Case No: FL-2017-000013

Neutral Citation Number: [2017] EWHC 3512 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
FINANCIAL LIST

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

Date: 21/12/2017

Before:

MR. JUSTICE POPPLEWELL

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Between:

(1) NATIONAL BANK OF KAZAKHSTAN **(2) THE REPUBLIC OF KAZAKHSTAN**	**Claimants**
- and -	
THE BANK OF NEW YORK MELLON SA/NV, LONDON BRANCH	**Defendant**

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MR. ALI MALEK QC, MR. DAVID QUEST QC and MR. WILLIAM EDWARDS (instructed by **Stewarts Law LLP**) for the **Claimants**
MR. CHRISTOPHER BUTCHER QC and MR. RUPERT ALLEN (instructed by **Linklaters LLP**) for the **Defendant**

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Judgment

MR. JUSTICE POPPLEWELL :

1. In other circumstances, I would have wished to reserve judgment and give my reasons in writing. However it is important for the parties to know my decision and reasons promptly and today is the last day of term. Accordingly, my reasons will be more abbreviated and less elegantly expressed than I would otherwise have wished.

INTRODUCTION

2. The Second Claimant is the Republic of Kazakhstan ("ROK"). The First Claimant is the National Bank of Kazakhstan ("NBK"). The Defendant is a bank incorporated in Belgium with a branch in, amongst other places, London. Through its London branch it provides banking and custody services to NBK in respect of the National Fund of Kazakhstan ("the National Fund"), pursuant to a Global Custody Agreement dated 24th December 2001, ("the GCA"). The National Fund has been the target of proceedings brought by Mr. Anatolie Stati and others, ("the Stati Parties"), who are seeking to enforce a Swedish arbitration award against ROK for a sum, including interest and costs, in excess of US$ 500 million. The Stati Parties obtained attachment orders from the Dutch court and the Belgian court, which were served on the Defendant ("BNYM"). BNYM, after taking legal advice, decided to freeze all the assets comprising the National Fund, which it holds under the GCA, on the basis that it was bound to comply with the Belgian and Dutch orders, breach of which would expose it to the risk of civil liability for the amount of the Stati Parties' claims and criminal liability in Belgium and the Netherlands.

3. ROK and NBK have brought these Part 8 proceedings for a number of declarations essentially designed to establish that, under the terms of the GCA, and as a matter of English law, BNYM is not obliged or entitled to freeze the National Fund by reason of the Belgian and Dutch court attachment orders.

THE CLAIMANTS AND THE NATIONAL FUND

4. NBK is the central bank of Kazakhstan and a distinct legal entity incorporated in the form of a republican state entity. NBK carries out its activities pursuant to the Law of the Republic of Kazakhstan on the National Bank of Kazakhstan, #2155, dated 30th March 1995 (as amended), which provides, amongst other things, by Article 7, that the responsibilities and functions of NBK include developing and carrying out the monetary and credit policy of ROK, ensuring the functioning of payment systems, carrying out currency regulation and currency control, and assisting to ensure the stability of the financial systems of Kazakhstan.

5. The National Fund was established by Presidential Decree on the National Fund of Kazakhstan, number 402, on 23rd August 2000, according to which it is a fund of assets held with the aims of securing the stable social and economic development of Kazakhstan, accumulating financial assets for future generations, and reducing the dependence of the Kazakhstan economy on unfavourable external factors. Article 2.2.1 of the Law on State Property provides that the National Fund constitutes state property.

6. The assets in the National Fund are managed by NBK pursuant to a Trust Management Agreement, dated 11th June 2001, number 299 ("the Trust Management

Agreement"). By clause 1.1 of the Trust Management Agreement, the Government of ROK transferred the National Fund into "trust management" and NBK agreed to carry out trust management of the National Fund "for the benefit of the Government [of ROK] by investing financial assets of the [National Fund]". By clause 2 of the Trust Management Agreement, NBK is given the right to "use and dispose of the [National Fund] under the conditions specified herein", and subject to investment rules to invest the National Fund assets. In return, there is a fee arrangement between the Government of ROK and NBK.

7. The Ambassador of Kazakhstan to the Court of St James has certified, in a letter dated 15th November 2017, that the assets held by BNYM at its London branch for NBK form part of the National Fund and belong beneficially to ROK. The letter continues:

> "The National Fund is designed to ensure the economic stability of Kazakhstan and to accumulate funds for future generations by way of investment in securities. In this connection, the assets held by BNY London for NBK under the GCA are not in use or intended for use by or on behalf of the Republic of Kazakhstan for commercial purposes."

THE DEFENDANT

8. BNYM is a limited liability company incorporated in Belgium with its registered office in Brussels. As such it is authorised and regulated as a significant credit institution by the European Central Bank and the National Bank of Belgium under the Single Supervisory Mechanism and by the Belgian Financial Services and Markets Authority. It is ultimately wholly owned by The Bank of New York Mellon Corporation, a United States entity. It has branches in a number of places, including a London branch through which it conducts business at two locations in London. It also has branches in Frankfurt, Amsterdam, Paris, Dublin, Luxembourg and Milan. The branches, including the London branch, are not separate legal entities with a distinct legal personality from the Belgium incorporated entity.

9. BNYM is registered in England and Wales as an overseas company and is registered as a UK establishment. As such, it is subject to the *in personam* jurisdiction of the English court. The staff at the London branch of BNYM are not employed by BNYM but are employees engaged on behalf of the London branch of The Bank of New York Mellon, BNYM's parent company, based in New York.

THE GCA

10. It is common ground that BNYM provides banking and custodian services to NBK in respect of the National Fund pursuant to and upon the terms of the GCA. The GCA was originally entered into between NBK and (1) Boston Safe Deposit and Trust Company, ("Boston Safe") and (2) Mellon Bank NA (London Branch). Boston Safe was a corporation established under the laws of Massachusetts USA. Mellon Bank NA was a US entity with a London branch. The GCA expressed itself to be with the London branch of Mellon Bank NA.

11. Clause 19 provided that, in the event of a merger or reorganisation, Boston Safe and/or Mellon Bank NA could assign their respective rights, duties or obligations to

any affiliated company of Mellon Bank NA or a successor in title to either company. This is what occurred by a deed of assignment, dated 25th January 2003, whereby the rights, title and interest in the GCA were assigned to ABN Amro Mellon Global Securities Services BV (London branch) ("AAMGS"), which is the Defendant, BNYM, by a subsequent name change. The assignment was expressed to be to the London branch of AAMGS, i.e., to BNYM (London branch).

12. The ECA is governed by English law and provides for English jurisdiction.

13. I shall have to refer to a number of the provisions of the GCA but, for present purposes, it is sufficient to identify that at the heart of the issues before me are the terms of clause 16(i) of the GCA, the critical words of which are:

> "[BNYM], shall [not] be liable for and no default shall be caused by any delay or failure on the part of [BNYM] to perform any obligation which, in whole or in part, arises out of or is caused by circumstances beyond its direct and reasonable control including without limitation .... any order .... imposed by any .... judicial .... authority."

THE ASSETS IN THE NATIONAL FUND AND ITS OPERATION

14. As of 31st October 2017, the total value of the assets held by BNYM pursuant to the GCA was a little in excess of US$ 22.6 billion. The assets fell broadly within four classes: (i) cash and cash equivalents; (ii) equities; (iii) fixed income and; (iv) preferred securities. The cash and cash equivalents involved cash deposits and also short-term government bonds or US Treasury Bills. The value of this asset class was approximately US$ 333 million. The equities class contained equities split by market and sector to a value of approximately US$ 11.4 billion. The fixed income class included a number of fixed income instruments such as corporate and other bonds, valued at about US$ 10.8 billion. The preferred securities class contained preferred corporate stocks valued at about US$ 91 million.

15. The National Fund assets which are subject to the GCA are managed externally by asset management managers appointed by NBK, of whom there are a number. It is those asset managers who are responsible for taking the investment and trading decisions in respect of the assets. BNYM is not involved in those decisions.

