Neutral Citation Number: [2018] EWHC 792 (Ch)

Case No: CR-2017-003973

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

IN THE MATTER OF THE OJSC INTERNATIONAL BANK OF AZERBAIJAN

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

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

Date: 12th April 2018

Before:

THE HONOURABLE MR JUSTICE HILDYARD

Between:

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GUNEL BAKHSHIYEVA

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

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 MARKET DEBT FUND

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

(6) FRANKLIN TEMPLETON SERIES II FUNDS

(7) FRANKLIN EMERGING MARKET DEBT INSTITUTIONAL FUND

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

Hearing dates: 24th January 2018 and 1st February 2018

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Judgment Approved

Mr Justice Hildyard :

Scope of this supplemental judgment

1. This is my supplemental judgment following a hearing consequential to (a) my decision on 21 December 2017 to refuse the application made on 15 November 2017 by the foreign representative of the OJSC International Bank of Azerbaijan ("IBA") (the "Foreign Representative") for the continuation of the Moratorium imposed by Barling J preventing creditors from commencing or continuing any action against IBA or its property without the permission of the Court, and (b) my reasoned judgment ("my Main Judgment") handed down formally on 18 January 2018.

2. This judgment explains my reasoning for my decision which I announced on 1 February 2018. This was to lift the Moratorium in part, but to stay that lifting in material respects pending appeal so as not to negate the utility of the appeal from my decision to refuse the Moratorium Continuation Application for which I gave permission and which may now apparently be heard in October. Unless otherwise appears, I shall use the same definitions as in my Main Judgment.

Procedural background and alterations to Azeri law

3. In my Main Judgment, I invited further submissions in relation to a cross-application made by Franklin Templeton (1) for the lifting of the Moratorium on the termination of the Restructuring Proceeding (then due to be on 30 January 2018), and/or (2) to enable Franklin Templeton to pursue immediately arbitral proceedings for payment under the 2019 Notes to which it is beneficially entitled. I considered that I needed this further assistance since (as Counsel accepted) in the time available at the end of last term I had not had full submissions on the cross-applications, although the submissions to me on the Moratorium Continuation Application did largely cover the ground: see paragraphs [164] to [166] of my Main Judgment.

4. When I adjourned the matter for further submissions, I anticipated that only Franklin Templeton would be pursuing an application for the lifting of the Moratorium (whether in whole or part). However, and as mentioned in paragraphs [161] to [163] of my Main Judgment, Sberbank had earlier issued a cross-application of its own for an order under Article 20(2) of Schedule 1 to the CBIR and/or section 130(2) of the Insolvency Act 1986 for permission immediately to issue proceedings in this Division against IBA, though as matters stood on 21 December 2017 when I announced my decision, it had determined that it was no longer necessary to pursue it.

5. Since that determination, however, there have been what Mr Riddiford on behalf of Sberbank described as "dramatic developments", which had persuaded Sberbank also to revive its application and/or to seek the lifting of the Moratorium to the extent necessary to enable it immediately (and notwithstanding any pending appeal) to issue proceedings in this jurisdiction (and in fact in this Division) for the recovery of its loans.

6. More prosaically described, there has been a substantial emergency amendment to the Azeri Law on Banks enabling the further extension of the Restructuring Proceeding, which I was told (and proceeded on the basis) was previously impermissible under Azeri law.

7. Accordingly, the position has materially altered since I gave my Main Judgment. The Moratorium which was then envisaged would lapse with the Restructuring Proceeding on 30 January 2018 has been extended under Azeri law. In consequence, it is not only Franklin Templeton but also Sberbank which seek an order lifting the Moratorium to enable them to pursue their remedies now under English law to enforce their claims.

8. In greater detail, a substantial amendment to section 57-11.6 of the Law on Banks (the "Amendment") has been passed, to provide that the term of a restructuring:

> "... may be amended by the court upon the mutual request of the bank and financial market supervisory authority [FMSA]. No extension for any petition shall exceed 180 days. There shall be no limit on the number of such extensions."

9. The effect of the Amendment was to give the Azeri court jurisdiction to extend the Restructuring Proceeding beyond 30 January 2018. At the time of the further hearing before me in January 2018, it was anticipated by the Foreign Representative that such an extension would be granted; and on 29 January 2018 the Azeri court exercised that jurisdiction, and granted a 180-day extension to the Restructuring Proceeding.

10. On the one hand, that has lifted some of the urgency of the matter, at least in terms of the appeal; on the other hand, it has, in the perception of Franklin Templeton and now Sberbank, accelerated the need for intervention by this Court to enable them to proceed as they wish with the proceedings which under English law they are otherwise entitled to commence and pursue.

