

# **ARTICLE: Choice of Law in Insolvency Proceedings: How English Courts' Continued Reliance on the Gibbs Principle Threatens Universalism**

2019

## **Reporter**

93 Am. Bankr. L.J. 343 \*

**Length:** 19527 words

**Author:** by Varoon Sachdev\*

\* An attorney in the Financial Restructuring and Insolvency practice at White & Case, LLP. Graduate of Northwestern Pritzker School of Law (JD, cum laude), Kellogg School of Management (MBA), and New York University Stern School of Business (MS, BS). Many special thanks to Professor Bruce Markell for his incisive criticism, questions, and tremendous encouragement, to Richard Kebrdle for his ideas and insights, and finally to Judge Frank W. Volk and the reviewers and editors of the American Bankruptcy Law Journal for their invaluable comments and critiques. Please note that the views and opinions expressed in this Article are the Author's alone and do not represent the opinions of White & Case, LLP or its clients.

## **Highlight**

---

### Abstract

Bankruptcy commentators, policymakers, and scholars generally agree that global insolvency systems should champion the principles of universalism and economic efficiency. The global delegations to the United Nations Commission on International Trade Law [hereinafter "UNCITRAL"] built those principles into their Model Law of Cross-Border Insolvency [hereinafter in text "Model Law"], which many nations have since adopted. <sup>1</sup> However, some nations have not taken the next step to incorporate these principles into their policies and jurisprudence. In England and Wales, a Victorian-era principle emanating from *Antony Gibbs & Sons v. La Societe Industrielle et Commerciale des Metaux*, <sup>2</sup> exemplifies how bygone conventional wisdom threatens to derail the world's progress toward efficiency through universalism. The Gibbs Principle states that only an English court may discharge debt arising under English law, even if that debt has first been discharged in a foreign insolvency proceeding. Furthermore, the modern rulings that support Gibbs go further. They hold that the Model Law offers only procedural relief, that judgments entered against parties who do not submit to the foreign jurisdiction are invalid, and that any relief granted under English law to the foreign representatives seeking enforcement under the Model Law must first be correspondingly available under English law. These rulings incentivize holdouts and disincentivize creditors from participating in foreign insolvency proceedings. Also, those with discharged debt arising under English law must, in order to fully discharge their obligations, pursue costly parallel proceedings in England following discharge in a foreign insolvency proceeding. The net effect of these decisions is increased systemic costs and a lack of uniformity contrary to the principles underlying the Model Law. Given these seismic implications, the cross-border insolvency community must pursue Gibbs-related reform.

---

<sup>1</sup> Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (United Nations Comm'n on Int'l Trade Law 1997) [hereinafter in notes "Model Law"].

<sup>2</sup> *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* [1890] QB 399, at 399-400 (Eng.).

## Text

---

[\*344]

### I. INTRODUCTION

Discharging debt through bankruptcy is a bedrock principle of many insolvency systems across the globe and has been for some time. In 1918, L.E. Levinthal stated that "the discharge of the honest insolvent has come to be regarded as the all important feature of some bankruptcy statutes."<sup>3</sup> A bankruptcy discharge releases debtors from their obligations to pay certain debts and, in some cases, replaces those debts with obligations that enable the debtor to regain its footing. Indeed, in 1918, the laws of England, the United States, Germany, and Austria allowed discharge much like that historically seen in ancient Islamic and Oceanic cultures.<sup>4</sup> By 1996, the practice had spread to France, Japan, Sweden, and other nations.<sup>5</sup>

Multinational debtors that hope to use discharge as a restructuring mechanism for debt governed by English law, however, must contend with the Gibbs Principle. The rule arises out of *Antony Gibbs & Sons v. La Societe Industrielle et Commerciale des Metaux*,<sup>6</sup> an 1890 opinion from the Queen's Bench Division of the High Court (now known as the English Court of Appeal) that has stubbornly withstood the advancement of cross-border insolvency law.<sup>7</sup> The Gibbs Principle generally holds that only English courts can discharge debt subject to English law, even if the debtor received a discharge in a foreign bankruptcy proceeding.<sup>8</sup>

[\*345] The persistence of the Gibbs Principle into the Modern Age, despite significant criticism, is driven by a broader movement within English insolvency jurisprudence that opposes universalism. Recently, English courts have limited the scope and power of UNCITRAL's Model Law, which was codified into English law under the 2006 Cross-Border Insolvency Regulations [hereinafter "CBIR"].<sup>9</sup> The courts have held that the Model Law is merely procedural in nature, not substantive, and that English courts may only grant relief that would otherwise be available under English law.<sup>10</sup> As a result, after parties endure extensive restructurings in the debtor's home country, they learn that English courts will not recognize or enforce the outcomes of those proceedings including, but not limited to, the discharge of debts.

The universalist foundation of modern cross-border insolvency law is weakened by Gibbs and the English jurisprudential movement to impede recognition of foreign insolvency proceedings. Rather than enabling a more

---

<sup>3</sup> Louis E. Levinthal, *The Early History of Bankruptcy Law*, 66 U. Pa. L. Rev. 223, 224 (1918).

<sup>4</sup> *Id.* at n.12.

<sup>5</sup> Andrew Grossman, *Conflict of Laws in the Discharge of Debts in Bankruptcy*, *INSOL Int'l. Insol. Rev.* 1, 2 (1996).

<sup>6</sup> [1890] QB 399 (Eng.).

<sup>7</sup> *Bakhshiyeva ex rel. Int'l Bank of Azerbaijan v. Sberbank of Russia* [2018] EWCA (Ch) 59 [158(1)] (Eng.) ("It being accepted that the 'rule' in Gibbs is binding upon me, I would not consider it consistent with the 'rule' to permit its practical abrogation by procedural means: even if I am wrong to have considered this to constitute a jurisdictional bar, I would not in my discretion have granted relief to side-step the 'rule' in that way.").

<sup>8</sup> Ian F. Fletcher, *Insolvency in Private International Law* P 2.7.1 (2d ed. 2005).

<sup>9</sup> Cross-Border Insolvency Regulations 2006, <https://www.legislation.gov.uk/uksi/2006/1030/contents/made> (last visited Jan. 10, 2019).

<sup>10</sup> E.g., *Fibria Celulose S/A v. Pan Ocean Co. Ltd.* [2014] EWHC 2124 [87], [111]; *Bakhshiyeva ex rel. Int'l Bank of Azerbaijan v. Sberbank of Russia* [2018] EWCA (Ch) 59 [57], [142].

efficient global insolvency system where debtors and creditors collectively negotiate in a unitary proceeding, English rulings require multiple proceedings or the use of English tribunals as the home court. Depending on the circumstances, that choice may be detrimental to the debtor and creditor body. It may also be detrimental to England's standing as a preferred hub for global financial underwriting. Under current English law, debtors may have to manage risk by avoiding issuance of debt under English law. Thus, it is time to thoroughly scrutinize and refresh this dated principle of English insolvency jurisprudence.

This Article proceeds in three parts. In Part II, I outline the legal and economic principles that undergird universalism, with special emphasis upon the Model Law. In Part III, I discuss the Gibbs Principle and additional developments in English cross-border insolvency jurisprudence, including a critique and overview of its current interpretation and effects. In Part IV, I discuss the practical effects of Gibbs, the reaction to it from other sources, and then I propose solutions for practitioners, Parliament, and the courts of England and Wales.

## II. KEY PRINCIPLES GUIDING THE ANALYSIS

The following analysis relies on two well-established pillars of insolvency law: 1) that insolvency systems applying universalist, rather than territorial, principles preserve more value, and 2) that insolvency systems should strive to promote economically efficient outcomes.

### **[\*346]**

#### A. Universalism

While hackneyed, Thomas Friedman's claim that the "world is flat" has never been more relevant, as both large, sophisticated, economic players and small businesses operate globally using nothing but a mobile phone.<sup>11</sup> Companies today are no longer confined to work within a single country or geographic region, and a global reach can be accomplished quickly. The ride sharing giant Uber is a case in point. The company was only an idea in 2009.<sup>12</sup> Ten years later, it operates in over seventy countries.<sup>13</sup>

Moreover, multinational companies control a vast array of infrastructure and capital; they are critical components of daily life in societies around the globe. According to *The Economist*, multinational companies (defined as those that make at least thirty percent of revenue outside of their home region) control supply chains that are responsible for fifty percent of all world trade and forty percent of the value of Western stock markets.<sup>14</sup> Invariably, some of these companies will face financial distress impacting people and systems across the globe. It thus behooves governments wishing to preserve economic value to enact insolvency laws that accomplish that goal across borders, as global uniformity minimizes insolvency-related damage and disruption.

The United Nations [hereinafter "UN"] has championed the goal of preserving global economic value and has worked to create the infrastructure and tools needed to achieve that objective. In 1966, the UN convened delegations from countries around the world to form UNCITRAL.<sup>15</sup> In 1995, the UN General Assembly tasked

---

<sup>11</sup> Thomas L. Friedman, *The World is Flat: A Brief History of the Twenty-First Century* 309 (Picador 2007) (2005).

<sup>12</sup> The History of Uber, Uber, <https://www.uber.com/newsroom/company-info/> (last visited Jan. 11, 2019).

<sup>13</sup> International sites, Uber, <https://www.uber.com/country-list/> (last visited Jan. 11, 2019).

<sup>14</sup> The Retreat of the Global Company, *The Economist*, (Jan. 28, 2017), <https://www.economist.com/briefing/2017/01/28/the-retreat-of-the-global-company>.

<sup>15</sup> Origin, Mandate and Composition of UNCITRAL, UNCITRAL, <http://www.uncitral.org/uncitral/en/about/origin.html> (last visited Jan. 11, 2019).