16. The relatively small cash component of deposits, which forms a sub-set of the cash and cash equivalents class, is a debt to NBK and is treated internally by BNYM as being located at the London branch of BNYM. The majority of the assets in the National Fund, in the form of the various securities described above are not such as to have any physical existence, so far as Mr. Ronald, the relationship manager at BNYM's London branch responsible for NBK, is aware. They are de-materialised securities, the underlying rights in which arise in a wide variety of different geographical locations and in jurisdictions governed by a variety of local laws, including amongst other places, England, the Netherlands and Belgium. They are intermediated securities, that is to say that they are typically represented in the books of a depository in the name of an intermediary, such as, for example, Clearstream or Euroclear, which in turn holds such interests by way of book entries, often in an omnibus account, sometimes in the name of BNYM directly but more often via book

entries in the name of sub-custodians, who in turn hold the interests as book entries in the name of BNYM, either directly or via further intermediaries. The interest of NBK in such underlying securities is recorded as a book entry by BNYM. Those securities are described by Mr. Ronald as, "held and represented, in effect electronically on the bank's IT systems..." Mr. Ronald explains that, for the bank's own organisational purposes, all customers' accounts are treated as being based at a particular branch of BNYM, that the account location is aligned with the law governing the contractual relationship between BNYM and the account holder and that, accordingly, the assets of NBK held by the bank under the GCA are treated as being based at the London branch of BNYM, given that the GCA was executed with the London branch of BNYM and that the GCA is governed by English law.

17. In the Custody Stock Records of BNYM, which constitute its books and records, all of the accounts for NBK under the GCA are given an identifier number, 521, which is the number used for any account held with the London branch.

18. The asset managers who manage the portfolio of assets on behalf of NBK, manage and trade the assets. Instructions received by BNYM are entered in a global electronic platform operated by BNYM known as GSP. The asset managers and NBK, should it so wish, are able to give SWIFT and Workbench instructions from anywhere in the world for the management and trading of the assets constituting the National Fund.

19. The client relationship between BNYM and NBK is generally managed from the London branch of BNYM. Client services on a day to day basis relating to, for example, failed trades, overdrafts, incorrect instructions, or requests for information, are dealt with by a client service team located at BNYM's headquarters in Brussels.

THE ARBITRATION

20. The dispute between the Stati Parties and ROK arose out of projects for the exploration and extraction of hydrocarbons in Kazakhstan. By an award dated 19th December 2013, in arbitral proceedings seated in Sweden, ROK was ordered to pay damages to the Stati Parties in a sum of approximately US$ 497.7 million, together with costs of approximately US$ 8.9 million, and, by a subsequent award, to pay three quarters of the costs of the arbitration, in an amount of approximately €800,000.

21. On 19th March 2014, ROK applied to the Swedish courts to set aside the award on jurisdictional grounds, grounds of procedural irregularity, and in due course, grounds that the award was obtained by fraud. That challenge was rejected by the Swedish court on 9th December 2016. An appeal to the Swedish Supreme Court was dismissed on 24th October 2017. The award is therefore final, unappealable and not capable of being set aside under the supervisory jurisdiction of the courts of its seat.

ENGLISH ENFORCEMENT PROCEEDINGS

22. On 24th February 2014, the Stati Parties applied without notice in England to enforce the award in the same manner as a judgment. On 28th February 2014, Burton J granted that application ex parte in the usual way. On 7th April 2015, ROK applied to set aside Burton J's order and, on 27th August 2015 applied for permission to amend that application to add an additional ground dealing with why the award should not be enforced, namely that it was procured by fraud.

23. On 1st September 2015, I stayed those applications pending the determination of the challenge to the award in Sweden. Following the dismissal of the challenge in Sweden the applications came on before Knowles J in February 2017 and, in a judgment handed down on 6th June 2017, he found that there was a *prima facie* case of fraud, for which permission to amend the grounds should be allowed, and that the issue should be tried for the purposes of determining the Stati Parties' entitlement to enforce the award. The trial of that issue has been set down for a hearing commencing on 31st October 2018, with directions which have reached the stage that disclosure is due shortly, in January 2018.

THE DUTCH PROCEEDINGS

24. BNYM has a branch in Amsterdam. On 23rd August 2017, the Stati Parties applied without notice to the Dutch interim relief court, seeking a number of pre-judgment attachments/garnishments as a prelude to seeking exequatur of the award and garnishment by way of execution. Amongst these was relief in relation to BNYM over what the Stati Parties described as the "Savings Fund" of the ROK. This was said to constitute part of the National Fund which, it was contended, was used or intended for use for commercial purposes.

25. In their application, the Stati Parties sought to attach assets at BNYM not only in Amsterdam but also outside the Netherlands. In her judgment of 8th September 2017, the interim relief judge granted an attachment but stated that it would not apply to assets at branches of BNYM outside the Netherlands. The Dutch garnishment writs were issued pursuant to that decision, each dated 14th September 2017 and in identical terms, save that in one case the garnishment is addressed to what is owed to "The Republic of Kazakhstan (National Fund of the Republic of Kazakhstan)", and in the other simply to what is owed to "The Republic of Kazakhstan." Neither writ contained the limitation in the judge's decision, and on their face each writ extended to all debts owed by BNYM whether within or outside the Netherlands.

26. There is a dispute as to whether, as a matter of Dutch law, the effect of the garnishment is limited to the assets held at the Amsterdam branch. It is common ground that the garnishment attaches to assets or debts in an unlimited amount and is not confined to the amount of the debt owed by ROK to the Stati Parties under the award with interest, which is the amount in respect of exequatur which it is sought to enforce in the Netherlands.

27. BNYM was served with the garnishment on 14th September 2017. Under Dutch procedural law, the garnishee is obliged to issue a declaration as to the assets owing to or held on behalf of the debtor. In its initial declaration on 12th October 2017, BNYM, through its Dutch lawyers, stated:

> "The Dutch branch of The Bank of New York Mellon SA/NV has no legal relationship with these entities, does not keep the accounts for these entities and at the time of the attachment had nothing to claim from these entities, nor will it in the future."

28. However, following intervention from the Stati Parties and having taken further advice, including advice on Kazakh law in relation to the relationship between ROK and NBK, BNYM took the view that it was arguable that the Dutch order, as a matter

of Dutch law, effectively attached the whole of the National Fund, and accordingly made a further declaration on 1st November 2017, stating that, given the uncertainties regarding the legal relationship between NBK and ROK, it could not fully exclude that ROK, including the National Fund, had claims, or would have claims, on BNYM, or that BNYM held assets of, or for, ROK, including the National Fund, which were subject to the garnishment.

29. There are competing views as to the position in Dutch law in respect of the Dutch garnishment. The Stati Parties' position appears to be that BNYM's obligations under the GCA are payable in the Netherlands because BNYM has a branch in Amsterdam and, accordingly, the Dutch courts have jurisdiction to garnish the assets held under the GCA. BNYM's position is that the drafting of the garnishment is such that it is not clear that it excludes from its scope receivables which are not administered in BNYM's Amsterdam branch. It also contends that the more generally accepted view in the Netherlands is that garnishment may be levied on receivables which *may* be payable in the Netherlands, irrespective of whether the courts of some other place of payment would recognise the garnishment as discharging the obligation (the alternative view being that garnishment is not possible if the courts in the other place would not regard the Dutch order as discharging the relevant obligation) and that the Dutch garnishment extends, potentially, to all the assets held by BNYM London under the GCA.

30. The position of NBK and ROK is that the assets held pursuant to the GCA are neither payable in, nor located in the Netherlands, and nothing is caught by the attachment. Those are, prima facie, matters of Dutch law which I am not asked to resolve in the current claim. NBK issued an application on 8th December 2017 to set aside the Dutch garnishment. That has been listed for a hearing on 9th January 2018. The evidence before me from the Dutch lawyers is that judgment is usually given within 14 days, although it may take longer, but is unlikely to take more than a month.

THE BELGIAN PROCEEDINGS

31. On 29th September 2017, the Stati Parties applied without notice in the Belgian courts for pre-judgment attachments/garnishments, again as a prelude to seeking exequatur of the award and garnishment by way of execution. On 11th October 2017, the Belgian judge granted the relief sought and BNYM was served with the garnishment on 13th October 2017. As under Dutch procedural law, BNYM was obliged under Belgian procedural law to make a declaration as to the assets and debts garnished. BNYM's response was to freeze the GCA accounts of the National Fund and, on 30th or 31st October 2017, to make a declaration in the same terms as it was to make in relation to the Dutch proceedings on 1st November 2017.

32. As with the Dutch order, there are competing views in relation to the legitimate scope and effect of the Belgian garnishment order as a matter of Belgian law. BNYM contends that, under Belgian law, a garnishment at a bank's seat covers all assets, whether or not they relate to activities of a branch of that bank outside Belgium, and that the garnishment therefore properly extends to all the assets held under the GCA. Where the assets are located, BNYM contends, or where BNYM's obligations are performable under the proper law of the GCA, i.e., English law, are irrelevant as a matter of Belgian law.

