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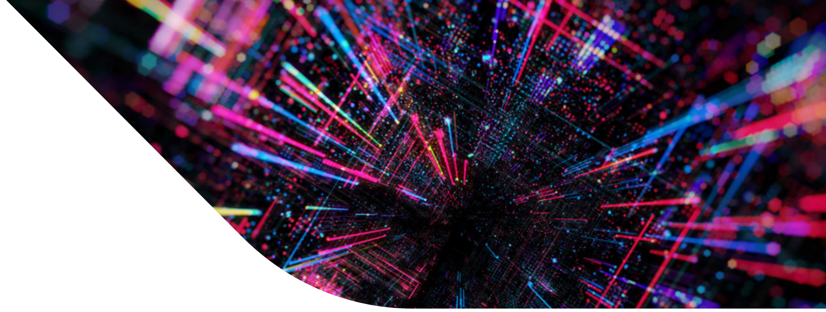

The sun never sets on English law governed debt: reviewing the Re Prosafe SE decision

Introduction

The century-old rule in *Gibbs*, a hot topic of dispute in the cross-border insolvency and restructuring space between the proponents of modified universalism in cross-border restructuring and the supporters of the freedom of contract, has again featured in the recent case of *Re Prosafe SE*[1].

The decision in *Re Prosafe SE* saw a court in the United Kingdom (**UK**) rule on an application for the recognition of a Singapore moratorium as a foreign insolvency proceeding and the granting of additional relief by way of a stay on creditor action.

The case is significant for companies and creditors looking to restructure debt instruments governed under English law in the APAC region, given the prevalence of English law governed debt and Singapore's ambitions to become a regional and international debt restructuring hub. It also sets the stage for further development in cross-border insolvency law, as the increasingly popular universalist approach to cross-border restructuring continues to clash with the priority given by English law to freedom of contract.

The rule in Gibbs

A hundred and thirty-one years old this year, the rule in *Gibbs* refers to the principle outlined in *Anthony Gibbs & Sons v. La Société Industrielle et Commerciale des Métau*[2] that the proper law of a debt governs how it may be modified or extinguished and, accordingly, an English law debt may only be modified or extinguished under English law.

The significance of the rule in *Gibbs* is that a foreign insolvency or restructuring process, such as a scheme of arrangement in Singapore, would not, *as a matter of English law*, be effective to compromise English law governed debt, even if it is effective as a matter of that foreign law. Accordingly, provided a creditor did not participate in the relevant foreign insolvency proceedings by, for example, filing a proof of debt, it could still seek to recover its debt claim under English law by pursuing its ordinary remedies.

However, where the relevant creditor submits to the foreign proceedings it is taken to have accepted that its contractual rights will be governed by the law of that foreign jurisdiction, and would likely be estopped from arguing that its claim has not been validly compromised under the foreign proceeding.

Many commentators have argued that the rule in *Gibbs* is at odds with the modified universalism that has guided the development of modern international insolvency law. However, *Gibbs* proponents point out that parties have freedom of contract and may have purposefully chosen English law in order to benefit from the certainty and protections that English law and English courts grant them, including the assurance that their contracts will not be modified or extinguished by any law other than the one they have chosen.

The Prosafe decision

Prosafe had applied to the Scottish Court of Session to seek recognition of proceedings commenced in Singapore in which moratoria had been granted by the High Court of Singapore in respect of two companies (Prosafe SE, incorporated in Norway and Prosafe Rigs Pte Ltd, incorporated in Singapore) as well as ancillary relief following such recognition in the form of a stay on creditor action generally. The Singapore moratoria over these two companies had been granted by the High Court of Singapore to facilitate finalisation of restructuring proposals to be implemented via a scheme of arrangement under Singapore law, and the application by Prosafe to the Scottish Court was made under the UK Cross-Border Insolvency Regulations 2006 (**CBIR**) (which implement the UNCITRAL Model Law into the UK's domestic law[3]). The respondent, Cosco, was a creditor holding English law governed debt, which was secured and guaranteed under English law agreements. Cosco had not submitted to the jurisdiction of the Singapore courts as it did not approve of the proposed scheme of arrangement which would have swapped its debt for equity.