UNCITRAL with developing a model international law to help move the global community closer to an insolvency system that enables multinational companies to efficiently restructure.<sup>16</sup>

For the most part, academics and the global delegations to UNCITRAL alike agree that a universalist insolvency system, rather than one built on territorial principles, best preserves value for multinational entities.<sup>17</sup> A universalist [\*347] system would have a single court convening a proceeding to manage the entire restructuring or liquidation of an entity, assessing the claims and assets from every nation involved and distributing assets collectively among all parties.<sup>18</sup> Conversely, territorial systems require countries to administer the claims and assets held by the debtor in their respective countries and ignore those claims and assets held beyond their borders.<sup>19</sup>

There are several reasons why many experts prefer universalism in cross-border insolvency, including the beneficial results of a single proceeding (1) allowing for efficient, cost-effective administration by reducing the time and resources spent coordinating and navigating multiple proceedings,<sup>20</sup> (2) encouraging collective action that reflects the interests of the entire society impacted by the insolvency,<sup>21</sup> (3) ensuring that certain creditors must compromise their individual rights to preserve the most value for the collective whole, even if enforcing those individual rights would have provided for a superior, individual outcome,<sup>22</sup> (4) diminishing the likelihood of contradictory or defiant orders and holdings from parallel proceedings, (5) creating more certainty by ensuring that resolutions to insolvency proceedings are recognized and enforced globally, thereby reducing expense, and (6) providing a "symmetrical" scope to the problems multinational debtors face, in that the dimension of the proceedings is equivalent to the reach of the debtor's business.<sup>23</sup>

Given these benefits, Professors Wessels, Markell, and Kilborn understandably claim that "universalism in one form or another commands virtually undisputed superiority over territorialism."<sup>24</sup> Professor Westbrook, in support of the principle, logically notes that multinational companies in distress require a unitary, conclusive proceeding for all stakeholders globally, and that any other action would only be "a temporary accommodation" subject to upset at any time.<sup>25</sup> Conversely, Professor Robert K. Rasmussen claims that [\*348] the fervor around universalism is

---

<sup>16</sup> See Model Law, *supra* note 1, at 23, 32.

<sup>17</sup> See, e.g., Reinhard Bork, *Principles of Cross-Border Insolvency Law* 28 (2017); Bob Wessels, Bruce A. Markell & Jason Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters* 49-50 (2009); Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, [98 Mich. L. Rev. 2177, 2179 \(2000\)](#); Jay L. Westbrook, *A Global Solution to Multinational Default*, [98 Mich. L. Rev. 2276, 2293 \(2000\)](#) [hereinafter Westbrook, *Global Solution*]; Jay L. Westbrook, *Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation*, [76 Am. Bankr. L.J. 1, 1-2 \(2002\)](#); Jay L. Westbrook, *Multinational Financial Distress: The Last Hurrah of Territorialism*, [41 Tex. Int'l L.J. 321, 322-23 \(2006\)](#) [hereinafter Westbrook, *Last Hurrah*] (reviewing Lynn M. LoPucki, *Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts* (2005)).

<sup>18</sup> See Wessels, Markell & Kilborn, *supra* note 17, at 49.

<sup>19</sup> *Id.* at 40.

<sup>20</sup> John Lowell, *Conflict of Laws as Applied to Assignments for Creditors*, 1 Harv. L. Rev. 259, 264 (1888).

<sup>21</sup> See Wessels, Markell & Kilborn, *supra* note 17, at 45; see also Westbrook, *Last Hurrah*, *supra* note 17, at 326.

<sup>22</sup> Wessels, Markell & Kilborn, *supra* note 17, at 39.

<sup>23</sup> Westbrook, *Global Solution*, *supra* note 17, at 2283-87.

<sup>24</sup> See Wessels, Markell & Kilborn, *supra* note 17, at 49. But cf. Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, [98 Mich. L. Rev. 2216, 2216 \(2000\)](#).

<sup>25</sup> Westbrook, *Global Solution*, *supra* note 17, at 2287.

unwarranted because the premise that multinational companies can and do face competing international proceedings has not been seen in practice.<sup>26</sup>

The UNCITRAL working groups recognized that nations were unprepared to adopt a pure form of universalism, where sovereigns relinquish bankruptcy jurisdiction to the extraterritorial main proceeding, known as the debtor's Center of Main Interests [hereinafter "COMI"].<sup>27</sup> As a result, the Model Law prescribes a modified form of universalism.<sup>28</sup> This modified system envisions a debtor reorganizing in its COMI, where the court asserts jurisdiction over all assets and claims globally.<sup>29</sup> The COMI court then applies its insolvency laws and conflicts principles to resolve the case.

After initiating the COMI proceeding, the debtor's foreign representative petitions courts in other countries to give primacy to the COMI proceeding (the "main proceeding").<sup>30</sup> Once recognized, the non-COMI courts facilitate the main proceeding in a number of ways: (1) by assisting or empowering the debtor's foreign representatives to consolidate claims and assets,<sup>31</sup> (2) by coordinating and cooperating with the COMI court,<sup>32</sup> (3) by protecting the debtor from claims brought in the non-COMI jurisdiction,<sup>33</sup> and (4) by, among other steps, granting "any appropriate relief" to preserve the estate.<sup>34</sup> This system gives the debtor the breathing room necessary to reorganize effectively and encourages all parties to participate in the main proceeding rather than prosecuting and defending claims in multiple jurisdictions. Theoretically, by reducing the number of venues, fewer resources are used to administer cases.

One unclear component of the Model Law is whether it empowers adopting countries to give effect to a discharge, judgment, or other adjudication resulting from an extraterritorial main proceeding. Some countries, like the United States, have determined that the Model Law provides such authority; English courts have concluded otherwise.<sup>35</sup> The lack of explicit authority to **[\*349]** recognize a foreign discharge is in tension with the modified-universalist approach embedded in the Model Law. This is so because debtors and creditors have less certainty whether the resolutions reached during main proceedings will be enforced upon conclusion. This uncertainty may cause parties to seek separate and duplicative proceedings in non-COMI courts. While UNCITRAL has recently attempted to respond to this inconsistency by promulgating the Model Law on Recognition and Enforcement of Insolvency-Related Judgments [hereinafter in text "2018 Model Law"], the true test of success awaits further jurisprudential developments.<sup>36</sup>

---

<sup>26</sup> Robert K. Rasmussen, Where Are All the Transnational Bankruptcies? The Puzzling Case for Universalism, [32 Brook. J. Int'l L. 983, 988-89 \(2007\)](#).

<sup>27</sup> See Bork, *supra* note 17, at 27-28.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See Model Law, *supra* note 1, art. 15.

<sup>31</sup> *Id.* arts. 20, 21.

<sup>32</sup> *Id.* arts. 25, 27.

<sup>33</sup> *Id.* arts. 20, 21.

<sup>34</sup> *Id.* art. 21.

<sup>35</sup> Compare [In re Condor Ins. Ltd., 601 F.3d 319, 329 \(5th Cir. 2010\)](#) (holding "that a court has authority to permit relief under foreign avoidance law under" Chapter 15 of the Bankruptcy Code), with [Bakhshiyeva ex rel. Int'l Bank of Azerbaijan v. Sberbank of Russia](#), [2018] EWHC 59 [73] (Ch) (holding that the court had no power under common law or the Model Law to recognize discharge of foreign debt from insolvency proceedings).

<sup>36</sup> Model Law on Recognition and Enforcement of Insolvency-Related Judgments (United Nations Comm'n on Int'l Trade Law 2018) [hereinafter in notes "2018 Model Law"].

## B. General Economic Efficiency

In addition to supporting universalism, insolvency systems should be structured to support general economic efficiency. Specifically, systems should focus on (1) disincentivizing a holdout bent on maximizing an individual recovery at the expense of overall value in insolvency, and (2) discouraging investment speculation driven by law rather than the underlying strength of the company.

### 1. Disincentivizing Holdouts

A "holdout" in the insolvency context is typically a creditor that either delays or does not participate in proceedings to leverage a higher recovery for itself than other similarly situated creditors. To minimize holdout leverage, nations like the United States, the U.K., and Canada have established domestic restructuring systems that allow a majority of a creditor class to bind nonconsenting creditors in that same class.<sup>37</sup> For example, in the U.K., debtors can implement a "scheme of arrangement" to restructure debts.<sup>38</sup> For a scheme to be approved, each class of creditors must vote in favor of it.<sup>39</sup> The rules state that a class will be deemed to have approved a scheme of arrangement if "50% in number constituting 75% in value" within each class vote for the scheme.<sup>40</sup> Chapter 11 of the United States Bankruptcy Code goes even further with its cramdown provisions, which allow for a plan to be confirmed even if only a single class of creditors approves a plan, provided that the plan meets several other standards.<sup>41</sup>

**[\*350]** Professor Marc J. Roe has written extensively on the topic of holdouts as it relates to restructuring bonds in an out-of-court settlement under the Trust Indenture Act.<sup>42</sup> He notes that creditors can and often do take advantage of their holdout positions in bond workouts.<sup>43</sup> While the majority of bondholders agree to exchange their bonds, the holdouts frequently achieve better results because the law requires that 100% of bondholders agree to the change.<sup>44</sup> Therefore, bondholders who hold the same instruments *ex ante* receive different value for those instruments *ex post*, and the holdouts engage in a costly process of negotiation and delay to achieve that result, reducing overall economic value.

---

<sup>37</sup> See, e.g., [11 U.S.C. § 1126](#) (2012) (describing voting procedures in the United States); Ashley Katz, Scheme of Arrangement: An English Law Cram Down Procedure, Mayer Brown (Jan. 12, 2019, 3:05 PM), [https://www.mayerbrown.com/public\\_docs/scheme\\_of\\_arrangement.pdf](https://www.mayerbrown.com/public_docs/scheme_of_arrangement.pdf) (describing U.K. voting procedures); McMillan LLP, *Insolvency Proceedings in Canada 7* (2012) [http://www.mcmillan.ca/files/Insolvency\\_Proceedings\\_booklet.pdf](http://www.mcmillan.ca/files/Insolvency_Proceedings_booklet.pdf) (describing Canadian voting procedures).

<sup>38</sup> Katz, *supra* note 37, at 1.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See [11 U.S.C. § 1129\(b\)](#) (noting that the standards include, but are not limited to, an impaired class accepting the plan, adherence to the absolute priority rule, no unfair discrimination against unaccepting, impaired classes, and overall fairness and equity).

<sup>42</sup> Trust Indenture Act of 1939, [15 U.S.C. §§ 77aaa-77bbb](#) (2012); see, e.g., Marc J. Roe, The Trust Indenture Act of 1939 in Congress and the Courts in 2016: Bringing the SEC to the Table, [129 Harv. L. Rev. F. 360 \(2016\)](#) [hereinafter Roe, Trust Indenture Act]; Marc J. Roe, The Voting Prohibition in Bond Workouts, [97 Yale L.J. 232 \(1987\)](#); Marc J. Roe, Giving Bondholders a Voice in Debt Restructuring, N.Y. Times (Dec. 14, 2015), <https://www.nytimes.com/2015/12/15/business/dealbook/giving-bondholders-a-voice-in-debt-restructuring.html>.

<sup>43</sup> See Roe, Trust Indenture Act, *supra* note 42, at 363; see also Hyun Chul Lee, Efficient and Inefficient Debt Restructuring: A Comparative Analysis of Voting Rules in Workouts, [40 Cornell Int'l L.J. 661, 662 \(2007\)](#).

<sup>44</sup> Roe, Trust Indenture Act, *supra* note 42, at 363.

