Neutral Citation Number: [2018] EWCA Civ 2802

Case No: A2/2018/0084

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (Ch D)
THE HONOURABLE MR JUSTICE HILDYARD
[2018] EWHC 59 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2018

Before:

LORD JUSTICE LEWISON
LORD JUSTICE HENDERSON
and
LORD JUSTICE BAKER

- -

IN THE MATTER OF THE OJSC INTERNATIONAL BANK OF AZERBAIJAN
AND IN THE MATTER OF THE CROSS-BORDER INSOLVENCY REGULATIONS 2006

Between:

GUNEL BAKHSHIYEVA **Appellant**
(IN HER CAPACITY AS THE FOREIGN REPRESENTATIVE OF THE OJSC INTERNATIONAL BANK OF AZERBAIJAN)

- and –

(1) SBERBANK OF RUSSIA **Respondents**
(2) FRANKLIN GLOBAL TRUST – FRANKLIN EMERGING MARKET DEBT OPPORTUNITIES FUND
(3) FRANKLIN EMERGING MARKET DEBT OPPORTUNITIES FUND PLC
(4) FRANKLIN TEMPLETON FRONTIER EMERGING MARKETS 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

- -

Mr Daniel Bayfield QC and Mr Ryan Perkins (instructed by **White & Case LLP**) for the **Appellant**
Mr Mark Howard QC and Fred Hobson (instructed by **Fried, Frank, Harris, Shriver & Jacobson (London) LLP**) for the **1st Respondent**
Mr Gabriel Moss QC and Mr Richard Fisher (instructed by **Dechert LLP)** for the **2nd to 7th Respondents**

Hearing dates: 24 and 25 October 2018

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Approved Judgment

Lord Justice Henderson:

Introduction

1. This appeal raises important questions about the proper scope of the powers conferred on the English court by the Cross-Border Insolvency Regulations 2006, SI 2006 No 1030, (the "CBIR") to order a stay of proceedings in this jurisdiction in support of a foreign insolvency proceeding.

2. The CBIR were made in order to implement and give the force of law in Great Britain to "the UNCITRAL Model Law", that is to say the Model Law on cross-border insolvency as adopted by the United Nations Commission on International Trade Law on 30 May 1997, "with certain modifications to adapt it for application in Great Britain": see regulations 1 and 2(1). The Model Law, with those modifications, is set out in Schedule 1 to the CBIR. References in this judgment to articles of the Model Law are (unless otherwise stated) to the version of it set out in the schedule.

3. By virtue of regulation 3(1), British insolvency law (as defined in article 2) is to apply with such modifications as the context requires for the purpose of giving effect to the CBIR, while regulation 3(2) provides that in the case of any conflict with British insolvency law, the CBIR shall prevail. The relevant definition of British insolvency law incorporates, in relation to England and Wales, the provisions of the Insolvency Act 1986, or any extension or application thereof by or under any other enactment.

4. The scope of application of the Model Law is laid down by article 1, which states that it applies where:

> "(a) assistance is sought in Great Britain by a foreign court for a foreign representative in connection with a foreign proceeding."

It also applies in the converse situation, immaterial for present purposes, where assistance is sought in a foreign State in connection with a proceeding under British insolvency law, and in certain other specified circumstances. "Foreign proceeding" is widely defined in article 2(i) to mean:

> "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."

A "foreign representative", by virtue of article 2(j), means:

> "a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding."

5. Article 9, headed "Right of direct access", entitles a foreign representative "to apply directly to a court in Great Britain". Such an application may be made for recognition of the foreign proceeding in which the foreign representative has been appointed: see article 15, which specifies the formalities which have to be complied with on such an application. Article 17 then provides for the mandatory recognition of a foreign proceeding if the necessary conditions are satisfied. By virtue of article 17, the foreign proceeding must be recognised as "a foreign main proceeding" if it is taking place in the State where the debtor has the centre of its main interests (or "COMI"), or as "a foreign non-main proceeding" if the debtor has an establishment in the foreign State.

6. Article 20 then provides for certain *automatic* effects of recognition of a foreign *main* proceeding:

> "(1) Upon recognition of a foreign proceeding that is a foreign main proceeding, subject to paragraph 2 of this article –
>
> (a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
>
> (b) execution against the debtor's assets is stayed; and
>
> (c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended."

In the case of a corporate debtor, the stay and suspension are to be the same in scope and effect as if the debtor had been made the subject of a winding-up order under the Insolvency Act 1986, but paragraph (6) also enables the court, either on application or of its own motion, to modify such stay and suspension, or any part of it, "on such terms and conditions as the court thinks fit." In practice, this means that where the foreign proceeding is not a winding-up or akin to a liquidation, but is a process such as an administration or reconstruction from which it is hoped that the company will emerge as a going concern, the English court is likely to adapt the automatic stay under article 20(1) so that it more closely resembles the moratorium which applies when a company goes into administration under Schedule B1 to the Insolvency Act 1986.

7. Article 21 then provides for relief that *may* be granted upon recognition of a foreign proceeding, whether *main or non-main*. Since this is the central provision upon which the present case turns, I will set out the relevant parts of article 21, together with the supplementary provisions in article 22 for the "[p]rotection of creditors and other interested persons":

> "**Article 21. Relief that may be granted upon recognition of a foreign proceeding**
>
> (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;
>
> …
>
> (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.
>
> (2) Upon recognition of a foreign proceeding whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in Great Britain are adequately protected.
>
> …
>
> **Article 22. Protection of creditors and other interested persons**
>
> (1) In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of this article or paragraph 6 of article 20, the court must be satisfied that the interests of the creditors… and other interested persons, including if appropriate the debtor, are adequately protected.
>
> (2) The court may subject relief granted under article 19 or 21 to conditions it considers appropriate, including the provision by the foreign representative of security or caution for the proper performance of his functions.
>
> (3) The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or of its own motion, modify or terminate such relief."

8. In the light of these provisions of the CBIR, I can now formulate the question which arises in this case with more precision. The relevant circumstances may be summarised in this way:

a) the foreign proceeding is not a liquidation, but a voluntary restructuring entered into between the company and its creditors, with the aim of enabling the company to survive as a going concern;

b) the restructuring plan provides for all the company's existing debts of a specified class to be discharged in full and replaced with various entitlements;

c) under the relevant foreign law (which is the law of the company's place of incorporation and COMI), the restructuring plan becomes binding on all the creditors of the relevant class once it has been approved by a specified majority of them and confirmed by the foreign court;

d) the plan is duly approved by the requisite majority and confirmed by the foreign court;

e) the relevant class of creditors includes some whose claims against the company are governed by English law ("the English creditors"), who do not participate in the restructuring or otherwise submit to the jurisdiction of the foreign court;

f) under English law as it now stands, binding on all courts below the Supreme Court, the claims of the English creditors are not discharged or otherwise affected by the foreign restructuring; and

g) the foreign representative successfully applies to the English court for recognition of the foreign proceeding as a foreign main proceeding, and obtains a suitably modified version of the automatic stay under article 20 which will continue in force until the restructuring has been fully implemented, but will lapse or be liable to termination thereafter.

In those circumstances, does the English court have the power (and, if so, should it exercise the power), on application by the foreign representative under article 21(1)(a) and/or 21(1)(g) of the CBIR, to direct that the claims of the English creditors should continue to be stayed indefinitely, even after the restructuring has come to an end and the company has resumed operation as a going concern?

9. The purpose of the application, as is candidly conceded, is to prevent the English creditors from relying on their rights under English law to seek to enforce their claims against the company's assets in England and Wales, or in any other jurisdiction which does not recognise the discharge of their debts under the foreign law. Thus, although a stay is normally a procedural remedy, of limited duration, the purpose of seeking it in the present case is to achieve what is in effect a substantive remedy, barring the English creditors from relying on their English law rights and thereby, so it is said, obtaining an unfair advantage over the other creditors of the specified class whose original debts have been replaced by the entitlements provided for by the plan. The justification advanced for inviting the English court to act in this way is that to do so would promote the principle of modified universalism in cross-border insolvencies which not only forms part of English common law but also underpins the UNCITRAL Model Law.

10. The applicant in the present case is the foreign representative of the OJSC International Bank of Azerbaijan ("IBA"), which fell into financial difficulties, obliging it to enter into a restructuring proceeding under Azeri law. The plan which IBA put forward to restructure its debts was approved by a large majority at a meeting of creditors in Azerbaijan on 18 July 2017, and was approved by the local court on 17 August 2017. 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. In this respect, the situation is similar to that brought about by a domestic scheme of arrangement under Part 26 of the Companies Act 2006 once it has been sanctioned by the court.

11. On 24 May 2017, the foreign representative applied to the Business and Property Courts of England and Wales for an order recognising the restructuring proceeding as a foreign main proceeding under the CBIR, and at a hearing on 6 June 2017 Barling J made the order sought. The order included a suitably modified version of the automatic stay under article 20.

12. The respondents are English creditors in the sense in which I have used that term – i.e. their claims against IBA are governed by English law. The first respondent, Sberbank of Russia ("Sberbank"), is the sole lender under a US $20m term facility agreement dated 15 July 2016 ("the Sberbank Facility"). The other respondents (together "Franklin Templeton") are beneficial owners (through Citibank as trustee) of some of the US $500m 5.62% notes issued by IBA under a trust deed dated 11 June 2014 and due to mature in 2019 ("the 2019 Notes"). The respondents did not vote at or participate in any way in the meeting in Azerbaijan to approve the restructuring plan, and it is accepted by the foreign representative for the purpose of these proceedings that they have not acquiesced in the plan or its application to them, nor have they submitted to the jurisdiction of the Azeri court.

