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**Recognition under the Model Law in the UK**

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*Introduction: The Story in a Nutshell*

This case is about an Azeri law restructuring proceeding and restructuring plan (which under Azeri law binds all creditors), and the position in relation thereto of two creditors under instruments governed by English law.

The Azeri proceedings were recognised in England and Wales under the UNCITRAL Model Law, and such recognition carried with it a moratorium. The dispute before the English court was whether the moratorium should be lifted in favour of the two creditors in light of the rule in *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399 or instead continued on a (near) permanent basis to give effect to the Azeri law restructuring plan.

On 18 January 2018, the English Court decided not to impose a stay on any actions that the two aforesaid creditors might take. It follows that the English Court rejected a continuation of the moratorium. The practical effect of the English Court’s decision is to effectively deprive the Azeri law restructuring plan of any effect in England and Wales as regards the two creditors whose debts arose under English law instruments.

*Setting the Scene*

Parties

The parties before the English court in this litigation were, on the one hand, Miss Gunel Bakhshiyeva in her capacity as an insolvency officeholder (“**Miss Bakshiyeva**”) in relation to Azeri restructuring proceedings in respect of OJSC International Bank of Azerbaijan (“**IBA**”). The first respondent was Sberbank of Russia (“**Sberbank**”). Sberbank was a creditor of IBA under a USD 20 million term facility agreement dated 15 July 2016 (“**the Facility**”). The second to seventh respondents were six separate Franklin Templeton entities (collectively “**Franklin Templeton**”). Franklin Templeton is, through Citibank NA, the beneficial owner of USD 500 million 5.62% loan notes issued under a trust deed dated 11 June 2014 (“**the Notes**”). Materially, both the Facility and the Notes were stated to be governed by the law of England and Wales.

Azeri Insolvency Proceedings

On 5 May 2017, Miss Bakhshiyeva was appointed in relation to restructuring proceedings relating to IBA (“**the Azeri Proceedings**”). A majority of creditors of IBA approved an Azeri-law plan proposed in the context of the Azeri Proceeding (“**the Plan**”) on 18 July 2017, which was in turn approved by the Azeri court on 17 August 2017. The unchallenged expert evidence on Azeri law that was before the court established that the Azeri Proceedings were akin to a rescue or turnaround procedure, or, in the words of the judge: “… the process facilitates rehabilitation and the resumption of trading rather than the collection of assets and their fair distribution followed by dissolution.” The Plan became effective on 1 September 2017.

Under Azeri law, the Plan binds all creditors whether they voted for or against its adoption, or event at all. Neither Sberbank nor Franklin Templeton voted or participated in in any way in the meeting in Azerbaijan to approve the Plan. It was common ground before the court for the purposes of these particular applications that they had also not acquiesced in the Plan. The expert evidence on Azeri law that was before the court also confirmed that an effect of the Plan was that all indebtedness within the scope of the Plan (referred to as ‘Designated Financial Indebtedness’) was cancelled with effect from 1 September 2017 and replaced with various ‘entitlements’.

It is also the case that, under Azeri law, the Azeri Proceedings were due to terminate on 30 January 2018.

UK Insolvency Proceedings

Miss Bakhshiyeva applied to the High Court of England and Wales on 24 May 2017 for a recognition order under the Cross-Border Insolvency Regulations 2016 (SI 2006/1030) (“**the CBIR**”). The CBIR incorporate into English law the UNCITRAL Model Law on Insolvency (“**the Model Law**”). The English court acceded to Miss Bakhshiyeva’s application on 6 June 2017 when it made a recognition order. That order also carried with it a moratorium on creditor action. However, if the Azeri Proceedings lapsed on 30 January 2018, the moratorium imposed as a result of the English Court’s order would also lapse.

In those circumstances, Miss Bakhshiyeva applied to the English Court for an order continuing the moratorium. She relied on Article 21(1)(a) and (b) of the Model Law. Sberbank and Franklin Templeton cross-applied for orders giving them permission to issue proceedings to enforce the Facility and the Loan and/or lifting the moratorium.

The applications were heard by Hildyard J on 14, 15 and 21 December 2017. He handed down his judgment on 18 January 2018. The losing side has appealed to the Court of Appeal. At the time of writing this Inside Story, the appeal has not yet been listed, although it is likely to be heard by the end of October 2018.

**The Issue**

The ‘rule’ in *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399 has been described as standing for the proposition that:

“…a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding. Indeed, the proposition goes further: discharge of a debt under the insolvency law of a foreign country is only treated as a discharge therefrom in England if it is a discharge under the law applicable to the contract.”

