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INSOLVENCY AND RESTRUCTURING ADVISORY

Debtors Must Continue to Consider English Restructuring Processes to Secure a Global Solution

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KEY POINT

- The UK government's proposals to only partially implement a new UNCITRAL Model Law means that creditors of English law debts who do not consent to a foreign restructuring proceeding will still have recourse to enforcing their rights against the debtor's UK-based assets.

English Law Is Still a Special Situation

The UK government's proposals[1] to only partially implement UNCITRAL's Model Law on Recognition and Enforcement of Insolvency-Related Judgments will not affect the "Rule in Gibbs."

English Law Claims Survive a Foreign Compromise

This means that a creditor of an English law obligation, who refuses to submit to a foreign restructuring process, will continue to have special status under English law, permitting it to enforce its rights against a debtor's assets in the UK. This is the case even if the debtor's plan of compromise that discharges those claims is sanctioned by a court having jurisdiction in respect of the plan, and further, even if the plan benefits from Chapter 15 recognition (see further below for Chapter 15 discussion).

The 19th century English court decision[2], known as the "Rule in Gibbs" ("***Gibbs***"), is the reason.

The UK government's proposals will undoubtedly cause much consternation abroad. Many debtors will need to continue to consider English law notwithstanding the plethora of new restructuring laws being implemented around the globe.

Existing Law Keeps *Gibbs* Alive and Well

As recently as 2018, the UK Supreme Court affirmed *Gibbs*, holding that the Cross-Border Insolvency Regulations 2006 (UK) ("**CBIR"**)[3] does not go so far as to override the common law of *Gibbs*.

What is more, the court said that any decision to override *Gibbs* lies, not with it, but with Parliament.

Like a hardy subterranean creature, *Gibbs* has stood the test of time.

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[1] Consultation on the proposals close at the end of September.

[2] The Rule in Gibbs arose out of *Antony Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux* (1890) 25 Q.B.D. 399.

[3] CBIR implements into English law the UNCITRAL Model Law on Cross-Border Insolvency.

It has defied creative arguments by the Queen's Counsel. In the *Bank of Azerbaijan* case[4], it was unsuccessfully argued that a permanent injunction against creditor action in the UK would not subvert *Gibbs*. The Supreme Court seemed untroubled in disagreeing. It pointed to the CBIR's absence of a choice of law provision and concluded that if the CBIR had intended to override creditors' substantive rights under the proper law governing their debts, it would have been made explicit. From a practical perspective, it observed that, as an insolvency proceeding, the Azeri plan of compromise had served its purpose and run its course: the creditors who had chosen to participate in the plan had received their entitlements under the plan. From the debtor's point of view, the court pointed to the fact that there was no contention that the plan would fail to achieve its primary objective if the claims of the English creditors succeeded: only 5 percent of the plan creditors' claims were affected by *Gibbs*.

Gibbs has also survived reprobation from the mighty US Bankruptcy Court for the Southern District of New York. In *Agrokor*[5], Judge Martin Glenn commented that *Gibbs* should be relegated to the history books and granted Chapter 15 relief in respect of a Croatian plan of compromise that included English law claims. He did so after extensive reasoning and knowing that granting the relief would effectively be in defiance of *Gibbs*. For those unfamiliar, a Chapter 15 order, in instances where the non-US case is filed in the debtor's centre of main interest, is effective to grant recognition and enforcement in the US of a foreign plan of compromise. The order imposes a stay of creditor action against the debtor's assets and operations located within the US.

A Glimmer of Light – *Norwegian Air*?

Ireland's High Court in *Norwegian Air*[6] exercised its jurisdiction to sanction an Irish scheme within an Irish Examinership notwithstanding that English law claims were caught by the compromise. It did so in reliance on the English court decision of *Re Business City Express* [1997] 2 BCLC 510, where the court recognised and enforced an Irish plan of compromise notwithstanding that it included English law claims. The English court relied on section 426 of the Insolvency Act 1986 (UK) as paving the way.

Is *Re Business City Express* still good law for this point? Does section 426 in fact go this far? Section 426 has been considered more recently.

