Neutral Citation Number: [2018] EWHC 59 (Ch)

Case No: CR-2017-003973

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (Ch D)

IN THE MATTER OF THE OJSC INTERNATIONAL BANK OF AZERBAIJAN

AND IN THE MATTER OF THE CROSS-BORDER INSOLVENCY REGULATIONS 2006

Royal Courts of Justice
7 Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 18/01/2018

Before :

THE HONOURABLE MR JUSTICE HILDYARD

- -

Between :

GUNEL BAKHSHIYEVA

(IN HER CAPACITY AS THE FOREIGN REPRESENTATIVE OF THE OJSC INTERNATIONAL BANK OF AZERBAIJAN)

Applicant

-and-

(1) SBERBANK OF RUSSIA

(2) FRANKLIN GLOBAL TRUST – FRANKLIN EMERGING MARKET DEBT OPPORTUNITIES FUND

(3) FRANKLIN EMERGING MARKET DEBT OPPORTUNITIES FUND PLC

(4) FRANKLIN TEMPLETON FRONTIER EMERGING MARKET DEBT FUND

(5) FRANKLIN TEMPLETON EMERGING MARKET DEBT OPPORTUNITIES (MASTER) FUND, LTD

(6) FRANKLIN TEMPLETON SERIES II FUNDS

(7) FRANKLIN EMERGING MARKET DEBT INSTITUTIONAL FUND

Respondents

Daniel Bayfield QC and Ryan Perkins (instructed by **White & Case LLP**) for the **Applicant**
Barry Isaacs QC and Alexander Riddiford (instructed by **Fried, Frank, Harris, Shriver & Jacobson (London) LLP**) for **Respondent (1)**
Gabriel Moss QC and Richard Fisher (instructed by **Dechert LLP**) for **Respondents (2) - (7)**

Hearing dates: 14th, 15th and 21st December 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE HILDYARD

Mr Justice Hildyard :

The subject-matter of this judgment

1. The interesting question raised by the three applications which are the subject of this judgment concerns the tension between what is often referred to as the 'rule' in *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399 and, in the context of a foreign insolvency proceeding which has been recognised in this jurisdiction, the principle or practice of 'modified universalism'.

2. More especially, the question raised is whether the Court has power to grant a permanent moratorium or stay to prevent a creditor exercising its rights under a contract governed by English law in order to prevent that creditor enforcing its rights contrary to the terms of the foreign insolvency proceeding by which all creditors were, under the relevant foreign law, intended to be bound. If it does, the second question is whether in its discretion the Court should exercise that power.

3. There are two further questions raised by counter-applications on behalf of the Respondents: both essentially concern whether such Respondents should be given permission now to proceed with claims in this jurisdiction.

The relevant foreign insolvency proceeding

4. These questions arise in the present applications in relation to the OJSC International Bank of Azerbaijan ("IBA"), which is the largest commercial bank in Azerbaijan. IBA's largest shareholder is the Government of Azerbaijan; its registered office and headquarters are situated in Baku, Azerbaijan and it is managed from its headquarters in Baku.

5. IBA has fallen into financial difficulties, obliging it to enter into a restructuring proceeding under Azeri law (the "Restructuring Proceeding"). The purpose of the Restructuring Proceeding was to enable IBA to propose a plan to restructure its debts.

6. On 5 May 2017, the applicant (Ms Gunel Bakhshiyeva) was appointed as IBA's Foreign Representative (the "Foreign Representative"). On 24 May 2017 the Foreign Representative applied to this Court for an order (the "Recognition Order") recognising the Restructuring Proceeding as a foreign main proceeding under the Cross-Border Insolvency Regulations 2006 (the "CBIR"). At a hearing on 6 June 2017, Barling J made the order sought.

7. Paragraph 2 of the Recognition Order imposes a wide-ranging moratorium akin to that which would arise in an English administration proceeding (the "Moratorium"). The Moratorium prevents creditors from commencing or continuing any action against IBA or its property without the permission of the Court.

8. The plan proposed by IBA pursuant to the Restructuring Proceeding ("the Plan") has been approved by a substantial majority at a meeting of creditors in Azerbaijan on 18 July 2017. It was thereafter approved by the Nasimi District Court on 17 August 2017 (the "Azeri Confirmation Order"). As a matter of Azeri law, the Plan is now binding on all affected creditors, including those who did not vote and those who voted against the Plan.

The Respondents

9. However, the Respondents (either together "the Respondents" or when more convenient, "Sberbank" and "Franklin Templeton"), contend that the Plan cannot bind them. In each case their relationship as creditor with IBA is governed by English law. They rely on the rule in G*ibbs,* which states that a debt governed by English law cannot be discharged by a foreign insolvency proceeding.

10. Sberbank is the sole lender under a US$20m term facility agreement dated 15 July 2016 ("the Sberbank Facility"). Franklin Templeton are the beneficial owners through Citibank NA, London Branch ("Citibank") as trustee of US$500m 5.62% notes issued under a trust deed dated 11 June 2014 (the "2019 Notes") and both the Sberbank Facility and the 2019 Notes expressly state that they are governed by English law.

11. The Respondents did not vote or participate in any way in the meeting in Azerbaijan to approve the Plan. It is for present purposes accepted by the Foreign Representative that they have not acquiesced in its application to them.

The Foreign Representative's application in detail and its urgency

12. The Restructuring Proceeding is due to terminate on 30 January 2018. It cannot, as Azeri law presently stands, be extended any further. Unless extended the Moratorium will lapse. In those circumstances, the Foreign Representative has issued an application to continue the Moratorium ("the Moratorium Continuation Application").

13. The Moratorium Continuation Application seeks an order in the following terms:

    (1) Notwithstanding the termination of the Restructuring Proceeding, the Moratorium shall continue until further order (but only in relation to the Designated Financial Indebtedness) so that no legal process in relation to the Designated Financial Indebtedness may be instituted or continued against IBA or its property except with the permission of the Court; and

    (2) The Moratorium shall not be lifted so as to permit Sberbank or Franklin Templeton to enforce their loans.

14. The Respondents oppose the Moratorium Continuation Application. On the basis of the rule in *Gibbs* they assert that their claims against IBA have not been discharged by the Plan. They contend that they retain the right to enforce their English law-based claims, subject only to the Moratorium presently in force. They submit that the continuation of the Moratorium would prevent them exercising and vindicating their continuing rights.

15. The determination of these matters has become urgent: in effect, unless Azeri law is changed to permit a further extension, the Foreign Representative must obtain the relief before the termination date of 30 January 2018 for the Restructuring Proceedings.

Common ground as to the application of the 'rule' in Gibbs

16. The Foreign Representative accepts that I am bound by the decision (in the Court of Appeal) in the *Antony Gibbs* case and that, for the purpose of the application before

me (though she reserves the right to argue to the contrary on appeal), the Respondents' claims have not been discharged by the Plan.

17. She also accepts that, for those purposes, the Azeri Confirmation Order itself cannot be directly enforced under the CBIR (so as to give rise to an estoppel *per rem judicatam* as against the Respondents); though again, she reserves the right to argue on appeal that the CBIR can be used to recognise and enforce foreign judgments which confirm or sanction restructuring plans.

18. Thirdly, it is not suggested that the Respondents have submitted to Azeri law or acquiesced in its application to them (and see paragraph [11] above).

The fundamental issues

19. As indicated at the beginning of this judgment, the Moratorium Continuation Application thus raises before me two short but fundamental points of cross-border insolvency law, namely:

    (1) Whether the Court has jurisdiction to extend a moratorium imposed under the CBIR without limit as to time, and in particular, beyond the date on which the foreign proceeding will terminate; and

    (2) If so, whether the Court should refuse to lift the continuing moratorium in favour of a creditor whose debt is governed by English law, so as to prevent that creditor from achieving a better return than that enjoyed by all of the company's other creditors under a restructuring plan promulgated in the jurisdiction in which the company is registered and has its centre of main interests ("COMI").

20. Sberbank's cross-application seeks an order granting it leave to commence proceedings against IBA in the form of a Part 7 Claim Form and Particulars of Claim annexed. Franklin Templeton's cross-application seeks orders for the modification of the Moratorium imposed by Barling J's order on 6 June 2017 to enable proceedings to be commenced to establish and enforce IBA's obligations to them under their Notes and then for the Moratorium to be lifted and cease to have effect altogether on termination of the Restructuring Proceeding.

21. Although Franklin Templeton's cross-application raises additional timing points, both cross-applications are to a large extent the obverse of the Foreign Representative's Moratorium Continuation Application; it was on the latter that argument was almost entirely focused at the hearing, and this judgment is focused accordingly.

22. The points raised are intriguing and complex, and of general potential application and thus importance. Furthermore, the matters reserved for argument in the event of the matter going up on appeal are of very considerable legal significance. They have been the subject of recent interest, including in extra-judicial speeches by Lord Neuberger of Abbotsbury: see, for example, his keynote speech, when President of the Supreme Court, at the International Insolvency Institute Annual Conference in London earlier this year. Further, the meaning and scope of "modified universalism" has recently occupied both the Supreme Court and the Privy Council, and has also been the subject

of considerable academic and extra-judicial presentations, including a lecture by Sir Geoffrey Vos C to the Singapore Supreme Court in October 2017.

23. In my consideration of the issues I have been much assisted by exemplary skeleton arguments and oral submissions of Counsel: Mr Bayfield QC leading Mr Ryan Perkins for the Foreign Representative, Mr Barry Isaacs QC leading Mr Alexander Riddiford for Sberbank, and Mr Gabriel Moss QC leading Mr Richard Fisher for Franklin Templeton (whose joinder, though none of the funds is a legal owner of the 2019 Notes, I permitted at the hearing for reasons adumbrated in a short separate ruling).

Structure of this judgment

24. In the rest of this judgment I consider in turn the following:

(1) The nature and purpose of IBA's voluntary restructuring under Article 57.11 of the Azerbaijan Law on Banks ("the Azeri Law on Banks");

(2) The principal features of the Plan and the consequences under Azeri law of its approval and confirmation under the Azeri Confirmation Order;

(3) The scope and application of the decision in the *Antony Gibbs* case, and its limitations;

(4) The nature, scope and purpose of the Model Law and the CBIR: the Court's jurisdiction and the ambit of discretion;

(5) Modified Universalism, Authorities and Competing considerations;

(6) Factors relevant to the exercise of any discretion;

(7) Conclusion on the Moratorium Continuation Application;

(8) The Respondents' respective cross-Applications.

Nature of the Restructuring Proceeding: the Azeri Law on Banks

25. The starting point is to identify the nature of the Restructuring Proceeding and the Plan which it has enabled. That is important, not least because (as I later seek to explain) different consequences and attitudes may follow according to whether the process is akin to a liquidation or termination procedure, or whether it is akin to a rescue or debt reconstruction with the purpose of enabling IBA to carry on business.

26. Whilst the identification of an appropriate comparator is a matter of English process, the issue as to the nature and purpose of a voluntary restructuring under the Law on Banks is a matter of Azeri law.

Expert evidence as to Azeri law

27. That law as applicable is described in the evidence of Mr Anar Karimov ("Mr Karimov"). Mr Karimov is an experienced lawyer instructed by IBA in Azerbaijan, and an expert on Azeri banking and insolvency law. His evidence was not disputed.

28. In summary, Mr Karimov has explained:

(1) The basic function of a voluntary restructuring is to give the relevant bank breathing space to propose a plan of reorganisation in respect of its debts.

(2) A voluntary restructuring is not a terminal liquidation-style process. Rather, a voluntary restructuring is a "rescue" or "turnaround" process which is designed to enable the bank to continue trading whilst implementing a plan of restructuring to reorganise its liabilities so that it can survive as a going concern.

(3) During a voluntary restructuring, the relevant bank will continue to carry on business (subject to the supervision of the Azerbaijan Financial Market Supervisory Authority ("the AFMSA") and the Azeri Court). For this reason, a voluntary restructuring can be described as a debtor-in-possession procedure.

(4) As a pre-requisite to commencing a voluntary restructuring, the relevant bank is required to promulgate an indicative restructuring proposal, which must be duly approved by the AFMSA.

(5) There is a statutory mechanism whereby the indicative restructuring proposal can be amended following consultation with creditors, and the proposal is required to be extensively advertised.

(6) Once the terms of the restructuring plan have been finalised, the affected creditors will attend a meeting to vote on the final form of the plan. If the plan is approved by the prescribed majority (effectively two-thirds of the affected creditors by value) and confirmed by the Azeri Court, it will be binding on all affected creditors.

29. In other words, the process facilitates rehabilitation and the resumption of trading rather than the collection of assets and their fair distribution followed by dissolution.