Same central issue notwithstanding certain differences in the two applications

11. The two applications differ in certain features, in particular because (a) whereas Franklin Templeton can only proceed by way of arbitration, Sberbank has always been entitled to proceed in court and has elected to do so, and (b) whereas Franklin Templeton seeks permission not only to commence arbitration but thereafter if successful to proceed to enforcement, Sberbank does not at present seek permission to proceed further than judgment. This has resulted in some differences of approach, as I shall explain later.

12. Further, although it was always made clear that the 2019 Notes were held by Citibank as trustee (the "Trustee") (who thus would be expected to be the claimant), it emerged late in the day (not until the hearing on 1 February 2018) that the effect of any lifting the stay to enable Franklin Templeton (or the Trustee at their behest) to proceed with their intended arbitral proceedings could well be that the Trustee as legal creditor under the 2019 Notes would be obliged to bring such proceedings on behalf not only of Franklin Templeton, but also on behalf of all other beneficial noteholders. That is because the trust deed under which the 2019 Notes were issued (see paragraph [10] of my Main Judgment, the "Trust Deed") apparently provides (though I was not shown the provisions) for 25% of the noteholders to compel proceedings: and Franklin Templeton represent more than 25% of the 2019 Notes. I consider this, and its corollary that any undertakings I may require should be given by the Trustee, later in this supplemental judgment.

13. But the central issues raised by both cross-applications as now pursued are (a) whether the Court should now lift or permit an exception to the Moratorium so as to allow the Respondents to enforce their claims against IBA before the final determination of the appeal; and (b) if so, whether a balance of the risk of injustice nevertheless supports IBA's submission that the lifting of the Moratorium or any variation of it should nevertheless be stayed pending the appeal or beyond, and, if so, on what terms.

Sequential approach to (a) lifting the Moratorium and (b) staying the effect of it

14. Although I am conscious that in a sense (a) lifting or varying the Moratorium and (b) staying that lifting or variation pending appeal appears somewhat contradictory, the two issues are different in character and though they involve many of the same questions, I think they must be taken in order so as not to confuse what appear to me to be rather separate considerations.

15. Accordingly, I propose to consider first whether the cross-applications should succeed, which involves primarily the application of the Model Law; and then to consider secondly, if or to the extent that they do, whether under ordinary domestic principles there should be a stay of the effect pending the appeal.

16. Obviously, in addressing both these questions I must seek to be consistent with my analysis in the Main Judgment, and to carry through what I perceive to be its logic, notwithstanding that the matter is now subject to pending appeal.

(a) Should the Moratorium be lifted to enable proceedings to be brought?

17. As to the first question, the position in this case is that the Plan has some time since been adopted. As a matter of Azeri law it is in effect and binding between all creditors and IBA, and has been implemented. As a matter of English law, however, I have held that it does not affect the rights of the applicants under their respective English law-governed contracts, because of the rule in *Gibbs.*

18. As was common ground (and as recorded in paragraph [39] of my Main Judgment) it was never suggested that the Plan proposed by the Restructuring Proceeding would substantially fail or be delayed if, according to English law it did not in this jurisdiction bind Franklin Templeton or Sberbank or any other English law governed creditors and the Moratorium here was not continued. As I understand the position, IBA, with its obligations reconstructed according to Azeri law, has been restored and returned to solvent conduct of its business.

19. On behalf of Franklin Templeton, Mr Moss QC argued that in these circumstances there was no remaining basis for the continuation of the Moratorium. It had fulfilled its purpose. He repeated and elaborated his two basic reasons (which I adumbrated in paragraphs [164] to [165] of my Main Judgment but which for clarity I can quote from his Skeleton argument) as being that:

    (1) The "breathing space" required by IBA is over, and the matter is now in the 'post-plan' stage, and

(2) The rule in *Gibbs*, together with the failure of the Moratorium Continuation Application, signifies that Franklin Templeton (or the Trustee in respect of the 2019 Notes held by Franklin Templeton) are not to be treated as creditors subject to the Plan and should not any longer be prevented from vindicating their existing English law governed contractual rights in this jurisdiction.

20. Sberbank adopted these submissions. It summarised its own position as being that "the moratorium should be lifted in the present case so as to permit Sberbank to issue proceedings against IBA immediately, on the basis that it is not, on any view, "*subject*" to IBA's Restructuring". It submitted further that "any order to the contrary would be flatly inconsistent with this Court's decision on paragraph 1 of the Moratorium Continuation Application."

21. Both Mr Moss (for Franklin Templeton) and Mr Riddiford (for Sberbank) relied especially in this context on the approach of Briggs J (as he then was) in *Cosco Bulk Carriers v Armada Shipping SA* [2011] 2 ALL ER (Comm) 481, at [46] to [49], when identifying claims which English law would generally permit to be brought notwithstanding the existence of the stay on proceedings in a winding-up; and the approach of Snowden J in *Nordic Trustee ASA v OGX Petroleo e Gas SA* [2016] Bus LR 121.

