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Neutral Citation Number: [2020] EWCA Civ 574

Case No: A4/2020/0068

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
MR JUSTICE ANDREW BAKER
[2019] EWHC 3568 (Comm)

Royal Courts of Justice,
Strand, London, WC2A 2LL

Date: 29/04/2020

Before :

LORD JUSTICE FLAUX
LORD JUSTICE MALES
and
LORD JUSTICE POPPLEWELL

- -

Between :

ENKA INSAAT VE SANAYI A.S.	**Claimant/ Appellant**
- and -	
(1) OOO "INSURANCE COMPANY CHUBB" **(2) CHUBB RUSSIA INVESTMENTS LIMITED** **(3) CHUBB EUROPEAN GROUP SE** **(4) CHUBB LIMITED**	**Defendants/ Respondents**

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Robin Dicker QC and Niranjan Venkatesan (instructed by **Shearman & Sterling (London) LLP**) for the **Claimant/Appellant**
David Bailey QC, Marcus Mander and Clara Benn (instructed by **Kennedys Law LLP**) for the **Defendants/Respondents**

Hearing dates : 7-8 April 2020

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Approved Judgment

Lord Justice Popplewell :

Introduction

1. This is an appeal against a decision at trial not to grant an anti-suit injunction against a party alleged to be in breach of a London arbitration clause by bringing proceedings in Russia. It concerns the significance to be attached to the choice of London as the seat of the arbitration in exercising such jurisdiction and in determining the proper law of the arbitration agreement.

The Facts

2. The Claimant ("Enka") is a Turkish company carrying on an international construction and engineering business based in Turkey but with a substantial presence and history of operations in Russia. The First Defendant ("Chubb Russia") is a Russian company and part of the well-known Chubb insurance group. Chubb Russia commenced proceedings on 25 May 2019 against Enka and 10 other parties in the Moscow Arbitrazh Court, under action number A40-131686/19-89-822, seeking damages in relation to a massive fire in February 2016 at the Berezovskaya power plant in Russia. I shall refer to those as "the Russian proceedings" and to the claim made by Chubb Russia against Enka in those proceedings as "the Moscow Claim".

3. The Moscow Claim has its genesis in the contractual arrangements for Enka's participation in building the power plant. The plant was built for PJSC Unipro, at the time named E.ON Russia ("Unipro"). In May 2011 Unipro engaged CJSC Energoproekt as general contractor for the design and construction of the power plant. Energoproekt engaged Enka as a subcontractor to provide works relating to the boiler and auxiliary equipment installation under a contract dated 27 June 2012 ("the Contract"). Enka was one of many contractors or subcontractors providing services in connection with the power plant. The Contract, which runs to 97 pages, with around 400 pages of attachments, 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. It provides that the Russian language version of its terms prevails in case of inconsistency or conflict.

4. The arbitration agreement appears within clause 50.1 of the Contract in the following 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, and*
- *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."

5. On 21 May 2014 Energoproekt, Unipro and Enka entered into an assignment of rights and obligations 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 any 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.

6. On 1 February 2016 the fire occurred at the plant. Unipro was insured by Chubb Russia under a primary policy, with reinsurance and retrocession arrangements involving retention of some risk in companies within the Chubb group and the balance of the risk ceded into the market. Between November 2016 and May 2017 Chubb Russia paid Unipro 26.1 billion Roubles (c.US$400 million) in total in respect of damage caused by the fire, and so became subrogated to any rights Unipro might have against Enka or others in respect of liability to Unipro for the fire.

7. On 23 September 2017, a Russian law firm, Rodin Djabbarov & Partners ('RDP') wrote a letter stated to be on behalf of "Reinsurance Company CHUBB" to Enka headed "Notice of low-quality performance of the works". It asserted 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. It gave notice that Chubb was subrogated to Unipro's rights. It concluded that "[Reinsurance Company CHUBB] informs [Enka] about the low-quality performance

of the Works, which entailed occurrence of losses". It did not make a claim, still less threaten any proceedings.

8. The next communication from RDP came some 18 months later. On 24 April 2019, RDP, again acting on behalf of Chubb Russia, sent to Enka a letter headed "Letter of Claim (according to the procedure in item 5 of Article 4 of the RF Arbitration Procedure Code)." It referred to the report of a Russian state commission issued a year earlier on 25 April 2018 as having concluded that "the accident was caused by defects (deficiencies) in the design, structures, fabrication and installation of the Facility including fuel oil pipelines". It alleged that Enka was liable under various identified provisions of the Russian Civil Code because it had performed the installation of the fuel oil pipelines . It demanded payment of the losses suffered by Chubb of 26.1 million Roubles. It concluded: "If this demand is not implemented, [Chubb Russia] reserves its right to seek remedy in a lawful manner, including application to a court."

9. Enka did not respond to RDP or Chubb Russia but took the matter up with Unipro in a formal letter of response dated 8 May 2019. It enclosed a copy of RDP's letter of 24 April, which it described as including a threat by Chubb Russia to sue Enka if the demanded payment was not made. Enka asserted that it had no liability and could have no liability, on the basis that in November 2014 the works which were alleged to have caused the fire had been excluded from the scope of works to be performed by Enka and had subsequently been performed by another contractor.

10. On 25 May 2019 Chubb Russia filed the Moscow Claim with the Moscow Arbitrazh Court. Enka became aware of that filing on 29 May 2019. The following day, 30 May 2019, the Moscow Arbitrazh Court made an order which 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. The Court's view appears to have been that what was filed failed to particularise the allegations and the basis of liability sufficiently for the court to able to say that a legally viable claim against each separate defendant had been articulated. Enka saw a copy of that ruling on 3 June 2019. On 4 June 2019, Enka then received the filed statement of claim containing the Moscow Claim, although not its attachments.

11. Enka continued to deal with Unipro. There was 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. It recorded that at the meeting Unipro had acknowledged that Enka was not responsible in any way for the fire and reiterated the grounds on which the claim was said to be unfounded. It referred to the fact that the Russian judge had deferred acceptance of the claim by Chubb Russia. It went on to assert that in any event Chubb Russia, in exercising subrogated rights, was bound to arbitrate the dispute having stepped into the shoes of Unipro, referring to an attached memorandum prepared by Shearman & Sterling LLP addressing the arbitrability of the Moscow Claim by reference to its nature and the scope of the arbitration agreement in clause 50.1 of the Contract. The letter to Unipro 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."

12. 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.*"

13. 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 filed a substantial motion supplementing its statement of claim on 22 August 2019. On 3 September 2019 the Moscow Arbitrazh Court ruled that the claim was now sufficiently particularised and accepted the claim to be dealt with in the proceedings as filed. Enka was aware of that ruling from the following day, 4 September 2019.

14. Shearman & Sterling LLP, acting for Enka, sent an email on 13 September 2019 to Joseph Wayland, general counsel in the US for the entire Chubb Group, demanding that the Moscow Claim be withdrawn by no later than 12 noon the following Monday, 16 September, failing which 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, that he had not had either the time or the materials to permit him to investigate and respond, and suggesting that Enka should provide a reasonable time for a properly considered response before commencing any legal action.

15. That same day, 16 September 2019, Enka issued the Arbitration Claim Form in the Commercial Court in London. The relief sought in the Claim form was:

(1) a declaration that Chubb Russia was bound by the arbitration agreement in clause 50 of the Contract and that it applied to the Moscow Claim;

(2) an injunction pursuant to s.37 of the Senior Courts Act 1981 restraining Chubb Russia from continuing the Russian Proceedings in breach of clause 50 and an injunction requiring Chubb Russia to discontinue the Russian Proceedings.

16. The Arbitration Claim Form also sought injunctions against the other three defendants, being respectively an English, a French and a Swiss company in the Chubb group, and associated disclosure orders. The basis of claim against them was an allegation that they were "pulling the strings" behind the breach of the arbitration clause by Chubb Russia. At the trial the judge concluded that there was no evidential basis to support such a claim against them, and there is no appeal in that respect. The only relief pursued by Enka on this appeal is against Chubb Russia.

17. The next day, 17 September 2019, Enka filed a motion with the Moscow Arbitrazh Court seeking dismissal without consideration of the claim against it on the basis of the arbitration agreement. Enka's motion to the Moscow court included a contention that the definition of "Applicable law" in Attachment 17 to the Contract was a choice by the parties of Russian law as the one governing their contractual relations. That contention was not maintained in the English proceedings.

18. At the preliminary hearing of the Moscow Claim on that same day, 17 September 2019, the Court adjourned the proceedings to 23 October 2019.

19. On 23 September 2019, Enka issued an application for permission to serve the Arbitration Claim Form out of the jurisdiction on Chubb Russia and Chubb Switzerland, together with an application for interim anti-suit injunctions. Notice of those applications was sent to the defendants on 26 September 2019.

20. On 30 September Teare J granted permission to serve the Arbitration Claim Form and other documents on Chubb Russia and Chubb Switzerland out of the jurisdiction.

21. On 2 October 2019, at Enka's request, a hearing was listed for 15 October 2019 to consider its application for interim injunctive relief.

22. On 11 October 2019 Kennedys Law LLP accepted service of the Arbitration Claim Form on behalf of Chubb Russia and Chubb Switzerland, stating that such acceptance was without prejudice to their right to challenge jurisdiction. Chubb Switzerland subsequently issued such an application to challenge jurisdiction and set aside Teare J's order. Chubb Russia did not.

23. On 15 October Enka's application for interim injunctions came on for hearing before Carr J. As a result of the inadequate way in which that application had been prepared and presented Carr J was unable to deal with it substantively, for the reasons set out more fully in her judgment [2019] EWHC 2729 (Comm). She determined that there should be an expedited trial commencing on 11 December and gave directions for the agreement of issues and service of witness statements and expert evidence on Russian law accordingly. The Agreed List of Issues pursuant to that order included the following:

Arbitration Agreement (Clause 50)

…..

4. Is the proper law of the Arbitration Agreement in the Enka Contract English law or Russian law? In this respect:

a. Was there an express choice of the applicable law?

b. Was there an implied choice of the applicable law?

c. If there was no express or implied choice, what law is the system of law having the closest connection to the Arbitration Agreement?

The Russian Claim and the Arbitration Agreement

5. Is the claim brought in the Russian Proceedings within the scope of the Arbitration Agreement?

Availability of relief

6. Can and should anti-suit injunctive relief be granted against D1 and if so what relief?

Including:

a. Is the proper law of the Arbitration Agreement relevant to the English Court's jurisdiction to grant an anti-suit injunction against D1 and if so how?

b. Would it be an affront to comity for the Court to grant anti-suit injunctive relief in the circumstances of this case (and hence should such relief be refused)?

c. Should an anti-suit injunction be granted against D1 as a matter of discretion or are there strong reasons not to grant such relief?

7. Can and should the court grant declaratory relief against D1?"

24. On 22 October 2019 Enka filed a further brief to the Moscow court, 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 it covered the claim brought against Enka in the Moscow Claim. The supplementary brief from Enka contended 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, that the arbitration agreement is treated as governed by the law of the seat. Enka's motion continued 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.

25. At the preliminary hearing the following day, 23 October 2019, Chubb Russia submitted its own substantial further written brief opposing the motion to dismiss, their brief supported by an opinion from Professor Adrian Briggs to the effect that, applying English law conflict of laws principles, 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.

26. In this jurisdiction, on 7 November 2019, Chubb Switzerland issued an application to set aside the order of Teare J granting permission to serve out on the grounds, amongst others, that there was no serious issue to be tried, and that there was a failure to give full and frank disclosure to Teare J. That application fell to be heard, and was heard, at the trial of the claim for final relief against all four defendants on 11 December 2019.

27. 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 Professor Briggs. The Moscow court did not deal with the Enka motion to dismiss on its substance and adjourned proceedings to 22 January 2020, at which it would require a statement by Enka, and for that matter the 10 co-defendants, of any position they intended to advance in the Moscow Claim on the merits.

