Neutral Citation Number: [2019] EWHC 3568 (Comm)

Case No: CL-2019-000572

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 20 December 2019

Before :

Mr Justice Andrew Baker

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Between :

Enka Insaat ve Sanayi A.S	**Claimant**
- and -	
(1) OOO "Insurance Company Chubb"	**Defendants**
(2) Chubb Russia Investments Limited	
(3) Chubb European Group SE	
(4) Chubb Limited	

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Charles Béar QC and Rupert Allen (instructed by **Shearman & Sterling (London) LLP**) for the **Claimant**
David Bailey QC, Marcus Mander and Clara Benn (instructed by **Kennedys Law LLP**) for the **Defendants**

Hearing dates: 11th, 12th December 2019

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Approved Judgment

Mr Justice Andrew Baker:

Preface

1. This is my judgment following an expedited trial last week of a claim by the claimant ('Enka') for declaratory relief and an anti-suit injunction in respect of what it says is a breach and threatened continuing breach of an agreement to refer disputes to ICC arbitration with London seat. The substantive proceedings said to have been brought in breach of that arbitration agreement are proceedings brought by the first defendant ('Chubb Russia'), a Russian insurer in the well-known Chubb Group, against Enka and 10 other parties, seeking damages in relation to a massive fire in February 2016 at the Berezovskaya power plant in Russia. Those proceedings are in the Moscow Arbitrazh (i.e. Commercial) Court, under action number A40-131686/19-89-822, and I shall call them 'the Moscow Claim'.
2. Enka claims that the second to fourth defendants ('Chubb UK', 'Chubb Europe' and 'Chubb Switzerland'), are amenable to being restrained by injunction also, on a suggestion that they are, or may be, 'pulling the strings' behind the breach, if it be a breach, of the arbitration agreement.
3. This judgment has been prepared in some haste to ensure the parties have my decision before the Christmas vacation, since a key milestone in the Moscow Claim has been set for 22 January 2020, and, it is thought, will not be delayed any further having already been adjourned twice. Whilst I can assure the parties that I have reflected with care on all of the points raised by them in writing or orally, they must forgive me that, in the circumstances, this judgment will not deal with all of those points, since in my analysis of the case many do not need to be decided, and may not deal as fully with some of those that matter as I might have done had there been more time.
4. I pay tribute to, and am very grateful for, the clear, thorough and helpful arguments prepared and presented by the parties, and for the efficient and useful way in which they dealt with the expert evidence of Russian law adduced for trial so that the trial, including cross-examination of the experts, Dr Andrey Loboda (called by Enka) and Prof Anton Asoskov (called by the defendants) was completed within two long sitting days. In particular as to thoroughness, the citation of authority was impressively comprehensive, the bundles of authorities running to some 62 decided cases, from *Hamlyn & Co v Talisker Distillery* in May 1894, [1894] AC 202, to *A v B* in July 2019, [2019] EWHC 2478 (Comm), and the textbook extracts and learned articles listed in the bibliography appended to this judgment.

Introduction

5. Apart from any impact of the arbitration agreement invoked by Enka, there could be no argument but that the Moscow Arbitrazh Court is an appropriate forum for Chubb Russia's substantive claim, and the Moscow Claim as brought is a suitable and convenient vehicle for its pursuit. The procedural background to the trial before me was somewhat chaotic, leading to a refusal of interim relief when the matter first came before the court: [2019] EWHC 2729 (Comm). Directions were instead set for the case to come on for final hearing, as it now has, on an expedited basis. (I mention for completeness that Mr Béar QC and Mr Allen, who appeared before me for Enka, were instructed only after that hearing before Carr J, DBE.)
6. I emphasise at the outset that it has been the defendants' position throughout that this court should not be getting involved, the question whether the arbitration agreement extends to the claim being brought against Enka in the Moscow Claim, being, say the defendants, a question of Russian law, and the Russian court being seized of an application by Enka to dismiss the claim against it without consideration, i.e. without reference to the merits, pursuant to Article II(3) of the New York Convention.

7. In *The Angelic Grace* [1995] 1 Lloyd's Rep 87, Millett LJ, as he was then, said this at 96 rhc:
   "*... where an injunction is sought to restrain a party from proceeding in a foreign court in breach of an arbitration agreement governed by English law, the English court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. ... The justification for the grant of the injunction ... is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction is of course discretionary, and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case.*"
   This was a bold approach, or at any rate it seemed so at the time, but it was explained and justified on the basis that, at 96 lhc: "*There is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them.*"; and at 96 rhc, as regards the need to act promptly: "*If there should be any reluctance to grant an injunction out of sensitivity to the feelings of a foreign court, far less offence is likely to be caused if an injunction is granted before that court has assumed jurisdiction than afterwards.*"
8. In the 25 years since, Millett LJ's punchy statement of principle has become established, orthodox doctrine under English law. That is so even though it was *obiter* and the actual result, an anti-suit injunction to restrain Italian proceedings, cannot obtain under the Brussels-Lugano jurisdictional scheme after *The Front Comor, West Tankers Inc v Allianz SpA*, Case C-185/07, [2009] 1 AC 1138. *The Front Comor* definitively settled the law in favour of the proposition that it is incompatible with the Brussels Regulation for the court of a Member State to issue an anti-suit injunction relating to proceedings in another Member State in a civil or commercial matter, in that regard remembering that the 'target' proceedings are not prevented from being proceedings in a civil or commercial matter so as to fall within the scope of the Regulation because they are brought, if they are, in breach of an agreement to arbitrate, notwithstanding that arbitration falls outwith the scope of the Regulation. (In the *Gazprom* case, Case C-536/13, [2015] 1 WLR 4939, the Advocate General suggested that that proposition does not hold true for the recast Brussels Regulation. I agree with the decision of Males J, as he was then, in *Nori Holding Ltd v PJSC Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm), [2018] 2 All ER (Comm) 1009, that the Advocate General's suggestion is unsound.)
9. When I say that Millett LJ's approach is now orthodox English law, that is as part of the *lex fori* governing a question properly raised before the English court whether to restrain by injunction a breach or threatened breach of contract. Under the common law, such a question is governed by the *lex fori*: see *Dicey*, para 7-011*ff*. It has yet to be decided whether that remains true under the Rome I Regulation (Regulation (EC) No 593/2008), the suggestion in *Dicey* at para 32-155 being, "*with some hesitation*", that it is a matter for the *lex contractus* under Rome I. But Rome I does not apply to arbitration agreements.
10. As stated, Millett LJ's formulation of the guiding principle is premised upon there being a breach of an arbitration agreement governed by English law. In the present case, the defendants say that the commercial contract in question and the arbitration agreement within it are governed by Russian law, and that that is a 'game changer'. Their simple, primary argument in that regard is that it was and is of the essence of the orthodox doctrine that the anti-suit injunction is sought by way of enforcement of an arbitration agreement governed by English law. As will be seen, I disagree and prefer what may be regarded as a more subtle, but I think a more robust, analysis.

11. Finally, by way of scene-setting, as in *The Angelic Grace* itself, it is common ground that there exists between Enka and Chubb Russia a valid and binding arbitration agreement. That is so even though Chubb Russia is suing in Moscow, and is therefore sued here, as subrogated insurer of Enka's original contractual counterparty. Whether Russian law or English law governs that question, it is common ground that such an insurer is bound by its insured's applicable arbitration agreement. The dispute between the parties, then, again as it was in *The Angelic Grace*, is whether the claim being pursued in the target proceedings is a claim in tort that falls outside the scope of the agreement to arbitrate.
12. The detail is more complex than it was in *The Angelic Grace*, however, because in that case there was no dispute but that the claim as brought in Italy was a claim in tort, and it was common ground that the question whether it fell within the scope of the arbitration agreement was governed by English law. Here, as I have said, the law applicable to the question of the scope of the arbitration agreement is disputed; and it is also contentious between the parties whether the claim as brought under Russian law in the Moscow Claim is a claim in tort, or, more strictly, whether it is viable as such. Furthermore, it is effectively common ground that if the question of the scope of the arbitration agreement is governed by English law, then that claim, however it is to be characterised under Russian law, is within that scope. The defendants' argument that the claim, if rightly characterised as a claim in tort, falls outwith the scope of the arbitration agreement, only arises at all if they are right that scope is a matter of Russian law.

Basic Facts

13. Enka is an international construction and engineering business based in Turkey but with a substantial presence and history of operations in Russia. In fact, it has global operations across Europe, Africa, Asia, the Middle East and South America. Chubb Russia, as I have said already, is a Russian insurer in the Chubb Group of companies. Chubb Switzerland is the parent company of the Group. Chubb UK is a UK company and is intermediate holding company for Chubb Russia within the Group. Chubb Europe is a French company which reinsured much of the risk under the insurance policy giving rise to Chubb Russia's subrogated rights.
14. On the evidence from the defendants for trial, Chubb Russia reinsured 93.75% of the relevant property risk with Chubb Europe. Chubb Europe in turn retained only 6.25% of the risk, matching the initial retention by Chubb Russia itself, 87.5% of the risk therefore being further reinsured, into the German reinsurance market. Chubb Russia and Chubb Europe then each ceded most of their respective 6.25% retentions to a Bermudan captive within the Chubb Group called Tempest Re. Tempest Re in turn had its own reinsurance arrangements.
15. The overall effect of the reinsurance and retrocession arrangements, on the evidence, is that although 26.1 billion Roubles (c.US$400 million) was paid out on the underlying fire claim, assuming all reinsurances and retrocessions are valid and good credits, the total net exposure of Chubb Russia and Chubb Europe is US$2.5 million each and the overall net exposure of the relevant business division of the Group is US$25 million.
16. In May 2011, CJSC Energoproekt was engaged by PJSC Unipro, at the time named E.ON Russia, as general contractor for the design and construction of the Berezovskaya power plant. Enka in turn was engaged by Energoproekt to provide works relating to the boiler and auxiliary equipment installation. That was done by a contract dated 27 June 2012 ('the Contract'). The Contract is a massive document: it runs to some 97 pages, with around 400 pages of attachments. It is contentious, but not a matter for this trial, whether any work for which Enka was responsible had any role in causing the fire in February 2016.