1 [2021] CSOH 94
2 (1890) 25 Q.B.D. 399
3 Note that this includes England, Wales and Scotland but not Northern Ireland.

The application was made amidst concerns that certain rigs owned by Prosafe might enter Scottish territorial waters and thus become subject to enforcement action by the respondent, and that if this happened it would prejudice the restructuring efforts. Prosafe had requested that the Scottish Court grant both recognition of the Singapore moratorium processes *and* additional relief by way of stays, and that unless both were granted, the application should be dismissed[4].

It is important at this point to understand why Prosafe considered that the relief sought was a necessary and integral part of the application.

Recognition of the Singapore proceedings was a necessary first step for Prosafe to guard against potential enforcement action against the rigs but procedural recognition would be insufficient unless Cosco could be prevented from taking action to enforce against assets within the UK's territorial jurisdiction. Prosafe therefore sought additional relief from the court to restrain Cosco from (a) enforcing its security, (b) repossessing goods, (c) instituting legal processes, (d) appointing an administrative receiver, and (e) presenting a winding-up petition in respect of the two entities. Although recognition was available under the CBIR, the extent of the additional substantive relief which Prosafe was seeking was not automatic, was subject to the discretion of the court and would only be available if the court was satisfied that the interests of creditors and other persons would be adequately protected.

Citing the English Court of Appeal decision in the 2018 case of *Re OJSC International Bank of Azerbaijan*[5], which recently reaffirmed the rule in *Gibbs*, the Scottish Court decided that it was unable to grant the additional relief requested because it was not convinced that the interests of Cosco would be adequately protected. As this final requirement could not be met because of the rule in *Gibbs*, the Scottish Court acceded to Prosafe's submission for an "all or nothing" approach and refused the applications. Although it was submitted by Prosafe's counsel that granting the full extent of the relief sought would not of itself engage the rule in *Gibbs* as the moratoria should be regarded as separate from any subsequent scheme of arrangement (which would seek to compromise the debt), the Scottish Court was not persuaded of this. Instead, the court found that the additional relief sought was not to provide "breathing space" pending reorganisation and so could not be regarded as a standalone separate process from the subsequent restructuring via a Singapore scheme of arrangement. Since the moratorium and scheme were interlinked, and because the scheme could not compromise the English law creditors due to the rule in *Gibbs*, the liabilities of Prosafe owed to the respondent would "stand outside the collective insolvency process of which the Moratoria are an integral part" and this was sufficient enough reason for the Scottish Court of Session to refuse the extent of the additional relief requested.

In other words, the Scottish Court of Session would have been willing to grant both the recognition of the Singapore proceedings and the full extent of the relief sought, subject only to a specific carve-out in respect of the respondent.

In fact, an English court in 2019 was the first foreign court to recognise the Singapore scheme proceedings as a "foreign main proceeding" and the moratorium order that stemmed from such proceedings. In addition, the Court granted ancillary relief by way of a stay on creditor action, albeit, with a carve-out to allow for certain on-going arbitration processes in England to continue. It is however important to note that in that case the scheme was not intending to compromise any English law claims.[6]

The crux of the matter is that a court in the UK will recognise Singapore insolvency proceedings and will grant appropriate relief where to do so would not conflict with or look to circumvent the rule in Gibbs.

Chapter 15 Recognition –a 'soft' workaround?

Even though *Re Prosafe SE* has underscored that as a matter of English law the rule in *Gibbs* still holds firm, one question which remains is whether attaining recognition in the United States (**U.S.**) under the Chapter 15 procedure might offer an alternative means to prevent creditors from taking action in the UK in reliance on the rule in *Gibbs*.

