Neutral Citation Number: [2020] EWHC 2483 (Comm)

Case No: CL-2020-000283

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/09/2020

Before :

Mr Justice Foxton

- -

Between :

RIVERROCK SECURITIES LIMITED	**Claimant**
- and -	
INTERNATIONAL BANK OF ST PETERSBURG (JOINT STOCK COMPANY)	**Defendant**

- -
- -

Stephen Houseman QC (instructed by **Jones Day**) for the **Claimant**
Harry Matovu QC (instructed by **Steptoe &Johnson LLP**) and **Angus Rodger** (of **Steptoe & Johnson LLP**) for the **Defendant**

Hearing dates: 9 and 10 September 2020

Approved Judgment

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

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MR JUSTICE FOXTON

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JUDGMENT

Mr Justice Foxton :

A INTRODUCTION

1. This is the hearing of:

    i) The Claimant's ("RSL"'s) application for interim an interim anti-suit injunction ("ASI") under s.37 of the Senior Courts Act 1981 ("the ASI Application") in respect of proceedings which the Defendant ("IBSP") has commenced before the arbitrazh court in the city of St Petersburg ("the St Petersburg Action"). RSL claims that the St Petersburg Action was commenced in breach of LCIA arbitration agreements between the parties.

    ii) IBSP's application under Part 11 for an order that the Court should not exercise any jurisdiction it may have over the claims which are the subject of the ASI Application.

    iii) IBSP's application for permission under CPR Part 35 to adduce and rely upon expert evidence in the form of a report on Russian law from Professor Asoskov.

2. RSL was represented before me by Stephen Houseman QC and IBSP by Harry Matovu QC and Angus Rodger (who were instructed as a new legal team for IBSP shortly before the hearing). I am grateful to both legal teams for the quality of their submissions, both written and oral, on an application which raised a number of interesting issues. I am only sorry that the urgent nature of the application, and the need for a prompt ruling, has restricted the time available to reflect upon those submissions. It has also meant that I have not had time to request further submissions on a small number of authorities referred to in this judgment which were not cited to me, although none of them constituted a key stage on the critical path to my conclusion.

B THE BACKGROUND

The parties

3. IBSP was, until it became insolvent, a large retail bank incorporated in the Russian Federation.

4. RSL is a company incorporated in England and Wales and regulated by the Financial Conduct Authority.

The Contracts

5. Between 31 January and 3 July 2018, RSL and IBSP entered into nine substantially similar contracts ("the Contracts") under which RSL sold IBSP securities in the form of credit linked notes which had been issued by UBS AG ("UBS") through its London branch ("the Notes"). The effect of the transactions was to transfer the credit risk arising under certain loans held by UBS to the holder of the Notes (and therefore to IBSP) in return for a coupon to be paid until the Notes reached maturity or a credit default event occurred. The Notes formed part of a transaction involving not just RSL,

IBSP and UBS, but also Hervet Investments Ltd ("Hervet"), a Cypriot company and minority shareholder in IBSP.

6. Each of the nine Contracts was for the sale of a Note with a notional value of US$15,000,000. The way in which each transaction worked was as follows:

   i) RSL as lender made a loan ("the Loan") to Hervet as borrower.

   ii) RSL sold the Loan to UBS.

   iii) On the date each Loan was transferred from RSL to UBS, UBS issued and sold the Note to RSL who sold it to IBSP.

   iv) The coupon received by IBSP on each Note was directly linked to the interest paid by Hervet under the Loan, such that IBSP would only receive coupon from UBS under the Notes if Hervet paid interest to UBS under the Loan.

   v) In the event of an Early Redemption Event or Default Event under the Loan, UBS was to seek to redeem the Note in cash or transfer the Loan to RSL who was to hold it on behalf of IBSP as Noteholder Representative.

7. The Notes are subject to the governing law and jurisdiction of the courts of England and Wales. So far as the Contracts are concerned:

   i) Clause 8.3 provides:

      "This Agreement and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with English law."

   ii) Clause 8.4 ("the LCIA Arbitration Agreement") provides:

      "Any dispute under the Agreement or in connections with it shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be three (3). The Seller shall appoint one arbitrator, the Purchaser shall appoint the second arbitrator, and arbitrators nominated by the Parties shall appoint the third arbitrator that shall be the chairman of the arbitration. The seat, or legal place, of arbitration shall be London, England.

      The language to be used in the arbitral proceeding shall be English."

8. Following a review carried out by Central Bank of Russia ("CBR") into IBSP's compliance with Russian banking law and practice, the authority of IBSP's management was suspended on 15 October 2018, and the Russian State Corporation Deposit Insurance Agency ("the DIA") was appointed as its administrator.

9. On 31 October 2018 the CBR placed IBSP into provisional administration and revoked its banking licence. Bankruptcy proceedings were commenced I respect of IBSP before the St Petersburg court on 12 November 2018. Shortly thereafter, Hervet stopped paying interest under the Loans, triggering a Default Event which led UBS to cease paying the coupon under the Notes. On 28 November 2018, UBS served

Notices of Early Redemption under the Notes, notifying IBSP of its intention to transfer the Loans to IBSP or to its order in full redemption of the Notes. In the absence of any response from IBSP, on 21 December 2018 UBS served notice of its intention to redeem the Notes by transferring the Loans to RSL as IBSP's Noteholder Representative.

10. IBSP was declared insolvent on 24 September 2019 and the DIA was appointed as its official receiver in bankruptcy.

The St Petersburg Action

11. Investigations carried out by the CBR and the DIA into IBSP are reported to have found various irregularities and improprieties so far as compliance with Russian banking law is concerned, including that bank officials had diverted IBSP's assets both by making loans to legal entities incapable of meeting their obligations, and through disposals of IBSP's property.

12. On 18 October 2019, in the context of the bankruptcy proceedings, IBSP commenced the St Petersburg Action against RSL. IBSP's complaint ("the Complaint") seeks the invalidation of the Contracts on the basis that the transactions involving the Loans, the Notes and the Contracts were a scheme intended to siphon off IBSP's assets. IBSP further seeks consequential relief in the form of repayment of all amounts paid to RSL. IBSP contends that Hervet was fully controlled by IBSP at all material times, and was owned by Mr Aleksander Zuev, a non-executive member of IBSP's supervisory board.

13. IBSP relies, in particular, on:

    i) Article 61.2(1) of the Bankruptcy Law of the Russian Federation ("the Bankruptcy Law"), which provides for the avoidance of transactions entered into within one year of the date of bankruptcy at an unequal consideration.

    ii) Article 62.2(2) of the Bankruptcy Law, which provides for the avoidance of transactions entered into within three years of the date of bankruptcy when those transactions were concluded for the purpose of harming creditors.

    iii) Article 10 and related provisions of the Civil Code of the Russian Federation ("the Civil Code"), under which the invalidation of transactions is sought on the basis that they involved an "abuse of rights".

14. The Complaint was served on RSL's English registered office (in Russian only) on 28 November 2019. After translating the Complaint, RSL wrote to the DIA on 10 February 2020 asking it to withdraw the St Petersburg Action, stating that any claim had to be brought in LCIA arbitration and that the St Petersburg court did not have jurisdiction. IBSP was asked to confirm by 21 February 2020 that it would withdraw the St Petersburg Action. The contents of that letter were repeated on 25 February 2020.

15. On 14 February 2020, the St Petersburg court ordered RSL to provide its response to the Complaint by 30 June 2020, and to attend a hearing taking place on 7 July 2020. Those rulings were not served on RSL and only came to its attention when preparing

its application to the English court, as a result of information communicated to it by its Russian lawyer, Mr Volfson, which he obtained from the court register.

16. Having received no response to its letters of 10 and 25 February 2020, on 5 March 2020 RSL proposed a meeting with the DIA to discuss the St Petersburg Action and the Complaint. On the same day, the DIA wrote to RSL referring to (but not providing) copies of the documents which had accompanied the Complaint when it was filed in the St Petersburg Action, but not otherwise addressing the substance of the letters of 10 and 25 February 2020. Those documents reached RSL on 11 March.

17. On 6 March 2020, the DIA informed RSL that it was considering its request for a meeting. The restrictions on international travel imposed in response to the Covid-19 pandemic led RSL to propose a virtual meeting on 20 March and, in the absence of a reply, again on 6 April. The DIA sent a non-committal response suggesting that the matter was still under consideration on 9 April, but nothing further before the ASI Application was issued.

The ASI Application and the Part 11 Application

18. RSL issued the ASI Application on 7 May 2020. Teare J gave RSL permission to serve the ASI Application out of the jurisdiction and for alternative service on 12 May 2020, formally expedited the ASI Application and gave directions for an expedited on notice hearing in June. On 9 June 2020, IBSP acknowledged service and stated its intention to challenge the jurisdiction of the court. In the event, the parties reached agreement, recorded in a consent order of Bryan J of 16 June 2020, that in return for IBSP giving certain undertakings in relation to the progression of the St Petersburg Action, directions would be given for the ASI Application to be heard in September 2020.

19. On 8 July 2020, IBSP issued its application under Part 11 challenging the jurisdiction of the English Court on the basis that Russia was the natural and appropriate forum ("the Part 11 Application").

Subsequent developments in the St Petersburg Action

20. On 7 July 2020, the St Petersburg court approved applications by two additional parties to join the St Petersburg Action.

21. The first application was by Mr Sergey Bazhanov, who owns 92.98% of the shares in IBSP and who was until 15 October 2018 the chair of its board. Mr Bazhanov submitted that the determination of the issues in the St Petersburg Action could result in a subsidiary liability being imposed on him, and he has stated he intends to resist the invalidation claim.

22. The second application was by JSC Triumph ("Triumph"), which owns 6.95% of the shares in IBSP, and is in turn 100% owned by Mr Bazhanov. Triumph also opposes the invalidation claim.

23. On 24 August 2020, one of IBSP's creditors, the Central Design for Marine Engineering Rubin ("Rubin"), filed proceedings against RSL in the St Petersburg court seeking to annul the Contracts under Article 61.9(2) of the Bankruptcy Law, and

consequential relief. A further such action was filed by OKS-1LLC ("OKS-1") on 1 September 2020. On the evidence before me, Rubin and OKS-1 have standing to bring such claims as creditors owed more than 10% of IBSP's total debt. It has been suggested that these applications are likely to be consolidated with the St Petersburg Action.

The Russian expert evidence

24. At this stage, I need to say a little more about the Russian law expert evidence.

25. IBSP notified RSL of its desire to serve expert evidence on Russian law and procedure on 9 June 2020. RSL expressed concern both as to the relevance of such evidence, and its impact on the timetable, and attempted to reach agreement with IBSP on the relevance and scope of such evidence. IBSP did not engage with those attempts. On 22 July 2020, IBSP served an expert report from Professor Asoskov, and the following day it issued an application for permission to rely on that evidence pursuant to CPR 35. In response, RSL reserved its position as to the relevance or admissibility of the report, but elected not to serve any expert evidence in reply on the basis that Russian law was irrelevant. In his skeleton argument, Mr Houseman QC made it clear that he did not object to the report being put in evidence.