17. The Contract was executed in Russian and English versions within a single document, set out with the Russian and the English side by side in a landscape format, A4 pagination, a format familiar to this court in relation to cases involving commercial contracts with Russian connections. It provides that the Russian language version of its terms prevails in case of inconsistency or conflict.
18. It contains no provision stating in so many words that it, the Contract, is governed by a specified system of law, for example Russian law or English law. The defendants say, though, that a choice of Russian law to govern the Contract is nonetheless clearly demonstrated by its terms and the circumstances of the case for the purposes of Article 3(1) of Rome I.
19. The arbitration agreement appears within clause 50.1 of the Contract. Clause 50 is in these terms:

    "***Resolution of disputes***

    50.1. The Parties undertake to make in good faith every reasonable effort to resolve any dispute or disagreement arising from or in connection with this Agreement (including disputes regarding validity of this agreement and the fact of its conclusion (hereinafter – "Dispute") by means of negotiations between themselves. In the event of the failure to resolve any Dispute pursuant to this Article within 10 (ten) days from the date that either Party sends a Notification to the opposite Party containing an indication of the given Dispute (the given period may be extended by mutual consent of the Parties) any Party may, by giving written notice, cause the matter to be referred to a meeting between the senior managements of the Contractor and Customer (in the case of the Contractor senior management should be understood as a member of the executive board or above, in the case of Customer, senior management shall be understood as general directors of their respective companies). The parties may invite the End Customer to such Senior Management Meeting. Such meeting should be held within fourteen (14) calendar days following the giving of a notice. If the matter is not resolved within twenty (20) calendar days after the date of the notice referring the matter to appropriate higher management or such later date as may be unanimously agreed upon, the Dispute shall be referred to international arbitration as follows:

    • the Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce.

    • the Dispute shall be settled by three arbitrators appointed in accordance with these Rules,

    • the arbitration shall be conducted in the English language,

    • the place of arbitration shall be London, England.

    50.2. Unless otherwise explicitly stipulated in this Agreement the existence of any Dispute shall not give the Contractor the right to suspend Work.

    50.3. Not used.

    50.4. Not used.

    50.5. All other documentation such as financial documentation and cover documents for it must be presented in Russian."
20. Energoproekt, Unipro and Enka entered into an assignment of rights and obligations on 21 May 2014, by which Energoproekt assigned to Unipro all rights against Enka resulting from the Contract. Clause 7.5 of that assignment agreement essentially reiterated the arbitration agreement and confirmed that disputes (i.e. now disputes between Unipro and Enka) were to be finally and exclusively resolved by arbitration in accordance with the provisions of clause 50.1 of the Contract. That said, one specific point arose whether clause 7.5 on its terms

narrowed as between Unipro and Enka the scope, as compared to the original scope between Energoproekt and Enka, of the obligation to arbitrate.

21. At the time the Contract was executed, Enka was one of many contractors or subcontractors providing services in connection with the power plant. That was, as is often found in large construction projects, a matter expressly contemplated within the Contract; for example, in its clause 4.30.
22. As I mentioned at the outset, the massive fire occurred in February 2016. In or between November 2016 and May 2017, Unipro received payment from Chubb Russia in respect of the fire damage under the primary insurance. Later in 2017, a Russian law firm, Rodin Djabbarov & Partners ('RDP') wrote a letter on behalf of Chubb Russia to Enka, notifying Enka of the insurance losses incurred and asserting that the fire had been caused by defects in the fuel oil pipelines which RDP contended were attributable to low-quality performance of works for which Enka was responsible under the Contract. The letter did not expressly threaten proceedings, let alone imminent proceedings, or mention any specific forum. But, as it seems to me, it will have raised, and obviously so, at least a possibility that should any claim in due course emerge against Enka, Chubb Russia would be using RDP for the claim and there was a possibility that that claim would be filed in a Russian court. On any view, assuming that Enka did not, as indeed it did not, accept the responsibility asserted against it, clause 50.1 of the Contract was triggered if the nature of the allegation against Enka was such as to be capable of generating an arbitrable dispute. Enka, it appears on the evidence, did nothing at all in response to that letter.
23. At the time of RDP's letter, a Russian state commission, established in 2016, was still investigating the circumstances of the fire. In due course it reported in April 2018. It is and will be said by Chubb Russia, wherever the merits are ultimately dealt with, that the commission report supports its case that there was culpable bad work on Enka's part that was involved in the fire. So far as concerns events visible to this court on the evidence, a year then passed until, by letter dated 24 April 2019, RDP, again acting on behalf of Chubb Russia, sent to Enka what was plainly in the nature of a letter before action. It alleged, again, that defects in works performed by Enka had caused the fire. It contended that Enka and 10 other parties (unsurprisingly, now, those parties being the co-defendants in the Moscow Claim) were responsible for damage in respect of which the US$400 million or so had been paid out under the insurance. Provisions of the Russian Civil Code concerning liability in tort were identified and asserted to give rise to the basis for a claim.
24. The letter concluded that if Enka did not make payment of the requested compensation, Chubb Russia reserved the right to seek remedy in a lawful manner, including application to a court. There was, again, no explicit mention of any particular forum. However, the word used was 'court' and not arbitration. The asserted basis for the claim was, as it remains in the Moscow Claim, Russian Civil Code provisions for liability in tort, especially Articles 1064 and 1096 of that Code.
25. As between itself and Chubb Russia, Enka did nothing to respond to that letter or the obvious threat it contained of bringing a claim, if a claim was required, in court; in all practical likelihood that would be a Russian court. Instead, by letter of 8 May 2019, Enka wrote to Unipro, noting the letter before action threatening to sue Enka if compensation were not paid. Enka asserted that it had no liability and could have no liability, on the basis (which in due course on the merits wherever they are determined will be Enka's case, and has been throughout) that Unipro had removed from the Contract any relevant scope of works that might have been the works or might have included the works that may have been involved in

causing the fire, such that, on Enka's case, any works badly performed so as to be involved in causing the fire will have been performed by a different party.

26. Enka having thus not responded in any way to Chubb Russia, Chubb Russia filed the Moscow Claim with the Moscow Arbitrazh Court on 25 May 2019. On the evidence, Enka became aware of that filing very promptly on 29 May 2019. Under what appears to be a procedure of preliminary review by the court of claims filed (I know not whether applied to every case or only in certain matters such as, for example, high-value or multi-party litigation), the court by a ruling on 30 May 2019 formally deferred acceptance of the claim as lodged and required Chubb Russia to remedy by 1 July 2019 what the court determined to be deficiencies in the articulation of the claim. As I understand the evidence I have on that, and it may be inappropriately using an English lawyer's terminology, essentially the court's view appears to have been that what was filed insufficiently particularised the allegations and the basis of liability for the court to able to say that a legally viable claim against each separate defendant had been articulated.
27. It appears that Enka saw a copy of that ruling on 3 June 2019. On 4 June 2019, Enka then received the filed Moscow statement of claim, although not its attachments.
28. Enka, pursuant to its initial contact with Unipro in May, continued not to do anything to respond to Chubb Russia's proceedings, but rather to deal with Unipro. There was, it seems, a senior-level meeting at Unipro's offices in Moscow on 19 June 2019, following which Enka wrote again to Unipro by letter dated 30 June 2019. That letter enclosed a memorandum prepared by Shearman & Sterling LLP as attorneys to Enka. Shearman & Sterling have then continued to act for Enka throughout and are solicitors of record in the proceedings here. The memorandum addressed the arbitrability of the claim being pursued by Chubb Russia in the Moscow Claim by reference to its nature and a possible interpretation of the scope of the arbitration agreement within clause 50.1 of the Contract. The letter to Unipro, informed by that memorandum, concluded as follows:

    "*By commencing a court action in deliberate disregard of a valid and binding agreement to arbitrate, Chubb has breached the arbitration agreement between UNIPRO and ENKA. Chubb should be asked to desist from any further action against ENKA in the Russian courts as a matter of urgency.*

    We are concerned that the only plausible motivation for a party to frustrate an arbitration agreement may be its belief that it would obtain some undue advantage in local litigation.

    ...

    It is our hope and belief that a reputable American company such as Chubb and its reinsurers would be extremely concerned about these matters and that if presented with accurate facts its senior management would never sanction a frivolous claim before local courts based upon a questionable report that deprives Enka of its right to an impartial, independent and confidential international arbitration process.

    As we understand that E.ON/UNIPRO has a global professional relationship with Chubb, it is well placed to inform Chubb and its decision-makers in US of the accurate facts and to remind it of Unipro's and thus now Chubb's obligations under the arbitration agreement. As a matter of priority therefore we urgently request you reach out to Chubb through your relationship contacts to put them on notice of the accurate facts and to request that they not interfere with the heretofore-excellent relationship between Unipro and Enka."
29. I agree with a specific submission made by Mr Bailey QC, for the defendants before me, that on the face of things, supported, as it would say, by Shearman & Sterling's analysis, Enka was thus fully briefed by, at the latest, the end of June, to demand arbitration, to start arbitration, and indeed, if it felt it appropriate to do so, to approach this court for anti-suit

injunctive relief. In reality, it could readily have been in that position within a matter of a week or two of the original letter before action in late April.

