

# Defending the Rule in *Antony Gibbs*

By Neerav Srivastava

The Rule in *Antony Gibbs*[1] ('the Rule') provides that if the proper law of a contract is Australian, then a discharge of the debt by a foreign jurisdiction will not be a discharge in Australia unless the creditor submitted to the foreign jurisdiction.[2] The Rule is much maligned, especially in insolvency circles, and has been described as "Victorian".<sup>[3]</sup> In 'Heritage and Vitality: Whether *Antony Gibbs* is a Presumption'[4] I seek to defend the Rule.

## Presumption

The article begins by arguing that, in the modern context, that the Rule should be recognised as a Presumption as to party intentions.

Briefly, *Gibbs* was decided in the 1890s. At the time, the prevailing view was that the proper law of a contract was either the law of the place of the contract or its performance.[5] This approach was based on apportioning regulatory authority between sovereign States rather than party intentions. To apply a foreign proper law in a territory was regarded as contrary to territorial sovereignty. Freedom of contract and party intentions were becoming relevant to proper law but only to a limited extent.[6]

As for *Gibbs*, Lord Esher's language is consistent with the 'Regulatory Approach':

It is clear that these were English contracts according to two rules of law; first, because they were made in England; secondly, because they were to be performed in England. The general rule as to the law which governs a contract is that the law of the country, either where the contract is made, or where it is to be so performed that it must be considered to be a contract of that country, is the law which governs such contract ...[7]

Notice that the passage makes no reference to party intentions.

By the early 20<sup>th</sup> century, the position had evolved in that it was generally accepted that party intentions determined the proper law.[8] Even so, it was not until the late 1930s that the Privy Council stated that the position was “well-settled”. [9] Party intentions has evolved into being the test for proper law universally.[10]

Under the modern approach, party intentions as to proper law are a question of fact and not territorial. Parties are free to choose a proper law of a jurisdiction with which they have no connection.[11] As a question of fact, party intentions are better understood as a ‘Presumption’. Further, the Presumption might be displaced. The same conclusion can be reached via an implied term analysis.

The parties can also agree that there is more than one proper law for a contract. That, too, is consistent with party autonomy. Under *depeçage*, one law can govern a contract’s implementation and another its discharge.[12] Likewise, the Second Restatement in the US[13] and the International Hague Principles allow a contract to have multiple proper laws.[14]

## **Cross-border Insolvency**

The second part of the article addresses criticisms of *Gibbs* by cross-border insolvency practitioners. In insolvency, issues are no longer merely between the two contracting parties. The body of creditors are competing for a share of a company’s remaining assets. Under *pari passu* all creditors are to be treated equally. If a company is in a foreign liquidation, and its discharge of Australian debt is not recognised by an Australian court, *Gibbs* appears inconsistent with *pari passu*. Specifically, it appears that the creditor can sue in Australia and secure a disproportionate return.

That is an incomplete picture. While the foreign insolvency does not discharge the debt in Australia, when it comes to enforcement comity applies. Comity is agitated by a universal distribution process in a foreign insolvency. Having regard to comity, the Australian court will treat local and international creditors equally.[15] If creditors are recovering 50% in a foreign insolvency, an Australian court will not allow an Australian creditor to recover more than 50% at the enforcement stage. Criticisms of the Presumption do not give due weight to enforcement.

*Gibbs* has been described as irreconcilable with the United Nations Commission on International Trade Law *Model Law on Cross-Border Insolvency 1997* (the *1997 Model Law*),<sup>[16]</sup> which is generally<sup>[17]</sup> regarded as embodying ‘modified universalism’. That, it is submitted, reflects a misunderstanding.

Historically, in a cross-border insolvency “territorialism” applied.<sup>[18]</sup> Each country collected assets in its territory and distributed them to creditors claiming in those insolvency proceedings. In the past 200 years, universalism has been applied.<sup>[19]</sup> Under ‘pure universalism’, there is only one process for collecting assets globally and distributing to all creditors. Modified universalism:

*accepts the central premise of [pure] universalism, that assets should be collected and distributed on a worldwide basis, but reserves to local courts discretion to evaluate the fairness of the home-country procedures and to protect the interests of local creditors ...[20]*

Modified universalism can be understood as a structured form of comity.<sup>[21]</sup> It asks that all creditors be treated equally but is a tent in that it allows States to choose how to protect the interest of creditors. A State may choose to couple recognition of the foreign insolvency - and the collection of assets in its jurisdiction - with the discharge of creditors’ debts. However, the *1997 Model Law* does not require a State to follow this mechanism.<sup>[22]</sup> Under the Anglo-Australian mechanism (a) a debt may not be discharged pursuant to *Gibbs* (b), but creditors are treated equally at the enforcement stage. It is a legitimate approach under the tent that is modified universalism.

