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ARTICLE

Gibbs Expansion in Prosafe Further Erodes Universalism in Cross-Border Insolvency?

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Synopsis

Lord Hoffman's 'golden thread' of modified universalism in cross border insolvency in the HIH case in 2008 has obviously unravelled a little since and it would seem that the decision of Lord Ericht at first instance in the Outer House of the Scottish Court of Session in *Chang Chin Fen v Cosco Shipping (Qidong) Offshore Ltd* [2021] CSOH 94 ('Prosafe') has unravelled it a little further. *Antony Gibbs & Sons v La Societe Industrielle et Commercial des Metaux* (1890) LR 25 QB 399 ('Gibbs') has obviously been a modification of universally effective insolvency ever since it decided over 130 years ago that a foreign release of an English obligation would not be recognised in England and Prosafe appears to have expanded the application of Gibbs a little. The significant features of Prosafe seem to be as follows:

1) Gibbs has been reinforced as a part of Scots law.
2) Gibbs' effect as a substantive choice of law rule relating to the discharge of obligations on insolvency has been applied by the courts of a different jurisdiction from the law governing the obligation rather than the courts of the jurisdiction of the law governing the obligation refusing to recognise its discharge under another law.
3) The application of Gibbs in *OJSC International Bank of Azerbaijan* [2018] EWCA CIV 2802 ('Azerbaijan') to prevent a stay under the Cross-Border Insolvency Regulations 2006 ('CBIR') of action on an English law obligation purported to be discharged by completion of a foreign insolvency scheme has been extended to prevent what might have been a temporary stay under the CBIR pending imminent conclusion of a foreign insolvency scheme in which the objecting creditor might theoretically still have participated.
4) Gibbs appears to have been applied to ensure Scottish assets may be attached in future rather than to prevent the discharge of the obligation on which such an attachment might take place, being assets relative to which foreign proceedings might have been separately recognised under the CBIR and being an attachment that could not take place until action had been taken (in England) to enforce the obligation on which attachment might proceed.
5) The court would have granted the stay relative to another creditor refusing to participate in the foreign proceedings but not appearing in the Scottish proceedings to object to the stay along with the objecting creditor who did appear in the Scottish proceedings.

Facts

Prosafe SE ('Prosafe Parent') is incorporated in Norway and its subsidiary Prosafe Rigs Pte Ltd ('Prosafe Rigs') is incorporated in Singapore. Two semi-submersible rigs owned by Prosafe Rigs were located in the North Sea and were likely to require to enter Scottish territorial waters. Prosafe Rigs had previously bought a different rig from Cosco Shipping (Qidong) Offshore Ltd ('Cosco'), deferred consideration of $18.8m for which was outstanding under an English law promissory note secured over that rig and guaranteed by Prosafe Parent under an English law guarantee. Cosco was also party to an English law Deed of Co-ordination with Nordea Bank Norge ASA ('Nordea') and other senior creditors, postponing Cosco's security over the purchased rig and containing other restrictions on enforcement of Cosco's claims without Nordea's consent. Litigation and mediation was ongoing in England on the withholding by Nordea of consent to enforcement by Cosco of its claims.

Given their broader financial difficulties, Prosafe Parent and Prosafe Rigs were seeking to put in place a debt for equity swap to restructure their balance sheet and proposed to include Cosco's claims under the promissory note and guarantee in that restructuring. As Cosco and at least one other major creditor appeared unwilling to participate in this debt for equity swap, Prosafe Rigs and Prosafe Parent were putting in place schemes of arrangement under Singapore law under which the claims of Cosco and that other creditor would be compromised along with those of other creditors, if creditors meetings so resolved and the Singapore court approved the schemes. Prosafe Rigs and Prosafe Parent

had also obtained moratoria on creditor actions under a separate Singapore moratorium regime.

Prosafe Parent and Prosafe Rigs obtained an order from the Singapore court under the moratorium procedure appointing their finance director as a Foreign Representative for the purposes of the UNCITRAL Model Law on Cross Border Insolvency and authorising application thereby in other courts for assistance in implementing the Singapore moratoria and otherwise. There was concern that Cosco or others may seek to attach the North Sea rigs were they to enter Scottish territorial waters and the Foreign Representative therefore petitioned the Court of Session for recognition in Scotland under the CBIR of the Singapore moratoria as foreign main proceedings in respect of Prosafe Rigs and foreign non-main proceedings in respect of Prosafe Parent. Following the Azerbaijan case, the remedies sought on recognition broadly followed the moratorium available to a UK administration, similar in turn to those under the Singapore moratoria, rather than those applying on a UK winding up under the principle provisions of the CBIR – the most pertinent being that no legal process be instituted against Prosafe Parent, Prosafe Rigs or their property (ie, as regards Prosafe Rigs, the North Sea rigs).