30. By email on 1 July 2019, Unipro replied to Enka stating: "*Local CHABB [sic.] confirmed that the initiative came from international level and they will transfer our concerns accordingly*". The email, on the face of things, was also supportive of Enka's underlying position on the merits, stating that Unipro were "*fully on the same page with you regarding ENKA's role in the construction and further accident. We have a strong position that your company has nothing to do with the accident at all.*"
31. The reference to Chubb being involved at an "*international level*" was, in fact, although Enka may only have learned this from the evidence in due course filed in this court, a relatively limited and commercially unsurprising aspect of the matter. In its capacity as primary reinsurer of Chubb Russia, Chubb Europe has the right to be consulted in relation to the handling and prosecution of any claim arising from the fire. Likewise, a consultative panel from the German retrocession market has a right to be consulted by Chubb Europe. That said, under the terms of the reinsurances and retrocessions, rights of final decision remain always with Chubb Russia.
32. Local Chubb Russia claims personnel, however, work under the supervision of Mr Andrew McAvan of Chubb Services UK Ltd ('Chubb Services') in London, not one of the Chubb companies sued. He is the Eurasia Property and Energy Technical Claims Manager for the Chubb Group. As such, he is authorised by Chubb Russia to manage the claim on its behalf, in the same way as he would be authorised by any number of other Chubb Group entities to handle claims on their behalf, depending, in the usual way, on amounts involved requiring claims to be handled at a more or less senior level. Thus decisions in relation to the Moscow Claim have been and are being made by Chubb Russia, but always in conjunction with Mr McAvan, reporting, as he does in turn, to a Claims Director at Chubb Services, currently Julie Chalmers, previously Peter Murray and Steve Parry. On the evidence, Chubb Switzerland and Chubb UK have had no relevant involvement at all, although it may be that some information in relation to the Moscow Claim has, at some stage, been provided to some Group board members.
33. On 29 July 2019 there was a second ruling of the Moscow Arbitrazh Court, asking for additional information from Chubb Russia to particularise its claims and giving it until 23 August 2019 to comply. Chubb Russia therefore filed a substantial motion supplementing its statement of claim on 22 August 2019. This appears to have done the trick, at all events in the sense that the Moscow court was now persuaded that there had been sufficiently particularised a claim viable on the merits in principle, so as to accept the claim to be dealt with in the proceedings as filed. That ruling was made on 3 September 2019. Enka was aware of that ruling from the following day.
34. Its response, again, was not to engage with Chubb Russia or RDP. Instead, by email on Friday, 13 September 2019 from Shearman & Sterling to Joseph Wayland in the US, general counsel for the entire Chubb Group, demand was made that the Moscow Claim be withdrawn by no later than 12 noon the following Monday, failing which it was suggested Enka would have no option but to commence legal proceedings to seek restraining and discovery orders and damages for wrongful pursuit of the Russian proceedings. That Monday, 16 September 2019, Mr Wayland replied by email, noting, accurately, that the Friday email had been the first correspondence to him on the matter. It stated that he, Mr Wayland, had not been contacted to determine if he might have access to the message or materials to be able to respond, or have any ability at all at such short notice to investigate the issues raised, and suggested, as it seems to me reasonably and unsurprisingly, that Enka should provide a

reasonable time for a properly considered response before commencing any legal action. That day, Enka issued the Arbitration Claim Form in this court.

35. The next day, 17 September 2019, Enka filed its motion with the Moscow court, seeking dismissal without consideration of the claim against it on the basis of the arbitration agreement. The Russian court therefore adjourned proceedings at the preliminary hearing of the Moscow Claim that day, to 23 October 2019. It is significant to note that Enka's motion to the Moscow court expressly contended that the Contract contains an express choice of Russian law as governing law. It treated all parts of the question whether Chubb Russia is obliged to arbitrate as governed by Russian law, that is to say (a) whether Chubb Russia, being an insurer, is bound, (b) the proper characterisation of the claim (contractual, as Enka would assert, rather than tortious, as was plainly being asserted by Chubb Russia), and (c) the scope of the arbitration clause.
36. The basis of the motion was that, properly characterised, no tort liability arises, since the claim is ultimately founded on an allegation of improper performance of contractual works, and, as a result of that true characterisation of the claim, it is a claim that falls within the arbitration agreement and must be arbitrated. It did not contend that the arbitration clause was applicable, even if the characterisation of the claim as tortious were correct, and such a claim were available despite the existence of the primary contractual relationship.
37. By email of 20 September 2019, Cem Celiker, general counsel at Enka, proposed to Mr Wayland discussions between Enka and Chubb and proposed that the Moscow Claim be adjourned until the newly commenced English proceedings had been determined. That message was responded to the same day by Mr McAvan, indicating that the matter had been passed on to him, that he was investigating and would respond further. Enka, as in part threatened in its initial contact with Mr Wayland, also that day commenced proceedings in the US under section 1782 of the United States Code, obtaining subpoenas against Chubb Group Holdings Inc and one of its officers relating to this matter.
38. On 23 September 2019, Enka issued its application for permission to serve out of the jurisdiction and for interim injunctions. Notice of those applications was sent to the defendants before me and Mr McAvan on 26 September 2019. On 30 September 2019 Kennedys Law LLP, who are now on the record for all of the defendants, acknowledged service on behalf of Chubb UK and Chubb Europe, and Teare J granted permission to serve out on Chubb Russia, Chubb Europe and Chubb Switzerland.
39. On 2 October 2019, at Enka's request, a hearing was listed for 15 October 2019 to consider its application for interim injunctive relief. That hearing took place and resulted in the judgment of Carr J, to which I have already referred.
40. On 22 October 2019 – it will be recalled that by now the next hearing in the Moscow Claim had been set for the following day – Enka filed a further brief to the Moscow court, in substance amending its application to dismiss without consideration, and supported by an opinion from Lord Neuberger to the effect that, as a matter of English law, the arbitration agreement in the Contract was valid, operative and capable of being performed, that it bound Chubb Russia as insurer and that, in his view, it covered the claim brought against Enka in the Moscow Claim.
41. At the preliminary hearing, as adjourned, the following day, Chubb Russia submitted its own substantial further written brief opposing the motion to dismiss, their brief supported by an opinion from Prof Adrian Briggs, to the effect that, applying English law conflict of laws principles, in his view the arbitration agreement would be found to be governed by Russian law. Enka sought and was granted further time to respond to that new material, and the

motion to dismiss was therefore again adjourned, as was the preliminary hearing in the proceedings generally, this time to 27 November 2019.

42. Considering the supplementary brief from Enka, it now said that, applying Russian conflict rules, the arbitration clause is governed by English law, on the basis that the choice of governing law for the Contract generally does not extend to an arbitration agreement within it, such an arbitration agreement requiring, they contend under Russian law, its own separate choice of law. It concluded that, on that basis, there is no choice of law for the arbitration agreement, and by default, under Russian rules, argued that the arbitration agreement is treated as governed by the law of the seat.
43. Enka's motion continues to contend in the alternative that if Russian law does apply to the arbitration agreement, it nonetheless covers the claim brought against Enka in the Moscow Claim because, as Enka has been submitting, the claim is founded upon alleged breaches of the Contract and therefore should be characterised as contractual in nature under a Russian classification so as then to be arbitrable.
44. In this jurisdiction, on 7 November 2019, Chubb Switzerland issued an application to set aside the order granting permission to serve out on the grounds, *inter alia*, that there is no serious issue to be tried, and also complaining of a failure to give full and frank disclosure to Teare J. That application is, although I said at the outset this has been an expedited trial, before me on this occasion also.
45. The preliminary hearing in the Moscow Claim occurred on 27 November 2019. The Moscow court considered and dismissed a motion by one of the co-defendants before it to transfer the case to a different Arbitrazh court based elsewhere in Russia, and considered a request by Enka to submit additional material because of the submission of Chubb Russia of further material, including a supplemental opinion from Prof Briggs which he had prepared, as I would describe it, having identified that there was a sense in which his and Lord Neuberger's original exchanged opinions had passed like ships in the night as regards the matters they had been asked to address.
46. The Moscow court did not deal with the Enka motion to dismiss on its substance and adjourned proceedings, for what is thought to be the final time it will allow, scheduling a next hearing before it for 22 January 2020, at which it will require a statement by Enka, and for that matter the 10 co-defendants, of any position they intend to advance in the Moscow Claim on the merits. It is common ground that Enka's motion to dismiss thus will now fall to be dealt with at the hearing on 22 January 2020 unless there is then a yet further adjournment, and that any filing by Enka of an indication of its position on the merits whilst it is simultaneously pursuing that motion to dismiss will not itself be a submission to the jurisdiction.

Choice of Seat

47. I find it convenient to consider first, as I now analyse the case, the effect or implication of the choice of London as the seat for any arbitration that is expressed within clause 50.1 of the Contract. What I am about to say assumes for the moment that the approach the English court takes to that issue is what matters. I should also be clear that this judgment concerns and concerns only cases such as the present where there is a single contract, one express term of which is or includes an agreement to arbitrate disputes. In such cases the separability of the agreement to arbitrate is or may be an important concept (enshrined in this jurisdiction by s.7 of the Arbitration Act 1996), but it remains the case that there is a single contract, one term of which is that agreement with that particular characteristic. Although it has acquired some currency – for example it appears in *Glick*, in *Joseph* and in *Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd* [2013] EWHC 4071 (Comm), [2014] 1

Lloyd's Rep 479 – I do not find the label 'matrix contract' illuminating and would discourage its use.

