NEW SOUTH WALES BAR ASSOCIATION PRESENTATION

JUDICIAL COOPERATION IN CROSS-BORDER INSOLVENCY: THEORY AND PRACTICE

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JUSTICE ASHLEY BLACK, SUPREME COURT OF NEW SOUTH WALES

I here address two decisions of the Supreme Court of New South Wales dealing with recognition of foreign restructurings under the Model Law and the continuing controversy as to the application of the *Gibbs* principle.

Recognition of foreign restructurings

The *Cross-Border Insolvency Act* 2008 (Cth) gives effect to the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law, set out in the Annex to United Nations General Assembly Resolution A/RES/52/158 (1997). The Model Law (as modified by Part 2 of the *Cross-Border Insolvency Act*) is given the effect of Australian law.[1] Both the Federal Court of Australia and the Supreme Court of a State or Territory have jurisdiction to recognise foreign proceedings and cooperate with foreign Courts in relation to a specified insolvency proceeding.[2] Key elements of the Model Law include access to local courts for foreign representatives; recognition of certain orders of foreign courts; relief to assist foreign proceedings and cooperation among courts of the states where assets are held and coordination of concurrent proceedings.[3]

If the court recognises a foreign main proceeding[4], then (1) the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; (2) execution against the debtor's assets is stayed; and (3) the right to transfer, encumber or otherwise dispose of the debtor's assets is suspended, and the scope of that stay is the same as if it arose under, relevantly, Ch 5 of the *Corporations Act* 2001 (Cth) (other than Pts 5.2 and 5.4A).[5] On recognition of either a main or a non-main foreign proceeding, and where necessary to protect the debtor's assets or creditors' interests, the court may grant relief including entrusting the administration or realisation of all or part of the debtor's

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[1] *Cross-Border Insolvency Act* s 6.

[2] *Cross-Border Insolvency Act* s 10.

[3] *Akers as Joint Foreign Representative of Saad Investments Co Ltd (in official Liquidation) v Deputy Commissioner of Taxation* (2014) 311 ALR 167; 100 ACSR 287; [2014] FCAFC 57 at [68].

[4] Article 17(2) of the Model Law provides that foreign proceedings are recognised as either "main proceedings" or "non-main proceedings" by reference to whether the proceedings take place in the state where the debtor has the "centre of its main interests" ("COMI"). Article 16(3) provides that, in the absence of proof to the contrary, the debtor's registered office or habitual residence, in the case of an individual, is presumed to be the debtor's COMI. The concept of a debtor's COMI for the purposes of arts 16(3) and 17(2) of the Model Law will generally correspond to the place where a debtor conducts the administration of its interests on a regular basis so as to be ascertainable by criteria that are objective and ascertainable by third parties. Article 17(2) provides that a foreign proceeding is recognised as a non-main proceeding if it takes place in a state where the debtor has an "establishment" (as defined in art 2(f) as "any place of operations where the debtor carries on a non-transitory economic activity with human means and goods or services").

[5] *Cross-Border Insolvency Act* s 16 and Model Law art 20.

assets located in the state to the foreign representative or another person and granting additional relief that may be available to an administrator or liquidator under Australian law.[6] The court must have regard to the interests of creditors, interested persons and the debtor in determining whether to grant or refuse relief on such terms.[7] Relief is not available as of right in a non-main proceeding.

Practice Note SC Eq 6, Cross-Border Insolvency: Cooperation with Foreign Courts or Foreign Representatives notes the provisions in the Model Law for cooperation and direct communication between the court and foreign courts or foreign representatives and the forms of cooperation recognised in the Model Law. The Practice Note provides that:

> "The Court adopts the JIN [Judicial Insolvency Network] Guidelines ([which are] attached to this Practice Note) and (subject to applicable rules of substantive and procedural law and to hearing any interested party in a particular case) will be guided by them in cases involving cross-border insolvency or restructuring of one or more companies situated in different jurisdictions".

The Court's approach to cross-border insolvency will, of course, be driven by the substantive provisions of the Model Law, by which the legislature has adopted a philosophy of "modified universalism", adopting a term used in the academic literature. Lord Hoffman in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 at [6] refers to modified universalism as "a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal [and] [t]here should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets." Lord Hoffman continues (at [7]), "this was very much a principle rather than a rule...elsewhere I have described it as an aspiration". It does not follow from the Model Law that a Court will always recognise a foreign restructuring and the Supreme Court of New South Wales did not do so in two recent cases.

