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THE *GIBBS* PRINCIPLE*

A Tether on the Feet of Good Forum Shopping

There is a pressing need to reopen debate on whether the principle articulated in *Antony Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399 remains relevant or useful in modern cross-border insolvency law. Criticism has been levied against the *Gibbs* principle both judicially and in academia, primarily on the ground that it cleaves to the outmoded philosophy of territorialism in cross-border insolvency and should finally be discarded in the light of the modern thrust toward modified universalism. This article will examine the arguments against the *Gibbs* principle and the tension between the principle and the growing acceptance of good forum shopping in cross-border insolvency. Significant benefits for both debtors and creditors are generated if they are allowed to engage in *bona fide* forum shopping for insolvency proceedings in order to avail themselves of juridical advantages available in foreign jurisdictions. Yet the *Gibbs* principle poses an impediment to good forum shopping by preventing recognition of debt discharge where the debt is governed by a law other than that of the insolvency jurisdiction. This is an urgent problem for corporations that borrow internationally and in multiple jurisdictions, and therefore incur debts under a plethora of national laws. The *Gibbs* principle is a relic of a different legal and economic era that ought to be consigned to the annals of history. In its place, a new approach will be proposed.

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I. Introduction

1 The principle of modified universalism in cross-border insolvency law is no longer a fresh or novel concept. It has at its essence the idea that bankruptcy proceedings (corporate or individual) should be unitary and universal, recognised internationally and effective in respect of all the bankrupt's assets. It lies at the core of the 1997 UNCITRAL Model Law on Cross-Border Insolvency ("Model Law") and the European Union's Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings ("EU Insolvency Regulation") which came into effect in 2002, more than a decade ago. It is safe to say that there is today a broad international consensus amongst insolvency practitioners and indeed many jurists that a comprehensive realisation of the principle of modified universalism is the way forward for cross-border insolvency. But features of the old philosophy of territorialism in cross-border insolvency remain bunkered within the common law. It continues to provide the juridical basis for certain rules which courts occasionally continue to recognise as good law.

2 One of these common law rules, which is the focus of this article, is the principle articulated by the English Court of Appeal in *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux*[1] ("*Gibbs*"). For ease of reference, this will be called "the *Gibbs* principle". Despite its vintage, the *Gibbs* principle continues to hold sway in cross-border restructuring and plague this area of law and practice.

3 The purpose of this article is to reopen debate on whether the *Gibbs* principle remains a relevant or useful rule in modern cross-border insolvency law. In short, does it have any relevance in the new global economic paradigm? It is suggested that it does not. Criticism has been levied against the *Gibbs* principle both judicially and in academia. The *Gibbs* principle cleaves to the outmoded philosophy of territorialism in cross-border insolvency and should finally be discarded in the light of the modern thrust towards modified universalism. This article will focus in particular on the problems posed by the *Gibbs* principle to the growing trend of good forum shopping.

II. The *Gibbs* principle

4 The defendant in *Gibbs* was a French trading company. It entered into contracts governed by English law to purchase copper from the plaintiff. The defendant ran into financial difficulties and was unable to accept further copper from the plaintiff. Eventually, the defendant

1 (1890) 25 QBD 399.

went into liquidation in France. The plaintiff submitted a claim in the French liquidation for damages in respect of the loss sustained on resale of the copper. The liquidator rejected that part of the plaintiff's claim in respect of the copper due to be delivered after the judgment of liquidation, on the basis that such a claim was not admissible under French law. The plaintiff commenced proceedings in the English courts. On appeal, the defendant contended that under French law, the judgment of liquidation operated as a discharge of the debt.

5 The Court of Appeal unanimously rejected this argument. Lord Escher MR delivered the principal judgment of the court. He emphasised that the law of the contract was English law. The parties had never agreed to be bound by French law, including French insolvency law. Therefore, the French liquidation did not discharge the debt owed by the defendant, and the plaintiff was entitled to maintain its action upon the English contracts.

6 Accordingly, the *Gibbs* principle, as stated in *Dicey, Morris & Collins on the Conflict of Laws*[2] ("*Dicey*"), is that a discharge of any debt or liability under the bankruptcy law of a foreign jurisdiction is a discharge therefrom in England if, and only if, it is a discharge under the law applicable to the contract. Along similar lines, a foreign composition is not regarded as effective unless it operates as a discharge according to the law of the debt.[3]

A. Continued application of the Gibbs *principle in England*

7 The *Gibbs* principle remains good law in England. But there have been rumours of disquiet and misgivings from the English High Court. Unfortunately the fact remains that *Gibbs* is a decision of the Court of Appeal and is therefore binding on the English High Court.

8 A fairly recent example is the 2011 decision of Mr Justice Teare in *Global Distressed Alpha Fund 1 Limited Partnership v PT Bakrie Investindo*[4] ("*Bakrie*"). The defendant, an Indonesian company, was the guarantor of certain notes issued by a company owned by the defendant. Subsequently, the defendant filed an application for a provisional moratorium of payments with the Indonesian court. The Indonesian court later also ratified a debt reorganisation composition plan in respect of the defendant. The claimant purchased some of the notes and

2 *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at para 31R-092.

3 *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at para 31-096.

4 [2011] EWHC 256 (Comm).

commenced English proceedings against the defendant on its guarantee. It argued that the guarantee, which was governed by English law, had not been discharged by the Indonesian composition plan. The defendant urged the court to give effect to the principle of modified universalism and depart from the *Gibbs* principle.

9 Mr Justice Teare found himself between a rock and a hard place. He noted the intense criticism of the *Gibbs* principle by various leading academics and admitted that there was "much to be said for developing English law in the manner suggested by [counsel for the defendant]".[5] But he was ultimately unable to avoid an application of the *Gibbs* principle because he was precedentially bound by *Gibbs* as it was a decision of the English Court of Appeal. Mr Justice Teare's decision eventually came before the High Court of Singapore, when the claimant sought to register the judgment for enforcement in Singapore. The ensuing proceedings will be described later in this article.

10 Another example is *AWB Geneva SA v North America Steamships Ltd*[6] ("*AWB*"). There the applicants sought an anti-suit injunction to restrain a debtor's foreign trustee in bankruptcy from seeking an order in ongoing Canadian insolvency proceedings that certain conditions precedent in liability, under a contract between the applicants and the debtor governed by English law, should cease to apply. Field J held[7] that it did not follow from the mere fact that an English court would not recognise the discharge of a contractual obligation in foreign liquidation proceedings that the court would grant an anti-suit injunction to restrain a party to the contract from bringing such proceedings. Accordingly, Field J rejected the application. There therefore appear to be limits to what the English courts are willing to countenance under the *Gibbs* principle.

11 *Gibbs* was applied recently in the 2016 decision of Mr Justice Snowden in *Re Indah Kiat International Finance Co BV*.[8] The applicant sought an order convening a meeting of its creditors for the purpose of considering and approving a scheme of arrangement under English law. The applicant owed debts under certain notes that it had previously issued, all of which were governed by New York law. Neither the applicant nor its parent company had any connection with England, save that the applicant's centre of main interests ("COMI") had been

5 *Global Distressed Alpha Fund 1 Limited Partnership v PT Bakrie Investindo* [2011] EWHC 256 (Comm) at [25].
6 [2007] EWHC 1167 (Comm).
7 *AWB Geneva SA v North America Steamships Ltd* [2007] EWHC 1167 (Comm) at [33].
8 [2016] EWHC 246.

shifted to England from the Netherlands about three months before the application for the sole purpose of promoting the scheme.

12 Prior to its application to the English High Court, the applicant had obtained an Indonesian judgment purporting to invalidate the notes and the obligations of the applicant and its parent. But the problem for the applicant and its parent was that the Indonesian judgment had not been given under the governing law of the notes. Though Mr Justice Snowden did not make express reference to the *Gibbs* principle, he implicitly did so when he expressed the view[9] that there was "no doubt" that the Indonesian judgment would therefore not have the effect of discharging the debts owed under the notes. It is clear that *Gibbs* remains alive and well in English jurisprudence. It would not be unfair to assume that he, like Mr Justice Teare in *Bakrie*, felt burdened by precedent to apply the *Gibbs* principle.

B. International reception to the Gibbs *principle*

13 Internationally, the *Gibbs* principle has met with a mixed reception amongst national courts. This article will begin with the approach taken by the courts in Hong Kong.