22. Again, I have identified the relevant passages relied on in my Main Judgment at paragraph [165], though I refrained from expressing a view on either aspect at that time (as explained in paragraph [166]).

23. Mr Bayfield for the Foreign Representative invited me to reject the argument (pressed especially by Mr Moss) that all the Model Law does is empower the Court to afford a "breathing space" in order to enable a reconstruction plan to be formulated, put forward and adopted, and such breathing space must expire when the plan is adopted. Mr Bayfield submitted that the reference to a temporary "breathing space" (in, for example, paragraphs 3 and 37 of the Guide to the Model Law) relates only to the effect of the automatic stay; that "opens the tool box" from which the Court may then select the appropriate tool to use to meet the needs of the case and "to do what is right and fair", and where appropriate, to grant further and more long-lasting relief. Mr Bayfield went on to submit that the "tool box" plainly extended to preventing creditors from taking enforcement action against the debtor whilst an appeal is being determined, particularly where the appeal raises the question of whether the relevant creditors should be permitted to take such enforcement action at all.

24. Mr Moss, supported by Mr Riddiford, adhered to the position that, notwithstanding the extension of the Restructuring Proceeding, there is neither need nor warrant for the continuation of the Moratorium, where the Plan has, as matter of Azeri law, been put into full force and effect under that law. The only question is whether under English law it is to be given like effect, and since I have determined that it is not to be so, that is that, subject of course to appeal. In that regard, he submitted, insofar as the extension of the Restructuring Proceeding simply purports to deal with the Foreign Representative's standing to appeal, it does not justify the continuation of the Article 21 stay at all (i.e. in respect of any creditors, let alone Franklin Templeton); and it is no part of the purpose of the Model Law to act as a shelter for proposed appeals when the local court has determined that the debtor is not entitled to a stay on proceedings by a creditor.

25. Mr Moss coupled this with his second argument, to the effect that the rule in *Gibbs*, together with the failure of the Moratorium Continuation Application, signifies that Franklin Templeton (or the Trustee in respect of the 2019 Notes held by or for Franklin Templeton) are not to be treated as creditors subject to the Plan and should not any longer be prevented from vindicating their existing English law governed contractual rights in this jurisdiction. He relied, as he had at the main hearing (see paragraph [165] of my Main Judgment) on the decisions of Briggs J and Snowden J in *Cosco* and *OGX* respectively.

26. Mr Bayfield's response to Mr Moss's reliance on these two cases was to point out first, that in *OGX* the relevant (Brazilian) creditors were not (and were not intended to be) bound by the relevant plan even under the law under which it was formulated and promulgated; and secondly, that in any event neither *Cosco* nor *OGX* was on point at this stage, since:

> "one has to focus on the counterfactual, which is that the appeal is ultimately allowed and they are not allowed to stand outside the restructuring…"

27. I am not persuaded of Mr Bayfield's argument based on the counter-factual insofar as he relies on it in seeking to justify his submission as to the broader scope of the Model Law. The point seems to me to go to the domestic question as to whether some intervention by the Court is necessary to prevent an appeal becoming nugatory, which I deal with later.

28. However, I am not persuaded that either *Cosco* or *OGX* is of such direct assistance as they were suggested to be. As I indicated during the course of the further hearing before me on 24 January 2018, I consider that those cases relate to somewhat different contexts, and may not stand quite for the propositions sought to be derived from them.

29. In *Cosco*, Briggs J did indeed travel over cases and general practice supportive of the proposition that (according to English insolvency law precepts) property which has been charged by a company has ceased to be its property so as to be within the scope of the automatic stay imposed by s130(2) IA 1986. But the claims under consideration in *Cosco* were claims to enforce a lien over sub-hire, which (it was accepted) may or may not be characterised as secured claims. The real issue in *Cosco* was whether such claims should be arbitrated in London or in Switzerland; and Briggs J was invited to and did "approach the matter as one of broad discretion" (see [53]). Briggs J assumed but did not therefore have to, and did not, determine the matter of jurisdiction.

30. In *OGX Petroleo*, Snowden J also considered whether secured creditor claims are (according to those English precepts) subject to the collective process relating to the relevant company's assets. He helpfully pointed out that the Guide to Enactment of the Model Law expressly recognises the possibility that a given jurisdiction may characterise secured claims and execution of rights *in rem* as not subject to a collective proceeding concerning the assets of the debtor company. However, in fact in that case it was common ground that under the Brazilian law applicable, the relevant plan did not apply to the claims sought to be brought: see for example, [33] in Snowden J's judgment.

31. Thus, the authorities relied on seem to me to go less far than was submitted; and in any event they are not quite analogous to the context here, and they do not determine the issue of jurisdiction which is pressed in this case.

32. That said, I tend to the view, assuming the application of the rule in *Gibbs*, that though a contractual right/claim is within the plan under the governing law of that plan, if it is not within it under the law applicable to that right/claim, it should be treated as outside the plan and no moratorium in aid of the plan should continue to apply to it once the plan has been implemented in the jurisdiction in which it is promulgated under the laws of that jurisdiction.

