Neutral Citation Number: [2011] EWHC 308 (Comm)

Case No: 2011 FOLIO 721

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/11/2011

Before :

MR JUSTICE BLAIR

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Between :

BNP PARIBAS S.A.	**Claimant**
- and -	
(1) OPEN JOINT STOCK COMPANY RUSSIAN MACHINES	**Defendants**
(2) JOINT STOCK ASSET MANAGEMENT COMPANY INGOSSTRAKH-INVESTMENTS	

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Mr Graham Dunning QC and Mr Stephen Houseman (instructed by **Clifford Chance LLP**) for the **Claimant**
Mr James Ramsden (instructed by **Steptoe & Johnson) for the First Defendant**
Ms Vasanti Selvaratnam QC and Mr Henry Ellis (instructed by **Bryan Cave LLP**) for the **Second Defendant**

Hearing dates: 7 and 8 November 2011

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Judgment

Mr Justice Blair:

1. The claimant, BNP Paribas S.A., is a French bank. The first defendant, Open Joint Stock Company Russian Machines, and the second defendant, Joint Stock Asset Management Company Ingosstrakh-Investments, are both Russian companies. These proceedings in the English Court comprise a claim for anti-suit relief in connection with an arbitration agreement between the claimant and the first defendant.

2. Three applications are before the court for decision.

   (1) The first defendant's application dated 25 July 2011 challenging the court's jurisdiction and service of proceedings upon it within the jurisdiction;
   (2) The second defendant's application, also dated 25 July 2011, challenging the court's jurisdiction and service of proceedings upon it within or outside the jurisdiction, and seeking to set aside the Order of 8 June 2011 giving permission to serve out of the jurisdiction;

(3) The claimant's cross-application dated 22 August 2011, seeking various aspects of service-related relief as against the first defendant and (to a lesser extent) second defendant, depending on the outcome of (1) & (2) above.

If these issues are decided in the claimant's favour, there is a further related application dated 28 October 2011 by the claimant seeking interim anti-suit injunctive relief as against the first and second defendants.

3. The issues in essence are whether the court has jurisdiction in respect of the substantive anti-suit claims as against the defendants, and as to whether the defendants were properly served with the proceedings, and if not, what consequences flow from that.

4. For the purposes of these applications, the facts can be stated as follows. By a guarantee dated 1 October 2008, the first defendant guaranteed certain liabilities of one of its subsidiaries. The liabilities arose under a collateralised margin loan made by the claimant bank to the subsidiary. The guarantee is governed by English law, and provided for disputes to be referred to arbitration under the LCIA rules, with the claimant having the option to bring proceedings in this court instead. The relevant provisions are as follows:

"**16**. **ARBITRATION**

16.1 Subject to Clause 16.4, any dispute (a "Dispute") arising out of or in connection with this Guarantee (including any question regarding the existence, validity or termination of this Guarantee or the consequences of its nullity) shall be referred to and finally resolved by arbitration under the Arbitration Rules of the London Court of International Arbitration.

16.2 Procedure for arbitration

16.2.1 The arbitral tribunal shall consist of one arbitrator who shall be a Queen's Counsel of at least five years' standing

16.2.2 The seat of arbitration shall be London, England and the language of the arbitration shall be English.

16.3 Save as provided in Clause 16.4, the parties to this Guarantee exclude the jurisdiction of the courts under Sections 45 and 69 of the Arbitration Act 1996

16.4 Before an arbitrator has been appointed to determine a Dispute, the Beneficiary may by notice in writing to the Guarantor require that all Disputes or a specific Dispute be heard by a court of law. If the Beneficiary gives such notice, the Dispute to which that notice refers shall be determined in accordance with Clause 17.1

17. ENFORCEMENT

17.1 In the event the Beneficiary issues a notice pursuant to Clause 16.4, the following provisions shall apply:

17.1.1 Subject to Clause 16.1 the courts of England have exclusive jurisdiction to settle any Dispute

17.1.2 The Beneficiary and the Guarantor agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly neither the Guarantor nor the Beneficiary will argue to the contrary

17.1.3 This Clause is for the benefit of the Beneficiary only. As a result, the Beneficiary shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Beneficiary may take concurrent proceedings in any number of jurisdictions

17.2 Without prejudice to any other mode of service allowed under any relevant law, the Guarantor:

17.2.1 irrevocably appoints Bryan Cave of 88 Wood Street, London EC2V 7 AJ England (or, if different, its registered office) as its agent for service of process in relation to any proceedings before the English Courts in connection with this Guarantee; and

17.2.2 agrees that failure by a process agent to notify the Guarantor of the process will not invalidate the proceedings concerned."

5. A dispute arose under the loan agreement, and the claimant sought to enforce the guarantee. On 6 August 2010, it commenced arbitral proceedings against the first defendant claiming about US$80 million. The first defendant is represented by Steptoe & Johnson. On 6 September 2010, it served its response on the basis that the guarantee was never valid because it did not recieve the fundamental approvals required to be effective.

6. Shortly afterwards the parties agreed to amend the arbitration agreement by substituting for arbitration by a Queen's Counsel, the appointment as arbitrator of Professor Albert van den Berg. It is useful to set out the relevant terms in that respect.

"1. AGREEMENT TO ARBITRATE THE DISPUTES BEFORE PROFESSOR VAN DEN BERG

1.1 In consideration of the mutual promises as set forth below, the Parties agree that any disputes arising out of or in connection with the Guarantee (including any question regarding the existence, validity, enforceability or termination of the guarantee or the consequences of its nullity) shall be referred to and finally resolved by arbitration under the Arbitration Rules of the LCIA in LCIA Arbitration No. 101665.

1.2 The arbitral tribunal shall consist of one arbitrator who shall be Professor van den Berg. If, for any reason, Professor van den Berg cannot act as arbitrator in LCIA Arbitration No. 101665, the arbitrator shall be a Queens Counsel of at least five years standing.

1.3 The seat of the arbitration shall be London, England and the language of the arbitration shall be English.

…

1.5 Clause 16 of the Guarantee shall be amended accordingly.

1.6 Clauses 17.1 and 17.2 of the Guarantee are repealed.

"2 GOVERNING LAW

2.1 This Agreement shall be governed by and construed in accordance with English Law."

7. As well as appointing Professor van den Berg as arbitrator therefore, the parties "repealed" the provision in the arbitration agreement as contained in the guarantee by which the London office of Bryan Cave LLP was appointed by the first defendant as agent for service of process in relation to any proceedings before the English Courts in connection with the guarantee. As I shall explain, it was this change that led in part to the problems as regards service which subsequently emerged. As is common in contracts of this kind, the guarantee gave the bank the option to bring proceedings in the English Court, but that option had not been pursued. The evidence is to the effect that the person dealing with the matter in the claimant's solicitors felt that the clause was no longer necessary, since the parties had agreed to arbitrate. On 1 December 2010, the LCIA Court confirmed the appointment of Professor van den Berg as sole arbitrator, and the arbitration got underway.

8. The second defendant is the trust manager of a small holding of shares in the first defendant (the evidence suggests 0.14%) that belongs to the Socium Non-Governmental Pension Fund. It is common ground that the defendants are related companies. On 27 December 2010, the second defendant commenced proceedings before the Moscow Arbitrazh Court seeking invalidation of the guarantee on the basis that it was an "interested party transaction", and a "major transaction" under the Russian Joint Stock Company Law, which should have been approved at a general meeting of the shareholders. Both the claimant and the first defendant are defendants to those proceedings. The proceedings were served on the claimant on 13 January 2011, and the evidence is that this was the first time that the claimant became aware of them.

9. The relationship between them is in dispute, but as a matter of fact there were now two sets of proceedings on foot as regards the guarantee. Various procedural hearings took place in the arbitration and in the Moscow Arbitrazh Court in February. The claimant's evidence is that it took some time to investigate the ownership structure of the defendants. On 8 April 2011, it issued a motion in the Arbitrazh Court to dismiss the Russian proceedings on the basis of lack of jurisdiction by reference to the arbitration.

10. On 11 April 2011, it requested the arbitrator's permission for the purposes of s. 44(4) Arbitration Act 1996 to commence an anti-suit action against both defendants. The matter was disputed by the defendants in correspondence, but by Order No.3 in the arbitration dated 4 May 2011, the claimant's request was granted.

11. On 27 May 2011, the claimant applied to this court for permission to serve an anti-suit action on the second defendant out of the jurisdiction. The application was made in respect of the second defendant only on the basis that the claimant could serve the first defendant in the jurisdiction pursuant to the service clause in the guarantee that I have set out above. Unfortunately, the claimant's solicitors had overlooked the fact that the clause in question had been "repealed" by the agreement appointing Professor van den Berg. It was not in dispute before me that this was an innocent oversight.

12. It was appreciated that the application raised a "number of complex issues" and it was accompanied by a skeleton argument settled by leading counsel (not counsel on this application). It was submitted that the claim in the Russian proceedings was properly treated as subject to the arbitration agreement, alternatively that its pursuit was vexatious and oppressive. The heads of jurisdiction relied upon were (1) that there was a real issue between the claimant and the first defendant to which the second defendant was a necessary or proper party, (2) that the contract in respect of which the claim is made (the guarantee) was made in England and governed by English law, and (3) under CPR 62.5(1)(b) so far as the claim was for an order under s.44 Arbitration Act 1996, and (c) so far as the claimant was seeking was a remedy affecting an arbitration.

13. In the usual way, the matter was considered on the papers, and on 8 June 2011 Hamblen J made the order sought. He gave permission to serve the claim out of the jurisdiction on the second defendant (a) pursuant to the Hague Convention at their address in Moscow (b) by leaving a copy with the second defendant's lawyers in Moscow, and (c) by delivering a copy by registered mail to the second defendant and to its lawyers in Moscow. However, as I have explained, the matter had been placed before the judge on the wrong basis, namely that the first defendant had an agent for the service of process in London.

14. On 20 June 2011, the proceedings were served on the London office of Bryan Cave LLP at its London office (pursuant to the repealed provision in the guarantee), and on the second defendant by delivery by hand to its lawyers in Moscow and by registered post in Moscow.

15. On 21 June 2011, the first hearing took place in the Moscow Arbitrazh Court in the Russian proceedings. The claimant's motion to dismiss based on the arbitration was rejected.

16. On 14/15 July 2011, the claim (and associated documents) were filed by the claimant's solicitors with the Foreign Process Section at the Royal Courts of Justice for service on the second defendant through the Hague Convention. The defendants' applications challenging jurisdiction and service (and in the case of the second defendant seeking to set aside the 8 June 2011 order) were issued on 25 July 2011.

17. During August 2011, there were two hearings in the Moscow Arbitrazh Court, resulting in the dismissal of the second defendant's claim in the Russian proceedings. This was on the basis that the claim had been brought outside the one year limitation period applicable to such a claim under Russian law.

18. On 22 August 2011, in the English proceedings, the claimant issued its cross application in response to those of the defendants.

19. On 14 September 2011, the second defendant filed an appeal in the Russian proceedings, which was served on the claimant's Moscow lawyers on 20 September 2011.

20. In the arbitration, the arbitrator heard the first phase of the issues in the arbitration at a hearing in London between 26 and 30 September 2011.

The application for an interim injunction and 11 November hearing

21. The appeal in the Russian proceedings is to the first of (potentially) three appellate courts. During September 2011, the claimant was trying to agree a date with the defendants for the hearing of the defendants' applications in the English anti-suit proceedings.

22. On 6 October 2011, the claimant asked the Commercial Court that the hearings be heard on an expedited basis. After representations by both parties, on 20 October 2011 Gloster J ordered that the hearings be listed for 7 - 8 November 2011.

