RULE IN GIBBS: THE CONTINUATION OF TERRITORIALISM BY OTHER MEANS?

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The 19th-century Rule in Gibbs has recently been given a new life by the England and Wales High Court: the Court held that a debt can only be discharged under the law chosen by the parties to govern the contract. This principle strikes at the core of the debate over which jurisdiction should be in charge of the insolvency proceedings of international companies. Universalists argue in favor of centralizing proceedings in one single jurisdiction, while territorialists believe that each jurisdiction should govern the assets located in its territory. This Column argues that the Rule in Gibbs has been mistakenly lumped together with territorialism. It questions both the efficiency and the moral rationales for favoring universalism over the Rule in Gibbs. In doing so, it opens the way for the Rule in Gibbs to be given more serious consideration by scholars and policymakers in this normative debate.

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Introduction

In 1888, the legal scholar John Lowell argued that it would generally be more efficient to manage the insolvency of a debtor through a single proceeding in a single jurisdiction rather than through multiple proceedings across various jurisdictions.[1] Nonetheless, in 2018, the England and Wales High Court affirmed a High Court decision refusing to extend a moratorium on English law-governed debt beyond the length of the foreign proceedings that had initially justified the stay on English proceedings, on the basis that an extension would amount to discharging English-law governed debt before a foreign court.[2] In doing so, the High Court reaffirmed the controversial "Rule in Gibbs," according to which a debt can only be deemed discharged by English courts if it has been discharged "under the law applicable to the contract."[3] The eponymous Gibbs decision dates back to the late 19th century, when the Court of Appeals rejected the idea that an English-law governed obligation could have been discharged under the French liquidation proceedings of the debtor.[4] This rule's contrast with Lowell's above-mentioned contemporary aspiration to centralize insolvency proceedings in one jurisdiction may seem to crystalize the long-standing debate in international insolvency between universalism and territorialism.[5] On the one hand, territorialism holds that only bankruptcy proceedings started in one jurisdiction can decide the allocation of the debtor's assets which are located within said jurisdiction.[6] On the other hand, universalism refers to a legal system in which a single court, applying a single law, would be competent to preside over the entirety of a firm's assets during insolvency proceedings, regardless of their actual location.[7] Beyond this somewhat simplified dichotomy, a third way seems to have emerged from practice, a so-called "modified universalism" under which a main proceeding is still opened in the "home country" of the debtor, while remaining open to the possibility of complementary proceedings in other jurisdictions—for instance, where assets or creditors

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[1] John Lowell, *Conflict of Laws as Applied to Assignments of Creditors*, 1 Harv. L. Rev. 259, 264 (1888), cited in Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98(7) Mich. L. Rev. 2177, 2178 (2000).

[2] OJSC International Bank of Azerbaijan [2018] EWCA Civ. 2802 [United Kingdom]; Katharina Crinson & Adam Gallagher, *Fighting on: the rule in Gibbs survives another day*, Corp. Rescue and Insolvency 47 (2019).

[3] Kannan Ramesh, *The Gibbs principle: A Tether on the Feet of Good Forum Shopping*, 29 Sg. Ac. L. J. 42, 44 (2017).

[4] *Id.* at 43–44.

[5] Antony Gibbs & Sons v. La Societe Industrielle et Commerciale des Metaux (1890) 25 QBD 399 [United Kingdom].

[6] Edward Adams & Jason Fincke, *Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism*, 15 Colum. J. Eur. L. 43, 55 (2009).

