

A Qualified Defence of the Rule in Gibbs

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ABSTRACT

This paper is about the controversial rule of English private international law known as the ‘rule in Gibbs’, found in the leading treatise *Dicey, Morris and Collins on the Conflict of Laws*:

A discharge from any debt or liability under the bankruptcy law of a foreign country outside the United Kingdom is a discharge from that debt or liability if, and only if, it is a discharge under the law applicable to the contract.¹

The rule has been the subject of intense criticism from US scholars and practitioners.² Critics consider that it undermines the very foundation of corporate bankruptcy as a unitary process in which individual collection efforts are replaced by a collective proceeding for all creditors. What matters, they argue, is the choice of the bankruptcy forum. The collective nature of the proceeding is fatally undermined if creditors can simply contract out of the mandatory effects of the bankruptcy proceeding by selecting a different choice of law to govern their contract. England’s refusal to acknowledge this is said to be a straightforward example of parochial and territorial self-interest. By stubbornly sticking to the rule in Gibbs, English practitioners ensure that English law governed debt contracts can only be restructured using English procedures, virtually guaranteeing their pipeline of work. For critics, this is utterly indefensible. In the paper I will, however, offer a qualified defence.

I will argue that the rule in Gibbs could, indeed, be abolished insofar as it applies to bankruptcy proceedings in which the debtor’s assets are realised and the proceeds of sale distributed, but only if international cross-border insolvency instruments offer a choice of law regime similar to that found in the European Insolvency Regulation (EIR).³ I arrive at this conclusion by analysing the pre-bankruptcy benefits to debtors of choices of law and the implications that these have in bankruptcy. When we turn

¹ Lord Collins of Mapesbury and Professor Jonathan Harris (eds), *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell 16th ed) Rule 211. The rule is named after the eponymous nineteenth century case in which it was first considered *Antony Gibbs & Sons v La Société Industrielle et Commerciale de Metaux* (1890) 25 QBD 399.

² Jay Lawrence Westbrook, ‘Comity and Choice of Law in Global Insolvencies’ (2019) 54(2) *Texas International Law Journal* 1; Insolvency Lawyers’ Association webinar ‘Introduction to the rule in Gibbs’ 26 March 2024. Many UK scholars and practitioners also object to the rule – see, for example, Irit Mevorach, ‘Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism?’ (2021) *European Business Organization Law Review* 283, 291 – 292.

³ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) OJ L 141, 5.6.2015.

to consider corporate reorganization, however, I argue that the Gibbs rule is the 'right' rule. I arrive at this conclusion by assessing the conceptual underpinning of a corporate reorganization transaction and the implications of this for the Gibbs debate. I acknowledge that the EIR choice of law regime purports to regulate corporate reorganization as well as sales and distributions in bankruptcy. I suggest, however, that this arose from the somewhat ill-thought-out addition of corporate reorganization to a regime designed for, and appropriate in, different circumstances. Specifically, I show that the choice of law rules in the EIR are a poor fit for concerns in corporate reorganization.

My paper also deals with other objections to the rule in Gibbs in this context: concerns for cost and speed (because multiple proceedings may need to be opened to handle liabilities governed by different laws); and concerns for creditor wealth maximisation (because multiple proceedings may make it harder to keep the bankruptcy estate together, leading to less value-maximising outcomes). I then arrive at my conclusion: England could abolish the rule in Gibbs for sales of assets and distribution of proceeds in bankruptcy if, and only if, UNCITRAL Working Group V is able to arrive at an acceptable international choice of law regime.⁴ The Gibbs rule, however, remains the 'right' rule for corporate reorganization.

⁴ Working Group V: Insolvency Law United Nations Commission on International Trade Law