28. The trial of the claim, and of Chubb Switzerland's jurisdiction challenge, came before Andrew Baker J on 11 and 12 December 2019 with expert evidence on Russian law. Enka contended that the arbitration agreement was governed by English law. If correct in that contention, it was common ground that the Moscow Claim fell within the scope of the clause in the light of *Fiona Trust and Holding Corpn v Privalov* [2008] 1 Lloyd's Rep 254, and that an anti-suit injunction should be granted unless there was strong reason not to in accordance with the principles set out in *Angeliki Charis Compania Maritima SA v Pagnan Spa (The "Angelic Grace")* [1995] 1 Lloyd's Rep 87. Chubb's primary submission was that the arbitration agreement in clause 50 was governed by Russian law; and that having reached that conclusion, the judge should as a matter of comity and discretion decline to grant relief but leave it to the Moscow Court to determine whether the Moscow Claim fell within the scope of the clause as a clearly more appropriate forum to address that question of Russian law, which it would do on Enka's motion in the Russian proceedings. Enka contended that if the arbitration agreement was, contrary to its primary case, governed by Russian law, the Court should decide on the Russian Law evidence before it that the Moscow Claim was brought in breach of the arbitration agreement and grant the final relief sought. Chubb submitted that if the court concluded that the Moscow Claim was within the scope of the arbitration agreement either because English law applied or because Russian law applied and had that effect, relief should be refused as a matter of discretion because Enka's delay, and conduct in both sets of proceedings, provided strong reason for doing so.

29. The Judge handed down his reserved judgment on 20 December 2019, acting with commendable speed to assist the parties prior to what was thought might be the final hearing in Russia on 22 January 2020. In his decision he took a course of his own initiative, not urged on him by either side, of declining to reach a decision on the proper law of the arbitration agreement and dismissing Enka's claim against Chubb Russia, as a matter of final determination, on forum non conveniens grounds, namely that all questions of the scope of the arbitration agreement and its applicability to the Moscow Claim, including the conflicts issue as to the governing law of the arbitration agreement, were more appropriately to be determined by the Moscow Arbitrazh Court in the Russian proceedings. The claim against Chubb Switzerland was determined by granting relief on its jurisdiction challenge application, setting aside Teare J's order for service out against it, setting aside service and declaring that the Court had no jurisdiction to determine the claim. In the case of the other defendants the order was simply that upon the trial of the claims they were dismissed.

30. Pending the hearing of this appeal events have moved on in the Russian proceedings as follows. The hearing took place on 22 January 2020 but the merits of the case were not addressed and the hearing was adjourned to 26 February 2020. At the hearing on 26 February 2020 the judge did not hear all the parties in the allotted time and the hearing was adjourned again to take place on 16 March 2020 (and if necessary 18 March 2020). In the course of the hearing on 16 March 2020 the judge announced that there would be a break in the hearing until 18 March indicating that she would then hear the parties' closing statements and give judgment. On 18 March 2020 the judge announced the operative part of her judgment after hearing closing statements. She dismissed, on the merits, all of Chubb Russia's claims against all defendants. She also dismissed Enka's motion seeking dismissal without considering the merits in reliance on the arbitration agreement. As is standard practice in Russian proceedings, the judge at this point announced only her decisions, not her reasons, which are to be given in a written judgment published by the court. In normal times that typically occurs within 5-10 working days but the evidence is that given the complexity of the case and the COVID-19 crisis there may be a much longer delay; the written judgment had not been published at the time of the hearing of this appeal. Chubb Russia will have one month from the date of written judgment within which to exercise its automatic right of appeal to the Arbitrazh Appellate Court in Moscow, which it has indicated its intention to do. In normal circumstances the hearing of such an appeal might typically take place about two months after filing the appeal but again the COVID-19 crisis adds considerable uncertainty in predicting the timetable. Enka may also appeal against the dismissal of its motion based on the arbitration agreement.

The Judgment

31. The Judge started with a section headed "Choice of Seat" in which he addressed the significance of the choice of seat in determining the proper law of the arbitration agreement on the assumption, which he later doubted, that it was the English Court's approach to that question which mattered ([47]). In this section he concluded at [64] that he did not regard the London seat of the arbitration as any real indication of a choice of English law, describing the choice of seat as not being "of any real moment at all for present purposes". In doing so he placed emphasis on the following. ICC Rules arbitration is well known worldwide to be arbitration under the auspices of a quintessentially and deliberately supranational institution, fundamental to which is

ICC's internal and supranational supervisory apparatus of the International Court of Arbitration ("the ICC Court") and its Secretary General and Secretariat [62]. Article 18 of the ICC Rules enables the ICC Court to choose the seat of the arbitration in the absence of choice by the parties [63]. In this ICC context the choice of London as the seat 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 [63]; it "perhaps may be taken to indicate a preference for the English court to be the court that gets involved, if any municipal court has ever 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". Despite these observations, the judge stopped short of deciding that English law was not the governing law of the arbitration agreement, or that Russian law was, later holding merely that the latter was "well arguable" [72] and "seriously arguable" [105].

32. The next section of the judgment is headed "The Arbitrators' Role" and starts by expressing "grave reservations" about whether the assumption in the first section is the correct one, namely that it is the English Court's view of proper law which matters. The reason given was that the a priori superior claim of any tribunal to be the one in which to decide whether the Moscow Claim was brought in breach of clause 50.1 of the Contract would be that of the arbitrators [69]. In this section the Judge expressed the following views in the course of reaching this conclusion. The English Court's special role under Articles V(1)(e) and VI of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the New York Convention") as the court of the seat does not give it any exclusive or even primary jurisdiction at the stage of enforcing the parties' agreement to arbitrate and the concomitant negative obligation not to litigate anywhere in the world a dispute falling within the scope of an arbitration agreement [66]. The exercise of the power to grant an anti-suit injunction to restrain such proceedings is not the exercise of powers as the arbitral supervisory court conferred by being the court of the seat, 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 [66], citing in support of this proposition *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] 1 WLR 1889. Where in such a case service out of the jurisdiction is required to establish personal jurisdiction, CPR 62.5(1)(c) provides the relevant gateway but the need to establish personal jurisdiction carries with it the requirement that this court be the most appropriate forum and "this is of real significance in the present case". The same is true of a defendant served here as of right because he may apply for a stay on grounds of forum non conveniens. Enka's argument that the choice of seat gives the English Court an a priori superior claim to determine whether the Moscow Claim is brought in breach of clause 50.1 was rejected [68]. Enka's failure to engage the primarily proper jurisdiction, namely that of an ICC arbitration tribunal was "a significant factor telling against their claim for the discretionary relief they seek" [78].

33. The next section is headed "A Russian Game-Changer", a reference to the submission by Chubb Russia that the approach of Millett LJ in *The Angelic Grace*, which was expressed in terms of an arbitration agreement governed by English law, only applied to such arbitration agreements and that therefore the fact that Clause 50.1 was in this case governed by Russian law was a game-changer [10]. At [81] the Judge rejected the

argument that there should necessarily be a different approach for agreements governed by foreign law, but concluded at [82] that the better view was that what mattered in all cases was whether the English Court was correctly seised of the claim to an anti-suit injunction as the most appropriate court to determine the claim for the grant of such relief.

34. Before addressing the application of the forum conveniens test to the facts of this case at [89], the Judge observed at [86]-[88] that normally a party would have to take such a stance on a Part 11 challenge to jurisdiction, and if he failed to do so could generally expect to find that it is too late to raise it at trial. However that did not apply to Chubb in this case because of "the scrambled procedure pragmatically adopted as something of an indulgence to Enka"; the "spirit" of Carr J's judgment being one to preserve the ability to raise issues already raised by the parties; and the fact that Chubb had throughout argued that the Russian Court was the appropriate forum. Accordingly he agreed with the submission of Mr Bailey QC, counsel for Chubb, "that in the circumstances of this case I should deal with the substance rather than the procedural form, and in fairness Mr Béar QC [then counsel for Enka] did not advance any contrary argument".

35. It is important to emphasise that the forum conveniens argument which Chubb had been advancing was not one which either had been or could have been advanced in a Part 11 challenge to jurisdiction: it was that the Court was properly seised of the claim and should embark upon and determine the first stage of the inquiry, namely determining the proper law of the arbitration agreement; Chubb's argument was and had always been that as a matter of comity or discretion in relation to the granting of relief, having found clause 50.1 to be governed by Russian law, the Court should refuse relief on the discretionary basis that the Russian Court was the better place to address the Russian law issues in the context of Enka's motion in the Moscow Court. Whereas the approach of the Judge seems to have been that the question he had to address was a truly jurisdictional one as to whether the court was properly seised of the claim and that he was entitled to treat the issue as a matter of substance as if it were a challenge to service of the proceedings under CPR Part 11, notwithstanding the absence of any such application as a matter of form. This was his own initiative and what led him to decline to decide the proper law of the arbitration agreement contrary to the course urged by both parties. Part 11 was raised as a relevant consideration by the Judge himself at two passages during the course of the hearing but in the course of musings in terms which do not in my view make it fair to criticise Mr Béar QC for failing to foresee or object to the course which the Judge decided to take of his own initiative. One of the issues which Enka sought to raise on this appeal by an application to amend its Appellant's Notice was that such a course was not procedurally open to the Judge, apart from its main argument that such a course was juridically unsound.

36. At [89] the judge expressed the ratio of his decision to decline jurisdiction over the claim on forum non conveniens grounds. It is convenient to set it out in full:

> 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."

37. There followed a section on Contract terms in which the Judge said he would "tread more lightly" because the issue would be before the Moscow Court, in which he expressed no firm views about the effect of the terms of the Contract on the question whether it involved an express choice of Russian law.

38. The judge then considered whether "if the analysis reached this point", i.e. if he had concluded that the Moscow Claim was brought in breach of clause 50.1, there was strong reason against the grant of an injunction. He rejected three of the grounds advanced on behalf of Chubb and accepted the fourth as amounting to a strong reason, which was expressed as "the delay and degree of participation on the part of Enka in the Moscow Claim."[97].

39. In the conclusion section of the judgment at [113] the Judge said

> "……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…..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 on 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…"

Submissions

40. Enka's submissions on this appeal may briefly be summarised as follows:

(1) The course taken by the judge of his own initiative to decline to decide the claim on forum non conveniens grounds was wrong in principle. The English Court as the court of the seat of the arbitration is for that reason the appropriate forum to exercise the jurisdiction to grant anti-suit relief. It is required to decide whether threatened or actual proceedings constitute a breach of the arbitration agreement, and if they do, to protect the integrity of the arbitration agreement by granting anti-suit relief unless there is a strong reason for not doing so. That is part of the supervisory jurisdiction of the court of the seat, to which the parties submit by choosing the place of the seat. There is no room for the application of any forum non conveniens consideration: either the forum conveniens question does not arise or it is automatically answered in favour of the English Court as the court of the seat.

(2) Such a course was also procedurally impermissible (a point sought to be raised by an amendment to the Appellant's Notice for which permission was sought and opposed by Chubb Russia).

(3) The proper law of the arbitration agreement in clause 50 is English law, and therefore it is common ground that the Moscow Claim is brought and pursued in breach of the agreement to arbitrate.

(4) Alternatively if the proper law of the arbitration agreement is Russian law, the Judge should have determined that it applied to the Moscow Claim. The principles identified in (1) render equally impermissible the course urged by Chubb's alternative case, pursued as its only case before the Judge and maintained as its primary case on appeal, that having determined that Russian law applied, the Court should at that stage decline to grant the declaratory and injunctive relief sought in the exercise of its discretion and for reasons of comity, leaving the question of whether the Moscow Claim involved a breach of an arbitration agreement governed by Russian law to the Russian courts.

(5) There is no strong reason to refuse anti-suit or declaratory relief. The Judge's exercise of discretion was flawed in its approach and the discretion should be exercised afresh in Enka's favour.

41. Chubb Russia submitted, in summary:

(1) The Judge's approach was a legitimate and conventional application of forum non conveniens considerations which cannot properly be criticised:

(a) The Judge was correct to treat the source of the power to grant anti-suit injunctions as s. 37 of the Senior Courts Act 1981 and that it was not the supervisory jurisdiction which was part of the curial law. The supervisory jurisdiction conferred by the curial law is confined to the exclusive supervisory jurisdiction which only arises in relation to an arbitration process which has been commenced or at least where a party has articulated a desire to commence an arbitration, and which does not include the anti-suit injunction jurisdiction which is concurrent rather than exclusive.

(b) Alternatively if the grant of anti-suit relief is the exercise of the supervisory jurisdiction conferred by the curial law, it is a non-exclusive and concurrent supervisory jurisdiction, and where there are concurrent jurisdictions questions of forum conveniens between the available jurisdictions always arise.

