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Case Nos: 2015-215
2015-213

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 07/08/2015

Before:
MR JUSTICE HAMBLEN
- -
Between:

GOLDMAN SACHS INTERNATIONAL Case No: 2015-215

-and-

NOVO BANCO S.A

-and-

(1) GUARDIANS OF NEW ZEALAND SUPERANNUATION Case No 2015-213

AS MANAGER AND ADMINISTRATOR OF

THE NEW ZEALAND SUPERANNUATION FUND

(2) ANDORRA GESTIÓ AGRICOL REIG, S.A.U. S.G.O.I.C.

(3) APWIA FUND SPC LTD

(4) OLIFANT FUND, LTD.

(5) FYI LTD.

(6) FFI FUND LTD.

(7) ELLIOTT INTERNATIONAL, L.P.

(8) THE LIVERPOOL LIMITED PARTNERSHIP

(9) KARRICK LIMITED

(10) GL EUROPE LUXEMBOURG S.A R.L.

(11) SILVER POINT LUXEMBOURG PLATFORM S.À R.L.

(12) TDC PENSIONSKASSE

-AND-

NOVO BANCO S.A

Tim Lord QC and Max Schaefer (instructed by Bird & Bird) for the Claimant/Respondent in Claim 2015-15

Richard Salter QC and Jonathan Mark Phillipps (instructed by **Pinsent Masons**) for the Defendants/Applicants (in Claims 2015-213 and 2015-215)

Laurence Rabinowitz QC, Tom Smith QC and Adam Sher (Instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) for the Claimants/Respondents in Claim 2015-213

Hearing dates: 27 and 28 July 2015

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Approved Judgment

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

....

MR JUSTICE HAMBLEN

Mr Justice Hamblen:

Introduction

1. By a Facility Agreement dated 30 June 2014 ("the Facility Agreement"), Oak Finance Luxembourg S.A. ("Oak") agreed to lend approximately US$ 835 million to Banco Espírito Santo S.A. ("BES").

2. The Claimants in 2015 Folio 213 ("the NZ Claimants") and the Claimant in 2015 Folio 215, Goldman Sachs International ("GSI") (together "the Claimants") make claims for repayment and interest under the Facility Agreement as successors to Oak's rights ("the English proceedings").

3. The Claimants' claim is made against the Defendant, Novo Banco S.A. ("NB") which they contend has replaced BES as the Borrower under the Facility Agreement by a form of statutory transfer. This is denied by NB.

4. NB applies to set aside both sets of proceedings on the grounds that the court has no jurisdiction to determine the claims; alternatively it seeks a stay of the proceedings. The applications in both proceedings were heard together.

5. The evidence at the hearing consisted of witness statements from Mr McNeill of Pinsent Masons LLP for NB; from Mr Baker of Bird & Bird LLP for GSI and Mr Crosby (Head of Portfolio Investments for the First NZ Claimant), Mr Orr (CEO of the First NZ Claimant) and Mr East of Quinn Emanuel Urquhart & Sullivan UK LLP for the NZ Claimants, together with the exhibits thereto. Each of NB, GSI and the NZ Claimants also provided expert reports from a Portuguese Professor of Law.

Outline of the case

6. On 30 June 2014 the Facility Agreement was entered into between BES and Oak. On 3 July 2014 US$ 784,564,000(being the drawdown amount less certain commissions) was drawn down under that facility by BES.

7. The Facility Agreement contains an express choice of English law (clause 34) and of English jurisdiction (clause 35). Clause 35.1 ("the Jurisdiction Clause") provides as follows:

   "(a) The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including any dispute relating to any non-contractual obligation arising from or in connection with this Agreement and any dispute regarding the existence, validity or termination of this Agreement) (a **Dispute**).

   (b) The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary."

8. On 3 August 2014 the Bank of Portugal resolved to create NB and certain of the assets and liabilities of BES were transferred to it in accordance with a decision of the Bank of Portugal ("the August decision").

9. NB is the bridge bank created by the Bank of Portugal as a "resolution measure" pursuant to the Europe-wide scheme for the rescue of banks now reflected in the Bank Recovery and Resolution Directive 2014/59/EU ("EBRRD"). Bank of Portugal is the "resolution authority" under the EBRRD, and NB was created to continue the business of BES, a substantial distressed Portuguese bank.

10. The transfer of assets and liabilities from BES to NB falls to be recognised under English law by virtue of the Credit Institutions (Reorganisation and Winding up) Regulations 2004 ("the 2004 Regulations"), which implement the EBRRD. The 2004 Regulations direct that certain EEA Insolvency measures are treated as if they were part of the general law of insolvency of the UK. The August decision transferred all liabilities of BES to NB, save for a category of liabilities described as "Excluded Liabilities" (the "Excluded Liabilities"). A central dispute between the parties is whether the liabilities represented by the Facility Agreement (the "Oak Liability") fell within the category of Excluded Liabilities defined by the August decision. If it did not, the Oak Liability was transferred to NB. If it did, then it was not so transferred.

11. It was the Claimants' case that the Oak Liability was not an Excluded Liability, that the effect of the August decision was therefore to transfer the Oak Liability to NB and that NB thereby became a party to the Facility Agreement and agreed English jurisdiction in accordance with the Jurisdiction Clause.

12. On 11 August 2014 the Bank of Portugal made further decisions clarifying and adjusting the assets and liabilities transferred to NB.

13. Between 7 and 14 August 2014 there were communications between GSI, the Bank of Portugal and NB in which it was stated that the Facility Agreement had been transferred to NB. GSI contended that, if the Jurisdiction Clause had not already been agreed as a result of the August decision, it was agreed thereby.

14. On 22 December 2014 the Bank of Portugal issued a "ruling" that the Oak Liability had not been transferred to NB pursuant to the August decision, but remained a liability of BES ("the December decision").

15. It was NB's case that the consequence of the December decision is that, as a matter of Portuguese law there has been no transfer of the Oak Liability from BES to NB and that the English court is bound to recognise this as a matter of English and European law. It is the Claimants' case that the December decision is not relevant to jurisdiction and that, in any event, it has no effect as a matter of English law, being the applicable law.

16. On 29 December 2014 the first repayment instalment amount payment fell due under the Facility Agreement and was not paid.

17. On 11 February 2015 the Bank of Portugal affirmed its December decision.

18. Between 23 and 25 February 2015 Oak assigned the Oak Liability to the NZ Claimants and GSI.

19. On 26 February 2015 the English proceedings were issued.

20. In the English proceedings the Claimants contend that the failure to make the first repayment under the Facility Agreement was an event of default which has led to the loan being accelerated such that the entire sum and accrued interest has fallen due. GSI claims approximately US$ 222 million plus interest and the NZ Claimants claim approximately US$ 613 million plus interest.

21. On 5 March 2015 GSI issued proceedings with the Lisbon administrative court for an injunction to suspend the effect of the December decision. Those proceedings were served on NB on 2 April 2015.

22. On 13 April 2015 the NZ Claimants issued proceedings with the Lisbon administrative court seeking to annul the December decision.

23. Proceedings akin to judicial review have accordingly been brought by the Claimants in the Portuguese administrative courts against the Bank of Portugal, in which the Claimants have challenged the legality, validity and effectiveness of the December decision as a matter of Portuguese law ("the Portuguese proceedings").