33. There is also force, as it seems to me, in the related argument that the Model Law is designed to afford a breathing space only until that stage (of the plan taking effect according to the law by which it is governed). Though the "tool-box" may be deep, the tools should not be deployed to subject a creditor whose rights cannot by the law of this jurisdiction be substantively changed under the law of the plan to restrictions beyond that limit in time.

34. I also tend to the view that these are jurisdictional limits in the strict sense; and that, as Mr Moss submitted, the Model Law does not empower the Court, in the teeth of the rule in *Gibbs*, to treat the applicants as creditors subject to the plan and prevent them any longer from vindicating their existing English law governed contractual rights in this jurisdiction.

35. However, despite the fact that I have had the benefit of argument, which is a clear advantage compared to the normal case where these matters are usually unopposed, I do not think it necessary or wise to reach a concluded view on the issue of strict jurisdiction. For even if there is jurisdiction to continue the Moratorium to prevent the exercise of such rights, I would not in my discretion consider it appropriate or justified, by reference to the Model Law (and especially Article 22), nor consistent with my Main Judgment, to permit it to continue simply to facilitate and accommodate the possibility of a successful appeal.

36. That is especially so, as it seems to me, where the issue at the next stage of appeal is whether a moratorium can be continued permanently so as to prevent the enforcement of rights recognised in this jurisdiction as subsisting under English law, and it is only at a further (and final) appellate stage in the Supreme Court that the only issue which could affect whether the rule in *Gibbs* is to be departed from so that the applicants are, after all, to be treated as subject to the Plan, can be determined.

37. It follows that I consider that I should accede to the cross-applications, and lift the Moratorium to enable the applicants to proceed with their claims, including to proceed thereafter if successful in the claims to enforcement in the case of Franklin Templeton.

38. That, however, is subject to what follows: for though that result seems to me to be the logic of my own decision, that decision is subject to appeal, presently listed to be heard (even though not expedited) by a three-man Court of Appeal some time this year.

(b) Whether the lifting of the Moratorium should nevertheless be stayed

39. I turn, therefore, to the second question, which is whether there should be a stay under the *CPR* of my decision to lift the Moratorium in the case of the applicants' claims pending that appeal, and if so on what terms.

40. As acknowledged above, the question of whether nevertheless to stay the lifting of the Moratorium pursuant to the cross-applications may look at first blush to suggest inconsistency, but it is on analysis of a different character. As it seems to me, what is then in play is not the Model Law, but ordinary domestic principles applicable to stays of the effects of judgments under domestic legislation and practice, governed here by *CPR* 52.16.

41. IBA submits that a stay is necessary in the interests of justice on two grounds:

    (1) If proceedings are issued against IBA before the final determination of the appeal, these "might lead to judgment and enforcement which will prejudice IBA's position in the event that the appeal succeeds"; and

    (2) The "lifting of the moratorium would put IBA to expense which might prove to be unnecessary".

42. The second was less stressed by IBA than the first, which Mr Bayfield on its behalf submitted was "the central issue".

43. Mr Bayfield submitted that, if unsuccessful in resisting the lifting of the Moratorium, a stay is necessary lest the appeal could be rendered nugatory: he posits that Franklin Templeton and Sberbank will take immediate enforcement action against IBA, and there is a risk that if they obtain and enforce an award or judgment in their favour, IBA will not be able to claw back any recoveries from them even if the appeal is successful.

44. He further submits that there is a special difficulty: IBA fears that, if obtained, an arbitral award obtained by Franklin Templeton, and any judgment obtained by Sberbank, may not be capable of being set aside even if the appeal succeeds (assuming that *Gibbs* remains good law) and in the meantime can be enforced abroad in a way which the English court would be unable (absent suitable enforceable undertakings) to control.

45. Mr Bayfield contended in that context that a moratorium, this Moratorium, does not have extraterritorial effect for the purposes of preventing legal process abroad. He mentioned the decision of the Court of Appeal in *Harms Offshore AHT "Taurus" GmbH & Co KG and ors v Bloom and ors* [2009] EWCA Civ 632 as acknowledging this, and as confirming a long established principle that a statutory prohibition against creditors bringing proceedings against a company in winding-up is not extra-territorial even though the same result may be secured by enforcing the statutory result which arises in the case of an English winding-up or administration (see *Re Oriental Inland Steam Company ex parte Scinde Railway Company* (1874) LR 9 Ch App 557).