To avoid the economic loss caused by holdout, insolvency systems should avoid establishing procedures that enable it. In some cases, however, policymakers may determine that such an enabling procedure nevertheless serves a higher policy goal, such as protecting small, local creditors. But such measures should be narrowly tailored where possible to avoid abuse and minimize economic loss overall. As discussed in section IV, the Gibbs Principle encourages creditors to engage in holdout, creating unfair, value-reducing outcomes.

## 2. Reducing Rent-Seeking

In addition to disincentivizing holdouts, insolvency systems should avoid policies that encourage or enable "rent-seeking" investment speculation.

"Rent-seeking" refers to situations where individuals expend time, money, and other resources competing for a fixed amount of wealth, in effect squabbling with each other over the size of their individual pieces of a fixed group pie. Because rent-seeking itself is costly, the net result is to reduce total wealth available for distribution.<sup>45</sup>

Professors Roe and Tung describe rent seeking in insolvency as creditors attempting to use innovative legal theory, novel transactions, and political lobbying [\*351] to leap ahead in priority, thereby gaining more, while the parties they leap over receive less.<sup>46</sup>

Creditors employing rent-seeking tactics stymie collective restructuring processes, thereby diminishing overall value, as interested parties spend time and resources defending their interests against the rent-seeking creditor rather than pursuing collective restructuring. Rather than preserving or creating value, these tactics "tax the efficiency of the bankruptcy process" and should be understood by policymakers as they consider their insolvency policy choices.<sup>47</sup> Some contend that speculators deploying these strategies add value by creating liquidity and enhancing the marketability of troubled company securities. These speculators purchase interests from willing sellers, offering market value. But this contention ignores the fact that rent-seekers are purchasing the securities in place of those who would otherwise participate in the restructuring process and help create new value. Instead rent seekers reduce value by spending unnecessary time and resources on claims litigation, hindering or obliterating otherwise successful restructurings.

It is naive to think that private actors would voluntarily choose to forego rent-seeking opportunities in support of collective goals if the current system creates a profit-maximization mechanism for the former. It is, therefore, up to the policymakers to act as the fulcrum and create systems that dissuade rent seeking. While governments may struggle to identify the inefficient rules, processes, and procedures that produce this type of speculation, they must accept and consider evidence of this activity and use it to continually refine their systems. The Gibbs Principle is one such inefficiency.

### ///. THE GIBBS PRINCIPLE

Although most commentators generally agree with the principles of universalism and economic efficiency, many nations have not reflected those principles in their insolvency systems.<sup>48</sup> In England, a peculiar tenet from the Victorian age known as the "Gibbs Principle" illustrates how a rule from a bygone era threatens to derail the world's progress towards efficiency through universalism.

---

<sup>45</sup> Margaret M. Blair & Lynn A. Stout, A Team Production Theory of Corporate Law, [85 Va. L. Rev. 247, 249 n.4 \(1999\)](#).

<sup>46</sup> Marc J. Roe & Frederick Tung, Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain, [99 Va. L. Rev. 1235, 1237 \(2013\)](#).

<sup>47</sup> [Id. at 1272](#).

<sup>48</sup> See generally supra note 17 and accompanying text.

The 1890 Gibbs case involved a contract for several deliveries of copper. A French purchaser (the defendant) had agreed to purchase the metal from an English copper dealer (the plaintiff).<sup>49</sup> The contract called for the English dealer to make several scheduled deliveries of copper to the defendant's Liverpool [\*352] location.<sup>50</sup> After agreeing to the contract, the French purchaser experienced financial distress and notified the English seller that it would not accept a scheduled delivery of copper.<sup>51</sup> Subsequently, the company was placed in judicial liquidation in France.<sup>52</sup> The plaintiff made a conditional claim for damages in the French liquidation proceedings for the entire loss on the contract, and it also reserved all rights to enforce its claims in England.<sup>53</sup> The French liquidator accepted the English seller's claim for damages for the French purchaser's failure to accept the delivery of copper prior to the debtor being placed in liquidation, but rejected the claim for damages for the failure to accept copper for deliveries scheduled after the defendant folded.<sup>54</sup>

The plaintiff took concurrent action in England and France to establish full rights to payment on the contract, and the French action was pending when the English court entered its ruling.<sup>55</sup> Experts in French insolvency law testified in the English court that the post-liquidation damages claim would not be allowed because the seller had not presented the copper to the French liquidator to "prove for the price," which was required under French law.<sup>56</sup> The lower court found in favor the seller, and the purchaser appealed to the Court of Appeal.<sup>57</sup>

On appeal, the liquidated purchaser argued that the debt had been discharged under French law, and that the seller had assented to French jurisdiction and French law by making a claim in France. He additionally asserted that English law required the court to (1) recognize the French liquidator's rights to all assets in England, and (2) stay all English proceedings pending the resolution of the liquidation.<sup>58</sup> The seller contended that a foreign court could not discharge a party to a contract made, and to be performed, in England, and that the conditioned claim made in the French proceeding did not equate to acceptance of French law, inasmuch as the plaintiff "reserved all rights in the action."<sup>59</sup>

The Court of Appeal unanimously held that the contracts were "English" because they had been entered into in England and performance was to occur in England.<sup>60</sup> The Court of Appeal held that "the law of the country of the contract [is] the law that governs not only the interpretation of the contract, [\*353] but also all the subsequent conditions by which it [is] affected as a contract."<sup>61</sup> As such, French bankruptcy law had no effect in England regarding the contract; English bankruptcy law alone provided the rule.<sup>62</sup>

---

<sup>49</sup> Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux [1890] QB 399 at 399-00 (Eng.).

<sup>50</sup> Id. at 400-01.

<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> Id. at 403.

<sup>54</sup> Id. at 400.

<sup>55</sup> Id. at 401.

<sup>56</sup> Id.

<sup>57</sup> Id.

<sup>58</sup> Id. at 402.

<sup>59</sup> Id. at 403.

<sup>60</sup> Id. at 404.

<sup>61</sup> Id. at 407.

<sup>62</sup> Id. at 405.



This ruling created what has become known as the "Gibbs Principle," which a leading treatise describes as "a discharge of any debt or liability under the bankruptcy law of a foreign jurisdiction [being] a discharge therefrom in England if, and only if, it is a discharge under the law applicable to the contract."<sup>63</sup> In theory, if applied universally, this unmistakably territorial principle would force international debtors who wish to restructure their global debts or contracts to enter restructuring proceedings in every jurisdiction in which they have entered into a contract with a choice-of-law provision different than their COMI. This Principle remains good law in England and other jurisdictions, which will be discussed further in subsequent sections.<sup>64</sup>

#### A. The Path to Gibbs' Current Interpretation in England

In the mid-2000s, U.K. cross border insolvency law transitioned toward acceptance of modified universalism through the 2006 adoption of the Model Law and through favorable common-law rulings. These developments arguably created an environment where the Gibbs Principle could have diminished in effect. In sum, English courts could have "granted any appropriate relief" to assist or support properly recognized extraterritorial insolvency proceedings, including the recognition of discharge by foreign courts.<sup>65</sup> However, a line of English cases discussed in this section have closed off that path. These cases involve English courts' refusal to recognize orders, judgments, or resolutions from foreign insolvency proceedings, including the discharge of debt noted in Gibbs. Critically, English courts have adopted a narrow interpretation of both common law powers to recognize foreign judgments and Article 21 of the Model Law, which, as noted, allows courts to fashion "any appropriate relief." This interpretation threatens the purpose of the Model Law and [\*354] the tenets of modified universalism, as parties lack certainty regarding the outcomes of main proceedings, forcing them to file parallel proceedings instead.

##### 1. Global Distressed Alpha Fund 1 Ltd. Partnership v. PT Bakrie Investindo

In *Global Distressed Alpha Fund 1 Ltd. Partnership v. PT Bakrie Investindo*, the English High Court adjudicated a matter that the debtor (and most others) had thought settled.<sup>66</sup> The debtor was an Indonesian company used for holding investments made by the Bakries, a prominent Indonesian merchant family.<sup>67</sup> The holding company had guaranteed English-law-governed notes issued by its Dutch financing subsidiary in 1996.<sup>68</sup> Subsequently, the company became financially distressed due to the Asian economic crisis and could not pay its debts as they came due.<sup>69</sup> In May 2001, the debtor applied for a provisional moratorium on payments in Indonesia to facilitate a restructuring. The plan was approved by the required number of creditors in February 2002.<sup>70</sup> The approved plan

---

<sup>63</sup> Kannan Ramesh, *The Gibbs Principle*, 29 *Sing. Acad. L.J.* 42, 44 (2017) (citing Albert V. Dicey, John H.C. Morris & Lord Lawrence A. Collins: *The Conflict of Laws* (Lord Collins ed. 15th ed., Thomson 2012) [hereinafter Collins, *Conflict of Laws*]).

<sup>64</sup> *Bakhshiyeva ex rel. Int'l Bank of Azerbaijan v. Sberbank of Russia* [2018] EWCA (Ch) 59 [158(1)] (Eng.) ("It being accepted that the 'rule' in Gibbs is binding upon me, I would not consider it consistent with the 'rule' to permit its practical abrogation by procedural means: even if I am wrong to have considered this to constitute a jurisdictional bar, I would not in my discretion have granted relief to side-step the 'rule' in that way."); *Hong Kong Inst. of Educ. v Aoki Grp. (No 2)* [2004] 2 H.K.C. 397 (Hong Kong ruling upholding Gibbs).

<sup>65</sup> See Model Law, *supra* note 1, art. 21(1) (noting that the court may grant "any appropriate relief" where necessary to advance the purposes of the Model Law, such as promoting greater legal certainty, fair and efficient administration of cross-border insolvency, and cooperation).

<sup>66</sup> *Glob. Distressed Alpha Fund 1 Ltd. P'ship v. PT Bakrie Investindo* [2011] EWCA (Comm) 256 [2] (Eng.).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* [3].