24. NB contends that the English court is bound to refrain from exercising any jurisdiction to entertain the Claimants' claim because to do so trespasses on the administrative acts of a foreign executive body (the Bank of Portugal) which the court ought properly to refrain from investigating as non-justiciable acts. Further or alternatively, as a matter of comity, or as a matter of practicality and case management, the court ought not to entertain or allow progress of this claim while the central issue is properly pending before the administrative courts in Portugal.

The EBRRD

25. The EBRRD establishes a framework for the recovery and resolution of credit institutions and investment firms. Each Member State is to designate a "resolution authority" that has available to it various "resolution tools" that it can apply to failing credit institutions (which become "institutions under resolution").

26. Its Recitals include the following:

(1) "The financial crisis has shown that there is a significant lack of adequate tools at Union level to deal effectively with unsound or failing credit institutions and investments firms ('institutions'). Such tools are needed, in particular, to prevent insolvency or, when insolvency occurs, to minimise negative repercussions by preserving the systemically important functions of the institution concerned. During the crisis, those challenges were a major factor that forced Member States to save institutions using taxpayers' money. The objective of a credible recovery

and resolution framework is to obviate the need for such action to the greatest extent possible.

....

(4) There is currently no harmonisation of the procedures for resolving institutions at Union level. Some Member States apply to institutions the same procedures that they apply to other insolvent enterprises, which in certain cases have been adapted for institutions. There are considerable substantial and procedural differences between the laws, regulations and administrative provisions which govern the insolvency of institutions in the Member States. In addition, the financial crisis has exposed the fact that general corporate insolvency procedures may not always be appropriate for institutions as they may not always ensure sufficient speed of intervention, the continuation of the critical functions of institutions and the preservation of financial stability.

(5) A regime is therefore needed to provide authorities with a credible set of tools to intervene sufficiently early and quickly in an unsound or failing institution so as to ensure the continuity of the institution's critical financial and economic functions, while minimising the impact of an institution's failure on the economy and financial system….."

27. The "resolution authority" in Portugal is the Bank of Portugal. The relevant "resolution tool" in this case is the "bridge institution tool" ("the bridge tool").

28. Article 31 lists the "resolution objectives". It provides that:

"1. When applying the resolution tools and exercising the resolution powers, resolution authorities shall have regard to the resolution objectives, and choose the tools and powers that best achieve the objectives that are relevant in the circumstances of the case.

2. The resolution objectives referred to in paragraph 1 are:

(a) to ensure the continuity of critical functions;

(b) to avoid a significant adverse effect on the financial system, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline;

(c) to protect public funds by minimising reliance on extraordinary public financial support;

(d) to protect depositors covered by Directive 2014/49/EU and investors covered by Directive 97/9/EC;

(e) to protect client funds and client assets."

29. Article 37 sets out the resolution tools, including the bridge tool. It provides that:

> "1. Member States shall ensure that resolution authorities have the necessary powers to apply the resolution tools to institutions and to entities referred to in points (b), (c) or (d) of Article 1(1) that meet the applicable conditions for resolution.
>
> ….
>
> 3. The resolution tools referred to in paragraph 1 are the following:
>
> ….
>
> (b) the bridge institution tool;
>
> ….
>
> 9. Member States may confer upon resolution authorities additional tools and powers exercisable where an institution or entity referred to in point (b), (c) or (d) of Article 1 (1) meets the conditions for resolution, provided that:
>
> (a) when applied to a cross-border group, those additional powers do not pose obstacles to effective group resolution; and
> (b) they are consistent with the resolution objectives and the general principles governing resolution referred to in Articles 31 and 34.
>
> …."

30. Article 63 sets out the general resolution powers which the resolution authorities shall have. It provides that:

> "1. Member States shall ensure that the resolution authorities have all the powers necessary to apply the resolution tools to institutions and to entities referred to in points (b), (c) and (d) of Article 1 (1) that meet the applicable conditions for resolution. In particular, the resolution authorities shall have the following resolution powers, which they may exercise individually or in any combination:
>
> ….
>
> (c) the power to transfer shares or other instruments of ownership issued by an institution under resolution;
>
> (d) the power to transfer to another entity, with the consent or that entity, rights, assets or liabilities of an institution under resolution;
>
> …."

31. In order for the bridge tool to operate, it is necessary for the resolution authority to have the power to transfer shares, assets or liabilities from the bank under resolution (the "bad bank") to the bridge institution ("a transfer"). This particular resolution power is addressed in Article 40(1) which provides that:

> "1. In order to give effect to the bridge institution tool and having regard to the need to maintain critical functions in the bridge institution, Member States shall ensure that resolution authorities have the power to transfer to a bridge institution:
>
> (a) shares or other instruments of ownership issued by one or more institutions under resolution;
> (b) all or any assets, rights or liabilities of one or more institutions under resolution."

32. Article 40(5) recognises that the transfer power may be exercised more than once and that supplemental transfers may be made ("a supplemental transfer"). It provides that:

> "5. When applying the bridge institution tool, the resolution authority may exercise the transfer power more than once in order to make supplemental transfers of shares or other instruments of ownership issued by an institution under resolution or, as the case may be, assets, rights or liabilities of the institution under resolution."

33. Article 40(6) provides that the resolution authority may also effect a transfer back to the bad bank ("a re-transfer") and a transfer to a third party ("a third party transfer"). It provides that:

> "6. Following an application of the bridge institution tool, the resolution authority may:
>
> (a) transfer rights, assets or liabilities back from the bridge institution to the institution under resolution, or the shares or other instruments of ownership back to their original owners, and the institution under resolution or original owners shall be obliged to take back any such assets, rights or liabilities, or shares or other instruments of ownership, provided that the conditions laid down in paragraph 7 are met;
> (b) transfer, shares or other instruments of ownership, or assets, rights or liabilities from the bridge institution to a third party."

34. The circumstances in which a re-transfer may be made are set out in Article 40(7) which provides that:

> "7. Resolution authorities may transfer shares or other instruments of ownership, or assets, rights or liabilities back from the bridge institution in one of the following circumstances:
>
> (a) the possibility that the specific shares or other instruments of ownership, assets, rights or liabilities might be transferred back is stated expressly in the instrument by which the transfer was made;
> (b) the specific shares or other instruments of ownership, assets, rights or liabilities do not in fact fall within the classes of, or meet the conditions for transfer of shares or other instruments of ownership,

> assets, rights or liabilities specified in the instrument by which the transfer was made.
>
> Such a transfer back may be made within any period, and shall comply with any other conditions, stated in that instrument for the relevant purpose."

35. The EBRRD also implements a system of mutual recognition of "crisis management measures". This is addressed by Article 66 of the EBRRD entitled *"*Power to enforce crisis management measures or crisis prevention measures by other Member States".

36. Of particular importance is Article 66 (1) which requires Member States to give effect to measures falling within it. It provides that:

> "Member States shall ensure that, where a transfer of shares, other instruments of ownership, or assets, rights or liabilities includes assets that are located in a Member State other than the State of the resolution authority or rights or liabilities under the law of a Member State other than the State of the resolution authority, the transfer has effect in or under the law of that other Member State."