(2) Alternatively, this Court should decide that the arbitration agreement in clause 50.1 is governed by Russian law and uphold the Judge's decision to decline to grant the declaratory and injunctive relief sought in the exercise of its discretion and for reasons of comity, leaving to the Russian courts the question of whether the Moscow Claim involved a breach of an arbitration agreement governed by Russian law.

(3) Alternatively, if the Moscow Claim is found to be in breach of the arbitration agreement in clause 50.1 of the Contract, this Court should not interfere with the Judge's exercise of his discretion in holding that that there was a strong reason to refuse the grant of relief.

The role of the court of the seat and forum conveniens

42. The Judge's approach was wrong in principle. The English court as the court of the seat of the arbitration is necessarily an appropriate court to grant an anti-suit injunction and questions of forum conveniens do not arise. This follows from two essential principles. First, the choice of the seat of the arbitration is an agreement by the parties to submit to the jurisdiction of the courts of that seat in respect of the exercise of such powers as the choice of seat confers. Secondly, the grant of an anti-suit injunction to restrain a breach or threatened breach of the arbitration agreement is an exercise of such powers. It follows, therefore, that by the choice of English seat the parties agreed that the English Court is an appropriate court to exercise the power to grant an anti-suit injunction.

43. Before developing these points it is worth saying something about labels. The law of the place of the seat is usually referred to as the curial or procedural law or the lex fori (see e.g. *Naviera Amazonica v Cie Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116, 119). I shall refer to it as the curial law. The powers which are conferred by such choice of seat are often described as the court's

"supervisory jurisdiction". This is a somewhat inaccurate label and may be apt to mislead. It undoubtedly includes the powers contained in the Arbitration Act 1996, which by sections 2(1) and 4(1) make the mandatory provisions applicable by virtue of the choice of seat, and provide at s. 4(4) that this is so irrespective of the law governing the arbitration agreement. Indeed even the non-mandatory provisions apply by virtue of the choice of seat in the absence of agreement to the contrary (s. 4(2)). The mandatory provisions include powers which can be exercised before there is any arbitration to "supervise". For example s. 12 provides that the court may extend the time for commencement of an arbitration beyond that agreed by the parties. Section 44 confers the power to grant ancillary orders, such as freezing injunctions, in cases of urgency before there is any arbitration reference. Even where there is an arbitration, the court of the seat is not in reality "supervising" it in exercising many of the 1996 Act powers, for example in enforcing the award (s. 66).

44. The use of labels in the argument on this appeal tended to obscure rather than illuminate the analysis. Mr Dicker QC referred to the package of rights contained in a London arbitration clause as including (1) an agreement to English law as the curial law or procedural law of the arbitration and to the application of the Arbitration Act 1996; and separately and distinctly (2) an agreement to the English Court exercising its "supervisory and supportive" role as the court of the seat including its power to grant anti-suit injunctions. The latter phrase seems to be derived from a passage in Dicey Morris & Collins on *The Conflict of Laws* cited with approval by Blair J in *U & M Mining Zambia Ltd v Konkola Copper Mines plc* [2013] 2 Lloyd's Rep at [64] but it is there applied to the conduct of an arbitration. Mr Bailey, on the other hand, referred to the jurisdiction as the supervisory jurisdiction but distinguished between exclusive and non-exclusive supervisory jurisdictions, suggesting that only the exclusive jurisdiction (which did not include the anti-suit injunction jurisdiction) was that conferred under the curial law because only one court could be charged with the function of supervision (although he appeared to accept at one point that the non-exclusive anti-suit injunction jurisdiction arose by virtue of the choice of seat), an analysis to which Mr Dicker objected on the grounds that the curial jurisdiction "cannot be subdivided" (per Kerr LJ in the *Naviera Amazonica* case at p120). I have not found it helpful to analyse the issue by treating the role of the court in granting anti-suit injunctions as "supportive" or to be viewed in isolation from the curial or procedural law; nor to approach the issue in two stages, first by labelling the jurisdiction as supervisory and then by analysing the ramifications of that label. What matters is whether the scope of the powers conferred on the English Court by the choice of English curial law includes the jurisdiction which the English Court undoubtedly has to grant declaratory and anti-suit relief in relation to foreign proceedings brought in breach of the arbitration agreement. I would prefer to use the label "curial jurisdiction" to reflect the powers which the court is exercising by reason of the parties having chosen its law as the curial law, whilst recognising of course that that is what is meant by the use in many of the authorities by the epithet "supervisory jurisdiction".

45. Both of the two principles I have identified were articulated by Lord Hoffmann in *West Tankers Inc. v RAS Reiunione Adriatica di Sicurta SpA (The "Front Comor")* [2007] 1 Lloyd's Rep 391, to which the Judge below was not referred. Lord Hoffmann said:

> "18. Of course arbitration cannot be self-sustaining. It needs the support of the courts; but, for the reasons eloquently stated by Advocate General Darmon in The

> Atlantic Emperor, it is important for the commercial interests of the European Community that it should give such support. Different national systems give support in different ways and an important aspect of the autonomy of the parties is the right to choose the governing law and seat of the arbitration according to what they consider will best serve their interests.
>
> 19. The Courts of the United Kingdom have for many years exercised the jurisdiction to restrain foreign court proceedings as Colman J did in this case: see *Pena Copper Mines Ltd v Rio Tinto Co Ltd* (1911) 105 LT 846. It is generally regarded as an important and valuable weapon in the hands of a court exercising supervisory jurisdiction over the arbitration. It promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court. As Professor Schlosser also observes, it saves a party to an arbitration agreement from having to keep a watchful eye upon parallel court proceedings in another jurisdiction, trying to steer a course between so much involvement as will amount to a submission to the jurisdiction (which was what eventually happened to the buyers in *The Atlantic Emperor:* see [1992] 1 Lloyd's Rep 624) and so little as to lead to a default judgment. That is just the kind of thing that the parties meant to avoid by having an arbitration agreement.
>
> 20. Whether the parties should submit themselves to such a jurisdiction by choosing this country as the seat of their arbitration is, in my opinion, entirely a matter for them. The courts are there to serve the business community rather than the other way round. No one is obliged to choose London. The existence of the jurisdiction to restrain proceedings in breach of an arbitration agreement clearly does not deter parties to commercial agreements. On the contrary, it may be regarded as one of the advantages which the chosen seat of arbitration has to offer. Professor Schlosser rightly comments that if other Member States wish to attract arbitration business, they might do well to offer similar remedies. In proceedings falling within the Regulation it is right, as the Court of Justice said in Gasser and Turner v Grovit , that courts of Member States should trust each other to apply the Regulation. But in cases concerning arbitration, falling outside the Regulation, it is in my opinion equally necessary that Member States should trust the arbitrators (under the doctrine of *Kompetenz-Kompetenz*) or the court exercising supervisory jurisdiction to decide whether the arbitration clause is binding and then to enforce that decision by orders which require the parties to arbitrate and not litigate."

46. As Lord Hoffmann observed in the opening sentence of [20], the choice of seat is by its very nature a submission to the curial jurisdiction. The choice of seat is a legal concept which determines the curial law. It is distinct from the geographical venue at which hearings take place. Absent specific agreement to the contrary, a London seated arbitration may be conducted for the convenience of the tribunal and the parties anywhere in the world. The significance of the choice of a seat is not a practical one as to where hearings or deliberations of the tribunal will be held but a legal one as to the curial law and the curial court. The choice of seat also determines where the award is made for the purposes of whether it is an award governed by the New York Convention, regardless of where it is signed or published: s. 53 Arbitration Act 1996 and Article 31(3) of the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 ("the Model Law"). The choice of seat is often made by choosing a "place" of arbitration,

or that the arbitration is to "be in", or "to take place in", the specified place, in this case London. It is well established that the choice of such place is a choice of seat rather than venue. If authority were required for these well-established principles it is to be found in the judgment of Kerr LJ in the *Naviera Amazonica* case, in which Kerr LJ also emphasised at p.120 that none of these principles is different in relation to institutional arbitrations such as those conducted under the ICC Rules or those of the London Court of International Arbitration. Thus it is common ground that in this case the choice of London in clause 50.1 as the place of arbitration is a choice of English seat and of English law as the curial law, notwithstanding that under Articles 18.2 and 18.3 of the ICC Rules which govern the conduct of the arbitration there is a discretion as to where to hold hearings and deliberations. To hold that the choice of seat is a submission to the curial jurisdiction is therefore no more than to give effect to party autonomy which is fundamental to arbitration agreements and which it is the primary function of the courts to respect and uphold. Parties who agree a particular seat deliberately submit themselves to the law of the seat and whatever control it exerts. That not only gives effect to party autonomy but promotes certainty.

47. That the choice of curial law is a submission to the curial jurisdiction is apparent from a number of other authorities. In *C v D* [2007] 2 All ER (Comm) 557 at [29], Cooke J held that the legal consequence of entering into an arbitration agreement with London as the seat is "*not only [that] there is agreement to the arbitration itself but also to the courts of the seat having supervisory jurisdiction over that arbitration*". In *A v B* [2007] 1 All ER (Comm) 591, [111(ii)], Colman J stated that *"an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause"*. These statements have been approved twice by this court, in *C v D* [2008] Bus LR 843, [17], per Longmore LJ and very recently in *Minister of Finance v IPIC* [2019] EWCA Civ 2080, [37], per Vos C.

48. Lord Hoffmann's suggestion that parties choose the curial law by reason of the remedies available to the curial court is not only rooted in logic and commercial sense but borne out by evidence of business practice. In the 30th Annual Freshfields Lecture in November 2015, published as an article dated 24 February 2016 in Arbitration International, 2016, 32, p223-241, Lord Mance referred at p234 to the results of the Queen Mary International Arbitration Survey for 2015 which concluded that "preferences for seats are predominantly based on users' appraisal of the seat's established formal legal infrastructure: the neutrality and impartiality of the legal system; the national arbitration law; and its track record for enforcing agreements to arbitrate and arbitral awards."

49. Nor is this a merely parochial view. In his keynote address at the 10th Annual International Conference of the Nani Palkhivala Arbitration Centre on 17 February 2018, the Chief Justice of the Supreme Court of Singapore, Chief Justice Sundaresh Menon said:

> "54. In his Freshfields Lecture Lord Mance forcefully argued that there has been and always will be a special link between an arbitration and its seat. In his view, decisions of the seat are "decisions which the parties must, on the face of it, be taken to have accepted when that seat was chosen, and should in the ordinary case be treated as final and binding". In other words, parties who agree to a particular seat may be taken to have intentionally submitted themselves to the law of the seat and whatever control it exerts. This is particularly so since, as pointed out by Lord

> Mance, the modern reality is that the choice of seat is often a deliberate and conscious one. Therefore an approach that places weight on the decision of the seat court gives effect to, rather than conflicts with, the principle of party autonomy.
>
> 55 I agree with this, and would argue that the pre-eminence of the seat court is the logical outworking of orthodox common law principles which I have discussed above, each of which is built on sound normative foundations, namely the principle of the comity of nations and the public interest in having finality in litigation."

50. Lord Hoffmann's statement in paragraph [21] of the *West Tankers* case that the power to grant anti-suit injunctions is part of the "supervisory jurisdiction" of the curial court is also well supported by principle and authority. In the *West Tankers* case itself Lord Mance joined with all the other members of the House of Lords in agreeing with Lord Hoffmann, and added a few paragraphs of his own which reflect the importance of the jurisdiction to grant anti-suit injunctions as part of the curial jurisdiction conferred on the courts of the "place of arbitration" (i.e. the seat), for the efficacy of international arbitrations generally:

> "29. The purpose of arbitration (enshrined in most modern arbitration legislation) is that disputes should be resolved by a consensual mechanism outside any court structure, subject to no more than limited supervision by the courts of the place of arbitration. Experience as a commercial judge shows that, once a dispute has arisen within the scope of an arbitration clause, it is not uncommon for persons bound by the clause to seek to avoid its application. Anti-suit injunctions issued by the courts of the place of arbitration represent a carefully developed — and, I would emphasise, carefully applied — tool which has proved a highly efficient means to give speedy effect to clearly applicable arbitration agreements.
>
> 30. It is in practice no or little comfort or use for a person entitled to the benefit of a London arbitration clause to be told that (where a binding arbitration clause is being — however clearly — disregarded) the only remedy is to become engaged in the foreign litigation pursued in disregard of the clause. Engagement in the foreign litigation is precisely what the person pursuing such litigation wishes to draw the other party into, but is precisely what the latter party aimed and bargained to avoid."