The Scottish CBIR petition was made and judgment given on it prior to the creditors meetings being held under the Singapore schemes, which were due to take place shortly after the judgment was given in the Scottish case.

Judgment

Lord Ericht held (at para.[49]) that the position under Scots law is the same as in Gibbs, under reference to the comments of Lord Hope in the Supreme Court in *Heritable Bank plc v The Winding-Up Board of Landsbanki Islands hf* [2013] UKSC 13 ('Heritable Bank', at para.[44]) and then agreed (at para.[53]) with Henderson LJ's comment in the Azerbaijan case (at para.[85]) that:

> 'the court should not exercise its power to grant a stay under [article 21 of the CBIR regarding discretionary stay], going beyond the automatic stay under article 20, where to do so: a) would in substance prevent the English creditors from enforcing their English law rights in accordance with the Gibbs rule…'

Lord Ericht considered Henderson LJ's comment to apply to the Prosafe petitions and (at para.[62]) that:

> 'The purpose of the Moratoria was not, as Senior Counsel for the Petitioner suggested, to provide a breathing space for discussion with creditors but was in my view to provide a breathing space to bind Cosco and other dissenting creditors through the mechanism of a scheme',

thereby rejecting the argument made (at paras.[33] and [37]) that the Singapore moratoria should be considered separately from the Singapore schemes that may follow and the implicit argument that it was at least premature to reject a Scottish stay in support of the moratoria.

Lord Ericht considered (at paras.[56]-[60]) the moratoria to be integral to the schemes and the schemes accordingly relevant to assistance that may, or may not, be provided for the purposes of the moratoria, concluding (at para.[63]):

> 'it is highly pertinent … that … as a matter of English law, Cosco will not be bound by the Schemes and the Schemes will not extinguish the liabilities of [Prosafe Rigs] and [Prosafe Parent] … These liabilities do not, as far as English law is concerned, form part of the restructuring. Pursuing them will not, as far as English law is concerned, disrupt the implementation of the restructuring as they do not form part of that restructuring. Cosco is entitled to enforce its rights under English law, and is entitled to do so before or after the implementation of the Scheme'

having quoted and approved (at para.[47]) the then Snowden J's comment in *Nordic Trustee ASA v OGX* [2016] EWHC 25 that :

> 'I do not think that the stay … upon recognition of a collective foreign proceeding under the Model Law is intended to prevent persons whose claims are not subject to that collective proceeding from being able to pursue their claims against the company. Such persons stand outside the collective process, and it would not be appropriate to utilise the stay … to prevent them from pursuing their ordinary remedies against the company.'

Lord Ericht then rejected (at para.[67]) the petitioners' argument that the purpose of the UNCITRAL Model Law, as implemented by the CBIR, is the protection of assets as this must be qualified by the protection of creditors – and in applying the tests in the CBIR (at paras.[65]-[79]) for granting the stay emphasis was placed on Cosco's claims 'falling outside' the Singapore schemes so far as the court was concerned.

Commentary

Gibbs as Scots law

Prior to Lord Hope's comments in Heritable Bank mentioned above, there was little direct commentary in Scottish cases on the application of Gibbs in Scots law. It had been generally assumed that Gibbs does apply in Scotland and this may be supported by *Rose v McLeod* (1825) 4 S 308. However, in *Dickie v Dick* 20 December 1811 FC and *Thomas v Pellatt* (1861) 23 D 1349, enforcement of debt by civil imprisonment was refused

on the basis of release of the relevant debt by English bankruptcy and one strand of the landmark *Royal Bank of Scotland v Stein, Smith & Company* 20 January 1813 FC is to similar effect. In addition, *Rhones v Parish & Schreiber* 6 August 1776 FC can be read as protecting a German creditor arrangement in Scotland from non-acceding creditors.