[7] *Id.* at 48.

are located.[8] There is substantial academic support for universalism which casts the Rule in Gibbs by English courts as "cleav[ing] to the outmoded philosophy of territorialism."[9] Thus, this thorny choice-of-law issue raises various questions: even though it empowers contracting parties to elect the law governing their agreement, why is the Gibbs principle seen as bolstering a territorialist agenda? If "pure universalism"[10] is a scholarly utopia, is the second-best strategy to emulate it to the extent possible, or is there an argument for an alternative welfare-maximizing legal framework?[11] How does the Rule in Gibbs for choice-of-law fit in the balance between striving for welfare-maximizing outcomes and giving weight to noneconomic considerations? In the first part, this paper will examine the "law and economics" appeal of universalism relative to the Rule in Gibbs (II), before suggesting that it does not fit the classical universalist-territorialist binary (III). Having shown that universalism is no panacea, this paper takes a functional comparative law approach to argue that the Rule in Gibbs can be reconciled with a pragmatic approach to modified universalism (IV).

I. Universalism: An Efficiency Panacea?

The immediate difficulties raised by the Rule in Gibbs highlight the intellectual appeal of universalism, evident through a law and economics approach to international insolvency situations.[12] However, some of the purported benefits of universalism over territorialism also serve to highlight that the Rule in Gibbs brings new solutions to the efficiency debate.

A. The Benefits of Universalism in Perspective with Gibbs

The recent reaffirmation of the Rule in Gibbs jeopardized the outcome of an Azeri restructuring since the creditors of the English law-governed debt threatened to make their claims before English courts as soon as the Azeri proceedings ended, and the stay granted by English courts had been

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[8] *Id.* at 50; Irit Mevorach, *Modified Universalism as Customary International Law*, 20 Tex. L. Rev. 1403 (2018).

[9] Ramesh, *supra* note 3, at 42; *see* Robert K. Rasmussen, *Where Are All The Transnational Bankruptcies? The Puzzling Case For Universalism*, 32(3) Brook. J. Int'l. L. 984 (2007) (describing the "near-consensus" in academic literature in favor of universalism); *see also* Frederick Tung, *Is International Bankruptcy Possible?*, 23 Mich. J. Int. L. 31, 32–33 (2001) (citing the extensive support for universalism).

[10] Adams & Fincke, *supra* note 6, at 49.

[11] *See* Tung, *supra* note 9, at 33 (on the impossibility of achieving universalism and the need for alternatives).

[12] *See* Richard A. Posner, *The Law and Economics Movement*, 77 Am. Ec. Rev. 1 (1987) (describing the law and economics method of analysis).

lifted.[13] By avoiding such inefficient duplication of proceedings through the centralization of the treatment of the entirety of all the debtor's assets, universalism is hailed as a way to substantially decrease transaction costs.[14] Universalism is also seen as more congruent with the principles of orderly bankruptcy proceedings, which rely on staying pursuits and obligations to prevent a "race-to-the-courthouse"[15] and thereby potentially preserving the "going-concern" value of the firm rather than forcing it into liquidation.[16] The fear is that territorialism would lead to such disorder on an international scale, by incentivizing each creditor to "grab" the assets in a given jurisdiction for a local creditor.[17] This concern is relevant to the Rule in Gibbs as it could lead to a "race-to-courthouses" across different jurisdictions were it not mitigated by the recognition of the foreign proceedings and the accompanying initial stay of execution against the debtor's assets under article 20 of Cross-Border Insolvency Regulations ("CBIR") of 2006, which implemented the UNCITRAL Model Law in the UK.[18] Beyond these direct cost reductions, Bebchuk and Guzman also demonstrate that territorial rules may distort investment incentives as domestic creditors may overinvest to shift some losses to foreign creditors.[19]

B. An Imperfect Fit for the Critique of Territorialism

Universalist scholars also argue that the uncertainty that would arise in some cases over the "home jurisdiction" in universalism is lower than the uncertainty that could arise when the proceedings relate to the location of each asset at the time of the bankruptcy under territorialism, as they might be opportunistically moved on the eve of the opening of proceedings.[20] In this regard, the Gibbs principle does not seem to fit the territorialist framework as it is not premised on the physical location of assets but rather refers to the choice-of-law clause in the agreement. If enforced by courts, it seems that a

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[13] Crinson & Gallagher, *supra* note 2, at 47.