48. I take the following to be trite law, for all parts of which, were authority required, *Hamlyn v Talisker*, *supra*, has been authority for as long as this court has existed:
    a. In principle, different parts of a single contract may be governed by different systems of law.
    b. The separability of an arbitration agreement makes it a natural candidate for at least the possibility that it might be governed by a system of law different to that which governs the contract generally.
    c. An express choice of seat may, but need not, convey or imply a choice of governing law for an arbitration clause.
49. I would also take it to be trite that every case must be judged on the particular terms of the contract under consideration; that those terms must be considered in the round – it would be as wrong to reach a firm conclusion as to what a choice of seat conveys or implies by considering the arbitration clause in isolation as it would be to reach a firm conclusion as to the scope of any choice of governing law conveyed or implied by other provisions without having regard to the arbitration clause – and that therefore there is limited utility in seeking to formulate or proceed to a decision from generally stated rules or presumptions as to the strength with which a choice of seat does or may convey or imply a choice of governing law for the arbitration agreement. Thus, for example, though *Glick* and *Joseph* are stimulating reads, *Glick* in particular being adopted in argument before me by Mr Béar QC for Enka, it is ultimately tilting at windmills to debate whether "*an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate*", *per* Moore-Bick LJ, *obiter*, in *Sulamérica SA v Enesa Engenharia SA* [2013] EWCA Civ 638, [2013] 1 WLR 102, at [26]; or, to the contrary: "*The arbitration agreement is likely to have been intended to be governed by the law of the seat: this is inherent in the choice of seat, whether or not the matrix contract is expressly or impliedly governed by a different law*", the proposition advanced by *Glick*.
50. I respectfully agree with Lord Neuberger MR at [51] in *Sulamérica* that whether the proper law of an arbitration agreement is that of the country whose law is to apply to the contract generally, or that of the country specified as the seat of the arbitration if a seat be specified, is a matter of contractual interpretation, so that inevitably "*the answer must depend on all the terms of a particular contract, when read in light of the surrounding circumstances and commercial common sense*".
51. That said, I venture to offer these observations of my own, whether or not they might be decisive in any particular case.
52. Firstly, I think it an error of analysis to see *Sulamérica* as a case about whether the express choice of Brazilian law for the policy meant there was an implied choice of Brazilian law for the arbitration agreement. I say that fully acknowledging that that is how Moore-Bick LJ articulated his conclusion in the case at [31], but emboldened by the fact that counsel before me did not identify any flaw in what I am to suggest is the better view.
53. The choice of law clause in *Sulamérica* was clause 7 of the policy and was in these terms:

    "***Law and jurisdiction***

    It is agreed that this policy will be governed exclusively by the laws of Brazil. Any disputes arising under, out of or in connection with this policy shall be subject to the exclusive jurisdiction of the courts of Brazil."
54. The question that arose was the proper construction of clause 7, not a question of implied choice. Looking at clause 7 in isolation, it might naturally be thought that saying "*this policy*

will be governed exclusively by the laws of Brazil" would convey that the meaning and effect of all of the terms of the policy was to be governed by Brazilian law; and the arbitration agreement was one such term, it was clause 12 of the policy. It is logic of that ilk, I apprehend, that will have encouraged the editors of *Dicey* to state at para 32-021 that "*where there is an express choice of law of the contract as a whole, that law will normally govern the interpretation of the forum selection agreement or the arbitration agreement*", albeit following *Sulamérica* they now say that their proposition "*although no doubt true in practice, requires some qualification*", referring to their Supplement to para 16-018 (Note 40). See also *Arsanovia et al v Cruz City I Mauritius Holdings* [2012] EWHC 3702 (Comm), [2013] 1 Lloyd's Rep 235, *per* Andrew Smith J, *obiter*, at [22].

55. But, properly construing an express contract term does not stop at what the words of the term might naturally convey when considered in isolation. The *Sulamérica* decision then is better understood as a decision that, upon the proper construction of the policy, i.e. considering what reasonable parties in the position of the contracting parties would have understood to be conveyed by the words they used in their contract in the circumstances in which they were contracting, the choice of Brazilian law in clause 7 did not convey after all that clause 12 was governed by Brazilian law.
56. That view, to my mind, exposes the primary argument in *Glick* as flawed. The authors' essential contention is that it ought to make no difference, to a conclusion that a choice of seat conveys a choice of governing law for the arbitration clause, that the contract in which the arbitration clause appears contains an express general governing law clause. But the obvious difference it may well make is that the express choice of law clause may state its subject matter in terms, for example "*this contract*", that naturally do encompass the arbitration clause.
57. The other difficulty with *Glick*'s *cri de coeur* for greater primacy to be given to a choice of seat come what may is that it pays little or no regard to the thought, to my mind logical and sound, that there are choices of seat and choices of seat: see *Dicey*, para 32-064 and *Egon Oldendorff v Libera Corporation* [1996] 1 Lloyd's Rep 380, *per* Clarke J, as he was then, at 389 rhc to 390 rhc.
58. Secondly, staying with *Sulamérica*, if, as I suggest, the limitation of clause 7 of the policy upon the proper construction of the policy as a whole, namely that it did not extend to clause 12, was a matter of construction, it was surely as much a matter of construing clause 12 as it was of construing clause 7. Clause 7 did not convey that clause 12 was governed by Brazilian law, because in all the circumstances, and despite the seemingly unqualified language of clause 7, in fact clause 12 conveyed that it itself was governed by English law. Therefore, in this result agreeing with *Glick*, the actual decision that the arbitration agreement was governed by English law is better viewed, to my mind, as a matter of choice of governing law upon the proper construction of clause 12, and not as an application of a 'closest and most real connection' test applied as if there had been no choice.
59. Thirdly, the burden of the case law exemplified by *Sulamérica* and *C v D* [2007] EWCA Civ 1282, [2008] 1 All ER (Comm) 1001, is that a choice of seat is not always sufficient to convey a choice of law for the arbitration agreement that is different to a choice of law for the contract as a whole if there is one. Put the other way round, where there is seemingly a choice of law for the contract as a whole, for example a classic "*this contract*" governing law clause, a choice of seat in the arbitration clause may not be enough on its own to cause that choice of law to be read down so as not to apply to the arbitration agreement that is a part of the contract.

60. Fourthly, it remains good law that where a seat of arbitration is specified and no choice of law for the contract generally is otherwise conveyed by its terms, the choice of seat may convey or imply a choice of law for the contract as a whole: see, for example, *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation* [1971] AC 572.
61. In this case, the choice of seat is found in the last of the bullet points at the end of clause 50.1 of the Contract that particularise specific choices the parties made concerning their agreement to refer "*to international arbitration as follows*" any Dispute (as defined by the opening sentence) that is not resolved by the informal, Russian-based dispute resolution methods set out in the main body of the clause. Those particulars are that any such Dispute is to be settled under the Rules of Arbitration of the International Chamber of Commerce ('ICC Rules') by three arbitrators appointed in accordance with those Rules, that any arbitration is to be conducted in English, and that the place of arbitration will be London.
62. First and foremost, ICC Rules arbitration is, and I apprehend is well known worldwide to be, arbitration under the auspices of a quintessentially and deliberately supranational institution, fundamental to which is ICC's own internal, and so again supranational, supervisory apparatus of the International Court of Arbitration ('the ICC Court') and its Secretary General and Secretariat.
63. By Article 18.1 of the ICC Rules, the place of arbitration is fixed by the ICC Court unless agreed upon by the parties. Save that it indicates a joint personal preference to come to London rather than, say, Paris, Geneva, New York, Singapore or any other commonly chosen international arbitration venue, I do not regard an agreed choice of London for the purposes of Article 18.1 in advance rather than only after a dispute had arisen as of any moment for present purposes; and if it had been chosen only after the fact, I do not think it would even be arguable that it conveyed or implied a choice of English law as governing law for clause 50.1.
64. Indeed, I do not think the choice of London under Article 18.1 of the ICC Rules is of any real moment at all for present purposes. It perhaps may be taken to indicate a preference for the English court to be the court that gets involved, if any municipal court ever has to get involved, to assist the arbitral process during its life, although even that is a stretch in the case of ICC Rules arbitration because of its essentially delocalised nature and the role and powers of the ICC Court. The choice of London as seat also fixes the English court as the court with the particular role in connection with possible future enforcement action in respect of any award of arbitration created by articles V(1)(e) and VI of the New York Convention. But for my part, I do not think, even read in isolation, let alone when read as part of its immediate context (the whole of clause 50.1), let alone further when read as part of reading the Contract as a whole, that choice of seat is any real indication of a choice of English law to govern the arbitration agreement in this case.
65. Also, I do not agree in the circumstances of this Contract and a choice of ICC arbitration that a mutual decision to seat that ICC arbitration not in Russia indicates negatively, as suggested by Mr Béar QC for Enka, a rejection of the possibility that Russian law might govern the scope of the arbitration clause.