33. The Claimants contend that the Belgian courts do not have jurisdiction to freeze assets located outside Belgium. As a matter of Belgian law, the obligations of a non-Belgian branch of a Belgian company are deemed to be located at that branch, i.e., outside Belgium, and English law is to be applied by the Belgian courts to decide where BNYM's debt under the GCA is payable and where the assets held under the GCA are held and managed.

34. The Claimants' stance is that the Belgian court will not make a final garnishment order if doing so would not discharge BNYM's liability, and that whether or not BNYM would be discharged from liability were it to respond to the Belgian garnishment is a matter for English law as the proper law of the GCA. Again, those are *prima facie* matters of foreign law, in this case Belgian law, which I am not asked to decide on this application.

35. On 20th November 2017, ROK issued proceedings in Belgium to set aside the Belgian garnishment. That, I am told, is the appropriate procedure in Belgium, which involves commencing separate proceedings. BNYM intervened in those proceedings on 30th November 2017 in order to seek declaratory relief. There was a case management hearing on 1st December in those proceedings at which a hearing was listed for the convenience of all counsel involved, that is to say including counsel on behalf of BNYM, ROK, NBK and the Stati Parties. The hearing was listed for the 2nd February 2018 for half a day.

36. The evidence before me from the Belgian lawyers is that the court is likely to give a judgment at least within a month of the hearing and that because it is in relation to asset freezing it is likely to be rendered much sooner after the conclusion of the hearing itself.

THESE PROCEEDINGS

37. By a Part 8 claim form issued on 22nd November 2017, ROK and NBK seek declarations that:

> "(1) The assets of the National Fund are held by BNYM subject to the terms of the GCA, which are governed by English law.
>
> (2) The *situs* of the cash and securities held under the GCA is England.
>
> (3) The debt and trust obligations owed under the GCA are governed by English law. All questions as to the performance and discharge of those obligations are to be determined by English law.
>
> (4) England (and not Belgium or the Netherlands) is the place of performance of the debt and trust obligations under the GCA.
>
> (5) No attachment or garnishment or charging order (or any other order to the like effect) in respect of the debt due from, and assets held by, BNYM London by virtue of the GCA made by any Court outwith England and Wales will be recognised by the courts of England and Wales; nor would any such order operate to discharge BNYM London from its obligations under the GCA.

(6) Notwithstanding the Dutch Order and the Belgian Order (and any further Order that may be made in the courts of either of those countries):

(i) BNYM London remains obliged to hold and deal with the assets of the National Fund pursuant to the terms of the GCA and on the instructions of the NBK;

(ii) BNYM London is not entitled to freeze those assets; and

(iii) BNYM London is not entitled to transfer any of those assets to the Stati Parties.

(7) The assets of the National Fund are immune from enforcement as property of a central bank and/or as property of a state not being in use or intended for use for commercial purposes."

38. With the agreement of BNYM the hearing of the Part 8 claim was expedited and evidence has been served by witness statements resulting in reply evidence on Dutch and Belgian law being served only shortly before the hearing. At the hearing, the Claimants sought to amend the relief sought in declaration 1 to make clear that ROK is not a party to the GCA by adding the words: "The contractual obligations under the GCA are owed only to NBK and not to ROK."

39. The Claimants have not sought to join the Stati Parties to these proceedings. The Stati Parties were notified of their existence and were provided with some of the documentation. The Stati Parties have not sought to intervene or to participate in this hearing.

40. The immediate consequences of the freezing of the National Fund by BNYM are set out in a witness statement of Ms. Moldabekova, the Director of the Monetary Operations Department of NBK. She states that NBK has suffered (and is suffering) significant loss and is likely to suffer further losses for so long as the assets remain frozen. There are a number of FX trades which were executed before the freeze which have already defaulted or will default for so long as the assets remain frozen. The asset managers are now unable to trade out of positions, as they typically would in their day-to-day investment strategy, thereby causing losses to NBK based on currency exposures in the portfolios. There are futures and options which cannot now be controlled or adjusted, or where margin requirements cannot be met, which may involve positions having to be closed out in circumstances where they would otherwise be kept open by increased posting of margin. A number of security trades have failed because the freezing of the assets has made it impossible to meet settlement on the settlement date, exposing NBK to claims on undelivered securities and instruments. In general, NBK's asset managers have been unable to manage the assets in accordance with their usual investment strategies, causing NBK to lose the opportunity to profit from such strategies, and/or causing it to suffer losses as a result of the current positions being frozen. Moreover, it is said that the reputation of NBK as a counterparty is suffering as a result of defaults in its trades, which may irredeemably prejudice NBK in its future relationships.

41. On 11th December 2017, BNYM issued an application in these proceedings challenging jurisdiction. The grounds of challenge may be summarised as follows:

(1) BNYM is domiciled in Belgium for the purposes of Regulation EU number 1215/2012 ("the Brussels Recast Regulation") such that it must be sued in Belgium under Article 4 unless the claim falls within one of the special derogations provided for in other Articles of the Regulation;

(2) so far as ROK's claim is concerned the only Article relied on is Article 7(5) but, it is submitted, ROK cannot show a good arguable case that Article 7(5) is engaged;

(3) in respect of the claim by NBK, which relies on Article 7(5) and Article 25:

(a) neither Article is engaged by the claim for declaration (7) in relation to sovereign immunity, because there is no dispute between NBK or ROK and BNYM in relation to its subject-matter;

(b) in relation to declarations (1) to (6) the court should stay the proceedings pursuant to Article 30 because the Belgian court was first seized and there is a risk of irreconcilable judgments;

(c) alternatively, the court should grant a stay pending the decisions of the Dutch and Belgian courts on the applications to set aside the garnishments in the exercise of this court's case management powers.

42. On jurisdiction, ROK and NBK's response can be summarised as follows:

(1) there is jurisdiction under the Brussels Recast Regulation in respect of the claims by both ROK and NBK under Article 7(5) because the claim arises out of the operations of a branch within the jurisdiction and, in addition, the claim by NBK falls within Article 25 of the Brussels Recast Regulation because it is a contractual dispute governed by an English jurisdiction clause;

(2) Article 30 is not engaged because:

(a) the Dutch and Belgian proceedings do not fall within the Brussels Recast Regulation because they are arbitration proceedings, being attachments in support of exequatur, i.e. enforcement of an arbitration award, and/or

(b) they are not related proceedings within the meaning of Article 30;

(3) if Article 30 is engaged a stay is not justified as a matter of discretion, nor is a stay warranted under the court's case management powers.

43. On the substance of the claim, the submissions of NBK and ROK can be summarised as follows:

(1) the main declaration sought is declaration (6). The central submission is that BNYM London branch is not entitled or obliged to freeze the assets comprising the National Fund because the only justification put forward for doing so is clause 16(i) of the GCA and the Dutch and Belgian orders do not fall within the operation of that clause. Therefore, BNYM remains obliged to hold and deal with the National Fund, pursuant to the terms of the GCA, and

on the instructions of NBK. That is, it is said, a question of construction of the terms of the GCA and in particular clause 16(i), which is governed by English law and which is the subject matter of the English jurisdiction clause in the GCA;

(2) clause 16(i) falls to be construed against the well established rule of English private international law and the position in European law under the Brussels and Lugano Conventions, the Brussels Regulation, and now the Brussels Recast Regulation, that the jurisdiction to attach assets in support of a judgment is confined to the courts of the country where the assets are situated; that it is well established that for these purposes assets held by a customer with a bank are treated as located at the relevant branch of the bank which governs the relationship with the customer, and the branch is, for those purposes, treated as a separate entity, notwithstanding that the branch does not have separate legal personality, and that the cash and securities comprising the National Fund are located in England because they are held at the London branch of BNYM, pursuant to the customer relationship reflected in the GCA, which is governed by English law;

(3) in that context where there is a prohibition imposed on BNYM by a foreign order or foreign laws, clause 16(i) is to be interpreted as only applicable if that foreign order or foreign law would be recognised and given effect by an English court under English principles of private international law; the Dutch and Belgian orders, it is submitted, do not fall within the scope of the clause because they would not be recognised under the English law principles of private international law as having subject matter jurisdiction to freeze assets held at an English branch of a bank;

(4) declarations (1) to (5) are steps in the reasoning which lead to the entitlement to declaration (6); moreover, they are declarations which it will, or at least may, assist the Dutch and Belgian courts in respect of issues which are governed by English law; declaration (7) will also assist the Belgian court, or at least may do so.