13. By a further application issued on 15 November 2017, the foreign representative sought an order against Sberbank continuing the moratorium imposed by the recognition order of 6 June 2017 "until further order… so that no legal process in relation to the Designated Financial Indebtedness may be instituted or continued against the Bank or its property except with the permission of the court". An order was also sought that the moratorium should not be lifted so as to permit Sberbank to enforce its loan facility agreement against IBA. In her affidavit in support of the application, the foreign representative made it clear that similar relief was also sought against Citibank as trustee of the 2019 Notes. This application was then countered by cross-applications from Sberbank and Franklin Templeton asking for the existing moratorium granted by Barling J to be lifted so as to permit the institution and prosecution of proceedings against IBA to enforce their English claims.

14. All three applications came on for hearing before Hildyard J as a matter of considerable urgency, on 14 and 15 December 2017. The urgency was occasioned by the fact that, as matters then stood, the Azeri restructuring proceeding was set to expire on 30 January 2018, with no possibility of further extension. The judge heard submissions from Daniel Bayfield QC leading Ryan Perkins for the applicant, from Barry Isaacs QC leading Alexander Riddiford for Sberbank, and from Gabriel Moss QC leading Richard Fisher for Franklin Templeton. On 21 December 2017, the judge announced that he would dismiss the application for a stay, and gave a brief indication of his reasons for so concluding. His detailed reasons were contained in the reserved

judgment which he handed down on 18 January 2018: [2018] EWHC 59 (Ch), [2018] Bus LR 1270.

15. Although produced under considerable time pressure, the judgment (which runs to 170 paragraphs) contains a full and thoughtful discussion of the arguments presented to the judge in what he described, at [23], as "exemplary skeleton arguments and oral submissions". By this date, however, it had become clear that the immediate urgency had gone, because the Azerbaijan Parliament had approved an amendment to the Law on Banks which would enable the Azeri court to order further extensions of the restructuring proceeding, with no limit on the number or duration of such extensions. Accordingly, orders have now been made by the Azeri court prolonging the restructuring pending the outcome of IBA's appeal to this court, which is brought with permission granted by the judge.

16. We have had the benefit of submissions from the same team of counsel who appeared below, except that Mark Howard QC and Fred Hobson have replaced Mr Isaacs QC and Mr Riddiford as counsel for Sberbank. Like the judge, I would wish to pay tribute to the excellent quality of the written and oral submissions which we have received from all parties.

The facts

17. There is little which needs to be added to the outline of the factual and procedural history which I have already given.

18. The judge received undisputed expert evidence from an expert on Azeri banking and insolvency law, Mr Anar Karimov. As Mr Karimov explained, the basic function of a voluntary restructuring of the present type is to give the relevant bank a breathing space to propose a plan of reorganisation in respect of its debts. It is a "rescue" or "turnaround" process, designed to enable the bank to continue trading while the plan is implemented, the object being to reorganise its liabilities so that it can survive as a going concern. While the restructuring is in progress, the bank will continue to carry on business subject to the supervision of the Azerbaijan Financial Market Supervisory Authority ("the AFMSA") and the Azeri court. As preliminary step, the bank must promulgate an indicative restructuring proposal, which must be approved by the AFMSA. There is a statutory mechanism which permits amendment of the proposal following consultation with creditors, and the proposal must also be extensively advertised. 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 it is approved by the prescribed majority (effectively two-thirds of the relevant creditors by value) and confirmed by the Azeri court, it will then be binding on all affected creditors.

19. In other words, as the judge said at [29], "the process facilitates rehabilitation and the resumption of trading rather than the collection of assets and their fair distribution followed by dissolution."

20. The plan in the present case provided for the restructuring of IBA's "Designated Financial Indebtedness" amounting to approximately $3.34 billion. Both the Sberbank Facility and the 2019 Notes constituted Designated Financial Indebtedness for the purposes of the plan, which provided for the Designated Financial Indebtedness to be discharged in its entirety and exchanged for various "entitlements". Those

entitlements consisted mainly of new debt securities, some of which were sovereign bonds issued by the Government of Azerbaijan and some of which were corporate bonds issued by IBA itself. The plan received overwhelming creditor support, being approved at the creditors' meeting held on 18 July 2017 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 requisite two-thirds majority was achieved by a large margin.

21. Following the approval of the plan, a number of creditors who had voted against it, or who did not vote at all, decided to consent to it and surrender their existing claims. As matters now stand, the only creditors which could seek to enforce their claims contrary to the terms of the plan are (a) Sberbank, in right and respect of the Sberbank Facility, and (b) Citibank, in its capacity as trustee for Franklin Templeton of the 2019 Notes. Holders of about $154.7m of the 2019 Notes either voted against the plan or did not vote, and have not subsequently surrendered their Notes. Approximately $58m of those Notes are beneficially owned by the second to seventh respondents, and most of the remainder are also owned by entities connected to Franklin Templeton Investment Management Limited. They have asked not to be joined as respondents because they prefer to remain anonymous.

22. The dissentient creditors represent only a very small proportion (about 5%) of the total Designated Financial Indebtedness, and it is important to note that the foreign representative does not contend that the plan will fail to achieve its primary objective if the claims of the English creditors do not continue to be stayed. The plan became effective under Azeri law on 1 September 2017, following its approval by the Azeri court at the confirmation hearing on 17 August 2017. As I have already explained, the consequence of the Azeri court order is that the plan is binding on all the creditors in respect of the Designated Financial Indebtedness, whether or not they participated in the creditors' meeting and whether or not they voted for or against the plan.

The rule in *Antony Gibbs*

23. It is common ground that this court is bound, as was the judge, by a rule of English private international law which is often referred to as "the *Gibbs* rule" or "the rule in *Antony Gibbs*". The rule takes its name from the decision of this court (Lord Esher MR, sitting with Lindley and Lopes LJJ) in Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) LR 25 QBD 399. The defendant was a French company which entered into contracts with the plaintiffs, who were merchants carrying on business in London, for the purchase of consignments of copper, to be delivered and paid for in England. The contracts were subject to the rules and regulations of the London Metal Exchange. After the contracts were made, but before the due dates for delivery of much of the copper, the defendant went into liquidation in France, and refused to accept delivery of the copper. In its defence to an action brought by the plaintiffs for non-acceptance of the goods, the defendant argued that the French liquidation operated as a discharge from liability on the contracts under French law. This argument was rejected by the trial judge, Stephen J, who gave judgment for the plaintiffs for the loss sustained on resale in respect of all the copper, including that of which delivery was not due until after the liquidation.

24. The defendant's appeal was then rejected by this court, which also held that there was no basis upon which the judge ought to have stayed the proceedings, whether before

or upon giving judgment. The first step in the reasoning of Lord Esher MR was that the contracts were governed by English law, because they were made in England and due to be performed in England. Accordingly, English law would govern the discharge of the contract, in whatever country the action was brought. Conversely, had the governing law of the contract been a foreign law, the English court would recognise a discharge from liability upon bankruptcy in accordance with that law: see his judgment at 405-406.

25. Lord Esher continued (ibid):

> "It is now, however, suggested that, where by the law of the country in which the defendants are domiciled the defendants would, under the circumstances which have arisen, be discharged from liability under a contract, although the contract was not made nor to be performed in such country, it ought to be held that they are discharged in this country. It seems to me obvious that such a proposition is not in accordance with the principle which I have stated. The law invoked is not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound; it is the law of another country by which they have not agreed to be bound.
>
> …
>
> Therefore, if it were true that in any of the modes suggested the defendants were by the law of France discharged from liability, I should say that such law did not bind the plaintiffs, and that they were nevertheless entitled, according to English law, to maintain their action upon an English contract."

26. In relation to the question of a stay, Lord Esher said at 409 that he could "see no ground in law on which any such stay ought to be granted." The other two members of the court took the same view, at 410 and 411 respectively.

27. For a modern statement of the *Gibbs* rule, the judge referred at [45] to Fletcher, The Law of Insolvency, fifth edition (2017), at para 30-061:

> "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 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."

28. As the judge went on to note at [46], there is an exception to the rule if the relevant creditor submits to the foreign insolvency proceeding. In that situation, the creditor is taken to have accepted that his contractual rights will be governed by the law of the foreign insolvency proceeding. But the application before the judge proceeded on the basis, as it does before us, that this exception is not engaged.

29. The *Gibbs* rule has been criticised by many academics and commentators, including Professor Fletcher, on the basis that it is an outdated relic from an era when international cooperation in insolvency matters was in its infancy, and a parochial outlook tended to prevail. I do not propose to discuss those criticisms in any detail, since it is agreed that we are bound by the rule, although the appellant reserves the right to challenge it in the Supreme Court if the case proceeds that far. For similar reasons, I will not review the subsequent cases in which the rule has been applied by courts at all levels in England and Wales, usually without adverse comment. Most of the significant cases are noted by the judge at [54], to which should be added the recent decision of the Supreme Court in Goldman Sachs International v Novo Banco SA [2018] UKSC 34, [2018] 1 WLR 3683, where Lord Sumption JSC (with whom the other members of the court agreed) said at [12]:

> "The rescue of failing financial institutions commonly involves measures affecting the rights of their creditors and other third parties. Depending on the law under which the rescue is being carried out, these measures may include the suspension of payments, the writing down of liabilities, moratoria on their enforcement, and transfers of assets and liabilities to other institutions. At common law measures of this kind taken under a foreign law have only limited effect on contractual liabilities governed by English law. This is because the discharge or modification of a contractual liability is treated in English law as being governed only by its proper law, so that measures taken under another law, such as that of a contracting party's domicile, are normally disregarded: *Adams v National Bank of Greece SA* [1961] AC 255."