Section 426 facilitates a court within the UK, as well as a court in certain designated foreign jurisdictions (Ireland being one such jurisdiction), applying to a court in the UK for assistance in an insolvency proceeding. The relevant provisions are as follows with underlining to emphasise the salient words:

> *(1) An order made by a court in any part of the United Kingdom in the exercise of jurisdiction in relation to insolvency law shall be enforced in any other part of the United Kingdom as if it were made by a court exercising the corresponding jurisdiction in that other part.*
> …
>
> *(4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.*
>
> *(5) … a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction. In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law.*

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4 *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802.

5 *In re: Agrokor d.d., et. al.*, 591 B.R. 163 (Bankr. SDNY 2018). *See too* Justice Kannan Ramesh, High Court of Singapore, *Pacific Andes Resources Development Ltd.* [2016] SGHC 210.

6 *In the Matter of Norwegian Air International Ltd.* [2021] IEHC 272.

Thus, paragraph (5) specifically includes a choice of law provision: it contemplates the English court applying the law of England OR of the "relevant country."

The Irish court must necessarily have relied on paragraph (5). However, the UK Supreme Court in *Rubin* and *New Cap*[7] held that paragraph (5) does not go so far.

In *Rubin*, the Supreme Court focused on the difference in language used in the three paragraphs. Paragraph (1), the court noted, concerns enforcing *orders* made by courts in different parts of the UK only. Paragraphs (4) and (5), on the other hand, concern the giving of *assistance* to a court in the UK or a relevant country.

Focusing on this difference in language, the Supreme Court concluded that paragraphs (4) and (5) do not apply to orders of courts in a relevant country. The Supreme Court said that if paragraphs (4) and (5) were to be read as giving the court power to enforce judgments of courts of relevant countries, it would make subsection (1) entirely redundant. Section 426 is therefore not a pathway to circumventing *Gibbs*.

There has been no English decision on this point since *Rubin*. Technically, the Supreme Court's decision on section 426 was "*obiter*." This means it is more susceptible to being overturned than if it was crucial to the decision. *Rubin* is also 10 years old and the issue has not been put to the test since. However, it does seem that the Supreme Court's decision is sound as a matter of statutory construction, and policy has not moved on. That is not to say that section 426 may not be helpful. For example, on a case-by-case basis, it may be worth exploring whether it can be used to open plenary proceedings in respect of the debtor (such as an administration) in the UK, potentially facilitating a disclaimer of the claim.

US Chapter 11 Plans Are Special Too

A US Chapter 11 plan of reorganization, however, is effective to bind creditors who benefit from English law claims, notwithstanding *Gibbs*. This is for the simple practical reason that a US bankruptcy court order sanctioning a Chapter 11 plan takes effect extraterritorially and applies to all creditors, including creditors of English law claims, and regardless of whether they have submitted to the jurisdiction of the US court.

Thus, a creditor acting in defiance of a US plan would visit contempt of a US court order, with all its consequences. No creditor has yet had the fortitude to rely on *Gibbs* in defiance of a sanctioned US Chapter 11 plan.

There are not many jurisdictions whose plans of compromise are expressed to take effect extraterritorially. There are fewer yet having the power and true global reach of the US.

What About Chapter 15?

There has been some thought that Chapter 15 might be a way to subvert *Gibbs*, but it seems that Chapter 15 (unlike Chapter 11) does not apply extraterritorially. Therefore, the arguments mentioned above as regards Chapter 11 do not apply. It is interesting to note that the US Bankruptcy Court for the Southern District of New York recently granted a Chapter 15 order in respect of a Cayman plan of compromise that included New York law governed claims[8]. The court reiterated that *Gibbs* has no place in US law.

Choosing Between Chapter 11 and a UK Restructuring Process

If the choice boils down to an English or a US restructuring solution, what factors should a debtor bear in mind? Anodyne though it may sound, the decision must be made on a case-by-case basis. English law might offer a more bespoke solution. Chapter 11, with its global stay, might facilitate a more fulsome and operational one. This is not the place to explore these issues in detail – suffice it to say, speak with your trusted Katten attorney.

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[7] *Rubin and another v. Eurofinance SA and others* and *New Cap Reinsurance Corporation (in liquidation) and another v. AE Grant and others* [2012] UKSC 46.

[8] *In re: Modern Land (China) Co., Ltd.*, Case No. 22-10707 (MG) (Bankr. SDNY).

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