44. In the alternative to its jurisdictional arguments, BNYM submits that the court should refuse to grant declaratory relief. Its arguments can be summarised as follows:

(1) BNYM is or may be entitled, pursuant to clause 16(i) of the GCA, to freeze assets that it holds in order to comply with the Belgian and/or Dutch orders wherever such assets are located; in this regard it is immaterial whether those orders would be recognised or enforced as foreign judgments by the English court; clause 16(i), it is said, is engaged by "any" order of "any" court, which includes the Dutch and Belgian orders; whether clause 16(i) as a whole is fulfilled also involves a question of causation; applying the words of causation in the clause, the causation question raises a factual issue which cannot be resolved in a Part 8 claim;

(2) most of the issues raised by ROK and NBK in these proceedings are irrelevant to any actual or potential dispute between them and BNYM, as they do not arise on the true construction of clause 16(i) of the GCA;

(3) insofar as the resolution of any of these issues turns on disputed factual evidence, including disputed evidence as to foreign law, it would not be appropriate to grant them in Part 8 proceedings, let alone expedited Part 8 proceedings such as these, or at the very least the court must proceed on the basis that BNYM's evidence of foreign law is to be taken as representing the true position;

(4) even if the English court were to grant any or all of the declarations sought it would not resolve the practical issues facing NBK and ROK, since the Belgian and Dutch orders would remain in place and BNYM would still be subject to those orders because of the *in personam* jurisdiction over it of the Dutch and Belgian courts and, so BNYM contends, it would still be obliged to freeze the assets it holds; accordingly, it submits that any order by the English court would only put BNYM in the invidious position of being subject to conflicting orders from two sets of courts with jurisdiction over it;

(5) the Claimants are the authors of their present predicament, which could be avoided by providing security for the amount of the award with interest to the amount claimed by the Stati Parties in the enforcement proceedings in Belgium and the Netherlands;

(6) the Claimants are seeking declaratory relief from the English court as to certain issues of English law with a view to advancing their case against the Stati Parties in other jurisdictions, most immediately in relation to the Belgian and Dutch proceedings, but also at least potentially in relation to other enforcement processes taken by the Stati Parties elsewhere, for example in Sweden, the United States and Luxembourg, rather than to resolve any real dispute with BNYM; this, it is said, is inappropriate in circumstances where:

(a) the parties who have a real interest in opposing the relief sought, i.e. the Stati Parties, are not before the English court;

(b) the Belgian or Dutch courts would not be assisted by a ruling from the English court on many if not all of the issues; and

(c) the declarations are sought in very general terms, divorced from the context in which those issues might arise under Belgian and Dutch law.

45. The Claimants respond that this is an appropriate case for the declarations, in summary because:

(1) if the Claimants be right on their construction of clause 16(i), BNYM, it is said, is in breach of contract and has been in breach of contract since October 2017 that is a breach which has serious prejudicial consequences and the Claimants are entitled to have the contractual dispute in relation to that issue decided by the English court in accordance with the governing law and the jurisdiction provisions in the GCA;

(2) it will assist BNYM if the issue is revolved because it will identify whether the bank is in double jeopardy if it were to apply the assets under the foreign garnishment orders to pay sums to the Stati Parties;

(3) delaying the decision pending the resolution of the challenges to the Belgian and Dutch orders will mean a delay until potentially March 2018, resulting in unfair prejudice to ROK and NBK from the continued freezing of its assets; in any event, it is said whatever happens in relation to those Dutch and Belgian attachments, the issues will need to be resolved, not only in relation to other likely attachments but, in any event, because it is said that if the Claimants be right they will have a claim for damages in relation to the losses suffered by the freezing of the assets since the end of October 2017.

JURISDICTION

Declaration (7)

46. I reject BNYM's submission that there is no jurisdiction to hear the Claimants' claim for a declaration in the form of declaration (7) on the grounds that there is no dispute between BNYM and the Claimants in respect of it. I accept that both Article 7(5) and Article 25 are only engaged in respect of a "dispute". However, there is a relevant dispute between BNYM and both Claimants over the claim for the declaration in the form of declaration (7) in two separate respects.

47. First, the Claimants have asserted as against BNYM, and as part of their argument in support of the construction of clause 16(i), that the assets comprising the National Fund are not used or intended for use for commercial purposes, and that they fall within immunity from attachment under English law under the State Immunity Act 1978, for either or both of the reasons given by Aikens J, as he then was, in *AIG Capital Partners Inc. v Republic of Kazakhstan (National Bank of Kazakhstan Intervening)* [2005] EWHC 2239 (Comm); [2006] 1WLR 1420, namely: (a) that the cash and securities in the National Fund were "the property" of NBK within the meaning of section 14(4) of the State Immunity Act because NBK had an interest in that property and, accordingly, the National Fund was immune from attachment as the property of a central bank; alternatively (b) if not the property of NBK, the National Fund was the property of ROK and was the property of a State, and that the National Fund was not at any time either in use or intended for use for commercial purposes and so was immune from the enforcement jurisdiction of the English court under section 13(ii)(b) of the State Immunity Act.

48. In the proceedings before me, BNYM does not accept that this is the case. It takes a neutral stance on whether the National Fund was used or intended to be used for commercial purposes. By not accepting that as an element of the Claimants' claim for the declaration in the form of declaration (7), BNYM is disputing it within the meaning of Article 7(5) and Article 25 of the Brussels Recast Regulation, and is no less disputing it simply because it does not seek to advance a positive case.

49. Secondly, whatever BNYM's stance vis-à-vis the substantive position on immunity under English law under the State Immunity Act, BNYM quite separately does advance a positive case that the Claimants should not be granted a declaration in the form sought in declaration (7) for various discretionary reasons. That involves disputing the claim of these Claimants to relief in the form of declaration (7).

50. It is of course a separate question whether claims for a declaration in the form of declaration (7), and indeed the other declarations, fall within Article 7(5) or Article 25 by reason of their subject matter, to which I now turn.

Do the Claims fall within Article 7(5)?

51. Article 7(5) of the Brussels Recast Regulation provides as follows:

> "A person domiciled in a Member State may be sued in another Member State:
>
> […]
>
> (5) as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place where the branch, agency or other establishment is situated;"

52. The European Court of Justice considered the predecessor to Article 7(5) in *Établissements Somafer SA v Saar Ferngas AG* [1978] ECR 2183. It is clear from paragraphs 8 and 13 of the judgment of the court in that case that there must be a special link justifying derogation from the basic rule of jurisdiction based on domicile embodied now in Article 4 of the Brussels Recast Regulation, that is a special link between the contractual or non contractual relationship between the parties, and the operations or branch or agency in question.

53. In *Anton Durbeck Gmbh v Den Norske Bank ASA*, [2003] EWCA Civ 147; [2003] QB 1160, the Court of Appeal considered the extent of the link which was required. At paragraph 40 of his judgment, Lord Phillips of Worth Matravers MR described the Article as requiring a sufficient nexus between the dispute and the branch as to render it natural to describe the dispute as one which has arisen out of the activities of the branch.

54. In my view that test is fulfilled in this case. It is common ground that it is fulfilled for NBK and, in my judgment, that is equally so for ROK, notwithstanding that on ROK's own case it was not a party to the GCA. ROK claims to have a beneficial property interest in the National Fund, and that it is being managed by NBK on its (ROK's) behalf when entrusted to the London branch of BNYM, pursuant to the terms of the GCA. ROK is in dispute with BNYM because, in response to the Dutch and Belgian orders, BNYM has asserted that those orders justify freezing the National Fund on the grounds that ROK may have claims against it. The form of the declaration (in respect of the Belgian order) includes:

> "[BNYM] cannot fully exclude that the Republic of Kazakhstan (including the National Fund) has or will have claims on BNYM or that BNYM holds assets of or for the Republic of Kazakhstan (including the National Fund) which are the subject of the garnishment in view of its contractual relationship with the NBK and the uncertainties of the legal relationship existing between the latter and the Republic of Kazakhstan.