[14] Lucian A. Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J. L. & Econ. 775, 778 (1999).

[15] *See* Mark J. Roe, *Three Ages of Bankruptcy*, 7 Harv. Bus. L. Rev. 188, 191–92 (2017).

[16] Jay L. Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law & Choice of Forums*, 65 Am. Bank. L. J. 457, 465–66 (1991) [hereinafter Westbrook, *Theory and Pragmatism*], cited in Robert K. Rasmussen, *Resolving Transnational Insolvencies Through Private Ordering*, 98 Mich. L. Rev. 2252, 2257 (2000).

[17] Westbrook, *Theory and Pragmatism*, *supra* note 16, at 465–66, cited in Rasmussen, *supra* note 16, at 2257.

[18] Crinson & Gallagher, *supra* note 2, at 47.

[19] Bebchuk & Guzman, *supra* note 14, at 787–90 (showing that when a territorialist rule provides an advantage to domestic creditors, they will be able to offer a lower interest rate than foreign creditors, thereby distorting investment decisions); Rasmussen, *supra* note 16, at 2256.

[20] Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 Mich. L. Rev. 2177, 2199 (2000), cited in Tung, *supra* note 9, at 42.

clear choice by the parties trumps even the purest universalism in terms of predictability. Hence, this argument is a limitation to the purported benefits of universalism when compared to Gibbs.

Likewise, proponents of universalism argue that there are information costs associated with becoming proficient with the insolvency rules of the jurisdiction where assets could be located and monitoring asset location.[21] If a creditor is familiar with German insolvency law, it might obtain covenants to prevent the debtor's assets from leaving Germany, but will have to monitor its enforcement and price in the risk that they are relocated anyway.[22] The Rule in Gibbs also avoids this caveat of territorialism as parties have the option of choosing to be subjected to rules they are already familiar with, except to the extent that an unfamiliar legal framework has been selected by prior creditors. In this case, new creditors must get acquainted with these laws to set the terms of the new loan that will be offered.[23] However, it seems unlikely to be a major hurdle to the efficiency of the Rule in Gibbs for two major reasons. First, since creditors will translate the cost of understanding the terms of unfamiliar insolvency rules selected by pre-existing debt agreements into a higher interest rate charged to the debtor, debtors will be incentivized to get financing governed by a law that future lenders are likely to know. Second, it is possible that giving parties the freedom to choose the law under which their debt would be discharged would lead to the emergence of favorable "debtor havens" jurisdictions, reducing the likelihood of encountering an unknown applicable law.[24] Hence, while universalism seems to make a compelling argument of welfare-enhancement over that of territorialism, it is not clear that the Gibbs principle fits either side of the binary. A critical examination of its theoretical origins is therefore required to assess whether it has an "affinity with territorial[ism]."[25]

II. Beyond the Dichotomy: Gibbs As a Third Option?

Understanding the theoretical roots of territorialism and universalism makes it evident that the Rule in Gibbs frees itself from the binary. Indeed, it seems to reject the premise of each of these well-trodden paths, preferring instead to rely on a belief in free market mechanisms.

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[21] Guzman, *supra* note 20, at 2198, cited in Tung, *supra* note 9, at 42.

[22] *Id.*

[23] *See* Rasmussen, *supra* note 16, at 2261 (describing the criticism levied by LoPucki against "bankruptcy selection clauses," but this is also applicable, by analogy, to choice of law clauses).

[24] *Id.* at 2255 (discussing the risks of forum shopping through "bankruptcy selection clauses").

[25] Look Chan Ho, Cross-Border Insolvency: Principles and Practice 4.096–4.107 (Sweet & Maxwell, 2016), cited in Riz Mokal, *Shopping and scheming and the rule in Gibbs*, South Sqr. Dig. 58, 61 (2017).