<sup>70</sup> *Id.*

discharged the English-law-governed notes, but it is unclear what, if anything, the noteholders received from the plan.<sup>71</sup>

In 2009, Global Distressed Alpha Fund 1 Limited Partnership [hereinafter "Global Alpha"] (the claimant hedge fund) purchased \$ 2,000,000 in nominal value of the discharged notes from a prior holder for an undisclosed sum.<sup>72</sup> Global Alpha then commenced proceedings in England against the debtor to enforce the guaranty, relying on Gibbs to claim that the Indonesian discharge did not alter the claimant hedge fund's rights.<sup>73</sup> For reasons unknown, the discharged notes were still traded electronically on Euroclear.<sup>74</sup> However, the broker responsible for the trade noted that the instruments were "pretty illiquid" and "have not been traded frequently, especially since the restructuring in 2001."<sup>75</sup>

Two of the arguments used in defense were: (1) English common law supports modified universalism, allowing the court to recognize the foreign discharge, and (2) strong criticism against the Gibbs Principle should cause **[\*355]** the decision to be overturned.<sup>76</sup> The defense noted that recognizing the discharge would align English common law with the Model Law, European Insolvency Regulation, and laws of the United States.<sup>77</sup>

The court cited Lord Hoffmann's reasoning in *Cambridge Gas Transportation Corp. v Official Committee of Unsecured Creditors of Navigator Holdings plc*<sup>78</sup> and *McGrath v. Riddell*<sup>79</sup> (discussed in detail below) as a common-law basis for recognizing the discharge, but held that Gibbs was binding until a superior court could "justifiably ... overrule[]" the decision.<sup>80</sup> Accordingly, the court held that the defendant had to honor the debts that it, and presumably most others, thought were discharged and worthless. Importantly, the court could not consider granting relief under the Model Law (such as relief under Article 21) because the related Indonesian insolvency proceedings preceded its adoption.

## 2. *Rubin v. Eurofinance SA*<sup>81</sup>

In 2012, the U.K. Supreme Court addressed the most cogent common-law and Model Law arguments available to tackle Gibbs. In its ruling, the court did not directly address Gibbs and choice-of-law principles. But its ruling cemented the jurisprudential basis for the Principle through its denial of common-law arguments and its narrow construction of the Model Law.

In *Rubin*, the Supreme Court resolved two cases:<sup>82</sup> *Rubin v. Eurofinance SA*<sup>83</sup> ("*Rubin*") and *New Cap Reinsurance Corp. Ltd v Grant* ("*New Cap*").<sup>84</sup> Both cases involved appeals from decisions enforcing default

---

<sup>71</sup> Id. [5].

<sup>72</sup> Id.

<sup>73</sup> Id.

<sup>74</sup> Id. [10].

<sup>75</sup> Id.

<sup>76</sup> Id. [15]-[16].

<sup>77</sup> Id. [23].

<sup>78</sup> *Cambridge Gas Transp. Corp. v Official Comm. of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 AC 508 (appeal taken from Isle of Man).

<sup>79</sup> [2008] UKHL 21 (appeal taken from Eng.).

<sup>80</sup> Id. [26].

<sup>81</sup> [2012] UKSC 46, [2013] 1 AC 236 (appeal taken from Eng.).

<sup>82</sup> Id. [1].

<sup>83</sup> [2010] EWCA (Civ) 895 (Eng.).

judgments for avoidable transfers made in insolvency proceedings outside the U.K. .<sup>85</sup> In both instances, the lower courts recognized the insolvency cases as "foreign main proceedings" under the CBIR.<sup>86</sup> The two recognized default judgments were entered against transferees that did not "submit to the jurisdiction" according to traditional civil conflicts rules.<sup>87</sup> The author of the U.K. Supreme Court opinion in Rubin, and also a General Editor of the authoritative Conflict of Laws treatise bearing his name,<sup>88</sup> quoted Rule 43 of that Work as **[\*356]** follows:

#### Rule 43

Subject to Rules 44 to 46, a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it was given in the following cases:

First Case-If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.

Second Case-If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.

Third Case-If the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.

Fourth Case - If the person against whom the judgment was given had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.<sup>89</sup>

In view of Rule 43, and prior to a discussion of the other relevant cases in this area, I pause to discuss two mechanisms from Rubin that English courts could profitably use to enforce foreign insolvency judgments: (1) through the common law and (2) through application of the CBIR.

#### a. The Common Law

As noted earlier, the U.K. Supreme Court in Rubin considered two cases promoting the view that the common law supported modified universalism: Cambridge Gas<sup>90</sup> and McGrath.<sup>91</sup>

In Cambridge Gas, Lord Hoffman, writing for the Privy Council, held that a Manx court could vest shares in a Manx company in creditors who were awarded those shares as part of a plan confirmed in the Southern District of New York under chapter 11 of the Bankruptcy Code, despite the company failing to submit to the jurisdiction of the rendering court.<sup>92</sup> Lord Hoffman stated that bankruptcy orders are neither judgments in personam **[\*357]** nor in

<sup>84</sup> [2011] EWCA (Civ) 971 (Eng.).

<sup>85</sup> Id. [2].

<sup>86</sup> CBIR, supra note 9.

<sup>87</sup> Id. [7].

<sup>88</sup> Collins, Conflict of Laws, supra note 63.

<sup>89</sup> Id. [7] (quoting Collins, Conflict of Laws, supra note 63, [14R-054]).

<sup>90</sup> Cambridge Gas Transp. Corp. v. Official Comm. of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26, [2007] 1 AC 508 (appeal taken from Isle of Man).

<sup>91</sup> McGrath v. Riddell [2008] UKHL 21 (appeal taken from Eng.).

<sup>92</sup> Cambridge Gas Transp. Corp. v. Official Comm. of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26 [21]-[22], [2007] 1 AC 508 (appeal taken from Isle of Man).

rem, because those judgments are "judicial determinations of the existence of rights."<sup>93</sup> In contrast, bankruptcy proceedings "provide a mechanism of collective execution ... by creditors whose rights are admitted or established."<sup>94</sup> Furthermore, Lord Hoffman concluded that modified universalism was recognized at common law where there is "a single bankruptcy in which all creditors are entitled and required to prove," and the principle is effectuated by "recognizing the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company ... ." <sup>95</sup> The Council held that the common-law principle enabled it to assist the foreign proceeding by doing whatever it could have done in a domestic insolvency and, on this basis, it enforced the material provisions of the New York confirmation order.<sup>96</sup>

In *McGrath*, the House of Lords addressed a request of the Supreme Court of New South Wales. The Australian court sought turnover of the English assets of an Australian company, despite material variances between the Australian creditor priority schedule and its English counterpart.<sup>97</sup> In that case, the Lords disagreed on whether the common law supported the holding. Lord Hoffmann, with whom Lord Walker agreed, gave a full-throated endorsement of modified universalism at common law, stating as follows:

The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century. That principle requires the English courts should, so far as is consistent with justice and U.K. 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."<sup>98</sup>

Lords Scott and Neuberger agreed with the premise that a unitary system is preferred. They disagreed with the proposition that a power to support and enact universalist principles exists at common law, asserting instead that the only applicable basis for granting remission was the Insolvency Act of 1986.<sup>99</sup>

**[\*358]** In reference to the common-law analysis, the U.K. Supreme Court in *Rubin* disagreed with Lord Hoffman's analysis that a "principle" exists at common law for the recognition of foreign insolvency judgments when a party did not submit to the jurisdiction of the rendering court.<sup>100</sup> The U.K. Supreme Court held that the principle of universality was a "trend, but only a trend."<sup>101</sup> Additionally, it held that avoidance judgments are in personam and declined Lord Hoffman's approach treating insolvency judgments as collective actions against property of the debtor by creditors whose rights are established rather than determinations of the existence of rights.<sup>102</sup> Lord Collins reasoned that the avoidance actions' purpose was not to declare existing property rights but rather to "alter property rights."<sup>103</sup>

Having determined that the judgments were in personam, the U.K. Supreme Court foreclosed another path to the recognition of foreign judgments. While it paused to consider whether jurisdiction would be conferred in insolvency cases if the party against whom judgment is sought had a "real and substantial connection" to the jurisdiction, it

<sup>93</sup> Id. [13].

<sup>94</sup> Id. [14].

<sup>95</sup> Id. [16], [20].

<sup>96</sup> Id. [20]-[22].

<sup>97</sup> [2008] UKHL 21 [41] (appeal taken from Eng.).

<sup>98</sup> Id. [30].

<sup>99</sup> See, e.g., id. [59] (discussing Insolvency Act 1986, c. 45 (Eng.)).

<sup>100</sup> See [2012] UKSC 46 [128], [2013] 1 AC 236 (appeal taken from Eng.).

<sup>101</sup> Id. [16].

<sup>102</sup> Id. [105]-[106].

<sup>103</sup> Id. [103].

ultimately concluded otherwise.<sup>104</sup> It held that no such principle exists in English common law outside of family law, and declined to follow countries like Canada, which had adopted the "real and substantial connection" test in insolvency cases.<sup>105</sup>

The court also declined to follow a jurisdictional mechanism offered by the respondents that calls for reciprocity, where an English court would recognize foreign assertions of jurisdiction in insolvency proceedings if the foreign court asserted jurisdiction in a way in which English courts assert jurisdiction over foreign persons in insolvency.<sup>106</sup> The U.K. Supreme Court rejected the principle outright, stating without additional explanation: "There is no basis for this line of reasoning. There is no necessary connection between the exercise of jurisdiction by the English court and its recognition of the jurisdiction of foreign courts ... ." <sup>107</sup>

In a further blow to the common-law proposition, the court held that changing settled jurisdictional law "is a matter for the legislature and not for judicial innovation."<sup>108</sup> Lord Collins also stated that any recognition of foreign judgments "would be only to the detriment of United Kingdom businesses without any corresponding benefit."<sup>109</sup> He added that there would be **[\*359]** no "serious injustice" by not extending the rules, noting that debtors could enter proceedings in England or their foreign representatives could pursue avoidance actions in England under Article 23 of the CBIR, which allows foreign representatives to make claims under the Insolvency Act of 1986.<sup>110</sup> In so holding, Lord Collins promotes the wasteful, inefficient parallel proceedings that are the hallmarks of territorial systems; his ruling also encourages English courts to prefer those outcomes rather than promoting comity and cooperation.

#### b. The CBIR

The arguments for foreign recognition under CBIR fared no better in the U.K. Supreme Court opinion. First, the U.K. Supreme Court stated that, because Article 7 of the CBIR does not limit the power of a court to provide additional assistance to a foreign representative under the laws of Great Britain, the CBIR "supplements the common law, but does not supersede [the common law.]" <sup>111</sup> After reviewing Articles 21, 25, and 27 of the CBIR, which follow the Model Law, the court concluded that the CBIR says "nothing about the enforcement of foreign judgments against third parties."<sup>112</sup> It rejected the following arguments of the respondents: (1) Article 21 should be construed broadly to grant "any type of relief available under the law of the relevant state," (2) reciprocal recognition and enforcement of judgments is a paradigm mechanism of cooperation, and (3) the examples listed in Article 27 as mechanisms for cooperation are not exhaustive.<sup>113</sup>

The court further held that the CBIR did not "by implication" deal with judgments in insolvency matters because the critical Articles (21, 25, and 27) appeared to govern only procedural, rather than the substantive, matters.<sup>114</sup> Early in its opinion, the court noted that the Guide to Enactment attached to the Model Law "emphasizes that the Model Law enables enacting states to make available to foreign insolvency proceedings the type of relief which would be

---

<sup>104</sup> Id. [109]-[110].