23. On 28 October 2011, the claimant issued its application for an interim injunction. It effectively sought to restrain the first defendant from assisting in the Russian appeal, and the second defendant from pursuing the appeal. The defendants objected to this being heard along with their jurisdiction challenge. Gloster J directed that it should be for the judge hearing the application to decide that matter, taking into account whether there was time to do so.

24. Meanwhile, on about 17 October 2011 the date of the hearing of the second defendant's appeal in the Russian proceedings to the appellate division of the Arbitrazh Court appeared on the court website listed for 15 November 2011.

25. There was a dispute on the evidence as to what would happen on that date. The claimant said that the court might well dispose of the appeal. The defendants said that it was more likely to go off for a further hearing. In fact, in evidence filed on 11 November 2011, the second defendant said that there was no sensible prospect of the appeal going ahead in the light of the claimant's recent motion to dismiss the claim.

26. The hearing on 7 - 8 November before me took a full two days. There was no time to deal with the claimant's application for an interim anti-suit injunction pursuant to its application of 28 October 2011.

27. On 10 November 2011, the claimant gave notice that it intended to apply for an interim injunction, which it did before myself the following day. After hearing argument from all parties, I ruled that the balance of convenience favoured the claimant, because if the appeal were to go ahead on 15 November there was a risk that the guarantee might be invalidated, thereby rendering the decision in these proceedings otiose. The defendants were not prepared to agree to a consensual adjournment of the appeal on 15 November 2011. For reasons I gave at the hearing on 11 November 2011, I granted limited injunctive relief intended to preserve the status quo until this decision could be handed down.

The issues to be determined on the applications

28. A considerable number of issues have been raised by the parties in argument, though some are common to each defendant, and the necessity for a decision on some is contingent on the decision on others. The issues in summary (I have taken them from a document prepared by the claimant and handed in at the hearing and agreed by the defendants) are set out below. I shall deal with them in this order (though the issues were dealt with in a different order in the skeleton arguments, and not all of them were developed in the skeleton arguments). A number of them raise difficult points of law.

First defendant

(1) Jurisdiction: Should the Court grant permission to serve D1 out of the jurisdiction? In light of D1's concessions that gateways CPR 62.5(1)(c) and Ground (6) PD 6B are satisfied (nb C maintains that CPR62.5(1)(b) is also satisfied insofar as relief is claimed under AA s.44)) and that England is the proper place for determining these claims, this boils down to the question: Is there a serious issue to be tried on each claim against D1?

(2) Deemed Service: If the answer to **1** is Yes, should service be deemed to have been effected upon D1, pursuant to CPR 6.15(2), by provision of the relevant documents to (a) Bryan Cave on 20 June and/or (b) Steptoe & Johnson on that date or any rate prior to its acknowledgement of service on behalf of D1 on 27 June 2011?

If the answer to both **1** and **2** is Yes, then it is not necessary to proceed any further.

(3) Service by Alternative Method within England: If the answer to **1** is Yes but the answer to **2** is No:

(a) Should an order be made for service by alternative method upon D1, pursuant to CPR 6.15(1) and/or CPR 6.37(5)(b)(i) and 62 PD para.3.1, allowing service upon Steptoe & Johnson at their address within this jurisdiction? and

(b) If so, should the validity of the Claim Form qua arbitration claim form (CPR 62.4(2)) be extended, pursuant to CPR 7.6, to enable such service?

If the answer to **1** and **3** is Yes, then it is not necessary to proceed any further

(4) Service by Registered Post in Russia: If the answer to **1** is Yes but the answers to **2** & **3** are both No:

(a) **Service under CPR 6.40(3)(c).** Is service of foreign process in the Russian Federation by registered post (i) permitted or (ii) is it required to take place exclusively through official channels as prescribed by Article 5 of the Hague Convention?

(b) **Service by alternative method.** If the answer to (a) above is (ii), then:

  (i) Should an order be made, pursuant to CPR 6.15(1) and/or CPR 6.37(5)(b)(i), for service by registered post at D1's address in Moscow?

  (ii) In so far as relevant to (i) above, is service of foreign process in the Russian Federation by registered post illegal as a matter of Russian law (CPR 6.40(4))?

(c) **Extension of validity.** Should the validity of the Claim Form qua arbitration claim form (CPR 62.4(2)) be extended, pursuant to CPR 7.6, to enable service

upon D1 in Russia hereafter pursuant to the methods identified in (a) and/or (b) above?

Second defendant

(1) Jurisdiction: Does the Court have jurisdiction over the claims against D2 and, if so, should it uphold/exercise such jurisdiction? In particular:

(a) Is there a good arguable case that each claim against D2 falls within one or more of (i) CPR 62.5(1)(b) or (ii) CPR 62.5(1)(c) or (iii) CPR 6.36 & Ground (3) PD 6B or (iv) CPR 6.36 & Ground (6) PD 6B?

(b) If so, is there are serious issue to be tried on each claim?

(c) If so, is England the proper place for determining such claims (CPR 6.37(3))?

(2) Validity of Service in Russia: If the answer to **1** is Yes, was D2 validly served on 20 and/or 28 June 2011 by delivery (i) by hand and/or (ii) registered post at its and/or its lawyers' offices in Moscow? As to this:

(a) **Permitted service (CPR 6.40(3)(c)).** Is service of foreign process in the Russian Federation by hand and/or by registered post (i) permitted or (ii) is it required to take place exclusively through the official channels prescribed in Article 5 of the Hague Convention?

(b) **Alternative service:** If the answer to (a) above is (ii):

  (i) Was the Court justified in ordering service by alternative methods on D2 in Russia (para.1(b) & (c) of the 8 June Order)?

  (ii) In so far as relevant to (i) above, is service of foreign process in the Russian Federation by hand and/or by registered post illegal as a matter of Russian law?

If the answer to both **1** and **2** is Yes, then go to **6** below.

(3) Deemed Service: If the answer to **1** is Yes but the answer to **2** is No:

(a) Should service be deemed to have been effected upon D2, pursuant to CPR 6.15(2), by provision of the relevant documents to (i) Bryan Cave on 20 June 2011 and/or (ii) Steptoe & Johnson on that date or any rate prior to its acknowledgement of service on behalf of D1 on 27 June 2011 and/or (iii) Egorov, Puginsky, Afanasiev & Partners by hand on 20 June 2011 and/or by registered post on 28 June 2011 and/or (iv) D2 at its address in Moscow by registered post on 20 June 2011?

(b) Is it relevant to the answer to (a) that it is said to be contrary to Russian law for substituted service to take place in England? cf. CPR 6.40(4), which refers to the law of the country in which the document is to be served?

If the answers to **1** and **3** above are Yes, then go to question 6.

(4) This was added by D2 in argument, and has to do with prospective service on D2 by an alternative method. Is there a "good reason" to allow service on Bryan Cave in London?

(5) Extension of Validity of Arbitration Claim Form: If the answer to **1** is Yes but the answers to **2** & **3** are both No, should the validity of the Claim Form qua

arbitration claim form (CPR 62.4(2)) be extended, pursuant to CPR 7.6, to enable service on D2 in Russia (the process already being underway) under the Hague Convention?

(6) Should the 8 June Order be set aside? As to this:

(a) [not pursued by D2 under this head]

(b) Did C commit a material non-disclosure when obtaining the 8 June Order by not drawing the Court's attention to the fact that the Russian Federation had made a reservation against Article 10 of the Hague Convention; and, if so, does this justify setting aside the 8 June Order?

(c) [not pursued under this head]

29. The defendants rely on alleged delay on the part of the claimant in various contexts, and I have dealt with it as raised.

Preliminary observations

30. On any view, this is a complicated menu of issues for decision on an interlocutory application, though it remains to be seen how many of them require decision. It is also clear that time is pressing, and that has dictated the length at which I have been able to consider some of the issues. It is important to make some preliminary observations. The guarantee is subject to English law, with a London arbitration clause. The claimant and the first defendant are in dispute over the guarantee, the first defendant claiming (among other things) that it is not valid and enforceable. After the dispute arose, an amendment to arbitration agreement was agreed between the claimant and the first defendant on 16 November 2010. A sole arbitrator was agreed and named. The agreement provided expressly that the seat of the arbitration was to be London. It was subject to English law. The first and second defendants are Russian companies in the same group and under the same ultimate ownership and control. On 27 December 2010, the second defendant began the Russian proceedings in the Moscow Arbitrazh Court against both the claimant and the first defendant (and others) seeking the invalidation of the guarantee. All this is common ground.

31. In essence the claimant's claim is simple. There are strong grounds to infer, it says, that the second defendant's commencement and pursuit of the Russian proceedings are part of a scheme involving the first defendant, designed to assist the first defendant's evasion of responsibility under the guarantee. The defendants strongly deny this. There is a dispute as to the nature of the Russian proceedings. The claimant says that the relief sought is in effect the same as the defence in the arbitration, namely that the guarantee is invalid. The defendants say that this is a wrong characterisation of the Russian proceedings, which proceed under distinct provisions of Russian statutory law. At this stage in the proceedings, the court's task is not to decide disputed issues of fact or foreign law. Its task is to assess the facts according to the applicable standard.

32. Since the matter has been submitted to arbitration, the court will not act at all unless the case falls within its limited powers to act in support of an arbitration. Since both defendants are Russian companies, it will not act unless the claimant is entitled to permission to serve them out of the jurisdiction. In principle, there should be little difficulty in obtaining permission to serve a party to an arbitration agreement out of

the jurisdiction in circumstances such as the present. The position as regards the second defendant, a non-party, is considerably more complex. However, when the claimant sought permission, it erroneously assumed that it could rely on the first defendant's appointment of agents for the service of process in London. Such a clause had been in the original contractual arrangements, but it was deleted in the substitute agreement appointing the sole arbitrator. So the permission to serve the second defendant on the basis that no permission was required to serve the first defendant was sought and obtained from the court on the wrong premise. The claimant says that the defendants have latched onto this mistake to resist service, but equally it must be said that they are in no way responsible for the mistake. In any case, the claimant seeks both retrospective validation of service, and in the alternative, seeks an order for service out of the jurisdiction now (which was described in the course of argument as prospective validation), and I will have to decide whether it is entitled to either.

33. A further general point relates to the claim form. Since it is an arbitration claim form, it is valid for one month, rather than the usual four months in a case of service within the jurisdiction. It expired on 17 July 2011. If the action is to proceed, an extension of validity is required unless the defendants are to be treated under the rules as properly served already.

34. Finally, it is to be noted that the injunction claims against both defendants are based upon both the specific (though limited) power in s.44 Arbitration Act 1996, and the court's general jurisdiction under s.37 Senior Courts Act 1981. It has been recently held that the court has jurisdiction to grant an anti-suit injunction under s.37 SCA 1981 even where there are no arbitral proceedings in contemplation or no statutory basis under the Arbitration Act 1996 for such claim. In *AES UST-Kamenogorsk Hydropower Plant LLP v. UST-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647 at [105], Rix LJ (with whom Stanley Burnton LJ and Wilson LJ agreed) made it clear that in the case of the protection of an agreement to arbitrate by granting declarations or injunctions, the issue is unlikely to be one of the court's jurisdiction, as distinct from the exercise of its powers of discretion. At [101], he said that such a conclusion reflected the numerous cases, both before and after the Arbitration Act 1996, in which the court has been prepared to use or to recognise the use of s.37 SCA 1981 to support arbitration by requiring parties to refer their disputes to arbitration, rather than to allow one party to pre-empt the issue of arbitral jurisdiction by the use of foreign courts. That was not in contemplation of the case where the party bringing the proceedings in the foreign court was not a party to the arbitration agreement, but the claimant relies on these remarks.