Chapter 15 of the U.S. Bankruptcy Code is the U.S.'s adoption of the UNCITRAL Model law on Cross-Border Insolvency. Companies in foreign restructuring or insolvency proceedings can seek to protect their U.S.-located assets from enforcement proceedings or direct appropriation by individual creditors by seeking Chapter 15 recognition of their foreign proceedings. If a U.S. bankruptcy court recognises a case as a foreign main proceeding, Chapter 15 provides an automatic stay that protects the debtor and property of the debtor located within the territory of the U.S.. At least one U.S. court has held that such stay does not apply with extraterritorial effect to protect the debtor from foreign litigations or other proceedings by creditors, provided that such actions do not adversely affect property of the debtor located in the U.S..[7] In addition, other relief may potentially be obtained on a discretionary basis in a Chapter 15 case, whether a foreign proceeding is recognised as main or non-main, which may include other injunctive relief necessary to assist the debtor and its foreign insolvency proceeding. One U.S. court has found that the court's power to grant such discretionary relief is "exceedingly broad" since a court may grant "any appropriate relief" in furtherance of the goals of Chapter 15 and to protect the debtor's assets and the interests of creditors.[8]

4 Recognition without assistance by way of a stay on creditor action would not have provided the protection required by the applicant

5 [2018] EWCA Civ 2802

6 *H & CS Holdings Pte Ltd v Glencore International AG* [2019] EWHC 1459 (Ch)

7 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.").

8 In *re Foreign Econ. Indus. Bank, "Vneshprombank"* Ltd., 607 B.R. 160 (Bankr. S.D.N.Y. 2019).

Where a creditor subject to the jurisdiction of the U.S. courts seeks to enforce its claims in the UK, notwithstanding an ongoing restructuring process in a foreign jurisdiction which would otherwise bar such a claim if not for *Gibbs*, and where the foreign debtor obtains recognition in the U.S. under Chapter 15, the U.S. ancillary proceeding under Chapter 15 may serve as an effective bar to the creditor's attempts to challenge the process in the UK.

Chapter 15 relief in practice can be quite broad. For example, in support of Boart Longyear's Australian scheme of arrangements, the U.S. Bankruptcy Court entered an order that enjoined "all persons and entities subject to the jurisdiction of the United States" from "taking any action inconsistent with, or interfering with the enforcement and implementation of [the Australian schemes]". Notably, in that case the proposed relief (and the breadth of the court's order) was not contested by creditors. That said, if relief is granted on such wide terms without limits to its effect in the U.S., it is not inconceivable that a debtor could argue that a creditor subject to the jurisdiction of the U.S. courts, may be in contempt of court if it seeks to rely on *Gibbs* in the UK to pursue a claim take enforcement action after Chapter 15 recognition of a foreign proceeding has been granted with such broad injunctive relief. Creditors must assess such risks in the context of a given case, however, and if there is concern regarding the scope of relief in a proposed order under Chapter 15, creditors may consider making objections or otherwise obtaining clarity over the scope of the proposed relief to ensure there is no inadvertent violation of a court order in pursuing actions against the debtor or its assets outside the U.S..

On the other hand, it remains to be seen whether the broad injunctive relief of the kind granted in connection with the recognition of the Boart Longyear scheme could, if actually tested, be used effectively to prevent subsequent collateral attacks in the UK on the restructuring of English law debt in reliance on the rule in *Gibbs*. Taken to its logical conclusion, the scope of the Boart Longyear recognition order's injunctive language would in effect deputise a U.S. Chapter 15 court with policing actions taken in the UK by parties that have not participated in the Chapter 15 case and that have limited connections to the U.S.. If that proposition were actually litigated, a U.S. court could well conclude that comity to a foreign restructuring process does not require such a result and that the appropriate scope of such comity as provided in connection with a Chapter 15 case is limited to preventing attacks against the foreign insolvency process in the U.S. or in foreign jurisdictions where the consequence would have a direct and material impact on property located in the U.S.. Such a conclusion would be arguably consistent with Chapter 15's clear focus on the protection of a foreign debtor's property located within the territorial jurisdiction of the U.S..