51. In his Freshfields Lecture Lord Mance also referred to the anti-suit injunction jurisdiction as one of the central features of English curial jurisdiction at p224:

> "In English law eyes, the effectiveness and probably attraction of arbitration depends upon the possibility of more or less circumscribed court intervention at potentially critical points: e.g. to determine whether or not an arbitration agreement exists, to assist its implementation if it does, e.g. by appointing, removing or replacing an arbitrator, or (save between EU or Lugano states) to injunct proceedings brought in breach of an agreement to arbitrate, to issue interim measures, and to enforce or in some cases to set aside any award."

52. The authorities contain a number of statements by judges of the Commercial Court that the anti-suit injunction jurisdiction arises from the choice of seat. It was said expressly to do so by Cooke J in *C v D* (above) at [34]; by Teare J in *Sheffield United Football Club Ltd v West Ham United Football Club plc* [2008] 2 CLC 741 at [40]; by Andrew Smith J in *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] 1 CLC 339 at [46]; and by myself in *XL Insurance Co SE v Little* [2019] EWHC 1284 (Comm) at [14]. It is implicit in the analysis of Colman J in *A v B* [2007] 1 All ER (Comm) 591 at [111].

53. The primary role of the curial court in granting anti-suit relief is supported by principle. The anti-suit injunction jurisdiction is concerned to protect and enforce the integrity of the arbitration agreement. In order to do so it must necessarily interrogate the substantive jurisdiction of the arbitral tribunal (or the putative or potential tribunal if none has been or is intended to be appointed) in determining whether the foreign proceedings are a breach of the agreement to arbitrate the dispute in question. Questions of the substantive jurisdiction of the tribunal are paradigm issues of curial law assigned to the court of the seat. This curial jurisdiction to determine the arbitrators' substantive jurisdiction arises notwithstanding the international principle of *Kompetenz-Kompetenz*, reflected in our domestic law in s. 30 of the Arbitration Act 1996, that in the absence of contrary agreement the tribunal may rule on its own substantive jurisdiction. This is because the court of the seat always remains the primary arbiter of the substantive jurisdiction of the tribunal and will examine that jurisdiction not only in a challenge to the tribunal's ruling on its own substantive jurisdiction, but if necessary in advance of it: see *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at [84] and [95]-[98], in which Lord Collins repeatedly refers to this as an aspect of what I have called the curial jurisdiction of the court of the seat; and the *AES Ust-Kamenogorsk* case at [40] per Lord Mance. This is the inevitable result of the fact that arbitration is consensual. As the learned editors of Mustill & Boyd on *Commercial Arbitration* 2nd ed put it at pp.6-7 "In the eyes of English law it is a logical absurdity to hold that the arbitrator can ask himself a question which if answered in the negative implies he had no jurisdiction to ask it". There must be a court with power to determine the substantive jurisdiction of an arbitral tribunal, and when an arbitral tribunal has been constituted or is in contemplation, this role is assigned to the court of the seat both before and after an award is made.

54. This is not only a matter of domestic law. The primacy of the court of the seat in this respect is reflected in Articles V(1)(e) and VI of the New York Convention when another court is asked to enforce an award. The enforcing court must defer to any decision of the curial court setting aside or suspending the award. That does not of itself determine that it is accorded primacy in matters prior to an award being made; but it recognises the particular role of the court of the seat in relation to one aspect which falls within the primacy accorded to it at the enforcement stage, an aspect which is common to both the validity of an award and the grant of anti-suit relief, namely whether a dispute is within the scope of an agreement to arbitrate and therefore the substantive jurisdiction of an arbitral tribunal.

55. It is consistent with this acknowledged primary role of the curial court that it should also perform the primary role of determining the substantive jurisdiction of an arbitral tribunal as the necessary inquiry in addressing whether to grant anti-suit relief to protect

such substantive jurisdiction. Indeed it is not only consistent, but it is moreover desirable that it should do so if the parties' legitimate expectations of certainty and business efficiency arising from their agreement to arbitrate and choice of seat are to be given effect. If the curial court cedes the question to a foreign court when asked to protect the integrity of an arbitration agreement by anti-suit relief, there arises a risk of parallel proceedings and inconsistent decisions. Parallel proceedings are always undesirable but are particularly inimical in this context where being engaged in foreign proceedings is the very thing a party bargained to avoid by his agreement to arbitrate, as Lord Mance emphasised in the *West Tankers* case at [30]. The risk of parallel proceedings and inconsistent judgments arises where the English Court as the court of the seat is exercising its undoubted primary jurisdiction to determine the substantive jurisdiction of the arbitral tribunal, whether before or after it has made an award. For example the English Court might determine that an award was valid on a challenge under s. 67 of the Arbitration Act 1996 on the grounds that the dispute was within the scope of the arbitration agreement, when the foreign court had declined to stay its proceedings on the basis that the dispute was outside its scope. Not only is such inconsistency undesirable in itself, there is the further risk of an issue estoppel arising from the decision of the foreign court, especially in the light of the difficulties to which Lord Hoffmann adverted in the *West Tankers* case of steering a line between participating in a way which prevents a default judgment but does not amount to a submission to the jurisdiction of the foreign court. Such consequences confound the parties' expectations of certainty and the upholding of party autonomy which it was the purpose of their arbitration agreement and choice of seat to provide.

56. There is nothing in this analysis which is undermined by the fact that there may be other courts which can exercise jurisdiction to protect the integrity of the arbitral process and restrain a party from taking or pursuing proceedings in breach of an agreement to arbitrate. Two circumstances were identified where a concurrent jurisdiction could be exercised by a court other than that of the seat. First, both parties before us accepted the correctness as a matter of English law of the decision of the Court of Appeal of Bermuda in *IPOC International Growth Fund Ltd v OAO CT-Mobile LV Finance Group* [2007] CA (Bda) 2 Civ, [2007] Bermuda LR 43, in holding that a court with personal jurisdiction over a defendant has jurisdiction to grant an anti-suit injunction notwithstanding that it is not the curial court. Secondly in countries which are party to the New York Convention, the court before which the proceedings are brought has the role conferred by Article II (3), reflected in our domestic law in section 9 of the Arbitration Act 1996, of declining to accept claims brought in breach of an agreement to arbitrate.

57. Neither of these possibilities, however, supports Mr Bailey's submission that by virtue of such concurrence there is introduced a concept of forum conveniens for the curial jurisdiction of the court of the seat. It is desirable that parties should be held to their contractual bargain by any court before whom they have been or can properly be brought. However in each of the two cases identified where the non-curial court has concurrent jurisdiction, the determination by the non-curial court on the scope of the arbitration agreement and the substantive jurisdiction of the arbitrators is not one which by their agreement the parties have agreed to submit to that court. On the contrary they have agreed to submit it to the curial court. If the curial court were to defer on forum conveniens grounds to the non-curial court, it would be defeating rather than upholding

the considerations of certainty and party autonomy which go with the control which the parties agree the curial court should exercise by reason of their choice of seat.

58. The cornerstone of Mr Bailey's argument to the contrary was reliance on the Supreme Court decision in the *AES Ust-Kamenogorsk* case, which the Judge cited at paragraph [66] of his judgment as support for his proposition that the anti-suit injunction jurisdiction was not an exercise of the supervisory jurisdiction of the court of the seat. Mr Bailey relied in particular on what Lord Mance said in a passage at paragraph [61]: "In some cases where foreign proceedings are brought in breach of an arbitration clause or exclusive choice of court agreement, the appropriate course will be to leave it to the foreign court to recognise and enforce the parties' agreement on forum". This, he submitted, was a recognition of the power in appropriate cases to defer to the jurisdiction of the foreign court on forum conveniens grounds.

59. I cannot accept that the *AES Ust-Kamenogorsk* case provides any support for the Judge's proposition. It would be surprising if Lord Mance's judgment should bear this interpretation given what was said (1) by Lord Hoffmann in the *West Tankers* case at [22] with which Lord Mance agreed, (2) by Lord Mance himself in the *West Tankers* case at [31] and (3) the personal views expressed by Lord Mance in his Freshfields Lecture, all of which are flatly inconsistent with the Judge's proposition. Nor is the statement in paragraph 61 of *AES Ust-Kamenogorsk* to be interpreted as Mr Bailey suggests. In that case the Court was concerned with an application to the English Court as the court of the seat to restrain proceedings in Kazakhstan in circumstances where the applicant did not wish to commence arbitration and had no intention of doing so. In upholding the grant of the anti-suit injunction the Supreme Court held that the absence of a reference to arbitration, or any intention to commence such reference, was irrelevant to the enforcement by anti-suit injunction of the negative aspect of an arbitration agreement which constituted a promise not to commence proceedings in a different forum (see [21]-[23], [48]). This jurisdiction arose under s. 37 of the Senior Courts Act 1981, not s. 44 of the Arbitration Act 1996 which was confined by its terms to powers exercisable "for the purposes of and in relation to arbitration proceedings." In rejecting an argument that this analysis was contrary to the terms, scheme, parliamentary intention and philosophy of the Arbitration Act 1996 as providing a complete set of rules for the determination of jurisdictional issues and excluding the jurisdiction under s. 37 of the Senior Courts Act 1981 (see [29] and [32]), Lord Mance regarded the expressly limited scope of s. 44 as conclusive in itself against the exclusion of the s. 37 jurisdiction to grant anti-suit injunctions because the existence or contemplation of such arbitral proceedings was irrelevant to the latter (see [43]). However it simply does not follow that because the power to grant an anti-suit injunction arises under s. 37 of the 1981 Act, rather than by virtue of the 1996 Act, it is not the exercise of the curial jurisdiction. On the contrary the Supreme Court's rejection of the proposition that the 1996 Act provided a complete set of rules for the determination of jurisdictional issues suggests the very opposite. Moreover Lord Mance recognised the significance of the place of the seat in the s. 37 jurisdiction to grant anti-suit injunctions at [50] when recognising that it was the fact of the seat being in London which engaged CPR 62.5(1)(c) and conferred personal jurisdiction over a defendant who could not be served within the jurisdiction. One of the flaws in Mr Bailey's argument was to treat s. 37 of the 1981 Act as if it conferred a freestanding power against anyone irrespective of an ability to assert personal jurisdiction over them. But like any other power of the English Court, it can only properly be exercised over

someone who is properly before the Court, and it is the fact that the seat of any arbitration would be in London which afforded personal jurisdiction in that case. Indeed in the current case it is difficult to see where the personal jurisdiction to grant a remedy against Chubb Russia comes from on its own case, if not from the fact that London is the seat of the arbitration. On Chubb Russia's case the arbitration agreement is not an English law agreement. On that hypothesis and in the absence of a voluntary submission to the jurisdiction, therefore, there could be no personal jurisdiction over Chubb Russia to enable the Court to exercise the s. 37 powers but for the fact that the seat of the arbitration is in London so that CPR62.5(1)(c) is engaged.

60. Lord Mance's comment at paragraph [61] of his judgment falls to be interpreted in this light. It is addressing the discretion to refuse injunctive relief which is discretionary in nature, when exercising the undoubted curial jurisdiction, on the discretionary grounds which have always been recognised since the seminal decision in *The Angelic Grace* where there is strong reason to do so. His remarks have nothing to do with declining to address the question on forum conveniens grounds. If there were any doubt about this, it is dispelled by the remarks being premised on a finding that there is a breach of the agreement to arbitrate in bringing the foreign proceedings.