26. Professor Asoskov is Professor of Law at the Lomonosov Moscow State University and Professor of Private Law at the Private International Law Department of the Private Law Research Centre named after SS Alekseev. In summary, it was his evidence:

    i) That the effect of IBSP's bankruptcy was that all claims by or against IBSP became non-arbitrable under Russian law, and had to be addressed within the St Petersburg bankruptcy proceedings. This includes invalidation claims.

    ii) This resulted from the fact that the bankruptcy process guaranteed broad procedural rights of participation for a wide variety of persons, including creditors and shareholders, which could not be accommodated within an arbitration. In addition, in relation to the bankruptcy of a bank, the DIA had an important public function of protecting and operating the deposit insurance system and maintaining the integrity of the Russian banking sector. The justification for the non-arbitrability of these claims was "inextricably linked to elements of Russian public order".

    iii) The Russian courts would not recognise an arbitration agreement or award in relation to a bankruptcy receiver's invalidation claim, and there is "a high probability" that a Russian court would refuse any attempt by the bankruptcy receiver to withdraw the St Petersburg Action in response to an ASI from the English Court, and would proceed to hear the claim anyway.

C THE PART 11 APPLICATION

27. Logically, the first issue which arises for determination is IBSP's Part 11 Application. I can deal with that application briefly. IBSP suggests that England and Wales is not the natural or appropriate forum for the determination of RSL's application for an injunction restraining the pursuit of the St Petersburg Action in breach of the LCIA

Arbitration Agreements, and that the natural forum is the Russian Federation. While formally advanced as a contention that the St Petersburg court was the natural forum in which to seek anti-suit relief, Mr Matovu QC accepted in argument that the issue would come before the St Petersburg court in the form of a stay application by RSL. He submitted that the St Petersburg court was better placed to understand the nature of the claims advanced there, for the purpose of determining whether they fell within the LCIA Arbitration Agreements or were arbitrable, and best placed to assess the impact on public and third party interests if the claims against RSL were stayed in favour of LCIA arbitration.

28. This argument is hopeless.

29. First, as Popplewell LJ stated in Enka Insaat Ve Sanayi v OOO "Insurance Co Chubb" and other [2020] EWCA Civ 574, [42]:

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

The parties having agreed to submit to the jurisdiction of the English court in respect of the exercise of such powers as the choice of seat confers (which include the power to grant anti-suit relief), the argument that the English court is not the appropriate court to grant such relief is an extremely challenging one.

30. Further, the suggestion that the court should stay the ASI Application until RSL has applied to stay the St Petersburg Action does not sit easily with the approach to stays in anti-suit injunctions. It is clear that a party seeking ASI relief is not obliged to seek to stay the foreign proceedings before applying to the English court, and that time spent seeking a jurisdictional ruling from the foreign court will form part of the court's assessment of whether ASI relief has been sought promptly (Ecobank Transnational Inc v Tanoh [2015] EWCA Civ 1309, [124]). It is also clear that a failed attempt to stay the foreign proceedings does not of itself preclude an application to the English court for an ASI (Ecobank, [128] noting that "in some cases an objection to jurisdiction can be dealt with first before the substantive merits, so there may be something to be said for pursuing that objection in the foreign court"). In those circumstances, Mr Matovu QC accepted that if I stayed these proceedings, and RSL applied for and failed to obtain a stay of the St Petersburg Action (which on IBSP's evidence would appear to be the inevitable outcome of such an application), that would not automatically preclude a further application by RSL for ASI relief from the English court. In those circumstances, a decision at this stage to refuse to exercise the jurisdiction it is accepted that the court has on forum conveniens grounds would achieve nothing.

31. In any event, English law is the proper law of the LCIA Arbitration Agreements (whichever of the two approaches to identifying that law considered in Enka Insaat Ve Sanayi v OOO "Insurance Co Chubb" is adopted) and the issues of arbitrability which arise are matters of English law as the law of both the arbitration agreements and the seat. In those circumstances, the English court is clearly better placed than the St Petersburg court to determine the scope of the LCIA Arbitration Agreements and the arbitrability of the dispute. The provisions of Russian law in play are relatively straightforward (and Mr Matovu QC submitted that there was "no real difference" between those claims and their English-law equivalents). So far as the issues which arise when considering whether there are "strong reasons" for not granting an ASI, or whether it is appropriate to do so as a matter of discretion, it is IBSP's case that under Russian law, which a Russian court would be bound to apply, the LCIA Arbitration Agreements are inoperative so far as the St Petersburg Action is concerned, with the result that no balancing exercise would fall to be undertaken by the St Petersburg court.

32. In these circumstances, it is not necessary for me to consider RSL's fall-back argument that IBSP had submitted to the jurisdiction because, so RSL says, IBSP issued the Part 11 Application one day late. Even if I had concluded that the application was issued one day out of time, I would have been willing to extend time for the very short period required, given the confusion which may have arisen from out-of-hours filings. Nor is it necessary to decide whether IBSP submitted to the jurisdiction by seeking two adjournments of the hearing of the ASI Application (and obtaining one of them), and giving interim undertakings in this context. In relation to both these points, it is important to note that IBSP's Part 11 Application accepted that the Court had jurisdiction, but contended that it should not exercise it. In such a context, "submission" to the jurisdiction may well have a less prejudicial effect than where a party wishes to contend that the court does not have jurisdiction at all: see Texan Management Ltd v Pacific Electric Wire & Cable Co Ltd [2009] UKPC46, [69]-[77].

D THE ASI APPLICATION

The applicable principles

33. There was no real dispute as to the applicable legal framework and principles when determining whether to grant an ASI:

    i) The Court has power to grant such an injunction to restrain proceedings brought in breach of an arbitration agreement under s.37 of the Senior Courts Act 1981, even if no arbitral proceedings are on foot or in prospect: Ust-Kamenogorsk Hydropower Plant JSC v AES Hydropower Plant LLP [2013] UKSC 35, [25].

    ii) The applicant must show a "high probability of success" that the pursuit of the foreign proceedings involves a breach of the arbitration agreement (The Angelic Grace [1995] 1 Lloyd's Rep 87 and Dell Emerging Markets (EMEA) Ltd v IB Maroc.com SA [2017] EWHC 2397). This involves establishing to that standard both (i) the existence of an arbitration agreement binding between the applicant and the respondent, and (ii) that the subject-matter of the foreign proceedings falls within and is subject to that arbitration agreement.

Issue (ii) can raise both issues as to the scope of the arbitration agreement, and whether the claim is of a kind which, as a matter of law or public policy, is capable of being made subject to an agreement for arbitration (i.e. a question of "arbitrability"). These issues were referred to by the parties as the Breach Issue.

iii) If the applicant makes out such a case, it is for the respondent to show a "strong reason" why relief should not be granted (The Epsilon Rosa [2003] 2 Lloyd's Rep 50, 518) ("the Strong Reason Issue").

iv) Finally, it must be just and convenient for an ASI to be granted ("the Discretion Issue").

Does RSL have a high probability of establishing that the St Petersburg Action is being pursued in breach of the LCIA Arbitration Agreements?

IBSP's argument in summary

34. IBSP contends that RSL cannot succeed on the Breach Issue for essentially three reasons:

i) The St Petersburg Action, which it seeks to restrain, is not being pursued by IBSP but by the DIA.

ii) The LCIA Arbitration Agreements do not cover the claims brought in the St Petersburg Action as a matter of construction.

iii) In any event, the claims brought in the St Petersburg Action are not arbitrable.

The applicable law

35. The construction of the LCIA Arbitration Agreements is clearly a matter of English law, as the governing law. So far as the issue of arbitrability is concerned, that is also a matter of English law both as the governing law of the LCIA Arbitration Agreements, and the law of the seat of the arbitration (Mustill and Boyd, *Commercial Arbitration: 2001 Companion* pages 75-76). Clearly the English court, as the curial court, would not enforce an arbitration agreement (whether by stay or ASI) or an award in respect of a dispute which was not arbitrable as a matter of English law, whatever the proper law of the arbitration agreement.

36. For the purpose of determining whether a claim is being brought by a party to the LCIA Arbitration Agreements, and whether the claim falls within those agreements and within the limits of arbitrability under English law, it is necessary to consider the ingredients of the claim under its applicable law. However, the classification of the claim, for the purposes of determining whether it falls within the scope of the arbitration agreement and is arbitrable, is a matter to be determined by the English court, considering the substance of the claim from an English law perspective.

37. In Through Transport Mutual Assurance v New India Assurance Co [2004] EWCA Civ 1598, the issue arose as to whether a claim brought by a third party under a Finnish statute to enforce insurance cover provided to the member of a Protection and Indemnity Club fell within the arbitration agreement in the club's rules. The Court of

Appeal held that answering this question involved "a consideration of the substance of the claim being advanced" ([56]) and approved the following passage in the first instance judgment:

> "The issue in the present case is whether New India is bound by the arbitration clause which in turn depends on whether it is seeking to enforce a contractual obligation derived from the contract of insurance or an independent right of recovery arising under the Insurance Contracts Act. If in substance the claim is independent of the contract of insurance and arises under the Finnish legislation simply as a result of its having a right of action against an insolvent insured, the issue would have to be characterised as one of statutory entitlement to which there may be no direct equivalent in English law. In that case the issue would in my view have to be determined in accordance with Finnish law. If, on the other hand, the claim is in substance one to enforce against the insurer the contract made by the insolvent insured, the issue is to be characterised as one of obligation. In that case the court will resolve it by applying English law".

To similar effect see Shipowners' Mutual Protection & Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret (The Yusuf Cepnioglu) [2016] EWCA Civ 386.

38. The Through Transport and Yusuf Cepnioglu decisions involved claims by third parties (under so-called "direct action" statutes) seeking to obtain the benefit of coverage afforded by an insurance contract. In my view, the same approach of considering the substance of the position should apply when considering whether a claim brought for the purpose of invalidating a contract falls within an arbitration agreement. I can see no good reason for adopting different approaches to the classifications of claims for the purposes of determining whether they fall within an arbitration agreement between contractually-offensive and defensive claims. In BNP Parisbas SA v Open Joint Stock Company Russian Machines [2011] EWHC 308 (Comm), Blair J considered an application for an anti-suit injunction to restrain proceedings brought in the Russian court by a shareholder in a Russian company seeking to invalidate a guarantee between that company and a London bank, which it was said fell within an arbitration clause in the guarantee. He accepted that the characterisation of the claims in the proceedings was a matter of English law (at [78]). It is fair to say that, applying that approach, he regarded the fact that the Russian law claim was not seeking to obtain a benefit under the contract but to impugn it, as something which made it more difficult to suggest that the claim was one under the contract as a matter of English law characterisation (see [66] to [78]). However, that is a subsequent stage of analysis to the question of identifying the law which is to be applied in answering that question. Similarly, as I explain below, Males J applied the Through Transport approach of considering the substance of the foreign action (although without referring to Through Transport) in determining whether an action to invalidate a contract under the Bankruptcy Law fell within an arbitration clause in Nori Holding Ltd v PJSC Bank Otkritie Financial Corp [2018] 2 Lloyd's Rep 80, [63].