30. I would, however, observe that the charge of parochialism seems to me rather unfair, given the acceptance by this court in Gibbs that questions of discharge of a contractual liability are governed by the proper law of the contract, whether or not that law is English law. In the present case, as in Gibbs itself, the relevant contracts were governed by English law; but if they had been governed by Azeri law, the English court would have recognised the effect of the restructuring.

31. The real criticisms which may be levelled against the *Gibbs* rule, I would venture to suggest, are twofold. First, the rule may be thought increasingly anachronistic in a world where the principle of modified universalism has been the inspiration for much

cross-border cooperation in insolvency matters, including the UNCITRAL Model Law, and has also been recognised as forming part of the common law: see Singularis Holdings Limited v Pricewaterhouse Coopers [2014] UKPC 36, [2015] AC 1675, at [19] per Lord Sumption. In particular, there may now be a strong case for saying that, in the absence of a stipulation to the contrary, contracting parties should generally be taken to envisage that, upon the supervening insolvency of one party, a single law closely associated with that party should govern the rights of its creditors, wherever in the world its assets happen to be situated, and regardless of the proper law of the contract. Secondly, the rule may be thought to sit rather uneasily with established principles of English law which expect foreign courts to recognise English insolvency judgments or orders, for example when a scheme of arrangement under Part 26 of the Companies Act 2006 is approved by the court. It is only fair to add, however, that this second objection was decisively rejected by Lord Collins of Mapesbury in Rubin v Eurofinance SA [2012] UKSC 46, [2013] 1 AC 236, ("Rubin") at [126].

The UNCITRAL Model Law: principles of construction

32. There is no dispute about the principles which should guide us in construing the Model Law.

33. Regulation 2(2) of the CBIR provides that:

> "Without prejudice to any practice of the courts as to the matters which may be considered apart from this paragraph, the following documents may be considered in ascertaining the meaning or effect of any provision of the UNCITRAL Model Law as set out in Schedule 1 to these Regulations –
>
> (a) the UNCITRAL Model Law;
>
> (b) any documents of the United Nations Commission on International Trade Law and its working group relating to the preparation of the UNCITRAL Model Law; and
>
> (c) the Guide to Enactment of the UNCITRAL Model Law… made in May 1997."

34. We were not directly referred to any of the "travaux préparatoires" apart from the Guide to Enactment ("the Guide"). At the beginning of the Guide, the purpose of the Model Law was described in these terms:

> "1. The UNCITRAL Model Law on Cross-Border Insolvency, adopted in 1997, is designed to assist States to equip their insolvency laws with a modern, harmonised and fair framework to address more effectively instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency. Those instances include cases 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. 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, subject to appropriate coordination procedures to accommodate local needs.
>
> …
>
> 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:
>
> (a) Providing the person administering a foreign insolvency proceeding ("foreign representative") with access to the courts of the enacting State, thereby permitting the foreign representative to seek a temporary "breathing space", and allowing the courts in the enacting State to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;
>
> …"

35. The important point that the Model Law "does not attempt a substantive unification of insolvency law" is reinforced by paragraph 21 of the Guide, which describes its scope as "limited to some procedural aspects of cross-border insolvency cases", and says that "the Model Law is intended to operate as an integral part of the existing insolvency law in the enacting State". It also deserves emphasis that the Model Law does not depend in any way on reciprocity. Once a State has decided to adopt the Model Law, the local version of it adopted by that State will apply to all cross-border insolvencies which fall within its scope, whether or not the foreign representative comes from another enacting State. Thus, at the present time, the Model Law has been adopted and given effect in Great Britain and some 40 other countries, but not in Azerbaijan. In this respect, there is a significant contrast both with the EC Insolvency Regulation (Council Regulation (EC) 1346/2000 on Insolvency Proceedings), which applies to insolvency proceedings within the EU, and with international conventions on the recognition and enforcement of judgments, which as Lord Collins said in Rubin at [128] typically depend on a degree of reciprocity.

36. Under the heading "Relief", the Guide says:

> "35. A basic principle of the Model Law is that the relief considered necessary for the orderly and fair conduct of a cross-border insolvency should be available to assist foreign proceedings, whether on an interim basis or as a result of recognition. Accordingly, the Model Law specifies the relief that is available in both of those instances. As such, it neither necessarily imports the consequences of the foreign law into the insolvency system of the enacting State nor applies to the

> foreign proceeding the relief that would be available under the law of the enacting State…
>
> …
>
> 37. Key elements of the relief accorded upon recognition of a foreign "main" proceeding include a stay of actions of individual creditors against the debtor or a stay of enforcement proceedings concerning the assets of the debtor, and a suspension of the debtor's right to transfer or encumber its assets (article 20, paragraph 1). Such stay and suspension are "mandatory" (or "automatic") in the sense that either they flow automatically from the recognition of a foreign main proceeding or, in the States where a court order is needed for the stay or suspension, the court is bound to issue the appropriate order. The stay of actions or of enforcement proceedings is necessary to provide "breathing space" until appropriate measures are taken for reorganisation or liquidation of the assets of the debtor… The mandatory moratorium triggered by the recognition of the foreign main proceedings provides a rapid "freeze" essential to prevent fraud and to protect the legitimate interests of the parties involved until the court has an opportunity to notify all concerned and to assess the situation."

37. In the commentary on article 21, the Guide notes at paragraph 189 that the grant of post-recognition relief under that article is discretionary, and that the types of relief listed in article 21(1) "are typical of the relief most frequently granted in insolvency proceedings". However, "the list is not exhaustive and the court is not restricted unnecessarily in its ability to grant any type of relief that is available under the law of the enacting State and needed in the circumstances of the case." Paragraph 191 adds that "[i]t is in the nature of discretionary relief that the court may tailor it to the case at hand."

38. Apart from the Guide, we were also referred to the explanatory memorandum to the CBIR, which was prepared by the Department of Trade and Industry and laid before Parliament. Under the heading "Description", paragraph 2.1 recorded that a project to produce a model law on cross-border insolvency was initiated by UNCITRAL, and two international colloquiums were held in the early 1990's "to discuss whether that body should facilitate the development of a legal instrument providing a framework, which would encompass judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings." A working group was then established in 1995, whose work led to the adoption by UNCITRAL of a model law in 1997 "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."

39. Under the heading "Policy background", the memorandum began with an introduction from which I will quote the following extracts:

"7.1… 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 on 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 co-operation 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 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."

40. Paragraph 7.19 of the memorandum noted that the language of the Model Law is similar to that used in international treaties and conventions, and "will almost certainly… be interpreted purposively. Accordingly the UNCITRAL Guide to Enactment will be a useful tool in interpreting the text."

41. Finally, it is relevant to note article 8 of the Model Law itself, headed "Interpretation", which states that:

> "In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith."

42. As counsel for Sberbank correctly point out in their written submissions, the Model Law deliberately does not incorporate a choice of law framework, nor is it predicated on reciprocity. That this was a deliberate choice is apparent from the reports of the working group discussed by Morgan J in Fibria Celulose S/A v Pan Ocean Co Limited [2014] EWHC 2124 (Ch), [2014] Bus LR 1041, ("Pan Ocean") at [82] to [87]. As appears from that discussion, an initial draft of what is now article 21(1)(g) included a power for the recognising court to apply the law of the foreign proceeding, but this was thought to be unrealistic and the wording was accordingly not included in the final version. Morgan J commented at [87]:

> "My reaction to the discussions of the working group is that it seems improbable that the working group, having deleted (from what is now article 21(1)(g)) a power for the recognising court to apply the law of the foreign proceeding, intended to bring back in such a power under the general wording which refers to "any appropriate relief"."

I respectfully agree, while noting that the submission of IBA (to which I will now turn) do not seek to go that far.

IBA's submissions

43. At an early stage of his oral argument, Mr Bayfield submitted that the principle of modified universalism does not entail the application of a single insolvency law to a cross-border insolvency. That would be a characteristic of what one might call full or unmodified universalism (see Rubin at [16]), but in the modified form which forms part of the English common law, and which underpins the UNCITRAL Model Law, it only requires, as Lord Hoffmann put it in In re HIH Casualty and General Insurance Ltd [2008] UKHL 21, [2008] 1 WLR 852, ("HIH") at [30]:

> "that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

See too Rubin at [17] to [20], where Lord Collins pointed out that a similar approach is adopted by the United States courts.

44. This submission is undoubtedly true as far as it goes, and it is well recognised that "at common law the court has power to recognise and grant assistance to foreign insolvency proceedings" as Lord Collins went on to explain in Rubin at [29] to [33]. Nevertheless, it is also important to note the qualifications expressed by Lord Sumption, speaking for the Privy Council, in Singularis at [19], where he said:

> "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 limits of its own statutory and common law powers. What are those limits? In the absence of a relevant statutory power, they must depend on the common law, including any proper development of the common law."