61. The Civil Procedure Rules provide some limited further support for Enka's case more generally. There is an express forum conveniens requirement in most cases of applications for permission to serve out of the jurisdiction: CPR 6.37(3) provides that the court will not give permission unless it is satisfied that England and Wales is the proper place in which to bring the claim. Arbitration claims, which include applications for anti-suit injunctions to restrain foreign proceedings brought in breach of an arbitration agreement, are governed by a different regime in Part 62. As already observed, one of the gateways for such jurisdiction is provided for in CPR 62.5(1)(c) where the seat of the arbitration is in England and Wales. But by contrast with the requirement in CPR 6.37(3), there is no requirement that England and Wales must be the proper place in which to bring the claim. This is because questions of forum conveniens do not arise when the court is exercising the curial jurisdiction which goes with the choice of England (or Wales) as the seat of the arbitration. It is true, as Mr Bailey emphasises, that the power to grant permission to serve out of the jurisdiction in CPR 62.5(1) is expressed in discretionary terms ("*The Court may grant permission…*"), but in cases where the gateway is the seat of the arbitration, that does not import forum conveniens as a relevant discretionary factor for the reasons I have explained. That is also the view of the editors of Merkin & Flannery on *The Arbitration Act 1996* 6th ed, at paragraph 44.12.5.1.4, which I prefer to that of the editors of Dicey Morris & Collins on *The Conflict of Laws* 15th ed at paragraph 16-046 who treat the question of forum conveniens as arising within the discretion under CPR62.5(1) in every case, but say that the forum conveniens requirement is likely to be satisfied where the seat of the arbitration is in England.

62. I turn to Chubb Russia's alternative case, which was its case before the Judge and remained its primary case on appeal, namely that the Court should decide what the proper law of the arbitration agreement is and having determined it to be Russian Law, defer to the Moscow Court as a matter of discretion in relation to the grant of discretionary relief.

63. This submission does not in fact help Chubb Russia because, for the reasons given below, I have concluded that the arbitration agreement in clause 50.1 of the Contract is

governed by English Law. However the approach suggested is just as flawed as the approach taken by the Judge. The task of the English Court as the court of the seat was to determine whether the Moscow Claim was a breach of clause 50.1; and if that involved determining questions governed by Russian law, the Court was required to do so. In this case the parties put before the Court the evidence necessary to enable it to decide those issues and the Commercial Court is well familiar with such an exercise of determining issues of foreign law and well equipped to do so. Indeed that may be one of the perceived advantages of the parties' choice of England as the seat of the arbitration, although it ought to arise comparatively rarely in the light of my conclusions below that the law governing the arbitration agreement will usually coincide with the curial law.

64. Once it is recognised that it is the primary function of the English Court as the court of the seat to determine whether an anti-suit injunction should be granted, it follows that the Court must address the two relevant questions, namely (1) whether the foreign proceedings are a breach of the arbitration agreement and (2) if so whether relief should be granted as a matter of discretion. As Males J, as he then was, put it in *Nori Holding Ltd and others v PJSC Bank Otkritie Financial Corporation* [2018] 2 All E R (Comm) 1009 at [28] "when such an injunction is sought it is for the court to determine whether there is a binding arbitration agreement and whether the pursuit of the foreign proceedings constitutes a breach of the agreement". It is illogical and impermissible to embark upon the first question by determining the proper law of the arbitration agreement but then declining to finish the exercise by ceding part of the issue to a foreign court. That is no less a failure to respect the parties' bargain in choosing England as the seat of the arbitration than not embarking on the first question at all. Only once this court has answered the first question, and answered it in the affirmative, can there be any consideration of the factors which weigh against the grant of relief as a matter of discretion. Forum conveniens is not a consideration in whether the curial court should consider the exercise of its anti-suit injunction jurisdiction, a jurisdiction which requires it to address the whole of the first question. It is no more a legitimate consideration for part only of that question than it is for the whole.

65. In the *West Tankers* case at first instance Colman J considered and rejected an argument that the grant of an anti-suit injunction by the English Court in that case was inconsistent with Article II(3) of the New York Convention which confers jurisdiction on the court seised of the allegedly abusive proceedings to grant a stay: see [2005] 2 All ER (Comm) 240 at [53]-[58]. At [55] he said that it was inappropriate and unnecessary to consider whether the Article II(3) court would be offended or affronted by the English Court granting an anti-suit injunction rather than leaving it to that foreign court whether to grant a stay. On the leapfrog appeal to the House of Lords, Lord Hoffmann endorsed his decision on this point and stated that it was unnecessary to enlarge upon the reasons he gave. This further supports the view that ceding the decision to the court seised of the allegedly abusive proceedings cannot be justified on grounds of comity, whether as a matter of forum conveniens or as a relevant factor in the exercise of discretionary relief.

66. For these reasons the Judge's approach was simply wrong in principle. He should have decided whether the Moscow Claim was a breach of the arbitration agreement in clause 50.1 of the Contract.

The procedural point

67. I have hitherto addressed the issue as a matter of principle. In the course of argument the Court raised the question whether the course adopted by the judge was procedurally permissible in the light of the fact that Chubb Russia, unlike Chubb Switzerland, had not issued a Part 11 application, Carr J had ordered a trial, and Chubb Russia had agreed to the substantive issues in the Agreed List of Issues being determined at trial and participated in the preparation for and conduct of such trial. This led to an application by Enka on the second morning of the hearing to amend its Appellant's Notice to take the point that the judge's course was indeed impermissible as a matter of statutory submission to the jurisdiction under CPR Part 11. Mr Bailey objected to the application on grounds of lateness and because he had not had a proper opportunity to consider the new point. We deferred the question whether to grant permission to allow the parties to make further written submissions after the hearing. Those submissions involved Enka taking a new point, namely that there had also been a submission to the jurisdiction at common law by waiver; and Chubb Russia advancing a number of different legal arguments in response whilst maintaining that the lateness of the application unfairly prejudiced Chubb Russia and that permission to amend should be refused. For my part I would refuse the application to amend on the basis that it is too late and as a result has not only prejudiced Chubb Russia but deprived the Court of an opportunity for proper consideration, with the benefit of oral argument, on what it now appears are several substantial new issues of both law and fact. The refusal of the application makes no difference to the result in the light of my earlier conclusions.

Proper law of the arbitration agreement

68. I shall refer to the proper law of an arbitration agreement as "the AA law" and the proper law of the main contract in which the arbitration clause is to be found as "the main contract law". It is well established that the AA law may not be the same as the main contract law. In this case Enka contends that the AA law of clause 50 of the Contract is English law, and Chubb Russia that it is Russian law. It is common ground that the main contract law is Russian law, but the route to that conclusion is also in issue.

69. The dispute in this case raises the question of the relative weight to be given to the curial law of the arbitration agreement and the main contract law, where they differ, in determining the AA law. It is a question on which it would be idle to pretend that the English authorities speak with one voice. It would appear that there are also differences of approach between other jurisdictions in international arbitration generally: see, for example, Glick QC and Venkatesan "*Choosing the Law Governing the Arbitration Agreement*" in Kaplan and Moser *Jurisdiction Admissibility and Choice of Law in International Arbitration* (2018), Chapter 9 at 9.03 and the sources cited in footnotes 8 and 9.

70. The English conflict of law rules are not themselves in doubt:

    (1) The search for the main contract law is governed by the Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)). The Regulation provides in Article 3.1 that the governing law is that chosen by the parties where a choice is made expressly or is clearly demonstrated by the terms

of the contract or the circumstances of the case. In the absence of such choice Article 4 provides that in a contract for the provision of services the governing law is prima facie that of the habitual residence of the service provider but that the law of another country applies where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with that country. Questions about the law governing arbitration agreements, on the other hand, are not covered by the Rome I Regulation because by Article 1(2)(e) it does not apply to arbitration agreements.

(2) The AA law is to be determined by applying the three stage test required by English common law conflict of laws rules, namely (i) is there an express choice of law? (ii) if not, is there an implied choice of law? (iii) if not, with what system of law does the arbitration agreement have its closest and most real connection? See for example *Sulamerica Cia Nacional de Seguros SA v Enesa Engelharia* SA [2013] 1 WLR 102 per Moore-Bick LJ at [9] and [25], who observed that as a matter of principle these three stages ought to be embarked on separately and in that order, but that in practice stage (ii) often merges into stage (iii) because identification of the system of law with which the contract has its closest and most real connection is likely to be an important factor in whether the parties have made an implied choice of proper law. The line between the search for the implied intention of the parties and the search for the system of law with which the contract has its closest and most real connection is a fine one which has frequently been blurred in the English jurisprudence: see Dicey Morris and Collins on *Conflict of Laws* 15th ed at paragraph 32-007.

71. In reviewing the authorities I shall confine myself to those which I have found helpful in illuminating the issue under discussion. *Hamlyn & Co v Talisker Distillery* [1894] AC 20 concerned a contract signed in London but to be performed in Scotland, which contained a clause providing for disputes "to be settled by arbitration by two members of the London Corn Exchange or their umpire in the usual way". Such arbitration clause would have been null and void if governed by Scottish law. The House of Lords unanimously held that the terms of the arbitration clause demonstrated a clear intention that the arbitration agreement was governed by English law. Although the clause was in different terms from one which merely identifies a choice of seat, providing as it did for a particular trade tribunal and its usual procedures, the case provides an early example of a choice of seat being treated as a choice of the curial law as the AA law.

72. In *Cie D'Armement Maritime SA v Cie Tunisienne de Navigation SA* [1971] AC 572, the issue concerned the main contract law in a contract of affreightment for a number of shipments of oil between Tunisian ports by the French shipowners. The contract had a governing law clause providing that the contract was to be governed by the laws of the flag of the carrying vessel. The dispute, however, did not relate to any particular shipment, which the shipowners might perform on vessels owned or chartered in, and therefore of potentially differing flags. The arbitrators had found that the shipowners "primarily" used French flag vessels. There was also a London arbitration clause. The House of Lords held unanimously that the governing law was French law, although the speeches differed as to whether this was by an express choice (per Lord Morris, Lord Diplock and Viscount Dilhorne) or by reason of the closest connection test (per Lord Reid and Lord Wilberforce). All rejected an argument that the London arbitration clause was a sufficient factor pointing to English law. The potential significance of the

case lies in passages in the speeches of Lord Reid (at p. 584E), Lord Morris (at p. 590G), Lord Wilberforce at (pp. 596B-D and 599C-D) and Lord Diplock (at pp. 604H-605A), all of whom expressed in slightly differing language the principle, that a choice of arbitration in England was an important factor, and in many cases might be the decisive factor, pointing to English law governing the main contract, although that was not always so and must sometimes yield to other factors as it did on the facts of that case. It is important to note that the case was not concerned with the AA law. It concerned the effect the curial law might have on the main contract law, and the argument that it had an effect was based on a direct connection between the two, which had nothing to do with the AA law: the choice of London arbitration was argued to be a pointer to the main contract law on the grounds that it would involve English arbitrators who would be familiar only with English law, or at least most familiar with such law; and so by choosing such arbitrators the parties could be taken as having chosen that their national law would be applied to the contract of affreightment: see per Lord Wilberforce at p. 596B-D and per Lord Diplock at p. 605A. Lord Wilberforce rejected the premise for the argument, and I doubt that it would now be accorded significant weight in the context of most international arbitration in England, in which English arbitrators are often asked to decide questions under a foreign governing law and are regarded as equipped to do so. A fortiori it is inapplicable to a case such as the present involving arbitration under the ICC Rules which commonly involves appointment of foreign arbitrators from different legal traditions and disciplines notwithstanding that the seat of the arbitration is in London. What matters for the purposes of the present debate is that this case is of no direct relevance on the effect the curial law may have on the AA law.

73. In *XL Insurance Ltd v Owens Corning* [2001] 1 All ER (Comm) 530 Toulson J was concerned with a Bermuda form policy of insurance which contained a governing law provision that the policy should be construed in accordance with New York law. There was a dispute as to whether there had also been incorporated a London arbitration clause. The assured commenced proceedings in Delaware and the insurers sought an anti-suit injunction from the English Court on the grounds that there had been incorporated an arbitration clause providing for disputes to be arbitrated in London under the provisions of the Arbitration Act 1996. In addressing the issue of the AA law of this clause Toulson J cited the dictum of Mustill J in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg* AG [1981] 2 Lloyd's Rep 446 at p. 453 that "It is by no means uncommon for the proper law of the substantive contract to be different from the lex fori; and it does happen, although much more rarely, that the law governing the arbitration agreement is also different from the lex fori". Toulson J went on to identify the reasons for this greater rarity of a difference between curial law and AA law at p. 541e:

> "The reasons are not hard to seek. Arbitration is all about a particular method of resolving disputes. Its substance and process are closely intertwined. The Arbitration Act 1996 contains various provisions which could not readily be separated into boxes labelled "substantive arbitration law" or "procedural law" because that would be an artificial division."