The decision in Nori Holding Ltd v PJSC Bank Otkritie Financial Corp

39. In support of his contention that the claims brought in the St Petersburg Action fall within the LCIA Arbitration Agreements, Mr Houseman QC understandably relies

heavily on the decision of Males J in Nori Holding Ltd v PJSC Bank Otkritie Financial Corp, the facts of which are strikingly similar to those of the present case. Acting by its temporary administrator, a Russian bank ("Otkritie") commenced proceedings before the Arbitrazh Court of Moscow seeking the invalidation of a series of pledge agreements which were governed by Cypriot law and subject to LCIA arbitration, and reversal of all transactions effected thereunder. Invalidation was sought there, as here, in reliance on Article 61.2(1) of the Bankruptcy Law and Article 10 of the Civil Code.

40. The applicant sought an anti-suit injunction restraining the Moscow proceedings on the basis that they had been brought in breach of the arbitration agreement. The hearing proceeded on the basis that (to the extent relevant) there was no material difference between Cypriot and English law (Nori, [46]).

41. Males J noted that as a matter of Russian law (on which he received expert evidence):

    i) The Article 61.2(1) claim could only be commenced by the temporary administrator (under Article 189.40 of the Bankruptcy Law) and was subject to the exclusive jurisdiction of the Moscow court ([19]). He noted that such a claim "was broadly similar to a claim to set aside a transaction at an undervalue pursuant to section 238 of the Insolvency Act 1986" and that "although the claim could only be brought by a temporary administrator, the claim could continue after the administration has ceased" and was "now vested in the Bank" ([19]).

    ii) The claim brought under Articles 10 and 168 of the Civil Code did not depend on the provisions of Russian insolvency law or the appointment of a temporary administrator ([20]).

42. In resisting the application for an anti-suit injunction in that case, Mr Houseman QC (acting for Otkritie) made essentially the same arguments as he finds advanced against him in this case, including that:

    i) the claim to set aside the pledges in the context of insolvency proceedings did not, as a matter of construction, fall within the arbitration agreement; and

    ii) that that claim was in any event not arbitrable,

    although not the argument that the claims were being brought by a non-party to the arbitration agreement, no doubt because by the time of the hearing before Males J, the Article 61.2(1) claim was vested in Otkritie which was no longer in administration.

43. Both arguments were rejected by Males J.

44. As to the construction argument:

    i) He held that, given the wide language of the arbitration clause, there was no "good reason to imply a limitation to the effect that the clause does not extend to a claim in insolvency proceedings to avoid a transaction as a transaction at an undervalue" ([60]).

ii) At [61], he rejected the approach which had been adopted by the Singapore Court of Appeal in Larsen Oil and Gas Pte Ltd v Petroprod Ltd [2011] 3 SLR 414 that reasonable business people would not expect avoidance claims brought in an insolvency context to fall within the scope of an arbitration agreement (Larsen, [20]) and that it was appropriate to "draw a line" between private law remedial claims and "claims that can only be made by a liquidator/judicial manager of an insolvent company" (Larsen, [21]).

45. As to the arbitrability argument:

i) Males J held that what mattered was not whether the claim was properly characterised as an insolvency claim as a matter of Russian law, but rather it was necessary to look at the nature of the claim and consider whether it was "capable of being determined in arbitration".

ii) At [63], he held that looking at "substance rather than form":

> "The parties' dispute is a straightforward factual dispute whether the August transactions constitute a fraud carried out on the Bank to replace valuable secured loans with worthless bonds. If so, the Bank will have a claim to avoid those transactions and to require the claimants to reinstate the position in which it was before they were carried out. A variety of legal labels can be and have been attached to that claim, including the labels of transaction with unequal consideration and abuse of rights under Russian law and conspiracy to defraud under Cypriot law. But in each case the essential dispute is the same, regardless of the label. This is a dispute which arbitrators can determine."

iii) At [65], he disagreed with the conclusion in Larsen that rights which only arose upon the onset of insolvency were, as a matter of public policy, not arbitrable because it would be wrong if the pre-insolvency management could restrict the post-liquidation avenues for seeking redress (which might include redress against the former management itself) (Larsen, [45]-[46]).

Are the claims in the St Petersburg Action being brought by IBSP?

46. IBSP contends that the claims in the St Petersburg Action are being pursued by the DIA, and not by IBSP, and for that reason they do not fall within the scope of the LCIA Arbitration Agreements. In support of that "privity" argument, they rely on a number of English authorities which consider the proper characterisation of statutory claims available to the liquidators of English companies under the Insolvency Act 1986, albeit in legal contexts very different from the present:

i) In Re MC Bacon Ltd (No.2) [1991] Ch 127, 137, Millett J observed of an application to set aside a transaction as a preference under s.394 of the 1986 Act:

> "An application to set aside a voidable preference can be made only by a liquidator or administrator and in the absence of a liquidation or administration order cannot be made at all: see section 239(1) of the Act of 1986…. It was thus established long before 1986 that any sum recovered

> from a creditor who has been wrongly preferred enures for the benefit of the general body of creditors, not for the benefit of the company or the holder of a floating charge. It does not become part of the company's assets but is received by the liquidator impressed with a trust in favour of those creditors amongst whom he has to distribute the assets of the company: see In re Yagerphone Ltd [1935] Ch 392."

ii) This passage was cited with approval by the Court of Appeal in Re Oasis Merchandising Services Ltd. [1998] Ch 170, 182, the Court of Appeal distinguishing at pp.182-183 between the property of the company at the commencement of litigation and property which is subsequently acquired by a liquidator "through the exercise of rights conferred on him alone by statute and which is to be held on the statutory trust for distribution by the liquidator" which was not the property of the company, but concerned "statutory privileges and liberties conferred upon liquidators as such".

iii) To similar effect, in the Supreme Court in Rubin v Eurofinance SA [2013] 1 AC 236, Lord Collins JSC stated at [98]:

> "The order [for payment for an unfair preference] does not vindicate property rights which the company itself would have had prior to liquidation, but statutory rights which the liquidator has under the statutory scheme in consequence of winding up. The purpose of the order for the payment of money to a company in liquidation is not to compensate the company, but to adjust the rights of creditors among themselves in such a way as to eliminate the effects of favourable treatment afforded to one or more creditors, to the exclusion of others, in the period immediately before an insolvent administration commences…"

47. However, it is necessary for present purposes to consider the actual claims advanced in the St Petersburg Action, rather than English analogies thereto. So far as those are concerned, there was no real dispute that the claim for abuse of right is a simple private law claim on the part of IBSP. Males J in Nori Holding observed of the same claim that that "is a claim which has nothing to do with Russian insolvency law" ([44]).

48. So far as the two claims under Article 61.2 of the Bankruptcy Law are concerned, the effect of Articles 189.40 and 189.90 is that such claims can only be initiated in the following circumstances:

i) By the temporary administrator of a company in administration. If a claim is commenced by the temporary administrator, and the company then exits from administration, the company can continue to pursue the Article 61 claim which the temporary administrator commenced.

ii) By the temporary administration for management of the credit institution or by the management company on behalf of the credit institution if the Board of Directors of the Bank of Russia has approved a plan for the Bank of Russia's participation in steps to prevent the bank's bankruptcy, or by the Agency on behalf of the credit institution if the Banking Oversight Committee of the Bank of Russia (and where provided by Article 189.49, Para. 3, paragraph two, the

Board of Directors of the Bank of Russia as well) has approved a plan for the Agency's participation in steps to prevent the bank's bankruptcy.

iii) By the Official Receiver of a company in liquidation.

49. The fact that such a claim can only be brought once a company has entered into administration or liquidation, and only by the temporary administrator, official receiver or other externally appointed persons does not of itself answer the question of whether such a claim is that of the temporary administrator or official receiver in its own right, or one which is brought on behalf of the company in administration or liquidation.

50. I have concluded that RSL has established a strong case that the Article 61.2 claims are IBSP's claims which the official receiver brings on its behalf. I have reached this view for the following reasons:

i) First, the document which commenced the St Petersburg Action stated:

> "Applicant: [IBSP] represented by the Official Receiver State Corporation Deposit Insurance Agency".

It also referred to the right of the Official Receiver under Article 189.78 of the Bankruptcy Law to apply to the arbitrazh court "*on behalf of the debtor* to declare the transactions and decisions concluded or performed by the debtor invalid, as well as for the consequences of such invalid transactions to be applied." (emphasis added).

ii) Second, the language of the Bankruptcy Law also suggests that the Article 61.2 claims are those of the company or credit institution rather than the office-holder. For example Article 61.9 refers to petitions for relief under Article 61 being filed "on the debtor's behalf" and Article 189.40(2) refers to the filing of a petition "on behalf of the credit institution". This analysis is also consistent with the fact that it remains open to the company to continue proceedings commenced by a temporary administrator after the company has exited from administration.

iii) Third, this was the evidence adduced by RSL from its Russian lawyer, Mr Volfson, who expressed the opinion that "the DIA had, in effect, replaced the management of IBSP but has not replaced or has otherwise novated IBSP's obligations". That evidence has never been challenged. Professor Asoskov does not directly address this issue (which appears to have been identified by IBSP after his report had been served). However he refers to the St Petersburg Action as having been commenced "by the Bank represented by the DIA as its bankruptcy receiver". While there are passages in the report which refer to the conduct of the DIA without referring expressly to IBSP, those passages are, in my view, to be read in the light of the preceding reference as references to DIA acting on behalf of IBSP.

iv) Fourth, this approach is consistent with IBSP's own position in this litigation at all times until the service of its skeleton argument, which was the first time this point was taken. Thus Mr Giles' first witness statement referred to the St

> Petersburg Action having been "issued on 18 October, by IBSP (represented by the DIA) against RSL". IBSP gave undertakings to this Court to adjourn a hearing in the St Petersburg Action and "not to take any steps to pursue, progress or prosecute the Russian Claims or the Russian Proceedings", and delivered on those undertakings, which is scarcely consistent with the assertion that the St Petersburg Action is being brought by someone else. Mr Nikolaev's witness statement of 4 September also referred to the St Petersburg Action as "the Defendant's existing application", and recognised that if the Article 61.2 claims were pursued in LCIA arbitration, they would be asserted by IBSP.