The Arbitrators' Role

66. I assumed for the previous section of this judgment that the English court's approach or view is what matters. I have grave reservations about that assumption, however. The English court's special role under articles V(1)(e) and VI of the New York Convention because it is the court of the seat, although that is of course an important role, does not give the English court any exclusive or primary jurisdiction as regards the enforcement at this stage of the parties' obligation to arbitrate, and corresponding negative obligation not to litigate anywhere in the world, a dispute falling within clause 50.1 of the Contract. Nor, were the court to grant

an anti-suit injunction as sought in this case, would it be an exercise of powers as arbitral supervisory court, but rather an exercise of original substantive jurisdiction to restrain by injunction a breach or threatened breach of contract by a party over whom it has a personal jurisdiction that it is right to consider exercising: see *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 WLR 1889. Where service out of the jurisdiction is required to found the necessary personal jurisdiction, CPR 62.5(1)(c) means that, if the arbitration is or will be seated here, the court will be entitled to permit such service. That is a different point and does not detract from the decision in *Ust-Kamenogorsk*. In the normal way, and this is of real significance in the present case, the need to establish personal jurisdiction over the injunction defendant that it is proper to consider exercising carries with it a requirement that this court be the most appropriate forum for the resolution of the dispute in the particular case. That is an element of justifying service out if required and then holding on to proceedings here if that service out is challenged. It arises in principle equally if jurisdiction is founded by service on the injunction defendant here, since he may make a *forum non conveniens* application to stay the claim.

67. In relation to these points, I pay particular tribute to *Briggs*, paras 6.27 to 6.37, which I find compellingly persuasive. Specifically, I agree with the conclusion at para 6.37 that:

> "*The enforcement of jurisdiction agreements by injunction ... places its focus on the existence of personal jurisdiction over the defendant, the construction of the promise made, and the question whether what is complained of is a breach of the agreement. Insofar as there is a further jurisdictional issue to consider, it asks whether a court with personal jurisdiction is nevertheless an inappropriate one from which to seek relief.*"

I also agree that the decision of the Bermuda Court of Appeal in *IPOC International Growth Fund Limited v OAO CT Mobile* [2007] Bermuda LR 43 should be treated as correct for a case in this jurisdiction.

68. I shall return to that theme later. For now, as will be clear, I reject the argument advanced by Mr Béar QC that the fact that the parties chose London as the place of arbitration under Article 18.1 of the ICC Rules means that this court has some *a priori* superior claim to determine whether the Moscow Claim is brought in breach of clause 50.1 of the Contract. Teare J rejected a similar argument in *Midgulf International Ltd v Groupe Chimique Tunisien* [2009] EWHC 963 (Comm), [2009] Lloyd's Rep 411, at [59].
69. The *a priori* superior claim to determine whether the Moscow Claim is brought in breach of clause 50.1 of the Contract in fact would be that of the arbitrators. As an issue within that, or on its own, theirs too the *a priori* superior claim to determine the governing law of the Contract generally and of clause 50.1 in particular. It is common ground that Enka and Chubb Russia are bound by contract to refer any disputed question of the proper meaning and effect of the terms of the Contract to ICC Rules arbitration; and these are questions of that kind.
70. Further, and though it may or may not mean a different result would obtain on the facts, the arbitrators would not be applying English (or Russian) conflict of laws rules to determine governing law. The ICC Rules set out the choice of law rule the arbitrators would be bound to apply at Article 21 in these terms:

> "***Applicable Rules of Law***
>
> *1. The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.*

2. The Arbitral Tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.

3. The Arbitral Tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such powers."

71. If Enka was not content to litigate the issue of the scope of the obligation to arbitrate, and within that or separately the question of governing law, before a Russian court, in the event the Moscow Arbitrazh Court, as part of a New York Convention application, the obvious course was for it to commence arbitration, unless time did not allow so that it needed the urgent intervention of the court. But time did allow, as I made clear when setting out the facts. Enka did nothing for over 18 months after first being on notice of at least the real possibility that it might face a claim in Russia in respect of the Berezovskaya fire. On any view, urgent action was called for, if Enka wanted to head off a need to deal with matters before the Russian court, after RDP's letter before action of 24 April 2019. Instead, however, Enka did nothing with a view to having the matter dealt with by arbitrators, and nothing at all to avoid litigating the issue before the Moscow court until mid-September.
72. Indeed, as regards arbitrating, there is no indication in evidence that Enka ever gave any thought to doing so. If it were incapable of serious argument that the arbitration agreement in this case is governed by Russian law, that might cast a different light on things, although then the legitimate criticism of Enka might be more simply that it failed to come to court straightaway to try to stop an obvious breach of an English law contract, subject to the further point on the arbitrators' powers to which I turn next. As it is, though, I regard it as at least well arguable that the arbitration agreement is governed by Russian law or, which is more strictly pertinent, that ICC arbitrators would so rule. Further, I find on the evidence that Chubb Russia adopted and is pursuing in perfectly good faith the position that (1) the arbitration agreement is indeed governed by Russian law and (2) the Moscow Claim falls outside the obligation to arbitrate construed under Russian law.
73. As an aspect of the somewhat chaotic early life of these proceedings on Enka's side, it was not until 17 September 2019 that any assertion was squarely made, in a witness statement seeking permission for service out of the jurisdiction, that the arbitration agreement would be said to be governed by English law, but that came hot on the same day as the formal statement of Enka's position before the Russian court, stating expressly that the Contract was by choice governed by Russian law and treating the scope of the arbitration agreement as likewise a question for Russian law.
74. There is no basis in evidence to find that Chubb Russia would not have participated in good faith before arbitrators, pursuing its positions on this point, if Enka had commenced a reference, or that, if the arbitrators held against it that its obligation to arbitrate was governed by English law, it would not have accepted that the Moscow Claim had to be arbitrated, as effectively it has, in this court (Mr Bailey QC accepted that no argument could be advanced to the contrary) and in the Moscow court (Chubb Russia does not contend there that if the arbitration agreement is governed by English law it does not extend to the claim brought there). There is equally no basis in evidence for a conclusion that Chubb Russia would have defied an award of arbitrators, if made, to stop the Moscow Claim as against Enka. If unexpectedly it did so, and the English court were asked as the court of the seat to enforce the arbitrators' award, then the basis for and analysis of a possible anti-suit injunction claim in aid of that enforcement would be quite different to the case as it presented itself at this trial.
75. In *Nori Holding, supra*, Males J concluded, and I agree, that arbitrators sitting under English curial law will generally have jurisdiction to determine the scope of an undoubted arbitration agreement, i.e. an arbitration agreement that it is common ground before them exists and is

binding, or that has been held to exist and bind the parties by a court of competent jurisdiction in proceedings between them. This is different to saying they have in any true sense jurisdiction to determine, i.e. to bind the parties to a decision, that an arbitration agreement exists at all, as to which I distinguish between true jurisdiction and the potential for an award of arbitrators on such a point to become effectively binding upon the parties before the English court if it is not challenged under s.67 of the 1996 Act. Males J also concluded, and again I agree, that arbitrators sitting under English curial law and properly seized of a question as to the scope of the arbitration agreement are entitled by way of final relief to make an award ordering a respondent to cease pursuit of, terminate or withdraw court proceedings making a claim falling within that scope as determined by them.

76. Males J also suggested, at [39], that it was hard to see how an anti-suit injunction defendant in court could assert that it was entitled to a stay under s.9 of the 1996 Act "*while at the same time denying any breach of the arbitration clause*". In that regard, on the face of things, he treated equally cases where the defendant said the clause was null and void, inoperative or incapable of being performed, and cases where the defendant says its claim in court fell outside the scope of a valid and binding clause. But in *Nori Holding*, the defendant bank's position was that the LCIA arbitrations were improperly commenced and the tribunal lacked jurisdiction: see at [24]. I respectfully disagree that there is any difficulty, logical or practical, over applying to stay an anti-suit injunction claim in court, where either it is agreed or the court has determined that there is a valid and binding arbitration clause and the substantial dispute is as to its scope and whether therefore the target claim in a foreign court falls within or outwith that scope.
77. In the present case, Chubb Russia, having participated on the merits of the anti-suit claim as brought before the court, lost the right to seek a stay under s.9 of the 1996 Act. However, as a preview of what I shall say shortly in relation to *forum conveniens*, this has been an unusual case procedurally. The defendants' position has been throughout that this court should not be determining the scope of clause 50.1 if it be governed by Russian law; the relief sought, both the declaratory relief and the anti-suit injunction, are discretionary remedies; and the choice is not between staying (to let arbitrators determine the immediate substantive dispute as to scope) and determining that dispute myself, it is between determining that dispute, given that it is now too late to stay these proceedings and let arbitrators do so, or leaving it to be determined by the Moscow Arbitrazh Court on Enka's New York Convention application there.
78. In the particular circumstances of this case, I regard Enka's failure to engage the primarily proper jurisdiction, namely that of the very ICC Rules arbitration they come to court wishing to enforce, as a significant factor telling against their claim for the discretionary relief they seek.
79. In *Nori Holding*, Males J in fact granted a final anti-suit injunction in respect of Russian proceedings, but not in respect of proceedings in Cyprus as they were immune under *The Front Comor*. He did so notwithstanding his conclusion that equivalent relief could have been granted by the LCIA tribunal. As one might have expected, therefore, the availability in principle of such relief from arbitrators does not necessarily defeat an anti-suit claim in court, but I do not accept, nor do I think Males J was saying at [42], that it can never be a relevant factor tending to deter the court from granting relief.
80. All that said, I would suggest for the future that an anti-suit injunction defendant who, like the defendant in *The Angelic Grace* and Chubb Russia here, accepts the existence and validity of the arbitration agreement sued upon and takes only a point on its scope, with or without a logically prior point on its governing law, but who wishes come what may that this court not

determine that point in the first instance, should apply for a stay under s.9 of the 1996 Act, and should expect that if he does not do so the fact that the point could and *prima facie* should have been put to arbitrators for determination will not assist him in resisting the anti-suit claim in court.

A Russian Game-Changer?