<sup>105</sup> Id. [111].

<sup>106</sup> Id. [123].

<sup>107</sup> Id. [126].

<sup>108</sup> Id. [129].

<sup>109</sup> Id. [130].

<sup>110</sup> Id. [131].

<sup>111</sup> Id. [27].

<sup>112</sup> Id. [142].

<sup>113</sup> Id. [141].

<sup>114</sup> Id. [143].

available in the case of a domestic insolvency;" but the court curiously never addressed why that alone was not sufficient to support an implied power to recognize a foreign judgment. <sup>115</sup> Finally, the court held that the cited cases recognizing foreign judgments in the United States "[did] not assist," because the American authorities applied jurisdictional procedures available under nonbankruptcy law. <sup>116</sup>

The holding in Rubin has far reaching impact on cross-border insolvency, **[\*360]** as the analysis can easily be applied to any substantive order or judgment from a recognized foreign proceeding, provided that the party against whom the judgment is sought did not submit to the foreign jurisdiction. This includes the discharge of debt governed by the Gibbs Principle, as a discharge granted against a creditor that did not participate in the foreign insolvency proceedings (i.e., submit to the foreign court's jurisdiction) can arguably be considered an in personam judgment against the creditor. <sup>117</sup> As a result, creditors are now incentivized to avoid foreign main proceedings, especially if they believe that the value they will receive is less than the nominal value of the debt they currently hold. In many cases, the creditor would gain more by allowing others to take a "haircut" and compromise in the foreign proceeding and then attempt to enforce its uncompromised rights under the old debt of the newly restructured company. In response, debtors will doubtless pursue parallel proceedings in England, enriching the professionals involved but diminishing value that would otherwise be available for other creditors and interested parties.

### 3. Fibria Celulose S/A v Pan Ocean Co. Ltd.

The next ruling proceeding down the path of the Gibbs' Principle in England is Fibria Celulose S/A v Pan Ocean Co. Ltd. <sup>118</sup> In Pan Ocean, the Chancery Division of the English High Court of Justice well illustrates (1) the deleterious effects of the Rubin decision on cross-border proceedings, and (2) how English courts apply Gibbs today. Pan Ocean, a Korean shipping company [hereinafter "Company"] was undergoing an insolvency process known as a "rehabilitation" in Korea, which the English court recognized under the CBIR as a foreign main proceeding. <sup>119</sup> The Company had a favorable and profitable executory contract that it wished to assume with Fibria Celulose S/A [hereinafter "Fibria"], a Brazilian wood pulp producer. <sup>120</sup> The contract was governed by English law and contained an ipso facto clause that declared an insolvent party in default. <sup>121</sup> Ipso facto clauses are enforceable under English law, <sup>122</sup> but Korea considers them unenforceable if contained in an unperformed bilateral contract. <sup>123</sup>

Relying on English law, Fibria attempted to terminate the contract after the Company entered rehabilitation, but the Company resisted. It argued **[\*361]** that the ipso facto clause was unenforceable and that its rights in the contract were protected by the Korean insolvency court. <sup>124</sup> As a result, approximately two months after the Company's proceedings were recognized as a foreign main proceeding, Fibria petitioned the English court for permission to

---

<sup>115</sup> Id. [28].

<sup>116</sup> Id. [144].

<sup>117</sup> See *Bakhshiyeva ex rel. Int'l Bank of Azerbaijan v. Sberbank of Russia*, [2018] EWHC 59 [46] (Ch) (noting that Gibbs does not apply to a creditor that submits to the foreign insolvency proceeding, but the scope of what constitutes "submission" is unclear).

<sup>118</sup> *Fibria Celulose S/A v. Pan Ocean Co. Ltd.* [2014] EWHC 2124.

<sup>119</sup> Id. [2].

<sup>120</sup> Id. [3].

<sup>121</sup> Id. [4], [9].

<sup>122</sup> Id. [13].

<sup>123</sup> See id. [54].

<sup>124</sup> Id. [32], [36].

commence an arbitration to seek declaratory relief terminating the contract.<sup>125</sup> In response, the Company's foreign representative asked the court for relief under Article 21 of the CBIR, enjoining Fibria from terminating the contract.<sup>126</sup> The Company urged the court to exercise its wide discretion to fashion "any [appropriate] relief" that it considered appropriate under Article 21; Fibria countered that Article 21 did not permit relief in accordance with Korean insolvency law.<sup>127</sup>

Fibria prevailed, and the court offered several reasons why it was unable to recognize the Korean court's determination that the Company's rights were protected. First, Justice Morgan expressed skepticism that the Model Law was entitled to the broad construction urged by the Company.<sup>128</sup> He noted that a judge, bounded only by his determination of appropriateness, could "do something which no system of law anywhere would allow."<sup>129</sup> He then reviewed the UNCITRAL working group reports and drafts of the Model Law, noting that at certain points in the drafting process the working group had included specific language in what is now Article 21 authorizing the recognizing court to grant relief "under the law of the state in which the foreign proceeding was opened."<sup>130</sup> Justice Morgan suggested that "it seemed improbable" that the working group intended to include the ability to fashion relief not available under English law within the term "any appropriate relief" if the specific language was added and subsequently removed.<sup>131</sup> Justice Morgan acknowledged two important shortcomings in his analysis. First, he noted removal of the working group's suggestion to add "under the conditions of the law of this State" following an objection; second, he conceded that the report he relied upon also "stated that the court should not be prevented from granting relief if that was found to be useful and fair... ." Nevertheless, he concluded that those observations could not bear the weight of the wide discretion sought.<sup>132</sup>

The court also considered American and Canadian cases interpreting the Model Law. Those decisions indicate courts have wide discretion in fashioning **[\*362]** relief, including relief unavailable under their own domestic insolvency laws.<sup>133</sup> His discussion included the Fifth Circuit's opposing view of the Model Law drafters' intent in Article 21. In *In Re Condor Insurance Co Ltd.*, the Fifth Circuit held that Article 21 intentionally left open this question in deference to the objections made by those supporting a broader interpretation, including the United States.<sup>134</sup> Justice Morgan distinguished his view by noting that the Fifth Circuit did not include, as he did, a discussion of the final working papers made by the drafters, and that the courts in the United States had a history of fashioning such judgments under Section 304 of the former Bankruptcy Code, which allowed for a broader understanding of the subject phrase "any appropriate relief."<sup>135</sup> Furthermore, he stated that, although Article 8 of the CBIR calls for uniformity in applying the Model Law, he believed that the United States' history under Section 304 in the former Bankruptcy Code necessarily created a different Model Law environment than that which existed in Great Britain.<sup>136</sup> Justice Morgan did not discuss why Canadian courts could adopt an interpretation of Article 21 similar to that of the United States but English courts could not.<sup>137</sup>

---

<sup>125</sup> Id. [38].

<sup>126</sup> Id. [39].

<sup>127</sup> Id. [57]-[58].

<sup>128</sup> Id. [79].

<sup>129</sup> Id. [80].

<sup>130</sup> Id. [83].

<sup>131</sup> Id. [87].

<sup>132</sup> Id. [85]-[87].

<sup>133</sup> Id. [95]-[101].

<sup>134</sup> Id. [97]-[98]; [In re Condor Ins. Ltd., 601 F.3d 319, 327 \(5th Cir. 2010\)](#).

<sup>135</sup> Pan Ocean, [2014] EWHC 2124 (Ch) [106].

<sup>136</sup> Id.

The court also relied on Rubin in support of its ruling.<sup>138</sup> Specifically, Justice Morgan quoted key holdings from that decision, including: "the CBIR ... says nothing about the enforcement of foreign judgments[,]" and "there is nothing to suggest that [Articles 21, 25, and 27] apply to recognition and enforcement of foreign judgments ... ." <sup>139</sup> Justice Morgan noted that Rubin instructed courts to interpret Article 21 as procedural, necessarily implying the unavailability of authority to alter substantive rights, thereby fortifying his narrow interpretation of Article 21. <sup>140</sup> Finally, the court addressed Article 6, which allows courts to refrain from action prescribed by the Model Law if that action is "manifestly contrary to public policy."<sup>141</sup> The court noted that this provision applied to the entire CBIR, not just Article 21. As a result, the court held that this Article 6 clause did not create the inference that courts can grant relief or recognize judgments that are unavailable under domestic law simply because any relief granted under domestic law must promote **[\*363]** the public policy of the recognizing court's domestic law. <sup>142</sup>

Applied broadly, the effect of Pan Ocean is that any foreign insolvency ruling from outside the European Union that provides for relief unavailable under English law will not be enforceable in England. This ruling amplifies the reach of the Gibbs Principle, as is seen in the following case.

#### 4. International Bank of Azerbaijan

In International Bank of Azerbaijan [hereinafter "IBA"], one readily appreciates how the principles espoused in Rubin and Pan Ocean (1) inform the present interpretation of Gibbs, and (2) derail progress toward adoption of universalist principles. The International Bank of Azerbaijan [hereinafter "IBA"] is the largest commercial bank in Azerbaijan and its largest creditor is the government of Azerbaijan. <sup>143</sup> IBA experienced financial distress and commenced a restructuring proceeding in Azerbaijan in early May 2017. <sup>144</sup> IBA's foreign representative petitioned an English court to recognize the Azeri proceeding as the "foreign main proceeding" under the CBIR and it was so recognized on June 6, 2017. <sup>145</sup>

IBA expeditiously produced a proposed plan on July 18, 2017. <sup>146</sup> The plan was approved by 99.7% of voting creditors, who held 93.9% of the bank's total indebtedness. <sup>147</sup> Two creditors, Sberbank and certain Franklin Templeton funds (represented by Citibank as trustee), chose not to vote on the Azeri restructuring or attend "in any way ... the meeting in Azerbaijan to approve the plan." <sup>148</sup> Sberbank held a \$ 20,000,000 term loan facility <sup>149</sup> and Citibank, as noted was the indenture trustee for \$ 500,000,000 in notes, of which Franklin Templeton owned \$

---

<sup>137</sup> Id. (discussing *In re Hartford Computer Hardware Inc.*, 2012 ONSC 964 para. 14 (Can.) (Ontario Superior Court of Justice stating "A significant factor to take into account is that the Final DIP Facility Order was granted by the U.S. Court. In these circumstances, I see no basis for this court to second guess the decision of the U.S. Court.").

<sup>138</sup> Pan Ocean [2014] EWHC 2124 (Ch) [90].

<sup>139</sup> Id.

<sup>140</sup> Id. [111].

<sup>141</sup> Id. [103]-[104] (quoting Model Law, *supra* note 1, at 5).

<sup>142</sup> Id.