Principal features and consequences of the Plan

30. As noted above, the purpose of the Restructuring Proceeding was to enable IBA to propose a plan to restructure its debts.

31. The Plan in this case provides for the restructuring of IBA's financial indebtedness amounting to some US$3.34bn ("the Designated Financial Indebtedness").

32. The Sberbank Facility and the 2019 Notes both constitute Designated Financial Indebtedness for the purposes of the Plan.

33. Under the Plan, the Designated Financial Indebtedness is divided into three main categories: "Trade Finance Liabilities", "Senior Liabilities" and "Subordinated Liabilities".

34. The Plan provides for the Designated Financial Indebtedness to be discharged in its entirety and exchanged for various "Entitlements".

35. These Entitlements consist predominantly of new debt securities (some of which are sovereign bonds issued by the Government of Azerbaijan, and some of which are

corporate bonds issued by IBA itself). In general terms, the Trade Finance Liabilities are treated more favourably than the Senior Liabilities, and the Senior Liabilities are treated more favourably than the Subordinated Liabilities.

36. The Plan has received overwhelming creditor support. At a creditors' meeting held on 18 July 2017, the Plan was approved by 99.7% of those voting at the meeting (in person or by proxy), who held, in aggregate, 93.9% (by value) of the total Designated Financial Indebtedness. Accordingly, the total votes in favour of the Plan significantly exceeded the requisite majority under the relevant Azeri law (i.e. two-thirds).

37. Following the approval of the Plan, a number of creditors who voted against the Plan (or who did not vote at all) decided to consent to the Plan and surrender their existing claims.

38. As matters stand, the Respondents (or, more accurately in the case of Franklin Templeton, their trustee) are the only creditors which could seek to enforce their claims contrary to the terms of the Plan:

(1) Sberbank, in right and respect of the Sberbank Facility.

(2) Citibank in its capacity as trustee for Franklin Templeton of the 2019 Notes. The 2019 Notes were issued under a trust deed dated 11 June 2014 (the "Trust Deed"). Holders of approximately US$154.7m of the 2019 Notes either voted against the Plan or did not cast a vote, and have not subsequently surrendered their Notes. Approximately US$58m of the 'rump' 2019 Notes (that is 2019 Notes not consented into the Plan) are beneficially owned by the Second to Seventh Respondents. It is understood that most of the remaining 2019 Notes are also owned by entities connected to Franklin Templeton Investment Management Limited. However, those entities have not asked to be joined as respondents to the proceedings (on the basis that they "*wish to remain anonymous*").

39. The Sberbank Facility and the 'rump' 2019 Notes represent a very small proportion of the total Designated Financial Indebtedness (about 5% in total). It is important to note that the Foreign Representative does not contend that the Plan will substantially fail if the Moratorium Continuation Application does, though of course the Plan will not be entire and perfect in its application in that event.

40. The AFMSA approved the Plan on 25 July 2017. IBA subsequently applied to the Azeri Court for final approval of the Plan, in accordance with the Law on Banks. At a hearing on 17 August 2017 (the "Confirmation Hearing"), the Azeri Court approved the Plan by the Azeri Confirmation Order. As a result, the Plan became effective under Azeri law on 1 September 2017.

41. Mr Karimov explains the consequences of the Azeri Confirmation Order as follows:

> "*[20] As a matter of Azeri law, all of the Designated Financial Indebtedness was cancelled on 1 September 2017 (being the Restructuring Date), in return for which creditors affected by the Restructuring Plan became entitled to receive the Entitlements set out therein.*

> *[21] As a matter of Azeri law, the Restructuring Plan is binding on all Designated Financial Indebtedness and the creditors in respect thereof, whether or not any such creditors participated in the Creditors' Meeting and whether or not they voted for or against the Plan.*"

42. The Plan having been approved, the Restructuring Proceeding was originally scheduled to terminate on 31 October 2017. IBA and the AFMSA jointly applied to the Azeri Court for a 90-day extension to the Restructuring Proceeding, which was granted. Accordingly, as a matter of Azeri law, at least as it presently is, the Restructuring Proceeding cannot be extended any further than its re-scheduled termination date of 30 January 2018. That is why this matter is so urgent, and why I directed the matter to be expedited and heard this (Michaelmas) term, to allow also, insofar as possible, for any appeals (and see my previous judgment at [2017] EWHC 3060 Ch).

The Antony Gibbs case and criticisms of the 'rule'

43. What is sometimes referred to as the 'rule in *Gibbs'* has a long pedigree, stretching back further than the case itself to a number of older authorities, such as *Smith v Buchanan* (1800) 1 East 6.

Criticisms of 'the rule'

44. Nevertheless, the *Antony Gibbs* case itself (as the name of the supposed rule signifies) is the most frequently cited authority for the general proposition that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding. Indeed, the proposition goes further: discharge of a debt under the insolvency law of a foreign country is only treated as a discharge therefrom in England if it is a discharge under the law applicable to the contract.

45. The position is summarised by Professor Ian Fletcher in *The Law of Insolvency (5th Edition)* at para 30-061 (as well as elsewhere), and by reference to decisions including the *Antony Gibbs* case, as follows:

> *"According to English law a foreign liquidation—or other species of insolvency procedure whose purpose is to bring about the extinction or cancellation of a debtor's obligations—is considered to effect the discharge only of such of a company's liabilities as are properly governed by the law of the country in which the liquidation takes place or, alternatively, of such as are governed by some other foreign law under which the liquidation is accorded the same effect. Consequently, whatever may be the purported effect of the liquidation according to the law of the country in which it has been conducted, the position at English law is that a debt owed to or by a dissolved company is not considered to be extinguished unless that is the effect according to the law which, in the eyes of English private international law, constitutes the proper law of the debt in question."*

46. There is an exception: if the relevant creditor submits to the foreign insolvency proceeding, the *Antony Gibbs* rule does not apply. The rationale is simple: the creditor will be taken to have accepted that the law governing that foreign insolvency proceeding should determine the contractual rights he has elected to vindicate in that proceeding. But, as explained previously, it is, before me at least, common ground that the exception does not apply, and the 'rule' does.

47. As it seems to me, the proposition for which the *Antony Gibbs* case stands would be considered entirely obvious by a contract lawyer characterising the question as a contractual one (as to the law applicable to the variation or discharge of a contract) and applying ordinary conflict of law principles.

48. However, as cross-border insolvency issues have increasingly come to the fore, the proposition has, particularly by academic writers, frequently been thought to be parochial and out of step in the context of foreign insolvency proceedings. In that context, considerations of universalism (modified or not) have tended to be in the ascendant; and a number of commentators and practitioners increasingly tend to regard insolvency law as having, in the extreme situation which its application denotes, an "overriding effect".

49. Characterising the issue not as a contractual one, where primacy is given to freedom of choice, but as an insolvency one, where primacy is given to orderly *pari passu* distribution and some form of universalism to achieve it, Professor Fletcher, for example, has pronounced that the

> "*Gibbs doctrine belongs to an age of Anglocentric reasoning which should be confined to history".*

50. Further, he and others have pointed out, not entirely unfairly, that English law can be accused of insisting on territorialism only when it suits it: in other contexts, even outside the context of insolvency, such as English schemes of arrangement under Part 26 of the Companies Act 2006, it expects other countries to recognise and give effect to the discharge and alteration of contractual terms by dint of an order of the English court even where foreign law applies to them.

Continued application of the 'rule' in this jurisdiction nonetheless

51. Recently, Teare J in *Global Distressed Alpha Fund 1 Ltd Partnership v PT Bakrie Investindo* [2011] 1 WLR 2038 accepted that there was much to be said for developing English law to recognise and give effect to a foreign (in that case, Indonesian) insolvency process which provided for discharge of an English law governed instrument, having regard to what he described as *"the principles of (modified) universalism"*. That said, however, he held that he was bound by the *Antony Gibbs* case to decline to do so.

52. More recently still, in *Erste Group Bank AG v JSC VMZ Red October* [2015] 1 CLC 706, the Court of Appeal (Aikens, Gloster and Briggs LJJ) stated (at [75]) that the case *"has been the subject of what many regard as justifiable criticism"*.

53. Furthermore, in *Pacific Andes Resources Development Ltd* [2016] SGHC 210 at [48] the High Court of Singapore, without any more mandate under legislation or treaty

than here, save for not being bound by the *Antony Gibbs* case, chose in its application of common law not to apply the 'rule'. It preferred instead a reformulation of it by Professor Fletcher as follows:

> *"In the case of a contractual obligation which happens to be governed by English law, a further rule should be developed whereby, if one of the parties to the contract is the subject of insolvency proceedings in a jurisdiction with which he has an established connection based on residence or ties of business, it should be recognised that the possibility of such proceedings must enter into the parties' reasonable expectations in entering their relationship, and as such may furnish a ground for the discharge to take effect under the applicable law."*

54. Nevertheless, the fact remains that the 'rule' has been repeatedly applied as established law at all levels of the courts in England and Wales, more often than not without adverse comment. The key cases cited to me where the 'rule' was so cited are as follows (in chronological order):

(1) *New Zealand Loan and Mercantile Agency Co v Morrison* [1898] AC 349 in the Privy Council: see the headnote and page 359 (per Lord Davey);

(2) *obiter dicta* by the House of Lords in *National Bank of Greece and Athens SA v Metliss* [1958] AC 509 at page 523 (per Viscount Simonds), though it was held that the rule did not apply in that case, which was concerned with a different issue;

(3) *obiter dicta* by the House of Lords in *Adams v National Bank of Greece SA* [1961] AC 255 at 287 (per Lord Denning);

(4) *obiter dicta* by the High Court in *Re T&N Ltd* [2005] Pens LR 1 at [121]-[122] (per David Richards J, as he then was);

(5) *obiter dicta* by the Supreme Court in *Joint Administrators of Heritable Bank plc v Winding Up Board of Landsbanki Islands hf* [2013] 1 WLR 725 at [44] (per Lord Hope);

(6) *Re Indah Kiat International Finance Company BV* [2016] BCC 418 at [11] per Snowden J:

> *"So far as this court is concerned, there can be no doubt that the Indonesian Judgment would not be regarded as discharging the Notes or the security in respect of the Notes, which are governed by New York law";*

(7) *obiter dicta* by the High Court in *Re Agrokor DD* [2017] EWHC 2791 (Ch) at [113] per HHJ Paul Matthews, sitting as a Judge of the High Court, who observed (at [115]) that:

> *"… it is necessary to find something in English law to take away creditors' rights. In modern times, provisions in the Companies Act and in the Insolvency Act may have this effect,*

> *but it is always a matter of construction whether in fact they do so."*

55. Furthermore, the trend discernible from the latest decisions at the highest level in this jurisdiction, that is in the Supreme Court and the Privy Council, is that the English Courts should do all in their own power to help but without express mandate may not import other laws to enable them to do so. This has been made plain by the Supreme Court in *Rubin v Eurofinance SA* [2013] AC 236 at [29] ("*Rubin"*) and by the Privy Council in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675 ("*Singularis"*) at [19].

56. It may be noted also in that context that Lord Collins of Mapesbury specifically addressed, albeit in the context of an application for recognition of a foreign judgment, the argument that since this court expects a foreign (in that case, New York) court to recognise its own insolvency orders, so too it should recognise and enforce in England insolvency orders made in foreign proceedings. The argument reflected perhaps the most oft-made criticism of the 'rule' in *Gibbs*, previously noted, to the effect that the refusal to accept a foreign discharge of an English debt is a "glaring anomaly" given that under English law an English bankruptcy or scheme of arrangement can discharge a foreign debt. Lord Collins did not accept the argument. At [126] he said this:

> *"There is no basis for this line of reasoning. There is no necessary connection between the exercise of jurisdiction by the English court and its recognition of the jurisdiction of foreign courts, or its expectation of the recognition of its judgments abroad."*

57. So not only is there presently and at this level no real doubt as to the continued application of the 'rule' in *Gibbs*, as the concession made on behalf of the Foreign Representative indicates: there is similarly no real doubt that the fact of foreign insolvency, even one recognised formally in this jurisdiction, is not of itself a gateway for the application of foreign insolvency laws or rules or for giving them 'overriding effect' over ordinary principles of English contract law.

Real issue whether application of 'the rule' can and should be modified

58. The real question in this case, therefore, at least at this level in the court hierarchy, is not whether the 'rule' in *Gibbs* applies. It is whether the principles of 'modified universalism' as expressed in the common law and in the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law ("UNCITRAL") on 30 May 1997 (the "Model Law"), on which the CBIR are based, and the CBIR themselves, nevertheless enable the Court to grant relief calculated to advance those principles without upsetting the 'rule' in the *Antony Gibbs* case when properly understood and confined.