Jurisdiction

35. This is the first issue in respect of each defendant. It arises in a number of contexts, namely whether the court should recognise the service on the defendants that has already taken place, and if not, whether it should now make an order for service out of the jurisdiction. As raised by the defendants, it is a prior issue, since if the court should not assume jurisdiction over the defendants, the other issues in the case become academic. A good deal of the oral argument at the hearing concerned the defendants' contentions on this issue. Each of the requirements necessary for permission to serve out of the jurisdiction has been challenged by the second defendant, namely the availability of a jurisdictional gateway, whether there is a

serious issue to be tried between the parties, and whether the English court is the proper place for the claim to be tried.

36. The major factual distinction between the defendants is that the first, but not the second, is a party to the arbitration agreement with the claimant. So far as the court's powers under s.44 Arbitration Act 1996 exercisable in support of arbitral proceedings are concerned, I have already noted that the claimant's application was made with the permission of the tribunal (see s.44(4)). The tribunal itself has no power to grant an injunction against the second defendant, as a non-party (see s.44(5)).

Gateways

37. The test which the claimant must satisfy is to show that there is a good arguable case that its claims fall within the gateway in question.

The CPR 62.5(1)(b) gateway

38. CPR 62.5 is the rule that deals with service of an arbitration claim form out of the jurisdiction. CPR 62.5(1)(b) provides that the court may give such permission if the claim is for an order under s.44 Arbitration Act 1996. Section 44 is the provision that gives the court powers exercisable in support of arbitral proceedings, including the granting of an interim injunction. It has been held that the Act provides "only a very limited role for the court" (see *Cetelem SA v. Roust Holdings Ltd*, referred to below, at [35]). On the face of it however, this gateway is available to the claimant, since the claim involves an application for interim relief in relation to arbitral proceedings, and the application was made with the permission of the arbitrator (see sub-sections (1) and (4)). This assumes (and rightly in my view it was not suggested to the contrary in argument) that the scope of s. 44 extends to the grant by the court of an anti-suit injunction in support of arbitral proceedings: *Starlight Shipping Co v. Tai Ping Insurance Co Ltd* [2008] All ER (Comm) 593 at [21] (Cooke J): *AES UST-Kamenogorsk Hydropower Plant LLP v. UST-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647 at [28] (Rix LJ).

39. The objections advanced by the defendants are as follows. The first point taken is that the issue is one for the arbitrator not the court. The defendants say that the claim against the first defendant is that it would not act in a way that frustrate or otherwise frustrates and interferes with the arbitration agreement. That is a matter, they submit, that should be decided by the arbitrator, not the court, the relevant question being whether or not the first defendant has acted in breach of the arbitration agreement.

40. This however is contrary to the view taken in the leading case on s.44 Arbitration Act 1996, *Cetelem SA v Roust Holdings Ltd* [2005] 1 WLR 3555. At [48], Clarke LJ points out in the context of s.44 (3) that the court's power derives from statute. Though its exercise may incidentally involve the preliminary (or even final) determination of an issue which the parties have agreed to submit to arbitration, and that may be an important matter to take into consideration in deciding how to exercise the discretion conferred by the section, it is not a matter which goes to the *jurisdiction* of the court. Furthermore, in the present case, the arbitrator has given permission to make the application. I reject this contention.

41. A more substantial objection was taken by the second defendant (and applies to it only). An order under s.44 Arbitration Act 1996 could not, it was submitted, be made against the second defendant because (unlike the first defendant) it was not a party to the arbitration agreement. If this submission is correct, this gateway is closed so far as non-parties are concerned. Looking at the matter in the abstract, where company A is a party to the arbitration agreement, and company B, which is not a party but is under the same ownership and control, seeks to frustrate the agreement by bringing proceedings in court, the gateway is closed as against company B. Recognising the unattractive nature of the outcome, Ms Vasanti Selvaratnam QC, counsel for the second defendant, said that the remedy in such a case lies in joining company B through the "necessary or proper party" gateway in CPR Practice Direction 6B (which however she submits is unavailable for unconnected reasons in the present case).

42. This submission was based on the decision in *Vale do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] 2 Lloyd's Rep 1. In that case, ship owners applied for a declaration that the defendant was a party to a contract of affreightment which included an arbitration agreement. The brokers were joined in that application so as to obtain their evidence that the contract had been authorised by the charterer, but the owners sought no substantive relief against them. The arbitration claim form was set aside as against the brokers on the grounds that the provisions as to service out of the jurisdiction (which were in materially the same form as CPR 62.5) were to be read as being referable solely to an application that was to be made only as between the parties to the arbitration agreement or the arbitration pursuant to that agreement. This conclusion is expressed by Thomas J at [40] after a full review of the authorities. The principle is stated in the same terms in Dicey, Morris & Collins, *The Conflict of Laws*, 14th edn, at para 16-045. At [32], Thomas J explains the rationale, namely that the essence of an arbitration agreement is that it is a consensual agreement between the parties to it; the only parties to the arbitration pursuant to the arbitration agreement are the parties to the arbitration agreement.

43. In *Niagara Maritime SA v Tianjin Iron & Steel Group Co Ltd*, 2 August 2011, unreported, Hamblen J granted an interim anti-suit injunction restraining both a cargo receiver and its insurer from pursuing a salvage claim in the Chinese court where the ship owner had shown, to a high probability, that there was an enforceable exclusive English arbitration agreement, and there was no strong reason why the injunction should not be granted. The injunction was granted under s.44(3) Arbitration Act 1996 albeit the insurer was not a party to the contract. It was held in the alternative that jurisdiction would have been conferred by the Senior Courts Act 1981 s.37 (1) (which as I have said the claimant also relies upon in this case). The judge's reasoning is not presently available, but the case appears closer to the present facts than those in *Vale do Rio Doce*.

44. There is a reasoned (albeit brief) judgment of Longmore LJ (with whom Rix LJ agreed) in *Tedcom Finance Ltd v Vetabet Holdings Ltd* [2011] EWCA Civ 191 which deals expressly with the point. In that case, the judge had held that an order for preservation of assets could not be made against a non-party to the arbitration. Disagreeing, the Court of Appeal held that there was at least an arguable case that there was jurisdiction to make the order. The court distinguished the *Vale do Rio Doce* case on the basis that it did not in terms consider an application under the then equivalent CPR 62.5(1)(b) but only in relation to (c) which, as far as the connection

with England is concerned, is more restrictive. The court held in the alternative that there was also an argument (permission having been given to serve the first defendant out of the jurisdiction on the basis of s.44 Arbitration Act 1996) that permission to serve other defendants out of the jurisdiction could be granted under PD 6B paragraph 3.1(3) (necessary or proper party).

45. As the claimant points out, the facts of the present case are different from those in *Vale do Rio Doce*. There was no substantive claim against the brokers, because any breach of warranty claim would have to be pursued in Norway. The present case concerns an allegation that the non-party has been engaged in the unconscionable pursuit of litigation intended to prejudice the arbitration agreement, and claims an injunction accordingly. Where that is the position, it may be that in most circumstances, the non-party will be amenable to service out of the jurisdiction as a "necessary or proper party". As has been said, the s.44(3) gateway to court action is a narrow one (*AES UST-Kamenogorsk* at [66], Rix LJ, and see *Elektrim v Vivendi Universal SA (No 2)* [2007] 2 Lloyd's Rep 8 at [68], Aikens J). Nevertheless, since s.44(3) encompasses the contractual right to have disputes referred to arbitration (*Starlight Shipping Co v. Tai Ping Insurance Co Ltd*, ibid, at [21]), the *Tedcom* case is authority supportive of treating the case also as falling within CPR 62.5(1)(b). Whether the claimant can make good the underlying allegation to the necessary standard depends on the facts, as to which my analysis is set out below in the context of "serious issue to be tried". But if it can, then it appears to me that the claim against the second (as well as the first) defendant falls within the CPR 62.5(1)(b) gateway.

The CPR 62.5(1)(c) gateway

46. By CPR 62.5(1)(c), the court may give permission to serve an arbitration claim form out of the jurisdiction if the claimant seeks some other remedy or requires a question to be decided by the court affecting an arbitration (whether started or not), an arbitration agreement or an arbitration award, and the seat of the arbitration is or will be within the jurisdiction. The latter point is not in issue: England is the seat of the arbitration.

47. The first defendant originally conceded that this gateway was passed by the claimant. In oral argument, it adopted a submission of the second defendant as follows. The proceedings in Russia cannot, it is said, give rise to issues of *res judicata* or issue estoppel as regards the guarantee. This was acknowledged in the recitals to the arbitrator's order of 4 May 2011 giving the claimant permission to commence the anti-suit action. The claimant's concern, it is said, is limited therefore to the extent to which an adverse conclusion in the Russian proceedings may impinge upon enforcement against the defendants of an award. Enforcement issues, it is said, are outside CPR r. 62.5. Once an award is made, the matter is no longer within CPR 62.5 (service out of the jurisdiction), and falls within CPR r. 62.18 (enforcement of awards). Accordingly, the language of CPR r. 62.5(1)(c) is not engaged, because neither the remedy, nor the question raised by the claimant is one "affecting an arbitration …, an arbitration agreement or an arbitration award". (There is an inconsistency in the defendants' case in this regard, because in the second defendant's written submissions dealing with the correct characterisation of the Russian proceedings, reliance is placed on a decision of the Moscow Court as to the nature of the proceedings as giving rise to *res judicata* and an issue estoppel preventing the claimant from arguing to the contrary in these proceedings.)

48. In my view, these contentions are incorrect. The fact that the claimant's concerns relate to enforcement, on the basis that an adverse decision in Russia may make an award in their favour much harder to enforce, does not imply that the question is not one "affecting an arbitration …, an arbitration agreement or an arbitration award". It plainly is, in my view, because enforcement is an integral part of the process.

49. On the point of substance, the *Tedcom* case which distinguished the *Vale do Rio Doce* case was (as explained above) in the context of CPR r.62.5(1)(b). The claimant contends that nevertheless the claim under s.37 Senior Courts Act 1981 gets it through the gateway relying on the judgment of Rix LJ in *AES UST-Kamenogorsk*, ibid, at [114] – [120]. I have discussed s.37 generally above. There is force in this submission, though it is to be noted that *AES UST-Kamenogorsk* did not concern the position of a non-party. So far as gateways under CPR r.62.5 are concerned, I prefer to base my decision as regards the second defendant on (b) rather than (c). So far as the first defendant is concerned I consider that its original concession was correctly made.

The "necessary or proper party" gateway

50. This arises as regards the second defendant. Under CPR r. 6.36 and PD 6B Ground (3), permission for service out of the jurisdiction may be given where a claim is made against a person on whom the claim form "has been or will be served", and there is between the claimant and the defendant "a real issue which it is reasonable for the court to try", and the claimant wishes to serve the claim form on another person who is "a necessary or proper party to that claim". The principles have recently been explained by Lord Collins in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7.

51. In its written submissions, the second defendant raised two objections. The first was that the claim against the first defendant was for breach of the arbitration agreement, which raised a question which should be decided by the arbitrator. Hence it is said that as between the claimant and the defendant there is no issue which it is reasonable for the court to try. The same point was raised under the CPR r. 62.5(1)(b) gateway, and I have given my reasons there why (in my view) it is incorrect. The comments I have cited from the judgment of Clarke LJ in *Cetelem SA v Roust Holdings* are equally applicable in this context.

52. The second point is that the second defendant would not be a "necessary or a proper party", since the issues can be decided (it is submitted) perfectly properly without it being joined as a party to the relevant proceedings. I reject that contention. Where the allegation is that parties are acting in consort, one party will usually be a necessary or a proper party to the claim against the other party, being a defendant which has been or will be served, and in my view, the second defendant is so here.