A. The Legal History of Territorialism and Universalism

Territorialism seems most consistent with the principles championed by the proponents of "vested rights" in the choice-of-law literature, such as Beale and Dicey.[26] According to this school of thought, rights "originating" in a jurisdiction should be recognized everywhere.[27] On the other hand, universalism is more reminiscent of "Savigny's idealistic internationalism."[28] Indeed, Savigny was concerned with avoiding conflicts of law by determining the "seat"[29] of the "legal relations"[30] under consideration, which was echoed in the Second Restatement of Conflict of Law as the place of "most significant relationship."[31] The universalist approach to cross-border insolvency revolves around the determination of the "central court" which should be in charge of the proceedings. Spearheading this literature, Westbrook argues that the very similar criterion of the debtor's "center of main interest" ("COMI") adopted by UNCITRAL's Model Law on Cross-Border Insolvency best legitimizes the court's jurisdiction.[32] Thus, it becomes apparent that classifying the Rule in Gibbs as a territorialist velleity by English courts would be an oversimplification.[33]

B. Gibbs as a Misfit for Both Theories

Classifying Gibbs as territorialist would obscure how it is premised on the respect for the will of the parties rather than on the incidental birth of rights and obligations. For instance, where a loan governed by English law is secured by assets located in France: the Gibbs logic would then be at odds with territorialism since it would lead English courts to not recognize a discharge of the debt under the law of the jurisdiction where the assets are located. Since courts are assumed to be less proficient at administering foreign law, this means

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[26] Look Chan Ho, *Conflict of Laws In Insolvency Transaction Avoidance*, 20 SG. Ac. L.J. 343, 357 (2008) [hereinafter Chan Ho, *Conflicts of Law*].

[27] *Id.* at 357–59; Alex Mills, *The Identities of Private International Law: Lessons from the U.S. and EU Revolutions*, 23 Duke J. Comp. & Int'l L. 445, 450–52 (2013).

[28] Mills, *supra* note 26, at 473 (describing Savigny's "universalism," albeit in a sense broader than the one ascribed to the expression in the international insolvency literature).

[29] Mills, *supra* note 26, at 449; Chan Ho, *Conflicts of Law, supra* note 25, at 355.

[30] *Id.*

[31] Friedrich K. Juenger, *American and European Conflicts Law*, 30 Am. J. Comp. L. 117, 122 (1982).

[32] Jay Lawrence Westbrook, *Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court*, 96 Tex. L. Rev. 1473, 1474 (2018) [hereinafter Westbrook, *Global Insolvency*].

[33] *See* Varoon Sachdev, *Choice of Law in Insolvency Proceedings: How English Court Continued Reliance on the Gibbs Principle Threatens Universalism*, 93 Am. Bankr. L.J. 343, 367 (2019) (citing Fletcher writing that "the Gibbs doctrine belongs to an age of Anglocentric reasoning which should be consigned to history").

proceedings are likely to be necessary in each distinct jurisdiction.[34] Hence, it appears that the Rule in Gibbs has been lumped with territorialism because of its *prima facie* rejection of extraterritoriality, a central tenet of the universalist movement. This conflation might lead to a refusal of the Gibbs principle for the wrong reasons. In effect, the Rule in Gibbs is closest in its ethos to the "bankruptcy selection clause" proposal by Rasmussen.[35] Under this proposed rule, firms can indicate the competent bankruptcy court in their corporate charter.[36] In both cases, the rule could be rooted in a Friedmanian belief that individuals will make welfare-maximizing choices about the laws that should govern their contractual agreements. In fact, if universalism is right that recovery value is maximized when firms are subject to a single proceeding, contractualism would lead to this outcome in the absence of market failures.[37]

III. The Paradox of Universalism's "Holier-Than-Thou" Status

The Rule in Gibbs has been doctrinally vilified as no more than a judicial tool used to perpetuate the values of British imperialism in modern contractual relationships. However, further scrutiny shows that positing universalism as the morally superior alternative is both harmful and paradoxical.