59. More particularly, the question is whether at one and the same time the 'rule' may formally be observed by accepting the continuation of the rights which English law confers, and yet the principles of modified universalism and the Model Law and CBIR given effect by preventing the exercise of those rights by a stay or moratorium.

The foundation of the Moratorium Extension Application and the solution suggested

60. The essence of what Mr Bayfield submits is that the 'rule' in the *Antony Gibbs* case should be confined in its application to prevent the abrogation or modification of the English law governed contractual rights in question as a matter of law. It should not be applied or extended so as to prevent the Court taking procedural steps, in order to assist a foreign insolvency proceeding which it has chosen to recognise, which as a practical matter prevent the exercise of those rights or negate the utility of their enforcement.

61. In proposing this solution, Mr Bayfield does not equivocate or shy away from the problem. In paragraph 160 of the Skeleton Argument on behalf of the Foreign Representative it is accepted that *"the relief sought by the Moratorium Continuation Application would materially undermine the practical effect of the Gibbs rule (because an undischarged debt is worthless if it cannot be enforced)."* Thus, Mr Bayfield accepts that a permanent moratorium continuation, resulting in a permanent stay, would in practical terms negate the enjoyment of the rights by preventing or impeding their enforcement and vindication. However, he submits that since, as a matter of strict legal definition of legal rights, the contractual position would not itself be affected, the 'rule' should not prevent its grant.

62. In other words, and as is submitted in paragraph 154 of the Foreign Representative's skeleton argument, Mr Bayfield submits that *"the question of enforcement is different from the question of discharge"*; and the 'rule' should be confined to the latter.

63. Mr Bayfield points out that in the *Antony Gibbs* case itself, the Court of Appeal drew a distinction between: (i) the question of whether the relevant debt had been discharged; and (ii) the question of whether the enforcement of the debt should be stayed. As to the first question, the Court of Appeal held that a debt could only be discharged under its proper law (i.e. 'the rule'). As to the second question, the Court of Appeal held that there was no basis for staying the enforcement of the debt; but, says Mr Bayfield, that was before the days of cross-border insolvency protocols such as the Model Law: in those days there may have been no basis for staying the enforcement of an undischarged debt. But, he submits, *"the Court of Appeal's reasoning on the latter point has been overtaken by the Model Law"*.

64. As Mr Bayfield acknowledged, the concept behind the Moratorium Continuation Application of a procedural solution to mitigate or outflank the 'rule' in *Gibbs* has been contemplated and promoted by a number of academic commentators. The idea has been advocated by, for example, Professor Philip Smart, who wrote an article[1] considering whether the effect of the *Gibbs* rule had been abrogated by the CBIR. In that article, Professor Smart states (at pages 8 to 9):

> "*In situations where a restructuring is on foot in the foreign jurisdiction, the foreign representative can seek recognition in England pursuant to Article 15 of the [Model Law]. (One is obviously dealing with a situation where the foreign representative does not wish to proceed with a parallel scheme of arrangement in England and creditors have not sought to invoke the English*

[1] See "Cross-Border Restructurings and English Debts" (2009) International Corporate Rescue (Volume 6) at pages 4 to 13.

> *court's insolvency jurisdiction.) Provided the foreign representative was appointed in foreign main proceedings, i.e. where the debtor has the centre of its main interests, the mandatory consequences of recognition include, under Article 20(1), the staying of both creditor actions and executions against the debtor's assets …*
>
> *Hence the foreign representative can stymie a hold-out creditor who might be minded to ignore the foreign restructuring and proceed instead to bring an action or to seek to execute in England, relying upon a debt that arose under an English contract. By applying for a stay the foreign representative may not have to deal, at least not immediately, with the substantive question of whether the English debt will ultimately be discharged by the foreign proceedings.*
>
> *However, the application of Article 20 in respect of a foreign restructuring is not wholly free from complexity. The reference in Article 20(2)(a) to 'as if' a winding-up order had been made raises some uncertainty. For there is, of course, no discharge in a winding up. Thus one may ask: what will happen in England in respect of the stay once the foreign restructuring plan has been approved, the corporation resumes trading outside bankruptcy protection and the foreign proceedings are formally closed by the foreign court?*" (emphasis added by Mr Bayfield)

65. This, Mr Bayfield says, is precisely the dilemma which faces the Foreign Representative in the present case. Professor Smart describes a hypothetical restructuring of English debts under Chapter 11 of the US Bankruptcy Code (in which the same problem would arise), and proposes a solution:

> "*… in January 2008, a US corporation, with its centre of main interests in New York, goes into Chapter 11. In March 2008, the 'foreign representative' applies under the [CBIR] for recognition of the foreign main proceedings and obtains an order from the English court staying Creditor X from executing against any assets in England. (Creditor X is an unsecured creditor whose debt arose under an English contract and who has chosen not to participate in the Chapter 11 process.) In late 2008, a plan is approved in the Chapter 11 proceedings which, inter alia, discharges or compromises all old unsecured debts. The US corporation emerges from bankruptcy protection and, in due course, a final decree is entered closing the Chapter 11 case. However, in 2011, Creditor X seeks to execute in England in respect of the old debt against assets that have recently been brought into the jurisdiction.*
>
> *It would be difficult to argue that, in this example, the English stay should automatically terminate when the Chapter 11 case is closed, for such an outcome would defeat the reason behind granting recognition in England in the first place. Nor is there anything in Article 20 to indicate that the stay should so terminate. This commentator's opinion is that the better view is that the English court's stay against Creditor X remains in force indefinitely. Such an approach facilitates the rescue of financially troubled businesses.*

> *Recalling that the English court does not directly apply the US (or any other foreign) stay provision, in an actual case where a foreign representative conducting a restructuring seeks recognition in England pursuant to the [CBIR] and a stay of creditor actions, the English court's order may need to be carefully drawn up, so as to apply to all the relevant debts: i.e. debts which fall within the foreign restructuring process. In such a way it can be made crystal clear that the English court's stay order will not apply to: (i) debts which are not covered by the restructuring (for instance, if the restructuring related only to certain types of finance creditors); and specifically (ii) new debts (e.g. loans made to the corporation after it has emerged from bankruptcy protection). But for relevant debts, the stay remains in force and does not lapse.*
>
> *This commentator's view, above, is that solutions to the threat of an English creditor undermining a foreign reorganisation can readily be found by employing the stay provisions set out in the [CBIR] ...*" (Mr Bayfield's emphasis.)

66. Professor Smart describes this as a "*procedural solution*" to the problem posed by the *Antony Gibbs* case, because it relies solely on the concept of a stay under the CBIR, does not involve the legal variation or discharge of a right, but only a procedural fetter on its exercise, and in consequence does not require (so it is contended) the application of foreign substantive law.

67. Mr Bayfield commends the 'procedural solution' and suggests that I should be fortified in adopting its approach (of restricting the 'rule' in *Antony Gibbs* to the narrow question of discharge or modification) because "the Court has shown no willingness to expand the scope of the rule".

68. In any event, Mr Bayfield submits that the Model Law *"has undoubtedly modified the common law in a number of respects"*; and that furthermore, the Model Law and the CBIR provide a regime for judicial cooperation and supply to the Court jurisdiction to make available to foreign representatives, in the context of foreign proceedings, additional remedies for cross-border assistance that supplement the common law. That jurisdiction and its exercise, he submits, is requisite for the achievement of the objectives and proper implementation of the Model Law and the CBIR, and if it requires a restrictive approach to the *Antony Gibbs* case, then so be it. Whilst not in a position at this level to suggest the 'rule' should not be followed he suggests that the Court's adherence to it should be confined to the letter, and that it should not be afraid to depart from it in spirit in pursuing modified universalism.

69. By way of support for his overall submission and comfort to the Court that although the *Antony Gibbs* case is binding at this level (and up to the Supreme Court) it has been and should be given narrow effect, Mr Bayfield pointed out that in the context of a foreign liquidation the Model Law/CBIR often has the effect or is deployed to prevent either the enforcement of English law rights or their practical vindication.

70. Thus, the automatic stay provided for by Article 20 if the liquidation is recognised as a foreign main proceeding under the CBIR frequently creates a situation in which

creditors are prevented from enforcing their contractual rights for an indefinite period of time, since the stay will remain in place throughout the foreign liquidation process.

71. Mr Bayfield also pointed to the example of the frequent practice of remitting assets situated in England to a foreign liquidation: see *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852. Where such remittal is ordered, creditors are unable to execute against any assets in England belonging to the debtor (because the relevant assets are removed from the jurisdiction), and are required to prove for their claims in the foreign liquidation alongside other creditors.

72. A third example Mr Bayfield cited is where the worldwide assets of a foreign debtor are transferred to a third party (such as a foreign trustee in bankruptcy or its local equivalent) pursuant to an insolvency proceeding in the place where the debtor is domiciled. In such a case, it seems clear that the transfer is recognised at common law, even though the effect is that whilst the bankrupt remains liable in England to perform his contract, he will have been deprived of his assets and his means of performance. (see *Dicey* at Rules 216, 217 and para. 31-097).

73. I accept that these examples show that in practical terms the 'rule' in *Gibbs* may have a limited scope in the context of a foreign liquidation. English debts may not, strictly speaking, be discharged: but if the relevant creditors seek to enforce their claims against assets in England, the ability of the foreign liquidator to apply for an order remitting the English assets to the foreign liquidation and the Court's practice of giving such assistance, demonstrates that the Court is well used to honouring the 'rule' but denying it practical efficacy.

74. The present case does not involve a foreign liquidation, so the moratorium is (unless expressly extended) more limited and there is no scope for a remittal order. Nevertheless, the concept in the context of liquidation of a permanent moratorium preventing the exercise of legal rights otherwise than in a foreign liquidation is accepted; and a remittal order illustrates another way in which what Mr Bayfield urged are the damaging effects of the *Antony Gibbs* case have been mitigated.

75. In summary: Mr Bayfield submits that the 'rule' should be confined by distinguishing between the strict definition of legal rights (of which the *Antony Gibbs* case prevents alteration otherwise than in accordance with their governing law) and their enforcement (which, says Mr Bayfield, is necessarily a procedural matter, since any stay on enforcement may always be lifted); that the practice of remitting assets found in this jurisdiction to the control of the 'rule' in the context of a foreign liquidation recognised here provides a parallel precedent for so confining and restricting the 'rule'; and that such a restrictive approach gives proper effect to and is now necessary to accomplish the terms and objectives of the Model Law and the CBIR, and of the concept of 'modified universalism' which they reflect and are intended to promote.

76. I turn therefore, to what Mr Bayfield described as the "critical question" as to the effect of the CBIR and the Model Law, on which (as stated in paragraph 86 of the skeleton argument for the Foreign Representative) the Moratorium Continuation Applications is founded.

The CBIR and the Model Law

77. The CBIR were made on 3 April 2006 in exercise of the powers conferred by Section 14 of the Insolvency Act 2000, and are designed to implement the provisions of the Model Law. The full version of the Model Law, with the necessary adaptations for Great Britain, is set out in Schedule 1 to the CBIR.

78. Regulation 2(2) of the CBIR makes clear that UNCITRAL's *travaux préparatoires* and the guide to enactment of the Model Law (the "Guide to Enactment", of which the latest edition was produced in January 2014) are admissible as aids to the construction of the CBIR. This is, of course, a different approach than would be usual in the context of purely domestic enactments and also serves to emphasise the CBIR's international roots and objectives.

79. The objective of the Model Law is to assist in the development of 'universalism'. The ultimate objective of 'universalism' is to provide a single forum applying a single regime to all aspects of a debtor's affairs on a worldwide basis.

80. To that end, the Model Law seeks to advance the notion that the law of the debtor's COMI should determine issues arising in the context of insolvency proceedings. Thus paragraph 1 of the Guide to Enactment states:

> "*In principle, the proceeding pending in the debtor's centre of main interests is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors*".

81. The Model Law is also based on the concept of comity. See In re Rede Energia S.A. 515 BR 69 (Bankr. SD NY, 2014):

> *"Chapter 15 of the Bankruptcy Code, which adopted the substance and most of the text of the United Nations Commission on International Trade Law's ('UNCITRAL') Model Law on Cross-Border Insolvency, provides a framework for recognizing and giving effect to foreign insolvency proceedings ... A central tenet of chapter 15 is the importance of comity in cross-border insolvency proceedings."* (emphasis added by Mr Bayfield)

82. The background to the implementation of the Model Law in Great Britain through the CBIR is explained in an explanatory memorandum prepared by the Insolvency Service (the "Explanatory Memorandum"). The underlined parts of the following quotations from that Explanatory Memorandum are those particularly emphasised by Mr Bayfield on behalf of the Foreign Representative:

> *"[2.1] ... In 1995 a working group was established and in 1997, as a result of their work, UNCITRAL adopted the text of a model law designed to assist States to equip their insolvency laws with a modern, harmonised and fair framework to address more effectively instances of cross-border insolvency. The*

model law is intended to cover cases, for example, where the debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place ...