> Pursuant to the Global Custody Agreement BNYM holds *'certain securities of the National Fund and Cash on behalf of the [NBK] as custodian and banker respectively'*.
>
> In addition, it is BNYM's current understanding that, under Kazakh law, the NBK is not capable of owning any assets which are not owned by the Republic of Kazakhstan, although NBK has the power to possess, use and dispose of assets of the National Fund pursuant to an agreement between the NBK and the Republic of Kazakhstan with the government as beneficiary. BNYM has been informed that this is the case even though the NBK, pursuant to Kazakh law, has separate legal personality towards third parties, has legal standing in courts and can hold and possess assets and liabilities that are separate from the Republic of Kazakhstan, i.e. assets of other parties than the Republic of Kazakhstan."

55. ROK brings the claim for declarations in these proceedings, designed to establish that BNYM's stance is unjustified vis-à-vis the property in which it, ROK, claims a beneficial interest and which is managed at the London branch of BNYM which ROK says, is not caught by the attachment orders. ROK therefore seeks the declarations by reference to the way in which the assets are held by the bank at its London branch and the terms of the GCA governing the banker/customer relationship at that branch. That provides the sufficient nexus between the dispute and the operations of the branch to bring the claim by ROK within Article 7(5).

Does Article 30 apply?

56. I have concluded that Article 30 has no application because the English and Belgian proceedings are not related actions within the meaning of Article 30. Article 30(3) provides:

> "For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

57. In *The Tatry* [1999] Q.B. 515, the European Court of Justice, considering the predecessor to Article 30 (then Article 22 of the Brussels Convention) made clear that the Article requires a broad interpretation and that it covers all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive. What is meant by conflicting decisions includes the situation where there are allegations which are common to both proceedings, which are disputed in each set of proceedings, and which will need to be decided in each set of proceedings, where there is a risk of conflicting decisions on those allegations. That that is sufficient to engage the Article was confirmed by the House of Lords in *Sarrio SA v Kuwait Investment Authority* [1999] 1 A.C. 32.

58. However, it is important not to lose sight of the requirement in the Article that the risk of conflict must be such as to make the proceedings so closely connected that it is

expedient that the issues be heard together so as to avoid the risk of irreconcilable judgments in the sense I have identified.

59. In this case, there are, in my judgment, no significant overlapping issues. On behalf of BNYM, it was contended that ROK had raised issues in the Belgian proceedings as to where the assets held by BNYM through its London branch were located as a matter of Belgian law, and whether they were immune from enforcement under the law on sovereign immunity, again as a matter of Belgian law, and that the same issues are raised by NBK and ROK as a matter of English law in these proceedings.

60. However, I see no risk of a conflict in the sense used in the European jurisprudence if the issues are being addressed as matters which arise under different applicable laws. Insofar as there is a factual question which is raised within the issue of whether there is sovereign immunity, in particular whether the National Fund was used or intended to be used for commercial purposes, for reasons which I will explain I do not believe that that issue requires to be determined or addressed in these proceedings, with the result that there is no risk of conflict.

61. I have already identified that the Claimants advanced a separate reason why Article 30 does not apply, namely that the Belgian and Dutch proceedings are not proceedings governed by the Brussels Recast Regulation, because they are arbitration proceedings and Article 30 has no application where the court first seized is not so seized under the Regulation.

62. Mr. Butcher QC accepted that the Belgian, and indeed Dutch, proceedings fell outside the Regulation as arbitration proceedings being proceedings to enforce an arbitration award (see Recital 12 and Article 1.2(d)). He submitted that, nevertheless, Article 30 applied to Regulation claims where there was a related action in a Member State in which the related action did not itself come within the Regulation. He relied in particular on the new wording which was introduced into the Brussels Recast Regulation at Articles 33 and 34, which requires or permits a stay in circumstances where there are related proceedings in a non-Member third party State. Article 34.1 provides:

> (1) Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and an action is pending before a court of a third State at the time when a court in a Member State is seised of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if:
>
> (a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;
>
> (b) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and
>
> (c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.

63. Mr. Butcher argued that there would be an odd lacuna if Article 34 required a stay where there were related non-Regulation foreign proceedings in a third party State and the position were not to be the same for equivalent foreign proceedings in a Member State. The lacuna is filled, he submits, by Article 30 performing that function.

64. There is, apparently no authority on this point under the Brussels Recast Regulation or on the predecessors to Article 30 under the Brussels or Lugano Conventions or the Brussels Regulation. I am strongly inclined to the view that the stance taken by the Claimants is correct. The Regulation forms a coherent set of principles for allocating responsibility for enforcement and jurisdiction between Member States but it only does so for the kinds of proceedings which are brought within the scope of the Regulation. It does not purport to allocate jurisdiction in relation to arbitration proceedings in any way. Articles 29 and 30 are therefore not naturally to be interpreted as regulating priority between Regulation and non-Regulation proceedings. Although I see the force in Mr. Butcher's argument based on Article 34 its logic only extends to interpreting Article 30 as applying to non-Regulation foreign proceedings in a Member State if those foreign proceedings were to fulfil the criteria required by Article 34, were they to be non-Regulation proceedings in a third party State. In this case, if the Belgian and Dutch enforcement proceedings were in a third party State they would not fulfil the provisions of Article 34 because criterion (b) would not be fulfilled.

65. However, since this issue is not determinative and was not argued before me in greater depth, I would prefer not to express a concluded view on this aspect of the argument on the applicability of Article 30.

CASE MANAGEMENT STAY

66. The Court's jurisdiction to grant a case management stay is well established, but it will only be in exceptional and compelling circumstances that a stay will be granted where jurisdiction is established under the Regulation, and the grounds for seeking a case management stay are proceedings in another Member State which do not themselves require a stay under Articles 29 or 30, or indeed Articles 33 or 34.

67. In this case, there is an issue of construction of clause 16(i) which arises between the parties to the GCA, which is governed by English law and which, importantly, BNYM have agreed to submit to the jurisdiction of the English court. Whether or not the court should accede to the claim and grant the declarations sought raises questions about the purpose and utility of the declarations in the context of the Dutch and Belgian proceedings, quite apart from whether the rights which the Claimants seek to have declared are established. Those discretionary considerations are part and parcel of the substantive Part 8 claim in these proceedings.

68. There is, in my view, no reason to await the outcome of the challenges in the Dutch and Belgian proceedings before determining whether the Claimants should have the relief they seek. If the Claimants be right, that clause 16(i) is to be interpreted in the manner for which they contend, and if the Claimants be right that the discretionary considerations governing the grant of declaratory relief mean that declarations should now be made because, for example, they will assist the Dutch and Belgian courts, then it is right that this court should now afford the Claimants the opportunity to

establish those matters without delay, and in advance of the Belgian and Dutch court hearings. If, on the other hand, the Claimants be wrong in those contentions then the claim will fail. In either event, the appropriate course is to determine the claim without further delay.

69. Many of the arguments advanced by BNYM in support of a case management stay were also relied on as reasons why the declaratory relief sought should be refused. The court can and will address those as part of the consideration of the Claimants' claim for declaratory relief.

70. The absence of the Stati Parties from these proceedings is one of the grounds relied on for those purposes and will be considered in that context, but in my judgment it is not a ground for a case management stay. The central issue which the Claimants say that this claim raises is one of interpretation of clause 16(i) of the GCA. That is a contract between BNYM and NBK; it is not a contract to which the Stati Parties are party. BNYM has addressed, through Mr. Butcher, arguments on the interpretation of clause 16(i) in circumstances in which I consider that this issue can fairly be resolved in the absence of the Stati Parties.

THE INTERPRETATION OF CLAUSE 16(i)

71. The argument of the Claimants proceeds in essentially three stages:

(1) In the absence of clause 16(i) the Dutch and Belgian orders would not excuse BNYM from performance under the GCA because, as a matter of English private international law and European law:

(a) the National Fund would be immune from attachment by proceedings in England under the State Immunity Act;

(b) English private international law does not recognise or enforce decisions of foreign courts seeking to attach assets located at a branch of a bank in England, irrespective of the nationality or domicile of the bank as a legal entity; and

(c) the situs of the cash and securities is the London branch of BNYM, being the place of performance of the rights under the GCA which are what the Belgian and Dutch orders purport to attach;

(2) accordingly clause 16(i) would have extraordinary commercial consequences were it to protect BNYM by reversing the common law position, in circumstances where it must be assumed that NBK contracted with the London branch in order to secure the immunity which English law confers; and

(3) that the language of the GCA would need to be very clear to achieve that result and there is no such clear language in clause 16(i).