[1] *Antony Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399.

[2] Albert Venn Dicey, *A Digest of the Law of England With Reference To The Conflict of Laws* (Stevens, 1896) rule 113.

[3] Varoon Sachdev, “Choice of Law in Insolvency Proceedings: How English Courts’ Continued Reliance on the Gibbs Principle Threatens Universalism” (2019) 93 *American Bankruptcy Law Journal* 343.

[4] (2021) 29 *Insolvency Law Journal* 61. Available at Westlaw Australia.

- [5] Alex Mills, *Party Autonomy in Private International Law* (CUP, 2018) 53, citing *Peninsular and Oriental Steam Navigation Co v Shand* (1865) 16 ER 103.
- [6] Alex Mills, *The Confluence of Public and Private International Law* (CUP, 2009), 53.
- [7] *Antony Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399, 405 (*Gibbs*).
- [8] Alex Mills, *Party Autonomy in Private International Law* (CUP, 2018) 56, Lord Collins et al, *Dicey, Morris & Collins, The Conflict of Laws* (Sweet & Maxwell, 15<sup>th</sup> ed, 2017), [32-004]-[32-005].
- [9] *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277.
- [10] Martin Davis et al, *Nygh's Conflict of Laws in Australia* (Lexis Nexis, 2019), [19.6]; Lord Collins et al, *Dicey, Morris & Collins, The Conflict of Laws* (Sweet & Maxwell, 15<sup>th</sup> ed, 2017), [32-004]-[32-005], [32-042]; and Principles on Choice of Law in International Commercial Contracts promulgated by the Hague Conference on Private International Law in 2015.
- [11] *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, Martin Davis et al, *Nygh's Conflict of Laws in Australia* (Lexis Nexis, 2019), [19.15].
- [12] *Club Mediterranee New Zealand v Wendell* [1989] 1 NZLR 216, *Olex Focas Pty Ltd v Skodaexport Co Ltd* [1998] 3 VR 380.
- [13] *Restatement (Second) of Contracts* § 188.
- [14] Principles on Choice of Law in International Commercial Contracts promulgated by the Hague Conference on Private International Law in 2015.
- [15] *Galbraith v Grimshaw* [1910] AC 508, *Chapman v Travelstead* (1998) 86 FCR 460, *Re HIH Casualty & General Insurance Ltd* (2005) 190 FLR 398.
- [16] In Australia the 1997 Model Law was extended to Australia by the *Cross-Border Insolvency Act 2008* (Cth).
- [17] Adrian Walters, "Modified Universalisms & the Role of Local Legal Culture in the Making of Cross-border Insolvency Law" (2019) 93 *American Bankruptcy Law*

*Journal* 47, 64.

[18] Although Rares J has pointed out, “centuries earlier, maritime lawyers had developed a sophisticated and generally harmonious system of dealing with cross-border insolvencies”: Steven Rares, “Consistency and Conflict - Cross-Border Insolvency” (Paper presented at the 32nd Annual Conference of the Banking & Financial Services Law Association, Brisbane, 4 September 2015).

[19] *Re HIH Casualty & General Insurance Ltd* [2008] 1 WLR 852, [30]; [2008] UKHL 21.

[20] Jay Lawrence Westbrook, “Choice of Avoidance Law in Global Insolvencies” (1991) 17 *Brooklyn Journal of International Law* 499, 517.

[21] UNCITRAL, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-border Insolvency* (2014) [8].

[22] *Akers v Deputy Commissioner of Taxation* (2014) 223 FCR 8; [2014] FCAFC 57. See too *Re Bakhshiyeva v Sberbank of Russia* [2019] Bus LR 1130 (CA); [2018] EWCA 2802.