[7.1] National insolvency laws are often not designed to cope with cross-border insolvencies and any problems that arise whether jurisdictional or practical. This makes it difficult to administer such insolvencies both quickly and effectively and any conflict in respective national laws can result in the dissipation of assets and the loss of a potential opportunity to rescue a viable business. Such uncertainties can be a barrier to trade and can have a negative impact on the flow of investment between countries. The UNCITRAL Model Law on cross-border insolvency is that body's attempt to promote modern and fair legislation for cases where the insolvent debtor has assets in more than one State. The Model Law is, however, designed to respect the differences amongst national procedural laws and does not attempt a substantive unification of insolvency laws.

[7.2] The British Government has a commitment to the promotion of a rescue culture and supports the Model Law as an appropriate legislative tool to support this objective and the wider international stage. In addition, implementation of the Model Law will be beneficial in serving the cause of fairness towards creditors who may be located anywhere in the world. We hope that it may also provide an example to other countries of our readiness to engage in a genuine process of cooperation in international insolvency matters and that our actions will encourage other countries to implement the Model Law. In this way, insolvency officeholders in Great Britain should be able to enjoy, progressively, the same benefits abroad as their international counterparts, and be able to reduce administrative costs incurred in recovering assets from overseas. As a result funds available for distribution to creditors, wherever they are located, should increase.

[7.3] Limitations on cooperation and coordination between different national jurisdictions can be the result of lack of a legislative framework or from uncertainty regarding the scope of the existing legislative authority, for pursuing cooperation with foreign courts. The passage of a specific legislative framework is useful for promoting international cooperation in cross border cases. The Model Law fills the gap found in many national laws by expressly empowering courts to extend cooperation in the areas covered by the Model Law.

> *[7.4] In May 2002, the European Union adopted its own Regulation on insolvency proceedings. There is a significant element of overlap between the UNCITRAL Model Law and the EC Insolvency Regulation and although the latter governs only the coordination of insolvency proceedings within the European Union, its underlying principles and approaches have been extremely influential in the international community. However, the Regulation does not deal with cross-border insolvency matters extending beyond Member States of the European Union. Thus, the Model Law will provide a complementary regime of considerable practical value that will be capable of addressing instances of cross-border insolvency and cooperation outside the European Union. This will place Great Britain, by virtue of the operation of s426 of the Insolvency Act 1986, in the unique position of having a suite of statutory procedures available in cross-border insolvency cases, as well as the flexibility of common law.*
>
> *[7.18] The Model Law is a legislative text that is recommended to countries for incorporation into their national law. In Great Britain, we have tried [to] follow UNCITRAL's exhortation to stay as close as possible to the original drafting in order to ensure consistency, certainty and harmonisation with other countries enacting the Model Law.*
>
> *[7.19] The language of the Model Law is similar to that used in international treaties and conventions and will almost certainly be approached by the courts in that way, i.e. it will be interpreted purposively. Accordingly, the UNCITRAL Guide to Enactment will be a useful tool in interpreting the text."* (emphasis added)

83. However, it is also important to appreciate that the Model Law is not dependent or premised upon reciprocal recognition (it has not been adopted in any of the major European states); and it does not address substantive domestic insolvency provisions. Still less does it seek to achieve a substantive uniformity or reconciliation between different jurisdictions and their substantive laws.

84. Its application, and the notion of 'universalism' which it is intended to advance, is thus subject to modification according to the jurisdiction in which it has been adopted. These modifications follow the substantive law in that jurisdiction, and may be significant.

85. Thus, although the concept of the debtor's COMI is central to the Model Law, the concept is an import so far as this jurisdiction is concerned, and it has not yet been fully assimilated: its importance as a factor has to be modified and restricted

accordingly. The concept of COMI had not been invented and would, of course, have been foreign in every sense to the Court of Appeal in the *Antony Gibbs* case; and, as Lord Neuberger pointed out in the speech to which I have referred in paragraph [12] above, although in many other countries "consensus seems to be forming around the state in which the debtor has its COMI" as the determinant,

> *"COMI is a creation of a treaty, and where that treaty is incorporated into law, of statute. It may be difficult for judges to justify taking it on themselves to develop the common law so that it accepts COMI as the touchstone…"*

86. Put another way, our common law does not yield to, adopt or enforce the law of a COMI elsewhere than here, and the law of the COMI cannot be enforced in this jurisdiction, unless and to the extent that by treaty and/or statute that law is absorbed into and becomes in effect part of British law. Such assistance as a British Court can provide in accordance with the theory and objectives of modified universalism is restricted to what by its own common law it has jurisdiction to do, or by what under such an express treaty or statute it is empowered to do. As Lord Sumption put it in *Singularis Holdings Ltd v PriceWaterhouseCoopers* [2015] AC 1675 at [19]:

> *"In the Board's opinion, the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limit of its own statutory and common law powers."*

87. Thus, in essence, the Model Law and the CBIR provide a framework of procedural mechanisms to facilitate the more efficient and constructive disposition of cases in which an insolvent debtor has assets or debts in more than one State: see *'Cross-Border Insolvency' 4th ed.* (General Editor, Richard Sheldon QC) at [3.9].

88. This is confirmed by paragraph 7.1 of the Explanatory Memorandum:

> *"The Model Law is, however, designed to respect the differences amongst national procedural laws and does not attempt a substantive unification of insolvency laws."*

89. That accords with the purpose of the Model Law as envisaged by UNCITRAL. Thus, and by way of example, as explained in the Guide to Enactment at [3] and [21][2]:

> *"3. The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. Rather, it provides a framework for cooperation between jurisdictions, offering solutions that help in several modest but significant ways and facilitate and promote a uniform approach to cross-border insolvency. Those solutions include the following:*

[2] See paragraphs 3 and 20(b) of the 1997 Guide.

> *(a) Providing the person administering a foreign insolvency proceeding … with access to the courts of the enacting State, thereby permitting the foreign representative to seek a temporary 'breathing space', and allowing the courts of the enacting State to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency …. "*
>
> *21. With its scope limited to some procedural aspects of cross-border insolvency cases, the Model Law is intended to operate as an integral part of the existing insolvency law in the enacting State. This is manifested in several ways:*
>
> …
>
> *(a)The Model Law presents to enacting States the possibility of aligning the relief resulting from recognition of a foreign proceeding with the relief available in a comparable proceeding under the national law (Article 20).*
>
> *…" (*emphasis added by Counsel for Franklin Templeton)

The basic concepts of "foreign proceeding" and a "foreign representative"

90. In terms of the triggers for its application (and the application of the CBIR) the Model Law is founded on two basic concepts: that of a "*foreign proceeding*", and that of a "*foreign representative*". The provisions of the CBIR only apply because assistance has been and is being sought by a foreign representative in connection with a foreign proceeding (see Article 1(a)). If there were no foreign proceeding or no foreign representative as defined in the CBIR, there could be no request for a stay or moratorium in this case[3].

91. Article 2(i) of Schedule 1 to the CBIR defines a foreign proceeding as:

> "*… a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation.*"

92. Article 2(j) of Schedule 1 to the CBIR defines a foreign representative as:

> "*… a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of*

[3] There are three other situations in which the CBIR can apply under Article 1 (b) – (d), but none of those applies here.

> *the debtor's assets or affairs or to act as a representative of the foreign proceeding.*"

Recognition of a foreign proceeding

93. Pursuant to Article 17(1) of Schedule 1 to the CBIR, the Court must recognise a foreign insolvency proceeding if:

(1) The foreign insolvency proceeding constitutes a "*foreign proceeding*" as defined by Article 2(i) of Schedule 1 to the CBIR;

(2) The applicant is a "*foreign representative*" within Article 2(j) of Schedule 1 to the CBIR; and

(3) The application satisfies the evidential requirements set out in Article 15 of Schedule 1 to the CBIR.

94. If these requirements are satisfied, and provided that recognition would not be contrary to the public policy of the court receiving the request (see below), the Court "*shall*" recognise the foreign proceeding. Paragraphs 150 to 151 of the Guide to Enactment explain the position as follows:

> *"The purpose of article 17 is to establish that, if recognition is not contrary to the public policy of the enacting State (see article 6) and if the application meets the requirements set out in the article, recognition will be granted as a matter of course ... The Model Law makes no provision for the receiving court to embark on a consideration of whether the foreign proceeding was correctly commenced under applicable law; provided the proceeding satisfies the requirements of article 15 and article 6 is not relevant, recognition should follow in accordance with article 17."*

95. The Court is entitled to refuse recognition if recognition would be *"manifestly contrary to the public policy of Great Britain"*: see Article 6 of Schedule 1 to the CBIR. The Guide to Enactment emphasises in its paragraph 104 that Article 6

> *"is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State".*

96. A foreign proceeding must be recognised either as a foreign "*main*" proceeding or as a foreign "*non-main*" proceeding, depending on the location of the debtor's COMI. As noted previously, the concept of COMI is central to the Model Law. If the debtor's COMI is situated in the jurisdiction of the foreign proceeding, then the foreign

proceeding must be recognised as a foreign main proceeding: see Article 17(2) of Schedule 1.

Consequences of recognition

97. Where a foreign liquidation is recognised by the English Court as a foreign main proceeding under the CBIR, the debtor benefits from an automatic stay in England: see Article 20(1) of Schedule 1. The stay is imposed in the same terms as if the debtor had entered into an analogous insolvency proceeding in England, namely a winding-up under the 1986 Act.[4] The scope of the stay imposed by Article 20(1) is set out in Article 20(2). The automatic stay can be modified under Article 20(6). The automatic stay under Article 20 is primarily designed for foreign liquidations.

98. This is to be contrasted with a foreign restructuring which does not involve liquidation. In such a foreign restructuring (particularly where the debtor continues to trade), the automatic stay is normally replaced with an administration moratorium in the terms of paragraph 43 of Schedule B1 to the 1986 Act: see *Re 19 Entertainment Ltd* [2017] BCC 347 at [20]-[22]. This approach was taken in the present case: see paragraph 2 of the Recognition Order and the judgment of Barling J at [14]-[17].

99. The basis for imposing an administration moratorium, and granting many other forms of relief, is found in Article 21(1):

> *"Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—*
>
> *(a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1(a) of article 20;*
>
> *(b) staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1(b) of article 20;*
>
> *(c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1(c) of article 20;*
>
> *(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;*

[4] The relevant provision under the 1986 Act is section 130(2), which stays all proceedings against the company (unless the Court grants leave).

> *(e) entrusting the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court;*
>
> *(f) extending relief granted under paragraph 1 of article 19; and*
>
> *(g) granting any additional relief that may be available to a British insolvency officeholder under the law of Great Britain, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986*."

Scope and extent of jurisdiction: the cases relied on for the Foreign Representative

100. Although relying generally on Article 21, the Foreign Representative's application is anchored in sub-paragraphs (1)(a) and (b) of that Article.

101. It is submitted on her behalf that the plain words of the specific provisions of sub-paragraphs (1)(a) and (b) of Article 21 extend to the grant of relief by way of permanent stay or moratorium; that a purposive interpretation reinforces the view that in consequence this court's jurisdiction (in the proper sense of power) to grant the relief should not be in doubt; and that this is so even if, having regard to the 'rule', there may be argument as to whether as a matter of discretion it would be appropriate to exercise it.

102. Mr Bayfield submitted that the words of the sub-paragraphs should be read purposively and given full effect. He cautioned against qualifying the specific provisions of the relevant sub-paragraphs, whether by reference to the words *"appropriate relief"* in the opening of Article 21, or by determining the issue of jurisdiction through the prism provided by the *Antony Gibbs* case. According to their natural meaning and plain intent, the words expressly provide for a stay additional to any stay, suspension or moratorium under Article 20: and that is all that is here sought. There is no express limitation on the length of the stay or moratorium: and there is no warrant in the words for any implied restriction. As he put it in oral argument:

> *"The relief that we seek, a stay of proceedings under 1(a) and 1(b), is precisely the relief which is catered for under Article 21.1. We rely on a specific statutory power…"*

103. As will become clear, other parts of the same Article 21 have been restrictively construed. But Mr Bayfield relied on cases on the specific paragraphs to support his case that not only are the words clear in principle, but there is precedent in support of his position also.