It was common ground before the English Court that (a) the High Court is, as matter of precedent, bound by the decision of the Court of Appeal in *Gibbs*, and at least at first instance that (b) the claims of Sberbank and Franklin Templeton were not discharged by the Plan, that (c) the order of the Azeri court approving the Plan cannot be directly enforced under the CBIR, and finally (d) there was no suggestion that Sberbank or Franklin Templeton had submitted to the Plan or Azeri law.

In those circumstances the key issue which Hildyard J was required to resolve was whether either ‘modified universalism’ under the common law, or the CBIR or the Model Law enabled the English court to grant relief which would advance those principles whilst at the same time respecting the rule in *Gibbs* (as that rule is properly understood).

The relevant passages in the Model Law (emphasised by underlining to identify the passages over which argument in *Bakshiyeva* ranged) are as follows:

“1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—

(a) staying the commencement or continuation of individual actions or individual proceedings

concerning the debtor’s assets, rights, obligations or liabilities, to the extent they have not been

stayed under paragraph 1(a) of article 20;

(b) staying execution against the debtor’s assets to the extent it has not been stayed under paragraph 1(b) of article 20…”

The solution contended for by Miss Bakshiyeva was to construe the rule in *Gibbs* as preventing the discharge of a creditor’s right under their contract (so that as a matter of strict law, the right continued to exist and remained unaffected by the foreign proceeding), but, as a matter of procedure, preventing the *enforcement* of that legal right by way of a stay on any potential proceedings. At first blush, the procedural solution is an attractive way of outflanking the rule in *Gibbs*. As it was put by Miss Bakshiyeva’s lawyers, the court should adhere to the letter of the rule in *Gibbs* (no legal discharge of contractual rights) but it should then depart from its spirit in in the pursuit of ‘modified universalism’ (no enforcement of the relevant debt).

**The Court’s Decision**

Hildyard J was not persuaded by Miss Bakshiyeva’s application. He declined to continue / grant a stay, and therefore dismissed her application. In reaching that conclusion, he relied heavily on the decision of Morgan J in *Fibria Celulose S/A v Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch). In that case, Morgan J had to consider the scope of the words “any appropriate relief” in the opening part of Article 21(1). He construed those words narrowly in *Pan Ocean*: they enable a court to grant procedural but not substantive relief. Hildyard J was satisfied that he was bound to follow *Pan Ocean*.

His key conclusion is neatly encapsulated in this paragraph:

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

In reaching that conclusion, Hildyard J declined to follow the decision on similar facts of Norris J in *Re BTA Bank JSC* [2012] EWHC 4457 on the grounds that the judge in that case had deliberately left open the question which Hildyard J was confronted with in *Bakshiyeva*. Moreover, Norris J in *BTA* had not received adversarial argument on stays in relation to a foreign proceeding which would come to an end in the context of the Model Law.

He also declined to follow another decision of Norris J, in *re Atlas Bulk Shipping A/S, Larsen and others v Navios International Inc* [2012] Bus LR 1124 (that was a case on set-off, which engaged Article 21(1)(g), and not 21(1)(a) or (b) of the Model Law) which Hildyard J did not find to be analogous to *Bakshiyeva*). Nor did Hildyard J derive much assistance from another (third) decision of Norris J in *Ronelp Marine Ltd v STX Offshore & Shipbuilding Co Ltd* [2016] EWHC 2228 (Ch) (since in *Ronelp*, it seems the relevant creditor submitted to the foreign jurisdiction).

It was then necessary to reflect on whether the application made by Miss Bakshiyeva was seeking a procedural or substantive order. Hildyard J concluded that the order would affect the substantive rights of Sberbank and Franklin Templeton in that it would prevent them from commencing proceedings in England and Wales to enforce their debts. That was effectively the same as discharging the contractual right forever.

It would also mean that Hildyard J was effectively applying Azeri insolvency law (i.e. that Sberbank and Franklin Templeton were bound by the Plan) instead of English contract law (the rule in *Gibbs*). He was not prepared to go that far. His view was that the decisions in *Pan Ocean*, and of the Supreme Court in *Rubin v Eurofinance SA* [2012] UKSC 46 meant that such a course was not open to him.

*Conclusion*

With the case being appealed, it may be time to review the rule in *Gibbs*. What the appeal court might do is open to conjecture. Will it maintain a rule that has been applied for over a century? Or will it take the opportunity to review the rule in light of the more modern approach to recognition and enforcement under the Model Law? This remains to be determined.