37. Article 66(2) imposes an obligation on Member States to provide the resolution authority "with all reasonable assistance to ensure that the shares or other instruments of ownership or assets, rights or liabilities are transferred to the recipient in accordance with any applicable requirements of national law."

38. Article 66(3) provides that:

> "Member States shall ensure that shareholders, creditors and third parties that are affected by the transfer of shares, other instruments of ownership, assets, rights or liabilities referred to in paragraph 1 are not entitled to prevent, challenge, or set aside the transfer under any provision of law of the Member State where the assets are located or of the law governing the shares, other instruments of ownership, rights or liabilities."

39. Article 66 (6) (a) provides that:

> "Each Member State shall ensure that the following are determined in accordance with the law of the Member State of the resolution authority … (a) the right for shareholders, creditors and third parties to challenge, by way of appeal pursuant to Article 85, a transfer of shares, other instruments of ownership, assets, rights or liabilities referred to in paragraph 1 of this Article;"

40. Article 85 provides (at (3)) that:

> "Member States shall ensure that all persons affected by a

decision to take a crisis management measure, have the right to appeal against that decision", and (at (4)) that the lodging of such an appeal "shall not entail any automatic suspension of the effects of the challenged decision".

41. Article 86 provides among other things for restrictions on the bringing of proceedings against, or insolvency proceedings in respect of, institutions which are under resolution without consent of the resolution authority.

42. Article 117 makes amendments to Directive 2001/24/EC ("the Winding up Directive") including that:

> "Directive 2001/24/EC is amended as follows:
>
> (1) in Article 1, the following paragraphs are added:
>
> 4. In the event of application of the resolution tools and exercise of the resolution powers provided for in Directive 2014/59/EU of the European Parliament and of the Council, this Directive shall also apply to the financial institutions, firms and parent undertakings falling within the scope of Directive 2014/59/EU."

Implementation of the EBRRD in Portugal

43. The key powers exercised by the Bank of Portugal are statutory. At the time of the material decisions the relevant powers were those under Title VIII of the Legal Framework of Credit Institutions and Financial Companies Decree-Law No. 298/92, of 31 December 1992, inserted and approved under Decree-Law 31-A/2012 of 10 February 2012 ("the Banking Law").

44. The powers in issue in this case are those contained in Articles 145-G and 145-H of the Banking Law. Those powers were based upon the drafts then in circulation for what became the EBRRD, but are not identical to the final form of that directive. It was nonetheless common ground that the Bank of Portugal was acting as a resolution authority within the meaning of the EBRRD and that its actions come to be viewed in accordance with it. The relevant Articles provide as follows:

> "<u>Article 145-G</u>
>
> 1 Banco de Portugal may order the transfer of all or part of assets, liabilities, off-balance sheet items and assets under management of a credit institution to one or more bridge banks established for this purpose, in order to allow their subsequent sale to another institution authorised to carry on the activity in question.
>
> <u>Article 145-H</u>
>
> Portfolio and financing of the bridge bank

1 Banco de Portugal selects the assets, liabilities, off-balance sheet items and assets under management to be transferred to the bridge bank at the time of its constitution

2 For the following cases, no obligations of the original credit institution may be transferred to the bridge bank:

(a) The respective shareholders, whose participation at the time of the transfer is equal or greater than 2% of the share capital, the persons or entities in the two years prior to the transfer, have had interest equal to or greater than 2% of the capital, members of the board of directors or supervisory, the statutory auditors or audit firms or people with similar status in other companies in controlling relationship or group with the institution;

(b) Persons or entities that have been shareholders, exercised the functions or provided the services referred to in the above paragraph in the four years prior to the creation of the bridge bank, and whose acts or omissions have given rise to the financial difficulties of the credit institution or contributed to aggravate that situation;

(c) Spouses or relatives in the first degree or third parties acting on behalf of the people or entities referred to in the preceding paragraphs;

(d) Those responsible for acts related to the credit institution, or who have taken advantage of them, directly or through an intermediary, which are the cause of the financial difficulties or contributed, by acts or omissions, within the scope of their responsibilities to the worsening of such a situation, according to Banco de Portugal.

….

5 After the transfer referred to in paragraph 1, Banco de Portugal may, at any time:

(a) Transfer other assets, liabilities, off-balance sheet items and assets under management of the original credit institution to the bridge bank;

(b) Transfer assets, liabilities, off-balance sheet items and assets under the management of the bridge bank to the original credit institution."

Implementation of the EBRRD in English law

45. The EBRRD; (and in particular the obligation imposed under Article 66 (1)) was implemented by:

(1) The Bank Recovery and Resolution Order 2014 SI 2014 No 3329, which substantially amended the Banking Act 2009 to introduce features from the EBRRD and

(2) The Bank Recovery and Resolution (No2) Order 2014 SI 2014/3348 ("the 2014 Order").

46. By Schedule 3 to the 2014 Order, the definition of "directive reorganisation measure" in the 2004 Regulations was substituted to include, in addition to any "reorganisation measure" defined in the Winding-up Directive, "any other measure to be given effect in or under the law of the United Kingdom pursuant to Article 66 of the [EBRRD] ..."

47. Regulation 5 of the 2004 Regulations provides that:

> "Reorganisation measures and winding-up proceedings in respect of EEA credit institutions effective in the United Kingdom
>
> 5. (1) An EEA insolvency measure has effect in the United Kingdom in relation to—
> (a) any branch of an EEA credit institution,
> (b) any property or other assets of that credit institution,
> (c) any debt or liability of that credit institution
> as if it were part of the general law of insolvency of the United Kingdom.
> …
> (6) In this regulation-
>
> "EEA Insolvency measure" means, as the case may be, a directive reorganisation measure or directive winding-up proceedings which have effect in relation to an EEA credit institution by virtue of the law of the relevant EEA state."

48. In summary, Regulation 5 of the 2004 Regulations states that an "EEA Insolvency measure" is to be treated as if it was "part of the general law of insolvency of the UK". By virtue of the amendment to the 2004 Regulations effected by the 2014 Order, an "EEA Insolvency measure" is defined in the 2004 Regulations (by virtue of Regulation 5(6) and Regulation 2(1)) to include any "reorganisation measure" defined in the Winding-up Directive and "any other measure to be given effect in or under the law of the UK pursuant to Article 66 of the [EBRRD]".

49. It follows that any transfer of rights or liabilities which falls within Article 66(1) of the EBRRD is a "directive reorganisation measure" and consequently of direct effect in the United Kingdom as an "EEA insolvency measure" by virtue of Regulation 5.

50. It was NB's primary case that the December decision, or the December decision taken together with the August decision, falls within Article 66(1) and accordingly has effect as a matter of English law.

51. At the hearing NB developed an alternative case that the decision has effect as a matter of English law because it involves the "exercise of the resolution powers provided for in" the EBRRD and is therefore a "directive reorganisation measure" by reason of the amendments to the Winding-up Directive made by Article 117.

Portuguese Administrative law

52. There was expert Portuguese law evidence put forward on behalf of all the parties, namely Professor Moreira for NB, Professor Duarte for the NZ Claimants and Professor Almeida for GSI. It was not considered necessary for any of the experts to be cross examined.