51. In these circumstances, it is not necessary to consider whether, as a matter of substance, a claim by an administrator or liquidator of an insolvent company against a contracting counterparty to set aside a contract between them would fall to be treated as a claim by the company in relation to the contract (and hence capable of falling within an arbitration agreement in the contract) in those cases in which the legislation under which the claim arises vests it in the administrator or liquidator acting in its own name rather than in the name of the company.

52. In Larsen Oil and Gas Pte Ltd v Petroprod Ltd, the Singapore Court of Appeal had to consider whether claims by the liquidator of a company to set aside a transaction as at an undervalue under ss.98 and 99 of the (Singapore) Bankruptcy Act (Cap 20, 2009 Rev Ed) read with s.329(1) of the (Singapore) Companies Act (Cap 50, 2006 Rev Ed) and to avoid certain payments under s.73B of the (Singapore) Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) fell within an arbitration agreement. Those provisions give the Official Receiver the right to apply to the court to set aside transactions at an undervalue. The Court of Appeal held that the arbitration clause, properly construed, did not extend to those claims, but not because the claims were those of a non-party to the arbitration agreement. Rather the Court assumed that the claims were to be treated as those of a party to the arbitration agreement, but held that, properly construed the arbitration agreement did not extend to claims of that kind. The closest the Court comes to addressing the "privity" issue was when quoting from the judgment of Barrett J in New Cap Reinsurance Corporation Ltd v A E Grants & Ors Lloyd's Syndicate No. 991 [2009] NSWSC 662, [87]

> "[E]ven on the most generous interpretation of the words '[a]ll matters in difference between the parties arising under, out of or in connection with this Reinsurance', they do not extend to the present proceeding under s 588FF(l) of the *Corporations Act* in which the liquidator of one party to the reinsurance contract seeks an order for the payment of money to that contracting party by the other contracting party. This proceeding has nothing to do with the reinsurance contract. It is a proceeding upon a statutory cause of action maintainable by the liquidator of one of the former contracting parties. *The cause of action is not available to the contracting party itself. Its liquidator, when suing upon the statutory cause of action, does not attempt to enforce some right of the contracting party*"

(emphasis added by the Singapore Court of Appeal).

53. The Singapore Court of Appeal observed of this passage (at [43]):

> "Barret J's judgment in New Cap Reinsurance appears to conflate the question of arbitrability, which deals with the question of whether a particular type of claim can be arbitrated, with the question of the scope of the arbitration clause, which is essentially an issue of construction. We are unable to agree with this approach because we regard these issues as being conceptually separate. Despite this, Barret J's insightful analysis that the scope of the arbitration clause could not include the plaintiff's avoidance claims, because they were only available to the liquidator of the company upon the commencement of insolvency, seems to us to be a practical approach in evaluating the kind of claims that ought not to be arbitrable."

In summary, the Court of Appeal thought the fact that the claim was vested in the liquidator was a matter relevant to the public policy question of arbitrability, rather than to the question of whether the claims fell within the arbitration agreement.

54. I would not regard it as wholly satisfactory if the answer to the question of whether claims of this kind met the privity requirement for an ASI or stay depended on the particular legal mechanism adopted in the relevant insolvency legislation, in circumstances in which the substance of an avoidance action might be thought to be the same in both cases. It might be said that the case for treating a claim by an administrator or liquidator to set aside a contract containing an arbitration agreement as, in substance, a claim by the insolvent company is stronger than the situation which clearly troubled Blair J in Russian Machines (where a creditor or shareholder sought an order invalidating the contract) because the administrator or liquidator will generally have supplanted the previous management of the company, which will not retain any power of independent action in relation to the contract in issue. However, that question can be left to a case in which it arises.

Do the claims advanced in the St Petersburg Action fall within the LCIA Arbitration Agreement as a matter of construction?

55. Even if the Article 61.2 claims are to be treated as claims by IBSP, Mr Matovu QC submitted that, as a matter of construction, they do not fall within the scope of the LCIA Arbitration Agreement in any event. Mr Matovu QC's submissions on this issue essentially adopted the reasoning of VK Rajah JA in the Singapore Court of Appeal in Larsen Oil and Gas Pte Ltd v Petroprod Ltd, [20-[21] and [45]-[46], to the effect that arbitration clauses should not ordinarily be construed to cover avoidance claims in the absence of express language, because the company's pre-insolvency management would not have contemplated that such claims would fall within the scope of the arbitration agreement.

56. Subject to one point I deal with below, I can deal with this issue briefly. I agree with the conclusions expressed by Males J in Nori Holding, [55]-[56] that the analysis in Larsen, and in particular the presumption that an arbitration agreement should not extend to claims which only arise on a company's insolvency, is not part of English law. On the contrary, since the decision in Fiona Trust & Holding Corporation v Privalov [2007] UKHL 40, English law has adopted a generous approach to the construction of arbitration agreements, which leaves little scope for implied limitations of this type. Further the LCIA Arbitration Agreements are expressed in expansive terms ("under or …. in connection with").

57. However, there is a further issue which must be considered. There is authority that the question of whether the particular claim advanced in the foreign court is one which the arbitrators could determine is relevant when considering whether an arbitration or jurisdiction clause extends to such a claim as a matter of construction. Lord Scott in Donohue v Armco Inc [2001] UKHL 64, [68] expressed the view that a claim brought under the Federal Racketeer Influenced and Corrupt Organisations Act did not fall within the English jurisdiction clause in that case for the following reason:

> "In so far as the RICO Act claims are based on conduct in connection with the transfer agreements or the sale and purchase agreement, it might seem that they, too, fall within the language of the exclusive jurisdiction clause. But it is common ground that a RICO Act claim could not be brought in an English court. It cannot, in my opinion, be supposed that in submitting to the exclusive jurisdiction of the English courts the parties had in mind claims which an English court would have no jurisdiction to entertain. The contractually expressed purpose of the submission to the English courts was 'to settle any dispute which may arise', etc. How can this language be sensibly thought apt to cover a dispute that the English courts would be jurisdictionally unable to settle …"

58. That approach found some favour with Laurence Rabinowitz QC in Team Y&R Holdings v Ghossoub [2017] EWHC 2401 (Comm), [52]-[54] and [57], another case concerned with an attempt to restrain an alleged breach of an exclusive jurisdiction clause said to have been constituted by the presentation of an unfair prejudice petition in Hong Kong. However the deputy judge noted the distinction which can be drawn when determining whether an English jurisdiction clause was engaged between the factual disputes relied upon as the basis for obtaining a remedy which the English court had no jurisdiction to grant, and the question of entitlement to the relief itself ([53]). He concluded that a substantial part of the factual matters in issue in that case fell within the jurisdiction clause, but the claim for relief did not. For that reason, he held that "an unfair prejudice claim which the English court would not have jurisdiction to hear does not come within the scope of clause 23.2 so that any injunction would not stop Mr Ghossoub maintaining his claim of unfair prejudice before the Hong Kong court for its ultimate resolution" [94]. So far as the factual disputes were concerned, he declined to grant an ASI as a matter of discretion having regard to the overall character of the Hong Kong petition, which involved other parties and other issues.

59. It is also clear, however, that the mere fact that the parties' chosen tribunal (whether arbitration or court) would not have power to entertain a cause of action or grant relief available in proceedings in a foreign court does not of itself have the effect that the foreign proceedings (at least to that extent) fall outside the arbitration agreement, nor that anti-suit relief is not appropriate. In Fulham Football Club (1987) Ltd v Richards [2011] EWCA Civ 855, [103], Longmore LJ stated:

> "It is well settled that the fact that an arbitrator cannot give all of the remedies which a court could give does not afford any reason for treating an arbitration agreement as of no effect … The inability to give a particular remedy is just an incident of the agreement which the parties have made as to the methods by which their disputes are to be resolved".

Patten LJ made an observation to the same effect at [84].

60. In Société Commerciale de Reassurance v Eras International Ltd [1992] 1 Lloyd's Rep 570, a stay in favour of arbitration under Illinois law in Illinois was resisted on the basis that it would deprive the respondent of the ability to claim under the Civil Liability (Contribution) Act 1978. Mustill LJ at p.611. stated:

> "Section 1 of the Arbitration Act, 1975 requires the Court to grant a stay, unless there is no dispute between the parties, or the arbitration agreement is 'null and void, inoperative or incapable of being performed.' These words do not apply here. Nothing has gone wrong with the arbitration agreement. All that has happened is that the parties have discovered that the remedies available to the arbitrator are in one respect more narrow than those which, but for the agreement, could have been awarded by the English Court. We can see no ground here for refusing a stay.
>
> At first sight this result appears harsh, but the impression is misleading. It is not a question of Clarksons being deprived of a right by the grant of a stay. On the contrary, the parties have agreed that all their rights shall be fixed in Illinois according to the procedures (and by implication the substantive law) in force in that state. If the stay is refused the consequence will be that by acting in breach of their agreement, in pursuing their claim against Howdens in the English Court, Clarksons have obtained for themselves the possibility of a right and remedy which they would not have possessed if they had acted as their agreement required. In the face of this we can see nothing unjust in holding Clarksons to their agreement, in accordance with the spirit of the Act of 1975 and the New York Convention on which it is based".

61. That analysis was followed in Wealands v CLC Contractors Ltd [1999] CLC. [20]-[21] and Assaubayev v Michael Wilson & Partners Ltd [2014] EWCA Civ 1491, [68]. Consistent with that principle, an anti-suit injunction may be granted even if the effect of doing so is to prevent the respondent from invoking constitutional grounds of objection to the contract which cannot be raised outside of the foreign jurisdiction: Aqaba Container Terminal v Soletanche Bachy France [2019] EWHC 471 (Comm), [42]. One of the advantages of agreeing both the forum and applicable law for any disputes is that the parties may avoid exposure to certain types of claim recognised by the home courts of one or other of them. As HHJ Chambers QC noted in Beazley v Horizon Offshore Contractors [2005] 1 Lloyd's Rep 231, [46], when considering an argument that requiring adherence to the jurisdiction clause in that case would deprive the assured of the ability to pursue bad faith tort damages in Texas:

> "The exclusive jurisdiction clause confers upon underwriters the agreed benefit of not having to face claims in tort in Texas. There is no injustice in holding Horizon to its bargain because this was known at the time that the bargain was made. To deny underwriters the benefit of the bargain would be an injustice."