Lord Hope's comments are clearly *obiter*, given the following paragraph in which the special statutory regime for cross border insolvency of credit institutions was noted as applicable rather than the common law. In addition, both Lord Hope and Lord Ericht in Prosafe dealt with the issue in a single short paragraph without analysis of potentially relevant Scottish caselaw. However, given the uncertainties in the older Scottish caselaw, the clear and direct application of Gibbs in Prosafe and the Supreme Court status of Lord Hope's comments, it is difficult not to conclude that Gibbs is now part of Scots law.

Gibbs as a substantive choice of law rule

The rule in Gibbs is normally stated as a substantive choice of law rule and Lord Ericht in Prosafe quoted (at para.[48]) the judgment in Azerbaijan which in turn quoted Fletcher's *Law of Insolvency* (5th Ed., 2017, para.30-061):

> 'According to English law, a foreign … insolvency procedure … is considered to effect the discharge only of … liabilities as are properly governed by the law of the country in which the [procedure] takes place or … are governed by some other foreign law under which the [procedure] is accorded the same effect.'

This expression of Gibbs reflects the general choice of law rule for extinction of contractual obligations in Article 12(1)(d) of the Rome I Regulation (Regulation (EC) No.593/2008, as retained by the European Union (Withdrawal) Act 2018), which is clearly a substantive choice of law rule of general application.

On the other hand, cases applying Gibbs tend to be cases in which a local creditor is seeking to enforce a local obligation locally and Henderson LJ's quote from Azerbaijan above relating Gibbs to the CBIR does refer to a stay preventing 'English creditors from enforcing their English rights'. Additionally, the exception to Gibbs, quoted again by Lord Ericht (at para.[48]) from Azerbaijan as submission to foreign insolvency proceedings being acceptance of governance of contractual rights thereby has a slightly procedural flavour which might add to an inference that Gibbs is actually an ad hoc rule favouring the local law over foreign rules.

However Prosafe clearly applies Gibbs as a substantive choice of law rule relating to the discharge of contractual obligations as it involved a Scottish court refusing a stay that might have prevented a Chinese creditor from enforcing an English right. Had Cosco's claim been governed by the law of a further jurisdiction applying the rule in Gibbs the same result might have been expected and had Cosco's claim been governed by the law of Brazil the decision may have been different, as it would appear that the Brazilian courts had granted a corresponding application by Prosafe Parent and Prosafe Rigs relative to the rig secured to Cosco which was located there.

Extending Gibbs and Azerbaijan?

The full quote by Lord Ericht (at para.[53]) of Henderson LJ in the Azerbaijan case (at para.[85]) is that:

> 'the court should not exercise its power to grant a stay under [article 21 of the CBIR regarding discretionary stay], going beyond the automatic stay under article 20, where to do so: a) would in substance prevent the English creditors from enforcing their English law rights in accordance with the Gibbs rule and/or b) *would prolong the stay after the Azeri reconstruction has come to an end*'.

Lord Ericht (at para.[53]) considered the text in italics to relate to the particular circumstances of the Azerbaijan case. That may be the case as a fact relevant to the application of the CBIR tests for allowing a stay in a given case, but the fact that the Azeri procedure had been completed meant that the stay in that case could not be assisting the procedure itself but rather seeking to implement it in more direct conflict with Gibbs.

In Prosafe there was no current purported Singapore release of Cosco's claims, no current action to constitute those claims, no court order for payment of those claims and no assets currently available in Scotland to satisfy any such court order. It was also still possible for Cosco to choose to participate in the Singapore schemes.

Clearly the scheme meetings were imminent and equally clearly Cosco remained adamant they would not be participating in those meetings. It also appeared very likely that other creditors would pass the resolutions at those meetings and that the Singapore court would then approve the schemes, which would then purport to discharge Cosco's claims. If Cosco won its action against Nordea in the English courts under the Deed of Co-ordination it might then have raised an action in the English courts to constitute its claims.

If the Singapore release was very likely and imminent and the Scottish stay would have prevented that English action to constitute Cosco's claims, paragraph a) of Henderson LJ's test in Azerbaijan would seem to have been satisfied. It was noted (at para.[30]) that Regulation 7(1) of the CBIR provides for Scottish court orders under the CBIR to be enforced in England as if they were English court orders and so an action to constitute Cosco's claims in England would have been stayed.