In the first of these cases, *Re Hydrodec Group Plc* (2021) 152 ACSR 401; [2021] NSWSC 755[8], Hydrodec was incorporated in the United Kingdom, had its primary operations in the United States (a significant matter, as will emerge below) and was registered as a foreign company in Australia under the *Corporations Act* 2001 (Cth). A creditor brought a winding up application under ss 459A, 459P, 461 and 583 of the *Corporations Act* in Australia. Hydrodec then applied for moratorium protection under the *Insolvency Act* 1986 (UK), and sought recognition of the moratorium under arts 15 and 17 of the Model Law as foreign main proceeding in Australia.[9] It did not seek the recognition of the UK restructuring as a foreign non-main proceeding. It

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[6] Model Law art 21(1).

[7] Model Law art 22.

[8] For commentary, see S Atkins and K Luck "Case Comment" (2021) 30 *Int Insolv Rev* 460; KK Sim, "Judicial Discretion in the grant of relief in recognition applications under the Model Law" (2022) 30(2) *Insolv LJ* 107.

[9] The recognition of a restructuring as a foreign main proceeding would not have prevented a winding up in Australia in any event, since art 20(5) of the Model Law provides that the stay on recognition of foreign main proceedings does not affect the right to commence proceedings under Australian law, although the Court can potentially restrict the commencement of winding up proceedings other than with leave of the Court: *Re Videology Ltd* [2018] EWHC 2186 (Ch).

also argued that, even if the moratorium should not be recognised as a foreign main proceeding, the winding up should be stayed.

Williams J found that Hydrodec's centre of main interests was in the United States and not the United Kingdom, and it followed that the UK restructuring was not a foreign main proceeding for the purposes of the Model Law and, as I noted above, Hydrodec had not sought to have it recognised as a foreign non-main proceeding. Her Honour declined to exercise a discretion under s 581(2) of the *Corporations Act* to stay the winding up, where she found that there was not sufficient evidence that the proposed UK restructuring had any realistic prospect of success.

In *Re Vietnam Industrial Investments Pty Ltd* [2022] NSWSC 1411, I dealt with the question whether a winding up application should be adjourned.[10] The winding up application was brought by a Malaysian bank against a company incorporated in Australia, which had intermediate subsidiaries in Singapore and operating subsidiaries in Vietnam, and conducted its business in Vietnam. The bank had sought repayment of its debt in December 2021; it had issued a creditor's statutory demand on 28 July 2022 and no application was brought by the company to set aside the demand; the demand was not complied with, and a presumption of insolvency arose; and the winding up application was brought on 24 August 2022, listed for hearing on 26 September 2022, and adjourned to 29 September 2022 when the company indicated that it may be opposed, implicitly on the basis of solvency. Instead of leading evidence of solvency, the company filed an application in Singapore invoking a statutory moratorium under the *Insolvency, Restructuring and Dissolution Act* 2018 (Singapore), shortly before the final hearing on 29 September. At the time the winding up application was listed for final hearing, the Singaporean Court had not exercised any jurisdiction in the matter. I declined to adjourn the winding up application that had been filed prior to the commencement of the Singapore proceedings; where the company then had no developed reorganisation plan; the application had been brought in Singapore at a very late stage; and there was no evidence that a restructuring would benefit Australian or Singapore creditors. A different result might well have been reached if the restructuring application had been made in Singapore at an earlier date and the Singapore Court had been dealing with it when the winding up application was brought in Australia.

Gibbs principle

I now turn to the continuing controversy as to the *Gibbs* principle, arising from the decision in *Antony Gibbs Sons v Society Industrielle et Commercial de Metaux* (1890) 25 QBD 399. In *Gibbs*, the plaintiff contracted to sell copper to the defendant under contracts governed by English law. The defendant was placed in liquidation in France. The plaintiff's claim for loss on copper due to be delivered after the liquidation was not admissible in the French liquidation. The plaintiff brought proceedings in England to recover that loss. The defendant relied on the French liquidation as discharging the debt. The Court of Appeal held that the French liquidation did not discharge a debt arising under a contract governed by English law. The *Gibbs principle* is ordinarily understood as having the result that the discharge of

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[10] A similar result was reached in *Legend International Holdings Inc (in liq) v Indian Farmers Fertiliser Cooperative Ltd* (2016) 52 VR 40; (2016) 309 FLR 464; (2016) 114 ACSR 257; [2016] VSCA 151.

a debt or liability by a foreign insolvency proceeding would only be recognised in England where the contract is governed by the relevant foreign law, and not where the contract is governed by English law.