81. I come now to the issue of principle between the parties as to the relevance or importance to Millett LJ's famous statement of principle in *The Angelic Grace* that the arbitration clause in that case was definitely governed by English law. I do not agree that it is of the essence of the approach, or its justification. Upon analysis, I say indeed it is neither strictly necessary nor necessarily sufficient. I have identified the basis for what I think is the better view already in my adoption of *Briggs*, para 6.37, and its supporting argument. It is also supported by what Toulson LJ, as he was then, said in *Deutsche Bank AG et al v Highland Crusader Offshore Partners LP et al* [2009] EWCA Civ 725, [2010] 1 WLR 1023, at [50], [56].
82. That better view is, in my judgment, that what matters in a case where the substantive dispute is whether the proceedings brought by the anti-suit injunction defendant put him in breach of an obligation to arbitrate he acknowledges but says does not extend to the claim he is thus pursuing, is whether this court is properly seized of that dispute so as to make it appropriate for it to determine the same. If it is so seized, determines the dispute against the anti-suit defendant and finds that the anti-suit claimant has acted promptly and the proceedings brought in breach are not far advanced, then the court indeed should require the anti-suit defendant to demonstrate strong reason why he should not be restrained from carrying on regardless, in substance defying that final ruling against him as to scope. That should be so in principle, whether the arbitration agreement and therefore the question of scope is governed by English law or not. It is not a parochial principle for the specially robust enforcement of English law contractual obligations; it is a willingness robustly to require a contract breaker to cease and desist who was properly before the court for a determination of whether he was breaking his contract.
83. Now, obviously the governing law of the contractual obligations sought to be enforced by an anti-suit injunction, or the degree to which that will or may be in dispute, may have been important in concluding that the issue was properly for determination in this court, else in ordinary procedural circumstances there would be no relevant trial in the first place. But that is a different and prior point, and to repeat the phrase I used above, it will have been neither strictly necessary nor necessarily sufficient, for the court to have concluded that it was properly and appropriately seized, that the arbitration agreement sued upon be governed by English law.
84. I articulated that deliberately in a past tense for ordinary procedural circumstances. That is because in my view, as I said this morning in *The Joker, Seniority Shipping Corporation SA v City C Crushing Industries Limited* [2019] EWHC 3541 (Comm) at [15], the appropriateness of this court as forum for the determination of any dispute as to whether by the proceedings sought to be enjoined the anti-suit defendant has been or will be acting in breach of contract will ordinarily be assessed provisionally in the anti-suit claimant's favour by a decision to authorise service out of the jurisdiction, and it will not normally be proper to revisit that assessment at trial, since the proper procedure for raising any suggestion that it is not appropriate for this court to take a claim forward to trial for final determination there is by application under CPR Part 11.
85. The same logic is effectively true for a defendant sued here as of right by service within the jurisdiction, but in that case strictly it is to be articulated by saying that it is inherent in our doctrine of *forum non conveniens* that this court is presumed to be the appropriate forum for

the determination of a claim against a defendant who has been brought before the court by service of proceedings here, unless he makes a successful *forum non conveniens* application. That doctrine and logic remain apposite in the present context, notwithstanding *Owusu v Jackson*, Case C-281/02, [2005] QB 801, since the anti-suit injunction proceedings are not within the scope of the Brussels Lugano regime.

86. Thus again, as I said in *The Joker*, in my view a defendant duly served who chooses not to make the appropriate application to have the point revisited should normally be taken to have made an informed decision that there is no serious argument against the appropriateness of this forum for the resolution of the issues raised by the claim brought against him. But in this case there is reason not to adopt that normal stance. That reason again lies in the scrambled procedure pragmatically adopted in this case, as something of an indulgence, frankly, to Enka, which could not fairly have complained if Carr J had just refused the application for interim relief and left it to take its normal turn in the litigation queue. The result is that the case came to trial last week, just three months after the Claim Form was issued, in the face of the defendants' consistent insistence that this is not the appropriate forum to determine the critical question of the scope of clause 50.1.
87. Carr J did not purport to find against the defendants as to that, and to my mind the spirit of her judgment was to provide a fair, if nonetheless still expedited, hearing for the resolution of the issues already then squarely raised between the parties, without by that decision itself or her consequent directions substantially prejudicing either side. In that spirit, I agree with Mr Bailey QC that in the particular circumstances of this case I should deal with the substance rather than the procedural form, and in fairness Mr Béar QC did not advance any contrary argument.
88. Before I do so, however, and echoing what I said about the possibility of seeking a s.9 stay in an anti-suit case, I would say for the future that if the substance of an anti-suit injunction defendant's opposition to the claim is or includes a contention that this court is not the most appropriate forum for the resolution of a question he says arises over whether he is breaking or threatening to break the obligation to arbitrate asserted by the claimant, then his proper course is indeed to apply to set aside or stay the claim pursuant to CPR Part 11. If he fails to do so, generally speaking he should expect to find it is too late to raise the contention at trial, where instead he will be expected to fight his corner, if he can, on (a) whether there is a breach or threatened breach and then (b) if there is, whether he can show strong reason that does not depend on a then necessarily inapt argument that the court should not have been deciding the first question.
89. In this case, in my judgment, everything points against it being appropriate for this court to take over from the Moscow Arbitrazh Court the question of the scope of clause 50.1:
    (1) I have already concluded that if I were deciding the issue, the choice of arbitral seat in this case, being the only hook upon which any attempt even could be made to suggest that clause 50.1 is governed by English law, does not convey a choice of governing law.
    (2) Chubb Russia, given its view in good faith that the Moscow Claim does not fall within the scope of clause 50.1, behaved reasonably in bringing that claim, all the more so given Enka's failure to engage at all, let alone suggest that clause 50.1 might apply, in response to RDP's letter before action in April, which in turn came against the background of RDP's original claim letter in September 2017 and the Russian state commission investigation.
    (3) Having not unreasonably acted upon the basis of its *bona fide* view as to the scope of clause 50.1, Chubb Russia has secured two significant juridical advantages before the Moscow Arbitrazh Court. First, it has Enka's concession there that the Contract is

governed by Russian law as a matter of express choice. There is nothing in the Russian law evidence I received to suggest that there is anything that might be regarded as odd internationally, or even parochially in England, about Russian choice of law rules that may have required that concession before a Russian court if it would not be sound before an English court or before ICC arbitrators. It would be unfair to Chubb Russia in the circumstances of this case to consider granting an anti-suit injunction unless it could be justified upon the basis of that concession, but (i) though the point was raised at trial, Mr Béar QC was not instructed to make the same concession before me – in fact his submission was that it was "*obviously wrong*" to suggest that the Contract contained an express general choice of Russian law, and indeed that the Contract terms, even leaving aside clause 50.1, were positively inconsistent with it – and (ii) if the concession were made, then the anti-suit claim would fall to be considered on the basis that Russian law indeed governed the question of the scope of clause 50.1. Second, Chubb Russia has secured in effect a small degree of favourable provisional consideration by the Moscow Arbitrazh Court of the merits of its contention that it has a viable claim formulated in tort so as at least to begin its argument that its claim does not have to be arbitrated under clause 50.1. That second is a less weighty point than the first, but it is not wholly without force.

(4) On the basis, then, that the real issue between these parties, the scope of clause 50.1, either is governed by Russian law, or at any rate, were I to decide it, could only be treated as so governed to be fair to Chubb Russia, it is plainly more appropriate for that issue to be determined by the Moscow Arbitrazh Court than by this court. I am content to assume in Mr Béar QC's favour that if I found that Chubb Russia had no arguable case on the issue under Russian law that might affect the assessment: (a) *ex hypothesi* I would then be finding that there was no point requiring serious consideration that it might be better in principle for a Russian court to decide; and (b) the reasonableness of Chubb Russia's conduct in joining Enka to the Moscow Claim at all might then be called into question. I do not make that finding, however.

(5) There is, ironically, even a sense in which it may favour Enka to have the scope of clause 50.1, and as the first step in that its governing law, decided in Moscow. For on the evidence, there seems to me to be more room for argument there than I have concluded there would be here if I had to decide the point that (a) an express choice of a general governing law for a contract that does not explicitly extend to the arbitration clause within it does not so extend; and (b) absent a choice of governing law explicitly for the arbitration clause, it will be treated as governed by the law of the seat where a seat is specified, irrespective of the governing law of the contract more generally. I see no reason in the evidence to suppose that, if the Moscow Arbitrazh Court now concludes that clause 50.1 is governed by English law, then Chubb Russia will not accept that it must arbitrate (and that Enka's motion for dismissal without consideration must succeed). Indeed, I understood the burden of the expert evidence of Russian law before me to be that, in that case, the Moscow court would be bound to and would so dismiss the claim. There was a difference between the experts over how likely it was that Enka would be joined in a third-party capacity, either on application by another party or of the court's own motion, to ensure findings would bind it as against or in favour of the other parties sued, even though *ex hypothesi* no claim would or could then be being pursued against it there by Chubb Russia. But that is an irrelevance at this trial. It was plain to me, and I find, that the prospects of Enka being required to have some involvement, but without Chubb Russia pursuing a claim against it, will be no different, Chubb Russia having

initially pursued a claim that was dismissed without consideration under the New York Convention, than if it had never brought a claim because it accepted the obligation to arbitrate throughout.