45. Next, Mr Bayfield submitted that, as an international instrument, the Model Law "should be construed on broad principles of general acceptation", and its "interpretation should not be rigidly controlled by domestic precedents of antecedent date": see Stag Line v Foscolo Mango & Co Limited [1932] AC 328 ("Stag Line") at 350, per Lord Macmillan, and the observations to similar effect of Lord Wilberforce in James Buchanan & Co Limited v Babco Forwarding & Shipping (UK) Limited [1978] AC 141 at 152. Again, I would readily accept that such an approach to the interpretation of the Model Law is appropriate. Indeed, it chimes with the principles of construction applicable to the Model Law which I have already discussed, including in particular paragraph 7.19 of the explanatory memorandum to the CIBR.

46. Mr Bayfield then submitted that, if the foreign proceeding in the present case were a liquidation instead of a reconstruction, the English creditors would have been unable to enforce their claims in England. The reasons he advanced for reaching this conclusion are:

> a) the Azeri liquidation would have been recognised as a foreign main proceeding under the CIBR, with the consequence that upon recognition an automatic stay would have come into effect under article 20(1), and would have remained in place throughout the liquidation until IBA was dissolved;
>
> b) the foreign representative would have been able to apply for any assets situated in England to be remitted to the Azeri liquidation under articles 21(1)(e) and 21(2), which would enable the assets to be distributed in accordance with Azeri law;
>
> c) before granting remission, the court would have to be satisfied that the interests of the creditors in Great Britain were adequately protected, but there is no reason to doubt that this requirement would be satisfied, because Mr Karimov's unchallenged evidence is that Azeri law treats foreign and local creditors equally, and has all the procedural safeguards that the English court would expect; and

> d) it follows that all monetary claims against IBA, including claims governed by English law, would have to be proved in the Azeri liquidation, and could not instead be enforced against IBA's assets in England.

I should add that neither article 21(2), nor article 21(1)(e) which is in similar terms, uses the language of "remission", but rather says that the court may "entrust" the distribution, administration or realisation of the debtor's assets located in Great Britain to the foreign representative. I would accept, however, that this language is wide enough to include the remission of assets located in Great Britain, or their proceeds of sale, to a foreign liquidator in an appropriate case, especially as such a power exists at common law: see Rubin at [31] and [34].

47. Against this background, counsel for IBA in their written submissions pose what they call the critical question: namely, "whether the CBIR requires a foreign reorganisation to be treated less favourably (from the perspective of the company and its general body of creditors) than a foreign liquidation." They submit that this would be a surprising result, because the CBIR were expressly enacted to promote the "rescue culture" (see the explanatory memorandum at paragraph 7.2). Accordingly, just as article 21(1)(e) empowers the court to remit assets to a foreign liquidation, so as to prevent creditors from enforcing their claims against assets in England, so too article 21(1)(a) enables the court to stay the enforcement of claims subject to a foreign restructuring, so as to achieve the same objective. They go on to submit that the judge's reasoning is flawed because "he failed to explain why foreign reorganisations should be treated less favourably that foreign liquidations."

48. On the question whether there is jurisdiction to make such an order under article 21(1)(a) and (b), IBA submits that the language of those provisions is clearly wide enough to confer the necessary power on the court. The wording of article 21(1)(a) must be intended to go further than the automatic stay under article 20(1)(a), because it authorises the stay of proceedings "to the extent that they have not been stayed" under the latter provision. So too, the power to grant a stay of execution under article 21(1)(b) only applies "to the extent it has not been stayed under paragraph 1(b) of article 20". Furthermore, the need to give article 21 a wide construction was endorsed by Lord Collins in Rubin at [143], where he said:

> "Articles 21, 25 and 27 are concerned with procedural matters. No doubt they should be given a purposive interpretation and should be widely construed in the light of the objects of the Model Law…"

49. Counsel for IBA then go on to deal with four alleged jurisdictional bars which are said to limit the apparently broad scope of article 21(1)(a) and (b):

> a) there is no jurisdiction to grant relief inconsistent with *Gibbs*;
>
> b) there is no jurisdiction to grant relief against persons who are not bound by the reconstruction plan;
>
> c) there is no jurisdiction to interfere with substantive rights; and

d) there is no jurisdiction to grant relief continuing beyond termination of the plan.

(*a) No jurisdiction to grant relief inconsistent with Gibbs*

50. IBA submits that this objection misunderstands the proper approach to construction of the CBIR. The existence of jurisdiction under these paragraphs of article 21 is essentially a question of statutory construction. Precisely because the CBIR give effect to an international instrument, which has been implemented in a large number of jurisdictions, the common law is irrelevant to its interpretation. This is reinforced by article 8, which requires regard to be had to the international origin of the Model Law and to the need to promote uniformity in its application. It is therefore wrong in principle to ask whether the CBIR were intended to abrogate the *Gibbs* rule. That rule is a classic example of a "domestic precedent of antecedent date", which in accordance with Stag Line should be ignored when construing an international instrument.

(b) No jurisdiction to grant relief against persons not bound by the reconstruction

51. According to IBA, this objection again takes matters nowhere. At common law, the English creditors can rely on the rule in *Antony Gibbs* to argue that they are not bound by the reconstruction plan, because they have not submitted to the jurisdiction of the Azeri court. But the present case is not concerned with the common law, and the relevant question is whether the English creditors' claims are capable of being stayed under the CBIR. As a matter of construction, it is clear that they are. There is no relevant restriction on the types of "obligations" or "liabilities" which can be stayed under article 21(1)(a); nor is there any suggestion in the CBIR or the Model Law (or in any of the *travaux préparatoires*) that the governing law of a liability is relevant to determining whether it can be stayed. As a matter of Azeri law, the plan is binding on all creditors who hold Designated Financial Indebtedness, including the English creditors, all of whom were entitled to vote at the creditors' meeting. There is nothing voluntary about the automatic stay under article 20(1), and there is equally no reason why a stay under article 21 should not be imposed contrary to the wishes of the English creditors.

(c) No jurisdiction to interfere with substantive rights

52. It is accepted (as I have already said) that the relief sought by IBA is intended to prevent the English creditors from exercising their contractual rights against IBA indefinitely. However, there is nothing in the CBIR which precludes the court from granting such relief. On the contrary, there are many forms of relief under the Model Law which prevent or interfere with the exercise of substantive rights, including rights governed by English Law. The most obvious example of this is the court's power to remit English assets belonging to the debtor in a foreign liquidation under articles 21(1)(e) and 21(2): see above. Where the court makes such an order, it operates to prevent creditors, including those whose claims are governed by English law, from enforcing their claims in England. The stay sought in the present case is simply the equivalent, in the context of a foreign reorganisation, of an order for remission in the context of a foreign liquidation. Further, although the judge drew a distinction between foreign liquidation proceedings and foreign reorganisation proceedings, there is no relevant difference between (a) remitting a company's assets

to a foreign liquidation so as to prevent a creditor from taking enforcement action in England, and (b) staying the enforcement of the creditor's claim in England so as to achieve the same result. Both forms of relief prevent the exercise of substantive contractual rights, and both are permitted under the Model Law.

53. Other examples of relief under the Model Law which prevent or interfere with the exercise of substantive contractual rights include:

> a) the power under article 21(1)(c) to grant an order "suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor";
>
> b) the power under article 23 for the foreign representative to bring avoidance proceedings under various sections of the Insolvency Act 1986, including section 238 (transactions at an undervalue), section 239 (unlawful preferences) and section 423 (transactions in fraud of creditors); and
>
> c) the power under article 21(1)(g) to grant "any additional relief that may be available to a British insolvency officeholder under the law of Great Britain". Thus, for example, in Re Atlas Bulk Shipping AS [2011] EWHC 878 (Ch), [2012] Bus LR 1124, Norris J made an order under this paragraph restraining the respondent from relying on a contractual right of set-off governed by English law.

54. In reaching the contrary conclusion, the judge sought to derive support from the decision of the Supreme Court in Rubin and the decision of Morgan J in Pan Ocean, but neither case justifies the reliance which the judge placed upon it.

55. In Rubin, the receivers of a trust established under English law, with trustees resident in England, to carry on a sales promotions scheme in the USA and Canada, filed for protection under Chapter 11 of the US Bankruptcy Code, having obtained authority to do so from the English court. The Chapter 11 proceeding was recognised in England as a foreign main proceeding under the CBIR, on the application of the receivers who had been appointed as "foreign representatives" of the debtor trust by the US Bankruptcy Court. The receivers then commenced "adversary proceedings" under the US bankruptcy legislation against various defendants, with the object of clawing back funds for distribution in the bankruptcy. The defendants were not present in New York when the proceedings were begun, nor did they submit to the jurisdiction of the New York court. As a result, default and summary judgments were entered against them in New York. The receivers, as foreign representatives, then sought to enforce the judgments in England.

56. The main question considered by the Supreme Court was whether the New York judgments could be enforced at common law, by application of the principles developed by Lord Hoffmann in HIH and Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings PLC ("Cambridge Gas") [2006] UKPC 26, [2007] 1 AC 508. Reversing the decision of this court, the Supreme Court held by a majority that the judgments could not be enforced in England at common law, and that the reasoning of Lord Hoffmann in Cambridge Gas should not be followed. For present purposes, nothing turns directly on that part of the Supreme Court's judgment. However, the receivers also argued in the alternative that the judgments should be enforced under article 21 of the CBIR. This argument was in

turn rejected by the Supreme Court, for the reasons given by Lord Collins at [141] to [144]. After pointing out that the CBIR and the Model Law "say nothing about the enforcement of foreign judgments against third parties", Lord Collins said at [143]:

> "It would be surprising if the Model Law was intended to deal with judgments in insolvency matters by implication. Articles 21, 25 and 27 are concerned with procedural matters. No doubt they should be given a purposive interpretation and should be widely construed in the light of the objects of the Model Law, but there is nothing to suggest that they apply to the recognition and enforcement of foreign judgments against third parties."