53. It was the Claimants' case that Portuguese law is irrelevant. The dispute involves an English law agreement and one is only concerned with matters which will be given effect as a matter of English law. NB nevertheless relied on Portuguese law as establishing the following (and for the purpose of NB's application I shall assume that it does so):

(1) Pursuant to Article 145 of the Banking Act (and in particular Article145-G and H) the Bank of Portugal had powers including the power to transfer assets to NB.

(2) In exercising, or in purporting to exercise, powers under Article 145 of the Banking Act, the Bank of Portugal was acting as an administrative authority.

(3) As an administrative authority, the Bank of Portugal had the power (reflected in Article 120 and Article149 of the Portuguese Civil Procedural Code ("the CPA) :

(i) to enact administrative decisions (administrative acts) establishing legal rights and obligations for third parties in specific situations; and,
(ii) in case of non-compliance, the power to enforce directly their own decisions by their own means, including by administrative coercion.

(4) Where an administrative act which is not a nullity defines a party's rights or obligations:

(i) That act is directly effective; and
(ii) The party's rights or obligations under Portuguese law are as stated unless or until such a decision is annulled.

(5) As a matter of Portuguese law, (with limited exceptions identified under A133 of the CPA giving rise to absolute nullity) an administrative act is valid unless or until it is annulled by the administrative courts.

(6) The review of an administrative act is a matter for the (sole) jurisdiction of the administrative courts.

(7) The administrative courts can entertain such a review upon the application of an affected party.

(8) The administrative court may annul an administrative act on grounds including an error in its factual assumptions, or an error of law.

(9) The administrative court may annul, but not modify or replace, the effect of an administrative act.

(10) Under A133 of the CPA administrative acts are null "when they lack any of the [legal] essential elements or when the law expressly provides for the form of invalidity".

(i) A133 (2) (D) provides expressly that acts are null which "offend the essential content of a [constitutional] fundamental right".
(ii) A134 provides that null acts have no legal effect, with no need of a declaration of nullity.

(11) The general rule (CPA A127) is that administrative acts take effect from their date.

(12) An administrative authority may, in respect of its own administrative act and by subsequent (and secondary) decision:

(i) Reform, ratify or convert its act in accordance with A137 of the CPA. Such acts of reform etc generally (as there set out) have retroactive effect.
(ii) Revoke the act in accordance with CPA 138-145.

(a) A valid administrative act which is constitutive or rights or legitimate interests in the addressee may not be revoked (A140 (1) (B)).
(b) Where a lawful act is revoked, its revocation is prospective only (A145 (1)).
(c) Where an unlawful act is revoked it has retroactive effect (A145 (2)).

(ii) Amend or replace an administrative act under A147 of the CPA, but subject to the same principles as revocation.

(13) An authority may interpret its own administrative act. Such interpretation is retroactive (A128 of CPA).

(14) An administrative authority may by subsequent administrative act apply to specific instances or implement its prior administrative act.

(15) Portuguese law (like other civil systems) recognises a clear distinction between civil matters and administrative matters, with the latter being the subject of discrete rules and subject to the review of dedicated courts.

(16) Even if liable to be annulled by such a court, unless or until the decision is quashed, it is binding and directly effective as a matter of law.

The Bank of Portugal's decisions

(2) The August decision

54. This provided:

(1) By "Point One", NB was established pursuant to Article 145-G (5) of the Banking Law.

(2) By "Point Two", the assets and liabilities identified in Annexes 2 and 2A were transferred to NB pursuant to Article 145-H(1) of the Banking Law.

(3) By Annex 2 all the liabilities of BES to third parties were transferred to NB with the exception of the defined "Excluded Liabilities". These Excluded Liabilities were defined in terms mirroring the language of Article 145-H (2), to include:

> ".. liabilities to (a) the respective shareholders, whose participation is equal to or higher than 2% of the share capital or to persons or entities which in the two-year period preceding the transfer held a participation equal to or higher than 2% of the capital of BES .."

This includes liabilities to:

> "..third parties acing on behalf of the persons or entities referred to in the foregoing..."

55. It was common ground that the language of Annex 2 reflected the prohibition contained in Article 145 (H)2.

(1) The 11 August decision

56. This decision modified the August decision. It recorded that "the Board of Directors [of Bank of Portugal] … has decided to clarify and adjust the perimeter of the assets, liabilities, off-balance-sheet items and assets under management of [BES]…", and went on to adjust and re-write Annex 2 of the August decision, although not materially to the claim.

(1) The December decision

57. This is the centrally contentious decision. It provided that:

"Whereas:

(1) Under the terms set forth in Point 1(b) (i) of Annex 2 of the resolution of the Board of Directors of the Bank of Portugal of

3 August 2014 (8:00 p.m.) as worded in the resolution of the same Board of Directors on 11 August 2014 (5:00 p.m.) no obligations of Banco Espirito Santo, S.A. (Banco Espirito Santo) were transferred to Novo Banco. S.A. (Novo Banco) that were contracted with, among other persons, third parties that acted on the behalf of entities that, in the two years prior to the transfer of assets, liabilities, extrapatrimonial elements and assets under the management put into effect by said resolution, had holdings equal to or greater than 2% of the share capital of Banco Espirito Santo.

(2) That provision of Annex 2 of the resolution is the expression of the provision set forth in Art. 145-H(2)(c) of the General Regime of Credit Institutions and Financial Companies (RGICSF), approved by Decree-Law no. 298/92, of 31 December, which prohibits said transfer of liabilities.

(3) On 30 June 2014 Banco Espirito Santo, through its Luxembourg branch, signed a financing contract with the company Oak Finance Luxembourg S.A. (Oak Finance) in the amount of 834,642,768 US dollars, and as a result of which Banco Espirito Santo received that amount, on 3 July, assuming the position of debtor to Oak Finance.

(4) According to the conclusion of the analysis contained in Doc. No. NTI/2014/00003441, there are serious and well-grounded reasons to justify the conviction that Oak Finance acted in the granting of this financing on behalf of Goldman Sachs International, an entity regarding which there also exist serious and well-grounded reasons to believe that it is included in Art. 145-H(2)(a) of the RGICSF:

(5) Therefore the transfer of the liability of Banco Espirito Santo to Oak Finance cannot be allowed, seeing the serious risk of allowing an irreparable violation of the provisions of Point 1(b)(i) of Annex 2 of the resolution of the Board of Directors of the Bank of Portugal of 3 August 2014 (8:00 p.m.) as worded in the resolution of the same Board of Directors on 11 August 2014 (5:00 p.m.) and the provisions of Art. 145-H(2)(c) of the RGICSF

Pursuant to the provisions of Art. 145 G(1) and Art. 145-H(2)(c) of the RGICSF, and based on the grounds contained in Doc. No. NTI/2014/00003441, the Board of Directors of the Bank of Portugal resolves the following:

(a) The liability of Banco Espirito Santo to Oak Finance resulting from the financing contract of 30 June 2014, was not transferred to Novo Banco;

(b) This ruling is effective as from 3 August 2014;

(c) Novo Banco and Banco Espirito Santo are to adjust their accounting records to this resolution and act in accordance with what is ordered herein.

Novo Banco, Banco Espirito Santo and Oak Finance are to be notified of this decision.

The minutes of this resolution is approved in draft form in order to be executed immediately, pursuant to the terms of Art. 27(3) and for the purposes of Art. 27(4) of the Administrative Procedure Code."