62. In the present case, it is not entirely clear to me on what basis it is said that the causes of action under the Bankruptcy Law would be available before an LCIA arbitration tribunal sitting in London when the Contracts and the arbitration agreements are governed by English law. It has been held that a submission to arbitration in London implicitly confers on the arbitrators certain powers which statutes make available to English courts: Wealands v CLC Contractors Ltd, [24]; Chandris v Isbrandtsen-Moller Co Inc [1951] 1 KB 24; President of India v La Pintada Compania Navigacion

SA [1985] AC 104, 119 (Lord Brandon) and Bridgehouse (Bradford No 2) Ltd v BAE systems plc [2020] EWCA Civ 759, [56]. However, it is difficult to see how the powers of the arbitrazh court under the Bankruptcy Law could be invoked before the LCIA arbitrators (any more than the powers under the Civil Liability (Contribution) Act 1978 would have been available to the Illinois-sited arbitrators in Eras), not because of any want of jurisdiction in the strict sense of that term, but because they would not form part of the applicable substantive or procedural law.

63. In those cases which have addressed the application of arbitration clauses to complaints relied upon to found unfair prejudice petitions, the factual matters relied upon can generally be raised before the arbitrators because they involve alleged breaches of a shareholders agreement or similar document which is subject to the arbitration agreement. In Fulham, that contract was constituted by the articles of association of the Football Association Premier League Ltd which required compliance with the Football Association Rules, and which contained the arbitration clause. Further (at least according to Longmore LJ, [96]) an arbitration tribunal would have had the power to determine the unfair prejudice petition on the "implied submission basis", because the power given to the English court by the relevant statute was also available to an arbitration tribunal sitting in England. Similarly in Team Y&R Holdings, the factual matters relied upon to found the Hong Kong petition were, in the main, matters which (if established) would have constituted breaches of the shareholders' agreement in which the English jurisdiction clause appeared. The Singapore Court of Appeal did not need to consider in Larsen whether the powers under (Singapore) Bankruptcy and Companies Acts would have been available in a Singapore-seated arbitration, although that was a case where the statutory provisions invoked formed part of the law of the seat of the arbitration.

64. This is not, however, the position in this case, and it was not the position in Nori Holding. Males J does not expressly consider whether (and if so on what basis) the avoidance claims under Article 61.2 could have been invoked before the arbitrators. This was because he held that the issue of whether the dispute fell within the arbitration agreement involved looking at the substance of the dispute, rather than the particular legal vehicle through which it was being advanced before the foreign court. At [63], he stated:

> "What matters is the substance rather than the form. In this case the parties' dispute is a straightforward factual dispute whether the August transactions constitute a fraud carried out on the Bank to replace valuable secured loans with worthless bonds. If so, the Bank will have a claim to avoid those transactions and to require the claimants to reinstate the position in which it was before they were carried out. A variety of legal labels can be and have been attached to that claim, including the labels of transaction with unequal consideration and abuse of rights under Russian law and conspiracy to defraud under Cypriot law. But in each case the essential dispute is the same, regardless of the label. This is a dispute which arbitrators can determine."

65. In the LCIA arbitration, the Bank had indicated its intention to counterclaim (if jurisdiction was established) on the basis that the transactions were fraudulent and void or should be set aside ([24]). In Cypriot proceedings, which the Bank had also commenced, its claim had been advanced on the basis of a fraudulent conspiracy to defraud, which sought to set aside the termination agreements, but did not rely on any

insolvency related claims ([26]). I agree with Males J's analysis, which is consistent with the authorities considered at [37] to [38] above, and also with the principle that it is no bar to a stay or an ASI that a particular cause of action or form of relief which is available in a foreign court in a dispute which is categorised by English law as contractual as a matter of substance will not be available in an arbitration with an English seat ([59] to [61] above).

66. In this case, I am satisfied to the requisite high degree of assurance that the claims being advanced in the St Petersburg Action are, as a matter of substance, claims which are contractual in nature and fall within the arbitration clause, whether or not it would be open to IBSP as a matter of choice of law analysis to advance those claims in any LCIA arbitration. There is a claim by one party to the Contracts (IBSP acting through its official receiver, the DIA) against its counterparty to invalidate the Contracts and seek to recover the amounts paid, on the basis that the consideration under the Contracts was at an undervalue and/or the Contracts were concluded by those purporting to act on IBSP's behalf with the purpose of prejudicing IBSP's creditors. The choice of law in any arbitration is ultimately a matter to be determined in accordance with s.46 of the Arbitration Act 1996 supplemented in the present context by Article 22.3 of the LCIA Rules. If, for any reason, the Bankruptcy Law causes of action cannot be asserted under the applicable choice of law rules, then that is a consequence of the parties' agreement rather than because those claims fall outside the scope of the LCIA Arbitration Agreements.

Are the claims in the St Petersburg Action arbitrable?

The concept of arbitrability

67. There are certain classes of claim which, even if they fall within the scope of an arbitration agreement, are treated under the relevant law as being incapable of being submitted to arbitration. The practical consequence of a particular claim not being arbitrable is that the law in question will not enforce an arbitration agreement in respect of such a dispute by stay or injunction, nor recognise or enforce an arbitration award which purports to determine such a dispute. A claim may be non-arbitrable *per se* (such that the entire claim is non-arbitrable even though its determination involves elements which, considered in isolation or in other contexts, would be arbitrable) or it may be that it is only some part of the dispute – for example the decision to grant a particular form of relief – which is non-arbitrable (e.g. where that relief requires what Males LJ termed "an order which only a court can make": Bridgehouse, [79]), at least where those questions are capable of independent consideration.

68. The issue of arbitrability has received its most extended consideration in cases in which a shareholders' agreement contains an arbitration agreement, and one of the shareholders seeks relief from the court by way of an unfair prejudice petition. It has never been disputed that an order winding-up a company on just and equitable grounds is one for the court alone, nor that relief which impacts on shareholders who are not parties to the arbitration agreement is non-arbitrable. However, in Fulham, none of the relief sought pursuant to the unfair prejudice petition required an order that "only a court could make" or impacted on third parties, for which reasons the Court of Appeal held that *that* dispute was arbitrable (Patten LJ, [40]). Patten LJ went further, expressing the view that even where such relief was sought, it might be possible to resolve the dispute in two stages, with the arbitrators resolving the factual

disputes to the extent they fell within the arbitration clause, leaving the petitioner on the basis of those findings to go back to court to obtain the relief the arbitrators cannot give, e.g. winding up a company [83]. That approach has also been adopted in other jurisdictions: e.g. Quicksilver Greater China Ltd v Quicksilver Glorious Sun JV Ltd and another [2014] 4 HKLRD 759 (Hong Kong); WDR Delaware Corporation v Hydrox Holdings Pty [2016] FCA 1164 (Australia); and Tomolugen Holdings Limited v Silica Investors Ltd [2015] SGCA 57 (Singapore). Where, however, a necessary precursor to any form of relief is a decision by the court that it would be just and equitable to wind up the company, then bifurcation will not be possible. This was held to be the position in respect of a petition presented under the Cayman Islands Companies Law in FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation Civil Appeal Nos. 7 and 8 of 2019.

69. However, it is clear that the issue of arbitrability can involve more than simply ascertaining whether the relief sought engages third party interests in a relevant sense, or seeks an order that "only a court can make". In Fulham Patten LJ recognised that a claim might be non-arbitrable for a third reason, namely that it "represent[s] an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process" ([40]). He referred elsewhere in his judgment to relief which seeks a "state intervention in the affairs of a company which only a court can sanction" ([77]). Examples of such intervention were matters which "engaged the rights of creditors" or impinged on a "statutory safeguard imposed for the benefit of third parties".

70. As set out above, in Larsen the Singapore Court of Appeal held that claims by a liquidator to avoid transactions of an insolvent company concluded at an undervalue were not arbitrable, even though the relief sought – a claim by the liquidator on behalf of the company against its contractual counterparty to avoid a contract and recover the payments made thereunder – did not involve an order which only a court could give, or engage the interests of third parties save to the extent that the general creditors of an insolvent company necessarily benefit if the company effects any recovery or avoids any liability. The Court of Appeal agreed with the first instance judge's view that the powers in question existed "for the benefit of the general body of creditors in an insolvency or insolvency-related context", noting that they permitted recovery of payments even though made under a transaction binding under general law ([8]-[9]). The Court characterised the purpose of the statutory powers as being to address the position where value had been subtracted from the company to the detriment of the general creditors, allowing for an adjustment of those transactions on the onset of insolvency ([10]). The Court concluded at [45] that:

> "Many of the statutory provisions in the insolvency regime are in place to recoup for the benefit of the company's creditors losses caused by the misfeasance and/or malfeasance of its former management. This is especially true of the avoidance and wrongful trading provisions. This objective could be compromised if a company's pre-insolvency management had the ability to restrict the avenues by which the company's creditors could enforce the very statutory remedies which were meant to protect them against the company's management. It is a not unimportant consideration that some of these remedies may include claims against former management who would not be parties to any arbitration agreement. The need to avoid different findings by different adjudicators is

> another reason why a collective enforcement procedure is clearly in the wider public interest".

71. I find the suggestion that the court should not allow the pre-insolvency management to determine the forum in which a liquidator could bring post-insolvency claims on the company's behalf less persuasive on this issue than the Singapore Court of Appeal did. In particular, it would seem to be limited to those cases in which the arbitration clause appears in a contract between the company and its management or vehicles associated with them, and in which the circumstances in which the arbitration agreement had been concluded did not themselves provide a basis for impugning that agreement. Nor are the risk of inconsistent decisions or the benefits of a single hearing a sufficient touchstone of arbitrability (Fulham, [25]), although they are clearly relevant to the exercise of any discretion the court may have. However, the conclusion that avoidance claims exist for the benefit of creditors generally, and as such engage a public rather than purely private interest, is one which finds support in other cases. In particular, in Fulham, [74], Patten LJ noted that:

> "There is no doubt that many aspects of this regime are immune from interference by the members of the company whether by contract or otherwise. They cannot override the provisions of the 1986 Act which apply on liquidation by agreeing between themselves or with a particular creditor that property which belongs to the company in liquidation should be dealt with other than in accordance with the Act ... . The same must go for the exercise of the liquidator's powers under sections 238 to 239 of the Insolvency Act 1986. They involve an exercise of a statutory power to intervene in and set aside transactions with third parties in the context of the insolvency regime. These are rights vested in the liquidator for the benefit of the creditors as a whole and cannot be overridden by a contract entered into by the company prior to its liquidation".

Patten LJ then cited paras. [44] to [46] of Larsen with apparent approval.