A. The Harms of Presenting Gibbs as Imperial Heirloom

Disassociating the Rule in Gibbs from territorialism is helpful to better compare it to universalism. While the "forward-thinking, cosmopolitan, one-world" flavor of universalism gives it a seemingly moral edge over competing theories, its limitations should not be minimized.[38] In contrast with the territorialist movement, universalism is criticized for disregarding the sovereignty of all states other than the "home country."[39] Since bankruptcy laws reflect and incorporate values that represent the will of the people in representative democracies, accepting universalism would amount to "export[ing] social policy."[40] This is also an issue with the contractual criterion of the Rule in Gibbs as it could lead to opportunistic forum shopping. For instance, it

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[34] Lynn M. LoPucki, *Global and Out of Control?*, 79 Am. Bankr. L.J. 79 (2005).

[35] *See* Rasmussen, *supra* note 16.

[36] *Id.* at 2254.

[37] *See* Rasmussen, *supra* note 16 (on the ability of parties to contract away intercreditor issues); *see also* Ronald Coase, *The Problem of Social Cost*, J.L. Econ. 1 (1960) (on the ability of parties to contractually share the surplus when an activity increases total welfare but diminishes that of one party).

[38] Tung, *supra* note 9, at 36.

[39] Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 Mich. L. Rev. 2216, 2251 (2000).

[40] Frederick Tung, *Fear of commitment in international bankruptcy,* 33 Geo. Wash. Int'l L. Rev. 555, 573 (2001).

could be used to bypass the priority granted to wage claims in French bankruptcy proceedings.[41] Furthermore, the Rule in Gibbs is castigated, more or less explicitly, as an atavism of British colonialism for its "irritating belief in the superiority of the English court,"[42] its "Anglocentric reasoning which should be consigned to history,"[43] or for fostering the idea that "[t]he sun never sets on English law governed debt."[44] However, this fails to account for the fact that the Rule applies to any choice of law before English courts, not only that of English law.[45] Despite its name, universalism might marginalize to an even greater extent the legal systems of developing countries since the single jurisdiction will be the one where most assets are concentrated.[46] Thus, universalism does no better than the Rule in Gibbs in these two important respects, suggesting that the choice between them might come down to efficiency rather than equity grounds.[47] More crucially, even its fiercest proponents acknowledge that universalism is "unrealistic."[48] This is due to the lack of political willingness by states to relinquish sovereignty over local assets to the courts of other countries.[49] Moreover, the thin connecting link to the COMI might pose a problem in recognizing civil judgments for foreign activities or even foreign-incorporated subsidiaries.[50] The widespread notion of a "public policy" exception could also be exploited by non-COMI courts to oppose judgments, thereby eroding the certainty and efficiency of universalism.[51] Even if some countries were to be willing to accept universalism, they would find themselves in a classic "prisoner's dilemma," as other countries may defect from enforcing universalism, turning even the

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[41] *Id.* at 574; Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense Of The Modified Universal Approach Considering The Japanese Experience*, 21 U. Pa. J. Int'l. L. 679, 697 (2000); Code civil art. 2331–34 and 2375.

[42] Howard Morris, *Substance Over Form: How The Rule In Gibbs Lives On*, Morrison Foerster: UK Updates and Analysis (July 8, 2022), https://restructuring.mofo.com/topics/substance-over-form-how-the-rule-in-gibbs-lives-on [https://perma.cc/QG7D-WTVB].

[43] Sachdev, *supra* note 32, at 367 (citing Fletcher).

[44] Gautam Narasimhan et al., *The sun never sets on English law governed debt*, Allen & Overy Sherman Sterling (2021), https://www.aoshearman.com/en/insights/the-sun-never-sets-on-english-law-governed-debt-reviewing-the-re-prosafe-se-decision [https://perma.cc/6G39-3X68] (alluding to the adage "the sun never sets on the British empire").