58. It is to be noted that the December decision, in contrast to the August decision, does not purport to transfer anything. It purports to be a ruling that there had been no transfer – i.e. a declaration of what in the view of the Bank of Portugal had already happened.

59. The Portuguese law expert evidence disclosed three slightly different views of this decision:

(1) Professor Duarte considered that it is either an act of confirmation (if the Oak Liability was in fact an Excluded Liability under the August decision), or of revocation – in which case it was (he says) illegal and annullable.

(2) Professor Almeida described the decision as a "self-standing declaration", accepted that it is an administrative act, but contended that it does not have the standing of the August decision as it was not made pursuant to the Banking Law.

(3) Professor Moreira contended that the act can be viewed as (possibly) interpretive, or implementing the original August decision, alternatively revocative or reformative of it.

60. All the experts nevertheless accepted that the December decision is, under Portuguese law, an administrative act and that even if annullable the decision is prima facie binding and effective as a matter of Portuguese law upon the parties to whom it is addressed.

61. The Claimants' case was that its status as a matter of Portuguese law is irrelevant. What matters is its effect as a matter of English law and it has none.

(1) The February decision

62. By this decision "the Board of Directors decided to confirm and maintain its decision of 22 December 2014". It recited the basis for that at (A)-(L), and in particular provides that:

> "I) Any margin of doubt or uncertainty on the fulfilment of the premises for the prohibition of the transfer of BES liabilities resulting from the loan agreement with Oak Finance … can only be overcome with a very high degree of certainty…
>
> J) Said degree of certainty can only be reached by an entity with powers to issue a final decision, i.e. by a court of law .."

63. It would appear that the February decision was itself, as a matter of Portuguese law, effective to confirm the effect of the December decision.

The Issues

64. The issues to be determined may be stated as follows:

(1) Does the English court have jurisdiction to entertain the present claim under the Council Regulation (EU) 1215/2012 (the Judgments Regulation). In particular:

(i) Does the claim fall within the material scope of the Judgments Regulation?

(ii) If so, does the English court have jurisdiction under the Judgments Regulation, more especially pursuant to Article 25?

(2) If the English court does have jurisdiction, should it decline to exercise that jurisdiction?

(3) If the English court should not decline to exercise jurisdiction, should it grant a stay of the proceedings?

Issue (1) - Does the English court have jurisdiction to entertain the present claim under the Judgments Regulation.

(i) Does the claim fall within the material scope of the Judgments Regulation?

65. Article 1(1) of the Judgments Regulation states that it shall apply in:

"civil and commercial matters" but "shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of state authority*"*.

66. The Claimants contended that their claim is a debt claim brought pursuant to the Facility Agreement and, as such, a "civil and commercial" matter. NB contended that it was an "administrative" matter as the "real issue" in the case is not any term, breach or consequence of the Facility Agreement but the impugning of the consequences of public law acts of the Bank of Portugal and the sidestepping of the appropriate avenue for challenge.

67. In considering whether a claim falls within Article 1(1) it was accepted that the ECJ cases provide guidance which may be summarised as follows:

(1) The phrase "civil and commercial matters" is to be given an autonomous meaning: *LTU v Eurocontrol* 29/76, [1976] ECR 1541 at [3].

(2) It is necessary to identify the legal relationship between the parties and the detailed rules governing the bringing of the action: see *LTU* at [4], *Gemeente Steenbergen v Baten* C-271/00, [2002] ECR 1-10489 at [31] and *Préservatrice foncière TIARD SA v Netherlands*, C-266/01, [2003] ECR I-4867 at [23]. If the legal relationship upon which the claim is based arises in private law (as opposed to the exercise of public law powers), then the claim will be a "civil and commercial matter": *Frahuil SA v Assitalia SPA* C-265/02, [2004] ECR I-1543 at [20]-[21], *TIARD* at [40], *Realchemie Nederland BV v Bayer CropScience* C-406/09, [2012] Bus LR 1825 at [41] and *Revenue and Customs Commissioners v Sunico* C-49/12, [2014] QB 391 at [39].

(3) A claim which arises from an act in exercise of public power will not be "civil and commercial" but this applies only if the claim is brought against the public authority in question: see *Orams v Apostolides* C-420/07, [2011] QB 519 (ECJ) at [45] (and the Advocate-General's opinion at [62]).

(4) The court must consider only the subject matter of the claim and not any matters raised by way of defence, which are irrelevant: see *TIARD* at [42]-[43].

(5) The mere fact that the context in which, or background against which, the private law claim arises may raise issues of public law, or the exercise of public law or administrative powers, is insufficient to bring the claim outside the scope of the Judgments Regulation: see *TIARD* at [42], *Sunico* at [39]-[41] (and see the opinion of the Advocate General at [49]), *Land Berlin v Sapir* C-645/11 [2013] I.L.Pr 29 at [38] (and see the opinion of the Advocate General at [74] and [77]) and *flyLAL* at [27]-[36] (and see the opinion of the Advocate General at [41]-[43]).

68. The Claimants further submitted that the exclusions from the scope of the Judgments Regulation are exceptions to be "strictly interpreted", as stated in *flyLAL-Lithuanian Airlines AS v Starptautiska Lidosta Riga VAS* C-302/13, [2014] 5 CMLR 27 at [27]. The correctness of that statement was challenged by NB in reliance on the critical comments made in *Briggs on Civil Jurisdiction and Judgments* (6th ed.) at 2.30. It is not necessary to resolve this issue as this is not a case which turns on any need for strict interpretation.

69. In support of its submission that the reality is that these actions are brought to impugn, or sidestep, the consequences of public law acts of the Bank of Portugal and the appropriate avenue for challenge, NB contended that in order to bring their claims the Claimants have not merely set up the public act of the Bank of Portugal in the form of the August decision, but also pleaded and then disputed the December decision. These are "administrative matters" excepted from the Regulation by Article 1.

70. It is apparent, however, from a consideration of the Particulars of Claim in both proceedings that the December decision forms no part of the Claimants' claim. Although it is referred to by way of factual background it is not a necessary part of the claim. The claim is not concerned with the December decision. On the Claimants' case it is legally irrelevant. That it may be an essential element of NB's defence is nothing to the point as it is the subject matter of the claim which must be considered rather than any defence.

71. The August decision is part of the claim since it is relied upon as effecting a statutory transfer of the Facility Agreement to NB. However, the claim made is one in debt, which is a claim based on private law rights conferred by the Facility Agreement and a civil and commercial matter. A novation of the Facility Agreement would not change the nature of that claim; nor does a statutory transfer.

72. Further, even if the claim did arise from the exercise of a public power it is not a claim brought against the public authority in question. The claim is brought against NB which is not a public body or a body exercising public law powers.

73. For all these reasons I am satisfied to the requisite standard that the claim falls within the material scope of the Judgments Regulation.

74. Further, even if NB was correct that the Judgments Regulation does not apply, the English court would still have jurisdiction. Under the common law rules (which would apply if the claim were outside the material scope of the Judgments Regulation), jurisdiction is established by service. In this case, service has taken place within the jurisdiction through service on NB's UK establishment pursuant to s.1139(2) of the Companies Act 2006 (alternatively on the basis of clause 35.2(a)(i) of the Facility Agreement). NB has not disputed the validity of this service.

