

KIRKLAND ALERT

November 5, 2018

Agrokor's Landmark Dual Recognition Proceedings in the U.K. and U.S.; Bankruptcy Court Finds *Gibbs* Rule Does Not Prevent Recognition and Enforcement Under Chapter 15

Following the first contested recognition application in the U.K. under the *Cross Border Insolvency Regulations 2006*, in which the High Court of England & Wales granted recognition of Agrokor d.d.'s "extraordinary administration" proceedings,¹ Agrokor has now also succeeded in its application for Chapter 15 recognition in the U.S.

Background

Agrokor's ground-breaking restructuring was the largest in Europe in 2017 and 2018.

Agrokor d.d. is the holding company of an integrated food-related group of companies headquartered in Croatia. At the time of filing, its annual revenues and funded debt were in the order of €7 billion each,² it had 60,000 employees, and directly accounted for approximately 15 percent of Croatia's GDP.

Given the importance of the Agrokor group to the Croatian and regional economy, the Croatian Government introduced a new law, the *Law on Extraordinary Administration Proceeding in Companies of Systemic Importance for the Republic of Croatia*, passed on April 6, 2017. On April 10, 2017, the Croatian court ordered that Agrokor be made subject to an extraordinary administration.

On July 4, 2018, after over a year of hard-fought negotiations and multiple litigation proceedings, creditors holding over 80 percent of claims against Agrokor voted to approve a settlement agreement providing for a comprehensive restructuring.

On October 24, 2018, after almost two months of review and deliberation, the U.S. Bankruptcy Court for the Southern District of New York issued a written opinion granting Agrokor d.d. and its affiliates full Chapter 15 recognition of the Croatian restructuring proceedings and court-approved settlement agreement.³ The opinion is especially important because of its analysis of the *Gibbs*⁴ rule, an English common-law principle dating to 1890 that generally restricts recognition of the discharge or modification of debt except in accordance with the law of the underlying

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contract.

In addressing the *Gibbs* rule in the context of an insolvency proceeding, the U.S. court ultimately favored the modified universalism of the UNCITRAL Model Law on Cross-Border Insolvency over the territorialism of the *Gibbs* rule.⁵ As a result, foreign companies can now be confident that there is a path to obtaining U.S. enforcement of a non-U.S., non-U.K. restructuring of English-law-governed debt. This *Alert* summarizes the Chapter 15 cases and the main takeaways from the U.S. court's opinion.

Agrokor's Chapter 15 Cases

On July 12, 2018, shortly after obtaining Croatian approval of the settlement agreement, Agrokor filed for Chapter 15 recognition. The U.S. bankruptcy court conducted a hearing on August 27, 2018, and entered an order on September 21, 2018, recognizing the Croatian proceedings as foreign main proceedings — the first time any Croatian proceeding had received Chapter 15 recognition. The court reserved on the express recognition of the terms of the settlement agreement related to Agrokor's English-law-governed debt and decided those issues in its October 2018 written opinion.

In his written opinion, Judge Glenn explained that recognition of reorganization plans should be granted where certain factors are present.⁶ Judge Glenn found that those factors were present in Agrokor's case. Nonetheless, he expressed concerns that recognizing the *Croatian* court's discharge of English-law-governed debt would offend the principles of comity with the *English* courts.

As noted above, the *Gibbs* rule generally provides that the discharge or modification of a debt under the laws of a foreign country, or by a foreign court, will be recognized (as a matter of English law) only if the debt is governed by the law of that foreign country. In the *Agrokor* decision, Judge Glenn resolved concerns regarding the *Gibbs* rule with an extended critique, ultimately finding that the rule is incompatible with modern international insolvency law and the modified universalism favored by the UNCITRAL Model Law and Chapter 15. Thus, Judge Glenn found, the *Gibbs* rule offered no legitimate reason to decline to recognize Agrokor's settlement agreement in the U.S.

More specifically, while *Gibbs* remains influential in Canada, Australia and Hong Kong and was followed in the recent *International Bank of Azerbaijan* case in the U.K.,⁷ Judge Glenn pointed out the rule's "seeming incongruence with the . . . Model Law and a broad consensus of international insolvency practitioners and jurists."⁸

Judge Glenn contrasted *Gibbs* with another 19th-century case, *Canada Southern Railroad. v. Gebhard*.⁹ The U.S. Supreme Court's reasoning in *Gebhard* was consistent with the reasoning provided by the Supreme Court of Singapore's Justice Kannan Ramesh in his opinion in *Pacific Andes Resources Development Ltd*, cited with approval by Judge Glenn.¹⁰ Judge Glenn explained that in Justice Ramesh's opinion, "parties to a contractual relationship governed by the law of a jurisdiction

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adhering to the *Gibbs* rule should be attributed with the expectation that their claims might be discharged in proceedings in a jurisdiction where the debtor has an established connection based on residence or ties of business.”¹¹

Judge Glenn further contrasted *Gibbs* with the U.S.’s *Gebhard*¹² and Singapore’s *Pacific Andes*¹³ on the issue of whether a person dealing with a foreign company subjects himself to the insolvency laws of that foreign country.¹⁴ Judge Glenn pointed to two criticisms of England’s contract-law view of foreign insolvency proceedings.