14 A marked reluctance to give effect to *Gibbs* was expressed by Anselmo Reyes J in *Hong Kong Institute of Education v Aoki Group (No 2)*[10] ("*Aoki*"). The Hong Kong Institute of Education obtained an arbitral award against Aoki, its contractor, for delays in completion of construction works. Aoki attempted to resist enforcement of the award on the basis that to do so would be repugnant to a corporate debt restructuring scheme in force in Japan, where Aoki was incorporated. The Institute argued that the scheme did not affect its ability to enforce a debt based on a contract governed by Hong Kong law.

15 Reyes J began by observing the heavy fire that the *Gibbs* principle had come under from leading commentators, and agreed that there was a tension between the principle and the demands of international comity. After considering the case law, Reyes J preferred a third course, to be navigated between the outright application of *Gibbs* and a departure from the principle. He applied what he termed a "2-stage approach", allowing judgment to be entered in the Institute's favour in the terms of the arbitral award, but ordering that conditions should be imposed on the enforcement of the judgment in order to give due recognition to the ongoing Japanese restructuring.

9 *Re Indah Kiat International Finance Co BV* [2016] EWHC 246 at [11].
10 [2004] 2 HKC 397.

16 In the more recent decision of the Hong Kong Court of First Instance in *Re LDK Solar Co Ltd*[11] ("*LDK*"), Godfrey Lam J held[12] that in determining whether the court should sanction a scheme of arrangement, it was important for the court to consider whether the debts owed were governed by the law of the scheme jurisdiction. Lam J agreed with the view taken by Lawrence Collins J (as he then was) in *Re Drax Holdings Ltd*[13] ("*Drax Holdings*") that if the law of the scheme jurisdiction did not govern the contractual obligations, dissentient creditors might disregard the scheme and enforce their claims elsewhere. On the facts, Lam J was satisfied that most if not all of the creditors' claims were governed by Hong Kong law, and approved the schemes.

17 The approach in *LDK* can be usefully contrasted with that of the Supreme Court of Western Australia in *Re Bulong Nickel Pty Ltd*[14] ("*Bulong*"). Em Heenan J was faced with an application for the approval of a scheme of arrangement where debts were owed under New York law. Heenan J acknowledged[15] that there was a general rule that the discharge of a contract or debt depended upon the law applicable to the contract, but took the view that:[16]

> … different rules apply in the case of bankruptcy or insolvency of a party to such a contract or in relation to schemes of arrangements which have the effect … of modifying the rights of creditors … in order to prevent or rationalise an actual or impending insolvency for that party.

On this basis, Heenan J held that the Australian scheme of arrangement was capable of compromising the New York debts and approved the scheme. In *Re Glencore Nickel Pty Ltd*,[17] a subsequent decision of the Supreme Court of Western Australia, the court expressed some doubts about the ability of an Australian scheme to discharge a foreign law debt, and advocated a more cautious approach in determining whether an Australian scheme should be approved. The applicants, which were companies incorporated in New South Wales, sought an order convening a meeting of creditors. Amongst the creditors were bondholders whose bonds were governed by New York law. McLure J agreed with Heenan J's view in *Bulong*, but nevertheless remarked[18] that it was possible that the schemes, if approved, might not be binding upon

11 [2014] HKCU 2855.
12 *Re LDK Solar Co Ltd* [2014] HKCU 2855 at [52].
13 [2004] 1 WLR 1049.
14 [2002] WASC 226.
15 *Re Bulong Nickel Pty Ltd* [2002] WASC 226 at [10].
16 *Re Bulong Nickel Pty Ltd* [2002] WASC 226 at [11].
17 [2003] WASC 18.
18 *Re Glencore Nickel Pty Ltd* [2003] WASC 18 at [41].

a dissentient or non-participating bondholder who sought to enforce rights under the bonds in the US. McLure J opined[19] that in considering whether to approve the scheme, it was relevant to take into account the potential risks and consequences of successful claims in the US after the Australian schemes had come into effect. Ultimately, McLure J decided – given that the plaintiffs' principal assets were in Australia, and that the Australian courts would not enforce a foreign judgment inconsistent with the schemes – that the scheme meetings should be convened.

18 Courts in the US have been untroubled by the *Gibbs* principle. In the view of the US courts, international comity mandates judicial recognition of discharge of debts following foreign insolvency. An example is the 2013 decision of the US District Court for the Southern District of New York in *Oui Financing LLC v Steven Dellar and Oui Management SAS*[20] ("*Oui Financing*"). Oui Management commenced a "safeguard procedure", which is essentially a debtor-in-possession restructuring regime, in the French courts. Thereafter, the plaintiff sued Oui Management and its guarantor for breach of contract in relation to certain loans that the plaintiff had previously extended to Oui Management. The contracts were governed by New York law.

19 District Judge Ronnie Abrams observed that there was a well-established practice of the US courts to decline to adjudicate creditor claims that were the subject of foreign bankruptcy proceedings, on the basis of international comity. Judge Abrams also recognised that there was a need to ensure that all claims were assembled in a single set of proceedings binding all creditors, or the plan of reorganisation would fail. Accordingly the US courts would defer to a foreign court of proper jurisdiction as long as the foreign proceedings were procedurally fair and did not violate public policy. Judge Abrams considered that the French "safeguard procedure" satisfied those requirements and therefore dismissed the plaintiff's claim. As the US Court of Appeals for the Second Circuit in *Cunard Steamship Co Ltd v Salen Reefer Services AB*[21] ("*Cunard*") explains, the extending of comity to a foreign bankruptcy proceeding by staying or enjoining the commencement of an action against a debtor or its property "enables the assets of a debtor to be dispersed in an equitable, orderly and systematic manner, rather than in a haphazard, erratic or piece-meal fashion". This is a clear reaffirmation of the principle of modified universalism.

19 *Re Glencore Nickel Pty Ltd* [2003] WASC 18 at [45].
20 2013 US Dist LEXIS 146214.
21 773 F 2d 452 at 457–458 (2d Cir, 1985).

III. Problems with the *Gibbs* principle

20 Does the *Gibbs* principle remain a justifiable feature of modern cross-border insolvency law? Indeed, has it ever been a defensible rule? This author's view is that the juridical basis of the *Gibbs* principle has been questionable since its inception.

A. Proper characterisation of debt discharge

21 It is appropriate to look more closely into the reasoning of Lord Escher in *Gibbs*. The basis for Lord Escher's decision was that while the parties had agreed that English law should govern the contracts, they had never agreed to be bound by French insolvency law. Thus he posed the rhetorical question: "Why should the plaintiffs be bound by the law of a country to which they do not belong, and by which they have not contracted to be bound?" The underlying assumption behind this reasoning is that the question of discharge ought to be characterised as a *contractual* issue rather than a *bankruptcy or insolvency* issue. Accordingly the focus is on what law the parties have agreed to apply giving primacy to the parties' choice rather than the policy considerations that are attendant on an insolvency. The accuracy of this characterisation must be scrutinised.

22 A bankruptcy discharge is properly characterised as a matter of bankruptcy law. When a debt is discharged in bankruptcy, it is so discharged not because the parties have agreed that it should be, but because of the policy reasons undergirding a bankruptcy discharge. As observed by Heenan J in *Bulong*,[22] a bankruptcy court exercises its jurisdiction not merely to adjudicate upon the rights and liabilities of contractual parties, but to safeguard the interests of other creditors, the general community within which the debtor has been carrying on business, and to ensure that the administration of his affairs is undertaken in a manner which ensures equality between creditors according to their degree and priority. A discharge in a bankruptcy setting inevitably and invariably involves the exercise of statutory cram down powers such that a dissentient voice of minority creditors is overreached by the voice of the majority. And that is because bankruptcy is undergirded by the philosophy that policy is given primacy over contractual rights. Look Chan Ho puts the point eloquently in his book *Cross-Border Insolvency: Principles and Practice*[23] ("*Cross-Border Insolvency*"):

22 *Re Bulong Nickel Pty Ltd* [2002] WASC 226 at [13].

23 Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell, 2016) at para 4-098.

> The claimants' pre-insolvency entitlements arising from contracts are properly the subject-matter of party autonomy, but the post-insolvency treatment of the claimants' pre-insolvency entitlements cannot be exclusively the subject-matter of party autonomy.

This author would put the point even more strongly than that, and contend that party autonomy is relevant during the post-insolvency treatment of pre-insolvency entitlements only in so far as it does not impede the policy considerations that undergird an insolvency.