(ii) If so, does the English Court have jurisdiction under the Judgments Regulation, more especially pursuant to Article 25?

75. The Claimants relied upon the Jurisdiction Clause as an agreement within Article 25 of the Judgments Regulation giving jurisdiction to the English court. It was not disputed that the Jurisdiction Clause is sufficiently wide to encompass the present dispute. The critical question is accordingly whether NB (as distinct from BES) can be taken "to have agreed" the Jurisdiction Clause for the purposes of Article 25.

76. The question whether a jurisdiction agreement is enforceable against someone other than the original party to the contract involves an inquiry as to whether that

second party (NB) has succeeded to the rights and obligations of the original party (BES). That is an issue governed by the applicable national law, which in this case is English law as the law governing the contract: see *Partenreederei Ms Tilly Russ v Haven & Vervoebedrijf Nova NV*, Case 71/83, [1985] 1 QB 935 (ECJ) at [24]-[26], *Trasporti Castelletti Spedizioni Internazionali v Hugo Trumpy*, C-159/97, [1999] I.L.Pr 492 at [41] and *Coreck Maritime GmbH v Handelsveem BV* C-387/98, [2001] CLC 550 at [24].

77. It was common ground between the parties that, in considering, for the purposes of jurisdiction, whether a party (here NB) has become a party to the jurisdiction agreement reflected in the Jurisdiction Clause, the court must evaluate whether the Claimants have the "better argument on the material available": see *Canada Trust v Stolzenberg (No 2)* [1998] 1 WLR 547 at 555 F-G and *Bols Distilleries v Superior Yacht Services* [2006] UKPC 45, [2007] 1 WLR 12 at [28]. The question is one of "relative plausibility" between the two parties' cases, and does not impose a balance of probabilities standard: see Aikens LJ in *Aeroflot v Berezovsky* [2013] EWCA Civ 784, [2013] 2 CLC 206 at [50] and Arden LJ in *Brownlie v Four Seasons Holding* [2015] EWCA Civ 665 at [23].

78. It was also common ground that it is for the English court, applying English law, to decide whether any act of a resolution authority is a measure to which effect is to be given under English law.

79. This is borne out by the approach taken by the courts in earlier cases concerning whether certain Icelandic legal measures constituted "reorganisation measures" or "winding up proceedings" under the Winding up Directive: see *Rawlinson and Hunter Trustees v Kaupthing* [2011] EWHC 566 (Comm) [2011] 2 BCLC 682, *Lornamead Acquisitions v Kaupthing* [2011] EWHC 2611 (Comm), [2013] 1 BCLC 73 and the ECJ in *LBI hf v Kepler Capital Markets* C-85/12 (a reference from a French court).

80. In relation to the central issue of whether the Claimants have the better of the argument that NB is a party to the Jurisdiction Clause, in outline the Claimants' case was that:

(1) The August decision has effect as a matter of English law;

(2) The August decision transferred to NB all liabilities other than the Excluded Liabilities; BES's liability under the Facility Agreement was not an Excluded Liability;

(3) As a result of and at the time of the August decision NB accordingly became a party to the Facility Agreement and the Jurisdiction Clause;

(4) In so far as it is contended by NB that the December decision means that it ceased to be a party to the Facility Agreement that is a "Dispute" to be determined under the Jurisdiction Clause to which NB had agreed in August;

(5) If it is relevant to consider the status of the December decision then it has no effect as a matter of English law, being the only relevant law.

81. In outline NB's case was that:

(1) The December decision in itself and/or taken together with the other decisions has effect as a matter of English law as a "directive re-organisation measure" under Article 66.

(2) Further or alternatively, it has such effect pursuant to Article 117 and the Winding up Directive because it involves the "exercise of the resolution powers provided for in" the EBRRD.

(3) Further or alternatively, it is to be given effect as a matter of common law as it involves foreign universal succession which the English courts will recognise.

(4) As a result of (1) and/or (2) and/or (3) the effect of the December decision is that NB is not a party to the Facility Agreement or the Jurisdiction Clause.

82. The starting point is that it is common ground between the parties that the August decision is a decision to which effect must be given as a matter of English law. As stated by NB's solicitor, Mr McNeill, it is "common ground that the 3 August decision was valid and effective, and that it was of a character to which effect must be given in England".

83. That decision involves a "transfer" that is required to be given effect by Article 66 and thus has effect pursuant to Regulation 5.

84. In reply oral submissions, it was pointed out by NB that the amendment to Regulation 5 which added the reference to Article 66 did not come into effect until 10 January 2015 and thus would not have applied at the time of the August decision. However, it was accepted that the August decision still had effect as a matter of English law as it involved "the exercise of the resolution powers" provided for in the EBRRD, and specifically the transfer power under Article 63(1)(d) and Article 40(1).

85. The next point is that it is clear, on the material before the court, that the Claimants have a good arguable case and the better of the argument that as a matter of fact the Oak Liability was not an Excluded Liability and that the rights and liabilities under the Facility Agreement were accordingly transferred to NB.

86. On the facts material to the present case, for the Oak Liability to be an Excluded Liability it would need to be established that:

(1) GSI was a shareholder with a participation of equal to or higher than 2% of the share capital of BES, or had (in the two years prior to the August decision) a participation equal to or higher than 2% in the share capital of BES; <u>and</u> that

(2) Oak was acting on behalf of GSI in entering into the Facility Agreement.

87. The Claimants' evidence may be summarised as follows:

(1) The Bank of Portugal's contention, as set out in the December decision, that there are grounds for considering that GSI fell within Art 145-H(2)(a) of the Banking Law is based on a transparency disclosure made by The Goldman Sachs Group, Inc on 21 July 2014, stating that it held (a) directly and indirectly, shares corresponding to 1.60% of BES's share capital; and (b) long economic positions in BES corresponding to an additional 0.67% of BES's share capital. However, the financial instruments making up the latter position

were cash-settled synthetic swap and contract-for-differences transactions between GSI and other counterparties that conferred on GSI no acquisition, ownership or voting rights in respect of the underlying BES shares. Under Portuguese law, holding such financial instruments does not amount to a direct or indirect holding or participation of BES shares for the purpose of Article 145-H(2)(a). When quantifying the degree of participation in a credit institution under Portuguese law, in addition to the holding of shares, only contractual instruments which confer rights to purchase shares or voting rights attached to shares (at the holder's sole initiative) can be considered.

(2) Oak was a special purpose vehicle owned by an independent Dutch foundation. It was required to ensure that none of its directors were directors, officers or employees of Goldman, Sachs & Co or any of its subsidiaries (which include GSI), to conduct its own business in its own name and to hold itself out as a separate entity. Oak's loan to BES was funded by monies provided by the original subscribers of the notes (and not by GSI). GSI assisted in structuring the transaction as (among other things) dealer and arranger. Before the physical settlement of the notes in February 2015, all rights in respect of the Facility Agreement were vested in Oak and secured in favour of the Trustee thereunder and noteholders (and not GSI). Oak accordingly did not act on behalf of GSI.

88. NB put in no evidence of its own to challenge the Claimants' factual case and indeed expressly did not "seek positively to assert the correctness of the decisions of the Bank of Portugal".