53. A further point was taken in oral argument. Since as is now accepted by the claimant, the application for service out of the jurisdiction on the second defendant was made (as I have explained above) on the wrong premise, it follows, it is contended, that at the time of the order of 8 June 2011 permitting service on the second defendant, the case was not one where the claim form "has been or will be served" on the first defendant within the wording of the sub-rule, which consequently cannot apply.

54. While there is some force in this point, I do not think that it is ultimately a good one. As a matter of fact, the words "has been or will be served" were literally satisfied as regards the first defendant at the time of the 8 June 2011 order. Whether they are still so satisfied depends upon my decision as to the claimant's application for retrospective validation of service on the first defendant, which is an issue I deal with below.

55. A variant of the same point is taken by the second defendant in respect of the alternative application, by which the claimant asks for permission now to serve the first defendant out of the jurisdiction, and serve the second defendant as a necessary or proper party (a process described in the course of argument as prospective validation). It was contended by the second defendant in oral submissions that such an order cannot be made at the same time as the order as regards the first defendant. The reasoning is that until permission is given, the first defendant cannot be described as someone who "will be served". There is a useful discussion in Briggs (ed Rees), *Civil Jurisdiction and Judgments*, 5th edn, 498-9), where the authors set out the history of this provision, saying that the point is unclear, but adding that nothing prevents applications from being made sequentially. However, I do not think it is necessary to add a gloss to the words of the sub-rule to achieve a sensible commercial result. The precondition under the sub-rule is that the first defendant "has been or will be served", and that precondition is satisfied if the court gives permission to serve the first defendant out of the jurisdiction. Of course the precondition must be satisfied at the time when the court gives permission to serve the second defendant out of the jurisdiction as a necessary or proper party, but if it is, then there is no need for sequential applications.

The "in respect of a contract" gateway

56. The first defendant (rightly) does not dispute that CPR PD 6B Ground (6) is applicable in its case, which it plainly is, since the claims against it are in respect of a contract or contracts (namely the guarantee and/or the arbitration agreement) which was or were made in England and/or which is or are expressly governed by English law.

57. This ground is also invoked against the second defendant. In its brief written submissions on the point, the claimant asserts that it has a contractual claim against the second defendant "for its breach of the Arbitration Agreement by commencing and pursuing a claim before the Russian courts seeking invalidity of the Guarantee on behalf of D1". It asserts that the non-contractual claim against the second defendant is a claim in respect of" a relevant contract. It matters not if D2 is not a contracting party itself. The claim against the second defendant seeks to protect the integrity and value of the arbitration agreement, a contract made in England and expressly governed by English law, and seeks to restrain the pursuit of foreign proceedings which themselves attack the validity of the Guarantee, a contract which is expressly governed by English law.

58. The fact that the second defendant is not a party to either the guarantee or the arbitration agreement in itself is not fatal to an application under this ground, if the claim is otherwise a contractual one. In *Greene Wood and McClean LLP v Templeton Insurance Ltd* [2009] 1 WLR 2013 at [17] – [20] in the context of a contribution under the Civil Liability (Contribution) Act 1978, Longmore LJ stated that though the

paradigm case falling within the contractual jurisdictional gateway is where the relevant contract is one between the intended claimant and the intended defendant "under" which the claim is made, the gateway is not limited to such claims, and extends to claims made "in respect of" a contract governed by English law to which only one of the intended parties to the litigation is a party. That is a very different context to the present case, in which the argument is that the second defendant has been engaged in unconscionable conduct in respect of the arbitration agreement between the claimant and the first defendant. The claimant's argument under this ground relates to its more general submission that its claim against the second (as well as the first) defendant can be framed in contractual terms. Since (as I shall explain) I have decided the case on the basis of the unconscionable conduct analysis, rather than the contractual analysis, I do not uphold the claimant's claim to jurisdiction on this ground.

Delay

59. Delay arises in a number of contexts in this case. As the claimant submitted, whether there is a good arguable case that the claims succeed in passing through one or more of the jurisdictional gateways falls to be tested as at the date of the relevant application for permission being determined by the Court: *ICS v. Guerin* [1992] 2 Lloyd's Rep. 430 at 434 col.2. Insofar as the delay issue arises in this context therefore, the period to consider is that between 13 January 2011, when the claimant was served with the Russian proceedings, and 27 May 2011 when it applied to the English court for permission to serve the second defendant out of the jurisdiction. Both defendants submit that this was a period of excessive delay. Reliance is placed on the authorities that hold that anti-suit injunctions must be sought promptly. I set these out later in the discussion of delay in the context of the merits.

60. The steps taken after 13 January 2011 are set out in some detail in the claimant's evidence. It is said that consultation with other banks was required under the terms of the relevant credit agreement, and it was then necessary to research the connection between the first and second defendants. Once a decision was taken, an approach had to be made to the arbitrator, which was done on 11 April 2011. There was correspondence from the first defendant's solicitors, and permission was given by the arbitrator on 4 May 2011. The defendants object that the connection between them was not concealed, and apparent (it is said) from straightforward searches on the internet. However, the nexus was not necessarily apparent to the claimant, and I consider that it was bound to take proper steps to establish the nature of the connection. In the light of the further necessity to consult with other banks before taking action, which is a common feature of credit agreements, I do not consider that there was unreasonable delay during this period.

Serious issue to be tried

61. I have held that the claims against the defendants pass through one or more of the gateways to permission for service out of the jurisdiction. The next question (taken in the order in the summary of issues agreed by the parties) relates to the merits of the matter. This is also disputed by the defendants. This stage of the matter does not involve a substantive resolution. In *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 at [85], Lord Collins approved the well known statement in *Seaconsar (Far East) Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438 at

452 that if, at the end of the day, there remains a substantial question of fact or law or both, arising on the facts disclosed by the evidence, which the claimant *bona fide* desires to try, the court should, as a rule, allow service. The standard of proof in respect of the cause of action can broadly be stated to be whether, on the evidence before the court, there is a serious question to be tried. As I make clear later however, other standards may be applicable depending on the particular issue before the court.

62. The claimant defines the issue to be tried as follows:

(1) As against the first defendant:

(a) Whether the first defendant has breached and continues further to breach the express or implied terms of the Arbitration Agreement; and/or

(b) Whether the first defendant has acted and continues to act vexatiously and/or oppressively and/or unconscionably,

in each case by supporting and/or procuring and/or encouraging the second defendant in its commencement and pursuit of the Russian proceedings with a view to frustrating the arbitration and/or hindering enforcement of any award in Russia.

(2) As against the second defendant:

(a) Whether the second defendant has itself breached and continues further to breach the Arbitration Agreement, i.e. by its commencement and pursuit of the Russian proceedings asserting a contractual claim to which the arbitration clause attaches; and/or

(b) Whether the second defendant has acted and continues to act vexatiously and/or oppressively and/or unconscionably, i.e. by its commencement and pursuit of the Russian Proceedings.

The claimant says that claims (1)(a) and (2)(a) above and/or their respective juridical bases are contractual, whilst claims (1)(b) and (2)(b) above and/or their respective juridical bases are non-contractual.

63. The second defendant puts it more succinctly (in terms that apply equally to the first defendant). In order for the claimant to succeed on its claim on the merits it either must make out that the second defendant has acted in breach of and/or non compliance with the Arbitration Agreement, and/or that the second defendant has acted vexatiously, oppressively or unconscionably so that the ends of justice require that the claimant be granted the relief it seeks. I do not think that this is different in substance from the claimant's formulation. It is reflective of the distinction drawn in the case law between cases (i) where there is a legal right not to be sued in the foreign court where, for example, the foreign proceedings are a breach of a jurisdiction or arbitration clause, and (ii) where there is no legal right not to be sued in the foreign court, but there is an equitable right because the pursuit of proceedings in the foreign court is vexatious and oppressive (*Kallang Shipping S.A. v Axa Assurances Senegal* [2007] 1 Lloyd's Rep 160 at [20], and *REC Wafer Norway AS v Moser Baer Photo Voltaic Ltd* [2011] 1 Lloyd's Rep 410 at [26] – [27]).

64. Although the matter is analysed by the parties under these two headings, in reality this results from the fact that only the first defendant is a party to the arbitration agreement. The factual allegations relied on by the claimant as amounting to, in the one case, breach of the arbitration agreement, and in the other, unconscionable conduct, are the same, namely collusive conduct on the part of the defendants to frustrate the arbitration and/or hinder enforcement of any award in Russia.

The claimant's contractual claim

65. I need say nothing in this respect as regards the first defendant, which is a party to the arbitration agreement with the claimant. In its case, the determination of the question whether there is a serious issue to be tried on the merits depends on the facts as regards the alleged collusion.

66. The position is considerably more complex in the case of the second defendant. The claimant's argument is as follows. The first question, it says, is as to the law governing the characterisation of the claim in the Russian proceedings. This must be English law as the applicable law of the substantive contract in issue, namely the guarantee. Questions as to privity and validity, including (ostensible) authority of those who signed the Guarantee on behalf of the first defendant, are therefore governed by English law. Alternatively, English law applies as the *lex fori*: see *Through Transport Mutual Insurance Association (Eurasia) Ltd v. New India Assurance Co Ltd* [2005] 1 Lloyd's Rep. 67 at [19] & [52]-[60].

67. Under English law, the claim which the second defendant asks to be determined in the Russian proceedings is, as a matter of substance, a contractual claim under a contract between the claimant and the first defendant and it seeks contractual relief, namely invalidation of that contract. Its pursuit of its claim for invalidation of the contract, therefore, concerns a right under the contract belonging to the first defendant. In the circumstances, the second defendant's relevant substantive right (if any) has attached to it the associated dispute resolution obligations relating to disputes under the contract. Reliance is placed on cases as regards assignment and subrogation, where for example, it has been held that an insurer becoming entitled to contractual rights by way of subrogation takes subject to an arbitration clause that is part of the rights: see eg, *Schiffahrtsgesellschaft Detlev Von Appen GmbH v. Voest Alpine Intertrading* [1997] 2 Lloyd's Rep. 279.

68. It is wrong, the claimant submits, to suggest that the second defendant's claim in the Russian proceedings is "independent of the guarantee" because it arises from Russian statute. The claim is headed "Statement of Claim seeking invalidation of a transaction"; the grounds put forward all seek invalidation of the guarantee; and the only head of relief sought at the end of the statement of claim is that the guarantee "be invalidated". In other words, it is a contractual claim and the contractual relief sought is that the Court should take a step, akin perhaps to rescission by an English Court, to deprive the contract of its validity. It is in substance a contractual claim albeit seeking to attack and destroy the relevant bargain. From an English law perspective, if the second defendant is to exercise such contractual rights, it must do so by operating the contractual dispute resolution machinery.

69. In response, the second defendant submits that it is not the case that its claim in the Russian proceedings is to have the guarantee invalidated by the Russian Court

applying Russian law on grounds the same or similar to those already invoked by the first defendant in the arbitration. It says that even a cursory comparison of the first defendant's Response to the Request for Arbitration and the second defendant's Statement of Claim seeking the invalidation of a transaction in the Russian proceedings is sufficient to reveal this allegation to be baseless. The first defendant's position in the arbitration is summarised in the introduction as being that the claim must fail because the guarantee is "not valid due to a lack of consideration" and "that in any event only gives rise to a secondary liability"; and further that "the Claimant (and its agents) failed to act in a commercially reasonably [sic] manner and/or in good faith when liquidating the shares pledged by the beneficiary under the guarantee agreement". By contrast, the heads of the second defendant's claim in the Russian proceedings are as follows:

i) "The Guarantee Agreement is an interested party transaction as the beneficiary under the transaction, a shareholder holding more than 50% of shares and the counterparty in the transaction are affiliated

ii) The Guarantee Agreement falls within major transactions as it is relate to the disposal of assets which value exceeds 25% of the book value of such assets

iii) The Guarantee Agreement should have been approved at a general meeting of shareholders by a majority vote cast by all of the uninterested shareholders

iv) BNP Paribas SA as a party to the Guarantee Agreement was and should have been aware that such a transaction showed evidence of both an interested party and a major transaction

v) The Guarantee is detrimental to Russian Machines OJSC and, therefore, violates the Plaintiff's [that is, the second defendant's] rights and legitimate interests"

70. This illustrates starkly, the second defendant submits, that the claimant's suggestion that the defendants are seeking to have the guarantee invalidated on the same or similar grounds is simply incorrect. The first defendant's alleged grounds for setting aside the guarantee are founded on English contract law. The second defendant's claims clearly "derive" from Russian company law. This also illustrates the artificiality, it is submitted, of the claimant's characterisation of the second defendant's claim in Russia as being "contractual" as a matter of substance. Self-evidently, the second defendant's claims are *not* contractual and are based on grounds that are specific to Russian company law.