72. In Tomolugen, the Singapore Court of Appeal adhered to the view in Larsen that avoidance claims arising in the event of insolvency are not arbitrable, Sundaresh Menon CJ stating at [84]:

> "In our judgment, a claim for relief under s 216 of the Companies Act stands on a different footing from the liquidation of an insolvent company or avoidance claims that arise upon insolvency because the former *generally* does not engage the public policy considerations involved in the latter two situations. There is certainly nothing in the text of s 216 to suggest an express or implied preclusion of arbitration. Nor does the legislative history and statutory purpose of the provision suggest that a dispute over minority oppression or unfair prejudice is of a nature which makes it contrary to public policy for the dispute to be adjudicated by an arbitral tribunal."

The character of the relief sought in the St Petersburg Action

73. In Rubin v Eurofinance SA, when considering whether English law should develop a new principle for the recognition and enforcement of judgments on foreign insolvency claims, Lord Collins JSC accepted that there was no conceptual difficulty in

identifying claims of that type, which clearly included avoidance claims arising on an insolvency ([99]). In relation to avoidance claims, he observed:

> "[94] In order to achieve a proper and fair distribution of assets between creditors, it will often be necessary to adjust prior transactions and to recover previous dispositions of property so as to constitute the estate which is available for distribution. The principle of equality among creditors which underlies the pari passu principle may require the adjustment of concluded transactions which but for the winding up of the company would have remained binding on the company, and the return to the company of payments made or property transferred under the transactions or the reversal of their effect. Systems of insolvency law use avoidance proceedings as mechanisms for adjusting prior transactions by the debtor and for recovering property disposed of by the debtor prior to the insolvency. Thus under the Insolvency Act 1986 an administrator, or liquidator, or trustee in bankruptcy may, where there has been a transaction at an undervalue, or amounting to an unlawful preference, apply for an order restoring the position to what it would have been had the transaction not taken place: sections 238 et seq and 339 et seq. Other systems of law have similar mechanisms, but they will differ in matters such as the period during which such transactions are at risk of reversal and the role of good faith of the parties to the transaction.
>
> [95] The underlying policy is to protect the general body of creditors against a diminution of the assets by a transaction which confers an unfair or improper advantage on the other party, and it is therefore an essential aspect of the process of liquidation that antecedent transactions whose consequences have been detrimental to the collective interest of the creditors should be amenable to adjustment or avoidance: *Fletcher, The Law of Insolvency* , 4th ed (2009), para 26-002; *Goode, Principles of Corporate Insolvency Law* , 4th ed (2011), para 13-03.
>
> [96] Thus the UNCITRAL Legislative Guide on Insolvency Law (2005) says:
>
> '150. Many insolvency laws include provisions that apply retroactively from a particular date (such as the date of application for, or commencement of, insolvency proceedings) for a specified period of time (often referred to as the 'suspect' period) and are designed to overturn those past transactions to which the insolvent debtor was a party or which involved the debtor's assets where they have certain effects ...
>
> 151. It is a generally accepted principle of insolvency law that collective action is more efficient in maximizing the assets available to creditors than a system that leaves creditors free to pursue their individual remedies and that it requires all like creditors to receive the same treatment. Provisions dealing with avoidance powers are designed to support these collective goals, ensuring that creditors receive a fair allocation of an insolvent debtor's assets consistent with established priorities and preserving the integrity of the insolvency estate.'

> [97] In In re Condor Insurance Ltd (2010) 601 F 3d 319, 326, the Court of Appeals for the Fifth Circuit said that:
>
> > 'Avoidance laws have the purpose and effect of re-ordering the distribution of a debtor's assets ... in favor of the collective priorities established by the distribution statute ... [and] must be treated as an integral part of the entire bankruptcy system.'"

74. I am satisfied that claims for relief sought under Article 61.2 are properly characterised as insolvency claims. As I have explained, the relief sought in the St Petersburg Action involves a claim by IBSP, but it is relief of a kind which can only be sought once a company has entered into administration or liquidation, and which can only be initiated on the company's behalf by a limited classes of persons, principally court-appointed officers. Its avowed purpose is, in respect of transactions concluded within a certain period of the administration or insolvency, to allow adjustment of those transactions for the benefit of the creditors generally, even where those transactions would have remained binding on the company but for the administration or insolvency. The position is particularly clear in relation to Article 61.2(1) – transactions at an undervalue. The claim under Article 61.2(2), which requires that the transaction is entered into with the intention of harming creditors, bears more similarity with claims under 13 Elizabeth Ch. 5 or s.172 Law of Property Act 1925. There was some debate in Larsen as to the proper characterisation of such claims (at [55]) but the particular features of Article 61.2(2) which I have identified have persuaded me that the better view is that that too is an insolvency claim, and in any event the argument before me did not seek to distinguish between the two limbs of Article 61.2.

75. In Nori Holding, Males J proceeded on the basis that the essentially-similar claims advanced in that case were insolvency proceedings under Russian law ([40]). Males J held, nonetheless, that they were arbitrable. He noted that the first two grounds identified in Fulham as to why a statutory claim in relation to a company might not be arbitrable – that it sought an order which only a court could make, or engaged third party interests in a relevant sense – did not arise. Indeed the relief sought was of a type which did not require the two-stage approach contemplated in Fulham because orders for rescission and restitution could be made by the arbitration tribunal ([64]). What, however, of the third basis for a conclusion of non-arbitrability identified by Patten LJ in Fulham – that the claim involved "a matter of public interest which cannot be determined within the limitations of a private contractual process"? The Judge stated that the characterisation of the claim as an insolvency claim under Russian law was "irrelevant" ([62]), but he does not expressly discuss whether such a claim was properly characterised as an insolvency claim under English law, beyond noting the "broad similarity" between the relief sought in the Russian proceedings and ss.238 and 239 of the Insolvency Act 1986 ([19]).

76. For the reasons I have set out above, I have concluded that the relief sought under the Bankruptcy Law is relief which is properly to be regarded as insolvency relief from an English law perspective as well. It does not automatically follow, however, that this renders the claims non-arbitrable as a matter of English law (as the curial law and the proper law of the arbitration agreement).

The competing public policies

77. With characteristic insight, VK Rajah JA noted in the opening paragraph of the judgment in Larsen that the case involved a conflict between two public policies – a policy favouring party autonomy and the decentralisation of private dispute resolution, and the policy underlying the insolvency process which seeks to achieve a public centralisation of disputes to achieve optimal returns for creditors through an efficient process for effecting recoveries and resolving disputes. In Larsen, as I have noted, that conflict manifested itself in a conflict between the provisions of the Singapore Arbitration Act and International Arbitration Act, and those of the Singapore Bankruptcy, Companies and Conveyancing and Law of Property Acts. By contrast, the present case – like Nori Holding – involves a conflict between the public policy of the English Arbitration Act 1996 and English arbitration law, and the policy underlying Russian legislation which, the issue of insolvency apart, would not generally form part of the applicable law for the purpose of determining the validity of the English law contract in issue.

78. Males J in Nori Holding was clearly influenced by the strong pro-arbitration policy of English law. As he observed at [66], "where parties agree to arbitrate, it is the policy of the law that they should be held to their bargain" (a sentiment he repeated in Bridgehouse at [73] when noting the importance of the parties' agreement to arbitrate a particular dispute in determining whether the dispute is arbitrable) and at [106] he referred to the "strong international public policy in support of arbitration". I do not regard Males J as having decided in Nori Holding that a claim under ss.238 and 239 of the Insolvency Act 1986 is arbitrable as a matter of English law (a view which I would regard as contrary to the general sense of the case law considered at [69] to [72] above and as to which Newey LJ in Bridgehouse, [53] observed "there may be room for argument"). However, that was not the issue which faced him (or which faces me).

79. Mr Matovu QC argued that there was no relevant distinction to be drawn, when determining whether the strong English policy of upholding agreements to arbitrate should yield to a competing public policy which rendered avoidance claims in an insolvency non-arbitrable, between avoidance claims arising on an English insolvency and those arising on a foreign insolvency. He suggested that it was part of English public policy to support and give effect to foreign insolvency procedures. At some level, I agree that there is such a public policy, but its content is, in my view, nowhere near as expansive as Mr Matovu QC's submissions suggested.

80. I accept that in relation to foreign insolvencies, English law gives effect to a policy of what Lord Hoffmann in Re HIH Casualty and General Insurance Ltd [2008] 1 WLR 852, [30] referred to as one of "modified universalism":

> "The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

At [6] Lord Hoffmann also stated:

> "Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets."

81. However, enforcing the LCIA Arbitration Agreements would not in any way conflict with the principle (or frustrate the policy) of modified universalism. Granting an injunction would not involve recognising a second bankruptcy on the part of IBSP, nor prevent there being a single system of distribution. Any recoveries made by the DIA on IBSP's behalf in an LCIA arbitration would be subject to, and administered in accordance with, the single scheme for distribution constituted by the St Petersburg bankruptcy proceedings.

82. It has been held that the policy of modified universalism also supports the provision by the English court of assistance to the foreign bankruptcy proceedings "so far as it properly can" (Singularis Holdings Ltd v PricewaterhouseCoopers [2014] UKPC 36, [15]). There are, however, limits to such co-operation where it would conflict with well-established principles of English private law or English public policy. In particular, it has been held not to justify the recognition and enforcement of avoidance orders made in foreign bankruptcies where the traditional English law requirements for the recognition and enforcement of foreign in personam judgments are not met: Rubin v Eurofinance SA. Some of the reasons which Lord Collins JSC gave for rejecting the argument to the contrary are of particular relevance to the issue before me.

83. First, at [116] he noted:

> "Although I accept that it is possible to distinguish between avoidance claims and normal claims, for example in contract or tort, it is difficult to see in the present context a difference of principle between a foreign judgment against a debtor on a substantial debt due to a company in liquidation and a foreign judgment against a creditor for repayment of a preferential payment. The respondents suggest that a person who sells goods to a foreign company accepts the risk of the insolvency legislation of the place of incorporation. Quite apart from the fact that the suggestion is wholly unrealistic, why should the seller/creditor be in a worse position than a buyer/debtor?"

In the present case, Mr Matovu QC's submissions would involve drawing just such a distinction, between a claim by a liquidator on behalf of an insolvent company to enforce a profitable contract (which would be arbitrable if the contract contained an arbitration clause) and a claim by a liquidator on behalf of an insolvent company to avoid an unprofitable contract and recover the amount paid because the transaction was concluded at an undervalue (which would not).

84. Second, at [115], Lord Collins noted that there is "no international unanimity or significant harmonisation on the details of insolvency law, because to a large extent insolvency law reflects national public policy". Lord Hoffmann made a similar

comment in In re HIH Casualty and General Insurance Ltd [2008] 1 WLR 852, [19]. If claims to invalidate contracts available under foreign insolvency proceedings were held to be non-arbitrable, that would potentially expose an arbitrating party to a range of claims not contemplated by the proper law and seat choices which the parties had made, perhaps for the very purpose of avoiding exposure to national law claims of that kind (see above).

