

Court of Appeal refuses to grant indefinite stay on the enforcement of English law debts

Introduction

For more than a century, a creditor holding English law governed debt relied on the principle (known as the “rule in *Gibbs*”¹) that a debt governed by English law cannot be discharged by a foreign insolvency proceeding, provided that the creditor does not submit to that proceeding.

Despite criticism that the rule undermines co-operation between jurisdictions in cross-border insolvency proceedings, in *Re OJSC International Bank of Azerbaijan*² the Court of Appeal confirmed that the rule continues to apply and that the Cross-Border Insolvency Regulations 2006 (the “**CBIR**”) (which implement the UNCITRAL Model Law on Cross-Border Insolvency Proceedings (the “**Model Law**”)) cannot be used to subvert it. Thus, creditors holding debt governed by English law can take comfort that the protections afforded by the rule remain intact, at least for the time being.

Background

In early 2017, International Bank of Azerbaijan (the “**Bank**”) fell into financial difficulties and entered into a voluntary restructuring process under Azeri law. Following the commencement of this process, the Azeri officeholder, Ms Gunel Bakhshiyeva (as the foreign representative), applied to the English court for an order recognising the restructuring under the CBIR. The English court granted recognition to the Azeri restructuring process. This recognition gave rise to a moratorium pursuant to the CBIR which, among other things, protected the Bank from English court proceedings.

In Azerbaijan, the Bank proposed a restructuring plan pursuant to which interests of certain creditors (which included the Respondents in this case) would be discharged in full and replaced with various other “entitlements”. The plan was approved overwhelmingly by the creditors who voted on it and was sanctioned by the Azeri Court. As a matter of Azeri law, all dissenting creditors were bound by the plan, including the Respondents (whose lending to the Bank is governed by English law and who did not vote or otherwise participate in the restructuring process or submit to the jurisdiction of the Azeri Court).

The Respondents indicated that once the restructuring process came to an end and the CBIR moratorium was lifted, they would seek to enforce their English law claims against the Bank in the English courts (contrary to the terms of the restructuring plan). This led to the Azeri officeholder making an application under Article 21 CBIR for an indefinite extension of the CBIR moratorium so that it would continue even after the Azeri restructuring came to an end and the Bank had resumed operation as a going concern. Article 21 provides that the English court can, where necessary to protect the interests of creditors, grant “*any appropriate relief*”.

The Respondents, relying on the rule in *Gibbs*, objected to the application and sought permission from the English court to bring proceedings against the Bank. The Bank accepted that the Court of Appeal was bound by the rule in *Gibbs*. Accordingly, it did not directly challenge the rule, though it reserved the right to do so if the case were to proceed to the Supreme Court. Instead it argued that the Court had the power to grant an indefinite moratorium pursuant to Article 21 CBIR and therefore, the rule was limited by the CBIR.

¹ *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399

² [2018] EWCA Civ 2802

At first instance³, Mr. Justice Hildyard refused the Bank's application but granted the Bank permission to appeal to the Court of Appeal.

Decision of the Court of Appeal

The Court of Appeal, with Lord Justice Henderson giving the lead judgment, unanimously upheld the High Court's decision. The Court considered whether, pursuant to Article 21: it was appropriate to grant an indefinite moratorium which would prevent the Respondents from enforcing their English law rights pursuant to the rule in *Gibbs*; or prolong the moratorium after the end of the Azeri reconstruction.

The Court held that it could only extend the moratorium (thus preventing the Respondents from enforcing their English law rights indefinitely) if this was *necessary* to protect the interests of the Bank's creditors; and was an *appropriate* way of achieving such protection⁴. The Court found that neither condition was satisfied.

The creditors bound by the Azeri restructuring plan had received everything to which they were entitled, the Bank had resumed trading and the reconstruction was at an end. No further protection was required for the Azeri restructuring to achieve its purpose. It was material that the Bank could, in principle, have promoted a parallel scheme of arrangement in England in order to deal with the issue presented by the rule in *Gibbs*, but chose not to do so. Lord Justice Henderson surmised that the Bank likely did not adopt that approach because it would have had to treat the English creditors as a separate class and to offer them terms which they would be prepared to accept.

Lord Justice Henderson noted that it could seldom, if ever, be appropriate to grant relief under the Model Law which would have the substantive effect of overriding the Respondents' English law rights as protected by the rule in *Gibbs*. The Court was bound by the Supreme Court's decision in *Rubin v Eurofinance*⁵ in which Lord Collins held that Article

21 was concerned with procedural matters and, although it should be given a purposive interpretation and widely construed, there was nothing to suggest that it applied to the recognition and enforcement of foreign judgments against third parties. Lord Justice Henderson could find nothing in Article 21 to suggest that the procedural power to grant a moratorium could properly be used to circumvent *Gibbs* and held that it would be wrong to use such powers, or any other provisions of the Model Law as incorporated in the CBIR, to circumvent the English law rights of the Respondents under the rule in *Gibbs*.

Finally, the Court considered whether a stay could, in principle, prolong the moratorium after the end of the Azeri reconstruction. It held that it could not. Article 18 CBIR requires the foreign representative to promptly inform the English court of any substantial change in the status of the recognised foreign insolvency proceeding, or the status of the foreign representative's own appointment. This strongly implied that once the foreign proceeding has come to an end, and the foreign representative no longer holds office, there is no scope for further orders under the CBIR to be made, and any relief previously granted should terminate. Against that background, the Court it would be "anomalous" and inconsistent with the "procedural and supportive" role of the CBIR to allow a moratorium to remain in place indefinitely.

Comment

Critics of *Gibbs* suggest that the rule is outdated and is inconsistent with the principles underlying the Model Law (on which the CBIR is based), which is intended to promote co-operation in cross-border insolvencies. The criticisms to which *Gibbs* has been subject were acknowledged by the Court of Appeal, however, the Court declined to discuss them in any detail given that all parties accepted that only the Supreme Court (or indeed the legislature) could overturn the rule. Notwithstanding any potential issues posed by the rule in *Gibbs*, the Court confirmed that the rule continues to apply in this jurisdiction and that the CBIR cannot be used to by-pass the protections it provides to creditors.

3 [2018] EWHC 59 (Ch)

4 Emphasis added.

5 [2012] UKSC 46

In a speech⁶ given by Lord Neuberger in 2017 when he was President of the Supreme Court, he commented that there are “*powerful arguments*” for revisiting the *Gibbs* principle. Therefore, if this case does proceed to the Supreme Court, it may be that it will take the opportunity to re-consider the rule.

One final point to note is that the case serves as an important reminder that creditors with English law governed rights will need to balance carefully the possible benefits of participating in a foreign insolvency proceeding as against what they might recover if they do not participate and instead seek to enforce their English law rights before the English court.

If you have any questions about the issues raised in this legal update, please get in touch with your usual Mayer Brown contact or:

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6 International Insolvency Institute Annual Conference in London on 19 June 2017