71. It is contended by the second defendant that it has been already been held by the Moscow Court at the preliminary stage of the proceedings that the second defendant was not subject to the arbitration agreement and that the second defendant was exercising its own right to have the guarantee declared void or invalid as a shareholder in order to protect its own interests qua shareholder. Reliance is placed on the test as set out in *The Sennar (No. 2)* [1985] 1 WLR 490 at 499. Therefore the question of the proper characterisation of the second defendant's claim in the Russian action is *res judicata* and gives rise to an issue estoppel preventing the claimant from arguing to the contrary in these proceedings.

72. The passage relied upon appears within the reasons given by the Abitrazh Court on 21 June 2011 for rejecting the claimant's motion to dismiss the Russian proceedings. The court notes that the second defendant (i.e. claimant in Russia) is not party to the guarantee, as a result of which it is not a party to the arbitration agreement. It rejects the argument of the claimant (a defendant in Russia) that the Russian proceedings were brought in order to protect the first defendant, since the second defendant was seeking to protect its own interests as a shareholder in the first defendant company.

73. The claimant seeks to meet the *res judicata* argument by submitting that the Abitrazh Court was not analysing the proceedings before it for the purposes of conflict of laws. It was not concerned with the question whether the substance of the claim before it was the same as that of the defence in the arbitration. In any event, the claimant submits that characterisation is to be determined according to English law.

74. This court will pay great respect to the reasoning of the Abitrazh Court. On the other hand, I consider there is force in the claimant's submission that the Abitrazh Court was not concerned with the point before this court, namely the nature of the Russian proceedings as compared with the defence put forward by the first defendant in the arbitration. Rather, the point made in the Court's reasons is that the second defendant was not a party to the arbitration agreement, and was pursuing a claim under the relevant code and statutory laws in Russia. This is not a matter that I can resolve at this stage, and it is sufficient to say that the claimant has shown (in my view) that there is a real prospect of showing that the matter is not *res judicata*. In any case, the analysis in the court's reasons does not extend to the question of collusion, which is the factual basis of the claimant's claim in the English proceedings.

75. The second defendant has a further argument on the basis that the claimant is correct to submit that characterisation of the claim in the Russian proceedings is a matter for English law. Relying on the statutory definition of "derivative claim" in s.260(1) Companies Act 2006, it is submitted that an essential element of a derivative claim under English law is that the relief sought is on behalf of the company, whereas in the Russian proceedings in the Abitrazh Court, the second defendant is seeking to exercise its own rights as shareholder.

76. The reference to the Companies Act is not in my view apposite. Where in this context the English case law speaks of "derived" rights, it is concerned with a different type of situation, one where a third party claims "in the shoes" of one of the original parties to the contract. The court will hold the third party's "derived" rights as subject to, and not to be exercised inconsistently with, an arbitration clause in the original contract. The classic situations are those of an assignee, or an insurer exercising a right of subrogation, who though not parties are treated as such: see Raphael, *The Anti-Suit injunction*, 1st edn, 2010, para 10.06. The question is whether the claimant can show, to the necessary standard, that is to say, that there is a serious issue to be tried, or in so far as its argument founds jurisdiction, a good arguable case, that by its commencement and pursuit of the Russian proceedings, the second defendant is asserting a contractual claim to which the arbitration clause attaches.

77. In my view, this is a question of considerable difficulty. It is right to say that, if successful, the proceedings will (it appears) result in an order invalidating the guarantee. I accept that a claim can be characterised as contractual even if it seeks the invalidation rather than the enforcement of a contract. On the other hand, the second

defendant's Russian claim is clearly not brought by way of subrogation or assignment, depending on the exercise of statutory rights under Russian law. The claimant points out that the *Through Transport* case also involved a claim under a foreign statute (ibid at [54] – [60]). But there the similarity seems to end, since the claim in that case concerned an insurer's statutory rights under the Finnish equivalent of the Third Parties (Rights against Insurers) Act 1930. It was held that this claim was to be characterised under English law, and as such was to be characterised as contractual, and thus subject to the contractual right to arbitrate. The element of subrogation present in *Through Transport* is not present in this case.

78. I appreciate that, as the claimant says, in these proceedings characterisation of the Russian proceedings is a matter of English law, but the English court should not be too ready to impose its own characterisation in such circumstances. Further, there is a question as to whether, based only on such an English law characterisation, the English court would grant an anti-suit injunction. It refused to do so in *Through Transport* (see [94]), though each case depends on its own facts. At this point, and on the material to which my attention has been drawn, I am not persuaded that the claimant makes out this part of its case. I need not decide the point however, because of my views in relation to the claimant's alternative case. In that context, it is to be noted that in *Through Transport*, the court went on to say that "…this is not a case in which it can fairly be said that the proceedings in Finland are vexatious or oppressive. New India is simply proceeding in Finland under a Finnish statute which gives it the right to do so" ([96]). I now proceed to consider whether the same applies on the present facts.

The claimant's claim based on unconscionable conduct

79. As stated above, the case advanced by the claimant is that the first defendant has acted and continues to act vexatiously, oppressively or unconscionably, by supporting, procuring or encouraging the second defendant in its commencement and pursuit of the Russian proceedings with a view to frustrating the arbitration and hindering enforcement of any award in Russia. The second defendant has acted and continues to act vexatiously, oppressively or unconscionably by its commencement and pursuit of the Russian proceedings. I begin by setting out the parties' submissions on the evidence.

80. It is not in dispute that the defendants are group entities ultimately under common ownership or control. Indeed, in the context of the allegation of collusion between the defendants, they rely upon the fact that (as the first defendant put it) their "close connection was publicly proclaimed", rather than deliberately concealed.

81. Against that background, the claimant submits that it is a reasonable inference that the commencement of the Russian proceedings by the second defendant on 27 December 2011, so long after the guarantee was executed on 1 October 2008, and just after the claimant filed its statement of case in the London arbitration on 20 December 2010, is not a coincidence. (I have set out some of the overall timing above.)

82. This contention was considerably developed in the claimant's oral submissions at the hearing, and the factual submissions in support form the bedrock of its case. It relies upon what it calls nine "overt acts" which demonstrate, it says, that the first defendant (though a defendant along with the claimant in the Russian proceeding) is in fact

supporting the second defendant (which is the claimant in the Russian proceedings – to avoid confusion I shall continue to describe them in the same way as in the English proceedings). These acts are as follows:

(1) The order of the Arbitrazh Court of 3 February 2011 records the first defendant "upholding" the position of the second defendant.

(2) The same decision shows the first defendant leaving the claimant's motion to adjourn "to the Court's discretion".

(3) The defence filed in due course by the first defendant contains in translation, the following: "On the basis of the foregoing, Russian Machines OJSC believes that the demand advanced by the Claimant is well-founded and leaves the question of granting the claim to the discretion of the court". Particular reliance is placed on this by the claimant.

(4) The above should be contrasted, the claimant submits, with what the first defendant should have done. It should have supported the claimant's application for a dismissal of the Russian proceedings, so that the issue could be decided within the London arbitration. Instead, it adopted an adverse position: reference is made to the minutes of the Abitrazh Court hearing on 21 June 2011 which records the first defendant objecting to the motion filed by the claimant, and explaining that the defendants are not "affiliated entities".

(5) At the same hearing, the first defendant objected to the claimant's oral motion to adjourn the proceedings so it could examine documents which had been submitted as evidence.

(6) The claimant submits that the record shows the first defendant filing evidence in support of the second defendant's case.

(7) At the hearing on 4-8 August 2011 at the Arbitrazh Court, it is said that the first defendant continued to support the second defendant. Reference is made to the judgment, to the effect that the first defendant "holds that the [second defendant's] claims are well founded and asserts that the contested agreement was an interested party transaction…".

(8) At the same hearing, the first defendant filed more evidence in support of the second defendant's case.

(9) At the hearing in front of the Arbitrazh Court on 4 August 2011, the claimant's evidence is that the first defendant objected to the production of documents as has been requested by the claimant.

83. Accordingly, the claimant submits that it is to be inferred that behind the scenes the defendants were colluding to bring the proceedings in Russia with the purpose of impeding the London arbitration. At this stage, it is accepted that this can only be a matter of inference. But, the claimant submits, the timing of the Russian proceedings, the ultimate control of the defendants being in the same hands, the fact that a successful invalidation in the Russian proceedings will assist the first defendant in avoiding the enforcement of any arbitration award against it, together with the

inference to be drawn from the nine overt acts listed above, justifies the court in drawing this inference, at least to the extent of finding that there is a serious issue to be tried.

84. For their part, the defendants submit as follows. There has never been, it has submitted, any attempt to conceal the fact that the ultimate beneficial ownership of the defendants is the same. That is fatal to any suggestion that there has been collusion. The second defendant is a management company of a pension fund, the latter being a minority shareholder of the first defendant. The evidence of Mr Egishe Dzhazoyan (a Russian qualified lawyer and senior associate at the first defendant's solicitors) together with that of Ms Eleonora Sergeeva, an independent expert in Russian law instructed by the second defendant, is that the second defendant is exercising its own rights and seeks legitimate relief on its own behalf. On that basis, it is submitted that the court should accept that there is a proper and legitimate purpose to the Russian proceedings.

85. There is nothing, it is submitted, in the timing of the Russian proceedings, which came nearly four weeks after the arbitrator's appointment was confirmed by the LCIA Court. In answer to the allegations based on the nine "overt acts" of cooperation in the Russian proceedings alleged against the first defendant, it is submitted that these are properly and cogently answered by the fact that it was the first defendant's duty (as a party properly joined under Russian law) to cooperate in the proceedings as required. The suggestion that this gives rise to a risk of collusion is illusory. Where the case is admittedly based on inference, it is at the "extreme edge" of what is permissible, and particularly cogent evidence is required.

86. Further, reliance is placed on the fact that the first defendant's solicitors made it clear to the arbitrator before he gave permission to bring these proceedings that any determination in the Russian proceedings would not be binding on the parties to the arbitration, and would merely stand as a piece of evidence to be relied upon by one or other of the parties. The arbitrator's order of 4 May 2011 recites that the first defendant's position is that the Russian proceedings cannot have a res judicata effect. A similar recital relates to the first defendant's statement that there would be no estoppel. This again, it is submitted, refutes any suggestion of collusion.

87. It is to be noted however that reliance is placed upon the view said to have been taken in the Russian proceedings that those proceedings are not abusive or vexatious under Russian law. The first defendant says only that this was accepted to "a certain degree" in the Russian proceedings (presumably to avoid inconsistency with its case as to what the arbitrator was told). The second defendant, on the other hand, says that the matter is res judicata and raises an issue estoppel. I have rejected this contention, and refer to my reasons above.