85. Where the parties have agreed to the exclusive jurisdiction of the English court, proceedings brought here will only be stayed where the defendant is in an insolvency process in its home jurisdiction if "strong and compelling reasons" to do so are shown: Jefferies International Ltd v Landsbanki HF [2009] EWHC 894 (Comm). At [24], Cooke J held that "any stay which had the effect of depriving Jefferies of resort to the courts of the agreed jurisdiction would not only be unjust, but contrary to principle". In Mazur Media Limited v Mazur Media Gmbh [2004] EWHC 1566 (Ch), [70], Lawrence Collins J observed of an application to stay proceedings brought against an insolvent German company:

> "the power should not be used simply because the claim in the English proceedings could be made, or more appropriately made, in the German insolvency. I would accept that there is a power to stay English proceedings in favour of insolvency proceedings in a Regulation state to prevent injustice, but it would require exceptionally strong grounds for the English court to exercise that power, particularly where (as regards the contractual claim) the parties have conferred exclusive jurisdiction on the English court. Otherwise, the court would be circumventing the Judgments Regulation by introducing forum non conveniens principles by the back door."

While these cases were decided in a Brussels Regulation or Lugano Convention context, they exemplify the importance the English court attaches to giving effect to forum selection agreements, even in circumstances in which the defendant is undergoing a foreign insolvency process.

86. IBSP also referred to the Cross Border Insolvency Regulations (SI 2006 No 1030) ("CBIR"), perhaps fortified by Males J's statement in Nori Holding, [68] that it was "not suggested that the Russian proceedings are entitled to recognition under the Cross-Border Insolvency Regulations 2006". However, in this case there has been no request for recognition, or relief consequential on recognition, nor has recognition been granted. In these circumstances, IBSP is no more assisted by the CBIR than the Bank in Nori Holding was. It is clear from Rubin v Eurofinance SA, [141] to [143] that even where recognition is granted, there are limits to the relief which can be granted by the English court as a result – for example this would not provide a basis for recognising avoidance judgments of the foreign bankruptcy court when the English requirements for recognising a foreign in personam judgment had not been satisfied.

Conclusion on arbitrability

87. To summarise my conclusion on the issue of arbitrability:

i) The claims brought in the St Petersburg Action under Article 61.2 of the Bankruptcy Law are insolvency claims, both as a matter of Russian law and as

a matter of English law characterisation. The claim for abuse of rights is not such a claim.

ii) In circumstances in which those claims seek relief which the arbitration tribunal is able to grant, and do not engage the interests of third parties save to the extent that any creditor of an insolvent company will benefit from its success in arbitration, those claims are arbitrable.

iii) In particular, there is no sufficient countervailing public policy at play in this case arising from the fact that the claims are avoidance claims in a foreign bankruptcy to override the clear policy of English law of upholding arbitration agreements (whatever the position might be if they were English law insolvency claims).

The Strong Reason Issue

The applicable principles

88. It has been held that those matters which fall to be considered at the "strong reason" stage of an ASI application, as opposed to the general discretionary phase, are principally concerned with "justifications for suit in the foreign court" as opposed to general discretionary considerations which arise on any application for equitable relief: Cockerill J in Times Trading Corporation v National Bank of Fujairah (Dubai Branch) [2020] EWHC 1078 (Comm), [102] citing Phillips J in ADM Asia-Pacific Trading Pte Ltd v PT Budi Semesta Satria [2016] EWHC 1427 (Comm), [34]).

89. I remind myself that the burden of establishing a strong reason lies on IBSP. I also remind myself that the ASI is sought in this case to give effect to an arbitration agreement. As Males J noted in Nori Holding this makes establishing a strong reason for not granting ASI relief all the more challenging:

> "[105] It is apparent from Lord Bingham's speech [in Donohue v Armco] that he viewed the grant of an anti-suit injunction to restrain foreign proceedings and the grant of a stay of proceedings in England as equivalent measures for the enforcement of an exclusive jurisdiction clause. Lord Mance echoed this in the arbitration context in para 60 of judgment in AES, when he said in the passage already cited that "the power to stay domestic legal proceedings under section 9 and the power to determine that proceedings are in breach of an arbitration agreement and to injunct their commencement or continuation are in in truth opposite and complementary sides of a coin". What is contemplated, therefore, is that (subject to general equitable considerations, for example as a result of delay in seeking relief) in circumstances where a court would stay domestic proceedings as being contrary to an exclusive jurisdiction or arbitration clause, it will be appropriate to grant an anti-suit injunction.
>
> [106] However, there is an important distinction in this respect between the two kinds of clause. In the case of breach of an exclusive jurisdiction clause, the court has a discretion to grant a stay and may take account of factors going to such matters as forum non conveniens, whereas in arbitration cases a stay under section 9 of the 1996 Act is mandatory. Colman J made

> this point in Alfred C Toepfer International GmbH v Societe Cargill France [1997] 2 Lloyd's Rep 98. In such cases the stay is mandatory however inconvenient that may be and regardless of whether the claim in court will nevertheless continue against other parties who do not have the benefit of an arbitration clause. Thus while the test of 'strong reasons' applies in both exclusive jurisdiction and arbitration cases, its application may produce a different result in the two situations. That is not surprising. The two situations are different as a result of the strong international public policy in support of arbitration reflected in the New York Convention."

90. With those principles in mind, I turn to consider the matters which Mr Matovu QC contended give rise to a "strong reason" not to grant ASI relief.

An order preventing an officer of a foreign court from carrying out its duties for the benefit of IBSP's creditors would be exceptional

91. Mr Matovu QC suggests that an order which would prevent an officer of a foreign court from carrying out its duties to a foreign court and to the creditors of a foreign insolvency would be "exceptional". However, arguments of comity between courts have limited scope when injunctions are sought to enforce forum selection agreements for the reasons which Longmore LJ gave in OT Africa Line Ltd v Magic Sportswear Corporation [2005] EWCA Civ 710,[32]-[33]:

> "In the case of exclusive jurisdiction clauses, however, comity has a smaller role. It goes without saying that any court should pay respect to another (foreign) court but, if the parties have actually agreed that a foreign court is to have sole jurisdiction over any dispute, the true role of comity is to ensure that the parties' agreement is respected. Whatever country it is to the courts of which the parties have agreed to submit their disputes is the country to which comity is due. It is not a matter of an English court seeking to uphold and enforce references to its own courts; an English court will uphold and enforce references to the courts of whichever country the parties agree for the resolution of their disputes. This is to uphold party autonomy not to uphold the courts of any particular country.
>
> The corollary of this is that a party who initiates proceedings in a court other than the court, which has been agreed with the other party as the court for resolution of any dispute, is acting in breach of contract. The normal remedy for this breach of contract is the grant of an injunction to restrain the continuance of proceedings unless it can be shown that damages are an adequate remedy; but damages will not usually be an adequate remedy in fact, since damages will not be easily calculable and can indeed only be calculated by comparing the advantages and disadvantages of the respective *fora*. This is likely to involve an even graver a breach of comity than the granting of an anti-suit injunction."

92. In this case, the ASI is directed to IBSP, in its capacity as the contractual counterparty to the LCIA Arbitration Agreements with RSL. The injunction does not interfere with the performance of the DIA's duties to the St Petersburg court, any more than an injunction which related to any attempt by the DIA on behalf of IBSP to enforce the terms of the Contracts would. The fact that the dispute is not arbitrable in Russia is

not a strong reason not to grant an ASI (Electronic Arts v CTO [2003] EWHC 1020 (Comm), [86]-[91]).

The policy of the English court to support foreign insolvency proceedings constitutes a strong reason not to grant ASI relief

93. Mr Matovu QC submitted that the policy of the English court of supporting foreign insolvency proceedings, and its duty at common law and under the CBIR to assist such proceedings, provides a strong reason not to grant an ASI. However, given my conclusions on the public policy issue at [80] to [86] above, and the fact that the ASI is sought here to enforce an arbitration agreement (bringing into play the considerations identified by Males J in Nori Holding quoted at [89]) above), I am not persuaded that this constitutes a strong reason for not enforcing the English law contractual promise to pursue any such claims in LCIA arbitration in England.

The risk of inconsistent decisions which would arise from requiring IBSP to pursue its claims against RSL in LCIA arbitration constitutes a strong reason not to grant ASI relief

94. Mr Matovu QC pointed to the risk of inconsistent decisions which would arise if the DIA was forced to pursue IBSP's claim in LCIA arbitration, while the claims by Rubin and OKS-1, or the actions brought by Mr Bazhanov and Triumph to uphold the Contracts and thereby defend their conduct, continued in the St Petersburg proceedings.

95. I accept that if granting an ASI would create a risk of inconsistent decisions, that is a factor which can, in an appropriate case, give rise to a strong reason not to grant ASI relief. Mr Matovu QC relied upon the decision of Teare J in Verity Shipping SA v NV Norexa [2008] EWHC 213 (Comm), in which a shipowner sought an ASI in respect of proceedings commenced by cargo interests in Antwerp in breach of the London arbitration clause in the bill of lading. In response to the cargo interests' claims, the owners had commenced their own proceedings in Antwerp against the entity which had inspected and condemned the cargo there ("the FAVV") seeking an indemnity against any liability they might have to the cargo interests. Teare J held that the risk of inconsistent decisions constituted a strong reason for not granting ASI relief:

> "[34] In the present case the Cargo Interests will not suffer an injustice in the event that they succeed in the London arbitration and the Antwerp Court, in the recourse action by the Owners against FAVV, later reaches a decision inconsistent with decision in the London arbitration. By contrast, the Owners may suffer an injustice in that event, but they are willing to take that risk as the price of enforcing the London arbitration clause. However, the third party, FAVV, may suffer an injustice from inconsistent decisions if the Cargo Interests succeed in the London arbitration but FAVV are found liable to the Owners by the Antwerp Court. This is not an unrealistic consideration. The Club's summary of the surveyor's provisional findings is that the cause of the loss was the 'unreasonable rejection of the entire cargo by FAVV.' If the London arbitration were to conclude that the loss of the cargo was caused by the Owners' breach of contract the Owners may well urge the Antwerp Court to find that the loss was caused by the unreasonable behaviour of FAVV.

> [35] Thus, although the Owners are prepared to take the risk of inconsistent decisions, the risk of injustice to the third party, FAVV, means that the risk of inconsistent decisions remains a reason in favour of refusing an anti-suit injunction. If the Antwerp Court tries both the Cargo Interests' claim against the Owners and the Owners' recourse claim against FAVV there will be no risk of inconsistent decisions and no risk of injustice to the third party".