- *First*, a fundamental tenet of modern insolvency law is that creditors of the same class are entitled to equality of distribution. But the *Gibbs* rule could result in a creditor holding a claim governed by English law to receive a greater percentage recovery than other creditors with similar claims, thereby “violat[ing] the fundamental principle of equality of distribution.”¹⁵
- *Second*, bankruptcy is an *in rem* proceeding, and as Judge Glenn noted, citing commentary, “framing the issue of which law should govern a creditor’s rights in a bankruptcy as a solely contractual issue between two parties overlooks orthodox English classification of bankruptcy as an *in rem* proceeding.”¹⁶

Ultimately, the U.S. court concluded that it was appropriate to extend comity to the settlement agreement, which will be recognized and enforced in full in the U.S. — including the provisions modifying the English-law-governed debt.

Takeaways

While the U.S. court’s holding only applied to recognition and enforcement of Agrokor’s settlement agreement, the opinion signals that the *Gibbs* rule should not be an obstacle to the enforcement of foreign insolvency rulings in the U.S. The decision will be influential on other courts (both in and outside the U.S.) and provide a helpful roadmap to stakeholders in applying comity principles in international insolvency law.

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Kirkland & Ellis represented the extraordinary administrator and foreign representative of Agrokor in its Croatian restructuring and certain recognition proceedings around the world, including the landmark recognition of the Croatian proceedings in the United Kingdom as well as the Chapter 15 recognition proceedings described in this *Alert*.

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- 1 *In the matter of Agrokor DD and in the matter of the Cross-Border Insolvency Regulations 2006*, High Court, Chancery Division, November 9, 2017 ([2017] EWHC 2791 (Ch)).
 - 2 2016 annual accounts.
 - 3 *In re Agrokor d.d.*, No. 18-12104 (Bankr. S.D.N.Y. Oct. 24, 2018) (MG). Accounting for approximately 15 percent of the entire gross domestic product of Croatia, Agrokor is the largest company in Croatia.
 - 4 *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890), English Court of Appeal.
 - 5 See footnote 3 at 32 (“The Model Law is often described as an attempt to create modified universalism, which essentially entails allowing courts outside of debtors’ home countries to open and maintain secondary cases supplemental to the main proceedings.” (citing Ian G. Williams & Adrian J. Walters, *Modified Universalism in Our Time? A Look at Two Recent Cases in the U.S. and U.K.*, 37-JUL Am. Bankr. Inst. J. 24 (2018)), 49 (“The essence of the Gibbs rule, on the other hand, is territorialism.”)).
 - 6 See *id.* at 43–45. The factors noted by the U.S. court included: (i) “whether the foreign proceeding provided a full and fair opportunity for creditors to be heard consistent with due process”; (ii) “whether the plan was approved by the debtor’s creditors and the foreign court”; (iii) whether insider votes were needed to obtain approval of the plan in the foreign jurisdiction; and (iv) the *Finanz* factors for procedural fairness, including: “(1) whether creditors of the same class are treated equally in the distribution of assets; (2) whether the liquidators are considered fiduciaries and are held accountable to the court; (3) whether creditors have the rights to submit claims which, if denied, can be submitted to a bankruptcy court for adjudication; (4) whether the liquidators are required to give notice to potential claimants; (5) whether there are provisions for creditors meetings; (6) whether a foreign country’s insolvency laws favor its own citizens; (7) whether all assets are marshalled before one body for centralized distribution; and (8) whether there are provisions for an automatic stay and for the lifting of such stays to facilitate the centralization of claims.” *Id.* (citing *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 249 (2d Cir. 1999)).
 - 7 *Id.* at 48–49 (citing Ian F. Fletcher, *Insolvency in Private Int’l Law*, Oxford Private International Law Series at 130 (2d ed, 2005); *Bakhshiyeva v. Sberbank of Russia*, [2018] EWHC 59 (Ch)). The judgment in *Bakhshiyeva v. Sberbank of Russia* — which is commonly referred to as the *International Bank of Azerbaijan* case — was appealed, and arguments have been presented to the English Court of Appeal. As of the date of this *Alert*, the decision of the English Court of Appeal is still pending).
 - 8 *Id.* at 47–48 (citing Kannan Ramesh, *The Gibbs Principle: A Tether on the Feet of Good Forum Shopping*, 29 Sing. Acad. L.J. 42, 43 (2017)).
 - 9 *Id.* at 48 n. 15 (citing 109 U.S. 527, 537–38 (1883)). In that opinion, the U.S. Supreme Court said “every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere.” *Id.*
 - 10 See *Id.* at 50–51 (citing *Pacific Andes Resources Development Ltd*, [2016] SGHC 210).
 - 11 *Id.* at 51.
 - 12 *Id.* at 51 n. 17 (“Lord Collins’ view about what is ‘unrealistic’ obviously differs markedly from the view of the Chief Justice Waites in *Gebhard*, decided in 1883, that everyone who deals with a

foreign corporation impliedly subjects himself to foreign law, including a discharge from liability.” (citing Gebhard, 109 U.S. at 537–38)).

13 *Id.* at 51 (“Justice Ramesh’s view also differs from the more recent Rubin decision, in which Lord Collins declares it ‘wholly unrealistic’ that ‘a person who sells goods to a foreign company accepts the risk of the insolvency legislation of the place of incorporation’ without providing further explanation on the point.” (citing Rubin [2012] UKSC 46 at 116 (Eng.))).

14 *Id.*

15 *Id.* at 52.

16 *Id.*

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