Case No: CL-2018-000132

Neutral Citation Number: [2018] EWHC 1343 (Comm)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/06/2018

Before :

MR JUSTICE MALES

- -

Between :

(1) NORI HOLDINGS LIMITED **(2) CENTIMILA SERVICES LIMITED** **(3) CONISTON MANAGEMENT LIMITED**	**Claimants**
- and -	
PUBLIC JOINT-STOCK COMPANY <<BANK OTKRITIE FINANCIAL CORPORATION>>	**Defendant**

- -
- -

Stephen Midwinter QC (instructed by **Simmons & Simmons LLP**) for the **Claimant**
Stephen Houseman QC (instructed by **Steptoe & Johnson LLP**) for the **Defendant**

Hearing date: 22.5.18

- -

Judgment

<B>Mr Justice Males :</B>

<B>Introduction</B>

1. This is an application for a final anti-suit injunction to restrain the pursuit of court proceedings in Russia and Cyprus which are alleged to be brought in breach of an arbitration clause. It raises some interesting questions including: (1) how the court should proceed when an application for similar relief can be made to arbitrators; (2) whether such an injunction can or should be granted to restrain proceedings brought in accordance with the insolvency law of a foreign state to set aside transactions at an undervalue; and (3) whether the decision of the CJEU in <I>West Tankers Inc v Allianz SpA</I> (Case C-185/07) [2009] AC 1138 that a court in one European member state cannot grant an injunction to restrain proceedings brought in breach of an arbitration clause in another member state remains good law.

<B>The parties</B>

2. The first and second claimants ("Nori" and "Centimila") are companies incorporated in Cyprus. They are wholly-owned subsidiaries of O1 Group Limited ("O1GL"), an investment holding company also incorporated in Cyprus, which owns and manages assets, including in real estate and finance. The ultimate beneficial owner of the group is Boris Mints. I refer to O1GL and the companies controlled by it as the O1 Group.

3. The third claimant ("Coniston") is a BVI-incorporated company, which has a minority shareholding in O1 Properties Limited ("O1 Properties"). O1 Properties is a company incorporated in Cyprus which owns valuable real estate in Moscow. Its majority shareholders are entities within the O1 Group.

4. Lira LLC ("Lira"), Leblanc Investments LLC ("Leblanc") and Semela LLC ("Semela"), companies incorporated in Russia, are or were at various times companies in the O1 Group.

5. O1 Group Finance LLC ("O1 Group Finance") is a company incorporated in Russia which raises money on the bond markets for companies within the O1 Group. According to the claimants it is not, despite its name, a company within the O1 Group but "a special-purpose orphan vehicle which attracts financing in Russia through the issue of bonds traded on the Moscow Exchange".

6. The defendant ("the Bank") is a licensed bank incorporated and existing under the laws of the Russian Federation. I was told that Mr Mints was formerly one of its largest shareholders and its Executive Director. His precise role does not matter for present purposes

<B>The transactions</B>

7. As at August 2017 the Bank had advanced over US $500 million in loans to O1GL and Lira under three Loan Agreements. The Loan Agreements were governed by Russian law and provided for the jurisdiction of the Moscow Arbitrazh Court. The loans were repayable between 2017 and 2019 and in the meanwhile provided regular interest payments.

8. The loans were secured by pledges of shares in O1 Properties. The pledges were given by the claimants in the form of five Pledge Agreements concluded in May and June 2017. Three of these were with Nori and one each was with Centimila and Coniston.

9. The Pledge Agreements were governed by the law of Cyprus. Each contained an arbitration clause, clause 19, which provided for arbitration in London under the rules of the LCIA:

> "In the event of any dispute or disagreement arising under, or in connection with, this Agreement, such dispute or disagreement shall be resolved by binding arbitration held in London under the rules of the London Court of International Arbitration (which rules are deemed to be incorporated herein; hereinafter – the 'Rules'), save that no requirements of the Rules as to the nationality of arbitrators shall apply, with 3 (three) arbitrators appointed in accordance with the Rules (where each of the Pledgee and the Pledgor shall appoint one arbitrator; the two arbitrators so elected shall appoint the chairman). The London Court of International Arbitration shall be the appointing authority. The working language of the proceedings shall be English. The Parties' addresses for service of process shall be the addresses specified in this Agreement."

10. One of the loans was also secured by a pledge of shares in Lira by Leblanc. This Pledge Agreement was expressly subject to the jurisdiction of the Moscow Arbitrazh Court.

11. In August 2017 these arrangements were changed. The parties entered into a series of agreements (to adopt a neutral phrase I shall refer to these as "the August transactions") as follows:

(1) The Bank purchased bonds with a face value of US $600 million issued by O1 Group Finance.

(2) O1 Group Finance used the sale proceeds to lend money to the borrowers under the Loan Agreements which the borrowers then used to repay the loans to the Bank.

(3) The Loan Agreements were then terminated.

(4) By agreements dated 9 and 10 August 2017 ("the Pledge Termination Agreements") the claimants and the Bank agreed to terminate the Pledge Agreements.