23 The point is even more fundamental to the proper operation of insolvency law than one might think. In *Insolvency in Private International Law*,[24] Professor Ian Fletcher describes "the principle of collectivity" as the one fundamental principle that commands universal acceptance, despite the wide variation between legal systems in the approach taken toward insolvency. According to Professor Fletcher, the principle of collectivity amounts to a recognition of the "common pool problem", which arises whenever more than one person has rights over the same finite fund of resources. In Professor Fletcher's words:[25]

> By regarding all those with claims against the insolvent debtor as members of a collectivised entity, *the law transforms what were originally multiple relationships between each creditor and the debtor into a unified whole for the purpose of administering and distributing such value as remains in the debtor's estate*. [emphasis added]

24 The point made by Professor Fletcher is a crucial one. The principle of collectivity in insolvency law demands the transformation of contractual entitlements in discrete pre-insolvency contractual relationships into the rights of creditors to participate in the distribution of the debtor's estate under the governing insolvency law. Once insolvency or restructuring is underway, a creditor no longer has any basis to insist on the satisfaction of the full range of his pre-insolvency entitlements. This includes his entitlement to have any contractual debt that is owed to him discharged under – and only under – the law of the contract. In other words, party autonomy is subjugated to a broader policy imperative.

25 Even if one accepts that a discharge of a contractual debt may properly be characterised as a contractual issue, it is important not to forget that a party who enters into a contract should reasonably expect that his contractual counterparty may be subject to insolvency proceedings at some point, and that such proceedings may adversely

24 Ian F Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd Ed, 2005) at para 1.08.

25 Ian F Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd Ed, 2005) at para 1.08.

impact on the contractual bargain. This is a point made also by Mr Justice Teare in *Bakrie*.[26] The defendant's creditors would have foreseen the circumstance that the restructuring of an Indonesian company, such as the defendant, might take place in Indonesia. Thus Mr Justice Teare opined that recognition of an Indonesian discharge would not be unjust. Similarly, Field J in *AWB* took the view[27] that the plaintiffs should have found it "entirely predictable" that if the defendant, a Canadian company, were to become insolvent, the insolvency and its effect on contractual rights would fall to be dealt with under Canadian law. There is force in these points.

26 A more fundamental criticism can be levied against the decision in *Gibbs*. Lord Escher's reasoning conflates, on the one hand, the issue of choice of law of a contract and party autonomy in this regard, and, on the other hand, the proper exercise of subject matter jurisdiction over a corporation in an insolvency by reason of connection to jurisdiction, assets or COMI or some other connecting factor. Once a court has properly taken subject matter jurisdiction over the distressed debtor enabling it to initiate insolvency or restructuring procedures, why should there be a lacuna in its power to discharge certain contractual debts which form part of the debtor's overall liabilities, simply because those debts are not governed by its law? There are powerful policy considerations that militate in favour of allowing a court's insolvency jurisdiction, properly seised, to override the choice of law problem posed by *Gibbs*. Lord Escher's decision amounts to a refusal to recognise that the debt restructuring is being undertaken under a statutory regime where contractual rights are being readjusted. There is no good reason why a party's contractual right to insist on its choice of law should not be similarly readjusted.

B. Analysis applied to schemes of arrangement

27 A possible objection to the characterisation of debt discharge as a matter for insolvency law is that such characterisation is out of place in the context of the forgoing of debts pursuant to schemes of arrangement. The argument rests on the premise that schemes of arrangement are *not* insolvency proceedings. They are simply a type of pre-insolvency settlement within which contractual rights are adjusted, and therefore it is proper that such adjustments take place in accordance with the choice of law of the contract. Thus the reasoning behind the *Gibbs* principle continues to apply with respect to composition proceedings.

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26 *Global Distressed Alpha Fund 1 Limited Partnership v PT Bakrie Investindo* [2011] EWHC 256 (Comm) at [25].

27 *AWB Geneva SA v North America Steamships Ltd* [2007] EWHC 1167 (Comm) at [31].

28 This potential objection is misconceived. While it is true that a scheme of arrangement was conceived as a statutory mechanism for the adjustment of contractual rights not predicated on the insolvency of the corporation, one must bear in mind the context in which such an adjustment typically takes place in the present day context. In many instances, such adjustments are sought because the applicant corporation is insolvent. The scheme jurisdiction has been customised as a debtor-in-possession regime for insolvent corporations seeking to restructure debt obligation. Indeed, the English scheme of arrangement may be utilised by foreign companies provided they may be liquidated within jurisdiction, as a matter of statutory definition. This is also the case in the scheme of arrangement regime in Singapore. This amounts to a clear recognition that the scheme of arrangement has insolvency underpinnings. It would be incorrect to ignore these matters. Indeed, courts in the US regularly give recognition under Chapter 15 of the US Bankruptcy Code to schemes of arrangement. The decision of Lane J in *In Re Magyar Telecom BV*[28] is illustrative. Under § 101(23) of the US Bankruptcy Code ("the Code"), a "foreign proceeding" is defined as a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation. Lane J found that an English scheme of arrangement was such a "foreign proceeding" as defined in § 101(23), and was entitled to recognition as a foreign main proceeding under §§ 1517(a) and 1517(b)(1) of the Code. Significantly, in that case, the English scheme would have had the effect of compromising New York law-governed debts. The anterior decision of the English court sanctioning the scheme of arrangement in *Re Magyar Telecom BV*[29] ("*Magyar Telecom*") will be described in greater detail below.[30]

29 Further, it is also clear that a scheme of arrangement can be implemented in a judicial management or liquidation. In the context of judicial management, this is expressly contemplated in s 227B(1)(*b*)(ii) of the Singapore Companies Act[31] ("Singapore CA"), which provides that the court may make a judicial management order if, *inter alia*, it considers that the making of the order would be likely to facilitate the approval of a scheme of arrangement under s 210 of the Singapore CA. Similarly, in England, where the equivalent regime is that of administration, para 49(3)(b) of Sch B1 of the Insolvency Act 1986[32] ("English Insolvency Act") envisages that an administrator's proposals

28 Case No 13-13508 (SHL) (Bankr SDNY, 11 December 2013).
29 [2013] EWHC 3800 (Ch).
30 See para 53 below.
31 Cap 50, 2006 Rev Ed.
32 c 45.

may include a proposal for a compromise or arrangement to be sanctioned under Pt 26 of the English Companies Act 2006[33] ("English CA"). Indeed, s 896(2)(d) of the English CA expressly states that an application to the court for the convening of a scheme meeting may be made by the administrator, if the company is in administration. Even when liquidation proceedings have been commenced, s 210(2)(*a*) of the Singapore CA enables the liquidator to apply to court for the convening of a meeting of creditors to consider a composition proposal. The equivalent statutory provision in England is s 896(2)(c) of the English CA.

30 Finally, the proposed and imminent legislative amendments to Singapore's insolvency regime should be highlighted. These amendments have been made in order to introduce the recommendations of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring[34] by, *inter alia*, strengthening the scheme of arrangement regime as a platform for debtor-in-possession restructuring for distressed corporations. The proposed amendments retain the oft-lauded flexibility of the scheme of arrangement while statutorily entrenching key features of Chapter 11 of the US Bankruptcy Code which establishes a debtor-in-possession regime that is, in essence, a scheme of arrangement. Taken in their totality, these statutory features make it quite unarguable that the scheme of arrangement does not involve debt restructuring in an insolvency setting.

31 Accordingly, the argument that a scheme of arrangement is only an adjustment of contractual rights unrelated to insolvency grows ever more unpersuasive. There is no principled basis for drawing a distinction between a scheme enacted in a judicial management or liquidation, on the one hand, and a scheme not situated in such a context, on the other. It may very well be that applicants and creditors apply for schemes in order to avoid triggering cross-default provisions in transactional and lending documents, relying on the argument that such an application is not an insolvency application. But that is a technical argument that surely does not camouflage the true nature and substance of the application.

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33 c 46.

34 The Committee to Strengthen Singapore as an International Centre for Debt Restructuring was appointed on 8 May 2015 to recommend initiatives or legal reforms that should be undertaken to enhance Singapore's effectiveness as a centre for international debt restructuring. The Committee released a report containing its recommendations on 20 April 2016. The report can be found at <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Final%20DR%20Report.pdf> (accessed 1 February 2017).

C. Anachronism of the Gibbs *principle*

32 Even if *Gibbs* was once sound as a matter of principle, it is clear in the light of modern developments in cross-border insolvency law that it is grounded in a philosophy that no longer holds sway amongst practitioners and, indeed, legislators. The Cross-Border Insolvency Regulations 2006 ("the Regulations") were enacted in England to give effect to the Model Law. If the Regulations had been in force at the time *Gibbs* was decided, the court would be required under Art 20(1) of the Regulations to order a stay of the plaintiff's action in England upon its recognition of French insolvency proceedings.

