

## English Court of Appeal Upholds "The Gibbs Rule"

### IN SHORT

**The Situation:** In *Bakhshiyeva v Sberbank of Russia*, a debtor sought to restructure English law-governed debts pursuant to an Azerbaijani restructuring proceeding. In order to prevent certain dissenting creditors from commencing enforcement proceedings against the debtor in the UK, the debtor asked the English court to provide an indefinite stay.

**The Result:** The Court of Appeal reinforced the old English common law principle known as "the rule in *Gibbs*," which prevents debt obligations governed by English law being discharged by foreign insolvency proceedings without consent.

**Looking Ahead:** *Gibbs* has been heavily criticised on the basis that the concept of "universalism" has become a central tenet in achieving a successful cross-border restructuring. However, proponents of the rule argue that creditors enter into English law contracts to access the impartiality, commerciality and due process of the English courts. Given the continuing uncertainty in relation to Brexit, the upholding of the rule in *Gibbs* is likely to be of critical importance when determining international restructuring strategies involving English law documentation.

### The Rule in *Gibbs*

The *Gibbs* rule is named for the case in which it was formulated: *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) LR 25 QBD 399*. Its effect is that, unless a creditor submits to a foreign proceeding, a foreign proceeding designed to bring about the cancellation of a debtor's obligations will discharge only those liabilities governed by the law of the country in which that proceeding took place.

In the context of the UK's current membership of the EU, *Gibbs* does not apply where an insolvency proceeding has been opened pursuant to the European Insolvency Regulation. However, following the UK's departure from the EU, the UK would need to make new arrangements with the EU to ensure the disapplication of the rule in *Gibbs* would continue. If no new arrangements are made, in the absence of consent, it will only be possible to amend English law documentation via English proceedings. The most likely consequence of this in a restructuring context is that a scheme of arrangement may be required in parallel with any local EU or other international insolvency proceeding.

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### THREE KEY TAKEAWAYS

1. The case highlights the importance of dissenting creditors not participating in a foreign proceeding in circumstances where they intend to challenge jurisdiction in the UK.



Kay V. Morley  
London



Sarah Archer  
London

2. For now, the *Gibbs* rule remains in force – therefore, English law-governed debt can only be discharged by consent of the creditor or via an English law insolvency proceeding.
3. Accordingly, parties should consider a parallel English scheme of arrangement in circumstances where a non-EU debt restructuring involves the discharge of English law-governed debt obligations. The position relative to EU restructuring after March 29, 2018 has yet to be determined.

*William J. Bettie, a trainee solicitor in the London Office, assisted with the preparation of this Commentary.*

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