57. IBA submits, and I would agree, that this paragraph contains the ratio of the Supreme Court's decision on the receivers' alternative argument. It must therefore be accepted that the court does not have jurisdiction under article 21 to recognise or enforce a foreign judgment against a third party. But, says IBA, that proposition has no bearing on the present case, where the foreign representative is not seeking to recognise or enforce any judgment of the Azeri court, but merely seeks to extend the existing moratorium (to the extent that it applies to IBA's Designated Financial Indebtedness) beyond the termination of the restructuring proceeding. Furthermore, although the Model Law contains no specific provision relating to the recognition of foreign judgments against a third party, there are specific provisions in article 21 which empower the court to grant the relief sought.

58. In Pan Ocean, the point in issue is helpfully summarised as follows by IBA:

> "a Korean company was party to a long-term contract of affreightment governed by English law with the respondent (Fibria). The company entered into an insolvency proceeding under Korean law, which was recognised as a foreign main proceeding in England under the Model Law. Under Korean insolvency law, a contractual term which purports to empower one of the parties to terminate the contract in the event of the other party's insolvency (an "*ipso facto* clause") is unenforceable. In those circumstances, the foreign representative sought an order under Article 21(1) of the Model Law preventing Fibria from serving a notice of termination under the contract. It was argued that Article 21(1) empowered the English Court to apply the Korean prohibition against *ipso facto* clauses."

59. The application was dismissed by Morgan J. He began by rejecting the foreign representative's argument that the court could "stay" Fibria's right to serve a termination notice under article 21(1)(a) of the Model Law, on the ground that a termination notice is not an "action" or "proceeding" within the meaning of that provision: see the judgment at [63] to [76]. No challenge is made by IBA to that part of the decision, which it accepts as being "plainly correct". In the alternative, the

foreign representative argued that the court had a general discretion to apply the law of the foreign proceeding as "appropriate relief" under article 21(1), but this argument was also rejected. Morgan J held that the court did not have jurisdiction under article 21(1) to grant "relief which would not be available to the court when dealing with a domestic insolvency": see [108]. Since *ipso facto* clauses are valid and enforceable under English law, the relief sought went beyond that which the court was able to grant in a domestic insolvency, and the court therefore lacked jurisdiction to grant it.

60. I have already referred to some of the reasoning which led Morgan J to this conclusion: see [42] above. I will also quote what he said at [80], in the context of his preliminary consideration of possible literal readings of article 21:

> "The administrator's argument that the scope of "any appropriate relief" is not cut down by the terms of sub-paragraphs (a) to (g) which are matters "included" in the appropriate relief but not exhaustive of the appropriate relief does reflect the ordinary meaning of the language of article 21. None the less, I consider it somewhat surprising that sub-paragraph (g) is expressed in the way which it is if it had really been intended that the phrase "any appropriate relief" permitted the recognising court to grant relief which it would not be able to grant in an insolvency conducted in accordance with the laws of the recognising court. A power for the recognising court to grant relief in that way would be a very significant power. It is odd to think that such a power was intended without there being any specific reference to the recognising court's ability to apply the law of a foreign state, or even to do something which no system of law anywhere would allow. This is particularly so in view of the terms of sub-paragraph (g) which deliberately limit relief under that sub-paragraph to relief which would be available to a British insolvency office holder under the law of Great Britain."

61. IBA submits that Pan Ocean presents no obstacle to its application in the present case, because the grant of a stay falls squarely within the language of article 21(1)(a) and (b), and is plainly "appropriate relief" in all the circumstances. If it were necessary to go further, and establish that the relief sought by IBA would be available to the court when dealing with a domestic English insolvency, that test is satisfied because the relief is substantially equivalent to a permanent anti-suit injunction in support of a creditors' voluntary arrangement or scheme of arrangement, those being the nearest domestic equivalents to the Azeri restructuring proceeding. IBA goes on to submit that, in any event, Morgan J was wrong to conclude that the relief available under article 21(1) is confined to relief which would be available in the context of a domestic insolvency. The words "any appropriate relief" mean what they say, and should not be glossed. If it were always necessary, as a matter of jurisdiction, to establish that the relief sought under article 21(1) is of a kind that would be available in an English insolvency, then the whole of article 21(1) apart from paragraph (g) would be redundant.

62. In oral argument, Mr Bayfield submitted that we should not be deterred by the relatively brief comments made by Lord Collins in Rubin about the scope and purpose of article 21. Lord Collins expressly recognised that article 21 should be "widely construed in the light of the objects of the Model Law", and at [28] he had referred to a passage in the Guide emphasising "that the Model Law enables enacting states to make available to foreign insolvency proceedings the type of relief which would be available in the case of a domestic insolvency". The grant of a stay or moratorium is of the same broad "type" as the relief available in a domestic insolvency, and although of a largely procedural nature, there is no reason why it should not be deployed so as to achieve a substantive result which fully accords with the principle of modified universalism.

(d) No jurisdiction to grant relief continuing beyond termination

63. The judge did not reach any final decision on the question whether, as a matter of jurisdiction, it is open to the court to grant relief which would continue beyond the termination of the foreign proceeding, although he expressed sympathy for the argument advanced by Mr Moss on behalf of Franklin Templeton that such a limitation is implicit in the scheme of the CBIR. As the judge said, at [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."

Franklin Templeton renew the contention in this court by means of a respondent's notice.

64. IBA's position in relation to the contention may be summarised as follows:

> a) There is nothing in the CBIR, the Model Law or the Guide which expressly confines the grant of relief under article 21 to the duration of the foreign proceeding itself. 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: see the Guide at paragraph 168.
>
> b) Upon termination of the foreign proceeding, there is admittedly no longer any "foreign representative" who has standing to apply for relief under the CBIR: see Sanko Holdings Co Limited v Glencore Limited [2015] EWHC 1031 (Ch) at [38] to [50]. However, it does not follow from this that the court lacks jurisdiction to grant relief continuing beyond the date of termination. Provided the application is made and determined before the date of

termination, there is no reason why the relief granted should not continue beyond that date.

c) Although the automatic stay under article 20(1) may well be a temporary measure designed to provide breathing space, the relief available under the Model Law does not end there, and the courts of the enacting State must then determine what coordination among the jurisdictions or other relief is best calculated to achieve the optimal disposition of the insolvency. Such relief may include, where appropriate, the grant of an indefinite stay under article 21.

d) Where a stay extends beyond the duration of the foreign proceeding, it is possible that a creditor might apply to lift the stay. Since the foreign representative would no longer be in office, the debtor company (here IBA) would have standing to oppose the application; and, in any event, the court would only lift the stay if it was appropriate to do so, even if the application were unopposed.

e) Various provisions in schedule 2 to the CBIR deal with procedural matters and envisage that the foreign representative will be a respondent to the relevant application, but these provisions do not form part of the Model Law itself and cannot be used as an aid to its interpretation. Their purpose is merely to bring the Model Law within the framework of English civil procedure.

Discretion

65. On the assumption that the court has jurisdiction to grant the relief sought, IBA submits that the court should exercise its discretion to do so. Since, however, the question only arises if IBA succeeds on the issue of jurisdiction, I will not at this stage set out IBA's detailed submissions on it.

The submissions of Sberbank

66. Mr Howard opened his oral submissions on behalf of Sberbank by emphasising that the Azeri restructuring proceedings are now for all practical purposes at an end. The plan has been approved by the Azeri court, its provisions have been implemented, and IBA has been restored to financial health and is now trading. Against that background, he submits, the substantive nature of IBA's application for an indefinite stay is readily apparent. By the use of a procedural device, IBA hopes to achieve the result that Sberbank's English law rights are abrogated and effectively transformed into rights under Azeri law. This would be an abuse of article 21, which was designed with the limited object of enabling modest assistance of a procedural nature to be given in the case of a foreign restructuring. The limited nature of the article's scope is reinforced by the complete absence of any provision which might enable creditors' rights to be subjected to the law applicable to the foreign proceedings.

67. Building on those opening points, Mr Howard submits that, as a substantive rule of English private international law, the rule in *Gibbs* applies, Sberbank's rights under the Sberbank Facility remain unaffected by their discharge under Azeri law, and it would be wrong in principle to use the procedural mechanisms of the CBIR so as to effect a substantive discharge of those rights. In order for Sberbank's English law rights to be affected, it would be necessary either for *Gibbs* to be overruled (which

should be done, if at all, by Parliament) or for a "gateway" to variation of those rights to be found under existing English law, for example in an English liquidation, administration or scheme of arrangement. In a case of the present type, the appropriate remedy for a foreign office holder to adopt would be to apply for a parallel scheme of arrangement in this jurisdiction; but, for whatever reason, the foreign representative has chosen not to go down that route.