74. At p. 543b Toulson J stated his conclusion on this point in the following terms:

> "I conclude that by stipulating for arbitration in London under the 1996 Act, the parties chose English law to govern the matters which fall within those provisions,

> including the formal validity of the arbitration clause and the jurisdiction of the arbitral tribunal; and by implication chose English law as the proper law of the arbitration clause (although that final step is further than is necessary for the purpose of determining the application)."

75. In *C v D* [2007] 2 All ER (Comm) 557 (Cooke J) [2008] 1 All ER (Comm) 1001 (Court of Appeal), the Court was again concerned with a Bermuda form insurance policy providing for New York law and London arbitration "under the Arbitration Act 1950 as amended". The assured obtained an award in its favour from a London tribunal. The insurer claimed that the award was in manifest disregard of New York law and threatened to bring proceedings in the United States invoking a US Federal law provision which permitted awards to be vacated if brought in manifest disregard of the law. The assured sought and was granted an anti-suit injunction to restrain such proceedings. In holding that AA law was English law because it followed the curial law, Cooke J said at [50]:

> "I am unable to see how, without express wording to the contrary, the provisions of the Act are agreed to apply to the arbitration, without also importing the provisions which relate to enforcement (section 66 - a mandatory provision), sections 67 and 68 (also mandatory provisions) and those parts of section 70 and 71 which apply to section 67 and 68, and section 73. As Toulson J pointed out, it is not easy to separate questions of validity of the award, enforcement of the award and challenges to the award into neat divisions of points of law which are substantive or procedural in the context of these issues. Whilst in the earlier part of this judgment, I have held that questions of challenge to the award and enforcement of the award are matters for the curial law, they plainly impact also upon the law of the agreement to arbitrate and the law of the Agreement to Refer, because those are matters which are inextricably caught up with the whole business of arbitrating and the effect of it. When the parties agreed to arbitrate in a particular place under particular laws, they plainly had in mind the effect of so doing and chose the law and seat of the arbitration with a view to achieving particular results in that respect. I cannot see that the law of the agreement to arbitrate and the law of the agreement to refer can here differ from the curial law."

76. On the appeal the insurer argued that the judge had been wrong to hold that the arbitration agreement was governed by English law merely because the seat of the arbitration was in London; and that although the arbitration agreement was silent as to its proper law, its proper law should follow that of the policy as a whole, namely New York law. In rejecting the argument Longmore LJ (with whom Sir Anthony Clarke MR and Jacob LJ agreed) treated the inquiry as a search for the system of law with which the arbitration agreement had its closest and most real connection. He cited Mustill J's dictum in *Black Clawson* quoted above and concluded that it was unaffected by anything which that judge said as Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334. He said at paragraph [22] that the AA law was more likely to be that of the law of the seat of the arbitration than the law of the main contract, giving his reasoning at paragraph [26]:

> "The reason is that an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the law of the underlying contract in cases where the parties have

> deliberately chosen to arbitrate in one place disputes which have arisen under a contract governed by the law of another place."

77. This aspect of the decision was obiter because at paragraphs [16] to [17] Longmore LJ gave as his primary reasoning for dismissing the appeal that by choosing London as the seat of the arbitration the parties must be taken to have agreed that proceedings on the award should be only those permitted by English law, the choice of seat being a choice of forum for remedies seeking to attack the award, and an exclusive one at that.

78. In *Shashoua v Sharma* [2009] 2 All ER 477 Cooke J granted an anti-suit injunction where there was an Indian Law contract (by express choice) with an arbitration clause providing for arbitration in London under ICC Rules. In rejecting the argument that the choice of Indian law as the main contract law indicated that Indian law was the AA law, the Judge said at [29] that "recent decisions, where the focus has been on the seat of the arbitration and the agreement to arbitrate, establish that it is much more likely that the law of the arbitration agreement will coincide with the curial law."

79. In *Sulamerica* there was an insurance policy expressly governed by Brazilian law and a London arbitration clause, with a separate mediation clause. The insurers commenced arbitration. The assured obtained an injunction in Brazilian proceedings restraining the insurers from pursuing the arbitration. The insurers in turn sought an interim anti-suit injunction from the English Court to restrain the assured from pursuing the Brazilian proceedings. The injunction was granted ex parte and maintained by the judge at an inter partes hearing, whose decision was upheld by this court. The leading judgment was given by Moore-Bick LJ, with whom Lord Neuberger MR and Hallett LJ agreed, although Lord Neuberger gave an additional judgment whose terms I confess I find difficult to reconcile with the statement in his opening paragraph that he was agreeing with the reasoning of Moore-Bick LJ on the issue of the proper law of the arbitration agreement.

80. At [11] Moore-Bick LJ said:

> "It has long been recognised that in principle the proper law of an arbitration agreement which itself forms part of a substantive contract may differ from that of the contract as a whole, but it is probably fair to start from the assumption that in the absence of any indication to the contrary, the parties intended the whole of their relationship to be governed by the same system of law. It is common for parties to make an express choice of law to govern their contract but unusual for them to make an express choice of the law to govern any arbitration agreement contained within it; and where they have not done so, the natural inference is that they intended the proper law chosen to govern the substantive contract also to govern the agreement to arbitrate."

81. He then identified statements in older cases and textbooks which were said to support that approach including the *Channel Tunnel* case (Lord Mustill's dictum which Longmore LJ had interpreted as leaving his contrary view in *Black Clawson* undisturbed), *Sonatrach Petroleum Corpn (BVI) v Ferrell International* [2002] 1 All ER (Comm) 627 per Colman J at [32]; *Sumitomo Heavy Industries Ltd v Oil and Natural Gas Commission* [1994] 1 Lloyd's Rep 45 per Potter J at p. 57; the decision of Cooke J in *Liebinger Stryker Trauma GmbH* [2006] EWHC 690 (Comm); Dicey Morris & Collins on *The Conflict of Laws* 14th ed at paragraphs 16-016, 16-017; and Mustill &

Boyd on *Commercial Arbitration* 2nd ed at p. 63. He also referred to *XL Insurance v Owens Corning* and to *C v D*. At [24] he said that if *C v D* were treated as something approaching a rule of law it would no doubt be convenient and would prevent many disputes of the kind which arose in that case, but he did not think it could easily be reconciled with the earlier authorities or with established principles for determining the proper law. This last comment would appear to be a reference to Longmore LJ treating the curial law as a guide to the AA law by application of the closest and most real connection test without first considering implied choice of law. After referring to a work by David Joseph QC *Jurisdiction and Arbitration Agreements and their Enforcement* 2nd ed at paragraphs 6.33-6.41, Moore-Bick LJ concluded this review by observing that although there is a wealth of dicta touching on the problem there is no decision binding on this court. Having identified the three stage approach required he said at [26]:

> "26. If the court were concerned with a free-standing agreement to arbitrate in London containing no express choice of proper law, it is unlikely that there would be a sufficient basis for finding an implied choice of proper law and it would simply be necessary to seek to identify the system of law with which the agreement had the closest and most real connection. In those circumstances the significance of the choice of London as the seat of the arbitration would be overwhelming. However, where the arbitration agreement forms part of a substantive contract an express choice of proper law to govern that contract is an important factor to be taken into account. The difference in emphasis between the views expressed in the earlier authorities and those to be found in the more recent cases is, I think, mainly due to the different degrees of importance that has been attached to the parties' express choice of proper law to govern the substantive contract, reinforced by a more acute awareness of the separable nature of the arbitration agreement…… In the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate. A search for an implied choice of proper law to govern the arbitration agreement is therefore likely (as the dicta in the earlier cases indicate) to lead to the conclusion that the parties intended the arbitration agreement to be governed by the same system of law as the substantive contract, unless there are other factors present which point to a different conclusion. These may include the terms of the arbitration agreement itself or the consequences for its effectiveness of choosing the proper law of the substantive contract: see *XL Insurance v Owens Corning*."

82. Moore-Bick LJ went on at [27] ff to apply the principles to the facts of that case. The express choice of Brazilian law to govern the policy was "a strong pointer" towards an implied choice of Brazilian law as the AA law [27] and "a powerful factor" in favour of such implied choice [29] but it was outweighed by two factors. The first was expressed at [29] in these terms:

> "…The first is that identified by Toulson J. in *XL Insurance v Owens Corning*. As the parties must have been aware, the choice of another country as the seat of the arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings. Accordingly, even though the arbitration agreement in this case does not specifically refer to the provisions of the Arbitration Act 1996, the parties must

> have foreseen and intended that its provisions should apply to any arbitration commenced pursuant to condition 12 (including all those provisions, such as sections 5, 7, 8, 12, and 13 which are more substantive than procedural in nature). This tends to suggest that the parties intended English law to govern all aspects of the arbitration agreement, including matters touching on the formal validity of the agreement and the jurisdiction of the arbitrators."

83. The second factor identified was that Brazilian law was said by the assured to require the consent of the assured to render the arbitration agreement enforceable. Since the parties must have intended to render the arbitration agreement effective they must impliedly have chosen a system of law which would make it so, and because there was at least a serious risk that a choice of Brazilian law would significantly undermine that agreement, that was an indication that the express choice of Brazilian law did not carry with it an implied choice of Brazilian law as the AA law. Having rejected the suggestion that there was any implied choice of AA law at stage (ii) of the inquiry he concluded at [32]:

> "One then has to consider with what system of law the agreement has the closest and most real connection. Although Mr. Wolfson submitted that the agreement has a close and real connection with the law of Brazil, being the law governing the substantive contract in which the arbitration agreement itself is embedded, I think his argument fails adequately to distinguish between the substantive contract and the system of law by which it is governed. No doubt the arbitration agreement has a close and real connection with the contract of which it forms part, but its nature and purpose are very different. In my view an agreement to resolve disputes by arbitration in London, and therefore in accordance with English arbitral law, does not have a close juridical connection with the system of law governing the policy of insurance, whose purpose is unrelated to that of dispute resolution; rather, it has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective. Its closest and most real connection is with English law. I therefore agree with the judge that the arbitration agreement is governed by English law."

84. Hallett LJ agreed with Moore-Bick LJ. Lord Neuberger also stated at [49] that he agreed with the reasoning and conclusions of Moore-Bick LJ but wished to add a few paragraphs of his own on the issue of the proper law of the arbitration agreement. His starting point at [51] was that determining the proper law of the arbitration agreement was in each case a matter of contractual interpretation. He contrasted the statements in the cases and textbooks to which Moore-Bick LJ had referred with the more recent decision of this court in *C v D* and lamented the lack of certainty in this area and the "unsatisfactory tension" between these different approaches [57]. He identified three possible approaches, one being to treat the approach in *C v D* as correct, another to treat it as wrong, and a third being to say that there were sound reasons to adopt either approach, but not to choose between them since they led to the same result on the facts of the instant case [57]. He specifically declined to treat what was said in *C v D* as wrong [58]. He declined to choose between the other two approaches on the grounds that they led to the same result on the facts of that case [59]. The upshot is that he specifically left open as correct, without deciding, the approach in *C v D*. I do not find

this easy to reconcile with his agreement with Moore-Bick LJ's reasoning, which to my mind is inconsistent with the approach in *C v D*.

85. Two subsequent first instance decisions have had to grapple with this rather unsatisfactory state of the law. In *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2013] 2 All ER (Comm) 1 Andrew Smith J sought to analyse the effect of the authorities and concluded that the express choice of Indian law in the main contract in that case, together with references in the London arbitration agreement to provisions of Indian law in relation to interim relief, supported an implied choice of Indian law as the AA law, rather than the English curial law.

86. In *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd* [2014] 1 Lloyd's Rep 479 Hamblen J, as he then was, summarised the effect of the authorities at paragraph [101] in the following terms:

> "The guidance provided by these authorities may be summarised as follows:
>
> (1) Even if an arbitration agreement forms part of a matrix contract (as is commonly the case), its proper law may not be the same as that of the matrix contract.
>
> (2) The proper law is to be determined by undertaking a three-stage enquiry into (i) express choice, (ii) implied choice and (iii) the system of law with which the arbitration agreement has the closest and most real connection.
>
> (3) Where the matrix contract does not contain an express governing law clause, the significance of the choice of seat of the arbitration is likely to be "overwhelming". That is because the system of law of the country seat will usually be that with which the arbitration agreement has its closest and most real connection.
>
> (4) Where the matrix contract contains an express choice of law, this is a strong indication or pointer in relation to the parties' intention as to the governing law of the agreement to arbitrate, in the absence of any indication to the contrary.
>
> (5) The choice of a different country for the seat of the arbitration is a factor pointing the other way. However, it may not in itself be sufficient to displace the indication of choice implicit in the express choice of law to govern the matrix contract.
>
> (6) Where there are sufficient factors pointing the other way to negate the implied choice derived from the express choice of law in the matrix contract the arbitration agreement will be governed by the law with which it has the closest and most real connection. That is likely to be the law of the country of seat, being the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective."