88. In stating my conclusion on this issue, I reiterate the threshold that the claimant must demonstrate at the jurisdictional stage. I have dealt with the "serious issue to be tried" standard above, and note that the good arguable case standard applies to the extent that the claimant relies on these matters as supporting its case on the gateway issues. This means the claimant having much the better of the argument on the material available, and does not imply that the claimant must at this stage establish its case on the balance of probabilities (*Canada Trust Co v Stolzenberg (No. 2)* [1998] 1 W.L.R. 547 at 555E-G, Waller LJ, and at 572H, Nourse LJ). As I explain shortly, the first

defendant has cited authority to the effect that a higher standard still is required if an interim injunction were to be granted the effect of which would be equivalent to a final resolution.

89. I start with a different point made by the first defendant. It is said that this claim is entirely circular in nature. It relies on the alleged collusion of the first and second defendant and on no other basis. It ignores (it is argued) the reality of the first defendant's participation in the Russian proceedings; the fact that it is procedurally regular and not abusive under Russian law; the fact that neither the claimant nor the Russian Court has complained (in those proceedings) that the first defendant's participation as defendant in the Russian proceedings is abusive or collusive or otherwise improper or irregular.

90. I accept the general point that the first defendant's participation as defendant in the Russian proceedings is premised on the fact that it is a Russian company, and so within the Abitrazh Court's jurisdiction. But that in itself does not in my view create a circularity. It would explain, for example, why the first defendant was a party to the proceedings, but not the stance it took in the proceedings. I do not think this is referable either to the duty to cooperate in the proceedings that Mr James Ramsden, counsel for the first defendant, mentioned in oral argument. Nor do I accept that the claimant's case can be described as "extreme" because it is based on inference. In the way of things, and before disclosure, it can only be based on inference. The question is whether the material supports an inference, and if so, as to its strength.

91. In those circumstances, I should state my conclusion briefly, since this is an interlocutory hearing, and there may remain matters relevant to the factual enquiry. On 16 November 2010 the claimant and first defendant agreed to the appointment of Professor van den Berg as sole arbitrator. The claimant filed its Statement of Case in the London Arbitration on 20 December 2010, and the second defendant commenced the Russian proceedings on 27 December 2010. The timing may be coincidental, but given that the defendants are under common ownership and control, a question clearly arises in that regard. The case of the second defendant may or may not be properly characterised as contractual, but the end result is the same, namely the invalidation of the guarantee.

92. In addition, there is evidence from the record that the first defendant has supported the second defendant's case in the Russian proceedings. What is unconscionable cannot and should not be defined exhaustively (*Glencore International AG v Exter Shipping Ltd* [2002] 2 All ER (Comm) 1 at [42], Rix LJ), but where companies are in the same ownership and control, it is arguably unconscionable for them to work together to the extent of one bringing court proceedings with a view to impeding the outcome of an arbitration to which the other is a party. Where England is the seat, this may justify the court intervening by way of injunction against both companies, albeit only one is a party to the arbitration agreement, because the conduct of the other party is bound up with the arbitration agreement. Against the non-party also, the court's jurisdiction ultimately rests upon the consensual submission of the dispute to arbitration. On the submissions I have heard, and the material I have seen, I accept the claimant's contention that there is sufficient material to justify drawing the inference that the Russian proceedings are brought with a view to impeding the outcome of the arbitration. There is authority that the claim should be made out to a "high degree of probability" where an interim injunction has the effect of finally disposing of all or

part of a claim (e.g. *Midgulf International Ltd v Groupe Chimiche Tunisien* [2009] 2 Lloyd's Rep 411 at [36]), Teare J, (reversed on other grounds: [2010] EWCA Civ 66). Although at present, I am considering the matter in the context of a challenge to jurisdiction, where it is sufficient to say that the good arguable case threshold is satisfied, I have kept in mind that this higher standard may be applicable on an interim application.

Delay

93. Most of the argument at the hearing concerned the numerous detailed points discussed above as to the jurisdictional gateways, and below as to service, but alleged delay on the claimant's part has been an important aspect of the defendants' cases. The sole claim in the English proceedings is for an anti-suit injunction. In the context of jurisdiction, the defendants submit that, "the Claimant will not be able to show a reasonable prospect of success on the merits of its anti-suit relief because of the delay that it has shown in applying for such relief". I now consider that question.

94. The principle is not in doubt. In the leading case of *The Angelic Grace* [1995] 1 Lloyd's Rep 87 at 96, Millett LJ said that "… where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced". Similarly, in *Transfield Shipping Inc v Chiping Xinfa Huayu Alumina Co Ltd* [2009] EWHC 3629 at [76], Christopher Clarke J said that "Once it [the claimant] was aware of the breach, it behoved it, in my view, promptly to seek relief". The reasons for promptness include the expenditure of costs in the foreign proceedings, and, also importantly, comity considerations, which may be exacerbated if the English court is perceived to be intervening in foreign proceedings at a late stage. Both defendants have urged that there is no authority to which the claimant can point where the court has granted an anti-suit injunction as late as in the present case.

95. I have set out above some of the main dates in the timing prior to the application to the court for permission to serve these proceedings out of the jurisdiction. On 13 January 2011 the Russian proceedings were served on the claimant, there were then investigations as to the relationship between the parties, and the necessity to obtain the consent for anti-suit proceedings from the other banks which were party to the credit agreement. The request to the arbitrator for permission to commence the anti-suit action was made on 11 April 2011, and subsequent submissions were made to the arbitrator by both parties. That culminated in permission being given by the arbitrator on 4 May 2011, and the application to the court was made on 27 May 2011. The second defendant has said that this in fact represents one of the most crucial and culpable periods of delay. However for reasons set out above, I do not consider this to be an excessive period of time in the circumstances, bearing in mind that this is not the more usual bipartite situation in which one party begins foreign proceedings allegedly in breach of an arbitration agreement, but a tripartite situation in which a connected party is alleged to have done so. That this is a major complicating factor appears from the facts of the present case.

96. On the other hand, it was not until the 28 October 2011 that the claimant issued its application for an interim injunction. There is much force in the defendants' submission that this was very late, particularly since it came over a month after the

second defendant had lodged its appeal to the Appellate Division of the Moscow Arbitrazh Court.

97. It is necessary to look at the intervening time period in some detail. The sealed order of 8 June 2011 was received (I am told) by the claimant's solicitors on 13 June 2011. At that time, the claimant's submissions in the arbitration were due on 16 June 2011. This may explain why the anti-suit action was in fact commenced on 17 June 2011.

98. There followed a period during which the claimant sought to serve the defendants. On 27 June 2011, the defendants acknowledged service of the claim form, indicating their intention to dispute jurisdiction. The chronology shows that there was discussion between solicitors in early July as to timing of the anticipated hearing. The second defendant's solicitors were not prepared to agree to an expedited timetable. On 11 July 2011, they sought a 14 day extension for the issuance of the jurisdiction challenge, which the claimant's solicitor agreed. Such challenges were issued by the defendants on 25 July 2011. They were accompanied by evidence, including evidence as to Russian law. The defendants' solicitors agreed to give the claimant until 22 August 2011 to respond. On that date, the claimant issued its own cross-application in response to the defendants' applications, together with its evidence in response. Reply evidence was served by both defendants on 5 September 2011. I think that this is a reasonable explanation as to why an application for an interim injunction was not issued before then.

99. In fact, as things stood at that point, the Russian proceedings appeared to have run into the sand, because although it had rejected the claimant's motion to dismiss on 21 June 2011, the Abitrazh Court dismissed the proceedings on 15 August 2011 (though this ruling was not to take effect until expiry of the one month appeal period). As I have indicated, the second defendant lodged an appeal on 20 September 2011, and it was received on that day by the claimant's solicitors in Moscow.

100. Meanwhile, the solicitors for the parties had been trying to agree a hearing date and time estimate for the jurisdiction challenge in the English court. The claimant says that the parties were simultaneously dealing with the substantive five day hearing in Phase I of the London arbitration, which took place on 26-30 September 2011. In the usual way, it was followed by post-hearing briefs due by 21 October 2011.

101. I have explained elsewhere in this judgment the material events in the period immediately before the hearing of these applications. On 6 October 2011, the claimant asked the Commercial Court that the hearings be heard on an expedited basis. After representations by the other parties, on 20 October 2011 an order was made for an expedited hearing on 7-8 November 2011. Meanwhile, on 17 October 2011, the date of the hearing of the second defendant's appeal in the Russian proceedings by the Appellate division of the Arbitrazh Court was listed for 15 November 2011. On 28 October 2011, the claimant issued its application for an interim injunction.

102. The principal point made by the claimant is that it acted reasonably by holding off seeking interim relief in the expectation that it could obtain a speedy determination of its claim for final relief. It is contended that it is the defendants who, through their objections to jurisdiction and service, have slowed down the procedure. It is said that for large parts of the intervening period there has been no pressing urgency to justify

interim relief by reference to impending steps in the Russian proceedings. Finally, it is said that throughout the process the claimant has itself been heavily engaged in the conduct of the arbitration, in which it is claimant.

103. The defendants submit that they cannot be criticised for challenging jurisdiction on properly arguable grounds. The delay in bringing the application is inadequately explained and inexcusable. Even after the judgement of the Arbitrazh Court, it was inexplicable for the claimant to fail to apply for interim anti-suit relief. It is wrong, it submitted, to suggest that the defendants have sought to frustrate the listing of their jurisdictional challenges. The interim relief application on 28 October 2011 was some nine and a half months after the Russian proceedings had begun, and over two and a half months after judgement in the Russian proceedings. It is clear, the second defendant submits, that the claimant obtained its expedited hearing date from the Commercial Court, and then attempted to shoe-horn in a further application. The claimant's solicitors are a major law firm well able to deal with both the arbitration and the interim anti-suit injunction. An application could have been made very much earlier, and would not have been frustrated by the defendants' jurisdictional challenges, because the court would have to take a preliminary view on jurisdiction and grant interim anti-suit relief on that basis, leaving the merits of the Part 11 challenge to be resolved *inter partes* while the interim order remained in force. When the Arbitrazh Court dismissed the claimant's motion to dismiss the Russian proceedings on 21 June 2011, it became inevitable that the claimant would have to face a merits hearing in Russia. The key point, the defendants submit, is that the claimant allowed the Russian proceedings to become so procedurally advanced that they reached the Appellate Court before seeking interim relief from the English court.

104. My conclusions on this difficult issue are as follows. I do not consider that it is a good answer to the delay allegation to assert the pressures of the conduct of the arbitration, though I do not doubt that it has had to take priority at particular times, and in practice explains particular periods of inaction. Nor do I accept that it is an answer that for large parts of the time elapsed there has been no "pressing urgency" to justify interim relief by reference to impending steps in the Russian proceedings. If anything this point counts against the claimant, because its application for interim relief now takes place against the background of imminent appeal hearings in Moscow, which is unsatisfactory on comity grounds alone. Albeit the court does not act contrary to international comity by restraining a party to an arbitration agreement from doing something which it has promised not to do (*O.T. Africa Line Lltd v Magic Sportswear Corp* [2005] EWCA Civ 710 at [35]), the court is bound to be concerned about perception in cases like this. The question it seems to me is whether the claimant can show that, despite these considerations, when the facts are taken as a whole, the delay is not such as to disqualify it from anti-suit relief which it would otherwise have good grounds to seek from the court of the seat of the arbitration.