(6) I do not overlook the complaint by Mr Béar QC that, as things now stand, the Moscow Claim is proceeding to, it may be, a species of rolled-up hearing, as he called it, where there will be at least some degree of consideration of the ultimate substantive merits at the same time as the court now deals with the motion to dismiss in favour of arbitration. The submission is that that is obviously unsatisfactory. In my judgment, however, firstly, in the particular circumstances of this case that has substantially been visited upon Enka by its failure to act promptly and more appropriately in response to the Moscow Claim, if its response was to be a claim in this court for relief by way of injunction in the hope of avoiding having to become entangled in the Russian proceedings. Secondly, it is important to bear in mind, again in the particular circumstances of this case, that there is a specific complexity to the arguments that arise as to arbitrability before the Russian court if Chubb Russia persuades it to find that the arbitration agreement is governed by Russian law. The need, in those circumstances, to arrive at an accurate characterisation of the claim as pursued by Chubb Russia, which on the evidence of the experts is not or may well not be limited to a consideration of how Chubb Russia has chosen to seek to characterise it in its Russian statement of claim, may well require a degree of understanding of what are the issues on the merits or what they would be as between the parties, so as to assess the nature of the claim and how it arises so as then to determine whether it falls within the scope of the arbitration agreement if governed by Russian law. In those (it may be unusual) circumstances it is not so outrageous or obviously unsatisfactory as it might in other circumstances be for the Moscow Arbitrazh Court in the event not to have dealt entirely separately and initially with the motion to dismiss without consideration of the merits.

Other Points

90. Here I shall tread more lightly. I am extremely conscious that, in the light of the conclusions I have already expressed and the reasons for them, I am declining to find that this is the right occasion for determination of a range of other matters raised by the parties and argued before me last week. In many respects, they will be points that now fall to be determined by the Moscow Arbitrazh Court under cover of Enka's motion to dismiss. In other respects, they may be points that will or will also need to be considered either by that court, or indeed in due course by ICC arbitrators, depending on the outcome of that motion to dismiss.

<u>The Contract Terms</u>

91. Briefly, then, the terms of the Contract upon which Chubb Russia would rely were it, unlike in Moscow, in dispute whether they constitute or include an express choice of Russia as the general governing law, are, or at least principally include, the following:

    a. Clause 1 refers to Attachment 17 for a series of terms and definitions and states that all terms used in the Contract that are there defined have the definitions there set forth. Clause 45.1 of the Contract states that the Attachments are to be considered inseparable parts of the agreement. The result is, though to my mind more conveniently than the practice of some contractual draftsmen, the definitions section appears as an attachment and not as the first 10 or 12 pages before one finds out anything substantive about the Contract, as a matter of construing the Contract the effect is the same. Although Attachment 17, and in particular the definitions I shall mention in a moment, therefore appears for me on about page 460 or so of the

document, as a matter of construction the Contract is to be read as if they appear front and centre in the very first article of the agreement.

b. Those definitions include the following definitions of Mandatory Technical Regulations and Applicable Law:

   i. Mandatory Technical Regulations are defined to: "*Include the following regulations applicable in the Russian Federation: (a) Building Codes & Standards (SNiP), (b) Recommended Construction Practices (RCP); (c) Directive Documents (DD); (d) Design and Construction Rules (DC); (e) Technical Standards, National Standards, (GOSTs); (f) environmental legislature, sanitary and hygienic regulations, requirements of the Industrial Safety and Fire Code; (g) other regulative, legal and technical acts, applicable to the Works; and (h) Standards and Procedures in effect in the sphere of health care and safety of the Contractor and Subcontractors personnel, in every separate case specified in the Clauses (a)-(h), to the extent specified by the Applicable Law (including orders or requirements by the Government Authorities issued according to the Applicable Law), mandatory for observance by the Contractor when performing Works.*"

   ii. Applicable Law is defined to mean: "*Law of the Russian Federation, including legislation of the Russian Federation, all regulatory legal acts of the State Authority Federal Bodies, State Authorities of the constituent entities of the Russian Federation, legislation of the constituent entities of the Russian Federation, regulatory legal acts by Local Authorities and any other applicable regulatory legal acts*", a definition plainly wide enough in principle to encompass the Russian Civil Code and any other legislative materials in Russia that go to form its body of substantive domestic contract law, it being essentially a civilian, codified system.

c. There are then numerous references to compliance with or operating under the Contract in accordance with Applicable Law, the defined term. They include clause 3.1 dealing with the obligations of the customer to give access to the site and allow the work to be undertaken, and clause 4, the primary provision dealing with the obligations of Enka as contractor. Without lengthening this judgment further by setting all of those out, they include at clause 4.32 a provision that "*the Contractor shall in addition be obliged to perform all of its other obligations as stipulated in this Agreement and Applicable Law*".

d. At clause 24.2 and in various other places, the parties also made reference to the nature or scope of contractual performance required by one or the other by reference to provisions of the Russian Civil Code. By clause 39.3, a provision concerning the customer's entitlement to give certain notices to Enka, the contractor, there is reference to rights belonging to the customer under the agreement or Applicable Law; and at clause 42.3, reference in the context of alterations to the scope of works simply to the contractor's obligations "*under the Agreement and the law*".

92. The primary burden of the argument against the proposition that is common ground before the Moscow Arbitrazh Court, namely that collectively provisions such as those I have summarised do convey an express choice of Russian law as a governing law, is, of course, that the one thing the Contract does not contain is a provision in the simplest and most general form of words that one often sees when it is the case that the parties have chosen to specify expressly a governing law. That is to say there is no classic "*This Contract is governed by …*" form of governing law clause.

93. Whether that, however, on the proper construction of the Contract as a whole is really to be explained on the basis that indeed there was no choice here, or rather on the basis that the choice was so evident and obvious from the way in which the parties had generally articulated the provisions of the Contract between themselves as not to require a specific separate choice of law clause, seems to me far from clear-cut in Enka's favour.

Strong Reason

94. If the analysis reached this point, Mr Bailey QC relied upon, as I would summarise them, four areas by reference to which he submitted there would be strong reason against the grant of an injunction. First, he raised, and (not necessarily ironically) so indeed did Mr Béar QC but in Enka's favour, the problem as it has been described of the 'conflict of conflicts', as discussed in particular in *Raphael* and in *Raphael 2* at para 8.31*ff*. As I also found myself saying this morning in *The Joker*, in my judgment this is not a case in which to engage fully in a review of that problem. It may be, having said that, that what I have said in this judgment concerning appropriateness of the forum and the adoption of the analysis in *Briggs*, and the conclusion at para 6.37, may be of some general relevance in respect of that problem. But more specifically for this case, that which *Raphael* describes as the true conflict of conflicts problem does not, to my mind, arise. This is not, in truth, a case of a claim that by English conflict of laws rules is plainly to be determined by and in accordance with English law, met by a defendant who accepts that, or has no significant argument against that, but who says that if he can be allowed to continue to pursue his claim elsewhere then, in that other court, the conflict of laws rules that would be applied there would lead to a different result. This is, as I have indicated, not in fact a clean conflict or clash of that kind.
95. Second, Mr Bailey QC proposed, although, as it seems to me, this somewhat evaporated under the burden of the expert evidence as to Russian law, that there would somehow be prejudice to Enka's co-defendants in the Moscow Claim were Chubb Russia now to be required to refer its substantive claim against Enka within those proceedings to ICC arbitration. By the end of the evidence, so far as I could see, there was no and certainly no substantial basis for finding that any co-defendant in Moscow would be worse off if the claim by Chubb Russia against Enka there were now stopped than if Enka had never been joined there in the first place.
96. Third, Mr Bailey QC raised, as from time to time defendants have, the suggestion that fragmentation or multiplicity of proceedings should be seen as such a problem in this case as to amount to strong reason against enforcing the agreement to arbitrate. To my mind, in a classic situation such as this of a large-scale commercial project, which, from the outset, was always and inevitably going to involve a wide range of contractors and subcontractors in close proximity to each other, speaking both factually and legally, the agreement in that commercial circumstance nonetheless with one particular such contractor or subcontractor to take disputes to arbitration, carries with it an acceptance of the possibility of fragmentation or multiplicity of proceedings, and it is, if not an absolute rule of law, very difficult to envisage the circumstances in which that would be likely to tip a balance against the enforcement of the arbitration agreement. In that respect, and with respect, I agree with and adopt what has been said in recent years in this court, e.g. by Males J in *Nori Holding*, *supra*, at [113]; by the same judge in *SCM Financial Overseas Limited v Raga Establishment Ltd* [2018] EWHC 1008 (Comm) at [66]; and, most recently of all, in *A v B* [2019] EWHC 2478 (Comm), *per* Jacobs J at [17]-[18]. Mr Bailey QC suggested that *Crescendo Maritime Co v Bank of Communications Co Ltd* [2015] EWHC 3364 (Comm), [2016] Lloyd's Rep 414, *per* Teare J at [49]-[51], took an inconsistently slightly softer line. For my part, I am not sure, with

respect, that it did. If I am wrong about that, in any event I firmly prefer the approach to and description of the issue given by Males J and Jacobs J in the cases to which I have referred.

97. Fourth and finally, Mr Bailey QC raised in any event as a matter of strong reason the delay and degree of participation on the part of Enka in the Moscow Claim. I have, at appropriate points throughout the judgment, in substance indicated my conclusions as to Enka's conduct in that regard. It suffices at this stage of the judgment therefore to say that, on balance, I would have regarded the particular circumstances of this case as having generated a strong reason not to grant an injunction because of that conduct.

The Russian Law Points

98. Here I wish for obvious reasons to tread lightest of all, and may do little more than identify for the record, such as it is that will be created by this judgment, what were the points explored before me as to what will be the substance of the consideration of the Enka motion to dismiss in Moscow, if all issues are treated as governed by Russian law.