46. He makes the further point that the appeal may simply lead to the conclusion that the Respondents should not be allowed to proceed with any further enforcement action, without disturbing past enforcement process. If that is right, there would be no way for IBA to recover any monies previously paid to the Respondents and/or Citibank

and/or other definitive noteholders under the arbitral awards and the judgment debts, given that those monies would simply be applied by the Respondents towards the discharge of IBA's valid legal liabilities. That is because the usual principle that where an appellant pays a sum of money to discharge a judgment debt which is later reversed on appeal, the appellant has a cause of action in unjust enrichment against the payee to recover the money so paid (see Goff and Jones, The Law of Unjust Enrichment (9th edition) at 26-02) may not apply where (as would be the case unless and until the rule in *Gibbs* is held not to apply) the judgment debt remains intact, is not set aside on appeal, and only its further enforcement can any longer be prevented.

47. On all these bases, Mr Bayfield submits that preventing enforcement is not enough: there is a real and substantial risk that if Franklin Templeton and Sberbank were to be free to and did obtain an award or judgment (respectively) IBA could suffer irremediable prejudice.

48. Mr Bayfield submits that this risk of irremediable prejudice, in the present context where permission to appeal has been given, connoting that it has a real prospect of success, should be determinative in favour of a general stay. Without one, he submits, an appeal would be rendered substantively nugatory; at the very least its utility would be eroded. He urged that no risk should be countenanced in that regard; and he summarised his overall submission as regards both Sberbank and Franklin Templeton as being that "anything that puts them in a better position to enforce or to enforce abroad than they are in now is prejudice to IBA which significantly outweighs any delay in them being able to establish their claims…"

49. Against this, both Franklin Templeton and Sberbank, perhaps inevitably since they perceive its effect to be to snatch away the fruits of their earlier success, oppose any such stay. They both submit that a stay is very much an exception rather than the rule, and that a stay is not normally granted (see *DEFRA v Downs* [2009] EWCA Civ 257 at [8] and [9]):

> "to prevent the kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal."

50. As to the (more straightforward) issue of potentially unnecessary expense, they submitted that the objections raised by IBA are simply reflective of the type of temporary inconvenience that any appellant is bound to face because it has to live with an unfavourable judgment pending appeal. But the starting point is that IBA has lost and Franklin Templeton, whether via the Trustee or directly, have an indisputable right to be paid, to obtain an award/judgment, and to seek execution. The suggestions that IBA might be put to cost or expense dealing with the proceedings, or be prejudiced if there is enforcement, are simply not good enough reasons to justify a stay. Given that there is no possible defence on the merits to the proposed proceedings, there is no need for IBA to incur any significant costs.

51. By contrast, if a stay is granted pending appeal, Franklin Templeton will, perhaps more than a year from now, have to start trying to recover the monies due to them, with no guarantee that they will be able to do so. In that regard, IBA has not suggested that it is willing to pay into Court the monies due in respect of the 2019 Notes held for Franklin Templeton, or otherwise secure such claims (including costs and further interest).

52. On the more difficult issue as to whether they should be permitted to issue proceedings and pursue their claim to award or judgment, even if not to enforcement, Franklin Templeton and Sberbank offered rather different answers; and both came to modify their initial answers as they gauged the lie of the land in the course of the hearings before me.

53. Sberbank's original position was that all it was seeking to do was to proceed with its claim in this Division (in the form of draft proceedings exhibited to its original application), and, in due course, obtain judgment. It made clear from the beginning that it would willingly undertake that it would not without further order seek to enforce any order in its favour that it obtains. It contended that merely obtaining a judgment against a company subject to a Foreign Proceeding (i.e. without subsequent execution against that company's assets) does not, of itself, cause any prejudice to that company or to its Foreign Proceeding.

54. It relied in this context on *Ronelp Marine Limited v STX Offshore & Shipbuilding Co Ltd* [2016] EWHC 2228 (Ch), esp. at [27], where process to judgment was permitted. It submitted that the Foreign Representative's expressed concern that her appeal "could be rendered nugatory" if Sberbank were to pursue "substantive claims against IBA and/or its property" is misplaced and unrealistic.

55. By contrast, it submits, if Sberbank is not permitted to issue proceedings it will suffer the prejudice of being prevented from even setting in motion the vindication of its rights, potentially indefinitely (if the Restructuring Proceeding is extended indefinitely, as it now can be), in circumstances where: (a) the debtor may well be fully solvent and able to pay; and (b) no defence to the debt, if still extant and not substituted by the Plan, has ever been advanced.

56. Mr Riddiford made the further point that (in contrast to Franklin Templeton's position) Sberbank is not a creditor under some negotiable or tradeable instrument: its relationship with IBA is under what he (I consider aptly) described as "a straightforward vanilla facility agreement, a bilateral contract". That gave the Court far greater control over any undertaking provided; and for its part, Sberbank had no difficulty in giving such undertaking as might be required.