105. The main factor, in my view, is as follows. On balance, I think it was reasonable for the claimant not to apply for an interim injunction at the time of seeking permission to serve the second defendant out of the jurisdiction. Though the first defendant is a party to a London arbitration, the jurisdiction issues as regards the second defendant were, as the claimant recognised when it made the application, likely to be complex ones. Once the proceedings were served, it became clear that jurisdiction would be strongly contested. It was apparent that evidence would be required on both sides,

and that the questions relating to jurisdiction and service would take some considerable time to argue before the court—as indeed they did. If there was culpable delay, it lay in not applying for an interim injunction before the issues as to service and jurisdiction could be decided. But as the second defendant put it, on such an application the court would have to take a preliminary view on jurisdiction and grant (or withhold) interim anti-suit relief on that basis. As the first defendant contended however, there are difficulties inherent in such a course since before full argument of the kind that there has been on these applications, the court would have to make uninformed assumptions which might turn out to be misplaced. Objection has been taken by the first defendant that the threshold test even on an application for interim relief requires the applicant for an anti-suit injunction to establish "a high degree of probability" that its case against the respondent is right and that it is entitled as of right to restrain the respondent from taking proceedings abroad. I accept that the defendants cannot be criticised for challenging jurisdiction on properly arguable grounds, but these challenges have set the framework for the timing. The difficult choice for the English court, as the court of the seat of the arbitration, is to consider making, or to decline to consider making, protective steps in support of the arbitral process. With some hesitation, I accept the submission of Mr Graham Dunning QC, counsel for the claimant, that delay should not itself preclude the bringing of the claimant's claim.

Forum conveniens

106. The claimant must also show that England is the proper place for determining its claims. This is accepted by the first but not the second defendant. Given that the seat of the arbitration is England, I am not in doubt that it is the proper place to determine these claims.

Deemed service on the first defendant

107. As explained above, no order for service out of jurisdiction was obtained as regards the first defendant, the claimant's solicitors mistakenly believing that service was covered by a process clause in the guarantee which had, in fact, been repealed when Professor van den Berg was appointed sole arbitrator. Service of these proceedings was made upon Bryan Cave LLP under the (revoked) process clause on 20 June 2011. The claimant seeks, and the first defendant opposes, retrospective validation of such service under CPR r. 6.15(2).

108. CPR r. 6.15 is the provision in the rules which provides for service by an alternative method or at an alternative place as follows:

> "(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.
>
> (2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."

109. Sub-rule (1) deals with alternative service where there is good reason to authorise it. The relevant provision for present purposes is sub-rule (2), which enables the court to order that steps already taken to bring the claim form to the attention of the defendant is good service. In *Lord Michael Cecil v Bayat* [2011] EWCA Civ 135, the Court of Appeal held that CPR r. 6.15 gave the court power to order service out of the jurisdiction by alternative methods. This and earlier authority on the relationship between CPR r. 6.15 and CPR r. 6.37(5) is reviewed by Tugendhat J in *Bacon v. Automattic Inc* [2011] EWHC 1072 (QB), to which I refer. The claimant accepts that an applicant must satisfy the test of "good reason" in sub-rule (1) before the court comes to consider sub-rule (2). In the case of a foreign-domiciled defendant (such as the first defendant), this entails the applicant showing that the English court has, and should exercise, jurisdiction in respect of the claim. (I have dealt with the jurisdiction question already and need say no more here than that the claimant has sufficiently made good its case in that regard.)

110. The parties' arguments were as follows. The claimant submits that this is a "paradigm case" for the exercise of the court's power under CPR r. 6.15(2). It asks that the court should order now that "the steps taken to date to bring these proceedings to the attention of D1 (including their provision as a matter of fact to Steptoe & Johnson, solicitors acting for D1 in the London arbitration) are sufficient to constitute good service". It makes the following submissions in that regard.

(1) Service on Bryan Cave LLP without asking for permission was an oversight, and was not deliberate.

(2) In the case of an arbitration in this country, service on the defendant's English solicitors is normally appropriate, and in this case the application could readily have included an application for permission to serve the arbitration claim form on Steptoe & Johnson.

(3) The proceedings are ancillary to the arbitration, and aimed at protecting it.

(4) The first defendant knew that the claimant intended to bring an anti-suit action against it, because the claimant had to apply to the arbitrator for permission. I have dealt with the facts in this regard above.

(5) A partner from Bryan Cave LLP appeared in the arbitration ostensibly representing the first defendant.

(6) There is no dispute that the defective service was brought to the immediate notice of the first defendant.

(7) If the court does not make the order sought, the claimant may be prejudiced, because it may have to cross extra hurdles to serve the first defendant. (This, I think, is a reference to service under the Hague Convention.)

111. As to the fifth point, this is based on a somewhat flimsy assertion that a partner of the firm was present at one of the arbitration hearings. Bryan Cave LLP does not act and has never acted for the first defendant in the arbitration. That was made clear in a witness statement filed by Mr Paul Hauser, a partner in the firm, and I accept it.

112. The first defendant's contentions in response are as follows. What this application amounts to, it is submitted, is the general assertion that because the proceedings eventually found their way to the solicitors acting for the first defendant in the arbitration, namely Steptoe & Johnson (which happened according to the correspondence on 20/21 June 2011), and then only so that they could challenge service and jurisdiction, good service has thereby been effected. This is an absurd proposition the court is invited to reject. The claimant should not be permitted to circumvent the prescribed procedure for service of documents and in particular CPR r.6.3 and CPR r.6.9 read with the Hague Convention, ratified both by the UK and the Russian Federation.

113. Reliance is placed on *Andrew Brown v Innovatorone Plc* [2009] EWHC 1376 (Comm), where Andrew Smith J said at [40]:

> "…even if exceptional circumstances are not required to justify a retrospective order under CPR r 6.15, the court should adopt a rigorous approach to an application by a claimant for indulgence. After all, the rule does stipulate that an order should be made only where it appears that there is "a good reason" to do so, and, while it might be said that this requirement adds nothing because the court should never exercise a discretionary power other than for good reason, this stipulation in itself seems to me to underline that the court should examine with some care why it has come about that it is being asked to make an order. Furthermore, in my judgment the mere absence of prejudice to a defendant will not usually in itself be sufficient reason to make an order under CPR r 6.15."

114. At [44], Andrew Smith J cites Mummery LJ in *Anderton v Clwyd County Council* [2002] EWHC Civ 933 at [36]: "…Justice and proportionality require that there should be firm procedural rules which should be observed, not that general rules should be construed to create exceptions and excuses wherever those who could easily have complied with the rules, have slipped up and failed to do so".

115. It is not good enough therefore, the first defendant says, for the claimant to protest that it should not be required "…to jump through further technical hoops, involving further delay in progressing these injunction proceedings", particularly where the confusion affecting these proceedings stems from the error in the application to the judge. Whilst pragmatism is justified in some circumstances, it cannot become the default justification of a party which has, for no good reason, failed to comply with the rules for service of proceedings. It is also said that delay on the claimant's part militates against the exercise of the court's discretion under CPR r. 6.15(2). I have dealt with the delay issue elsewhere in this judgment, but say here that I have taken the issue into account.

116. Overall, my conclusions are as follows. The CPR r. 6.15(2) power applies to a foreign defendant (see *Abela v Baadarani* [2011] EWHC 116 (Ch) at [66], Sir Edward Evans-Lombe). So far as the first defendant argued that the power could not be exercised against a Russian defendant on the basis that service could only take place under the Hague Convention, I reject such argument. Since this was a point which was raised in the evidence, I should say that I do not think that questions of the legality of service under foreign law arise if the court exercises power to order service on a foreign defendant in England.

117. However the first defendant was right to submit that in cases of service out of the jurisdiction, CPR r. 6.15 cannot be invoked where convenience or pragmatism is the only justification. This is clear from the decision in *Cecil v Bayat*, ibid, a case under CPR r. 6.15(1). Stanley Burnton LJ (with whom Wilson and Rix LJJ agreed) said that service on a party to the Hague Convention by an alternative method under CPR r. 6.15 should be regarded as exceptional, to be permitted in special circumstances only (at [65]). Speed is a relevant consideration when deciding whether to make an order under CPR r. 6.15, but in general not a sufficient one (at [66]). In general, the desire of a claimant to avoid the delay inherent in service by the methods permitted by CPR r. 6.40 cannot of itself justify an order for service by alternative means (at [67]).

118. He continued:

> 68. Service by alternative means may be justified by facts specific to the defendant, as where there are grounds for believing that he has or will seek to avoid personal service where that is the only method permitted by the foreign law, or by facts relating to the proceedings, as where an injunction has been obtained without notice, or where an urgent application on notice for injunctive relief is required to be made after the issue of proceedings. In the present case, the only reason for urgency in serving the Defendants arose from the Claimants' delay in seeking and obtaining their permission to serve out of the jurisdiction: a delay resulting in part from their decision not to proceed with their claim until they had obtained funding for the entire proceedings. Furthermore, their application for permission to serve out was not particularly complicated.
>
> 69. This does not mean that a claimant cannot bring proceedings to the attention of a defendant by email, fax or other more speedy means than service pursuant to CPR r 6.40. The Claimants could have done so in the present case. But, as I have indicated, service is more than this. In my view, the judge confused this possibility with service itself.

119. This passage makes it clear that that service by alternative means may be justified by the circumstances of the case including, where appropriate, cases of urgency. Some special circumstance is needed to amount to good reason, but the need for some flexibility is also acknowledged at [113] (where Rix LJ is speaking in the context of delays in the case of service under the Hague Convention).

120. The present case is an unusual one. The points that seem most compelling to me are as follows. The claimant had overlooked the fact that the service of process clause had been repealed. Had that been noticed, it is difficult to see why service in England on the first defendant's solicitors acting for it in the arbitration would not have been permitted. Unlike the present case, *Cecil v Bayat* did not concern an arbitration claim. In such a case the position as to service is as stated by Tomlinson J in *Kyrgyz Republic v. Finrep GmbH* [2006] 2 C.L.C. 402 at [29]:

> " …in relation to arbitration applications concerning arbitrations which have their seat within the jurisdiction it is the almost invariable practice of the court to permit service upon a party's solicitor who has acted for that party in the arbitration, provided that that solicitor does not appear to have been disinstructed or absent other special circumstances. This practice is reflected in paragraph 3.1 of Arbitration Practice Direction 62.4 which provides, under the rubric

> 'Arbitration Claim Form Service': '3.1 Service. The court may exercise its powers under Rule 6.8 to permit service of an arbitration claim form at the address of a party's solicitor or representative acting for him in the arbitration.'"

121. I accept unreservedly the defendants' submission that the authorities make it clear that the rules as to service have to be abided by. A mistake may be irrecoverable, as when a limitation period has expired. But that is not the present case. The solicitors acting for the first defendant in the arbitration knew that this claim was coming, and prior correspondence about it had taken place with the arbitrator. The proceedings were sent to Bryan Cave LLP (now acting for the second defendant) and passed to Steptoe & Johnson, solicitors for the first defendant in the arbitration. The defendants are in common ownership and control. There is jurisdiction to make an order that the steps already taken to bring the proceedings to the attention of the first defendant are to be good service, there is or would be no prejudice to the first defendant in making such an order, and the result of declining to do so would be the unnecessary incurring of yet further expense. For these reasons, I am satisfied that I should exercise the CPR r. 6.15(2) power in accordance with the claimant's application.

Other issues as regards the first defendant

122. It is common ground that in the light of the conclusions I have reached, it is not necessary to proceed any further as regards the issues concerning the first defendant. I restrict myself to stating that, had I not concluded that an order should be made under CPR r. 6.15(2), I would have ordered service by an alternative method upon the first defendant, allowing service on their solicitors at their address within this jurisdiction. In this regard, I refer to the passage in the *Kyrgyz Republic* case cited above. I would have ordered that the validity of the claim form (as an arbitration claim form) be extended pursuant to CPR r. 7.6 to enable such service. As I understood it, the only point taken by the first defendant in that respect was delay on the claimant's part up to the making of the order of Hamblen J on 8 June 2011. I explain elsewhere in this judgment why I do not consider delay to have occurred during that period.