89. If, as I find to be the case, the Claimants have an arguable case to the requisite standard that the Oak Liability was not an Excluded Liability and that the rights and liabilities under the Facility Agreement were transferred to NB, then they submitted that that was sufficient for present purposes. In particular, they contended that once it became a party, NB agreed the Jurisdiction Clause. Whether or not, subsequently, it ceased (for English law purposes) to be a party – an issue that arises as part of the substantive dispute between the parties – is a matter to be determined by the court chosen by the Jurisdiction Clause, to which NB had (on this premise) agreed.

90. NB had no principled answer to this argument. They suggested that the EBRRD (and in particular Article 40(7)) contemplated further decisions being made by the resolution authority. They submitted that this was consistent with Portuguese administrative law and administrative law generally. Even if that be so, however, that does not alter the fact of the August decision in relation to Excluded Liabilities. At the time it was made that was a clear and unqualified decision that depended on matters of fact. As a matter of fact, a liability was either an Excluded Liability or it was not. The criteria for so determining was set out. It might take time to ascertain the relevant facts for that purpose but the facts would not change. There was no call for or need for any exercise of judgment by the Bank of Portugal. The exercise of further judgment is not provided for either in the August decision or in the material terms of Article 145-H which it reflected.

91. NB submitted that the Claimants could not have the "plums" (the August decision) without the "duff" (the December decision). But at the time of the August decision there was no "duff". At the time that the August decision was made and took effect it was a "plums" only decision.

92. I accordingly accept the Claimants' primary case that they have the better of the argument that NB became a party to the Jurisdiction Clause in August 2014 as a consequence of the August decision. If so, then I also accept their case that the status and effect of the December decision is a matter to be determined (if raised in the Defence) in the proceedings commenced pursuant to that Jurisdiction Clause and does not go to jurisdiction.

93. If that be wrong, it becomes necessary to consider the Claimants' secondary case that they have a good arguable case and the better of the argument that in any event the December decision has no effect in English law. This issue falls to be addressed by reference to (1) Article 66; (2) Article 117; and (3) common law.

94. As to (1), the Claimants' case was that under Article 66 it is only a "transfer" which is to be recognised as having effect. A "transfer" means a transfer carried out pursuant to the exercise of resolution powers under the EBRRD and in particular the various types of transfer contemplated by Article 40, namely a transfer, a supplemental transfer, a third party transfer and a re-transfer. The December decision, however, is none of these. It neither purports to be nor is a transfer.

95. NB's case is that this is too narrow an interpretation of Article 66. The notion of transfer is not restricted to one particular act or event, but covers recognition of "the resulting state of affairs" and requires one to consider "the substance of the totality of the measures taken by the resolution authority".

96. I am satisfied that the Claimants have the better of the argument on this issue for a number of reasons and in particular the following:

(1) Their interpretation is consistent with the ordinary meaning of the word "transfer" and with its use elsewhere in the EBRRD and, in particular, Article 40.

(2) It provides a clear demarcation between what is and is not to be recognised.

(3) By contrast, the linguistic basis for NB's interpretation is unclear.

(4) The precise meaning and effect of NB's interpretation is elusive and its scope of application uncertain.

(5) The consequence of NB's argument is that any action taken by the resolution authority which is effectual as a matter of the domestic law of the resolution authority's home state (even if it is only effective unless and until it is set aside) is to be recognised in all other Member States. That is not what Article 66 states. It is also a remarkably wide recognition measure which would lead

to significant variations in the measures to be recognised as between Member States.

(6) Such a consequence is contrary to the structure and terms of the EBRRD. When the EBRRD directs a Member State to apply the law of the state of the resolution authority it does so clearly, as, for example, in Article 66(6).

(7) It is also contrary to the EBRRD regime of mutual recognition which depends upon resolution authorities utilising tools and powers provided for in the EBRRD and subject to the limits set out therein, as, for example, in Article 40(7).

(8) For mutual recognition to be accorded by reference to the idiosyncrasies of the domestic law of the resolution authority's home state would be the converse of the harmonisation of procedures that is the express intent of the EBRRD as set out, for example, in Recital (4).

(9) NB's argument means that a decision which does not purport to be and is not a transfer is nevertheless to be regarded as being a "transfer" under Article 66. Not only is the December decision not a transfer, but it is the antithesis of a transfer, being a statement that there has been no transfer.

97. In oral argument NB laid great stress on the terms of Article 40(7)(b) and the logical difficulty it was said to present. It pointed out that if an asset or liability does "not in fact" fall within the specified conditions for transfer then it will not have been transferred. In those circumstances a re-transfer makes little sense and therefore it is implicitly covering other measures, such as a declaration that there has been no transfer, as in the December decision.

98. As the Claimants pointed out, however, there might well be a situation in which a specific asset or liability had been transferred in error and therefore a re-transfer was required. Even where that was not so, the means by which the situation is to be regularised under Article 40 is a re-transfer, whether or not that is legally required. That is not what the Bank of Portugal did, as was accepted.

99. Further, this is not a case in which the resolution authority is claiming that the requirements of Article 40(7)(b) are satisfied. The Bank of Portugal has not stated or purported to find that the Oak Liability is an Excluded Liability and therefore did "not in fact fall within" the liabilities transferred. It has simply asserted that there are "serious and well-grounded reasons" to so conclude, whilst recognising that that is a matter for a court of law to determine.

100. NB also contended that the Claimants' case produces bizarre and paradoxical results because it means that Article 66 requires the English court to give effect to a "transfer" which as a matter of Portuguese law has not, or must be taken to have not, happened. This, however, begs the question. If the English court is not required to recognise Portuguese law then the result it produces is irrelevant. In any event, there is nothing bizarre about a mutual recognition regime which is founded upon acts taken under the EBRRD, but not upon acts taken outside it.

101. In effect the Bank of Portugal is seeking to bring about a result which is not provided for under the EBRRD, namely to prevent a transfer from taking effect unless and until a court of law has determined that it is effective. If, however, the facts are that the Oak Liability is not an Excluded Liability then that liability was transferred and there is no explicit or implicit requirement that that must first be determined by a court of law.

102. As to (2), the Claimants' case was that the December decision does not involve "the exercise of the resolution powers provided for" in the EBRRD and therefore is not to be recognised. NB contended otherwise on the grounds that the December decision involves the exercise of powers implicitly provided for in the EBRRD and/or that the listed powers are not exhaustive.

103. I am satisfied that the Claimants have the better of the argument on this issue for the reasons given by them and in particular the following:

(1) The resolution powers "provided for" in the EBRRD are those set out therein.

(2) As was acknowledged, the December decision does not involve the exercise of any power set out in the EBRRD.

(3) The contention that it was the exercise of an implicit power is based on the Article 40(7)(b) argument considered and rejected above.

(4) The argument that the listed powers are not exhaustive relies on the fact that Article 63 states that "in particular" the resolution authority "shall have" the listed resolution powers. The fact remains, however, that the powers that the resolution authority "shall have" are those so listed and no others are specified. Further, if there could be some further power provided one would expect it to be set out in the Banking Law, but no such power has been identified. One would also expect it to be referred to at the time of its purported exercise, but the December decision does not do so.