<sup>143</sup> *Bakhshiyeva ex rel. Int'l Bank of Azerbaijan v. Sberbank of Russia* [2018] EWCA (Ch) 59 [4].

<sup>144</sup> Id. [5].

<sup>145</sup> Id.

<sup>146</sup> Id. [8].

<sup>147</sup> Id. [36].

<sup>148</sup> Id. [11].

<sup>149</sup> Id. [10].



154,700,000. <sup>150</sup> Both the facility and the notes "expressly stated that they are governed by English law." <sup>151</sup> Fearing that the two creditors would cite Gibbs and move to enforce their contractual rights when the Azeri proceeding terminated, IBA's foreign representative moved to permanently prolong the moratorium on claims in England. <sup>152</sup>

Given the rulings in Rubin and Pan Ocean, IBA's foreign representative had limited means with which to enforce the discharge. IBA could not request that the discharge be enforced directly, because enforcement was unavailable **[\*364]** under English law (as required by Pan Ocean). <sup>153</sup> Furthermore, the relief sought under the Model Law had to be procedural in nature and ideally tied to an express provision. As a result, the foreign representative initially conceded that the debts in question had not been discharged and the plan confirmation order could not be directly enforced under the CBIR. <sup>154</sup> (Although he did reserve the right to argue otherwise on appeal.) Given these constraints, the foreign representative sought multiple forms of relief: (1) an indefinite stay granted under Articles 20, 21(a), or both, (2) a discretionary stay lift upon motion by an interested party, and (3) a ruling that the stay should not be lifted in favor of Sberbank and Franklin Templeton as they sought to achieve a better return than the Company's other creditors under a confirmed restructuring plan in the Debtor's COMI. <sup>155</sup>

The court relied heavily on Rubin and Pan Ocean in denying IBA's request. Justice Hildyard noted that both cases agree that the Model Law may not alter substantive rights, stating "there is ... no doubt that [a] foreign insolvency, even one recognized formally ... is not of itself a gateway for the application of foreign insolvency laws or rules or for giving them 'overriding effect' over ordinary principles of English contract law." <sup>156</sup> The court held that the practical effect of the requested relief was to deny a substantive right permanently, a result far beyond "procedural." <sup>157</sup> Furthermore, the court stated that relief granted under the Model Law for restructurings was necessarily temporary in nature. <sup>158</sup> Thus, owing to the transitory nature of the relief available via the CBIR, and the vitality of Gibbs, Justice Hildyard unashamedly counseled debtors who seek to discharge debts arising under English law to commence parallel proceedings in England. <sup>159</sup> His statements abundantly illustrate that English courts robustly, and regrettably, defy the principles of universalism that underlie the Model Law.

The English Court of Appeal affirmed Justice Hildyard's ruling. <sup>160</sup> The Court of Appeal largely adopted Justice Hildyard's analysis, specially emphasizing several troubling aspects of the original ruling. Like Justice Hildyard, the panel held that IBA should have pursued parallel proceedings in England. <sup>161</sup> The Court of Appeal paid no heed to the fees and costs borne by **[\*365]** all stakeholders when debtors pursue parallel proceedings and it went further, postulating that "IBA's real reasons for not promulgating [parallel proceedings] probably had more to do with the need ... to offer [English law creditors] terms which they would be prepared to accept." <sup>162</sup>

---

<sup>150</sup> Id. [38(2)].

<sup>151</sup> Id. [10].

<sup>152</sup> Id. [13].

<sup>153</sup> See *Fibria Celulose S/A v. Pan Ocean Co. Ltd.* [2014] EWHC 2124 [106].

<sup>154</sup> *Bakhshiyeva ex rel. Int'l Bank of Azerbaijan v. Sberbank of Russia* [2018] EWCA (Ch) 59 [16]-[17].

<sup>155</sup> See id. [19].

<sup>156</sup> Id. [57].

<sup>157</sup> Id. [142].

<sup>158</sup> Id. [153].

<sup>159</sup> Id. [158(5)].

<sup>160</sup> *Bakhshiyeva ex rel. Int'l Bank of Azerbaijan v. Sberbank of Russia* [2018] EWCA (Civ) 2802 [95] (appeal taken from Eng.) [hereinafter "IBA II"].

<sup>161</sup> Id. [88].

<sup>162</sup> Id.

The Court of Appeal went on to state that Article 21 of the Model Law is "procedural in nature, with the main object of providing a temporary 'breathing space' ... ." <sup>163</sup> Furthermore, it held that "once the foreign proceeding has come to an end ... there is no scope for further orders in support of the foreign proceeding to be made, and any relief previously granted under the Model Law should terminate." <sup>164</sup> Remarkably, the Court of Appeal anchored its ruling in the view that the drafters of the Model Law did not intend for their opus of universalist principles to give full force and effect to reorganization proceedings in the debtors' home country. The panel appears to have concluded that, if a debtor has sufficient funds to reorganize rather than liquidate, it has sufficient funds to pursue parallel proceedings globally. <sup>165</sup> In true territorial fashion, the ruling misguidedly focused on the dividends to be reaped by English creditors without any nod whatsoever to the costs and inefficiencies visited upon their non-English counterparts. <sup>166</sup>

## B. Summary of Gibbs Today

To recap, the Gibbs Principle will retain its vitality for the foreseeable future. The one possible crack in this wall was espoused by Justice Teare in *Bakrie*, where he upheld the Gibbs Principle but invited appeal to a higher court. <sup>167</sup> He noted that the common-law principles endorsing modified universalism described by Lord Hoffman in *Cambridge Gas* and *McGrath* presented a reasonable foundation for overruling Gibbs. <sup>168</sup> But in *Rubin*, the U.K. Supreme Court criticized Lord Hoffman's holdings, stating that the principle of modified universalism did not exist at common law. <sup>169</sup> Furthermore, the Supreme Court narrowly interpreted the Model Law, noting it was procedural in nature and did not contain explicit or implicit authority to alter substantive rights. <sup>170</sup> *Pan Ocean* extended the reasoning in *Rubin*, further holding that English courts could not fashion relief under the Model Law if **[\*366]** that relief was unavailable under English law. <sup>171</sup> As illustrated by IBA, it is nearly impossible to attack Gibbs using either the Model Law or the common law.

## C. Criticism of Gibbs

A prominent criticism of the Gibbs Principle is that it hews too neatly with contract law in an insolvency setting, without appropriately adapting for the realities of insolvency proceedings. As noted, in *Gibbs*, the court applied contract law to conclude that only an English court could discharge debt governed by English law, as the parties made that feature (i.e., their choice of law) part of their bargain.

In an insolvency setting, however, courts discharge debts "not because the parties have agreed ... but because of the policy reasons undergirding a bankruptcy discharge." <sup>172</sup> Look Chan Ho pressed that argument further, noting that once bankruptcy proceedings have been filed, a creditor no longer bargains bilaterally with the bankrupt, but rather "the real contest is between the contractual counterparty and the bankrupt's other creditors." <sup>173</sup> Therefore, the English courts' continued adherence to the Gibbs Principle defies logic and ignores the economic reality of

---

<sup>163</sup> *Id.* [89].

<sup>164</sup> *Id.* [97].

<sup>165</sup> *Id.* [93].

<sup>166</sup> *Id.* [87].

<sup>167</sup> *Glob. Distressed Alpha Fund 1 Ltd. P'ship v. PT Bakrie Investindo* [2011] EWCA (Comm) 256 [16] (Eng.).

<sup>168</sup> *Id.* [16]-[20].

<sup>169</sup> *Rubin v. Eurofinance, S.A.*, [2012] UKSC 46 [132], [2013] 1 AC 236 (appeal taken from Eng.).

<sup>170</sup> *Id.* at [141]-[143].

<sup>171</sup> *Fibria Celulose S/A v. Pan Ocean Co. Ltd.* [2014] EWHC 2124 [104].

<sup>172</sup> *Ramesh*, *supra* note 63, at 49.

<sup>173</sup> Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* 4-096 to 4-107 (2016).

insolvency proceedings. More importantly, the courts' reluctance to modify certain contractual rights when companies are in the midst of insolvency proceedings destroys economic and social value; that reluctance makes restructuring more complicated and inefficient.

Furthermore, domestic bankruptcy law and the Model Law necessarily disrupt or alter the bargains struck by affected parties and remove their autonomy to behave as they would under contract.<sup>174</sup> For example, in England, a scheme of arrangement can bind creditors that do not assent to a change in their contract if the requisite majority of similarly situated creditors endorse the scheme. Those non-assenting creditors' rights are altered without their consent. Other jurisdictions like the United States go further, where restructuring plans can be imposed upon an entire class of nonconsenting creditors, provided certain conditions are met.<sup>175</sup> Both systems illustrate that insolvency demands a relaxation of strict contractual principles, and something as fundamental as a discharge should be no different.

Beyond an overreliance on contractual principles, the Gibbs Principle has **[\*367]** an aroma of hypocrisy. As discussed by Justice Hildyard in IBA, an oft-repeated criticism of Gibbs is:

Even outside the context of insolvency, such as English schemes of arrangement under Part 26 of the Companies Act 2006, [England] expects other countries to recognize and give effect to the discharge and alteration of contractual terms by dint of an order of the English court even where foreign law applies to them.<sup>176</sup>

This flies in the face of the principle of comity espoused by the Model Law, enough so that Professor Fletcher has said "the Gibbs doctrine belongs to an age of Anglocentric reasoning which should be consigned to history."<sup>177</sup>

The Rubin court dismissed this criticism out of hand, stating, "There is no basis for this line of reasoning. There is no necessary connection between the exercise of jurisdiction by the English court and its recognition of the jurisdiction of foreign courts ... ." <sup>178</sup> The Supreme Court's reasoning elevates territorialism over comity and universalism. The court admitted as much in IBA. There, when addressing the assertion that Gibbs subverts modified universalism and the Model Law by requiring parallel English proceedings to discharge English debts, the court stated that Gibbs is "one of the protections which a creditor has by virtue of the selection of English Law to govern its debts." <sup>179</sup>

Gibbs is also in tension with other English insolvency laws. For example, English common law permits assets in England to be transferred first to a debtor's home country and then to a third party, like a trustee, in the event of an insolvency proceeding. However, that same debtor's English-law debts cannot be discharged in his home country. As a result, the English common law allows for an absurd result: a debtor with no assets in England with which to satisfy the undischarged English liability.<sup>180</sup> Rather than tolerating this obvious non-sequitur, English courts should abandon Gibbs.