However, the action on the Deed of Co-ordination would also require to have been resolved and unless it was clear that the action on the Deed of Co-ordination would fall through compromise of the senior creditors' claims on approval of the schemes, it is arguable that the action on the Deed of Co-ordination rather than a Scottish CBIR stay would have been preventing constitution of Cosco's claims in England. The relevance of these arguments to the prevention 'in substance' of enforcement of Cosco's claims was not articulated in Lord Ericht's judgment in Prosafe.

Another issue not articulated fully in Lord Ericht's judgment is why preventing enforcement of rights in paragraph a) of Henderson LJ's test in Azerbaijan extends beyond preventing an action to constitute them to preventing assets being available against which to enforce a judgment constituting those rights. Clearly Lord Ericht thought that should be the case, presumably as 'in substance' preventing the enforcement of those rights once constituted. If there are obvious assets against which a judgment is likely to be enforced this seems a reasonably strong argument and it may be that the North Sea rigs were, in reality, just such assets.

However Lord Ericht appears to have placed more emphasis when analysing the test in article 21(1) of the CBIR that a remedy be necessary to protect the assets of the debtor or the interests of the creditors on the creditors rather than the assets, and on the interests of Cosco as a creditor rather than the interests of all of the creditors of Prosafe Parent and Prosafe Rigs. Lord Ericht noted (at para.[71]) that 'it is not necessary for the assets to be protected from [Cosco's] claims … as these claims fall outside the measures to be taken for the reorganisation' and (at para.[72]) that '[t]he majority creditors have an interest in the Schemes, but, so far as remedies within Great Britain are concerned, this interest does not extend to matters which, according to English law, fall outside the Schemes, such as [Cosco's claims]'. There is no discussion of why the assets should not be preserved for creditors as a whole in addition to a simple statement (at para.[72]) that 'it is not necessary to protect the interests of other creditors'. Again, however, if the North Sea rigs were obvious assets which might shortly have been attached by Cosco, preserving them for all creditors by granting a stay seems more clearly contrary to the spirit of Gibbs.

No comment was made in this context on the status of the proceedings in relation to Prosafe Rigs as foreign main proceedings in relation to its North Sea rigs, nor any comparison drawn with the proceedings in relation to Prosafe Parent as foreign non-main proceedings, although it can safely be assumed that the more restricted scope of recognition of foreign non-main proceedings would have made a stay relative to any Scottish assets of Prosafe Parent less likely still.

Some possible consequences of Prosafe

- One possible outcome of Prosafe might have been a temporary stay excluding actions to constitute Cosco's claims (in addition to the exclusion from the stay accepted of actions against third parties, like the action on the Deed of Co-ordination). This temporary stay might then have been lifted were Cosco to get judgment in England on those claims or following approval of the Singapore schemes. This would have facilitated the operation of the business of Prosafe Rigs in the interim for the potential benefit of all of its creditors. It is not impossible that a different fact pattern may lead to this approach in a future case.
- If the imminence of approval of the schemes and the clarity and imminence of Cosco's reliance on Gibbs were particularly significant factors in Prosafe, it is possible that action may be taken earlier in a restructuring process under the CBIR in order to obtain a stay to seek to protect that process, although this would need to be balanced with CBIR remedies being considered necessary by the court granting them. Prosafe may, alternatively, reinforce the need in many circumstances to have parallel UK restructuring proceedings where Gibbs is a real threat to main restructuring proceedings elsewhere.
- If Prosafe means that assets may be kept available for future attachment by denying a stay under the CBIR, might other remedies, such as entrusting administration of local assets to a foreign representative under Article 21(1)(e), be restricted where such assets may be removed from the jurisdiction when they would otherwise be available for attachment by a creditor protected by Gibbs?
- As powers of Irish examiners or of other relevant favoured foreign insolvency practitioners are sometimes given effect wholesale in the UK under the more extensive cross border insolvency regime in s.426 of the Insolvency Act 1986, might Prosafe raise questions about the breadth of the recognition or effects of those powers where some creditors may not participate in the relevant foreign proceedings and may seek to interrupt the exercise in the UK of relevant powers by analogy to Prosafe?
- As Lord Ericht indicated the stay would have been granted relative to the creditors not participating in the Singapore proceedings and not appearing in the Scottish proceedings had the petitioners sought it, such creditors should ensure they participate actively along with other creditors opposing CBIR remedies sought by their debtor.

Clearly more is to be expected in future on the CBIR, on Gibbs and on wrinkles in cross border insolvency more generally, particularly as EU restructuring regimes develop.

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