72. I will assume for these purposes that the Claimants are correct in their arguments at the first stage as to the position absent clause 16(i). I proceed on that assumption, although I make clear that I am not deciding that that is so, and in relation to the arguments in relation to stage 1(c), there is room for considerable debate. That being

an area which was touched on by Mr. Butcher QC on behalf of BNYM, but is an area where the Stati Parties would have an interest in developing further detailed argument.

73. I can decide the question of interpretation under clause 16(i) by assuming that the Claimants are right at stage 1, because, on that assumed premise, in my view, the arguments at stage 2 and 3 face a number of serious difficulties which, in the end, are insurmountable. They are the following.

74. First, the Claimants' argument takes as its initial premise that the intention of NBK was to contract only with the London branch of a bank so as to protect the National Fund from any enforcement process because the assets would be treated as located only in London. There is no evidence before the court to that effect. Nor in my judgment can it be presumed to be the intention of NBK simply from the terms of the GCA itself. The GCA was originally with Mellon Bank NA (London branch) and with Boston Safe. Boston Safe was a Massachusetts company and it was Boston Safe who was to be the custodian of the securities in the portfolio. It is true that clause 4(a) and the schedule provide that, in relation to Boston Safe, instructions are to be given to a London address and that clause 25 provides for notifications to go to that London address. But it is far from clear from the terms of the agreement alone that it was intended that the assets were all intended to be treated as located in London.

75. Clause 3(a) provides that Boston Safe should open one or more accounts in Boston Safe's books for all the non-cash assets of NBK, as Boston Safe or any of its sub-custodians might from time to time hold in custody. There is nothing to identify that those records will be kept in Boston Safe's books in London rather than, for example, in Massachusetts.

76. Clause 5 provides that Boston Safe may appoint sub-custodians to safe-keep and administer investments on such terms as it may determine, and by clause 5(c), that the assets may be held by the sub-custodian outside the United Kingdom; that different settlement, legal and regulatory requirements, and different practices relating to the segregation of those assets may apply, and that any loss in connection with those different requirements and practices will be borne solely by NBK. It is inherent in that provision that the underlying security assets may be held abroad and may be subject to attachment in the local foreign jurisdictions where the underlying assets are held.

77. Clause 6(b) recognises that Boston Safe may arrange for securities held outside the UK to be registered in the name of either Boston Safe itself or a sub-custodian, again recognising that the securities may be held in Boston Safe's name abroad.

78. I have not lost sight of the fact that clause 6(d) provides that, without prejudice to proprietary rights of NBK, the client's re-delivery rights in respect of the securities are not *in specie*, but rather in respect of securities of the same issue, number, class, denomination and issue as those originally deposited with Boston Safe in the securities account. The Claimants rely upon the analysis of Briggs J in *re Lehman Brothers International (Europe)* [2010] EWHC 2914 (Ch) at [266]:

> "It is common ground that a trust may exist not merely between legal owner and ultimate beneficial owner, but at each stage of

> a chain between them, so that, for example, A may hold on trust for X, X on trust for Y and Y on trust for B. The only true trust of the property itself (i.e. of the legal rights) is that of A for X. At each lower stage in the chain, the intermediate trustee holds on trust only his interest in the property held on trust for him. That is how the holding of intermediated securities works under English law, wherever a proprietary interest is to be conferred on the ultimate investor. In practice, especially in relation to dematerialised securities, there may be several links in that chain."

79. The analysis advanced by the Claimants is that in the case of a trust the position depends on whether or not the beneficiary can assert under the law governing the trust, here English law, a beneficial interest in the trust property, in which case the situs depends on the location of that property, or has only a right to resort to the court to compel the trustee to discharge his duties. It is said that in the present case the nature of the assets means that the trust falls into the second class of case.

80. It seems to me doubtful, to put it at its lowest, whether even if this is the right analysis as a matter of English private international law, and I have heard no detailed argument on it, a customer in NBK's position who was agreeing to the clauses which I have identified, would in truth have regarded that the proprietary interests in foreign securities were located anywhere other than the seat of the securities.

81. Given the width of the exceptions in clause 16, including in particular clause 16(c), it is by no means obvious that in substance NBK intended to render itself immune in practice from the consequences of a local foreign court attaching underlying securities which were within that court's local jurisdiction.

82. Moreover, and in any event, clause 19 of the GCA contemplates that the location of the relevant branch of NBK's counterparty can be altered without reference to NBK and can be altered so that the branch is no longer a London branch. If, for example, there were a corporate re-organisation which involved BNYM's business being transferred to The Bank of New York Mellon, the US corporation in New York, and if, for example, in those circumstances it was decided to close all the European operations and branches and to transfer this business under the GCA to New York, it would be in the records of the branch at New York that the relevant electronic entries would be entered, and it would be with the New York branch that NBK would have its relevant relationship. On the Claimants' own case the situs of the assets and place of performance would not then be London.

83. It therefore seems to me that the point of departure for the Claimants' argument, namely that the presumed intention of NBK, such presumption being derived from the terms of the GCA, was that the funds were placed with the London branch of a bank so as to protect them from any enforcement process abroad, provides a shaky foundation for all that follows.

84. Second, I do not accept that BNYM's construction would have extraordinary commercial consequences. The arguments advanced by the Claimants focused on what their intention would be as clients of BNYM. There was, of course, no evidence of actual subjective intention, which would be inadmissible. The matter was put on

the basis of their presumed intention. But the argument entirely ignored the countervailing interests which BNYM might have in any contractual term which formed part of the bargain. If the language of clause 16(i) is to be read in the context of presumed intentions, account must be taken of what interests BNYM *qua* the bank would have had, as well as those of the Claimants as clients. It must have been well within the common expectations of the parties to the GCA that BNYM might be exposed to orders of foreign courts which it was bound to obey because it owed *in personam* jurisdiction, and that it and its officers would be subject to potential criminal sanction and civil liabilities if it failed to do so. An order from a Belgian court, namely a court in the country where the bank is domiciled, would have been an obvious possibility. Why, one asks, should the presumed intention of both parties have been that in those circumstances the bank should be exposed to double jeopardy? If the intended effect of clause 16(i) was to make some alteration to what would otherwise be the scope of the bank's obligations and liabilities, as it is plain from its extensive terms it was, why should one start, one asks, from an *a priori* assumption that the assumed common law position was not intended to be altered? I see no reason for doing so. The Claimants' argument offends the principle that, in construing a contract, regard is to be had to the presumed intention of both parties, not just one party.

85. Third, the Claimants' argument also offends more generally the principles which are applicable to the construction of commercial contracts. Those principles have been laid down in what might be regarded as an abundance of recent cases of high authority. It is not necessary to identify them all, but they include *Arnold v Britton* [2015] UKSC 36; [2015] A.C. 1619 and *Wood v Capita Insurance Services Limited* [2017] UKSC 24; [2017] A.C. 1173; [2017] 2 WLR 1095. It is well established that the court must pay particular attention to the language which the parties have chosen to use to express their bargain. Whilst the commercial consequences of each parties' arguments are something which can be taken into account as part of the iterative process, what is impermissible is to start by identifying that there are consequences of one construction which would be unfavourable, perhaps very unfavourable to one of the parties, and to conclude from that, that the language cannot have been intended to have had such consequences. I must keep in mind what Lord Neuberger said in *Arnold v Britton* at paragraphs 17 and 19:

> "17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (e g in *Chartbrook* [2009] AC 1101, paras 16—26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision."

> "19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in *Wickman Machine Tools Sales Ltd v L Schuler AG* [1974] AC 235, 251 and Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191, 201, quoted by Lord Carnwath JSC at para 110, have to be read and applied bearing that important point in mind."

86. Fourth, the language in clause 16(i) is in my view clear. The operative wording, before one gets to the non-limiting examples, requires: "circumstances beyond the direct and reasonable control of BNYM". The Belgian and Dutch orders made by courts to which BNYM owes *in personam* loyalty, and which it must obey if it is not to face civil liability and criminal sanction, fall fairly and squarely within that language. Mr. Quest QC, on behalf of the Claimants, did not seek to argue otherwise. The same is true in my view of the specific wording which follows, and in particular the words, "any order…imposed by… any…judicial…authority". The natural meaning of "any" in this context, used twice, is that it means "any" without limitation. I am aware of course that there are some cases in which there are powerful contextual reasons for giving the word "any" some more limited meaning -- see for example, *The Antaios* [1985] A.C. 191; but there do not seem to me to be any contextual reasons for restricting its natural meaning in this case when the word is applied to "order" or "judicial authority".