Authorities and competing consideration

104. The issue as to whether any intervention under the Model Law/CBIR can be permanent or must be limited has occasioned much debate. However, though the cases are instructive, there is none which is dispositive.

105. Mr Bayfield in his oral submissions sought to displace the notion that the purpose of recognising the foreign proceeding is only to enable a *"breathing space"* (that being, as the references to paragraphs [28(1)] and [89] above show, the phrase used by his expert and in the Guide to Enactment), and any relief under the CBIR must be confined in its application to that *"breathing space"* and not permanent. He contended that those descriptions apply only to the automatic stay, and not to 'additional relief' thereafter.

The BTA case

106. He referred me in this context (and generally in support of his thesis that the CBIR neither requires nor has been limited in the past to relief providing a temporary *"breathing space"*) most especially to the decision of Norris J in *Re BTA Bank JSC* [2012] EWHC 4457 (Ch) ("the *BTA* case"). He described this in his skeleton argument as the *"leading case"* and as having facts *"strikingly similar to the present case"*.

107. I take the following summary of the *BTA* case from paragraph 116 of that skeleton argument:

i) The BTA Bank JSC ("the BTA Bank") was subject to a restructuring proceeding in Kazakhstan, where it was incorporated and headquartered.

ii) In July 2012, the Kazakh restructuring proceeding was recognised as a foreign main proceeding by David Richards J (as he then was) under the CBIR. As a result of recognition, the BTA Bank benefited from the automatic stay under Article 20 of Schedule 1 to the CBIR.

iii) As part of the Kazakh restructuring, the BTA Bank promulgated a plan to reorganise its debts. The plan was approved by 93.8% of the affected creditors (well in excess of the required majority), and was subsequently approved by the Kazakh Court.

iv) The Kazakh restructuring proceeding was due to terminate on 31 December 2012. However, some of the relevant debts were governed by English law. The BTA Bank was concerned that a number of dissentient creditors would seek to enforce their English law claims against it upon the termination of the Kazakh restructuring proceeding.

v) Accordingly, prior to the termination of the Kazakh restructuring proceeding, the BTA Bank's foreign representative applied to the English Court for an order that the stay under Article 20 be made permanent (with liberty for any creditor to apply to lift the stay), either pursuant to Article 20.6 or pursuant to Article 21.1 (a) or (b).

108. Norris J granted the application. It is important to note that the application was not opposed. However, the parties who supported the application were represented by

three experienced insolvency counsel, including two silks. Norris J summarised the background as follows:

> "*[5] … The effect of [the] recognition order was to bring into place an automatic stay of proceedings under article 20 of the UNCITRAL Model Law which applies by virtue of the Cross-Border Insolvency Regulations 2006. Accordingly, those with English law claims could neither commence nor continue individual actions or proceedings concerning the bank's assets, rights, obligations or liabilities.*
>
> *[6] The progress of the plan, following its approval by the Financial Court of Almaty City, is that, on the restructuring date identified in the plan, the entitlements to which individual categories of holders of designated financial indebtedness are entitled will be paid … the dissentient holders of designated financial indebtedness will also become bound, their claims against the bank discharged, cancelled and released.*
>
> *[7] All this takes effect under Kazakh law. But the question arises: what of claims which are governed by English law? For it is established that those whose claims are governed by English law will not, as a matter of English law, be bound by the terms of the plan. At present their claims are stayed under the automatic stay. But a question might arise, once the Kazakh restructuring proceedings are terminated on 31st December 2012, what force remains in the recognition order. It is in anticipation of that lack of clarity arising that the foreign representative makes an application for the current automatic stay to be rendered permanent.*
>
> *[8] It is important to note that the stay that is proposed is one akin to that arising under section 130 of the Insolvency Act 1986, being one that is capable of being lifted on an application to the court. The propos[ed] stay accordingly, whilst perpetual in length, is by no means entirely prohibitory in action.*
>
> *[9] The real risk which arises, as from 31st December 2012, is that holders of obligations governed by English law will seek to commence proceedings in England and enforce against the bank's assets in England. It is right that those claimants who participated in the Kazakh restructuring plan but were on the losing side in the various votes, may face some difficulty in launching proceedings since, by their participation in the foreign insolvency process, they may be taken to have recognised its effectiveness in binding them. (See the observations of Lord Collins in Rubin v. Eurofinance SA [2013] 1 AC 236, at paragraph [167]). But there is a real risk in relation to those who did not vote in the Kazakh insolvency process. So by the present application the foreign representative seeks to impose upon them a stay which they must apply to the court to lift before they can commence proceedings which might disrupt the carefully negotiated restructuring plan approved by so large a majority of the bank's claimants*."

109. Norris J held (at [10]-[12]) that he had jurisdiction to extend the stay beyond the termination of the foreign proceeding under Articles 21(1)(a) and 21(1)(b) of Schedule 1 to the CBIR. He held:

> *"[11] In the alternative, the foreign representative relies on article 21, paragraphs (1)(a) and (b). These provisions declare that the court may, at the request of the foreign representative, 'grant any appropriate relief', including, under paragraph (a), 'staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities'.*
>
> *"[12] Of the two routes said to be available to the foreign representative, I prefer that provided for under article 21, I am really staying the commencement of individual actions that fall within a particular class."*

110. In his judgment at [13]-[14], Norris J explained the key reasons why it was appropriate to extend the stay beyond the termination of the foreign proceeding:

> *"[13] I propose to grant the stay for two principal reasons. First, the relief is appropriate because it enables the English court to cooperate with the financial court in Almaty City in subjecting the bank's assets and claims to a single regime for the benefit of the general body of claimants. Secondly, I consider the relief appropriate because there plainly should not be an unseemly scramble for English assets by English claimants to the possible prejudice of the general body of claimants, but there should be an ordered approach to such English claims as might survive the Kazakh insolvency process.*
>
> *[14] The relief which is sought, although of unending duration, is, as I have indicated, capable of being modified on the application of an individual creditor who can show that his claims are governed by English law and that his claims have not been discharged by the Kazakh insolvency process. It might be thought that, having regard to my summary of the English common law, there could be no question of any discharge having been effected, but there is an argument, which the steering committee of those holding designated financial indebtedness would wish to promote, that, following the implementation of the Model Law by the Cross-Border Insolvency Regulations, there is in fact a true discharge. It is unnecessary to express any view about whether that argument is right or wrong because all I am doing is putting in place a regime to 'hold the ring' until such an argument can be addressed in an orderly way."*

111. Mr Bayfield accepted that Norris J did not decide whether the stay should be lifted so that claims governed by English law could be enforced. There was no need for Norris J to decide that issue because the relevant English law creditors were not before the Court. Instead, Norris J envisaged that the relevance of the 'rule' in *Gibbs*, and the question of whether to lift the stay, would be determined in the future (in the event that a creditor applied for leave to enforce). He expressed no view as to whether leave would be granted, and there has been no subsequent application for leave.[5]

112. Mr Bayfield submits that although Norris J's judgment does not assist on the question of discretion, his decision establishes that the English Court has jurisdiction under the CBIR to extend the Moratorium beyond the termination of the Restructuring Proceeding and indeed permanently, subject to the Court having a continuing jurisdiction to lift it on application made by an affected creditor.

113. The *BTA* case is not binding on me; but I would ordinarily follow such a decision unless distinguishable or in my view plainly wrong. There are, however, features of the case which to my mind undermine its persuasive effect:

(1) The first is that, contrary to what might at first appear from the title to the Report, the application was not opposed: the person described as a "Respondent" was in fact a supporting creditor. Norris J had not the benefit, therefore, of adversarial argument.

(2) Secondly (though a related point), the foreign representative was seeking relief in order to address the inherent risk that holders of obligations governed by English law who had not chosen to participate in the Kazakh restructuring plan would seek to commence proceedings in England and enforce against the Bank's assets here: but no such opposing holder had yet emerged.

(3) As a consequence of that, and thirdly, the judge did not feel it necessary or appropriate to consider the question as to the true effect of the Kazakh insolvency process, or detailed argument against the CBIR and Model Law being used to deprive English law creditors of their substantive English law rights. That would be a matter for another day, if ever a challenge actually eventuated. No doubt that was the way it was presented to the judge: and that is supported by the time estimate given in the applicant's skeleton argument, which Mr Bayfield helpfully managed to track down, which suggested a reading time of (only) 45 minutes and a hearing time also of (only) 45 minutes. That provides an insight into the limited nature of the argument. That time estimate did not need to allow, given the way the matter was presented, and indeed did not allow, time for argument and proper consideration of the difficult issues raised before me.

(4) Thus, and although undoubtedly the order sought and made was for a permanent stay, Norris J's reference to *"putting in place a regime to "hold the ring"*

[5] Norris J indicated at [14] that the stay would be "*capable of being modified on the application of an individual creditor who can show that his claims are governed by English law and that his claims have not been discharged by the Kazakh insolvency process*". However, later in the same paragraph, Norris J expressly stated that the question of whether the stay should be lifted in any particular case would be a matter for a future hearing. It is clear that he did not make any decision about the circumstances in which the stay would be lifted.

until…argument can be addressed in an orderly way" suggests that the judge was approaching the matter on the basis that the stay would only be permanent if and so long as unopposed, and if any opposing creditors wished to challenge then a fuller argument would be enabled and required. I suggested at the hearing that this was not wholly dissimilar from an order granting *ex parte* a freezing order until trial (as would be the practice in the Queen's Bench Division): although so expressed such an order in reality is intended to have such an extended effect only if unchallenged in the meantime, and in that sense merely *"holds the ring"*.

114. As it seems to me, that element of Norris J's approach and reasoning was crucial to his decision. The perceived interlocutory nature of the intervention, and the fact that it was not necessary or intended to determine whether relief could be granted which would operate, in order to give effect to the Kazakh proceeding, as a truly permanent stay on the exercise of contractual rights governed by English law, distinguishes the case, and with all respect substantially diminishes its persuasiveness on the argument now before me.

115. By contrast, in this case, my decision will (subject, of course, to appeal) determine the issue as between IBA and the only objecting creditors, unless there is some fundamental change of circumstances. Though procedural in form the relief, if granted, would in all likelihood determine in practice the substantive rights of the relevant parties. In other words, I am confronted with the question which Norris J expressly stated (see [14]) was not necessary for him to determine and on which he considered it therefore unnecessary to express any view. On analysis, therefore, it follows that the *BTA* case is not an authority on the real question before me.

116. Mr Bayfield referred me also to another (earlier) decision of Norris J, in *re Atlas Bulk Shipping A/S, Larsen and others v Navios International Inc* [2012] Bus LR 1124 ("*Atlas Bulk"*). He submitted that *Atlas Bulk* is another example and illustration that the enforcement of rights governed by English law (including contractual rights) can be restricted, and indeed permanently restricted, through the application of Article 21.

117. Again, I can take a useful summary of the case largely from his skeletonargument:

i) A Danish company had entered into a bankruptcy or insolvency proceeding in Denmark, which was recognised as a foreign main proceeding in England. The company had entered into a number of contracts with the respondent, each governed by English law and subject to the exclusive jurisdiction of the English Court.

ii) An effect of the commencement of the bankruptcy proceeding was that these contracts (which were forward freight agreements) became subject to automatic early termination.

iii) The foreign representative of the company commenced litigation in its name in the Commercial Court against the respondent to recover US$2.1m under the contracts, being the sum calculated to be due on automatic early termination.

iv) The respondent did not contest the US$2.1m liability, but sought to resist the claim by relying on two alleged rights of set-off against the company: the first

being an alleged contractual right of non-mutual set-off, and the second being an alleged right of legal set-off arising from a post-bankruptcy assignment.

v) In those circumstances, the foreign representative applied for an order restraining the respondent from relying on the alleged set-offs in the Commercial Court litigation. It was assumed, for the purposes of the application, that the alleged rights of set-off existed: the issue was whether the Court should restrain the respondent from relying on them.

118. It was common ground that the respondent was not permitted, under Danish insolvency law, to invoke the relevant rights of set-off against the company (because non-mutual set-offs and set-offs arising from post-bankruptcy assignments are not permitted in a Danish bankruptcy). The respondent argued, however, that the English Court could not apply Danish law; and that, even if (as indeed is the case) the rights of set-off could not be exercised in an English liquidation, this fact was irrelevant (because there was no English liquidation, only a Danish bankruptcy).