Validity of Service in Russia on the second defendant

123. Since I have held that the court has, and should exercise jurisdiction over the second defendant, the next question is as to the validity of service of these proceedings on the second defendant in Russia which pursuant to the order of 8 June 2011 happened, or purportedly happened, on 20 and/or 28 June 2011 by delivery (i) by hand and/or (ii) registered post at its and/or its lawyers' offices in Moscow. This raises a question as to permitted service under CPR r. 6.40(3)(c)), namely whether such service is (i) permitted or (ii) required to take place exclusively through the official channels prescribed in Article 5 of the Hague Convention. If the latter, the question is whether the court was justified in ordering service by alternative methods on the second defendant in Russia (paragraph 1(b) & (c) of the 8 June 2011 Order). In so far as relevant to (i), there is a further question as to whether service of foreign process in the Russian Federation by hand and/or by registered post is illegal as a matter of Russian law.

124. It may be noted that the order of 8 June 2011 gave permission to serve the proceedings on the second defendant pursuant to the Hague Convention as well as by

alternative methods (namely by hand or post at the second defendant's offices in Moscow, or those of its lawyers). Ms Selvaratnam QC accepted in oral submissions that if it is decided that there is jurisdiction as regards the second defendant (and I have decided that there is) then the order of 8 June 2011 would stand to that extent, subject to an extension of the validity of the claim form. The claimant's evidence on the application for permission to serve out was that service in Russia through the Ministry of Justice under the Hague Convention can take between three to six months, and I do not understand that to be in dispute. Since the Hague Convention procedure was incepted by the claimant on 14/15 July 2011, it appears that service through that channel will in fact take place soon.

125. I have set out above the provisions as to alternative methods of service in CPR r. 6.15 in relation to the first defendant, and referred there to some of the case law. The relevant sub-rule as regards the making the order of 8 June 2011 in respect of the second defendant so far as it provided for alternative service was sub-rule (1).

126. I must now set out the general provisions about the method of service of a proceedings on a party out of the jurisdiction which are to be found in CPR r. 6.40 as follows:

> **"Methods of service-general provisions**
>
> 6.40—(1) This rule contains general provisions about the method of service of a claim form or other document on a party out of the jurisdiction.
> …
> *Where service is to be effected on a party out of the United Kingdom*
> (3) Where a party wishes to serve a claim form or other document on a party out of the United Kingdom, it may be served—
> (a) by any method provided for by-
> (i) rule 6.41 (service in accordance with the Service Regulation);
> (ii) rule 6.42 (service through foreign governments, judicial authorities and British Consular authorities); or
> (iii) rule 6.44 (service of claim form or other document on a State);
> (b) by any method permitted by a Civil Procedure Convention or Treaty; or
> (c) by any other method permitted by the law of the country in which it is to be served.
> (4) Nothing in paragraph (3) or in any court order authorises or requires any person to do anything which is contrary to the law of the country where the claim form or other document is to be served.
> …"

127. There was evidence of Russian law before the court as regards service. The following is common ground. Service of domestic process in Russia by registered post is permitted, and in fact is the "usual" way of effecting service domestically. Both the United Kingdom and Russia are parties to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague, November 15, 1965) (the Hague Convention), but in 2004 Russia made a reservation with respect to the application of Article 10 (service directly by post). Process originating in another Hague Convention signatory country (like the United Kingdom) is only permitted through so-called Article 5 "official channels" (in other words through the Ministry of Justice and the Arbitrazh Court). Service of other foreign

process in Russia, in other words process which originates in a non-Hague Convention signatory country, by registered post is permissible under Russian law.

128. The parties' respective contentions were as follows. The claimant accepted, as I understood it, that direct service by post or in person of legal proceedings emanating from the United Kingdom was not "permitted" by Russian law. It submitted that the English court could nevertheless order such service as service by an alternative method under CPR r. 6.15(1) provided that such service was not illegal under Russian law. This proposition is based on the contention that the relevant provision in this respect is CPR r. 6.40(4), by which the court is precluded from making an order which "authorises or requires any person to do anything which is contrary to the law of the country where the claim form or other document is to be served".

129. The second defendant's contention is that service by a means that is not permissible as a matter of Russian law is bad and invalid. Under Russian law, service of foreign proceedings from a Hague Convention member (such as the UK) is only permissible pursuant to the Hague Convention, and as such that is the only way in which the proceedings can lawfully be served Russia. The first defendant has supported the second defendant's argument in this respect, contending that if the alternative method proposed by the claimant is not "clearly permitted" under Russian law, the English court cannot properly exercise its discretion under CPR r. 6.15(1).

130. In its submissions, the second defendant has contended that the claimant's interpretation drives a wedge between CPR r. 6.40(3)(c) and r. 6.40(4), is contrary to authority and cannot be justified. It submits that the claimant's contention was rejected in *Amalgamated Metal Trading Ltd v Baron* [2010] EWHC 3207 (Comm), in which Judge Chambers QC said at [40]: "It seems to me that, while it is always open to a claimant to lead evidence to the effect that the state in which service is said to have been effected permits such service by conduct that is not express, a claimant cannot say that where a state expressly provides for a method or methods of service within its jurisdiction but does not expressly provide that service by other means is illegal then it is to be inferred that service by other means is permitted for the purposes of CPR r. 6.40(3)(c)."

131. In that case, the question was as to whether personal service on the defendant in Peru was good service, where under Peruvian law service is to be through judicial channels. The court rejected the proposition that CPR r. 6.40(3)(c) could be applied in a way in which the term "permitted" could be construed as meaning not "contrary to law" within the words of CPR r. 6.40(4). That led to the conclusion in the passage from the judgment which I have quoted. However, the court went on to consider service by alternative means, concluding that there was jurisdiction to make such an order, albeit it would not do so on the facts of the case.

132. The claimant therefore itself relies on this decision, which so far at the court's powers are concerned, is consistent with the decision in *Cecil v Bayat* (ibid) making clear that service on a party to the Hague Convention by an alternative method under CPR r. 6.15 can be ordered ([65]), subject to the qualifications expressed by the court which I have mentioned above.

133. The claimant's case in this respect was presented by its junior counsel, Mr Stephen Houseman. He summarised the evidence as to Russian law, and told me that whilst

the evidence was to the effect that service was not "permitted" otherwise than through official channels, service of foreign proceedings in person or by post was not illegal under Russian law.

134. The defendants' objection (as I understood it) was not to the detail of this analysis of the evidence, but rather on the basis that it follows that, since service of foreign proceedings emanating from a Hague Convention country is "not permitted" under Russian law save through official channels because of the 2004 reservation to the Convention, service in person or by post is "contrary" to Russian law within the meaning of CPR r. 6.40(4). For that reason, it is submitted by the defendants, the order of 8 June 2011 cannot stand.

135. However, the defendants' approach is not supported by authority. I apply the law as set out in the notes in the White Book at r. 6.40.5. This states that the function of CPR r. 6.40(3) is to prevent service by a method forbidden by the law of the place of service; *Shiblaq v Sadikoglu* [2003] All ER (D) (428) (Comm). It is implicit in CPR r. 6.40(4) that the court may permit any alternative method of service abroad so long as it does not contravene the law of the country where service is to be effected; *Habib Bank Ltd v Central Bank of Sudan* [2007] 1 WLR 470. Alternative service in Russia in person or by post is not permitted, but neither is it illegal. The court can properly order service by alternative means provided such an order is justified under the guidance laid down in *Cecil v Bayat*, ibid, which I have explained above.

136. It is said by the second defendant that there was no special circumstance justifying an order for alternative service in the present case. One of the factors identified as such in *Cecil v Bayat* is the case of urgency. The second defendant points out that in making its application to the court, the claimant relied upon s.44 (4) Arbitration Act 1996. That provides that if the case is not one of urgency, the court can only act with the permission of the arbitral tribunal. That is to be distinguished from the power in s.44 (3) which gives the court a general power to make orders for the purpose of preserving evidence or assets if the case is one of urgency.

137. My conclusion in this respect is as follows. The claimant's evidence in support of its application made it clear that although, at that time, the claimant did not envisage an urgent application for interlocutory relief, there was nevertheless "some element of urgency" in the matter. In particular, it was stated that "the relief sought is sufficiently urgent that to wait for service to be effected under the Hague Convention on the second defendant (which could take between 3 to 6 months) would likely defeat the purpose of this application, which in order to be effective, must be heard before the Russian proceedings are concluded. I understand [said the deponent] that there is English authority that allows for service of foreign process by an alternative method, and I believe that service on the second defendant's lawyers would not prejudice the second defendant as its lawyers already represent it in the Russian proceedings".

138. At the time of the application to the court, the arbitration was underway. Two procedural orders had already been made before the application to the arbitrator which resulted in the order giving permission to bring the anti-suit proceedings. I do not consider that it is surprising that the claimant thought it right in those circumstances to seek permission from the arbitrator. Nor do I consider that the fact that his permission was sought requires a conclusion that the matter was not sufficiently "urgent" to fall

within the kind of special circumstance envisaged by the court in *Cecil v Bayat*. Hamblen J was the judge at first instance in that case, and was well acquainted with the issues. I consider that he was right to make the order he did, and reject the defendants' contentions to the contrary.

139. That being so, the matter remaining for decision as regards the second defendant concerns its submissions as regards material non disclosure in the obtaining of the 8 June 2011 Order and the question of delay.

Material non-disclosure

140. The application for permission to serve the second defendant was made on a without notice basis, and the claimant was under the duty of good faith disclosure that applies to an applicant in such circumstances. The second defendant submits that the 8 June 2011 order should be set aside by reason of the claimant's material non-disclosure in its application notice and supporting evidence of the fact that Russia had made a reservation to Article 10 of the Hague Convention, and therefore service by alternative methods was not permitted.

141. The claimant responds that there is no suggestion that the alleged non-disclosure was other than inadvertent and innocent. It is not even clear, it is submitted, how this is said to be material: service of foreign process in Russia by registered post either is or is not a valid method of service which it was appropriate for the court to sanction as it did in the 8 June Order. If it is, the alleged non-disclosure is not material. If it is not, the alleged non-disclosure adds nothing to the substantive position as to validity of service. It appears that this ground is, therefore, something of a make-weight.

142. I do not accept the logic of the claimant's analysis of materiality, which overlooks the relevance of the reservation to Article 10 to the decision which the court had to make. However nor do I accept the second defendant's description of the omission as "egregious" which is based on a submission as regards *Amalgamated Metal Trading Ltd v Baron* (ibid) at [40] which I have not accepted. Other than the mistake as to the service of process clause dealt with above, I consider that this application was put before the court with due care, and I would not discharge the order on the ground of non-disclosure.

Other issues as regards the second defendant

143. It is common ground that in the light of the conclusions I have reached, it is not necessary to proceed any further as regards the issues concerning the second defendant. I restrict myself to saying that had I not reached the above conclusions, I was not persuaded by the second defendant's objections to an extension of the validity of the claim form. I would have granted an extension. Neither however was I persuaded by the claimant's submission that an order for deemed service should be made at this stage under CPR r. 6.15(2). The first and second defendants are in a different position in this regard, because in the case of the latter, the possibility of service on solicitors within the jurisdiction acting in the arbitration is not available. There is in my view no basis for the claimant's contention that an order should be made recognising as good service the provision of the relevant documents to Bryan Cave LLP, because that firm is acting for the second defendant for the purpose of contesting jurisdiction, and not otherwise. As I have said, the second defendant

accepts that so far as it ordered service in accordance with the Hague Convention, the order of 8 June 2011 was valid (subject to its points on jurisdiction and extension which I have rejected).

Conclusion

144. For the above reasons, I have concluded that the defendants' applications of 25 July 2011 should be dismissed. I am grateful to the parties for their assistance, and will hear them as to the terms of the consequential orders, and on other matters resulting from this decision.