68. As an example of this conventional way of proceeding, Mr Howard referred us to the decision of Lawrence Collins J (as he then was) in In re Drax Holdings Limited [2003] EWHC 2743 (Ch), [2004] 1 WLR 1049. The scheme of arrangement in that case related to funding liabilities incurred on the acquisition of the Drax power station in Yorkshire, carried out by a series of transactions involving a group of subsidiaries of a Delaware corporation. The relevant contractual obligations were governed by English law, but the claimant companies were incorporated in the Cayman Islands and Jersey respectively. As Lawrence Collins J noted, at [30]:

> "In the case of a creditors' scheme, an important aspect of the international effectiveness of a scheme involving the alteration of contractual rights may be that it should be made, not only by the court in the country of incorporation, but also (as here) by the courts of the country whose law governs the contractual obligations. Otherwise dissentient creditors may disregard the scheme and enforce their claims against assets (including security for the debt) in countries outside the country of incorporation."

69. Lawrence Collins J added, at [34]:

> "Of fundamental significance in the present case is the fact that simultaneous orders would be made (if the schemes are sanctioned) in the courts of the place of incorporation, Cayman Islands and Jersey. The English schemes will make those schemes effective by binding the creditors who are subject to the English jurisdiction. I was also informed (although I was not given details) that Drax Holdings will, for a similar purpose, apply for injunctions under the United States Bankruptcy Law (11 United States Code section 304) granting relief, in aid of the schemes of arrangement in England, the Cayman Islands and Jersey, with the object of preventing United States creditors from taking action to frustrate the schemes."

70. Given the existence of this recognised procedure for binding English creditors to a foreign scheme of arrangement, it would be wholly wrong, submits Mr Howard, to seek to achieve the same result indirectly under the CBIR, thus circumventing the substantive and procedural conditions which have to be satisfied before an English scheme of arrangement can be sanctioned by the court.

71. More generally, Sberbank submits that an indefinite stay is no longer required for the purposes of the Azeri reconstruction plan, which has run its course. The "breathing space" envisaged by the Model Law has served its purpose, and all the creditors who participated in the plan have received their entitlements. As I have already pointed out, there is no suggestion that the success of the plan is jeopardised by the non-participation of the dissentient English creditors, and the entitlements of those who participated were calculated on the assumption that all the holders of Designated Financial Indebtedness would be treated alike. If the English creditors choose not to participate in the scheme, and are instead able to enforce their debt claims under English law, the other creditors have no legitimate grounds for complaint. They have received everything to which they were entitled under Azeri law.

72. As to the construction of the Model Law, Sberbank submits that its provisions should be interpreted widely and purposively, so far as procedural matters are concerned, but narrowly, in relation to substantive matters. While it may be difficult in some cases to draw the line between procedural and substantive matters, there is no such difficulty in the present case. Indeed, IBA now concedes that the indefinite moratorium which it seeks would have a substantive effect. In support of this approach to the construction of the Model Law, Sberbank relies on the Guide and other admissible aids to construction to which I have already referred, the guidance by Lord Collins given in Rubin, and the discussion by Morgan J of the *travaux préparatoires* in Pan Ocean. It is notable, says Mr Howard, that there is nothing in the *travaux* specific to article 21, which one would have expected if its provisions were intended to have substantive effects and to go beyond the provision of supplementary procedural assistance.

73. As an instructive example of how the Model Law operates in practice, Mr Howard took us to an appellate decision in the Federal Court of Australia on which Mr Bayfield also places reliance for IBA, Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 ("Akers"). The foreign main proceeding in that case was the liquidation in the Cayman Islands of a Cayman-registered company, Saad. The appellants were the joint foreign representatives of the Cayman liquidators, and upon recognition of the liquidation in Australia under the Australian version of the Model Law, they asked the court to order remission of Saad's remaining funds in Australia to the Cayman Islands. This was opposed by the Deputy Commissioner of Taxation, on the basis that Saad was liable to Australian tax and penalties for which the Commissioner would have been unable to prove in the Cayman liquidation, because under Cayman law that would amount to enforcement of a foreign revenue law. This objection was upheld by the federal court, both at first instance and on appeal, but it should be noted that the Commissioner's claims to pursue relief against the company within Australia "were limited to recovery of an amount of money up to, but no more than, a sum that would be received by the DCT on a *pari passu* basis if he or she were entitled to prove the taxation debts as an unsecured creditor in the foreign main proceeding": see the judgment of Allsop CJ at [26]. In other words, the effect of the order was to place the Commissioner in the same position as the other creditors, but freed from the rule against enforcement of foreign revenue debts which still formed part of Cayman law, but not the law of Australia.

74. For present purposes, submits Mr Howard, the main interest of Akers lies in the explanation given by Allsop CJ of how the Model Law works: see in particular paragraphs [58], [68] to [69], [98] and [115] to [143]. These passages are too long to

quote in full, but one of the matters upon which the court placed repeated emphasis was the need to provide proper protection for the interests of local creditors under articles 21(2) and 22(1) of the Model Law. I will also quote Allsop CJ's conclusion at [120]:

> "Whilst the Model Law reflects universalism, there is nothing in the Model Law or the UNCITRAL Working Papers prior to its formulation, or in the CBI Act, which would justify the stripping of rights of a local creditor by reason of recognition. The universalism that underpins the Model Law and CBI Act is one for the benefit of all creditors, and the protection of local creditors is expressly recognised. It is not inappropriate to call it "modified universalism" for what such an appellation is worth."

75. Sberbank goes on to submit that, where the Model Law does potentially have a substantive effect on creditors' rights, this is made explicit. Apart from articles 21(1)(e) and 21(2), which (as I have explained) make express provision for the remission of assets located in Great Britain to the foreign representative for distribution under the relevant foreign proceeding, provided that the interests of creditors in Great Britain are adequately protected, Mr Howard also referred to article 13(3), where Parliament made express provision relating to claims by a foreign tax or social security authority, thereby reversing the common law rule in Government of India v Taylor [1955] AC 491. By contrast, the effect of granting the indefinite stay sought by IBA would be to force the English creditors to accept the terms of the Azeri reorganisation and the effective abrogation of their English law rights, despite the absence of any express provision to that effect in the Model Law. There is simply no equivalent to the clear and unambiguous provisions which permit the remission of assets to a foreign liquidator in a case like Akers.

76. Sberbank also made submissions on the issue of discretion, but as I have already noted this issue only arises if IBA succeeds on jurisdiction. In this context, Mr Howard reiterated that the Azeri reconstruction plan had been drawn up on the footing that all the relevant creditors would participate, and the terms on offer were not "discounted" to reflect the probable non-participation of the English creditors. The plan was therefore premised on all the creditors being offered the same treatment. None of the other creditors' entitlements are affected if the English creditors succeed in obtaining a better outcome through enforcement of their English law rights. Mr Howard likened any resentment which the other creditors might feel in those circumstances to that of a passenger on an aeroplane who discovers that the person sitting next to him paid less for their ticket. It is undeniably irritating, but the passenger who paid more cannot claim to have been deprived of anything, or of having been treated unfairly.

The submissions of Franklin Templeton

77. Franklin Templeton adopted the written and oral submissions of Sberbank in their entirety. Near the start of his oral argument, Mr Moss emphasised the contrast between the Model Law, which contains no choice of law provisions, and the EU

Regulation on Insolvency Proceedings, which both in its original form (available to those who drafted the Model Law) and in the recast version which has applied since 2015 contains a general choice of law provision (subject to specific exceptions), and also provides expressly for the recognition and enforceability with no further formalities of judgments of the courts of the Member State in which the debtor's COMI is situated, including compositions and schemes of arrangements: see articles 19 and 32 of the recast Regulation (EU) 2015/848 of 20 May 2015. Against that background, submits Mr Moss, it is very significant that the framers of the Model Law did not adopt similar provisions.

78. In so far as this omission may be thought to leave a gap in the Model Law, Mr Moss points out that UNCITRAL is currently working on a further model law about the recognition and enforcement of insolvency-related judgments ("the Insolvency Judgments Model Law"). Indeed, matters have progressed to the stage where the Insolvency Judgments Model Law was adopted by a decision of UNCITRAL on 2 July 2018, and it will now be disseminated to governments and other interested bodies with a recommendation that all States give favourable consideration to its implementation. The accompanying Guide to Enactment includes in its non-exhaustive list of the types of judgment that might be considered insolvency-related judgments, at paragraph 59(e):

> "A judgment (i) confirming or varying a plan of reorganisation or liquidation, (ii) granting a discharge of the debtor or of a debt, or (iii) approving a voluntary or out-of-court restructuring agreement."

79. It is provisions of this kind, submits Mr Moss, which if implemented in the United Kingdom would provide the appropriate machinery to deal with the present type of case. As matters stand, however, there is a confusion at the heart of IBA's case between two different aspects of international insolvency restructurings. One aspect is the stay or moratorium that debtors seek in order to obtain a breathing space while they formulate a restructuring; the other is the question of how the debtor can bind dissenting parties to the proposed restructuring. Only the former aspect falls within the scope of the existing Model Law. The latter issue depends on jurisdiction over the dissenting creditors and/or the law which governs their debts. In many cases, of which this is one, it may not be possible to enforce the compromise against all creditors, but the reorganisation may nevertheless be worthwhile and save a viable business. If it is desired to go further, and bind foreign creditors who would not otherwise be bound, the long-standing practice in international restructurings of the present type has been to apply for parallel schemes of arrangement in other jurisdictions. IBA's failure to follow this course "should not be cured", as counsel for Franklin Templeton put it in their written submissions, "by granting unprecedented and unjustifiable relief under the CBIR".