33 An example of the effect of the Regulations can be found in the judgment of Mr Justice Morgan in *Samsun Logix Corp v DEF*.[35] Mr Justice Morgan gave recognition to Korean rehabilitation proceedings under Art 17 of the Regulations and ordered a stay of a pending arbitration in London involving the Korean company, which was to be the respondent in the arbitration, in an exercise of the court's powers under Art 20.

34 The authors of *Dicey* observe[36] that a "curious result" flows from the application of the *Gibbs* principle when coupled with other private international law rules of English insolvency law. Under *Gibbs*, the English court will not recognise a discharge of debt if the insolvency proceedings did not take place in the jurisdiction of the governing law. However, the debtor's movables situated in England will have vested in the foreign trustee in bankruptcy, and the foreign trustee may also have been appointed by the English court as a receiver of the rents and profits of his immovables situated in England. The authors of *Dicey* therefore make the observation that "the bankrupt remains liable in England to perform his contract, but he will have been deprived of his assets". Professor Fletcher has similarly criticised the "unjust situation" where English insolvency law accepts that all the bankrupt's property has been lawfully removed from him by virtue of the foreign insolvency process, but simultaneously holds him liable to be sued in England in respect of liabilities in those same proceedings. In the author's view, this is yet another striking example of the anachronism of the *Gibbs* principle. While English courts assist and recognise the effects of foreign insolvency proceedings on the debtor's assets in England – a practice that is completely in line with the modern thrust toward international judicial co-operation in cross-border insolvency – the *Gibbs* principle undermines these efforts by thwarting the effects of foreign insolvency

35 [2009] EWHC 576 (Ch).

36 *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at para 31-097.

judgments and creating potential injustice for debtors. What English insolvency law gives with one hand, it takes away with the other.

35 *Gibbs* was decided in an era when insolvency law not only embraced a different philosophy, but also operated in a different commercial paradigm. The Court of Appeal decided *Gibbs* in the year 1890. Suffice it to say, more than a century later, the way businesses are organised and trade is conducted has developed beyond the wildest imagination of the court in *Gibbs*. Companies operate transnationally and borrow globally. They may list in one jurisdiction and borrow in another. In fact, given the spread of business, companies borrow in multiple markets and consequently incur debts governed by a plethora of national laws. There is therefore a real possibility of a disconnect between the jurisdiction of debt origination and a company's place of incorporation, listing or COMI. Yet upon a strict application of *Gibbs*, it would be impossible for such a company to find a suitable jurisdiction to commence insolvency or restructuring proceedings because the effect of *Gibbs* is to prevent recognition of a discharge of debt flowing from those proceedings, where the debt is not governed by the *lex concursus*. *Gibbs* assumes (perhaps correctly at the time it was decided, but surely no longer) that a debtor borrows in only one market and therefore under one law, and therefore assigns primacy to the choice of law of the debt over the subject matter jurisdiction of the insolvency court. But times have moved on. So too must judicial philosophies. It is high time for a decisive severance of the tether to *Gibbs*.

IV. Irreconcilability of *Gibbs* with good forum shopping

36 This article now examines a point that has hitherto received little judicial discussion as a reason for the abolition of the *Gibbs* principle, but is a powerful objection to the principle. This is the incompatibility of the *Gibbs* principle with good forum shopping.

A. Re Codere *and good forum shopping*

37 *Re Codere Finance (UK) Ltd*[37] ("*Codere*") is a decision of Mr Justice Newey in the English High Court. Codere SA, a Spanish company, was the parent of a group of companies that carried on business in Latin America, Italy and Spain. The group fell into financial difficulties and sought to restructure itself. The creditors desired to use the advantages of the scheme jurisdiction available in England for *bona fide* reasons. Accordingly, Codere SA acquired a company, Codere Finance (UK) Ltd, for this purpose. Codere Finance (UK) Ltd assumed a

37 [2015] EWHC 3778 (Ch).

joint obligation for debts owed and thereafter applied to the English High Court for an order sanctioning a scheme of arrangement. All creditors voted in favour of the scheme.

38 The application first came before Mr Justice Nugee, who remarked that this appeared "at first blush, to be quite an extreme form of forum shopping, in which the restructuring is brought in the UK purely by incorporating a company to take on very large liabilities".[38] The matter was later fixed before Mr Justice Newey, who approved the scheme. Mr Justice Newey began by noting[39] that Codere Finance (UK) Ltd was an English company that had its COMI in England and that there existed various connections between England and the debts owed. He further observed[40] that "the authorities show that over recent years the English courts have become comfortable with exercising the scheme jurisdiction in relation to companies which have not had longstanding connections with this jurisdiction".

39 Mr Justice Newey recognised[41] that what was being sought to be achieved in *Codere* was, in essence, forum shopping. Debtors were seeking to give the English court jurisdiction so that they could take advantage of the scheme jurisdiction available in England, which might not be available elsewhere. Mr Justice Newey expressed the view that in certain circumstances forum shopping could be undesirable – for instance where a debtor seeks to move his COMI in order to take advantage of a more favourable bankruptcy regime and *thereby escape his debts*. But in his opinion, this was not such a case. However, what was being attempted by the debtor was to achieve a position where resort could be had to the law of a particular jurisdiction, not in order to evade debts, but rather with a view to achieving the best possible outcome for creditors. This, in Mr Justice Newey's view, was forum shopping conducted for a *bona fide* purpose – what he termed "good forum shopping".[42] On the facts, he found that the scheme was "very much in the interests of the group's creditors", was devised "following close consultation with creditors", and enjoyed an "overwhelming level of support".[43] He therefore approved the scheme.

40 The approach taken in *Codere* regarding forum shopping is merely a recent illustration of the consistently positive sentiment expressed by the English courts toward applications for approval of English schemes of arrangement.

38 *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch) at [13].
39 *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch) at [15]–[16].
40 *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch) at [17].
41 *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch) at [18].
42 *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch) at [18].
43 *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch) at [19].

41 In *Sea Assets Ltd v Perusahaan Perseroan (Persero) PT Perusahaan Penerbangan Garuda Indonesia*[44] ("*Garuda*"), the Indonesian national airline Garuda, which was wholly owned by the State of Indonesia, applied to the English courts for approval of a scheme of arrangement. The directors of Garuda had made a deliberate decision not to initiate proceedings in Indonesia but rather in England and in Singapore, due to perceived juridical advantages of schemes in the latter jurisdictions. The Court of Appeal rejected the applicant's bid to obtain leave to appeal against the decision of the High Court judge sanctioning the scheme. It rejected the applicant's argument that it was wrong for Garuda, an Indonesian company, to put forward schemes in England and Singapore with which it had no obvious connection. In the words of the Court of Appeal, there was "nothing in this point".[45]

42 In *Re AI Scheme Ltd*[46] ("*AI Scheme*"), a case which Mr Justice Newey cited in *Codere*,[47] a company was created so that it might assume certain liabilities and thereafter enter into a scheme of arrangement, in order to make compensation for the liabilities owed. Mr Justice Norris agreed[48] that the fact that this was a deliberately created scheme company did not affect the jurisdiction of the court. He remarked that "[t]he structure ha[d] not been created as a matter of mere artifice; it ha[d] a solid grounding in commercial necessity". The scheme was later sanctioned by Mr Justice Norris.[49] It thus appears that the focus of the English courts – at least in relation to English schemes of arrangement – is practical and commercial in nature.

43 The final case that will be mentioned in this regard is *Re Apcoa Parking Holdings GmbH*[50] ("*Apcoa*"), where nine bodies corporate applied to the court to obtain its sanction to schemes of arrangement for the purposes of effecting a restructuring that was considered essential to avoid a descent into formal insolvency. This was a heavily contested application, and indeed the litigation that unfolded led Mr Justice Hildyard to remark[51] that the adversarial process "[shone] light on issues that in unopposed matters [might] not have been so sharply exposed". One of the questions before the court was whether it was appropriate to exercise its scheme jurisdiction. Mr Justice Hildyard was keenly aware that the proposed schemes "test[ed] the boundaries of a jurisdiction

44 [2001] EWCA Civ 1696.
45 *Sea Assets Ltd v Perusahaan Perseroan (Persero) PT Perusahaan Penerbangan Garuda Indonesia* [2001] EWCA Civ 1696 at [58].
46 [2015] EWHC 1233 (Ch).
47 *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch) at [17]–[18].
48 *Re AI Scheme Ltd* [2015] EWHC 1233 (Ch) at [26].
49 In *Re AI Scheme Ltd* [2015] EWHC 2038 (Ch).
50 [2014] EWHC 3849 (Ch).
51 *Re Apcoa Parking Holdings GmbH* [2014] EWHC 3849 (Ch) at [11].

which [was] by its nature potentially exorbitant".[52] Counsel for the creditor opposing the applications objected to the exercise of jurisdiction on the basis that the choice of English law, which had been relied on as the principal connecting factor, had not been the parties' original choice, given that the original governing law was German law and that this had been changed to English law solely in an attempt to persuade the English court to exercise its scheme jurisdiction. Counsel likened this to "forum shopping".