96. From the brief report of the facts in the case, I have found it difficult to identify how there was a risk of prejudice to FAVV from inconsistent decisions, save possibly a risk that owners might be found liable to cargo interests on a different factual basis to that which would have engaged FAVV's liability to owners, which risk could not be accommodated within the terms of any indemnity ordered. For present purposes, it is sufficient to note that there was a legal interdependence between the two claims (the relief sought by the owners in Antwerp was an indemnity against any liability found against the owners in the arbitration), and the owners had themselves commenced the Antwerp proceedings against FAVV.

97. It is clear, however, that a risk of inconsistent decisions will not always constitute a strong reason for not granting ASI relief. In particular, if it is not possible to ensure the submission of the entire dispute to a single forum, the parties' agreement to arbitrate is "the decisive factor" (Nori Holding, [113]). In any event, as Males J noted in that paragraph, and in SCM Financial Overseas Ltd v Raga Establishment Ltd [2018] 2 Lloyd's Rep 99, [66], some fragmentation is unavoidable in many multi-party disputes, and, just as it does not provide a basis for refusing a stay of a dispute which the parties have agreed to refer to arbitration, it will not of itself provide a strong reason to refuse to grant an ASI. In this case, if RSL commenced an LCIA arbitration seeking a declaration that the Contracts are and remain valid, it would not be possible for this Court to restrain such an arbitration (A v B [2019] EWHC 2478 (Comm), [17]-[18]), which would proceed in parallel with the St Petersburg Action.

98. Further, it is necessary to look carefully at the claims brought by Rubin and OSK-1, and by Mr Bazhanov and Triumph. The former are, in effect, parasitic on the claims brought by IBSP, but as 10% creditors, Rubin and OSK-1 are able to petition for the same relief in the St Petersburg bankruptcy proceedings. In my view, the essentially parasitic nature of those claims (under which a third party is able to assert relief as to the status of a contract between two other parties to the same effect as one of the contracting parties) means that they carry less weight in determining whether there are strong grounds for not granting ASI relief to enforce an arbitration agreement between the principal protagonists. Not only is IBSP (acting through the DIA) the party most central to the dispute and the "natural claimant", but with the benefit of the investigation the DIA has been conducting for some two-years using its extensive powers, it is the party best placed to pursue those claims (although, of course, to the extent that any creditor had any factual or legal insight to offer, an ASI would not prevent it from feeding that material through to the DIA to deploy in an LCIA arbitration). Finally the financial interest of the creditors (whether the 10% creditors or others) is also parasitic on IBSP's interest. If the Contracts are set aside and consequential relief obtained, the asset pool of IBSP will be enlarged for the benefit of all its creditors. That interest on the creditors' part is no different in kind to that which arises when an insolvent company through its office-holders pursues an attempt

to recover under, or annul, a contract on conventional private law grounds. As Lord Collins JSC noted in Rubin v Euorfinance SA, [114]:

> "The respondents accept that the *Dicey* rule applies to claims which may be of considerable significance by an office-holder in a foreign insolvency, such as a claim for breach of contract, or a tort claim, or a claim to recover debts. It is clear that such claims may affect the size of the insolvent estate just as much, and often more, than avoidance claims. Like claims to recover money due to the insolvent estate such as restitutionary claims not involving avoidance, avoidance claims may establish a liability to pay or repay money to the bankrupt estate (as in the present cases). There is no difference of principle."

99. It is also far from clear that Rubin and OSK-1 will continue their claims in the St Petersburg Action if IBSP pursues its own claim in LCIA arbitration. For Rubin and OSK-1 to advance and support those claims acting in their own right and without the DIA making the same arguments would be a very different proposition from supporting a claim by IBSP in which the DIA was there to do the "heavy lifting".

100. So far as the position of Mr Bazhanov and Triumph are concerned, they do not have legal interests which are directly engaged in the claims of IBSP against RSL to avoid the Contracts, but they appear to be concerned that findings of fact about their conduct made in the course of determining those disputes may lead to claims against them. That is a rather weaker connection than that in Verity Shipping on which IBSP relied. Further, any findings made in an LCIA arbitration will not be binding upon them, and it is far from clear that those findings would become public at all, still less carry any weight in any Russian proceedings brought against Mr Bazhanov and Triumph.

101. For these reasons, I am not persuaded that the risk of inconsistent decisions, and of prejudice to third parties resulting from such inconsistency, provides a strong reason for not granting ASI relief in this case.

102. In these circumstances, it is not necessary to consider whether this factor would have been neutralised by RSL's offer to consent to the joinder of Rubin and OSK-1, and perhaps Mr Bazhanov and Triumph, to any LCIA arbitration under Article 22.1(viii) of the LCIA Rules 2014. This gives the tribunal power:

> "to allow one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented to such joinder in writing following the Commencement Date or (if earlier) in the Arbitration Agreement; and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration".

103. In Joint Stock Asset Management Co Ingosstrakh-Investments v BNP Paribas SA [2012] EWCA Civ 644, a guarantee between a Russian guarantor and the bank provided for LCIA arbitration. A pension fund which held a small shareholding in the guarantor issued proceedings in the Russian courts seeking to set aside the guarantee, and the bank sought an ASI to restrain it from doing so. The Court of Appeal upheld the ASI (on "vexatious and oppressive" grounds), because the fund manager was connected to the guarantor and there were indications that the Russian proceedings were the product of collusion with the guarantor. In dealing with the suggestion that

this would deprive the manager of the ability to advance those claim anywhere, Stanley Burnton LJ held at [81]:

> "I reject the contention that Russia is the only available forum for the determination of the Appellant's invalidity claim. The claim that the Guarantee was not binding on D1 because the necessary corporate approvals had not been given, so that it was entered into without corporate authority, which is the essential claim made by the Appellant, is justiciable in this country. If there were no arbitration agreement, D1 or the Bank (if claiming relief) could rely on the gateways in PD6B 3.1(6)(c) and, more importantly, (d), and both D1 and the Appellant (if claiming relief) could rely on CPD6B 3.1(8). There is an arbitration agreement, but as mentioned above, rule 22.1(h) of the LCIA Rules would enable the Appellant to be joined in the arbitration, and I have little doubt that the agreement of D1 and of the Bank would have been forthcoming if the Appellant had requested joinder (although the agreement of either one would have sufficed). Moreover, the claim, in so far as it asserted that the approval of the Board of D1 was required, was raised (and has been determined) in the arbitration".

104. In the present case, no ASI has as yet been sought against any non-party to the LCIA Arbitration Agreements. However, if I had been otherwise persuaded that the risk of inconsistent findings constituted a strong reason not to grant ASI relief, I would not have regarded the possibility of joinder under the LCIA rules as a sufficient answer to that point. At least on the evidence before me, there is nothing to suggest that Rubin and OSK-1 are companies connected to IBSP, and the suggestion that they would (or ought to be) willing to join in an LCIA arbitration in London in support of IBSP seems a little unreal. The same is true of Mr Bazhanov and Triumph, whose principal concern appears to be the impact upon them of findings of wrongdoing on their part being made by a Russian court which might then lead to proceedings being commenced against them in Russia.

IBSP would face "an unbearable burden" in having to pursue its claims in an LCIA arbitration

105. Mr Matovu QC suggested that having to fund and participate in an LCIA arbitration in isolation from the collective process of asset realisation taking place in the St Petersburg bankruptcy court, with the expense and inconvenience that would entail, would place "an unbearable burden" on IBSP. However, forum conveniens arguments of this kind can only carry limited weight when relied upon in support of the argument that the parties should not be held to the neutral forum to which they have agreed (Skype Technologies SA v Joltid Ltd [2009] EWHC 2783 (Ch), [37]). In any event, the amount which IBSP says is in issue in its claims is $140m, which is said to represent almost half of the deficit in IBSP's assets. There can be no serious suggestion that a requirement to pursue such a claim in London arbitration would be disproportionate or oppressive.

If the Bankruptcy Law claims would not be available in an LCIA arbitration, that would constitute a strong reason not to grant ASI relief

106. Finally, perhaps encouraged by the Court, Mr Matovu QC submitted that the effect of an ASI might be to prevent the avoidance claims being pursued at all, if those claims did not arise under the applicable law(s) in an LCIA arbitration (see [59] to [61]

above). Mr Houseman QC met this objection by offering an undertaking on RSL's part not to contend before the arbitration tribunal that it was not open to IBSP to pursue in arbitration the claims which it is currently advancing in the St Petersburg Action. That undertaking having been offered, I do not need to consider whether any inability to pursue the claims in the St Petersburg Action in an LCIA arbitration (to the extent that this followed from the parties' choice of forum and law) is capable of constituting a "strong reason" for not granting an ASI in the particular context of insolvency claims. I would also note that it remains open to the DIA on behalf of the IBSP to apply for recognition of the St Petersburg bankruptcy proceedings under the CBIR, and then, pursuant to Article 21(1)(g) of the UNCITRAL Model Law, to invite the English court to make orders under ss.238 and 239 of the Insolvency Act 1986.

The Discretion Issue

107. There are two matters to be considered at this stage of the analysis.

108. The first is that it is said that it is "highly probable" that the injunction will not be obeyed, and that the Court should not act in vain. As Blair J noted in Impala v Wanxiang [2015] 2 All ER (Comm) 234, [137], it will be a rare case in which difficulties in enforcing an English injunction in the country where proceedings have been commenced would constitute a strong reason to refuse to grant an anti-suit injunction. Further, if any judgment obtained against RSL in the St Petersburg Action was obtained in breach of an injunction of this Court, that might well have implications so far as attempts to enforce such a judgment or hold RSL to its findings were concerned (The Wadi Sur [2010] 1 Lloyd's Rep 193, [125]).

109. The second is the prejudice which IBSP may suffer if the court decides no final anti-suit injunction is appropriate. There was nothing before me to suggest that IBSP would suffer any prejudice beyond that ordinarily inherent in the delayed recovery of money, and that is capable of being compensated for by an award of interest. In any event, RSL has offered an undertaking in damages. Its latest accounts suggest it has net assets of just over Euros 1 million. Given the high probability of success which I have found, I am satisfied that it would be just and equitable to grant the negative ASI which RSL seeks.

110. Mr Houseman QC also seeks a mandatory injunction ordering IBSP to take immediate steps to withdraw, discontinue or terminate the St Petersburg Action with prejudice. However, this is an interim application, and mandatory relief is usually granted only after the final hearing (Mobile Telecommunications Co v HRH Prince Hussam Bin Saudi Bin Abdulaziz Al Saud [2018] EWHC 1469, [19]). Further, the interim application has raised issues of arbitrability which I have not found straightforward. Taking these factors into account, I have concluded that it would not be appropriate to grant a mandatory injunction at this stage.

CONCLUSION

111. For the reasons set out in above:

    i) The Part 11 Application is dismissed.

ii) On the basis of the undertakings to which I have referred, the negative ASI sought in the ASI Application is granted.

iii) The application for mandatory injunctive relief is refused.