87. Proposition (5) begs the question as to the relative weight to be attached to the choice of seat. However that was a case in which there was no express choice of law for the

main contract. In those circumstances Hamblen J treated the *Sulamerica* decision as clear authority for the AA law being that of the country of the seat [103].

88. The most recent case to which I need to refer is *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] 1 Lloyd's rep 269. In that case the main contract was expressly governed by English law and contained an arbitration clause providing for ICC arbitration in Paris. The issue was whether the AA law was English or French law. This Court upheld the decision of Burton J that it was English Law. It did so on the basis that the express choice of law in the main contract was also an express choice of the AA law as a matter of construction of the particular terms of the main contract and the arbitration clause in that case. It was therefore unnecessary for the court to grapple with the principles to be applied in the absence of express choice of AA law.

89. In my view the time has come to seek to impose some order and clarity on this area of the law, in particular as to the relative significance to be attached to the main contract law on the one hand, and the curial law of the arbitration agreement on the other, in seeking to determine the AA law. The current state of the authorities does no credit to English commercial law which seeks to serve the business community by providing certainty.

90. Where the AA law question can be answered at the first stage, namely whether there is an express choice of the AA law, no conceptual difficulty arises. An express choice of AA law may exceptionally be found in the arbitration agreement itself. If not, it may be found in the terms of an express choice of main contract law, or a combination of such express choice with the terms of the arbitration agreement. That was the position in *Kabab-Ji*. That will be a matter of construction of the whole contract, including the arbitration agreement, applying the principles of construction of the main contract law if different from English law. This solution is likely to be confined to cases where there is an express choice of main contract law. If the main contract law is not one by express choice it is difficult to conceive of circumstances in which it could support a finding of express choice of AA law. It is not a conclusion which will follow in all cases, or indeed the majority of cases, in which there is an express choice of main contract law but only in the minority of such cases where the language and circumstances of the case demonstrate that the main contract choice is properly to be construed as being an express choice of AA law.

91. In all other cases, the general rule should be that the AA law is the curial law, as a matter of implied choice, subject only to any particular features of the case demonstrating powerful reasons to the contrary. There are three principal considerations which point to that conclusion, which is in line with the approach of Toulson J in *XL Insurance v Owens Corning* and of Cooke J and this court in *C v D*.

92. First, there is no principled basis for treating the main contract law as a significant source of guidance for the AA law in cases where there is an arbitration clause with a different curial law. The law of the main contract is a system of law applicable to the terms of the main contract and the validity, interpretation and performance of those terms, *other than* the terms of the separate arbitration agreement and the validity, interpretation and performance of those separate arbitration terms. This follows from the doctrine of separability of the arbitration agreement recognised in section 7 of the Arbitration Act 1996 and re-emphasised by the House of Lords in *Fiona Trust v Privalov*. This is so whether or not the main contract law arises by express or implied

choice of the parties, or by any other conflicts rules applied by a court such as the closest and most real connection test or application of Article 4 of the Rome I Regulation. If there is an express choice of law, it is a choice as to the law to be applied to the terms other than those in the separate arbitration agreement (*Kabab-Ji* type cases aside). It therefore has little if anything to say about the AA law choice because it is directed to a different and separate agreement. The same is true of an implied choice of main contract law, and a fortiori where the main contract law is imposed under conflicts rules on grounds other than a choice by the parties. Of course if the main contract law does not recognise the doctrine of separability, and there has been an express choice of that law, that may be a reason for treating the main contract law choice as an express choice of the same AA law. But that would take it outside the category of cases here being considered, which do not include those where there is an express choice of AA law. In any event such cases will be rare if, as has been suggested, the doctrine of separability is "one of the conceptual and practical cornerstones of international arbitration" (Born on *International Commercial Arbitration* (2014) at p349).

93. It has been argued that it is impermissible to treat the arbitration agreement as entirely separable in the current context, on the grounds that the doctrine of separability, as enshrined in Article 16 of the Model law and s. 7 of the Arbitration Act 1996, confines the doctrine to questions of the existence, validity and effectiveness of the arbitration agreement ("invalid, non-existent or ineffective"): see for example Glick QC and Venkatesan at 9.05. Moore-Bick LJ made this point in *Sulamerica* at [26]:

> "The concept of severability itself, however, simply reflects the parties' presumed intention that their agreed procedure for resolving disputes should remain effective in circumstances that would render the substantive contract ineffective. Its purpose is to give legal effect to that intention, not to insulate the arbitration agreement from the substantive contract for all purposes."

94. However without going so far as to suggest the doctrine insulates the arbitration agreement for all purposes (cf *JSC Zestafoni G Nikoladze Ferroalloy Plant v Ronly Holdings Ltd* [2004] EWHC 245 (Comm)), there are good reasons for treating it as doing so for the purposes of choice of AA law where there is a different curial law from that applicable to the main contract. In such circumstances the parties have, ex hypothesi, chosen a separate system of law to govern one aspect of their relationship, namely the curial law of the arbitration agreement. The arbitration agreement is treated as separate and severable for the purposes of this choice of curial law, about which the main contract law has nothing to say. Why then should it have anything to say about the closely related aspect of the very same arbitration agreement, namely the AA law (absent express language to that effect so as to give rise to an express choice of AA law)? Moreover questions of the validity, existence and effectiveness of an arbitration agreement are often governed by the AA law, under which they fall to be determined. If the arbitration agreement is properly isolated from the main contract by the doctrine of separability for the purposes of one aspect governed by the AA law, namely its validity, existence and effectiveness, that is a powerful indication that it is to be isolated for the purpose of determining the AA law more generally. In other words because parties are to be treated as having contracted on the basis that the main contract and the arbitration clause are separate and distinct agreements for the purposes of the latter's validity, existence and effectiveness, so they should be taken as having contracted on

the same basis in respect of the governing law of the arbitration agreement which determines its validity, existence and effectiveness.

95. The principal rationale articulated in the authorities for treating an express choice of main contract law as indicative of a choice of AA law is not some connection between the subject matter of the former and the latter, but rather that businessmen do not usually intend that their relationship should be governed by more than one system of law: see for example *Sulamerica* at [11]. This is a sensible starting point where there is no arbitration clause with a different seat; but it ceases to have any application where there is. In such cases, whatever the AA law, the parties have necessarily chosen their relationship to be governed in some respects by two systems of law, namely the curial law and the main contract law.

96. Secondly, the overlap between the scope of the curial law and that of the AA law strongly suggests that they should usually be the same. As Toulson J observed at p. 543b in *XL Insurance v Owens Corning*, the scope of the curial law is not limited to the exercise of purely procedural powers. It involves the curial court determining aspects of the substantive rights of the parties under their arbitration agreement by reference to the curial law. This is well illustrated by provisions of the Arbitration Act 1996. Section 5 requires the arbitration agreement to be in writing or evidenced in writing, reflecting Article 7 of the Model Law. If it is not, the Act does not apply. This is not strictly speaking a question of validity because an oral agreement may be valid at common law, which is preserved by s. 81 of the Act. But section 5 directly affects the substantive rights of the parties because the ability to enforce performance contained in the myriad provisions of the Act is unavailable in the case of an oral agreement. Section 6, also reflecting Article 7 of the Model Law, contains a definition of what amounts to an "arbitration agreement" to which the provisions of the Act are then applicable. This affects the substantive rights of the parties in the same way as section 5. Section 7 of the Act, reflecting Article 16(1) of the Model Law, provides for the separability of the arbitration agreement, again a matter of the substantive arbitral rights of the parties. Indeed it goes to the very heart of those rights by insulating them from matters which affect the validity or effectiveness of the main contract. Section 8 of the Act provides that the arbitration agreement is not discharged by the death of a party and may be enforced by or against the personal representatives. Section 12 enables the court to extend time for the commencement of proceedings in the face of a contractual time bar, which applies where the time bar is a substantive one which is expressed to extinguish the claim as well as those in which it bars the remedy. An equivalent power for other time limits is contained in section 79. Section 13 applies the Limitation Acts, which may therefore affect the substantive rights of the parties by barring a claim. Section 14 defines when arbitration proceedings are commenced in the absence of agreement of the parties, again affecting the substantive rights of the parties under their arbitration agreement for the purposes of time limits imposed by contract or the Limitation Acts. Section 30, reflecting Article 16 of the Model Law, provides that in the absence of contrary agreement the arbitral tribunal may rule on its own jurisdiction: this therefore affects the scope of the arbitration agreement in defining that which the parties are deemed to have agreed to submit to the jurisdiction of the tribunal at least in the first instance. The same applies to the enforcement provisions in s.66-68 of the Act: they are in one sense procedural but they affect the scope of the substantive rights of the parties under the arbitration agreement.

97. In *Sulamerica* Moore-Bick LJ recognised the force of this point that the substantive nature of a number of the 1996 Act provisions suggested that the parties intended English law to govern all aspects of the arbitration agreement, including matters touching on the formal validity of the agreement and the jurisdiction of the arbitrators, at paragraph [29]. He treated it as one of two important factors pointing away from the main contract law being an implied choice of the AA law in that particular case. However this is not a case specific factor, but one which will apply in every case in which English law is the curial law. There will always be this substantial overlap between the scope of the curial law and the scope of the AA law.

98. Although I have expressed this point by reference to the content of English curial law, its validity does not depend upon any peculiar features of English law as the curial law. It applies equally as a general rule to any curial law. There can be no suggestion that English curial law is in this respect over expansive in its scope by international standards, given that many of the provisions identified reflect those in the Model Law. Moreover the very function which the curial law performs means that one would expect it always to be capable of playing some part in affecting the scope of the substantive rights of the parties under their arbitration agreement.

99. Perhaps ironically, this analysis is to my mind supported by the rationale previously put forward to support the opposite view, namely that businessmen should not be taken to have intended that different systems of law should apply to their relationship; or perhaps more pertinently, that they should not be taken to have intended that different systems of law should apply to two closely related aspects of their relationship, even where a different system does apply to a third aspect. Of the three potentially different systems of law, the connection between the AA law and the curial law is very much closer than that between the AA law and the main contract law. If the curial law and AA law are different, the curial court will be bound to apply the foreign AA law when exercising its curial jurisdiction, and I accept that there is nothing conceptually problematic about this. But that would be an unlikely choice for businessmen. Their starting point might well be that the curial court would be expected to apply its own system of law to all issues which would arise when exercising its curial jurisdiction. But however that may be, the significant point is that if the curial function which is being exercised by the curial court involves the determination of the scope of the arbitration agreement in order to protect its integrity, as it will when questions arise as to the substantive jurisdiction of the arbitrators in a challenge to the award, or when exercising its anti-suit relief curial jurisdiction as in the instant case, it is unlikely that businessmen would have chosen that the curial court should apply two different systems of law when exercising that single function. So in the instant case, whilst there is nothing conceptually problematical about the English Court applying the English curial law on anti-suit relief and Russian law as the AA law, it is inherently unlikely that businessmen would have made that choice because it involves asking the court to determine rights whose scope so substantially overlaps by two different systems of law. Put another way, as a matter of commercial common sense, one would not expect businessmen to choose two different systems of law to apply to their arbitration package.

100. Thirdly, I regard this as a matter of implied choice at stage (ii) of the AA law inquiry, rather than by application of the closest and most real connection test at stage (iii). This is how it was treated in *Hamlyn v Talisker*: see per Lord Herschell LC at p. 208, Lord Watson at pp. 212, 213, Lord Ashbourne at p. 215 and Lord Shand at p. 216. The *Cie*

D'Armement case also indirectly supports this view because it treats the curial law as capable of determining the main contract law on the basis that a choice of seat may constitute a choice of that country's law as the law of the main contract; and it would be anomalous if a choice of curial law could amount to a choice of the main contract law but not the AA law.