44 After a careful consideration of the matter, Mr Justice Hildyard rejected the argument. He observed that there was nothing in the facility agreements that precluded the changes to the governing law and agreed with the German law expert instructed by the scheme companies that the parties to the agreements were experienced business actors not in need of any special protection. Ultimately, Mr Justice Hildyard was swayed by the fact that the schemes offered the means of enabling a restructuring that was in the interests of all creditors, and held[53] that the objection raised was insufficient to require him to decline to sanction the schemes and "thus frustrate the realistic possibility of a group reconstruction which seem[ed] manifestly in the interests of all creditors and [was] clearly and consistently supported by a strikingly high proportion of them". Mr Justice Hildyard did, however, issue a qualifier to the approach he adopted:[54]

> … it seems to me that the onus placed on the court in exercising its jurisdiction to make an order which will be given recognition elsewhere may well require it to be especially wary if, for example, the new choice is of a law which appears entirely alien to the parties' previous arrangements and/or with which the parties had no previous connection; or if the change in law has no discernible rationale or purpose other than to advantage those in favour at the expense of the dissentients; or even more generally, where in its discretion the court considers that, in the places in which the parties are, the extent of the alteration of rights between the parties for which sanction is sought would be considered a 'step too far'.

45 The limits to "good forum shopping" remain to be defined. This is likely to be an intensely factual assessment in every case, but on a preliminary view the wishes of the creditors – particularly if a unanimous or close to unanimous view is taken – will always be a relevant and important factor, subject of course to the baseline requirement that the decision to forum shop and the measures taken for that purpose are not abusive or part of a ploy to target and disadvantage

52 *Re Apcoa Parking Holdings GmbH* [2014] EWHC 3849 (Ch) at [205].
53 *Re Apcoa Parking Holdings GmbH* [2014] EWHC 3849 (Ch) at [244].
54 *Re Apcoa Parking Holdings GmbH* [2014] EWHC 3849 (Ch) at [251].

particular creditors. This will be elaborated on in the section that follows.

B. A word on forum shopping

46 This article is not intended to be an exposition of the merits and demerits of forum shopping in cross-border insolvency, which is a controversial issue that has been discussed at length by various commentators. It is an issue of particular sensitivity in the European Union with regard to the EU Insolvency Regulation, which states in its fourth recital that:

> It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).

This is reflected also in recital 5 of the 2015 recast Regulations, *ie*, Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, which will enter into force in June 2017. But there is much to be said in support of the view taken by Mr Justice Newey on the benefits of "good forum shopping".

47 The parties most immediately affected by a debtor's pending insolvency, besides the debtor itself, are, of course, its creditors. Part of the rationale behind the institution of insolvency and composition proceedings is to ensure that assets are accounted for and preserved so they might be distributed to creditors in a fair and orderly manner. Thus, a signal from the creditors that it is their informed desire for winding-up or restructuring to take place in a particular jurisdiction, under a particular set of rules, is a powerful indication that the creditors consider such an arrangement to be in their best interests. *Prima facie*, this should be respected and endorsed, not merely because the creditors desire it but also because it represents their considered assessment of how the enterprise value of a failing company may be maximised, which is surely the core goal of any insolvency law.

48 This was the case in both *Codere* and *Garuda*. The judges in both cases were particularly influenced by the fact that the creditors had voted overwhelmingly in favour of the proposed schemes. In both cases, there was no question that the courts possessed the necessary subject matter jurisdiction to sanction the schemes. Jennifer Payne, Professor of Corporate Finance Law at Oxford University, argues persuasively against the European anathema to forum shopping in her article "Cross-Border

Schemes of Arrangement and Forum Shopping".[55] Professor Payne's thesis is that forum shopping might not always be a bad thing, particularly where the debtor is "driven by a desire to utilise a form of proceeding in a particular jurisdiction with a view to maximising returns to creditors". Where a financially distressed company has no domestic option that allows it to restructure, to deny access to a scheme may result in insolvency which, as Professor Payne points out, may destroy a large amount of the value of the company. She opines that since modern businesses typically have most value as going concerns, rehabilitative restructures are "almost always preferable for companies and their creditors".

49 Where a particular forum is selected for insolvency or restructuring because, in the view of the debtor or the creditors, that jurisdiction possesses an insolvency ecosystem – comprising both regulatory and soft infrastructure – that will best promote the economic survival of the debtor or achieve the best possible outcome for creditors, the courts should not stand in the way of such an arrangement even though it is evident that that particular forum is chosen solely for those purposes and none other. This is the type of forum shopping that we should all get behind. It is carried out for a *bona fide* purpose and is therefore properly characterised as "good forum shopping". The touchstone is really whether the forum shopping was undertaken to take advantage of the juridical and other advantages that a jurisdiction possesses for a *bona fide* purpose.

C. Difficulties posed by Gibbs

50 It does require the imagination to be stretched for one to perceive the intractable problem that the *Gibbs* principle poses for good forum shopping. A court applying the *Gibbs* principle will not recognise that the discharge of a debt flowing from foreign insolvency or composition if the debt is not governed by that foreign law. This means that a company in distress or its creditors will not be able to pursue restructuring in a preferred jurisdiction since the company's debts may not be effectively compromised in the eyes of a court applying the *Gibbs* principle.

51 Why should good forum shopping become bad forum shopping simply because the law of the debt is not the law of the forum? The indefensibility of the *Gibbs* principle becomes even more pronounced if one reminds oneself of the contractual argument advanced by Lord Escher for his decision in *Gibbs* – *ie*, that the plaintiff never agreed to subject its contractual rights to the effects of foreign insolvency law.

55 (2013) 14 *European Business Organisation Law Review* 563.

Yet *precisely* such an agreement exists in circumstances where creditors have given their approval for debt restructuring to occur in a forum whose law does not govern the debts they are owed. The contractual argument holds no water where the creditors have approved a scheme of arrangement. The courts should not refuse to sanction such a scheme on the basis of a principle that has had the ground cut from under its feet.

D. Contradictory approaches in forum shopping

52 Look Chan Ho has identified a particular inconsistency in the approach of the English courts to the application of the *Gibbs* principle. He argues that the English courts espouse forum shopping in the context of opening English insolvency proceedings but effectively reject forum shopping in the context of recognising foreign insolvency proceedings, by refusing to recognise the discharge mandated by foreign insolvency law of debts governed by English law.[56]

53 English courts have consistently demonstrated a willingness to compromise debts owed under foreign law following English insolvency or composition proceedings. An illustrative example is found in the 2015 decision of *Magyar Telecom*.[57] A Dutch company sought judicial sanction of a scheme of arrangement in England, although certain debts it owed were governed by New York law. The court did not find that the foreign debts posed any obstacle to the sanctioning of the scheme, expressing the view that there was an "obvious logic in treating a scheme approved under English law as effective to alter the rights of creditors, even though those rights [were] governed by the law of a different country".[58] It must logically follow that this "obvious logic" should apply in like fashion to schemes approved by courts other than English courts – these schemes should, *mutatis mutandis*, be found effective to alter contractual rights governed by English law. The rationale furnished by the court was that:[59]

> In the event of an insolvency process, the rights of the creditors to recover against the assets of the company would be governed by the insolvency law and recognition would be likely given to a scheme approved in the course of the insolvency process just as it would be given to the insolvency process itself.

This does appear to be an implicit recognition that subject matter jurisdiction in an insolvency enjoys primacy over contractual freedom.

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56 See Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell, 2016) at p viii (preface).
57 Referred to at para 28 above.
58 *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch) at [19].
59 *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch) at [19].

Once a court is properly seised of insolvency jurisdiction, it is its insolvency law that determines whether and to what extent creditors may draw from the pool of available assets.

54 Professor Fletcher has expressed the opinion that this inconsistency in English insolvency law is insular and reflective of double standards.[60] According to Professor Fletcher, judicial recognition of the effectiveness of English discharges must be complemented by a recognition that foreign discharges of English debts have equivalent effect. The inconsistency was observed by Lam J in *LDK*,[61] and it appears to be the reason why Lam J emphasised later in his judgment that the claims of the creditors against the scheme companies were largely governed by Hong Kong law.