119. Norris J granted the foreign representative's application, and made an order preventing the respondent from relying on the set-offs. The source of jurisdiction for the order was held to be Article 21(1)(g), which empowers the Court to grant *"any additional relief that may be available to a British insolvency officeholder under the law of Great Britain"*. It was argued, and Norris J accepted, that an English liquidator could have obtained an order preventing the respondent from relying on the relevant set-offs in an English liquidation. He said (at [26]):

> *"I am satisfied that it is necessary for the protection of the assets of the debtor and in the interests of the general body of creditors as a whole that I should declare that Navios may not, by way of defence in the Commercial Court action, rely on set-offs arising under either the non-mutual set-off argument or the post-insolvency assignment argument. Set-off operates contrary to the general principle of pari passu distribution which applies upon insolvency. Navios contracted with a Danish entity. The Danish bankruptcy law recognises the principle of equal distribution and strikes a balance between the interests of the person having a claim capable of amounting to a set-off and the interests of the general body of creditors. Those who contract with a Danish entity might expect that balance to govern their relationships inter se when insolvency supervenes. The only reason it does not do so automatically in the present case is that the fortuitous circumstance that the FFAs happen to be governed by English law and justiciable in England. But English law in fact strikes the same balance. The public policy of Denmark and England both say that non-mutual set-offs and post-insolvency assignment set-offs do not hold good against the general body of creditors, and the assets of the debtor and the interests of the general body of unsecured creditors are to be protected accordingly. There is no reason why the recognising court in England should not regard as 'necessary' the protection which both Danish and English law afford to the general body of creditors."*

120. Mr Bayfield acknowledged that there are differences between *Atlas Bulk* and the present case. In *Atlas Bulk*, the foreign representative's application was brought under Article 21(1)(g), whereas the present application is brought under Articles 21(1)(a) and 21(1)(b). Further, the proceeding in Denmark was the equivalent of insolvent liquidation. Nevertheless, Mr Bayfield submitted that this left intact his key point to the effect that Article 21 can and should be used in appropriate cases to restrict by procedural means the enforcement of substantive rights governed by English law.

121. In my view, that is to overlook both the materiality of the differences and the context. In the case before me, there is no bankruptcy or insolvency proceeding and there can be no resort to Article 21(1)(g), which enables the grant of "additional relief" that would be available to a *"British insolvency officeholder under the law of Great Britain, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986"*.

122. In *Atlas Bulk* the relief sought in aid of the insolvency proceedings in Denmark involved no erosion of any right which would have been available in an English insolvency process at all. The English law and the relevant Danish law on liquidation set-off were at one: neither jurisdiction's insolvency laws recognised or permitted non-mutual set-off nor set-off based on a right acquired after the commencement of winding-up (see paragraphs [9] and [10]). What the respondent was seeking to do was rely on the fact that though Atlas Bulk was admitted to be insolvent there was no English insolvency, and to assert a defence of set-off in the English Commercial Court proceedings which would not have been available in an English insolvency.

123. As Mr Moss submitted to me orally:

> *"It is nothing to do with recognising foreign law, foreign judgments, and it is nothing to do with getting rid of rights which you have under British law in the sense that the respondent may have said, "Well, I have a British law right to settle," but it was not actually a British law right to settle in an insolvency context. In terms of British insolvency law, there was no right of settlement. What the judge said was that… it was something that you actually could not do under British law. In the present case, the Gibbs rule says that what we want to do we can do under British law and there is nothing that says that we cannot do it.*
> *In that case, and this is, in our respectful submission, fundamental to the whole process of reasoning in Atlas, that is, that the Danish law and the British coincided so that unless one said they fell between two stools, then one could rationalise the result by saying whether you look down at the foreign law order or the British order you get the same result, therefore I will achieve that result. In our respectful submission, one can leave open whether it is rightly decided or not, it does not in any way control or govern the facts or principles of the present case."*

124. In short, I do not consider that *Atlas Bulk* is analogous; still less is it authority for what is sought in the present application. Mr Bayfield ultimately did not press it: correctly in my view.

Ronelp

125. In his skeleton argument, Mr Bayfield also relied on a third (and very recent) decision of Norris J, that in *Ronelp Marine Ltd v STX Offshore & Shipbuilding Co Ltd* [2016] EWHC 2228 (Ch) ("*Ronelp"*) as illustrating "with particular clarity" Mr Bayfield's basic proposition that:

> *"the mere fact that liabilities governed by English law are not discharged (by virtue of the Gibbs rule) does not mean that such liabilities can be enforced in a manner which is contrary to the scheme of the Model Law."* [Mr Bayfield's emphasis]

126. However, closer analysis of *Ronelp* shows that the creditor who was applying to lift the stay in that case, who had an English law governed debt, had in fact submitted to the jurisdiction of the Korean court in which the proceedings for restructuring the company's debt under the Korean Debtor Rehabilitation and Bankruptcy Act ("the KDRB", which is similar to Chapter 11 under the US Bankruptcy Code) were pending.

127. On that basis, Mr Bayfield, understandably, did not press *Ronelp* either, beyond commending the general approach underlying it of:

> *"the court looking to the benefit to the creditors as a whole of a co-ordinated, global solution (which is the way that the Judge puts it)."*

128. In summary, therefore and despite Mr Bayfield and his team's researches, there was not put before me any case providing, at least to my mind, any precedent or authority for the application in this case.

A more restrictive interpretation of Article 21 and the Pan Ocean Case

129. I turn to discuss whether there is authority against it, as the Respondents submit there is, principally citing the decision of Morgan J in *Fibria Celulose S/A v Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch) ("the *Pan Ocean* case").

130. The application in the *Pan Ocean* case was made by a foreign representative in respect of insolvency/rehabilitation proceedings under Korean law (again, the KDRB) which were recognised in this jurisdiction as a foreign main proceeding. The foreign representative sought to invoke Article 21(1)(a) and/or the alleged jurisdiction of this court under Article 21 to grant *"any appropriate relief"* (see those words in the general opening part of the Article).

131. However, a curious or unusual feature, which Mr Bayfield was swift to emphasise, was that in the *Pan Ocean* case what was sought by the application was a 'stay', not of an action or proceedings, but of the exercise of a right to serve a termination notice to bring an end to a contract of affreightment governed by English law and providing for London arbitration. The ground put forward was that as a matter of Korean insolvency law the contract termination provision was unenforceable.

132. Morgan J held that such an application was not within the wording of Article 21(1)(a), even adopting a generous purposive approach, since the service of a notice

to terminate could not be characterised as the commencement or continuation of an action or proceedings. No other particular sub-paragraph of Article 21 applied either. So the question became whether this court had jurisdiction to make an order restraining the exercise of the termination right pursuant to the power conferred to grant *"any appropriate relief"*.

133. The applicant submitted that the words should be given their literal and very broad meaning, and as empowering the court to do whatever it thought fit, subject to the protection of Article 22 (which prescribes that the interests of creditors and others are *"adequately protected"*). Morgan J summarised the argument as follows (at [77]):

> *"It was said that these words deliberately gave the court very wide powers to do what it thought fit. If the court thought it was appropriate to order relief which would be available to the [applicant] administrator in the Korean court applying Korean insolvency law, then the English court could grant that relief. In so doing, the English court was not applying Korean law. Article 21 was part of English law and it was English law which was being applied when the English court granted the same sort of relief as would be available in the Korean court under Korean insolvency law."*

134. Morgan J, after an extensive consideration of the Model Law and the CBIR, the relevant guides and explanatory memorandum, the decisions in *Rubin* (as well as *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508), *Atlas Bulk*, and numerous cases in the USA and Canada, declined to grant the relief sought.

135. He recognised that the words *"any appropriate relief"*, taken on their own, were wide words (see [79]) which it was possible to read as enabling the Court to grant any relief, whether available under English law, any other system of law, or no system of law (see [79] and [105]); but they had to be construed in context, and the very width of their literal meaning encouraged caution (see [105]). The judge also observed that the manner in which certain of the sub-paragraphs in Article 21(1) are expressed, in particular (g) and the deliberate limitation to relief which would be available to a British insolvency office-holder, suggested that it would be surprising if the opening language used in Article 21(1) could be read in such a literal manner: it would render the express limitation on the relief anticipated under Article 21(1)(g) otiose (see [80]).

136. In conclusion, Morgan J was not persuaded, as regards jurisdiction, that the words allowed him *"to grant relief which would not be available to the court when dealing with a domestic insolvency"* (see [108]).

137. Furthermore, Morgan J, in considering how he would have exercised his discretion if he had held that the relevant words did give him jurisdiction, also addressed *Rubin,* its support for the view that the relief under Article 21 as a whole is of a procedural nature, and the resulting question as to the boundaries between substantive and procedural relief. At [111] he said this:

> *"Rubin…supports the view that the relief available under Article 21 is of a procedural nature and that the article should be given a wide interpretation in relation to matters of procedure. There is considerable scope for argument as to*

> *whether the relief sought in a particular case is of a procedural or substantive nature. I will not attempt to define which matters are procedural and which are substantive. However, having explained the difference between [the Applicant] being entitled to terminate the contract and not being so entitled, it seems to me that this difference goes well beyond matters of procedure and affects the substance of the parties' rights and obligations under the contract."*

138. Mr Bayfield advanced five arguments in seeking to persuade me that the *Pan Ocean* case did or at least should not stand in the way of the Moratorium Continuation Application:

(1) First, he submitted that in *Pan Ocean* the English court was being asked to apply Korean insolvency law; whereas in this case the court is not being asked to apply Azeri insolvency law, but simply to continue a stay which already exists pursuant to an express statutory provision.

(2) Secondly, and as previously recorded, he stressed that the Moratorium Continuation Application in this case is not reliant on the words *"appropriate relief"*. It is based on the clear words of sub-paragraphs (a) and (b) of Article 21(1). *Pan Ocean* does not relevantly cut down the meaning of those sub-paragraphs or deal with the position as it obtains here of the relief falling within one of the specific heads of relief provided for in that Article.

(3) Thirdly, he submitted, the relief sought here is in substance the sort or type of relief which would be available to the court when dealing with a domestic insolvency proceeding most closely comparable (there being no exact equivalent) to the Azeri process, which Mr Bayfield submitted was an English administration coupled with a CVA or scheme of arrangement. In such a proceeding, he submitted (citing in support a passage in Sheldon: *Cross-Border Insolvency* (4th ed) at para. 14.33 and the cases there noted), an administrator would be able to obtain a permanent anti-suit injunction restraining creditors from seeking to enforce their claims contrary to the terms of the CVA or scheme; and such an injunction could continue to operate after the conclusion of the administration so as, for example, to prevent any creditor of a company emerging from administration as a trading entity enforcing its claim.

(4) Fourthly, whereas intervention (as sought in *Pan* Ocean) to prevent exercise of a contractual right of termination was more readily characterised as an interference with the substance of the contract of affreightment than, the continuation of the Moratorium sought in this case is procedural in form and reality since it would remain capable of being lifted if there is a good reason subsequently demonstrated to do so.

(5) Fifthly, to the extent that the moratorium or stay sought here would have a substantive effect, the effect is no more substantive an interference with individual contractual right than the effect of the automatic stay which would apply in the context of a foreign liquidation and which would, unless lifted, continue until the termination of the liquidation. In such a case, by the time the liquidation stay falls

away, the assets will have been distributed, the company is likely to have been dissolved and lifting the stay will be of no benefit to anyone.

139. Finally in relation to the *Pan Ocean* case, Mr Bayfield submitted that if and to the extent that the case was relied upon as authority for the proposition that no relief can be granted under the CBIR, which has the effect of preventing English law governed creditors from enforcing their claims in this jurisdiction once a foreign restructuring has been completed, that part of the judgment was *obiter* and, in any event, wrong, as the conclusion would entirely cut across the purpose of the Model Law/CBIR.

140. Mr Bayfield advanced these points with admirable (and characteristic) efficiency and clarity. I am persuaded that the *Pan Ocean* case was a clearer case for refusal of the relief sought and that it is not on all fours with the present case. In particular:

(1) I accept Mr Bayfield's first point to the (qualified) extent that the stay sought in that case to prevent the exercise of the legal right of termination conferred by the English contract in order to achieve the same result as under Korean law was plainly and obviously (a) a direct interference with a substantive right which could not be classified as procedural with (b) the intention of nullifying the right in accordance with Korean law, albeit through the purported application of English procedural law.

(2) I accept also that it is an obvious and relevant point of difference that in *Pan Ocean* that which was sought to be prevented was the exercise of contractual rights of termination, rather than the right to enforce a contract by legal action, so that the applicant could not realistically invoke any of the specific provisions of Article 21(1), whereas the present case is firmly grounded in the literal words of the specific provision in Article 21(1)(a).