101. This seems to me to accord with principle. The curial law is a matter of choice which comes with the express choice of seat. The passages identified above in the *West Tankers* case, *C v D* and *Ministry of Finance v IPIC*, which refer to it as a submission to the curial jurisdiction, reflect the fact that juridically it is a choice of curial law; and Lord Mance's Freshfields Lecture illustrates that that is so not merely as a matter of legal theory but of business practice. Given the connection and overlap between the scope of the curial jurisdiction and the scope of the AA law, it seems natural to regard a choice of the former as a choice of the latter, rather than merely the latter being the system of law with which the arbitration agreement has its closest and most real connection.

102. This is none the less so when the parties have chosen arbitration under the ICC Rules or some other institutional umbrella. Such rules often circumscribe some of the powers which would otherwise be available under the curial law, for example a right of appeal from an award; and confer certain powers on the institutional bodies which would otherwise fall to the curial court, such as the appointment of arbitrators. This is all part of the party autonomy which applies to the choice of curial law as much as to any other aspect of the arbitration agreement. But there always remains a substantial function for the curial court, not least in cases where there is a dispute as to the validity or effectiveness of the arbitration agreement or the substantive jurisdiction of the arbitrators.

103. Conceptual problems may arise where no seat has been chosen, because English conflicts rules do not recognise the concept of a floating proper law: the arbitration agreement must be governed by a system of law which is identifiable at the time the agreement is made. Institutional arbitration rules sometimes provide for this eventuality. Article 18.1 of the ICC Rules provides that if the parties have not agreed the place of arbitration it shall be fixed by the ICC Court. The floating proper law problem stands in the way of an analysis that in such cases the delegated choice of seat operates as an implied choice of AA law. However it is not necessary for the purposes of the present discussion or the decision in the present case to explore the ramifications of a situation in which the parties have not chosen a seat.

104. All I have said may yield to specific contrary factors thrown up by the circumstances of individual cases, for example if the arbitration agreement would be invalid under the law of the seat. There may in any given case be specific factors which may point in one direction or another. However there would need to be powerful countervailing factors to negate the reasons I have identified for treating a choice of curial law as an implied choice of AA law as a general rule.

105. I would therefore summarise the principles applicable to determining the proper law of an arbitration agreement, what I have called the AA law, when found in an agreement governed by a different system of law, as follows:

(1) The AA law is to be determined by applying the three stage test required by English common law conflict of laws rules, namely (i) is there an express choice of law? (ii) if not, is there an implied choice of law? (iii) if not, with what system of law does the arbitration agreement have its closest and most real connection?

(2) Where there is an express choice of law in the main contract it may amount to an express choice of the AA law. Whether it does so will be a matter of construction of the whole contract, including the arbitration agreement, applying the principles of construction of the main contract law if different from English law.

(3) In all other cases there is a strong presumption that the parties have impliedly chosen the curial law as the AA law. This is the general rule, but may yield to another system of law governing the arbitration agreement where there are powerful countervailing factors in the relationship between the parties or the circumstances of the case.

106. Applying these principles to the current case it is clear that the proper law of the arbitration agreement in clause 50 of the Contract is English law. The governing law of the Contract is Russian law but that is not by express choice. Mr Bailey relied on the definition of Applicable Law in Attachment 17 in the following terms:

> "Law of the Russian Federation, including legislation of the Russian Federation, all regulatory legal acts of 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 regulatory legal acts."

107. However this is not applied to the contract terms by any clause of the kind "This Agreement is governed by the Applicable law". Article 1 merely provides that "The terms used in this Agreement shall have the definitions set forth in Attachment No. 17 to this Agreement". On the contrary the term "Applicable Law" is used in a limited number of specific provisions rather than expressed to apply generally. Typical is Article 4.1(b) which provides that Enka shall ensure performance of the work in accordance with the Applicable Law. This is a common technique in international construction contracts where quite apart from the governing law of the contract, which can be chosen by the parties, there are particular local laws and regulations which are mandatorily applicable, such as those governing planning, health and safety, labour laws, taxes and customs. The technique is to define such applicable laws and impose an obligation to comply with them separately from any choice of governing law of the contract as a whole: see Baker Mellors Chalmers and Lavers on *FIDIC Contracts, Law and Practice* at 2.126, 2.140, 2.145. The definition of Applicable Law in Attachment 17 is accordingly drafted in suitably wide terms to cover not just Russian law as such but so as to have a particular focus on regulatory requirements. It only specifically applies to certain obligations in the Contract where the definition is used, in each case in a way which fulfils this function of compliance with mandatory local regulations. There is nothing to suggest an express general choice of Russian law as governing law.

108. Even if I were wrong in this and there were an express choice of Russian law, this is not one of those rare cases where it is or informs an express choice of the AA law of clause 50, and Mr Bailey did not argue to the contrary.

109. Accordingly the presumption applies that the parties have impliedly chosen that the proper law of the arbitration agreement should coincide with the curial law and be English law. There are no countervailing factors let alone powerful ones. On the contrary there is a supportive factor to be found in the pre-arbitration procedures identified in the first part of clause 50. The parties must have intended that the whole of clause 50 as a single dispute resolution procedure should be governed by the same system of law, a conclusion reinforced by the definition of Dispute which is adopted both for the mediation aspect and the arbitration aspect. The senior management discussing the dispute for the purposes of resolving it under the mediation provisions would not as businessmen be expected to draw distinctions between the legal basis for the claims, whether contractual tortious or otherwise, and to discuss only some. They would be expected to discuss all aspects of the dispute, whatever their legal basis, because the purpose of such discussions is the resolution of the entire dispute between the parties, not part only. That is an indication of an intention to apply the wider approach to what amounts to a dispute falling within the clause which is required by English law as explained in *Fiona Trust v Privalov*, rather than the narrower interpretation which it is suggested is required by Russian Law of distinguishing between legal bases of claim. If this is true of disputes which are to form the subject matter of the mediation provisions, it is equally true of the arbitration agreement which adopts the same definition of "Dispute" in defining its scope.

110. It follows that the Moscow Claim was brought and pursued by Chubb Russia in breach of the agreement to arbitrate in clause 50.1 of the Contract.

Discretion/strong reason

111. I turn to the Judge's alternative and secondary basis for his decision, namely that there was strong reason to refuse relief by reason of the three factors identified at paragraphs [97] and [113] of his judgment, being (1) Enka's delay (2) Enka's participation in the Russian proceedings and (3) Enka's failure to commence arbitration.

112. The Judge's exercise of his discretion was infected by errors of principle in a number of ways. It is apparent from what I have already said that he failed to appreciate the primary role of the English Court as the court of the seat in granting anti-suit relief in the exercise of its curial jurisdiction. He also inclined strongly to the view, without expressing a final conclusion, that the arbitration agreement was not governed by English law. He therefore exercised his discretion from the wrong starting point. His approach to what was necessary to provide a strong reason for not giving effect to the parties' bargain was infected by his failure to treat Enka's claim as a proper and straightforward invocation of the curial court's primary role in granting an anti-suit injunction to restrain a breach of an English law arbitration agreement. He also fell into error in treating Enka's failure to commence arbitration as a "very significant factor" counting against it. It is not a relevant factor at all. It is clear from *AES Ust-Kamenogorsk* that the anti-suit injunction jurisdiction arises irrespective of any actual or contemplated arbitration proceedings because an arbitration agreement contains the independent negative promise not to commence proceedings anywhere in the world. The Judge was also mistaken in treating an arbitration tribunal as prima facie the a priori forum in which Enka should seek to resolve the scope of the arbitration agreement: that was the primary function of the English Court in exercise of its curial jurisdiction which Enka was entitled to invoke without commencing arbitration proceedings to seek a

declaration of non-liability. It therefore falls to this court to exercise the discretion afresh.

113. It is not clear quite what the Judge had in mind when treating Enka's participation in the Russian proceedings as one of the factors counting against it. Mr Bailey suggested that it meant the service of several rounds of submissions, including expert opinions on English law from prominent English lawyers (Lord Neuberger and Professor Briggs). If so, this is not a matter for legitimate criticism which should be held against Enka; it was no more than its proper attempt to get the Moscow Arbitrazh Court to force Chubb Russia to respect its bargain not to litigate the claim there.

114. The only ground which might therefore justify a refusal to grant relief is delay by Enka and its effect on the Russian proceedings, bearing in mind the considerations identified by Christopher Clarke LJ in *Ecobank Transnational Inc v Tanoh* [2016] 1 WLR 2231 at paragraphs [120]-[142] in the context of anti-enforcement injunctions. The Judge treated that delay as starting at the latest by the end of June 2019, and was critical of Enka in the period from the letter before action on 24 April 2019. In my view, Enka cannot properly be criticised for not seeking relief from this court prior to it becoming clear to Enka that the Moscow Claim would be accepted by the Moscow Arbitrazh Court as sufficiently particularised to go forward. That occurred on 4 September 2019 when Enka was notified of the Moscow Arbitrazh Court's ruling to that effect the previous day. Until then, the Russian proceedings were being treated essentially as defective and the defect might never have been cured. Chubb Russia only satisfied the Moscow Arbitrazh Court on that score at the third attempt. Had Enka applied to the English Court for relief prior to this time it would have risked wasting time and expense in an unnecessary application and being told that the application was premature.

115. It was only 12 days later on 16 September 2019 that Enka issued its Arbitration Claim Form seeking injunctive relief, and one day after that, on 17 September 2019, that Enka issued the motion in the Moscow Court to have the claim dismissed without consideration of the merits based on the arbitration clause. There was no undue delay in Enka initiating steps to protect its rights in either jurisdiction.

116. Nor was there any culpable delay by Enka in the Russian proceedings in seeking to have its motion for the proceedings to be dismissed heard and resolved. It tried unsuccessfully to have that application determined in advance of any consideration of the merits, and pursued it with suitable despatch.

117. So far as the English proceedings are concerned, there is clearly criticism to be levelled at Enka in the way the matter came before Carr J on 15 October 2019 when seeking interim relief. However it is by no means clear that that resulted in any delay in obtaining injunctive relief. Given the contentions being advanced by Chubb Russia at such interlocutory hearing that the arbitration agreement was governed by Russian law which did not treat the Moscow Claim as within the scope of the arbitration agreement, it may well be that the ordering of a speedy trial without interim relief would have been the solution adopted in any event, however well presented the material, in the light of the then state of the Russian proceedings and the prognosis of their progression. Moreover even by 11 December 2019 when the trial took place, the Russian proceedings were not so far advanced as to provide any good reason for failing to give effect to the parties' bargain that Enka would not be sued in Russia.

118. Mr Bailey submitted that if we were exercising a fresh discretion we should do so as of now, taking account in particular of the current advanced state of the Russian proceedings. I accept that we should address the situation in Russia as it currently presents itself in considering the utility of injunctive relief. From that point of view granting an injunction to prevent Chubb Russia from pursuing an appeal from the dismissal of its claim on the merits still serves the necessary and useful purpose of giving effect to the bargain in the arbitration agreement that Enka should not be exposed to continued involvement in such proceedings. It is not right, however, that we should look at the position today in analysing any delay or resulting state of advancement of the Russian proceedings. If the Judge exercised his discretion on a flawed basis in December, and on the state of play at that date should have granted the anti-suit injunction sought, it would be wrong to penalise Enka by reason of the further inevitable delay, not of Enka's making, in getting on an appeal to establish and correct the Judge's error.

119. In short, therefore, there has been no delay by Enka in this case which provides any good reason for not granting injunctive relief. I would treat this as a classic case, like *The Angelic Grace*, in which the court should grant an injunction to restrain the further conduct of proceedings brought in breach of an English law arbitration agreement.

Conclusion

120. I would allow the appeal. It will be necessary to consider the form of the order, which, as explored during the course of the hearing, will require an undertaking from Enka which Mr Dicker was instructed to give. Having secured an injunction to prevent Chubb Russia from exercising its Russian appeal rights to seek to overturn the current decision of the Moscow Court against it on the merits, Enka must undertake that it will not treat the decision as giving rise to an issue estoppel if its claim is now pursued in arbitration.

Lord Justice Males :

121. I agree.

Lord Justice Flaux :

122. I also agree.