87. Fifth, the construction that "any" means "any" is, in my view, supported by the wide wording used elsewhere in clause 16(i) itself, which suggests that clause 16(i) was indeed intended to alter the common law position by having extensive exculpatory effect. It requires a delay or failure which must arise out of, or be caused by, the circumstances identified. The use of two separate phrases suggests that the causative link required by the words "arises out of" is looser than would otherwise be a stricter test of causation. The delay or failure must do so "in whole or in part." Again, the inclusion of the words "in part" suggests a wide approach to causation. The circumstances need only be beyond BNYM's direct and reasonable control, again, a test suggesting wide exculpatory effect. That is the operative scope of the exculpation and, if one looks at the non-limiting examples, it is clear they are extensive.

88. Sixth, this construction is also in my view supported by the width of the other exculpatory clauses within the GCA, including clauses 7(a), 7(b), 13(d), 16(c) and 16(d), which provide:

> "7(a) Boston Safe will attend to the settlement of all transactions in the Securities Account and Mellon will attend to the settlement of all transactions in the Cash Account in each case in accordance with the terms of this Agreement. The

Client hereby authorises Boston Safe and Mellon to use such settlement and Security Systems on the terms of business of the operators of such systems. Such settlement may be effected in accordance with local legal, regulatory, market or trading practices where the settlement occurs including, without limitation, delivery of investments before payment and payment before delivery. The Client acknowledges that this may, in certain circumstances, require the delivery of cash or securities (or other property) without the concurrent receipt of securities (or other property) or cash and, in such circumstances, the Client shall have sole responsibility for non-receipt of payment (or late payment) or nondelivery of property (or late delivery) by the counterparty. Neither Boston Safe nor Mellon shall be obliged to effect any transaction or provide any service in a country or jurisdiction in which Boston Safe has not appointed a Sub-custodian."

"7(b) Boston Safe's and Mellon's respective obligations under this Agreement to settle transactions in respect of Assets either itself, or through Sub-custodians, is conditional upon Boston Safe or Mellon, or a Sub-custodian, as the case may be, receiving Authorised Instructions which are timely and upon Boston Safe or Mellon or a Sub-custodian, as the case may be, holding or receiving from or on behalf of the Client, on a timely basis, all necessary Assets. In addition, delivery or payment by the other party to any such transaction shall be at the Client's risk and any obligation of Boston Safe or Mellon to account to the Client for any Asset or the proceeds of sale of any Security shall be conditional upon receipt by Boston Safe or Mellon or a Sub-custodian, as the case may be, of the relevant Asset or sale proceeds from the other party to the transaction."

"13(d) Except insofar as the same may result from the negligence, wilful default or fraud of Boston Safe or, as the case may be, Mellon (and for the avoidance of doubt any belief by Boston Safe or, as the case may be, Mellon in good faith that instructions are Authorised Instructions shall under no circumstances be construed as negligent), the Client agrees to indemnify each of Boston Safe and Mellon on demand against each loss, liability and cost suffered or incurred by Mellon or, as the case may be, Boston Safe, including without limitation any legal fees and disbursements arising directly or indirectly:

(i) from the fact that any Securities are registered in the name of or held by Boston Safe or a nominee or a Sub-custodian or Securities System; or

(ii) from the proper and lawful performance or non-performance or the exercise or non-exercise, by Boston Safe or Mellon, as the case may be, of the powers and discretions conferred by this Agreement including, without limitation, any act or omission or thing undertaken or done or arising in connection with or pursuant to the terms of this Agreement or undertaken in compliance with any instruction received by Boston Safe whether orally or through facsimile transmission or otherwise and which Boston Safe or, as the case may be, Mellon believes in good faith to be an Authorised Instruction."

"16(c) Subject to the other provisions of this Agreement, each of Boston Safe and Mellon accepts liability to the Client for each loss, cost, expense, damage and liability (each referred to as a "**Loss**"), including but without limitation to loss of Securities, suffered or incurred by the Client only insofar as such Loss is a direct result of the negligence, wilful default or fraud of Boston Safe, Mellon, or any Sub-custodian or any of their respective officers, and employees. For the avoidance of doubt, neither Boston Safe nor Mellon shall be liable for any indirect, special or consequential Loss under any circumstances whatsoever."

"16(d) Subject to clauses 3(d), 16(b) and 16(c) above, neither Boston Safe nor Mellon shall be liable to the Client for any Loss incurred by the Client arising from the negligence, default, fraud or insolvency of any broker, bank or Sub-custodian."

89. It is clear NBK did agree that there would be a wide variety of circumstances in which its common law position, absent such clauses, would be seriously and significantly altered. Clause 16(c), in particular, provides that there will be no liability without the negligence or wilful default or fraud on the part of BNYM and, in any event, no liability for indirect special or consequential loss.

90. Seventh, if any words are to be read into clause 16(i) so as to qualify what orders are meant by "any orders", there is, in my view, no sound reason for qualifying it by reference to what the position would have been absent the provision. That assumes that the clause was not intended to alter the rights of the parties, in which case it would be otiose.

91. Mr. Malek QC and Mr. Quest QC posited the example of an order by a Ruritanian court made in circumstances where BNYM had no connection with Ruritania and owed no *in personam* jurisdiction. They submitted that it would be absurd for the clause to bite if BNYM froze assets pursuant to such an order. However, in those circumstances, BNYM would not be bound by the Ruritanian order and if it chose to

use the order as an excuse to freeze funds, no doubt it would have considerable difficulty in bringing itself within the causative test. The words "any order" could still properly be construed as meaning any order in those circumstances without leading to absurd consequences.

92. There is, in my view, no need to restrict the width of the language used. It will be a factual question in each case whether the causation test has been fulfilled and that is not a matter which in the present case be can be resolved in this Part 8 claim.

93. Eighth, the construction for which the Claimants contend involves reading in a qualification which is uncertain in its scope and in its application. If the parties are to have to have resort to the principles of English private international law, which in this area may well be controversial, in order to interpret the clause and ascertain its effect, then the words which would be being read in would themselves give rise to a significant risk of commercial uncertainty. Uncertainty in commercial documents of this kind is something which the parties would have wished to avoid.

94. Ninth, there is, in my view, much force in Mr. Butcher's argument that, if one were to introduce any qualification into the words "any order…imposed by…any…judicial… authority" then the words should be construed as at least wide enough to include orders of the Belgian court as the court of the place of the bank's domicile and, indeed, the place where a number of its client facing activities are rendered by the bank staff towards NBK.

95. For those reasons I reject the Claimants' construction of clause 16(i) which lies at the heart of their claim for declarations.

THE DECLARATIONS

96. I turn, then, to the terms of the declarations sought. It is convenient to start with declaration (6). Mr. Butcher made a number of justified criticisms of the width of the drafting, although they might be capable of being cured by re-drafting. However, the central foundation for the declaration sought is unsound, based as it is upon a construction of clause 16(i) which I have rejected, and that is sufficient reason to decline to make that declaration. I should record that Mr. Butcher raised a number of other objections to this declaration, which mirrored a number of his objections to the other declarations which I shall address in that context.

97. Turning to the other declarations I remind myself of the relevant principles. They were helpfully summarised by Aikens LJ in *Rolls Royce PLC v Unite the Union* [2009] EWCA Civ 387; [2010] 1 WLR 318 at paragraph 120:

> "120. For the purposes of the present case, I think that the principles in the cases can be summarised as follows.
>
> (1) The power of the court to grant declaratory relief is discretionary.
>
> (2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the

claimant does not need to have a present cause of action against the defendant.

(3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.

(4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue; (in this respect the cases have undoubtedly "moved on" from *Meadows*).

(5) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish, even on "private law" issues. This may particularly be so if it is a "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned.

(6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court.

(7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question it must consider the other options of resolving this issue."

98. Turning to declaration (1), there are a number of objections to this. First, it does not raise matters disputed by BNYM. That, in fact, would be a reason why there is no jurisdiction under Article 7(5) or Article 25, although that point was not taken by Mr. Butcher. More significantly, the court will only decide disputes where there is a concrete matter in issue between the parties to the proceedings. Moreover, the declaration is in abstract terms. It serves no useful purpose as between the parties to these proceedings and, if it is intended to serve some other purpose, then it offends the principles I have identified. It would be wrong to make a declaration in those terms in the absence of the Stati Parties when the only purpose for making it would be for it to be deployed by the Claimants in the dispute between the Claimants and the Stati Parties who are not before the Court.