There are two important qualifications to the *Gibbs* principle. First, a creditor which has submitted to proceedings which extinguish a debt, for example by appearing and making submissions, cannot rely on *Gibbs* to contest the effect of those proceedings in another jurisdiction. Second, the *Gibbs* principle also does not apply to a foreign judgment that invalidates a debt as resulting from a transaction at undervalue or a preference or a related-party transaction.

The *Gibbs* principle is generally attacked by academic commentators on cross-border insolvency and has prompted divided approaches in the courts. The argument against the *Gibbs* principle is that it is contrary to principles of modified universalism, which imply that a Court should recognise the decision of a foreign court in a restructuring in a company's centre of main interests. The argument in favour of that principle is that choice of law provisions in loan arrangements are directed to predict stability of decision-making, and lenders would either be reluctant to lend, or would charge higher interest rates, if their debts could be compromised in some home jurisdictions of borrowers.

The *Gibbs* principle has been repeatedly challenged but applied in English cases. In *UK Global Distressed Offer Fund 1 Limited Partnership v PT Bakrie Investindo* [2011] EWHC 256 (Comm) (discharge of guarantee governed by English law under a debt reorganisation in Indonesia was not recognised in England); see also *Indah Kiat International Finance Co BV* [2016] EWHC 246 (Ch). The *Gibbs* principle was again applied in *Re OJSC International Bank of Azerbajian* [2019] 2 All ER 713; [2018] EWCA Civ 2082, where the Court of Appeal declined to recognise the discharge of a debt governed by English law under a restructuring process in Azerbajian.

The effect of the *Gibbs* principle to encourage the use of a parallel scheme in England, at least where a debt is governed by English law, as in *Re Drax Holdings Ltd* [2004] 1 WLR 1049; [2003] EWHC 2743 (Ch). An English Court there convened scheme meetings in relation to a parallel scheme of arrangement, where the security trust deeds, subscription and security documents and debentures relating to the first plaintiff were governed by English law. Lawrence Collins J observed at [30] that:

> "In the case of a creditors' scheme, an important aspect of the international effectiveness of a scheme involving the alteration of contractual rights may be that it should be made, not only by the court in the country of incorporation, but also (as here) by the courts of the country whose law governs the contractual obligations. Otherwise dissentient creditors may disregard the scheme and enforce their claims against assets (including security for the debt) in countries outside the country of incorporation..."

In *Re Vietnam Ship Building Industry Group* [2013] EWHC 2476 (Ch), an English Court also dealt with a parallel scheme where the debt and security agreements were governed by English law.

English Courts have approved schemes of arrangement which compromise debts governed by foreign law: for example, *Re Magyar Telecom BV* [2013] EWHC 3800. In *Re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch) at [71], Snowden

observed that jurisdiction in a scheme did not require that the scheme would necessarily be recognised by a foreign court, although the Court would require some credible evidence that it would not be "acting in vain" in approving the scheme. There is no necessary inconsistency in this approach, because that other jurisdiction may recognise the discharge of a debt by an English Court, although an English Court presumably would not have recognised the discharge of a debt governed by English law in the reciprocal position. English Courts will be less likely to convene a scheme meeting or approve a scheme where a foreign Court would likely not recognise the discharge of the debt because it also applied the *Gibbs* principle or its equivalent.

Turning to other jurisdictions, US courts do not apply the *Gibbs* principle and will generally recognise the discharge of a debt by a restructuring in a company's centre of main interest, even if that debt is governed by US state law, and this has substantial significance where many such debts will be governed by New York law.

In *Pacific Andes Resources Development Ltd* [2016] SGHC 210, a Singaporean Court exercised jurisdiction in a scheme of arrangement, although the debts were governed by Hong Kong law. Ramesh J there questioned the continued cogency of the *Gibbs* principle, although the Court did not there need to depart from it.