Last, Rubin and Pan Ocean fundamentally misinterpret the Model Law. Mark Phillips, QC, a barrister of high rank, has described several of these errors, including the overlook of the drafters' decision to craft Article 21 with language that mirrored [Section 304 of the Bankruptcy Code](#), which preceded the adoption of title 15 of that

<sup>174</sup> See, e.g., Model Law, *supra* note 1, art. 21 (allowing a stay of proceedings); Ho, *supra* note 173, at paras. 4-096 to 4-107 (discussing party autonomy in insolvency); Ramesh, *supra* note 63, at 49 (noting that pre-insolvency agreements are only valid to the point of infringing upon the underlying policy supporting insolvency).

<sup>175</sup> See *supra* text and accompanying notes 37-41.

<sup>176</sup> *Bakhshiyeva ex rel. Int'l Bank of Azerbaijan v. Sberbank of Russia* [2018] EWCA (Ch) 59 [50].

<sup>177</sup> Fletcher, *supra* note 8, P2.71.

<sup>178</sup> *Rubin v. Eurofinance, S.A.*, [2012] UKSC 46 [125], [2013] 1 AC 236 (appeal taken from Eng.).

<sup>179</sup> *Bakhshiyeva ex rel. Int'l Bank of Azerbaijan v. Sberbank of Russia* [2018] EWCA (Ch) 59 [1158(5)].

<sup>180</sup> *Id.* [71].

insolvency law. The drafters' adoption of that interpretation by United States courts permitted tribunals to **[\*368]** "broadly mould appropriate relief in near blank check fashion."<sup>181</sup>

Furthermore, he contends that the English courts do not understand the procedure by which they should examine whether relief should be granted, which entails an assessment of the conditions stipulated in Article 6 (whether the relief sought is manifestly contrary to public policy), Article 21 (whether the relief sought protects the assets or interests of the debtor or creditor), and Article 22 (whether all interested parties' rights are adequately protected).<sup>182</sup> This interpretation, followed by United States and Canadian courts, removes the insurmountable hurdles that the English courts have added that make it nearly impossible to enforce a foreign ruling, namely, (1) whether the relief sought is substantive or procedural, and (2) whether the relief sought is valid under English law.<sup>183</sup> Had the IBA court assessed the three questions noted in Articles 6, 21, and 22, rather than relying upon the Rubin and Pan Ocean misinterpretations, the court could have readily enforced the Azeri discharge.

Mr. Phillips also correctly notes that English courts have neglected Article 8 of the Model Law and the stated desire of Parliament to "promote uniformity in application [of the Model Law]."<sup>184</sup> He contends that by discounting and shunning the legally persuasive American and Canadian interpretations of the Model Law, the English courts have stunted progress towards a rational, harmonized system of cross-border insolvency.<sup>185</sup> I would go one step further than Mr. Phillips, as I believe that the English courts' interpretations have actually reversed progress, inasmuch as the rules under current interpretation encourage parallel proceedings that had previously been on the decline. Rather than a harmonious global system, English courts are adding disuniformity, complexity, and cost.

#### IV. THE PRACTICAL EFFECTS OF THE ENGLISH INTERPRETATION OF THE MODEL LAW AND GIBBS

These English decisions have had a profound impact on the practice of cross-border insolvency law. They create both perverse incentives and unjust outcomes. As both Justice Hildyard and Lord Justice Henderson noted in IBA and IBA II, entities looking to alter substantive rights and enforce those alterations in England should either pursue parallel proceedings or reorganize **[\*369]** in England.<sup>186</sup> Requiring any company with debt arising under English law to reorganize in one of the world's most expensive jurisdictions creates unnecessary inefficiency, makes restructuring more difficult to execute, and may be detrimental to the combined interests of creditors. As we have seen in the past, certain aspects of English law, such as honoring ipso facto clauses, can reduce the debtor's overall value, which then reduces the value available to the entire pool of creditors.<sup>187</sup>

Further, these English rulings disincentivize creditors from participating in bankruptcy proceedings outside of England because courts may view their participation as submission to the foreign jurisdiction. This is especially true because the cases provide little guidance regarding what actions would amount to "submission" to the foreign court's jurisdiction. In Rubin, the U.K. Supreme Court held that the appellant-transferee did not submit to New York jurisdiction even though it had filed a notice of appearance in the primary chapter 11 proceedings, reasoning that the appellant did not appear in the relevant adversary proceedings regarding the fraudulent conveyance that

---

<sup>181</sup> Mark Phillips, *International Insolvency at a Crossroads...*, South Square Digest 3 (Nov. 2014) [hereinafter Phillips, *Crossroads*] (emphasis added) (quoting *In re Culmer*, 25 B.R. 621, 624 (Bankr. S.D.N.Y. 1982)).

<sup>182</sup> *Id.* at 4.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 5.

<sup>185</sup> *Id.*

<sup>186</sup> *Bakhshiyeva ex rel. Int'l Bank of Azerbaijan v. Sberbank of Russia* [2018] EWCA (Ch) 59 [158(5)]; *Bakhshiyeva ex rel. Int'l Bank of Azerbaijan v. Sberbank of Russia* [2018] EWCA (Civ) 2802 [88].

<sup>187</sup> See, e.g., *Fibra Celulose S/A v. Pan Ocean Co. Ltd.* [2014] EWHC 2124 (denying Korean debtor's requested relief designed to maintain a profitable executory contract under Korean law).

resulted in the default judgment. <sup>188</sup> In *Bakrie*, the court held that the debtor pursuing discharge was obliged to prove that the creditor had participated, but did not describe what would constitute "participation," only that the debtor had presented no evidence and attempted to place the burden instead on the creditor. <sup>189</sup> IBA is equally unhelpful. There, the court noted an exception exists when a party participates, but failed to define participation. <sup>190</sup> The opinion noted that the banks seeking to enforce their rights under *Gibbs* neither voted nor attended the creditor meeting, but the opinion does not discuss whether the banks actively engaged in negotiations with the debtor.

Given the lack of clarity regarding what constitutes "participation," creditors attempting to assert their claims under *Gibbs* will avoid the slightest indication they submitted to a jurisdiction (i.e., appeared in that jurisdiction or voted in insolvency proceedings). However, it is highly unlikely that courts will consider negotiations as 'submission to the jurisdiction,' so creditors have a mechanism to assess whether the company will emerge from restructuring with or without the creditor's support. If a creditor is reasonably certain that the company will emerge without the creditor's vote or support, the creditor can utilize Sberbank and Franklin Templeton's tactics in IBA. **[\*370]** The creditor would not vote or appear in the foreign proceedings, especially if the plan calls for the creditor to receive something less than its full return under the terms of its pre-bankruptcy contract. Instead, the profit-maximizing creditor will move to enforce its full pre-bankruptcy rights under *Gibbs*. The creditors deploying this strategy become successful rent-seekers, ensuring that their windfall profits will come at the expense of other stakeholders. A debtor may only avoid this windfall by spending time and resources filing a complicated, concurrent English proceeding. <sup>191</sup>

Finally, these cases encourage speculators to make rent-seeking investments. *Bakrie* is a case in point. In *Bakrie*, a hedge fund secured a generous windfall by using *Gibbs* to enforce a guaranty that the debtor had long considered discharged. <sup>192</sup> Remarkably, the court held that, even if the holder of the note at the time of the restructuring had participated in the process, any subsequent purchasers of the English debt would not have participated. Thus, the new purchasers could still take advantage of the rights afforded by *Gibbs*. <sup>193</sup> Armed with this holding and the English courts' belief that the CBIR does not allow recognition of foreign discharge, investors will mine for the discounted English debt of troubled companies in the process of reorganizing or, alternatively, English-law-governed debt considered discharged but still in circulation with the express purpose of asserting rights under *Gibbs*. Here, the investors solely seek to achieve returns by enforcing the *Gibbs* Principle, not because they believe the debtor itself is undervalued or because they envision their investment unlocking additional economic value that increases the value of the debtor. Instead, the investments destroy overall value as each action to enforce *Gibbs* compels the debtor to incur significant legal expense to fight the claim. These costs are borne by other creditors and stakeholders. The resulting inequity is compounded by the fact that participating creditors likely took "haircuts" to effectuate the restructuring.

#### A. The Global Response to *Gibbs*

The *Gibbs* Principle and the English case law fueling its current interpretation has faced considerable criticism from government delegations, courts, academics, and practitioners. In the past, several common law countries had followed the *Gibbs* Principle, but many have recently overturned the rule, noting its toxic effect on cross-border insolvency cases. For example, in determining whether to approve a scheme, the Supreme Court of Western Australia faced the question of whether it had the power to discharge debts governed by New York law. <sup>194</sup> The

---

<sup>188</sup> *Rubin v. Eurofinance, S.A.* [2012] UKSC 46 [63], [2013] 1 AC 236 (appeal taken from Eng.).

<sup>189</sup> *Glob. Distressed Alpha Fund 1 Ltd. P'ship v. PT Bakrie Investindo* [2011] EWCA (Comm) 256 [31-32].

<sup>190</sup> *Bakhshiyeva ex rel. Int'l Bank of Azerbaijan v. Sberbank of Russia* [2018] EWCA (Ch) 59 [46].

<sup>191</sup> *Id.* [158(5)].

<sup>192</sup> *Glob. Distressed Alpha Fund 1 Ltd. P'ship v. PT Bakrie Investindo* [2011] EWCA (Comm) 256.

<sup>193</sup> *Id.* [31].

<sup>194</sup> *In re Bulong Nickel Proprietary Ltd.* (2002) 26 WAR 466, [2002] WASC 126 P 2 (Austl.).

court held that the Gibbs Principle, as [\*371] described in an authoritative treatise,<sup>195</sup> was inapposite and that "different rules apply" to schemes or other rehabilitative insolvency proceedings.<sup>196</sup> The court endorsed universalist principles, noting that insolvency demanded collective action, and held that "once the jurisdiction is established the consequences of the insolvency ... will govern the rights, obligations and property of the insolvent debtor wherever situate."<sup>197</sup> Finally, the court also noted that the collective, universal approach not only is best for the debtor and all of its creditors, but also "the community in which [the debtor] has been conducting business ... ." <sup>198</sup>

Singapore similarly rejected the principle in *Pacific Andes Resources Development Ltd.*, where creditors argued that the Singaporean court could not assert jurisdiction over their claims because the contracts in question were governed by Hong Kong law.<sup>199</sup> The court reviewed extensive academic arguments against the Gibbs Principle and endorsed Professor Ian Fletcher's view to wit:

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 recognized 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."<sup>200</sup>

Professor Fletcher's observation seems especially apropos today, given the increasing number of countries that have adopted the Model Law. However, the recent English rulings in *Rubin*, *Pan Ocean*, and *IBA* support the Gibbs Principle. These rulings arguably provide creditors with debt subject to English law the foundation upon which to assert that they reasonably expect that only English courts can discharge such debt.