57. As to what undertaking it might be prepared, if pushed, to offer, it became clear by the further hearing on 1 February 2018 that (as I have foreshadowed) Sberbank was prepared to give any undertaking that would satisfy the Court, provided that it could at least set its proceedings in motion and pursue them by way of vindication of its rights. I suspect that this was a pragmatic approach given that, unless the hearing in the Court of Appeal is long delayed, the prospect of actually obtaining judgment before then is entirely academic, not to say unrealistic.

58. The short point is that Sberbank has in effect agreed to abide by such undertaking as may be thought necessary as the price of permission to instigate and pursue its proceedings.

59. Franklin Templeton was less expansive in its offer, though it too has softened its approach latterly; and it will already be apparent that its position is materially different in at least four important respects.

60. First, it is committed to arbitral and not court proceedings; and the court is both less willing and less able to intervene to prescribe some stopping place in such proceedings. Second, any award would be enforceable immediately under the New York Convention in any jurisdiction to which it applies where assets may be found (though interesting issues might arise in a jurisdiction bound by that Convention, but which would also recognise the effect of the Plan): no English Court process would stand in the way. Third, the 2019 Notes are negotiable or transferable, and might be negotiated in favour of a third party ignorant of any undertakings or impediment and whom it would be difficult to bind. Fourth, as already explained, the person legally entitled in respect of the 2019 Notes is a person not before the Court, making at least more complicated the giving of any satisfactory undertaking.

61. It was having regard to these considerations that I enquired of Mr Moss at the hearing on 24 January 2018 whether he wished to consider taking instructions as to whether Franklin Templeton might agree either not to enforce any award or offer some suitable undertaking to return the proceeds of its enforcement. Recognising that such any undertaking might need careful consideration and consultation with the Trustee as legal creditor under the 2019 Notes, I offered an adjournment for its proper exploration and formulation. Mr Moss, after some equivocation, initially declined this offer; but after I had adjourned to prepare what would in effect have been in the nature of an *ex tempore* judgment to be given the next day, I received an email requesting, on reflection, further time in which to consider the matter, and (with the consent of all parties) I agreed to that course.

62. By email dated 26 January 2018 (passed on to me on 29 January), Dechert, on behalf of Franklin Templeton, stated that they had progressed initial discussions with the Trustee but these had not been concluded and it was not possible to provide "any certainty to the Court as to how long they will take". The e-mail continued as follows:

> "In those circumstances, and without prejudice to our clients' primary case as submitted by Mr Moss QC at the hearing on Wednesday (that there were no further proper grounds to continue the general stay, or if there were, the stay should be lifted to allow arbitration proceedings and no stay pending appeal should be granted), we would respectfully suggest that if the Judge concludes that: (a) he is willing to continue the general stay and (b) he is not willing to lift that stay as matters stand or (c) stays an order terminating the general stay or lifting the current stay on arbitration proceedings pending appeal but (d) he would be willing to allow proceedings to be brought by the Note Trustee if the Note Trustee proffered an appropriate undertaking, he might so indicate in his judgment.

> Whilst we would of course then seek to agree any form of undertaking and variation to the stay with the legal representatives of the Foreign Representative, the Judge might also consider it appropriate to indicate that if necessary the matter could come back before him (which we understand would be within his jurisdiction) potentially as an application on the papers."

63. That response troubled me in the sense that it appears to have the advantage to Franklin Templeton of requiring the Court to commit to an answer and enabling Franklin Templeton to determine what to offer in the light of it. In other words, it smacked of determining to see how the wind blows before deciding on a settled course.

64. When the matter came before the Court again on 1 February 2018, these difficulties were further compounded by the emergence of the fact that although Franklin Templeton appear to be the only persons beneficially interested in the 2019 Notes who are parties in these proceedings, they, together with other accounts managed by Franklin Templeton Investment Management Limited, control sufficient numbers of votes as to be able under the relevant Trust Deed to compel the Trustee to bring proceedings, in which case the proceedings would be brought on behalf of all outstanding 2019 Notes and those beneficially interested in them. Mr Fisher (appearing on that occasion on his own for Franklin Templeton in the absence of his leader, Mr Moss) explained to me further that Franklin Templeton's application, which I had read as brought only on behalf of the named Franklin Templeton parties, was more carefully worded to make clear that the modification to the Moratorium sought would apply also to those "third parties whose funds are managed" by Franklin Templeton Investment Management Limited.

65. At my request made at the hearing on 1 February 2018, these complications were further explained in written submissions on behalf of Franklin Templeton dated 6 February 2018. Those submissions confirm that (1) all the 2019 Notes are represented by a Global Note held on behalf of a clearing system to the order of the Trustee, Citibank; (2) IBA has acknowledged an event of default; (3) the Trustee can be mandated and become bound to institute proceedings to enforce its rights under the Trust Deed in respect of the 2019 Notes if so requested by the holders of not less than one-fifth in principal amount of the outstanding 2019 Notes or so directed by an Extraordinary Resolution, provided it is indemnified or pre-funded; and (4) Franklin Templeton are the holders of more than one-fifth in principal amount of the outstanding 2019 Notes and can thus require the Trustee to bring such proceedings.