[45] *The Rule in Gibbs: Exploring its value and practical use in the financial markets as a guarantor of legal predictability,* Fin. Markets L. Cmte. 3 (February 29, 2024), https://fmlc.org/publications/paper-the-rule-in-gibbs-exploring-its-value-and-practical-use-in-the-financial-markets-as-a-guarantor-of-legal-predictability/ [https://perma.cc/MD9K-9ZVS] [hereinafter, *FMLC Gibbs Report*].

[46] Adams & Fincke, *supra* note 6, at 54.

[47] *See, e.g.*, Gerard McCormack, *Universalism in Insolvency Proceedings and the Common Law*, 32 Ox. J. Leg. Stud. 325 (2012) (referring to Lord Hoffman's description of "universalism in insolvency proceedings as the golden thread of the common law").

[48] Westbrook, *Theory and Pragmatism*, *supra* note 16, at 485.

[49] Tung, *supra* note 9, at 47–49.

[50] *Id.* at 48–49.

[51] McCormack, *supra* note 46, at 338.

enthusiastic countries away from enforcing it.[52] When the agriculture conglomerate Agrokor sought recognition of its Croatian proceedings under the universalist Chapter 15 of the US Bankruptcy Code, it was not lost on the bankruptcy judge that English creditors would likely not be bound to a plan emerging from Croatian proceedings under Gibbs.[53] Thus, as of 1999, the empirical observation was that most jurisdictions were still working under a territorial system.[54] In defense of universalism, one might argue that the implementation of the Rule in Gibbs is also subject to a prisoner's dilemma: why would a country let foreign law govern the distribution of domestic assets? The English model accepts this risk, seemingly betting that it will be a net beneficiary of choice-of-law clauses. The use of the public policy exception by English courts could likewise turn Gibbs into a "heads England wins, tails the other country loses" situation. The fact that Gibbs relies on countries respecting contractual choices rather than foreign laws might mitigate the willingness of domestic courts to shirk their commitment to Gibbs. The universalist will retort that insolvency law is fundamentally about disrupting pre-insolvency contractual arrangements.[55] Taking a step back from this doctrinal debate, it seems that policymakers should cut this Gordian Knot based on whichever solution preserves the most value.

B. Gibbs' Functional Equivalence to Modified Universalism

Adopting a functional approach to comparative law, an inquiry into the US and the EU reveals that other jurisdictions still have exceptions to their universalist rhetoric.[56] The US legal system relies on Chapter 15 of the US Bankruptcy Code, which is itself based on universalist ideals and provides for the recognition of foreign judgments discharging US law debt under foreign laws.[57] Indeed, the Agrokor case recently reaffirmed that assembling all claims in a single proceeding was necessary for the "equitable and orderly distribution" of assets.[58] Nonetheless, this recognition is limited by the public policy exception under §1506 of the Bankruptcy Code.[59] As mentioned above, such

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[52] Tung, *supra* note 9, at 60–65.

[53] *In Re* Agrokor D.D. 591 B.R. 163, 167–68 (Bankr. S.D.N.Y. 2018).

[54] Bebchuk & Guzman, *supra* note 14, at 787, cited in Tung, *supra* note 9, at 40.

[55] *In re* Agrokor D.D. 591 B.R. at 194.

[56] *See* David Christoph Ehmke, Bond Debt Governance: A Comparative Analysis Of Different Solutions To Financial Distress Of Corporate Bond Directors (2018); *see* Konrad Zweigert & Heinz Kötz, Einführung in die Rechtsvergleichung (3ed, 1996).

[57] 11 U.S.C §§1501–1532 (Chapter 15); Adams & Fincke, *supra* note 6, at 75; 11 U.S.C. §§1515–1524 (on the recognition of a foreign proceeding and relief).

[58] *In re* Agrokor D.D. 591 B.R. at 184.