Whether a U.S. court or creditors seek to limit the scope of the protections accorded by Chapter 15 recognition (including available discretionary relief), the U.S. Bankruptcy Courts are firmly on the side of universalism. There is clear precedent that the U.S. courts will recognise foreign restructurings, notwithstanding the rule in *Gibbs* and any principles of comity. In *In re Agrokor*,[9] a Croatian debtor sought recognition under Chapter 15 for a Croatian restructuring which compromised English law debt. The U.S. Bankruptcy Court considered the issue of *Gibbs* in much detail and eventually opined that it was in conflict with the universalism favoured by "the Model Law and a broad consensus of international insolvency practitioners and jurists" and granted recognition of the Croatian restructuring proceedings and the settlement agreement that restructured English law debt.

We note however that the relief in *Agrokor* was limited to recognising the restructuring "within the territorial jurisdiction of the United States" and there has not yet been a case that directly tests the proposition that broad relief granted in the context of a Chapter 15 case could be used to effectively prevent collateral attacks on the restructuring of English law debt in reliance on the rule in *Gibbs*. Furthermore, even if the U.S. Bankruptcy Court were to enjoin persons or entities within its jurisdiction from challenging a foreign restructuring on the basis of *Gibbs*, such remedy would be limited to holding a violator in contempt of the U.S. court and does not extinguish the ability of such persons or entities to pursue recourse in the UK as a matter of English law.

Governing law considerations

A practical takeaway for borrowers and lenders alike from *Re Prosafe S*E is to be acutely aware that the governing law of the debt obligations could affect their rights and restructuring options in the worst-case scenario should the borrower become financially distressed.

After all, one of the key arguments raised in *Re Prosafe SE* and in academia generally for the continued recognition of the *Gibbs* rule is freedom of contract – that is, creditors have chosen English law and thus the parties' contractual expectations should be respected which includes having the benefit of the rule in *Gibbs*.

While this reasoning has been criticised given the global movement towards universalism in cross-border insolvency, there is no sign that the English courts will soon abandon the rule in *Gibbs* and so borrowers and lenders should be mindful of the insolvency law repercussions of the choice of governing law when the loan is being negotiated.

It is worth noting that it is possible to change the governing law of a debt obligation to facilitate a restructuring ex post. In *Re APCOA Parking Holdings GmbH*[10] which came before the English courts, a debt obligation originally governed by German law and subject to the jurisdiction of the German courts was modified by majority lender consent to English law and the jurisdiction of the English courts expressly to enable the debtor company to apply for a scheme of arrangement. However, it is worth remembering that market-standard or LMA APLMA facility agreements typically provide that changes to governing law are an all-lender decision.

9 591 B.R. 163 (Bankr. S.D.N.Y. 2018)
10 [2014] EWHC 3849 (Ch)

Moratoriums – standalone or contingent?

A point raised by the Scottish Court of Session in *Re Prosafe SE* was that the Singapore moratorium is not a standalone process and therefore the argument presented by Prosafe's counsel that the moratorium was merely to create "breathing space" was rejected. The Scottish Court of Session noted that the Singaporean moratorium introduced by the Insolvency, Restructuring and Dissolution Act 2018 is inextricably linked to a scheme of arrangement under Singapore law – it can only be granted if the applicant proposes or intends to propose a scheme of arrangement.

This begs the question of whether a standalone moratorium would be treated differently. The trailblazer in this space is the United Kingdom which recently introduced a standalone moratorium via the Corporate Insolvency and Governance Act 2020 (**CIGA**). Unlike all other forms of moratorium under every other jurisdiction in the world, the UK standalone moratorium is unique in that it exists solely to provide the distressed company with "breathing space" to assess its options and does not exist as a formal pre-cursor or a gateway into a specific insolvency or debt compromise process.

Given that a UK Court had previously recognised the Singaporean moratorium in *H & CS Holdings Pte Ltd v Glencore International AG* as a "foreign main proceeding" where *Gibbs* was not engaged, a standalone moratorium much like the one under CIGA, may have been recognised on the same facts since it would not have the feature of being inextricably linked to a debt compromising process. Notwithstanding this, if the intention of creditors when applying for the moratorium is to subsequently compromise the English law governed debts via a Singaporean scheme, the fact that a moratorium is procedurally separate from a scheme would not convince an English court to render assistance in undermining *Gibbs*.

