for purposes of protecting property of the debtor that is within the territorial jurisdiction of the United States.").

Do nothing

Having considered the above workarounds to the rule in Gibbs, a debtor may decide not to embark on any of the above and instead solely pursue a foreign restructuring process that purports to compromise or discharge its English law-governed claims.

Whilst this may seem rash, if a company has its key assets and operations primarily in the jurisdiction that is effecting the restructuring then it may not fear the prospect of action in England. The key to this approach is a careful risk assessment. Leaving open the possibility of action in England could have serious ramifications. For example, if a creditor successfully sought and obtained a judgment debt in England in respect of the outstanding claim, it may be able to enforce that judgment in jurisdictions where that English judgment may be recognised and the company has assets. Similarly, if the debtor has other financings, pursuing this approach could cause cross-defaults. This is in addition to any reputational issues that may arise as a result. For debtors with English law-governed claims who otherwise are entirely in another jurisdiction, this can however be a practical and significantly cheaper approach.

Conclusion

The rule in Gibbs is infamous in restructuring circles and, while its sun may soon set, the issues it currently presents in cross-border restructurings are far from insurmountable.

There are many good reasons to use an English restructuring process even if a debtor may otherwise have little connection to England. However, there are also many tools in the international restructuring toolkit that continue to allow debtors to successfully restructure English law-governed obligations without solely relying on English processes notwithstanding the rule in *Gibbs*.

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This article first appeared in Volume 20, Issue 6 of International Corporate Rescue and is reprinted with the permission of Chase Cambria Publishing – www.chasecambria.com