(3) Adopting the "elephant test" which Mr Isaacs QC propounded (a test not infrequently invoked in this court), the *Pan Ocean* case was much more easily recognisable beyond the confines of the Article.

141. In my view, however, Mr Bayfield's submissions have not persuaded me that these points of distinction enable the case to be so entirely distinguished that the *Pan Ocean* case does not constitute any material impediment to the Moratorium Continuation Application.

142. In my judgment:

(1) The depiction of the Moratorium Continuation Application as simply one to continue a stay which already exists pursuant to an express statutory provision, in which the court is not being asked to apply Azeri insolvency law, elevates form over substance. As a matter of substance, this application seeks an order of the court which has the intended effect of forever preventing the exercise by the Respondents of an English law right in order to conform the position of the Respondents to that they would be recognised as having under Azeri insolvency law, rather than English contract law. What is sought cannot sensibly be distinguished from a discharge or variation of the right itself: its depiction as merely procedural belies its true and intended effect. I share Morgan J's reluctance to offer any general definition of what matters are procedural and

which are substantive (see [111] of his judgment in *Pan Ocean*). But I would adopt as at least part of the test (as, though in a part of his judgment addressing how he would have exercised his discretion if he had held he had power, Morgan J suggested it is) whether what is proposed *"affects the substance of the parties' rights and obligations under the contract"*. I consider that it is difficult to see any material distinction between preventing the exercise of an express right of termination or preventing an implicit or general right of enforcement in terms of whether they *"affect the substance"* of the parties' contractual rights and obligations.

(2) It is true that the Foreign Representative has no need to resort in this case to the general provisions of the preamble to Article 21, rather than the particular examples of its scope. But the specific provisions constitute a sub-set and/or individual examples of the general power, which is limited to granting relief which is *"appropriate"*; and *Pan Ocean* follows *Rubin* in making quite clear that this power does not and could not include either the (purported) application of foreign law or the substantive discharge or variation of an English law right.

(3) That in the present case this would be the nature of the exercise and its result is illustrated by the Foreign Representative's suggestion (in case of having to show such an analogy) that the relief it is seeking is substantively analogous with relief which would be available in an English administration in the form of a permanent anti-suit injunction in support of a CVA or a scheme of arrangement. In such a circumstance the purpose of the anti-suit injunction is to enable the application of the English law process which has been selected as most appropriate to protect English law rights. Here the purpose would be to force the holder of the English law right to choose between the negation of its English law right and the substitution of a foreign law right. The choice would be a false one, forced by a process which may be presented as procedural but is calculated to be substantive in its effect.

(4) Mr Bayfield's deployment of the analogy of the effect of remittal of assets to a foreign liquidator where the foreign insolvency is recognised as the main proceeding was skilful. However, even in the context of liquidation, (a) it is not entirely clear whether, in the absence of statutory authority (for example, under section 426 of the Insolvency Act 1986), there is such a power of remittal, since though Lord Hoffmann concluded there was in *re HIH Insurance Ltd* [2008] 1 WLR 852 at [24], the judgments of Lord Collins in *Rubin* and Lord Sumption in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675 at [17] may suggest otherwise; and in any event (b) any such power at common law is subject to the constraint that it not be used to undermine the statutory rights of English creditors to a *pari passu* distribution according to English precepts and rules.

(5) Furthermore, in the present case, the context is not a liquidation; the nearest analogy is administration. Although both are "*collective proceedings"* for the purposes of the Model Law, the one involves a distribution of all the insolvent company's assets, the other a variation or removal of individual rights. Even if common law permits the one, which is not clear, the 'rule' in *Gibbs* precludes the other. Furthermore, there is to my mind a material difference between the removal of assets from the grasp of a creditor in a particular jurisdiction and depriving the creditor of his contractual right. It is not part of the unsecured creditor's

contractual right to be able to look to or have preserved any particular fund in any particular place.

143. As to Mr Bayfield's final resort, I do not accept the argument that the *Pan Ocean* case was wrong in so confining the scope of Article 21. I should, on well-established principles of precedent, follow Morgan J's decision in *Pan Ocean* unless persuaded that it is properly distinguishable or plainly wrong. But I should make clear that far from doubting the decision in *Pan Ocean*, I consider it to be (a) plainly correctly decided; (b) correct in taking from *Rubin* that the Model Law and the CBIR are *"concerned with procedural matters"* and not matters affecting the existence or exercise or enforcement of substantive rights, nor (as in *Rubin* itself) the recognition of foreign judgments against third parties; and (c) correct also in its analysis that the question whether relief sought is of a procedural or substantive nature is to be answered according to whether in all the circumstances it would affect otherwise than in a purely temporary way the substantive rights and obligations of both parties.

144. I note further that the decision and analysis in *Pan Ocean* accord with the views previously expressed in, for example, *'Cross-Border Insolvency' 4th ed*, at [3.91] to [3.92] that neither the relevant words of Article 21(1)(g), nor the CBIR and Model Law as a whole, *"authorise the English Court to apply foreign law, or to apply English law in a manner that replicates or achieves an identical result to relief available under foreign law if such a result could not be achieved under domestic English law."*

145. That is to be contrasted with the grant of temporary relief to a foreign representative, after recognition of a foreign proceeding, which is calculated not to modify or remove a substantive right but to suspend its exercise for a sufficient time to enable either a liquidation or a plan of reorganisation to be put in place: and see paragraphs [12] and [62] above. That may well in the circumstances be characterised and justifiable as a procedural intervention, as indeed the modified stay imposed by Barling J plainly was in the present case. But that is wholly different in its true character from a permanent stay or moratorium such as is proposed now.

146. In conclusion, in my judgment, the *Pan Ocean* case, following *Rubin*, and consistently with the *Antony Gibbs* case, affirms that the Model Law and the CBIR do not empower the English court, in purported appliance of English law, to vary or discharge substantive rights conferred under English law by the expedient of procedural relief which as a practical matter has the same effect, and has been fashioned with the intention, of conforming the rights of English creditors with the rights which they would have under the relevant foreign law.

147. I would regard that as a jurisdictional bar in the strict sense. But in any event, it would amount to a jurisdictional fetter in the wider sense (see for example, the distinction in *Guaranty Trust Company of New York v Hannay* [1915] 2 KB 536 at 563 and *In the Matter of Chime Corporation Limited* [2004] HKCFA 73) that any such power could never appropriately be exercised so as to achieve the application of foreign law to the discharge or variation of an English law right.

As a matter of jurisdiction, must relief end when the foreign proceeding does?

148. The Respondents (and in this context, most strenuously Mr Moss on behalf of Franklin Templeton) argued further that any relief under Article 21 must temporally be limited to the time that the Foreign Representative is in office and cannot continue beyond the point at which the foreign proceedings have terminated; and that this is a further reason why the court cannot as matter of jurisdiction accede to the Moratorium Continuation Application.

149. Mr Moss advanced a variety of points in support of the argument, including principally the following:

(1) that the provisions of the CBIR, which are triggered only if there is a recognised foreign main proceeding, assume, in detailing the available relief, that the foreign main proceeding is ongoing and the foreign representative granted recognition continues to be authorised. In particular, (a) a foreign proceeding is defined as one where the assets and affairs of the debtor are subject to control or supervision by a foreign Court for the purpose of reorganisation or liquidation (see Article 2(i));[6] (b) a foreign representative is defined as being a person who is (present tense) a duly authorised foreign representative in respect of (c) a foreign proceeding which is on foot (again, present tense);

(2) As from the date of filing an application for recognition, the foreign representative is obliged to inform the Court promptly of *inter alia* "*any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment*" (Article 18(a)). As the Guide indicates at [168], the purpose of this provision is to allow the Court to modify or terminate the consequences of recognition:

> "*... it is possible that, after the application for recognition or after recognition, changes occur in the foreign proceeding that would have affected the decision on recognition or the relief granted on the basis of recognition, such as termination of the foreign proceeding or conversion from one type of proceeding to another."*[7]

This, it is submitted, is an indication that, if the circumstances justifying recognition cease to exist (i.e. termination of the proceedings or removal without replacement of the foreign representative), the Court should terminate the consequences of recognition.

(3) The overall architecture of the Model Law and the CBIR limits the relief to that which is required until the end of the relevant insolvency proceeding, but not after. Thus, in the case of a liquidation-type proceeding, the foreign proceeding will terminate on dissolution. Assistance under the CBIR can plainly not last beyond that or plainly should not last beyond that. If the foreign proceeding is like administration, and if the administration rescues the foreign debtor, the administration type proceeding will end, and the assistance of the CBIR must end. If the administration type proceeding fails and

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[6] See also "*foreign main proceeding*" Article 2(g) and "*foreign non-main proceeding*" Article 2(h).

[7] See the 1997 Guide at [133].

liquidation ensues, the assistance under the CBIR must end on dissolution. If the administration type proceeding terminates with a rescue based on a plan of reorganisation, then (i) the CBIR relief cannot last beyond the foreign proceeding being assisted, and (ii) cannot or should not affect creditors who are not bound by the plan.

(4) The consequences of recognition are described in the Guide at [37] as being *"necessary to provide "breathing space" until appropriate measures are taken for reorganization or liquidation of the assets of the debtor"* (see also [178])[8]. The stay provides a breathing space until appropriate measures can be put in place for reorganisation or liquidation.

(5) The intention of providing the stay as a form of breathing space was the intention of Parliament when the CBIR were enacted. The Explanatory Memorandum provides at paragraph 7.9:

> "*This moratorium (which is automatically triggered by the recognition of a foreign main proceeding) provides a respite until appropriate measures can be put in place for the reorganisation or liquidation of the debtor's assets. Exceptions and limitations to the moratorium will be the same as if the debtor had been wound up or made bankrupt under British insolvency law.*"

(6) In the context of both liquidation and administration under English law, the relevant moratorium lasts only as long as the process. Thus, there is no case in which the stay on proceedings has been held to continue beyond the point of termination of the liquidation. In the (more analogous) case of administration it is clear that the moratorium under paragraph 43 of Schedule B1 subsists only while the company is "*in administration*": see paragraphs 42(1) and 43(1) of Schedule B1. Once a company leaves administration, the moratorium necessarily comes to an end. Relief under the CBIR is "*of a character that would be similar to the moratorium relief under paragraph 43 of Schedule B1 to the Insolvency Act 1986 in the case of an administration*" per Morgan J in *Re Samsun Logix Corporation* [2009] EWHC 576 (Ch). There can be no relief granted in respect of a foreign proceeding equivalent to a paragraph 43 moratorium once the foreign proceeding has terminated: that would not be relief which was available to a British insolvency officeholder under the law of Great Britain after an administration had terminated.

(7) It cannot therefore be right that relief can be granted beyond the point at which the foreign proceedings terminate, and there is neither a foreign proceeding in being nor a foreign representative in office.

150. Mr Moss advanced the further argument that once the foreign main proceeding had terminated and there is no foreign representative there therefore could not be anyone who could be a respondent to future applications by a creditor: and that this also supported his argument against any relief which had effect after that point in time.

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[8] See the 1997 Guide at [32] and [143].

151. Mr Bayfield rejected this phalanx of arguments marshalled by Mr Moss in support of a temporal limitation on the relief that may be granted under the Model Law and the CBIR. He submitted in particular that:

(1) Although the use of the present tense in the definitions of foreign proceeding and foreign representative means that the court cannot grant relief to a foreign representative once the foreign proceeding has terminated (and see, for example, *Sanko Holdings Co Ltd and anr v Glencore Ltd* [2015] EWHC 1031 especially at [38] to [50]) it does not follow that the court has no jurisdiction to grant relief that survives the termination of the foreign proceeding or the order recognising it.

(2) There is nothing in the CBIR, the Model Law or the Guide to Enactment which expressly confines the relief that may be given under Article 21 to the duration of the foreign proceeding itself, and no such temporal limit should or can be implied.

(3) The fact (which he accepted) that an automatic stay upon recognition expires at the termination of the foreign proceedings likewise does not militate against other relief with a longer-term effect: the recognition order opens the tool box, the stay affords time for its use, but the relief available under Article 21 (for example) may be *"additional"* to the moratorium (see sub-paragraph (g)) and there is no basis for confining it temporally to the period of automatic stay. The temporary *"breathing space"* which Franklin Templeton refers to is the automatic stay on the recognition of the foreign main proceeding. Once that is in play the courts had to assess the situation to see what further relief might be appropriate and it is clear from Article 21(1)(a) and (b) that a stay beyond the scope of the automatic stay is expressly a head of relief which the court is entitled to grant.