80. In this connection, Mr Moss also submits that there are fundamental differences between liquidations (and equivalent procedures) on the one hand, and company reorganisations (in a broad sense) on the other hand. When a company goes into liquidation, the governing principle is that the pre-existing rights of the creditors should be enforced collectively. As Lord Hoffmann said in Cambridge Gas at [15], "bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them". By contrast, the purpose of a corporate

reorganisation will generally be to change the substance of the creditors' existing rights, with a view to the company emerging from the reconstruction as a going concern. It is therefore not surprising if these two very different types of proceeding are treated differently under the Model Law. Moreover, even in the case of a foreign liquidation, it is by no means clear that the English court would remit assets to a foreign liquidator if to do so would be unfair to creditors whose rights are governed by English law: compare In re Bank of Credit and Commerce International SA (No.10) [1997] Ch 213, discussed by Lord Hoffmann, and regarded by him as correctly decided on its facts, in HIH at [15] to [17].

81. The remainder of Mr Moss's oral submissions were principally directed to the temporal issue, that is to say the question whether (as Franklin Templeton put it in their respondent's notice) it is possible as a matter of jurisdiction to grant relief under article 21 which extends in duration beyond the termination of the foreign proceedings. The arguments relied on by Mr Moss in the court below in support of this proposition were summarised by the judge at [149] (1) to (7) and [150], which I will not repeat. In summary, the main points which Mr Moss emphasised before us were as follows:

> a) Numerous provisions of the Model Law, including in particular articles 1, 2, 9-12 and 15-31, are all drafted on the assumption that the relevant foreign proceeding is still in existence and there is a validly appointed foreign representative still in office.
>
> b) The notion of "appropriate relief" in article 21(1) must be confined to relief which is available under domestic law (see in particular the Guide at [189]), and as a matter of English law it would not be possible for a stay or moratorium to continue beyond the termination of a liquidation or administration.
>
> c) Regardless of the position under domestic law, the temporal limitation is anyway inherent in the scope of relief potentially available under article 21, and the judge was right to conclude as he did at [154], quoted at [63] above.
>
> d) Support by way of analogy for what is basically a proposition of common sense may be found in Re Kingscroft Insurance Co Limited [1994] BCC 343, where Harman J held that an order for the production of books and documents and for private examination obtained by provisional liquidators under section 236 of the Insolvency Act 1986 was spent once the winding-up petition had been dismissed and the provisional liquidators ceased to hold office: see his judgment at 346-347. As Harman J said at 347, "when there is no office, there cannot be a purpose of assisting the holder of that non-existent office."
>
> e) Further support may also be found in the recent decision of Rares J, sitting in the Federal Court of Australia, in Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA [2018] FCA 153 ("Rizzo"). That case had a complex procedural background, summarised by Rares J at [3] to [11]. For present purposes, it is enough to say that an Italian form of reconstruction proceedings (known as a *concordato preventivo*) had been superseded in Italy by a liquidation ordered by the Italian court, and one issue which then arose was whether, and if so when, orders

which the Australian court had previously made in support of the *concordato* should be terminated and replaced with interim relief in support of the liquidation. The judge dealt with these matters at [26] to [34], concluding that the purpose of the earlier orders had come to an end when the Italian court dismissed the *concordato*, with the result that those orders should be vacated or set aside with effect from that date. As the judge put it, at [33]:

> "As a matter of principle, orders made under the Model Law should also cease to operate once the reason for having originally granted a stay and any other orders under the Model Law to recognise, aid or facilitate the conduct of the foreign proceeding also has ceased to exist. There is then no need to protect the debtor's assets here under the Model Law, because the foreign proceeding (in aid of which the local stay, recognition and any other orders were made) has ceased to exist, or otherwise no longer provides a justification to prevent creditors from exercising their rights in Australia against the debtor or the debtor's assets."

82. In the present case, submits Mr Moss, the Azeri reconstruction has for all practical purposes come to an end, and it is only being kept alive artificially for the purposes of this appeal. In substance, it terminated on 30 January 2018, and it would be wrong in principle for this court to grant any relief extending beyond that date.

The jurisdiction issue: discussion and conclusions

83. The first question to consider, in my judgment, is in what sense it may be said that the English court lacks jurisdiction to grant the indefinite stay requested by the foreign representative. As Pickford LJ usefully clarified in Guaranty Trust Company of New York v Hannay & Company [1915] 2 KB 536 at 563:

> "The word "jurisdiction" and the expression "the Court has no jurisdiction" are used in two different senses which I think often leads to confusion. The first and, in my opinion, the only really correct sense of the expression that the Court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject-matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, i.e., that although the court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances."

84. It is clear, to my mind, that the present case does not involve an issue of jurisdiction in the former, or what one might call the "strict", sense. The application was made by a foreign representative of a foreign proceeding, duly recognised as such in this jurisdiction under the CBIR. Furthermore, the foreign proceeding was still in progress both when the application was made and when it was determined by the High Court.

As Mr Bayfield made clear, the application is made under article 21(1)(a) and (b), which expressly empower the court, "where it is necessary to protect… the interests of the creditors", to "grant any appropriate relief" at the request of the foreign representative, including a stay of the commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities, or a stay of execution against the debtor's assets to the extent that there has not already been an automatic stay under article 20(1)(a) and (b). As a matter of jurisdiction in the strict sense, the application seems to me to fall squarely within the clear wording of article 21. In particular, I would reject a submission made by Mr Moss that the only purpose of article 21(1)(a) and (b) is to enable the court, upon reorganisation of a foreign *non-main* proceeding, to grant equivalent relief to that automatically conferred by the corresponding paragraphs of article 20(1) in the case of a foreign *main* proceeding. That is no doubt an important function of article 21(1)(a) and (b), but I can see no warrant in the wide language of the paragraphs for confining their scope so narrowly.

85. Accordingly, the real issue in the present case, as I see it, is one of jurisdiction in Pickford LJ's second sense, that is to say whether as a matter of settled practice the court should not exercise its power to grant a stay under those paragraphs, going beyond the automatic stay under article 20, where to do so:

> a) would in substance prevent the English creditors from enforcing their English law rights in accordance with the *Gibbs* rule; and/or
>
> b) would prolong the stay after the Azeri reconstruction has come to an end.

Despite Mr Bayfield's skilful and well-sustained submissions, I would answer both those questions in favour of the respondents. I must now explain my reasons for reaching that conclusion.

(a) Is it appropriate to grant an indefinite stay so as to defeat the rights of the English creditors?

86. An English court could only properly grant the stay sought by IBA, which is avowedly intended to prevent the English creditors from enforcing their English law rights indefinitely, if it were satisfied of two things. First, the stay would have to be *necessary* to protect the interests of IBA's creditors. Secondly, the stay would have to be an *appropriate* way of achieving such protection. In my view, neither of those conditions is satisfied.

87. As to the interests of IBA's creditors, viewed collectively, the relevant class which needs to be considered is the creditors whose debts formed part of IBA's Designated Financial Indebtedness. But they have now obtained everything to which they were entitled under the Azeri reconstruction plan, unless they deliberately chose not to participate in it. There is no evidence to suggest that the benefits on offer under the plan were discounted to reflect the probable non-participation of the English creditors, and the plan was duly approved by the Azeri court. IBA is now trading again, and the reconstruction is at an end. There is no further protection which the creditors need in order for the foreign proceeding to achieve its purpose. The highest that Mr Bayfield was able to put it was to argue that the creditors who participated in the plan could conceivably be prejudiced if the ability of IBA to repay its new corporate bonds,

which formed part of the new entitlements provided under the plan, were jeopardised in the future by successful enforcement by the English creditors of their stayed claims. There is no evidence, however, to suggest that this possibility is of more than theoretical significance; and, even if there were, I would regard it as far too indirect and imponderable a consideration to satisfy the test of necessity in article 21(1).

88. It is also material in this context that IBA could in principle have promoted a parallel scheme of arrangement in this jurisdiction, but chose not to do so. Mr Bayfield says that this objection misses the point, because one of the objects of the Model Law is to avoid duplication of proceedings with all the additional expense and inconvenience which they entail. I acknowledge the force of that argument, and would accept that the Model Law is designed to increase cooperation and reduce the need for separate proceedings in relation to matters falling within its scope. But that goes only some of the way towards answering the question whether protection of the interests of IBA's creditors really requires an indefinite stay of the English creditors' claims, when the alternative of a separate English scheme of arrangement was always available. One may surmise that IBA's real reasons for not promulgating a separate English scheme of arrangement probably had more to do with the need which would then have arisen to treat the English creditors as a separate class, and to offer them terms which they would be prepared to accept. That is another way of saying that the English creditors' strongest bargaining position would have been their English law rights, protected by the *Gibbs* rule; and this brings one back to the question whether anything in the Model Law, properly construed, should be permitted to override those rights. If not, it seems to me that it could seldom, if ever, be appropriate to grant relief under the Model Law which would have the substantive effect of doing just that.