[59] Adams & Fincke, *supra* note 6, at 77–78.

exceptions limit the potential benefits of universalism, as it is "an unruly horse to ride especially where national sensitivities are concerned."[60] However, §1506 is interpreted quite narrowly and the real constraints on universalism seem to stem from the plethora of other hurdles to granting comity.[61] For instance, the Second Circuit has listed no less than eight criteria for assessing procedural fairness, and a bankruptcy court within its ambit has refused to enforce an Indonesian plan containing non-debtor nonconsensual third-party releases on such grounds.[62] Functionally, therefore, these conditions could serve a similar purpose as the Rule in Gibbs. The carveouts from universalism are even more telling in the European Union, where the European Insolvency Regulation (the "Regulation") is also distinctively universalist in its aspirations.[63] It purports to achieve this goal through the recognition of proceedings and judgments across the EU.[64] However, the Regulation being the result of a political compromise, it is subject to numerous territorialist exceptions, including the *de situs* rule as it relates to immovable property.[65] More crucially, Article 12 of the Regulation includes what is essentially a narrower Rule in Gibbs, limited in scope to the rights and obligations to a payment or settlement system or to a financial market.[66] The rationale for this exemption is assumed to be "legal certainty" and the "smooth operation" of these markets.[67] If the Rule in Gibbs avowedly fosters an efficient and smooth operation of sensitive financial infrastructures in a modified universalist system like the EU, it seems that it could, at least in theory, be extended to all contracting parties seeking predictability and efficiency of execution by opting for English law.[68] Otherwise, the line between pragmatic universalism and anachronistic neocolonialism is blurred beyond recognition since both the EU and England rely on similar principles.

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[60] McCormack, *supra* note 46, at 338.

[61] Omer Shahid, *The Public Policy Exception: Has §1506 Been a Significant Obstacle in Aiding Foreign Bankruptcy Proceedings?*, 9 J. Int'l Bus. & L. 175, 195–96 (2010) (finding only one case of successful §1506 claim).

[62] Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 249 (2d Cir. 1999); *In re* PT Bakrie Telecom Tbk, 628 B.R. 859, 878–9, 887 (Bankr. S.D.N.Y. 2021).

[63] Adams & Fincke, *supra* note 6, at 63–64.

[64] *FMLC Gibbs Report*, *supra* note 45, at 4.

[65] Regulation (EU) of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) 2015/848, art. 11, 2015 O.J. (L 141) [hereinafter, *European Insolvency Regulation*]; *see also* Adams & Fincke, *supra* note 6, at 65 (on the territorialist exceptions to the EU system).

[66] *European Insolvency Regulation*, *supra* note 65, art. 12, 2015 O.J. (L 141), cited in *FMLC Gibbs Report*, *supra* note 45, at 4.

[67] Francisco Garcimartín and Miguel Virgós, *Article 12 - Payment systems and financial markets*, in Commentary on the European Insolvency Regulation 267 (Reinhard Bork & Kristin van Zwieten, Oxford University Press 2nd ed.).

[68] *FMLC Gibbs Report*, *supra* note 45, at 6 (on the attractiveness of English law for contracting parties).

Conclusion

Hence, this inquiry leads to the iconoclast view that the Rule in Gibbs is compatible with a version of modified universalism. This matters because the conventional wisdom that Gibbs is a territorialist rule makes its way to court decisions affecting distributive outcomes.[69] While giving a normative answer to the cross-border insolvency conundrum is beyond the scope of this paper, it contributes to the literature by reassessing an oft-scorned principle. The allocative efficiency and functional comparative law lenses suggest that each side of the debate has radically different *Weltanschauungs* and that the balance would be best struck by a well-informed democratic process.

[69] *E.g. In Re* Agrokor D.D. 591 B.R. at 192; Pacific Andes Resources Development Ltd [2016] SGHC 210, 47 (Sing.).