55 The concerns expressed by Professor Fletcher and Look Chan Ho are real. There is a need to achieve consistency between the legal effects of local and foreign insolvency proceedings on an issue as fundamental as the discharge of debts. This is demanded not merely as a matter of intellectual coherence, but rather as a matter of international and judicial comity. American courts have rightly emphasised the importance of respecting foreign insolvency proceedings as a requirement of international comity.[62] Failing to do so results not only in what can be regarded as an affront to judicial co-operation, but also risks undermining the fair, orderly and cost-efficient distribution of a debtor's assets. It is also anathema to the spirit of the Model Law and indeed is inconsistent with the demands of Art 20(1), as explained above.[63]

E. Governing law clauses as jurisdictional hooks

56 In comparison with the decision in *Magyar Telecom*, the *Gibbs* principle clearly weighed more heavily on the mind of the court in *Drax Holdings*.[64] Ultimately, however, in both cases the court found it appropriate to exercise scheme jurisdiction, although in *Drax Holdings*, the court came to its decision only after a consideration (in substance) of *Gibbs*.

57 Two companies, incorporated in the Cayman Islands and Jersey respectively, applied to the English court for orders that meetings of

60 See Ian F Fletcher, *The Law of Insolvency* (Sweet & Maxwell, 4th Ed, 2009) at paras 29-037 and 29-063–29-069.
61 *Re LDK Solar Co Ltd* [2014] HKCU 2855 at [48] and [49].
62 See paras 18 and 19 above.
63 See para 32 above.
64 Referred to at para 16 above.

scheme creditors should be convened for the creditors to consider and approve, if thought fit, their respective schemes of arrangement. Collins J first satisfied himself that the English court had jurisdiction to summon meetings and sanction schemes in relation to foreign companies. He then held as follows:[65]

> 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.

58 Collins J found that there were "many factors here which point[ed] to the exercise of the jurisdiction in the present matters being both legitimate and appropriate".[66] He noted that the relevant trust deeds, subscription and security documents and debentures in respect of the first claimant were governed by English law. Similarly, the bank facility agreement to which the second claimant was a party was governed by English law. In the circumstances, he concluded that he was satisfied that the court had jurisdiction to order the meetings and approve the schemes because they had a sufficient connection with England.[67]

59 Two observations can be made about *Drax Holdings*. First, there is an obvious contrast between the attitude taken by the court in *Drax Holdings* and that in *Magyar Telecom*. The approach taken in *Drax Holdings* has, at the very least, the merit of being consistent with the English courts' adoption of *Gibbs* in the context of recognition of the effects of foreign restructuring and insolvency. *Gibbs* evidently weighed heavily on Collins J's mind. It is unclear what the result would have been had Collins J found that the debts owed by the two claimants were in fact governed by foreign law. The second point concerns Collins J's remark in the quoted passage above that a scheme involving foreign debt 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". From the language used, Collins J appears to have taken the view that it would *also* be appropriate for a scheme to be implemented in the country of incorporation, despite the existence of foreign debt. Quite apart from the fact that serious questions exist regarding the utility or cost efficiency in having multiple

65 *Re Drax Holdings Ltd* [2004] 1 WLR 1049 at [30].
66 *Re Drax Holdings Ltd* [2004] 1 WLR 1049 at [31].
67 *Re Drax Holdings Ltd* [2004] 1 WLR 1049 at [36].

schemes of arrangement in multiple jurisdictions, it is perhaps even more difficult to see how a scheme in the country of incorporation could be at all useful in precluding dissentient creditors from pursuing foreign debts in foreign courts, if the view is taken (as it was by Collins J) that a debt in insolvency can only be discharged under its governing law.

60 *Re Vietnam Shipbuilding Industry Groups*[68] ("*Vietnam Shipbuilding*") is another decision involving an application for an order to convene a meeting of scheme creditors. The insolvent company was incorporated in Vietnam, was wholly owned by the Vietnamese government, and had no connection with England save for the fact that the facility agreement between the company and the scheme creditors was governed by English law and conferred non-exclusive jurisdiction on the English courts.

61 The court found that it had jurisdiction to sanction the proposed scheme, relying on the finding made in *Drax Holdings* on this point. The court then went on to consider whether there existed a sufficient connection between the insolvent company and England such that it might be appropriate for the scheme to be sanctioned. In finding that a sufficient connection existed on the facts, the court was particularly swayed by the fact that the facility agreement was governed by English law. Indeed, it took the view that "the fact that the loan agreement [was] governed by English law [was] of *itself sufficient to create [the] necessary connection*" [emphasis added].[69] The court relied on the passage from *Drax Holdings* quoted above[70] in making its decision. It added that "it [was] likely that most, if not all, countries would not recognise a change in the rights of lenders under [the] facility, unless it [had] been effected in accordance with English law".[71] This is a clear reference to *Gibbs* and an (inaccurate) supposition that *Gibbs* has been embraced globally.

62 The decisions in *Drax Holdings* and *Vietnam Shipbuilding* turned on the fact that the relevant debt and security agreements were governed by English law. The English law clauses in these agreements therefore acted as a "jurisdictional hook" that ultimately served to anchor the English courts' exercise of jurisdiction to sanction English schemes of arrangement. The court in *Vietnam Shipbuilding* went so far as to opine that the fact that the loan agreement was governed by English law, *taken alone*, provided sufficient basis for the court's decision

68 [2013] EWHC 2476 (Ch).
69 *Re Vietnam Shipbuilding Industry Groups* [2013] EWHC 2476 (Ch) at [9].
70 See para 57 above.
71 *Re Vietnam Shipbuilding Industry Groups* [2013] EWHC 2476 (Ch) at [8].

to exercise scheme jurisdiction. This is a particularly acute application of the *Gibbs* principle. The *Gibbs* principle has now come a long way from precipitating a mere non-recognition of a foreign discharge. It now grounds the exercise of the English court's discretion to sanction schemes of arrangement for foreign companies as long as they possess English law debts. Through the insertion of an English law clause into a facility agreement, an English restructuring becomes, in the eyes of the English courts, the *only* appropriate composition worldwide, if the effects of the restructuring are to be universal. If this is universalism at all, it is surely universalism at its narrowest of lenses.

63 It should be made clear that this author's objection is *not* to the exercise of jurisdiction by the English courts in the scenarios posed in *Drax Holdings* and *Vietnam Shipbuilding*. Neither does this author take objection to the finding that the existence of English law-governed debts provided a connection to England, which supported the courts' exercise of jurisdiction. The objection is to the reasoning – that by virtue of the existence of such English law clauses, England becomes the only appropriate jurisdiction for restructuring. The modern and most compelling explanation for the exercise of insolvency jurisdiction to discharge foreign debts is that utilised by the court in *Magyar Telecom* – *ie*, that insolvency proceedings alter the rights of creditors, even where those rights are governed by foreign law. Their contractual entitlements to recover moneys owed, as explained above,[72] become subject and secondary to the policy considerations that undergird the insolvency process.

V. Approach of the Singapore courts

64 This article now turns to a description of how the Singapore courts have dealt with the problems posed by *Gibbs*, and – more broadly – how our courts have begun to align themselves with the principle of universality and to explore the consequences that the principle has for cross-border insolvency law.

65 It is apt to begin with the decision in *Bakrie*, which (as mentioned above)[73] eventually came before the Singapore courts in enforcement proceedings.

72 See paras 22–24 above.
73 See para 9 above.

A. Aftermath of Bakrie

66 Having succeeded before Mr Justice Teare, the claimant sought to enforce the judgment in Singapore by making an application under s 3(1) of the Reciprocal Enforcement of Commonwealth Judgments Act[74] ("RECJA"). Section 3(1) of the RECJA allows a judgment creditor to apply to the Singapore High Court to have a judgment of a superior court of the UK registered. The High Court may order such judgment to be registered if it thinks, in all the circumstances of the case, that it is just and convenient for the judgment to be enforced in Singapore.

67 An assistant registrar granted the order sought by the claimant and the defendant appealed. On appeal, the defendant argued that the registration order should be set aside on grounds of public policy under s 3(2)(*f*) of the RECJA, under which the registration of a judgment is prohibited if the judgment was in respect of a cause of action which for reasons of public policy or some other similar reason could not have been entertained by the registering court. The essence of the defendant's submission was that the registration of Mr Justice Teare's judgment would entail disregarding the order of the Indonesian court that ratified the composition plan and discharged creditor claims against the defendant. Such registration would accordingly be in breach of international comity, which was part of the public policy of Singapore.