The U.K. Supreme Court's ruling in *Rubin* created enough of an uproar within the international insolvency community that UNCITRAL convened a working group to address the issue of foreign recognition of insolvency judgments.<sup>201</sup> That working group has since presented a final draft to the [\*372] General Assembly, which then promulgated the 2018 Model Law.<sup>202</sup> In forming the working group, UNCITRAL recognized that if courts followed the English interpretation of the Model Law and adopted the position that neither Article 7 nor Article 21 authorized recognition of foreign judgments, it would have a "chilling effect" on additional countries adopting the Model Law.<sup>203</sup>

---

<sup>195</sup> Collins, *Conflict of Laws*, supra note 63.

<sup>196</sup> *In re Bulong Nickel Proprietary Ltd.* (2002) 26 WAR 466, [2002] WASC 126 P 11 (Austl.).

<sup>197</sup> *Id.* P 13.

<sup>198</sup> *Id.* P 15.

<sup>199</sup> *Pacific Andes Res. Dev Ltd.*, [2016] SGHC 210 [46] (Sing.).

<sup>200</sup> *Id.* [48] (quoting FLETCHER, supra note 8, P 2.129); see also Fletcher, supra note 8, P 2.127.

<sup>201</sup> See United Nations Commission on International Trade Law, *Recognition and Enforcement of Insolvency-Related Judgments: Draft Guide to Enactment of the Model Law*, 2 n.1 (2018) [hereinafter in notes "Draft Guide"] (noting that the working group was formed in response to *Rubin*). The Draft Guide "provides guidance on application and interpretation of the [2018 Model Law] on recognition and enforcement of insolvency-related judgments ... ." *Id.* at 2.

<sup>202</sup> See 2018 Model Law, supra note 36.

<sup>203</sup> The phrase appeared in the 2017 version of the Draft Guide but was omitted in the current version published in 2018. Nevertheless, the 2018 version of the Draft Guide leaves no doubt respecting the undesirable effects of the troublesome line of English jurisprudence. See Draft Guide, supra note 201, at 21.

The drafters of the 2018 Model Law addressed the narrow interpretation of Model Law Article 21 by including "Article X," which is applicable to countries that had adopted the Model Law.<sup>204</sup> Article X provides a mechanism to overturn narrow interpretations of the Model Law by stating that the discretionary relief available under Article 21 of the Model Law "should be interpreted as including the recognition and enforcement of a judgment, notwithstanding any interpretation to the contrary."<sup>205</sup> This rebuke of the narrow English interpretation of Article 21 is a rather remarkable step from a diplomatic working group. Whether it does much to reverse the English pattern is yet to be seen.

The Model Law drafters created what they consider to be an "exhaustive" list of conditions where a court may deny recognition in Article 14, but the Draft Guide to Enactment of the Model Law [hereinafter in text "2018 Draft Guide"] emphasizes that courts are not "obliged to refuse recognition and enforcement" if any of these conditions are met.<sup>206</sup> Within this Article, they rebuke Lord Collins' reasoning in *Rubin* that the English exercise of jurisdiction over a foreign entity in insolvency is unrelated to its recognition of foreign judgments.<sup>207</sup> Article 14(g)(iii) stipulates that a court must accept that a foreign court properly asserted jurisdiction when it issued its judgment if the receiving court could have used the same jurisdictional basis in an analogous case.<sup>208</sup> Article 14(g)(iv) expands the jurisdictional bounds further, noting that a foreign court may assert jurisdiction using any grounds that "are not incompatible" with the law of the receiving state.<sup>209</sup>

Finally, the drafters rebuke the *Pan Ocean* holding, as they do not include any mention that the relief sought to be recognized must be available under **[\*373]** domestic insolvency law, but do reemphasize recognition is subject to Article 7, which allows courts to refuse to take any action that would be "manifestly contrary to public policy."<sup>210</sup> Based on the language proposed in the 2018 Model Law, it appears that the drafters agree wholeheartedly with Mr. Phillips that the English rulings in *Pan Ocean* and *Rubin* misinterpreted the Model Law.<sup>211</sup>

## B. Proposed Solutions to Gibbs

There are several solutions that practitioners, governments, and courts may pursue to help ameliorate the effects of Gibbs on cross-border restructurings. First, debtors and their financial advisors may contractually declare within their debt instruments that an insolvent party may restructure in its home jurisdiction or center of main interests (COMI), where the courts will apply the insolvency laws of that jurisdiction. This clause would remove a creditor's ability to claim that it had not considered the possibility that non-English law would apply in the face of insolvency, negating the contractual principles underlying the decision in Gibbs. In effect, the parties would contractually accept Professor Fletcher's reasoning adopted by the Singapore High Court in *Pacific Andes*.<sup>212</sup>

This suggestion closely resembles Richard Kebrdle and Laura Femino's position that debtors should add COMI clauses to bond indentures issued by special purpose financing vehicles in an effort to deter creditors from

---

<sup>204</sup> 2018 Model Law, *supra* note 36, art. X.

<sup>205</sup> *Id.*

<sup>206</sup> See Draft Guide, *supra* note 201, at 25.

<sup>207</sup> 2018 Model Law, *supra* note 36, art. 14(g)(iii).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* art. 14(g)(iv).

<sup>210</sup> See Draft Guide, *supra* note 201, at 6.

<sup>211</sup> See Phillips, *Crossroads*, *supra* note 181.

<sup>212</sup> See Fletcher, *supra* note 8, at P 2.71.; *Pacific Andes Resources Development Ltd.*, [2016] SGHC 210 [48] (Sing.).

attempting to pursue insolvency proceedings in jurisdictions outside a debtor's COMI. <sup>213</sup> I believe a similar clause could negate Gibbs, as it implies that the creditor accepts that it will "incur the political, social, and legal risks" of the debtor's home country, which would include the assertion of jurisdiction and the application of foreign insolvency law. <sup>214</sup> These authors note that this information is typically included in offering memoranda, so adding it to the contractual language is not a large "leap." <sup>215</sup> Furthermore, they note that there may be tax implications for debtors associated with such a clause and, therefore, it must be carefully drafted with that risk in mind. <sup>216</sup>

One might ask why a creditor would agree to such a clause given that the Gibbs Principle now functions as a protective feature for creditors **[\*374]** purchasing debt subject to English law. Considering this issue in a vacuum, they likely would not. But it seems doubtful that creditors would consider this issue worthy of negotiation at the outset of a lending relationship when there are so many other items to address in a large company financing. It also seems doubtful that a clause of this type would have a material impact on interest rates. If creditors choose to make this clause a critical bargaining issue that will influence pricing, debtors will be able to make an informed decision at the outset whether they would be better served going elsewhere for financing. Large, sophisticated companies have access to debt markets globally and have global advisors. Their creditors have access to those same markets and advisors. As a result, debtors with multinational businesses would likely be able to secure financing in a more "universalist" jurisdiction, such as the United States.

English practitioners (solicitors, investment bankers, financial advisors, and others) should take note of the risk Gibbs poses to their business and to their country's status as one of the world's leading global underwriting hubs. Their interests align with the debtors in this respect and they should petition the government to change the law to better reflect international norms so that they may maintain a competitive stake in the world of global financing. In this regard, the British government should actively champion the promulgation and adoption of the 2018 Model Law. If the government does not feel that passing the 2018 Model Law is feasible or would take too long, the appropriate cabinet Secretary of State could present Parliament with an amendment to the CBIR in the form of Article X in the 2018 Model Law. This simple clause expressly vests courts with discretion to grant relief, including the recognition of foreign judgments under Article 21 of the CBIR. <sup>217</sup>

English courts should take heed of UNCITRAL's action in responding to the holdings of Rubin and Pan Ocean. They should consider whether the English courts' interpretation of the Model Law, especially Article 21, is accurate. The working group states that it received its mandate in response to the Rubin decision, not based on a collection of cases from different jurisdictions around the world. <sup>218</sup> This at least implies that Rubin's holding was unanticipated and is out-of-step with the rest of the countries that have adopted the Model Law.

While the 2018 Model Law and Draft Guide are not binding authority in the CBIR, lower courts should invite appeal and, therefore, reconsideration by the higher court, by authoring decisions that discuss the well-reasoned academic critiques of Gibbs and Rubin, including the possibility that the **[\*375]** higher courts have misinterpreted the Model Law. Furthermore, lower courts could fashion opinions that rely on Article 8 of the Model Law to accord relief in line

---

<sup>213</sup> Richard Kebrdle and Laura Femino, A Solution for Competing Foreign Insolvency Proceedings, Law360 (Sept. 28, 2016), <https://www.law360.com/articles/845453/a-solution-for-competing-foreign-insolvency-proceedings>.

<sup>214</sup> Id.

<sup>215</sup> Id.

<sup>216</sup> Id.

<sup>217</sup> See 2018 Model Law, *supra* note 36, art. X.

<sup>218</sup> Draft Guide, *supra* note 201 at 2.



with jurisdictions like the United States and Canada. <sup>219</sup> While these actions may not directly overturn Gibbs, they would stem the tide of a complete return to territorialism.

Finally, it appears that the U.K. Supreme Court will soon have another opportunity to reconsider Gibbs. The International Bank of Azerbaijan has indicated that it will appeal IBA II. <sup>220</sup> The U.K. Supreme Court must take into account the considerable developments and criticisms following Rubin and its progeny. It is time for England to join the world stage and throw off the shackles of Gibbs.

## V. CONCLUSION

English courts' continued application of the Gibbs Principle and a narrow interpretation of the CBIR reduces global economic value and breeds inefficiency by forcing parties to pursue duplicative and costly insolvency proceedings in England. The Gibbs Principle also invites rent-seeking financial speculation. The English courts' narrow interpretation of the CBIR chills adoption of the Model Law around the globe, as countries considering its adoption have reason to doubt its ability to reduce friction and expense in reorganizations when at least one country will act as a hold out. Harmonization of cross-border insolvency laws are critical to support today's globally interconnected economy. Practitioners, the British government, and the English courts should do all they can to combat an entrenchment in the territorialism that Gibbs espouses.

**[\*376]**

American Bankruptcy Law Journal

Copyright (c) 2019 National Conference of Bankruptcy Judges  
The American Bankruptcy Law Journal

---

End of Document

---

<sup>219</sup> Model Law, supra note 1, art. 8 ("In the interpretation of [the Model Law], regard is to be had to its international origin and to the need to promote uniformity in its application ...").

<sup>220</sup> Bagirova, Naila, International Bank of Azerbaijan to appeal UK court ruling, Reuters, (Dec. 21, 2018) <https://www.reuters.com/article/azerbaijan-iba-appeal/international-bank-of-azerbaijan-to-appeal-uk-court-ruling-idUSR4N1YO002/>.