99. It will be recalled that the essence of Chubb Russia's resistance to that motion involves two propositions on both of which it must be correct. First, it must be correct that its claim against Enka in the Moscow Claim is viably to be characterised under Russian law as a non-contractual, i.e. tortious, claim. Second, it must then be correct that, as a matter of the interpretation of clause 50.1 if governed by Russian law, that claim therefore falls outside the scope of the clause. On the first of those, there was at least at one stage the appearance of a possible suggestion that if Chubb Russia be correct that it has a tort claim, and that the claim is in the nature of a joint liability between Enka and one or more of its co-defendants in Russia, then somehow it would fall outside the scope of the arbitration agreement or the Moscow court would not dismiss in favour of arbitration as against Enka, even if the arbitration clause otherwise extended to a claim of that type. I did not understand that, after exploration of the point with the experts, that more extreme proposition was really being pursued.

100. I therefore understood the substance of the first point to be that, as the experts agreed, Russian law starts with what they called a non-competition principle, under which the contractual claim must be used if a claimant has both contractual and tortious claims; or, as it might also be put, there is no room for claims in tort where the relevant matter is governed by a contractual relationship. Thus the question will be whether this case falls within some exception, if there be exceptions, to that principle.

101. In that regard, the suggestion, as I understood it, is that there is at least a good arguable case to the effect that since the property damaged extended well beyond any property that may have been the subject matter of the contractual relationship, the claim both could be and had to be characterised in tort, alternatively (but Prof Asoskov accepted that whatever strength any of these arguments had this was the more difficult argument) the Contract between Unipro, originally Energoproekt, and Enka could, in its context, be regarded as having been concluded by the customer for a consumer purpose within the purview of article 1095 of the Russian Civil Code.

102. I say only that whilst, having explored the matters with the expert witnesses to the extent that one could in a short and expedited trial, it is possible to begin to see where there may be strengths and weaknesses in those propositions as advanced by or to be advanced by Chubb Russia, I am a long way from being able to say that Chubb Russia's position as to be advanced in the motion to dismiss is not sensibly arguable under Russian law.

103. Then the second point overall, the scope of the arbitration clause, again had two strands to it. There was first the suggestion I mentioned early on in this judgment, whether the language of clause 7.5 of the assignment agreement had narrowed the scope of the arbitration

agreement effective between Unipro and Enka from the scope it had as between Energoproekt and Enka. Again, without purporting to reach any decision, I shall record only that that did not strike me as an easy argument for Chubb Russia, but I do not say that it is being advanced, to the extent it is advanced before the Moscow court, other than in good faith. There is then secondly in substance a debate over the degree to which, as we might characterise it, a *Fiona Trust*-type approach to the construction and interpretation of agreements to arbitrate is or is not the approach adopted under Russian law. In particular, by reference to Article 431 of the Russian Civil Code, there appears to be something of a strong tradition of a literal interpretation by Russian courts, one aspect of which has been and continues to be a conclusion that only contractual claims go to arbitration in the absence of wording explicitly extending the agreement to arbitrate to non-contractual, for example tortious, claims. On the other hand, there is, it seems, a strong body of learned opinion that that is too narrow an approach. That latter view appears coincidentally very, very recently, that is to say literally on the eve of our trial, to have been given perhaps some boost by a Plenum Resolution of the Supreme Court of Russia.

104. That point itself, however, becomes contentious as it gives rise to an argument whether that Plenum Resolution is focused and focused only on certain species of arbitration regulated by relatively recent Russian legislation that does not apply to an international arbitration with a seat outside Russia. That possibility, namely that it might be said an international arbitration seated within Russia will be approached differently as regards its scope than an equivalently worded arbitration agreement providing for arbitration in a seat outside Russia, then it seems gives rise to a further argument whether that is in conflict with Article III of the New York Convention, a further thought, and I do not criticise him necessarily for this, that Mr Béar QC introduced for the first time during the argument in the trial before me.

105. Again, without purporting to tread on the very toes I have concluded primarily by this judgment are toes upon which I should not be treading, I shall say only that these strike me, as best I can assess them as matters of Russian law, as interesting and fascinating points, and I would, in other circumstances, be eager to await the outcome to find out what the court, that is to say the Moscow court, makes of them. I am a very long way from saying that Chubb Russia's position on these matters is other than seriously arguable and pursued in good faith.

106. I mention finally for completeness as regards these Russian law points the *Unitech* case, only to illustrate the difficulty presented to this court by the suggestion that, as a springboard for an anti-suit injunction, it should be the court to determine some of these issues. *Unitech LLC v Georgia Pacific SJSC*, Case A41-4461/11, decided by the Federal Arbitrazh Court (Moscow Circuit) on 7 August 2013, is a decision of a court one tier below the Supreme Court and may or may not be the last word on any of the points it considered. Both experts, however, made reference to it and continue to regard it as of relevance and potential importance. As explored over a significant proportion of the respective cross-examinations (and again, no complaint there from me in context), it seemed to me to be *ex facie* helpful to Chubb Russia on the first of the two points, namely the characterisation of its claim as a tortious claim, but at least potentially quite difficult to see why it is correct, that is to say correctly decided, on that aspect. On the other hand, and as regards the second point, namely the breadth of the arbitration agreement, and again as the cross-examination proceeded, it seemed to me increasingly quite difficult to see why it was not both *ex facie* helpful to Chubb Russia and possibly correct as a matter of Russian law. Certainly, I would not have been in a position to say that it was at all clearly incorrectly decided.

Chubb UK, Chubb Europe & Chubb Switzerland

107. I am going to take this very briefly. In short, in my judgment, there was in this case a significant overinterpretation of some very limited information indicating, as was indeed true, that decision-making in respect of the Moscow Claim was not in all respects local within Chubb Russia. That overinterpretation may well have been fuelled in part, at least initially, by an overestimation, through ignorance it may be, of the Chubb Group's ultimate exposure to the claim, and thus its fiscal importance to the worldwide group. The result, as it seems to me, was something not far short of a purely speculative conspiracy theory that there was or must be some species of untoward pulling of strings from on high that might possibly implicate Chubb Switzerland and senior executives in the United States.

108. I was, with respect, unimpressed by the suggestion that some limited evidence such as there is that the claim in Russia may have been mentioned in some papers that went to some board members at Group level created really a serious issue to be tried that Chubb Switzerland took any relevant decision or action or influenced the decisions and actions behind the scenes being made and taken on behalf of Chubb Russia. As it seems to me, there was no basis ever, even at the outer edges of any possible conspiracy theory, for supposing that Chubb UK did anything beyond simply owning Chubb Russia as an intermediate holding company. Though Chubb Europe can be seen indeed to have had an involvement that continues, albeit through the agency of Chubb Services that has not been sued and Mr McAvan and his Claims Director in particular, to my mind there was no basis for any finding that it knew or believed that the Moscow Claim was being brought in breach of contract, and no basis for any finding that, if there had been an anti-suit injunction against Chubb Russia, it would not simply have been obeyed, with Mr McAvan, or Ms Chalmers above him, giving direction if by any chance direction were required to ensure compliance.

109. I would, therefore, have had no hesitation at all in dismissing the claims against all three co-defendants even if the claim against Chubb Russia had succeeded. Given the basis of that conclusion, and without lengthening this already long oral judgment even further, strictly, as it seems to me, my analysis means that the jurisdiction challenge by Chubb Switzerland succeeds, if only on the simple ground that there is no serious issue to be tried against it that it ought to be the subject of relevant relief.

Conclusion

110. The result, for the reasons I have given, is that Enka's claims fail and are dismissed, save that, strictly, as regards Chubb Switzerland, the order will be that its challenge to jurisdiction succeeded and the proceedings against it are set aside.

111. Far from being a straightforward application of *Angelic Grace* orthodoxy requiring that an anti-suit injunction should be granted, this is almost a converse set of facts. Chubb Russia has sued Enka in what is, subject to any question of an obligation to refer to arbitration, the obvious and natural forum for its claim. It did so in the belief, held in good faith on reasonable grounds, whether or not that belief will ultimately be vindicated, that there is no relevant arbitration obligation. It takes the view that on any view the Contract as a whole is governed by Russian law as a matter of express choice, and that any question whether the obligation to arbitrate extends to the claim it has brought would and should be determined under Russian law.

112. Enka expressly agrees the first part of that, and initially in substance accepted the second part of it too, before the Russian court, whose choice of law rules do not appear to be materially less favourable to Enka, if it wanted to contend for the application of English law, than those that might apply in this court. Enka however comes to this court to pursue arguments inconsistent with that case, and as a result amends its position before the Russian

court at all events on the second part of what I just said; and, on the asserted strength of those inconsistent arguments, asks this court to interfere by injunction in what is otherwise set to occur in the ordinary course of the proceedings in Russia.

113. Standing back, I find Enka's position on this trial to lack any substantial merit. On balance, in the particular circumstances of this case, I would have concluded that Enka's delay, failure to pursue arbitration and participation in Russia, were sufficient strong reason to refuse to grant an anti-suit injunction. But my preferred and primary ground for dismissing Enka's claims is that this court is not the appropriate forum, again in all the circumstances of the case, in which to determine finally the real issue between the parties, which is whether the acknowledged obligation to arbitrate disputes extends to the dispute over Enka's liability as alleged by Chubb Russia in the Moscow Claim. The appropriate forum for that determination is the Moscow Arbitrazh Court, pursuant, as things stand, to Enka's application pending before it for dismissal without consideration of the claim against it in those proceedings. Enka will enjoy the ability ultimately to arbitrate by ICC Rules arbitration whether it is so liable, if it succeeds on that motion.

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