68 Woo Bih Li J, whose grounds of decision are reported in *Global Distressed Alpha Fund I Ltd Partnership v PT Bakrie Investindo*[75] ("*Bakrie (enforcement)*"), rejected the defendant's submission. He observed that s 3(2)(*f*) of the RECJA required the High Court specifically to have regard to the cause of action on which the foreign judgment was based.[76] The claimant's cause of action was basically one in contract (under a contract of guarantee), and such a cause of action was not in any way contrary to the public policy of Singapore. What the defendant was urging the court to do was to determine whether the *effect* of registering and enforcing Mr Justice Teare's judgment – rather than the *cause of action* behind the judgment – would entail a breach of international comity.

69 Woo J accepted, however, that Mr Justice Teare's decision appeared to be in conflict with the Indonesian order. He took the view that the principle of universality and the doctrine of comity were more appropriately to be considered under the "just and convenient" factor

74 Cap 264, 1985 Rev Ed.

75 [2013] 2 SLR 228.

76 *Global Distressed Alpha Fund I Ltd Partnership v PT Bakrie Investindo* [2013] 2 SLR 228 at [42].

under s 3(1) of the RECJA,[77] rather than as part of a public policy argument under s 3(2)(*f*).[78] Woo J observed that Mr Justice Teare had appeared to favour the principle of universality which favoured giving effect to the Indonesian composition plan, but had ultimately found that he was unable to do so because he was bound by the Court of Appeal's decision in *Gibbs*. Woo J considered that if the defendant was dissatisfied with the outcome, it should have filed an appeal, especially in the light of Mr Justice Teare's endorsement of the principle of universality. Filing an appeal would have been the proper course for the defendant, rather than attempting to attack Mr Justice Teare's judgment indirectly by resisting enforcement in Singapore. Given that Mr Justice Teare had already considered the universality argument but had decided not to give effect to it, Woo J concluded that he should not rehear the merits of the foreign judgment sought to be enforced, and dismissed the defendant's appeal.

70 While Woo J did not embark upon a consideration of the merits of *Gibbs* given that Mr Justice Teare had already done so, the predicament that Woo J faced in *Bakrie (enforcement)* reveals the residual difficulties posed to other jurisdictions by the English courts' continued acceptance of *Gibbs*, even if those other jurisdictions do not accept *Gibbs* as good law. The enforcement of English judgments applying *Gibbs* may result in the indirect application of *Gibbs* in those other jurisdictions.

71 In Singapore, the RECJA establishes a statutory scheme for the recognition and enforcement of UK judgments. The statute itself prohibits registration in certain specified circumstances (see s 3(2) of the RECJA), and the High Court is given a discretion whether to order registration (see s 3(1) of the RECJA) and whether to set aside registration (see O 67 r 9(3) of the Rules of Court[79]). But it is obviously necessary for a court to clearly articulate the basis on which it refuses to register a judgment or decides to set aside such registration. It remains to be seen how a decision of the High Court to refuse to register a foreign judgment, on the basis that the foreign court gave judgment on a debt that was earlier discharged through insolvency or composition, is to be justified under the RECJA.

72 Woo J took the view that in such circumstances, registration of the foreign judgment would not be "just and convenient" under s 3(1) of the RECJA, and refusal could be justified on this ground. We shall never

77 See para 66 above.
78 *Global Distressed Alpha Fund I Ltd Partnership v PT Bakrie Investindo* [2013] 2 SLR 228 at [44].
79 Cap 322, R 5, 2014 Rev Ed.

know if Woo J would have been prepared to set aside the registration of *Bakrie* if Mr Justice Teare had not addressed the principle of universality in his judgment, and thus Woo J could not be said to be rehearing the merits of the judgment by considering those arguments. It is interesting to ask whether it was really the case that Woo J would be rehearing the merits by considering what the principle of universality required in the registration proceedings. The answer is perhaps not as clear as one might imagine. Mr Justice Teare was bound by *Gibbs* on the question of whether, under English law, foreign composition would discharge English debts. The Singapore court is clearly not bound by *Gibbs* and the question before it was whether, under Singapore law (*ie*, s 3(1) of the RECJA), the interests of justice and convenience required the non-registration of the foreign judgment. The inquiries before the two courts were different, as were the laws governing those inquiries.

73 As Singapore heads toward the possible implementation of the Model Law, it may be apposite to consider what the result in *Bakrie (enforcement)* would be if the Model Law applied. Under Art 15, the defendant could apply to the Singapore court for recognition of the Indonesian proceedings, which the court might recognise under Art 17(2)(a) as a foreign main proceeding. Upon such recognition, any individual actions or proceedings and any execution against the defendant's assets would be stayed pursuant to Arts 20(1)(a) and 20(1)(b). The High Court would therefore have ordered a stay on the registration proceedings commenced by the claimant. This would have obviated any need to wrestle with the provisions of the RECJA.

74 This approach under the Model Law presupposes, of course, that the Singapore courts do not recognise *Gibbs* as good law. If the view is taken that *Gibbs* is indeed good law, it is perhaps unlikely that the court will grant a stay despite the Indonesian composition proceedings. It may decide, for instance, to refuse a stay on the ground that it would be manifestly contrary to public policy for it to do so under Art 6 of the Model Law, reasoning that international comity equally requires that it recognise and give effect to a judgment of the English court, which has properly taken jurisdiction over the parties and the dispute before it and rendered a carefully considered judgment disposing of the matter. At the time *Bakrie (enforcement)* was decided, the Singapore courts had not yet taken a clear position on *Gibbs*. The position is, however, clear today as will now be explained.

B. Re Pacific Andes Resources Development Ltd

75 Until 2016, it appears that the Singapore courts had not had the opportunity to fully consider the *Gibbs* principle. In July 2016, the case

of *Re Pacific Andes Resources Development Ltd*[80] ("*Pacific Andes*") came before this author for decision.

76 A number of related companies filed applications for *moratoria* on proceedings brought or to be brought against them by their creditors in Singapore and elsewhere, on the basis that the companies intended to enter into schemes of arrangement in Singapore. None of these companies were incorporated in Singapore and they owed debts governed by Hong Kong law. One of the arguments of the creditors was that the court should not assume jurisdiction over the applications because the debts owed by the applicants were subject to Hong Kong, and not Singapore, law. By reason of this, any discharge of the debts in Singapore would not be recognised in Hong Kong under the *Gibbs* principle.

77 This author rejected the argument substantially for the reasons explained earlier. In this author's view, the *Gibbs* principle was not defensible and should not create an obstacle to the exercise of jurisdiction. Unlike Mr Justice Teare in *Bakrie*, this author was not bound by the decision of the English Court of Appeal. This author took the position that if it has subject matter jurisdiction, and there exists assets in or sufficient nexus to jurisdiction that warrants the exercise of jurisdiction, then debts which are not governed by Singapore law may be legitimately compromised by a scheme of arrangement in Singapore.[81]

C. Modified universalism in Singapore

78 In recent years, a series of decisions in the Singapore courts has revealed the strong impetus toward universalism in our judicial philosophy, and illustrates how the Singapore courts are working out, through the incremental development of the common law, the modifications of the common law that universalism requires. These cases will be described in brief, in order to illustrate this trend in Singapore insolvency law and to place the decision in *Pacific Andes* within this broader context.

79 In 2014, the Court of Appeal in *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd*[82] recognised that it is open to a Singapore court to assist foreign winding-up proceedings through the regulation of its own proceedings. It may, for instance, exercise its

80 [2016] SGHC 210.
81 *Re Pacific Andes Resources Development Ltd* [2016] SGHC 210 at [52].
82 [2014] 2 SLR 815.

inherent discretion to stay a claim, an execution or attachment, or refuse leave to serve process out of the jurisdiction.

80 A further development transpired in *Re Opti-Medix Ltd*.[83] The applicant had been appointed by the Tokyo District Court as the bankruptcy trustee for two BVI-incorporated companies. These companies conducted their business primarily in Japan, but they transferred their proceeds to Singapore bank accounts. The Tokyo court granted bankruptcy orders against the companies. The applicant sought recognition of the Japanese insolvency proceedings in Singapore and itself as foreign liquidator. Judicial Commissioner Aedit Abdullah recognised the Japanese liquidation even though it had not occurred in the place of incorporation of the companies. He observed[84] that there was a movement toward universal co-operation in cross-border insolvency both internationally and in Singapore, and agreed that it was sound in principle to recognise insolvency proceedings in a company's COMI. Despite the fact that the Model Law has not yet been adopted in Singapore, in Abdullah JC's view the COMI test could first be incepted into the common law.