66. The supplemental submissions further clarified that the permission now sought by Franklin Templeton is in respect of all 2019 Notes save for those which are not outstanding for the purposes of clauses 1.1 and 5.1 of the Trust Deed. In the application as issued, Franklin Templeton had referred to and sought permission in respect of 2019 Notes "that were not either voted in [IBA's] Creditors Meeting that took place on 18 July 2017 as part of the Foreign Proceeding or surrendered to IBA…" The reason for the proposed change, which I regard as a technical one which I should permit, is that Franklin Templeton understands from Citibank, the Trustee,

that although some have been assented into the Plan, none has yet been cancelled; and Franklin Templeton is concerned that unless and until any 2019 Notes which have been surrendered to IBA have actually been cancelled they may still remain "outstanding" for the purposes of those clauses.

67. Lastly, Franklin Templeton put forward the following as a basis for holding the ring pending appeal:

> "2. The lifting of the moratorium as provided for in paragraph 1 of this order be stayed pending IBA's appeal to the Court of Appeal against the Court's order of 21 December 2017, save that:
>
> (1) The Proceedings may be pursued in the form of arbitral proceedings in the London Court of International Arbitration against IBA ("the Arbitration") by the trustee or trustees for the time being appointed under the Trust Deed;
>
> (2) Subject to any further order of the Court, the Arbitration may not proceed to, and must be stayed immediately prior to, the making, transmission and delivery of any award to the LCIA Court and parties (as provided for by Rule 26.7 of the LCIA Rules)."

68. Although I welcome this and any effort to address IBA's central point which is that nothing should be permitted which establishes an award and enables its enforcement or "export" for enforcement under the New York Convention, I am not presently persuaded that it would be enforceable. I return to that concern below.

Resolution

69. I am anxious to assist in a practical solution to what is in some ways a difficult conundrum, exacerbated by the difficulties not only of not knowing how long would be any period before resolution in the Court of Appeal, but also of being unable to predict, in a context where a further appeal to the Supreme Court is by no means unlikely, what might happen thereafter. Furthermore, I am concerned about awarding any head start to one or other of the applicants (which, as I understand it, will be the only entities representing persons not bound into the Plan).

70. As I indicated when announcing my general conclusions on 1 February 2017:

(1) I consider that I should lift the Moratorium to enable the applicants to pursue their proceedings, in my judgment there being no basis or justification for its continuation under the Model Law/CBIR.

(2) However, in doing so I should do or require to be done what is necessary to remove or at least attenuate any realistic risk that the appeal to the Court of Appeal, for which I have given permission, might be rendered nugatory.

(3) I accept that it has been demonstrated that such a risk could eventuate if the order lifting the Moratorium to the extent sought is not stayed or made subject to

satisfactory undertakings pending that appeal or further order of the appropriate court (as to which, see below) in the meantime.

(4) Even though theoretically any judgment or award might, if ultimately the rule in *Gibbs* is not applied, be on a false basis (and that prospect might be put forward as a defence) I do not consider that the utility of an appeal would be substantially undermined or negated by the commencement and pursuit of proceedings (whether in court in the case of Sberbank or arbitration in the case of Franklin Templeton). The rule in *Gibbs* is presently accepted by all to be binding on me, and it seems would be so on any other court or tribunal at a lower level than the Supreme Court. I do not therefore consider that a complete stay of proceedings pending appeal is necessary or justified.

(5) Indeed, I would not propose to order any stay, provided appropriate undertakings can be devised to ensure that Sberbank do not proceed to judgment and Franklin Templeton do not obtain an award pending appeal or further order in the meantime.

(6) In reaching that view, I have taken into account the issue as to potentially wasted costs in such proceedings if my decision in December 2017 is reversed. I appreciate also that the court or tribunal in those proceedings may then and before this matter comes before the Court of Appeal be faced with a defence based on the future disapplication of the rule in *Gibbs*. I consider that I must leave that to the court or tribunal concerned to determine how that should affect the progress of those proceedings pending review of my own decisions by the Court of Appeal.

(7) I would prefer, if possible, to adopt broadly the same restrictions in the case of both applicants. That is so even though I am not convinced that proceeding to judgment in the case of Sberbank would cause real prejudice; but again I bear in mind that unless the hearing in the Court of Appeal is long delayed, that is unlikely to be a practical reality.

(8) Although I have welcomed Franklin Templeton's efforts to this end, as indicated above, I am not presently persuaded that the form of undertaking offered would be enforceable. It appears to me to be, in effect, an order against the arbitrators, who are not of course parties and against whom I would be unlikely to contemplate giving relief. The LCIA Rules stipulate the machinery for making an award; but presently I do not see how I can impose a brake, except through a suitable undertaking such as to bind all relevant persons. If I have overlooked or misunderstood the LCIA Rules then I shall need a corrective explanation of them. Unless some provision of the LCIA Rules can be deployed to overcome that difficulty, it may be that an undertaking binding all relevant persons to the like effect is the only answer.