A Hong Kong Court assumed the continued application of the *Gibbs* principle in *Re Rare Earth Magnesium Technology Group Holdings Ltd (prov liqs apptd)* [2022] HKCFI 1686, dealing with a relatively common position in Hong Kong restructurings. Rare Earth was a company in a corporate group which produced fertilizers, primarily in the People's Republic of China. Rare Earth was incorporated in Bermuda and listed on the Hong Kong Stock Exchange and had subsidiaries in Hong Kong, the People's Republic of China and the British Virgin Islands. It sought approval of a scheme in Hong Kong which would discharge debt largely governed by Hong Kong law and where its effect would be recognised in Bermuda, where Rare Earth was incorporated, and in the Cayman Islands, where the parent company was incorporated. That approach was consistent with the *Gibbs* principle. In dealing with that orthodox application, Harris J pointed to the risk that, in a different situation, a Hong Kong Court would *not* have recognised the discharge of debt governed by New York law other than by a restructuring under Chapter 11 of the US Bankruptcy Code, even if a restructuring in another jurisdiction had been recognised by a New York Court under Chapter 15 of US Bankruptcy Code (corresponding to the Model Law). His Honour noted that the latter approach would not discharge the debt by a proceeding in New York law, the governing law of the debt, as distinct from a proceeding in another jurisdiction recognised in New York, and that debt may still be enforceable in Honk Kong. This was perhaps a reminder of the need, if *Gibbs* applied, for a parallel scheme in Hong Kong.

Perhaps oddly, that decision prompted a response by the US Bankruptcy Court in *Modern Land (China) Co Ltd (*Bankr SDNY, 2022*)*, where a Cayman Islands restructuring compromised a debt governed by New York law and the Bankruptcy Court recognised the compromise of that debt under Chapter 15 of the US Bankruptcy Code. The Court there recognised the discharge of a debt governed by New York law under that restructuring. Glenn J there emphasised that discharge of a debt would be enforceable in the United States as a result of a restructuring in the company's centre of main interest.

These decisions simply emphasise the difference in the underlying approach in a jurisdiction that follows *Gibbs* and one that does not. *Rare Earth* rightly recognises the effect of the *Gibbs* principle, assuming it is applied in Hong Kong, and *Modern Land* indicates that the result is different in the United States, which does not apply that principle. *Modern Land* does not remove the risk to which *Rare Earth* had pointed, that a debt governed by New York law could still be enforceable in a jurisdiction which applied *Gibbs* if it was not discharged in accordance with *Gibbs*, although it not enforceable in New York.

The Australian position as to the *Gibbs* principle

Finally, Australian courts have regularly considered whether to approve a scheme of arrangement which seeks to compromise debts governed by foreign law. These results are uncontroversial, at least in the several cases where the debt was governed by New York law, since New York courts will likely recognise its discharge under an Australian restructuring, if Australia is the company's COMI (in the sense noted above). In *Re Bulong Nickel Pty Ltd* (2002) 42 ACSR 52; [2002] WASC 126, the Supreme Court of Western Australia approved a scheme that would discharge debts governed by New York law. The position was left open in *Re Glencore Nickel Pty Ltd* (2003) 44 ACSR 210; [2003] WASC 18, which also related to debts governed by New York law.

In *Re BIS Finance Pty Ltd* [2017] NSWSC 1713, I relied on *Bulong* and *Glencore* to find that the Court had jurisdiction to convene a scheme that would vary the party's contractual rights under an indenture governed by New York law, where recognition of the Australian scheme would be sought and readily obtained in a US Bankruptcy Court In *Re Tiger Resources Ltd* (2019) 141 ACSR 203; [2019] FCA 2186, a scheme company sought approval of an Australian creditors scheme to reduce debt which was guaranteed by that company and secured against assets of its subsidiaries, which was governed by English law. The scheme company sidestepped any difficulty under the *Gibbs* principle by including a condition precedent that required recognition of the scheme in England. A minority lender which opposed the scheme did not contest the subsequent approval of the scheme in England, and likely could not have done so where it had participated in the Australian proceedings.

Australian courts have not yet had to consider the harder question arising from the application of the *Gibbs* principle, whether to recognise the discharge of a debt governed by Australian law under a foreign restructuring, which would raise the question whether that decision should be followed in Australia.