81 In the recent case of *Re Taisoo Suk*[85] ("*Taisoo Suk*"), a foreign representative of Hanjin Shipping Co Ltd, a Korean company, made an urgent *ex parte* application to the Singapore High Court. Amongst other things, the representative sought recognition of Hanjin's rehabilitation proceedings in Korea and a restraint of all new or pending proceedings against Hanjin and its Singapore subsidiaries. Abdullah JC granted the interim orders sought. He began by emphasising the Court of Appeal's observations in *Beluga* where the benefits of a universalist approach in winding up were recognised. There was no reason, in his view, why similar considerations should not apply to other forms of insolvency proceedings such as restructuring and rehabilitation, since creditors' interests were affected all the same.

82 Significantly, Abdullah JC held[86] that the imperative for orderly rehabilitation and restructuring of a company running a global business across jurisdictions, and the need to ensure that the company's assets could be marshalled for such effort, provided sufficiently strong grounds for the exercise of the inherent powers of the court to grant such orders.

83 The author is convinced that the rejection of the *Gibbs* principle is a natural progression in the implementation of modified universalism.

83 [2016] 4 SLR 312.
84 *Re Opti-Medix Ltd* [2016] 4 SLR 312 at [17].
85 [2016] 5 SLR 787.
86 *Re Taisoo Suk* [2016] 5 SLR 787 at [32].

It represents the next step in the common law and will be a shot in the arm for judicial comity in cross-border insolvency.

VI. Beyond *Gibbs*: The proper approach

84 As mentioned at the beginning, the purpose of this article is to reopen and sustain debate on the *Gibbs* principle. This author's view that the *Gibbs* principle is no longer defensible – if indeed it ever was sound as a matter of principle – has been explained. The remaining issue concerns the proper approach to be adopted in its place.

85 Professor Fletcher has offered a reformulation of the *Gibbs* principle which he advocates as a better reflection of the needs of the current global economic paradigm.[87] In the case of a contractual obligation which happens to be governed by English law, a rule should be introduced that 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, then it should be recognised that the possibility of such proceedings must enter into the parties' reasonable expectations in entering their relationship. This may furnish a ground for the discharge of the contractual debt to take effect under the applicable law. Professor Fletcher describes this as "a more internationally enlightened mode of responding to the effects generated by foreign insolvency proceedings".

86 This proposal was quoted with approval in *Bakrie*,[88] but as described above Mr Justice Teare ultimately found himself unable to give effect to it. For completeness, it should be added that in *Bakrie*, Mr Justice Teare also held that creditors who participated in foreign composition proceedings would be estopped from asserting subsequently that the composition does not bind on the basis of *Gibbs*.[89] This is indisputably correct. Professor Fletcher's proposal was also quoted by Reyes J in *Aoki*,[90] although it appears that what Reyes J adopted eventually[91] was Professor Fletcher's broader suggested approach toward the recognition of foreign insolvency and restructuring proceedings, without specific adoption of his proposed replacement for the *Gibbs* principle. In *Pacific Andes*, however, this author took the

87 See Ian F Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd Ed, 2005) at para 2.129.

88 *Global Distressed Alpha Fund 1 Limited Partnership v PT Bakrie Investindo* [2011] EWHC 256 (Comm) at [14].

89 *Global Distressed Alpha Fund 1 Limited Partnership v PT Bakrie Investindo* [2011] EWHC 256 (Comm) at [31].

90 *Hong Kong Institute of Education v Aoki Group (No 2)* [2004] 2 HKC 397 at [124].

91 *Hong Kong Institute of Education v Aoki Group (No 2)* [2004] 2 HKC 397 at [152].

position that Professor Fletcher's suggestion held much merit and accepted that it should form part of Singapore insolvency law.[92]

87 In a sense, the analysis is nothing more than a timely update of Lord Escher's contractual analysis in *Gibbs*. The focus of the inquiry remains on the parties' contractual intentions and expectations. But in the context of modern international business, it is perfectly sensible and realistic to expect that a commercial entity would reasonably envisage the possibility of its contractual counterparty going into liquidation in the place of its incorporation or in its COMI. Thus Professor Fletcher's proposal can be conceptualised simply as a modernisation of the *Gibbs* principle. It is a problem of contract law that has a solution in contract law. The conclusion mandated by the principle has changed, but its underlying method of reasoning has not.

88 It is necessary, however, to sound a note of caution as we conceptualise new rules to replace the approach in *Gibbs*. This author agrees with the view expressed by the US courts in *Oui Financing* and *Cunard*[93] that a court should defer only to a foreign insolvency court seised of jurisdiction if it is also satisfied that the foreign court will operate fair procedures. As observed by the US Court of Appeals for the Second Circuit in *Cunard*,[94] in order for comity to be extended, the foreign court must abide by fundamental standards of procedural fairness. In the view of the US courts, there is also no requirement that the foreign insolvency proceedings be identical to US proceedings.[95] What is important is that the foreign insolvency proceedings enable the debtor's assets to be dispersed in an equitable, orderly and systematic manner.

89 A similar sentiment was also expressed by Abdullah JC in *Taisoo Suk*, where he held that differences between rehabilitation regimes in Singapore and in South Korea should not be a bar to the recognition and assistance of proceedings in South Korea, because "[d]ifferent regimes will have differences in requirements and details: to insist on equivalence or even near-equivalence would not serve the needs of universality and orderly disposition".[96] This is a sound approach. The court must be satisfied that foreign insolvency or restructuring proceedings are conducted in a manner that respects due process before

92 *Re Pacific Andes Resources Development Ltd* [2016] SGHC 210 at [48].

93 Described at paras 18 and 19 above.

94 *Cunard Steamship Co Ltd v Salen Reefer Services AB* 773 F 2d 452 at 457 (2d Cir, 1985).

95 See *Oui Financing LLC v Steven Dellar and Oui Management SAS* 2013 US Dist LEXIS 146214 at 458 and *Allstate Life Insurance Co v Linter Group Ltd* 994 F 2d 996 at 999 (2nd Cir, 1993).

96 *Re Taisoo Suk* [2016] 5 SLR 787 at [27].

it accords recognition to a foreign discharge of debt. The court's focus should be on the fairness of the foreign proceedings and not on their resemblance to domestic procedures.

90 Professor Fletcher echoes this in his work *Insolvency in Private International Law*:[97]

> Before any creditor can subsequently be permitted to take action in England to enforce an obligation which the defendant claims was comprised within the foreign discharge, but whose applicable law was not that of the country of bankruptcy, *the court should have regard to whether the plaintiff had adequate notice of the foreign proceedings and a reasonable opportunity to participate in them in accordance with acceptable standards of fair and equal treatment*. If this was the case, the remedies of English process should be withheld on the basis that the plaintiff is estopped from invoking them. [emphasis added]

91 It is also noted that Professor Fletcher's suggestion that the plaintiff may be estopped from bringing a claim in the English courts strikes a chord with the view expressed by Mr Justice Teare in *Bakrie*[98] that a creditor who participates in foreign insolvency or restructuring proceedings should subsequently be estopped from relying on *Gibbs* in an action to enforce a debt before the English courts. Similar reasoning was applied by the Singapore High Court in the recent judgment of *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK*[99] ("*Humpuss*"). In *Humpuss*, the defendants applied to strike out an action commenced by the plaintiff's liquidators on the basis that the plaintiff should and ought to have raised its causes of action during the insolvency proceedings of the first defendant in Indonesia. According to the defendants, since the plaintiff failed to do so, it was now barred from proceeding by reason of the extended doctrine of *res judicata*. Steven Chong J rejected the application, finding that the Indonesian court did not have jurisdiction over the plaintiff because the plaintiff had not participated in the proceedings, and thus the Indonesian court's judgment did not preclude the plaintiff from commencing its action in Singapore. The corollary of Chong J's reasoning is that if the plaintiff had indeed participated in the Indonesian insolvency proceedings, its liquidators would now (*ceteris paribus*) be barred from pursuing its claims in the Singapore action on the basis of the extended doctrine of *res judicata*.

97 Ian F Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd Ed, 2005) at pp 108–109.

98 Described at para 86 above.

99 [2016] 5 SLR 1322.

VII. Concluding remarks

92 This article will conclude by placing the *Gibbs* principle and the problems that it poses into perspective. The 1890 decision of Lord Escher was made in an era where business interests were further apart and insolvency law was a largely territorial affair. Courts functioned within hermetically sealed silos and examined insolvency through domestic lenses. The *Gibbs* principle is a creature of antiquity that should now be consigned to the scrapyard of history because it is out of touch with modern business practices and the push toward legal convergence.

93 There is little sense in anchoring oneself obstinately to a principle that has little basis in principle and even less in relevance. Rather, the courts should play an active role in modernising cross-border insolvency law by scouring the common law for these relics of legal history and purging them uniformly and decisively.