(9) Subject to that, I must therefore invite Counsel to re-consider the form of undertaking to be offered in line with my elaboration of my conclusions. I would expect any undertakings to run until the substantive matter comes before the Court of Appeal, or (if earlier) the lapse of the extension granted by the Azeri court on 30 January 2018. Thereafter it will be for that court to determine what, if any, further relief or stay is appropriate.

(10) I appreciate that there may be a change of circumstances in the meantime. For example, although at the hearing before me, a listing for mid-July 2018 had been indicated, further to an email from the parties dated 16 February 2018, I understand that a listing after the long vacation, in October 2018, is now proposed. Even with that extended timeframe, it still seems unlikely that either court proceedings or arbitral proceedings would have progressed to the point of judgment or award. But a risk of further delay cannot be ruled out. I would be disposed to regard that as a change of circumstances.

(11) The drafting of the undertakings may cover that point. But in any event it may be that inclusion in my order of specific permission to apply to me might be appropriate, assuming I would retain jurisdiction notwithstanding having determined the substantive issues. It seems to me that the Court of Appeal would have jurisdiction in any event: but it is a busy Court.

71. I would hope that, in the light of this supplemental judgment, the form of any undertakings and order can then be agreed. However, I have well in mind that Mr Bayfield (in particular) wished to consider the position after sight of this judgment in draft. If agreement is not possible, then I will determine objections either on paper or at a short oral hearing after formally handing down this judgment if that is required.

72. Any remaining question of costs can be dealt with either on paper or at a short hearing after this judgment is handed down.

Postscript

73. After circulating this judgment in draft (on 6 March 2018), Counsel for Franklin Templeton and for Sberbank requested further time in which to consider and seek to agree a form or forms of Order including appropriate undertakings as contemplated in this judgment.

74. On 23 March 2018, Sberbank provided a draft form of Order agreed between it and IBA which I am content to approve.

75. Regrettably, in the case of Franklin Templeton, Counsel on its behalf informed me on 15 March 2018 that "as matters stand, and having contacted the Trustee again, Franklin Templeton is unfortunately unable to provide or procure an undertaking binding on all relevant persons (including on behalf of or by the Trustee) as contemplated by paragraph 70 of the Judgment".

76. In such circumstances, Counsel invited the Court either (i) to determine whether to make the order sought by it as described in this judgment (at paragraph [67]) or (ii) to "grant the proposed stay pending appeal without modification, with liberty to apply in the event of a change of circumstances (including if discussions with the Trustee progress and enable adequate undertakings to be identified)".

77. The first remains Franklin Templeton's favoured course (for obvious reasons); and in an email Mr Fisher, junior counsel for Franklin Templeton, has sought to elaborate and press the argument that the order as proposed in paragraph [67] of this Judgment would indeed be effective.

78. I remain, for the present, unpersuaded. Nevertheless, though mindful of diminishing proportionality, I have indicated to the parties that, in light of the practical importance of the point, and rather than leave it to be raised (as Franklin Templeton suggested) at some future and uncertain date pursuant to the permission to apply, I will consider further short submissions from Franklin Templeton and IBA. I have asked Counsel to include submissions on the following points of concern:

1) Part 1 of the Arbitration Act 1996 and the general principle that the court should not intervene except as there provided

2) The fact that there appears to be no precedent for an injunction restraining the making of an award when the arbitration has already taken place, which may be analogous: and see para. 7-069 of *Russell on Arbitration 24th ed* and *fn 295*

3) The indications in the only cases that the Judge has been able to identify that where a stay has been lifted to enable arbitral proceedings to proceed for the purpose of having rights and obligations determined, but not to allow the obtaining of an award, undertakings have been required to prevent the latter: and see: *United Drug (UK) Holdings Ltd v Bilcare Singapore Pte Ltd and another* [2013] EWHC 4335 (Ch) (at [6]) and *Re Pan Ocean Co. Ltd; subnom Seawolf Tankers Inc and another v Pan Ocean Co. Ltd and another* [2015] All ER (D) 102 (Jun) (at [5]).

4) The difficulty that Franklin Templeton's own proposal appears to contemplate some action by it and presumably the Trustee (from whom no undertaking is presently available) to ensure no award.

79. In light of Counsel's other pressing commitments, I have been invited to agree that Franklin Templeton should have until 27 April to file its written submissions, with IBA to reply by 11 May 2018. That is a somewhat generous time-table; but, the parties being agreed, and the appeal hearing having been deferred, I shall permit it nevertheless. I would invite Counsel to provide a form of Order to record the position as between IBA and Franklin Templeton accordingly.