Given Singapore's ambitions of becoming an Asia-Pacific restructuring hub and the prevalence of English law governed debt, perhaps a legislative response to *Re Prosafe SE* would be to decouple the Singapore moratorium from the scheme of arrangement, or introduce a standalone moratorium to function as an intermediate step. Such a moratorium would be limited in the sense that it would not be a precursor to a process that compromises English law governed debt but could nonetheless provide valuable "breathing room" for the debtor to negotiate with its creditors. This additional time could allow the debtor to implement a more holistic restructuring proposal, for instance by implementing a parallel scheme of arrangement in the UK where the restructuring exercise contemplates the compromise of English law governed debt.

Impact on future Singapore schemes of English law debt

One of the criteria which English courts take into account when sanctioning an English scheme of arrangement is whether it would be reasonably likely to be effective or recognised in other jurisdictions (*Re Codere*[11]). An English court is reluctant to sanction a scheme of arrangement if it will not be effective or recognised in the jurisdictions where the debtor is based or where it has assets and, often, independent evidence is required to be presented to the court to confirm that, if sanctioned, a scheme would be recognised in all relevant jurisdictions. This is also the case in Hong Kong where one of the criteria for sanctioning schemes with an international element is that it is effective in the relevant foreign jurisdictions,[12] and if Singapore were to follow similar criteria when determining whether or not to sanction a Singaporean scheme of arrangement, *Re Prosafe SE* could throw a spanner in the works.

Interestingly, notwithstanding the refusal of the Scottish Court of Session to grant the relief sought in *Re Prosafe SE*, the Singapore High Court has now sanctioned the Prosafe scheme of arrangement. The judgment is not public as at the date of publication of this article and so there is no visibility of how (if at all) the *Gibbs* rule and the *Re Prosafe SE* decision were dealt with. It may have been that the question was never directly asked of the Singapore judiciary on the basis that the only assets potentially subject to the jurisdiction of the UK were a number of semi-submersible rigs, and as such it is possible for steps to be taken to ensure that the rigs never enter UK waters.

However it will be interesting to see what happens if and when the Singapore judiciary is asked to sanction a scheme in circumstances where there are clearly assets subject to the jurisdiction of the UK, say for instance real estate and there are also English law creditors which have not submitted to the Singapore jurisdiction. Would the Singapore courts sanction the scheme in full knowledge that a UK court would refuse to recognise it?

Singapore has already confirmed it is no longer a *Gibbs* jurisdiction. The judiciary has expressed disapproval of the rule in *Gibbs* both in the case law (see *Pacific Andes*) and in extrajudicial writings (see Judicial Commissioner K. Ramesh's article in the Singapore Academy of Law Journal: *The Gibbs Principle: A Tether on the Feet of Good Forum Shopping*). Nonetheless, it is trite law in common law jurisdictions that a court will not act in vain, and thus it remains to be seen what the approach of the Singapore courts will be when asked to sanction a scheme that will surely fail without the cooperation of a foreign court.

11 *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch)
12 See, for example, Judge Jonathan Harris' decision in *Re China Lumena New Materials Corp* [2020] HKCFI 338

Concluding remarks

Gibbs will no doubt remain relevant in the APAC region and internationally as the UK Courts show no sign of reversing their commitment to stand by the rule and champion the freedom of contract and its applicability in the restructuring and insolvency space. With the Singaporean judiciary showing an at least equal resolve to disregard the century-old rule, embrace universalism and establish Singapore as an Asian restructuring hub comparable to the U.S. and the UK, it is inevitable that the issue will arise for full argument and decision sooner or later.

Given the continued popularity of English law as the governing law of bank debt worldwide and the development of the APAC restructuring market, creditors and companies considering Singapore as a forum for their restructuring strategies will want to stay abreast of these developments.

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