99. As to the proposed amendment dealing with who is party to the contract, it seems to me too late for the Claimants to seek to raise that as a new issue, which they did for the first time in their skeleton argument. It raises an issue as to whether there is any legal relationship between BNYM and ROK. That is a matter in which the Stati Parties might well have a substantial interest and it is not therefore a matter on which it is appropriate to make declarations in their absence.

100. As to declaration (2), again, there are a number of valid objections to the grant of this declaration. First, the justification for it which the Claimants advanced has fallen away. The Claimants submitted that it was ancillary to declaration (6) and one of the necessary arguments the court would have to consider and accept in reaching its conclusion on the construction of clause 16(i). I have, however, not found it necessary to accept or reject the proposition in order to determine the question of construction under clause 16(i), and the Claimants' argument that it is ancillary to declaration (6) means that it fails with the failure of declaration (6).

101. Secondly, it raises questions of English law in respect of dematerialised intermediated securities, which are not settled, are not the subject matter of prior authority, and which are to some extent controversial amongst academic and financial sector commentators; and may depend on facts in relation to individual underlying securities which are not explored in the evidence. For those reasons, it would be inappropriate to embark upon a determination of the complex issues raised by the claim for this declaration unless it were necessary to do so for compelling reasons. There are no such compelling reasons.

102. Third, the parties who have an interest in opposing the arguments of the Claimants on this issue are primarily the Stati Parties, not BNYM. They are not before the court and it would be wrong for the court to make a declaration without having the arguments fully addressed by the interested parties.

103. Fourth, it is not clear that this declaration would be of any assistance to the Dutch or Belgian courts. In some circumstances, the English court will be prepared to grant declarations for the purposes of informing a foreign court of the position under English law where it will assist the foreign court in resolving issues before that court; see *AWB (Geneva) SA and Another v North America Steamships Ltd* [2007] EWCA Civ 739; [2007] 2 Lloyd's 315; and *Knighthead Master Fund LP and others v The Bank of New York Mellon* [2014] EWHC 3662 (Ch).

104. However, it will be a rare case in which the court will do so simply for the purposes of assisting the foreign court without it serving any other purpose in relation to an issue between the parties before the English court. It is clear, from *Howden North America Inc v. Ace European Group Ltd* [2012] EWCA Civ 1624; [2013] Lloyd's Rep IR 512, that the court must exercise very considerable caution before doing so on these grounds. Where the assistance has not been requested by the foreign court, it must be clear (a) that the foreign court cannot itself receive evidence and resolve the English law issues on its own without difficulty and (b) that the English court's view will be of real and substantial assistance. Otherwise, the idea that the English court should give unsolicited advice to the foreign court may be regarded as presumptuous and condescending.

105. It is not clear in this case that declaration (2) would assist the Belgian or Dutch courts. The Claimants submit that the situs of the assets is something which Mr. Peters and Mr. Nuyts, the respective Dutch and Belgian lawyers acting for the Claimants, say is relevant to the attachment jurisdiction of the two foreign courts as determined under English law. That, however, is controversial. It is contested by Ms. Strik and Madame Lefèvre, the respective experts for BNYM.

106. Doing my best to analyse the respective reasons that are put forward, it seems to me so far as Belgian law is concerned, on analysis Mr. Nuyts' view is based on a case in the *Cour de Cassation*, in 2008, the *FG Hemisphere Associates LLC v Gecamines Pas* case, which provides no obvious support for the proposition which he advances and which appears to be contrary to the majority view of commentators.

107. So far as Dutch law is concerned, again on analysis the issue appears not to be one of situs, but place of performance. In either case, it is by no means clear that the Dutch and Belgian courts respectively need the assistance of the English courts to express views on English law, even if that were relevant. This is not, therefore, a case in which the declaration can be justified on the grounds that it is appropriate to grant it for the purposes of the assistance of a foreign court.

108. So far as declaration (3) is concerned, there are a number of similar objections. First, as with declaration (2), the justification for it advanced by the Claimants as a stepping stone ancillary to declaration (6) and to the clause 16(i) construction issue has fallen away. Secondly, the first sentence is anodyne and not in dispute, if all that is meant is that the GCA is governed by English law. As such, it is not in dispute and as an abstract proposition a declaration in those terms serves no useful purpose. The second sentence is itself abstract, vague and general and divorced from any particular concrete dispute between the parties who are before the court.

109. Third, in so far as the declaration seeks to raise questions over the governing law of trust obligations, in relation to the underlying rights in the intermediated securities, it again raises complex issues of fact and law which have not been fully explored before me, either factually in the evidence or legally in submission, and which could not properly be the subject matter of a declaration in any event in the absence of the Stati Parties as the parties having the main interest in contesting the Claimants' position.

110. Finally, again there is no reason to conclude that a declaration in these terms will be of assistance to the Dutch and Belgian courts.

111. So far as declaration (4) is concerned, the objections to it are similar. First, as with declarations (2) and (3), its justification as ancillary to the declaration sought in the form of declaration (6) and as a stepping stone in the arguments on construction of clause 16(i) falls away.

112. Second, the proposition which it seeks to advance is controversial and has not been explored legally in the course of argument or factually in the evidence in relation to intermediated securities. It is inappropriate to grant the declaration in the absence of the Stati Parties as the parties at interest. Third, again, it is not clear that the declaration would assist either the Dutch or the Belgian court. The place of performance as an English law issue is not relevant to the garnishment jurisdiction of the Belgian court. In the Netherlands, whilst the place of performance of debts is in issue, the issue is whether the Netherlands is *a* place of performance; that is to say where performance may be demanded, which is not affected by whether performance *may* also be demanded elsewhere.

113. As to declaration (5), the objections are similar. First, the justification for the declaration has fallen away. Second, it is in unacceptably wide, abstract and general terms. It is not linked to the Dutch or Belgian orders. It is expressed in terms of any

orders from any courts. Third, even were it redrafted so as to be confined to the factual context of this particular case, it would be inappropriate to make declarations in those terms in the absence of the Stati Parties who are the parties at interest. Fourth, the effect of the Dutch and Belgian orders on the discharge of obligations under the GCA should best await the outcome of the challenges in Belgium and Holland and be determined if and when BNYM were to pay anything to the Stati Parties. Again, as with the other declarations, it is not clear that a declaration on the issue in question will assist the Dutch or Belgian court.

114. The Claimants' submission that the question of whether there will be discharge of BNYM's obligations under the GCA as a matter of English law is relevant to the issues which the Belgium court will have to decide is based on the evidence of Mr. Nuyts, which, to a great extent, is not in his first witness statement but was only introduced in his reply evidence served on 13th December 2017 without BNYM having had a reasonable opportunity to respond.

115. So far as Dutch law is concerned, the relevant passage only comes in the second statement of Mr. Peters and suffers from the same defect. However, in any event, on analysis, what Mr. Peters there says does not support the proposition that the Dutch court is likely to be assisted by what the English court has to say on this question.

116. I turn finally to declaration (7). This falls into a different category, because the Claimants do not suggest that it is ancillary to declaration (6). However, it is inappropriate because there are a number of other objections. The first is that although as I have explained there is technically a "dispute" between the Claimants and BNYM so as to bring the claim for a declaration in this form within Article 7(5) and Article 25, there is no substantial joinder of issue between those parties in relation to the subject matter of this declaration. BNYM is neutral as to the question of the use or intended use of the National Fund for commercial or non-commercial purposes insofar as that is a question which is of importance in arguments over sovereign immunity. It is not, therefore, a declaration which covers a subject matter which resolves a concrete issue between these parties.

117. Secondly, it is not clear that sovereign immunity under English law is indeed a relevant issue for the Dutch or Belgian courts.

118. Third, with regard to the underlying factual issue of whether the use or intended use of the funds is in issue (or very likely to be in issue) in both sets of proceedings: (a) it has not been the subject matter of any investigation before this court and; (b) the party at interest in contesting the Claimants' position is the creditor, that is to say the Stati Parties who are not before the court and; (c), the form of order seeks to bind future creditors. Other creditors of the Claimants in the future may have an interest in the determination of the questions. For all those reasons, it would be wrong to grant such a declaration.

119. Accordingly, for those reasons the claim will be dismissed.