89. Here, the starting point must in my opinion be the clear recognition in the Guide that the scope of the Model Law is "limited to some procedural aspects of cross-border insolvency" and that it "does not attempt a substantive unification of insolvency law". I would accept the respondents' submissions that the absence of any choice of law provisions in the Model Law is highly significant in this context, as is the absence of any requirement of reciprocity and the contrast which may be drawn with other international instruments such as the EU Insolvency Regulation or conventions for the mutual recognition of judgments. Furthermore, if the power to grant a stay under article 21 had been intended to override the substantive rights of creditors under the proper law governing their debts, one would expect this to have been made explicit, or at the very least to have been the subject of discussion and a positive recommendation at the preparatory stage. In the absence of any such material, I can find no warrant for treating the relevant article 21 powers as other than procedural in nature, with the main object of providing a temporary "breathing space" of the kind envisaged in the Guide.

90. Strong support for this approach may also be found in the existing case law. The decision of the Supreme Court in Rubin is particularly instructive, in my view, because the court there firmly rejected the approach taken by this court (of which I was a member) which sought to build on the principles stated with typical brilliance by Lord Hoffmann in HIH and Cambridge Gas so as to develop the common law on recognition of foreign judgments in line with the principle of modified universalism in insolvency proceedings. In essence, as it seems to me, IBA is trying to achieve a similar sort of result in the present case, by asking us to sideline or circumvent the

established common law rights of the English creditors by an appeal to the principle of modified universalism.

91. In any event, whatever the force of that comparison may be, Rubin is also directly in point, and binding on us, because, having declined to extend the common law, the Supreme Court went on to reject the receivers' alternative argument based on the CBIR and the Model Law. It was in this connection that Lord Collins expressly said, at [143], that article 21 is "concerned with procedural matters", and although it should be given a purposive interpretation and widely construed, there is nothing to suggest that it applies to the recognition and enforcement of foreign judgments against third parties: see [56] above. In a similar way, I can find nothing in article 21 to suggest that the procedural power to grant a stay could properly be used to circumvent the *Gibbs* rule.

92. Nor, in my view, does IBA gain any assistance from the Australian case of Akers. The issue was a very different one, concerning the terms on which it would be appropriate for the Australian court to order the remission of assets to a foreign liquidator, in circumstances where the Commissioner of Taxation would be unable to prove in the foreign liquidation because of the rule in Government of India v Taylor, but was subject to no such disqualification in Australia. The solution adopted was, in effect, to put the Commissioner on the same footing as the other creditors, but freed from the disability which would have prevented him from recovering anything in the foreign liquidation. Thus, the decision fully respected the domestic rights of the Commissioner as an Australian creditor, and far from circumventing them, the whole purpose of the order was to protect these rights, although not to the extent of affording him a preference over the other creditors. The fundamental principle of *pari passu* distribution on a liquidation was thus also protected. Nothing in Akers appears to me to be inconsistent with the position of the respondents in the present case. The difference is that the substantive rights which they are asking the court to respect gives them a potential advantage over the other creditors, but since the Model Law is essentially procedural in nature, it would in my view be wrong to use it to deprive the English creditors of that substantive advantage.

93. I also agree with Mr Moss's submission that there is an important distinction to be drawn between a liquidation and schemes of reconstruction. In a liquidation, the substantive rights of creditors are generally unaffected, and the primary focus is on achieving a fair distribution of the company's assets between all the creditors, normally on a *pari passu* basis. Save in exceptional cases, the liquidation will end with the dissolution of the company. In a reconstruction, on the other hand, the object is usually that the company will continue as a going concern, and the terms will typically involve significant changes to the creditors' substantive rights. This distinction was in my view rightly recognised by the judge, albeit in his discussion of discretion, at [158(3)], where he expressed his agreement with Morgan J in Pan Ocean at [112], helpfully adapting that paragraph to the present case as 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 Limited [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."

94. More generally, I also agree with the main thrust of the conclusion reached by the judge at [146] after his careful consideration of essentially the same arguments as have been addressed to us:

> "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."

95. The judge went on to say, at [147], that he would regard this conclusion "as a jurisdictional bar in the strict sense", but that it would in any event amount to a jurisdictional fetter in the wider sense explained in the Guaranty Trust case, with the result "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." While I agree with the judge's conclusion at [146] in its application to the facts of the present case, however, I think that in [147] he went rather further than is either necessary or appropriate for resolution of the present case. In the first place, as I have already explained, I do not regard the issue as one of jurisdiction in the strict sense. Secondly, viewing the matter as one of jurisdiction in the wider or "soft" sense, I feel a lawyer's instinctive reluctance to use the word "never". I think there could be circumstances where, to a limited extent, it might be appropriate to exercise powers under the Model Law so as to achieve the discharge or variation of an English law right in a way that is tantamount to the application of a foreign law, for example when exercising the powers to remit assets to a foreign liquidator: compare HIH at [18] to [21]. In the context of the present case, however, I am satisfied that it would be wrong in principle to use the powers in article 21(1)(a) and (b), or any other provisions of the Model Law as incorporated in the CBIR, so as to circumvent the English law rights of the English creditors under the *Gibbs* rule.

(b) Can a stay properly be granted beyond the end of the Azeri reconstruction plan?

96. Since the conclusion which I have already reached is sufficient to dispose of the appeal, I will deal with this alternative ground more shortly.

97. In my view the arguments advanced by Mr Moss provide a compelling case for concluding that relief under the Model Law should not be granted so as to continue

beyond the date of termination of the relevant foreign proceeding. Such a limitation would be consistent with the procedural and supportive role of the Model Law. Once the foreign proceeding has terminated, there will no longer be a foreign representative who can apply to the English court for assistance, nor will there be a foreign proceeding for which such assistance could be sought. Consistently with this, article 18 requires the foreign representative to inform the court promptly of any substantial change in the status of the recognised foreign proceeding, or the status of the foreign representative's own appointment. This duty can only be performed while the foreign proceeding is still in existence, and the foreign representative is still in office. The strong implication is that, once the foreign proceeding has come to an end, and the foreign representative no longer holds office, there is no scope for further orders in support of the foreign proceeding to be made, and any relief previously granted under the Model Law should terminate.

98. Against that background, it would in my judgment be anomalous if a stay granted before the termination of the foreign proceeding were permitted to remain in force indefinitely. Furthermore, in the absence of a foreign representative, it would no longer be possible for IBA to institute proceedings under the Model Law in which the continuing validity or function of the stay could be tested. I do not think it is a sufficient answer to this point to say that the debtor company could always oppose an application to lift or vary the stay. No doubt that is true, in the sense that an English court would presumably allow submissions to be made on the company's behalf upon any such application; but that does not meet the objection that, had the Model Law ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would surely have addressed the question explicitly and provided appropriate machinery for that purpose.

99. There is little in the way of existing authority on this issue, but I agree with Mr Moss that the decision in Rizzo accords with common sense, and provides a helpful illustration of some of the practical problems likely to arise if relief continues beyond the duration of the relevant foreign proceeding, even if some of the reasoning of Rares J may arguably be open to criticism. On this last point, Mr Bayfield submitted that the decision of Allsop CJ in Yakushiji v Daiichi Chuo Kisen Kaisha (No. 2) [2016] FCA 1277 was in places difficult to follow, even though Rares J had found that the latter case "cogently explained" why recognition can be terminated, if the grounds on which it was granted "have ceased to exist": see Rizzo at [32]. Mr Moss was, I think, disposed to accept that there may be some difficulties with the reasoning of the court in Yakushiji, but he submitted that this did not deprive the decision in Rizzo of its value. I respectfully agree, while emphasising that I express no views on either the decision or the reasoning in Yakushiji.

100. Mr Bayfield also pointed out that a rather different approach has been adopted in the United States, where the courts have on occasion shown themselves willing to grant relief which is capable of continuing after the end of the foreign proceeding. In this regard, he referred us to In re Ho Seok Lee [2006] 348 B.R. 799 and In re Daewoo Logistics Corporation [2011] 461 B.R. 175. I do not consider it necessary to explore this point any further, however, because the background to the incorporation of the Model Law in the United States differs significantly from that in Great Britain or Australia, as Morgan J explained in Pan Ocean at [94] to [104] and [106] to [107]. It need not therefore occasion any surprise if the approach taken by US courts to the

interpretation and application of the Model Law is not always the same as that adopted in Great Britain or Australia.

101. If my analysis is right thus far, the only remaining question is whether it makes any difference that the Azeri reconstruction has been prolonged after its original termination date on 30 January 2018 by the change in the law enacted by the Azeri legislature and the orders made under it prolonging the life of the foreign proceeding pending the outcome of the present litigation. In my view, for the purposes of construing the Model Law and its temporal scope, the position cannot be altered by a legislative change made with specific reference (as I understand it) to the present proceedings. As a matter of substance, the original purpose of the Azeri reconstruction had been achieved before the termination date in January 2018, and IBA is now trading normally. The reconstruction plan is being kept alive artificially, but as an insolvency proceeding it has served its purpose and run its course.

Conclusion on the jurisdictional issue

102. For all these reasons, therefore, I am satisfied that the jurisdiction issue should be decided in the respondents' favour, as it was by the judge, provided that "jurisdiction" in this context is understood in the wider or "soft" sense.

Discretion

103. In view of the conclusions I have reached, the question of discretion does not arise and I prefer to say nothing about it. I will merely note that by the end of the hearing it had become common ground that, had we been in favour of IBA on the jurisdiction issue, it would then have been necessary for this court to exercise its discretion afresh, because the judge, although he discussed the issue at some length, ultimately left the question open.

Disposal

104. I would dismiss the appeal.

Baker LJ:

105. I agree

Lewison LJ:

106. I also agree.