(4) Article 18 does not suggest any temporal restriction. On the contrary, where the foreign proceeding terminates, Article 18 merely requires the foreign representative to inform the Court of any "*substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment*". The Court can then decide what steps should be taken to modify or terminate the effects of recognition. As the Guide to Enactment explains (at §168), the purpose of Article 18 is to "*allow the Court to modify or terminate the consequences of recognition*" (emphasis added). This is reflected in paragraph 14(2)(a) of Schedule 2 to the CBIR, which provides that the Court may make "*such provision as [it] thinks fit with respect to matters arising in connection with the termination*". There is no suggestion that the Court's hands are tied, such that it is required as a matter of jurisdiction to terminate any relief upon the termination of the foreign proceeding.

(5) Whereas a foreign liquidation typically continues until the company is dissolved, a foreign restructuring typically ends when a restructuring plan is approved (whereupon the company returns to its ordinary business activities). Although a foreign restructuring proceeding may be temporary, the effect of an approved restructuring plan is necessarily

> permanent. It would be unfortunate if the Court had no power under the Model Law to provide for the continuation of any relief to ensure fulfilment of the plan after the termination of a foreign restructuring proceeding by which it was promoted and given effect.

152. As to Mr Moss's further argument based on the consequence of termination of the foreign proceeding resulting in the lapse of the foreign representative's standing, and there thus being a practical problem with any continuing stay, because the Foreign Representative will not be in office to respond to an application to lift that stay, Mr Bayfield offered two answers. The first answer is that it is provided in Article 20(6) that *"any person affected by the stay"* has liberty to apply and the debtor company is such a person and can appear and be represented (see also Schedule 2 paragraphs 6 and 25). The second point is that even if that were wrong, the court, being seized of the matter, would only lift the stay if it was appropriate to do so.

153. Plainly, my view that the procedure cannot trump substantive right, and thus cannot permanently derogate or remove such a right, chimes with Mr Moss's submissions that any relief must be limited in time to the duration of the foreign process. In the context of a foreign liquidation where the foreign proceeding will terminate on dissolution, it seems clear that assistance under the CBIR cannot last beyond that or plainly should not last beyond that. However, the position is less clear where the foreign proceeding is analogous to administration, where (if the process succeeds) the debtor will continue in being, and have to face its creditors, as a going concern.

154. If the administration type proceeding terminates with a rescue based on a plan of reorganisation, then there seems to me to be, at least in general terms, sound sense in the proposition that the CBIR relief (i) cannot last beyond the duration of the foreign proceeding being assisted and (ii) cannot or should not affect creditors who are not bound by the plan which the foreign proceeding has enabled. I also consider it to be a useful test of the nature of the relief sought, and its proper characterisation as substantive or procedural in nature, whether it is to extend in time beyond the pendency of the foreign proceeding.

155. However, I do not think it is necessary for me, in adjudicating the Moratorium Continuation Application, to express a final view or seek definitively to determine whether this is an independent objection to jurisdiction or a sub-set or test of the conclusion I have reached as to the lack of it. My conclusion that a permanent stay cannot be deployed as the way round the 'rule' in *Gibbs* is sufficient to dispose of the Moratorium Continuation Application.

156. The issue may have to be re-visited in the context of the cross-Applications (see below). But in the context of the Moratorium Continuation Application, the only circumstances in which I think this further set of arguments would have to be determined is if I am wrong in my fundamental conclusion, or if the 'rule' in the *Antony Gibbs* case is ultimately abandoned or held to be abrogated by the Model Law. In such circumstances, it may well be that the scope of the Model Law and the CBIR would be viewed from a very different perspective in this context, as indeed generally. I do not think it would be appropriate or wise to postulate what the answer would then be.

How would I have exercised my discretion if persuaded of jurisdiction?

157. Similarly, although I would usually consider it appropriate (as, for example, did Morgan J in the *Pan Ocean* case (see [109] to [114]) to state whether I would have been prepared to grant the relief had I concluded that I had jurisdiction to do so, I have felt some considerable reluctance to do so in this case. The only context in which it would be relevant would be as described above, and in such a context a very different perspective might be introduced. Furthermore, an appellate court will be as well placed as I am, given that there has been no material factual dispute.

158. All I would say in this context, therefore, is this:

(1) It being accepted that the 'rule' in *Gibbs* is binding upon me, I would not consider it consistent with the 'rule' to permit its practical abrogation by procedural means: even if I am wrong to have considered this to constitute a jurisdictional bar, I would not in my discretion have granted relief to side-step the 'rule' in that way.

(2) The fact is that the Model Law/CBIR, and Articles 21, 25 and 27 in particular, have been characterised as concerned only with *"procedural matters*" (see *per* Lord Collins in *Rubin* at [143]), enabling procedural and not substantive intervention. Like it or not, the 'rule' in *Gibbs* requires that any substantive alteration of English contractual rights be sanctioned by some substantive provision of English law (common law or statute): and see also in *re Agrokor* [2017] EWHC 2791 (Ch) (at [115]).

(3) Further, although I accept that there has been criticism of the 'rule', it is based on an entirely logical approach when considering the contractual rights of parties which have especially selected English law to govern their relationship. Where the foreign proceeding is an insolvency there may well be an overriding argument that a creditor should expect the insolvency law of a corporate counterparty's COMI to determine its rights in that insolvency. It is well arguable in such a context that the choice of law in a contract should not extend to bankruptcy or insolvency, which is a process regulating the universal collection and distribution of property and which can be characterised as the exercise of *in rem* jurisdiction (and see in that regard, both *Atlas Bulk* at [26] and the useful discussion, explaining the approach in the USA, in Professor Westbrook's article *'Chapter 15 and Discharge'* in 13 A.B.I.L.R. (2005) 503). But in a reconstruction, involving in essence not collection and distribution of assets but the removal, variation or substitution of contractual rights, I think the strength of the overriding argument is much more debateable. In such a context, and whilst acknowledging that the English courts usually apply a different approach as to the effect of its own orders in the case of foreign debts, I agree with Morgan J in the *Pan Ocean* case at [112] and would adopt what he there says (substituting 'Azeri' in place of 'Korean', and adding the words in square brackets) in the quotation of that paragraph which follows:

> *"In some cases, it can be argued that anyone who does business with a foreign company which might thereafter enter a process of insolvency, governed by the law of its country of registration, should expect that the insolvency will be governed by that law. Indeed, statements to that effect have been made in [Atlas Bulk] para. 26 and AWB (Geneva) SA v North America Steamships Ltd [2007] 1 CLC 749, para. 31. However, in the present case, the parties had deliberately chosen English law as the law of the contract. Whereas the parties might have expected that an [Azeri] court*

> *would apply [Azeri] insolvency law to the insolvency of the company, they might have been very surprised to find that an English court would [in effect] apply [Azeri] insolvency law to the substantive rights of the parties under a contract which they had agreed should be governed by English law."*

(4) My conclusion as to the jurisdictional scope of Article 21 leaves no scope for its application at that stage; but it is relevant also at the discretionary stage, to consider Article 22 of the Model Law/CBIR, which in relevant part provides:

> *"In granting or denying relief under Article 19 or 21…the court must be satisfied that the interests of the creditors…and other interested parties, including if appropriate the debtor, are adequately protected."*

The question in that context becomes whether the rights of a creditor under English law could ever be *"adequately protected"* by intervention which, in effect and intention, negates or varies the rights. Even if I am wrong as to the jurisdictional issue, I would hesitate, in a reconstruction rather than insolvency context, to remove or vary individual rights for the greater good and in the name of universalism (which is essentially the nature of the invitation to me as I see it), for the same reasons as I have stated above.

(5) I consider that it is also a relevant factor that (as Mr Bayfield candidly accepted) the Bank could have sought to promote a parallel scheme of arrangement in this jurisdiction which would, if approved by creditors and sanctioned, have overcome the 'rule' in *Gibbs*. Indeed, that has become the usual course. Mr Bayfield submitted that

> *"[t]he whole point of the Model Law is to prevent the need for foreign companies to use expensive and time-consuming English insolvency procedures in parallel to a foreign main proceeding…*
>
> *More generally, the idea that a parallel English scheme is necessary to bring about an effective restructuring of a foreign company's debts is inconsistent with the concept of modified universalism (which underwrites the Model Law and the common law)."*

I do not feel able to agree, at least for so long as the 'rule' in *Gibbs* stands. I quite appreciate that a parallel scheme may carry expense; and class issues may require separate class meetings which in practice render it unachievable. But that is one of the protections which a creditor has by virtue of the selection of English law to govern its debts. I do not see why a different, lesser, standard of protection would "adequately protect" such a creditor in such circumstances.

Conclusion on Moratorium Continuation Application

159. For all these reasons, I feel bound to refuse to accede to the Moratorium Continuation Application.

160. A re-evaluation of the *Antony Gibbs* case may materially change the approach. The introduction of a new Model Law concerning the recognition and enforcement of insolvency related judgments as proposed by UNCITRAL may solve the problem if ever adopted. But as matters presently stand, the *"procedural"* answer to the 'rule' in *Gibbs* is not one which in my judgment can succeed, at least in a reconstruction context.

The Respondents' respective cross-Applications

161. That leaves for consideration the cross-applications brought by Sberbank and by Franklin Templeton.

162. Put shortly, Sberbank's application seeks an order pursuant to Article 20(2) granting it leave to issue proceedings against IBA (its Part 7 Claim Form and Particulars of Claim being attached). Franklin Templeton's application seeks an order lifting immediately the Moratorium ordered by Barling J as from 30 January 2018, and in the meantime modifying that order to permit or grant permission for proceedings to be brought immediately for the purpose of establishing liability under the 'rump' Notes.

163. I can deal swiftly with Sberbank's application since at the hearing (on 21 December 2017) at which I announced my conclusion (reserving a judgment explaining my full reasoning) Sberbank, by Mr Riddiford of Counsel, confirmed that Sberbank regarded its application as substantially subsumed in the Foreign Representative's application, and no longer sought to pursue its own.

164. Franklin Templeton, on the other hand, continue to pursue their application. That is principally on the basis that (a) the *"breathing space"* is over, and the matter is now in the 'post-plan' stage, and (b) the 'rule' in *Gibbs*, together with the failure of the Moratorium Continuation Application, signifies that they are not creditors subject to the Plan and should not any longer be prevented from vindicating their contractual rights in this jurisdiction.

165. Mr Moss referred me in that context to the approach of Briggs J (as he then was) in *Cosco Bulk Carriers v Armada Shipping SA* [2011] 2 ALL ER (Comm) 481 at [46]-[49] when identifying claims which English law would generally permit to be brought notwithstanding the existence of the stay on proceedings in a winding-up, and the approach of Snowden J in *Nordic Trustee ASA v OGX Petroleo e Gas SA* [2016] Bus LR 121. Snowden J, when describing the scope of the stay imposed by Section 130(2) of the Insolvency Act 1986, observed at [50] and [53] that:

> *"[50] The obvious assumption that underlies the operation of section 130(2) is that the party against whom a stay should operate is a creditor whose claims against the debtor company are subject to the collective insolvency proceeding. So, for example, if the party is a secured creditor, he will be regarded as standing outside the collective process, and the automatic stay under section 130(2) will invariably be lifted to enable him to enforce his security"*
>
> ...

> *"[53]…I do not think that the stay which is intended to operate 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 under Article 20(1) to prevent them from pursuing their ordinary remedies against the company."*

166. As mentioned previously, the focus of the hearing was on the Moratorium Continuation Application and there was much less focus on these points in oral submissions. As indicated at the hearing on 21 December 2017, if the cross-applications are pressed, I would invite further submissions directly on these points. The possibility of some further extension of the Azerbaijan Proceedings by the Azeri legislature has been suggested, and may be relevant to whether these applications are pursued. In any event, Mr Bayfield suggested, and Mr Moss was content, that they be further addressed at a further hearing once the content of this judgment has been considered. I adopt that course.

167. The question of costs and the form of order can also be addressed at the same time.

Postscript

168. After this judgment had been circulated in draft I was provided with a Witness Statement on behalf of the Foreign Representative (dated 11 January 20-18) confirming that the Azerbaijan Parliament has approved an amendment to the Law on Banks which would now enable the Azeri Court to order further extensions of the Restructuring Proceeding (it being expressly provided that there shall be no limit on the total number of such extensions).

169. That amendment seems likely to affect both (a) whether there is still urgency in respect of any appeal (which is a matter for the Court of Appeal and (b) the cross-Applications (which may in consequence have more significance, and remain pending before me).

170. That may in turn affect the timing of and time estimate for any further hearing; and Counsel should keep my clerk closely informed accordingly.