(5) In so far as NB's arguments relies on Article 37(9) which provides that a Member State "may confer on resolution authorities additional tools and powers", that does not assist because the definition of "resolution power" to which effect is to be given as a "re-organisation measure" is "a power referred to in Articles 63 to 72". In any event, no such additional conferred power has been identified.

104. As to (3), the cases on universal succession relied upon by NB are not in point since NB's case is that there has been no succession. If anything, those cases - *National Bank of Greece & Athens v Metliss* [1958] AC 509 and *Adams v National Bank of Greece & Athens* [1961] AC 255 – assist the Claimants since they illustrate how a foreign law measure which is to be given effect as a matter of English law (in this case the August decision - in the *National Bank of Greece* cases a law of universal succession) will not be affected by a later foreign legislature decision purporting to reverse the position retrospectively unless that has effect as a matter of English law. I am accordingly satisfied that the Claimants have the better of the argument on this issue also.

105. For all these reasons I conclude that the Claimants have the better of the argument that NB became a party to the Facility Agreement as a result of the August decision and that this is sufficient to found jurisdiction under Article 25 of the Judgments Regulation. Further or alternatively, the Claimants have the better of the argument that NB remains a party to the Facility Agreement and that the English court accordingly has jurisdiction.

106. In those circumstances it is not necessary to determine GSI's alternative case that a jurisdiction agreement was made by email.

(2) If the English court does have jurisdiction, should it decline to exercise that jurisdiction?

107. NB submitted that the English court should not exercise any jurisdiction which it has under the Judgments Regulation in reliance on the principle of non-justiciability or act of state. In this connection it referred in particular to *Buttes Gas and oil co v Hammer* (Nos 2 and 3) [1982] AC 888 per Lord Wilberforce at 931ff; *Yukos Capital Sarl v OJSC Rosneft Oil Company* [2014] QB 458; [2012] EWCA Civ 855 paras 40ff; *Rahmatullah v MOD* [2014] EWHC 3846 QB at paragraphs [111]-[114] and [116ff], *Shergill v Khaira* [2014] UKSC 33.[2015] 2 WLR 1105.

108. NB submitted that it is well established that the English court will not sit in judgment on the executive or administrative acts of another state and that "the English court ought not to presume to adjudicate upon the status or validity of the decisions of the Bank of Portugal."

109. The first difficulty with this argument is that the English court is not seeking to adjudicate upon the status or validity of any decision of the Bank of Portugal. As already found, the claim does not rely upon the December decision. Further, in so far as that decision is relied upon by way of defence the court will not be pronouncing upon its validity. It will be determining whether it has effect as a matter of English law. If it does then it will give it appropriate effect. If it does not then it will be irrelevant. The court will be considering the underlying factual issue of whether the Oak Liability is an Excluded Liability but the determination of that issue does not impugn the validity of any decision the Bank of Portugal may have made. In any event, that is not an issue which the Bank of Portugal has purported to determine.

110. The second difficulty with this argument is that the Bank of Portugal was not acting as an emanation of the Portuguese state. In *Yukos v Rosneft* the Court of Appeal, having traversed the case law since *Buttes Gas*, summarised the non-justiciability or act of state doctrine (at [66]) as preventing adjudication on the "validity, legality, lawfulness, acceptability or motives of state actors".

111. In this case the Bank of Portugal was not acting as a "state actor" but rather in its capacity as the designated resolution authority for the purposes of the EBRRD. The status of its acts as resolution authority, and the ability of the courts of other Member States to adjudicate on those acts, is regulated, not by doctrines derived

from international or national law such as the act of state doctrine, but rather by the scheme and terms of the EBRRD itself.

112. As the Claimants further submitted, at least at the jurisdictional stage, it is doubtful that there is room for the application of a comity doctrine such as that of act of state in circumstances where it has been determined that the court has jurisdiction under the Brussels Regulation as it is a "civil or commercial matter".

113. For all these reasons I conclude that it has not been shown that the English court should not exercise its jurisdiction under the Judgments Regulation by reason of the doctrine of non-justiciability or act of state.

(3) If the English court should not decline to exercise jurisdiction, should it grant a stay of the proceedings?

114. NB contended that the English court grant a case management stay of the English proceedings pending the decision of the administrative courts in Portugal.

115. Where the Judgments Regulation confers jurisdiction on the courts of the United Kingdom, there is no power to stay or dismiss proceedings in favour of the courts of another Member State except in accordance with the express provisions of the Regulation: *Dicey, Morris & Collins* (15th ed. 2014) at [12-015]; Briggs, *Civil Jurisdiction and Judgments* (6th ed. 2015) at [2.303].

116. It was common ground here that in this case there is no power to stay under the Judgments Regulation (e.g. pursuant to the *lis pendens* rules in Articles 29 or 30).

117. It was also common ground that the court retains an inherent jurisdiction, preserved by section 49(3) of the Senior Courts Act 1981, to stay proceedings commenced before it, including in the exercise of case management: *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173.

118. As the Court of Appeal emphasised in *Reichold*, such stays will only be ordered in "rare and compelling cases": see p186C-D per Lord Bingham CJ. *Reichhold* itself did not concern a case where the Judgments Regulation (or its predecessors applied) or where there was a jurisdiction clause. In *Mazur Media v Mazur Media GmbH* [2004] EWHC 1566 (Ch), [2004] 1 WLR 2966 (a case which had both features), Lawrence Collins J explained that whilst the residual power still existed in such circumstances, it was extremely limited. He stated that:

(1) Such discretion could not be used so as to circumvent the Judgments Regulation and therefore could not be used simply because another Member State was the *forum conveniens*: see [69].

(2) The exercise of the discretion in favour of granting a stay would require the existence of "exceptionally strong" grounds necessary to prevent injustice, especially where the parties had conferred exclusive jurisdiction on the English court; see [70].

(3) Such "exceptional circumstances" are not to be found in "typical forum conveniens factor" such as the multiplicity of proceedings or the danger of inconsistent judgments: see [71].

119. In the present case no "rare and compelling" circumstances, still less "exceptionally strong grounds" have been made out.

120. NB suggested that there was a risk of inconsistent judgments between the English proceedings and the Portuguese proceedings, but that is not so. The English proceedings concern the Claimants' claim for repayment of a debt. That is not a claim which is being or could be determined by the Portuguese administrative court. The Portuguese proceedings concern the validity of the December decision. For reasons already stated, that is not a matter which the English court needs to or will determine. At most there is a factual overlap in relation to the question of whether the Oak Liability is an Excluded Liability but the risk of differing decisions on an underlying factual issue does not involve inconsistent judgments. Even if it did, that would be a factor of little if any weight in circumstances where there is an exclusive jurisdiction clause and, for good measure, an express agreement that the English courts "are the most appropriate and convenient courts" to settle disputes under the Facility Agreement and that neither party "will argue to the contrary".

121. In any event, there are compelling reasons why the court should not grant a stay. In particular, the resolution of the Portuguese proceedings is likely to take a number of years and NB, as a bridge institution, is in the process of being sold.

122. NB had a fallback application that a stay should be granted pending the determination by the Portuguese administrative court of GSI's application for an interim suspension of the effect of the December decision, which is likely to be later this year. NB, however, have failed to make out a proper basis for any case management stay, whatever its duration.

123. I accordingly reject NB's application for a stay.

Conclusion

124. For the reasons outlined above I conclude that NB's application should be dismissed.