(5) The Pledge Termination Agreements were governed by the law of Cyprus. Each contained an arbitration clause, clause 8, as follows:

> "Any dispute, controversy or claim which may arise out of or in connection with this Deed, or the execution, breach, termination or invalidity thereof, shall be settled in accordance with provisions of clause 19 of the Share Pledge."

12. At the same time, the Leblanc Pledge Agreement was also terminated.

13. The net effect of these new arrangements was to replace the Bank's short-term loans secured by pledges of shares in a company which owned valuable Moscow real estate with long-term unsecured bonds. The claimants say that this was a commercial restructuring requested by the Bank which was negotiated at arms' length with a significant number of senior staff at the Bank, and which they understood to be intended to provide the Bank with bonds which would pay a higher interest rate and (as they could be used to raise funds through repo transactions) would provide the Bank with urgently needed liquidity. The Bank on the other hand alleges that it was the victim of a fraud which resulted in US $500 million worth of secured loans being replaced by worthless bonds which provided no regular coupon payments as (while interest accrued) interest payments were deferred until maturity of the bonds in 2032.

14. It is common ground that it is not for this court to determine which of these rival contentions is correct.

15. Since the August transactions, the claimants have transferred their shares in O1 Properties to other Cypriot companies within the O1 Group and the shares have been pledged as security to another Russian bank, Moscow Credit Bank, as security for other loans. The claimants say that, as the Pledge Agreements had been terminated, they were entitled to deal with these shares as they saw fit. The Bank relies on these transfers as evidence of the alleged fraud.

<B>The Bank's temporary administration</B>

16. On 29 August 2017, only three weeks after the conclusion of the August transactions, the Central Bank of Russia ("the CBR") appointed a temporary administrator to manage the Bank. The CBR is responsible for the regulation and supervision of Russian banks. The appointment of a temporary administrator was made pursuant to provisions of Federal Law No. 127-FZ dated 26 October 2002 as subsequently amended (the "Bankruptcy Law"). Such an appointment is a measure for the financial rehabilitation of Russian credit institutions. It is aimed at preventing bankruptcy rather than initiating the process of formal asset distribution to creditors and shareholders. The powers of a temporary administrator are extensive. They include, by Article 189.31 of the Bankruptcy Law, the power to present claims on behalf of the credit institution in courts and arbitration tribunals.

17. On 12 December 2017 the CBR effectively nationalised the Bank after which, on 21 December 2017, it appointed new management and the Bank's temporary administration ceased. It returned to normal operation.

<B>The Russian proceedings</B>

18. On 31 October 2017, the Bank (acting by the temporary administrator) commenced proceedings in the Moscow Arbitrazh Court against ten defendants, including all three of the claimants as well as Lira, Semela and Leblanc. In these proceedings it seeks the invalidation and reversal of all of the August transactions, including but not limited to the Pledge Termination Agreements, so as to restore the Bank to the position in which it was prior to these transactions being concluded. Thus the proceedings, if successful, would result in reinstatement of the Loan Agreements and the Pledge Agreements, together with orders for the return of the pledged shares in O1 Properties. They would result also in reinstatement of the Leblanc Pledge Agreement.

19. Two legal grounds are advanced for invalidating the August transactions, although they each rely on the same factual allegations. First, it is said that the August transactions were concluded with unequal consideration. This is a claim brought (and which can only be brought) by a temporary administrator pursuant to Article 189.40 of the Bankruptcy Law and which, under Russian law, is subject to the jurisdiction of the Moscow Arbitrazh Court. It requires proof that during a period of one year before the appointment of the temporary administrator the Bank entered into a transaction in which the counterparty provided "unequal consideration". Such a claim is broadly similar to a claim to set aside a transaction at an undervalue pursuant to section 238 of the Insolvency Act 1986. Although the claim can only be brought by a temporary administrator, the claim can continue even after the administration has ceased. It is now vested in the Bank.

20. The second ground for invalidating the August transactions is that the August transactions constitute an abuse of rights contrary to Articles 10 and 168 of the Russian Federation Civil Code. This claim does not depend in any way on the provisions of Russian insolvency law or the appointment of a temporary administrator. It is an ordinary civil claim.

21. On 1 November 2017 the Moscow Arbitrazh Court made an interim order (without notice to the defendants in those proceedings) restraining dealings in shares of O1 Properties. However, it is common ground that this interim order does not have extra-territorial effect so that none of the shares affected by the August transactions have actually been frozen.

22. The claimants' position is that they have not been properly served with the Russian proceedings and that, if and when they are served, those proceedings should be stayed as against them in favour of arbitration. It appears that the Moscow Arbitrazh Court may have taken the view at a hearing on 2 February 2018 that the proceedings had been properly served on the claimants, but at the date of the hearing before me (22 May 2018) it had made no decision about a stay and had not considered the merits of the claim. A further hearing was scheduled for 25 May, but the purpose of that hearing was not apparent.

<B>The LCIA arbitrations</B>

23. On 2 January 2018 Nori and Centimila commenced (or purported to commence) eight arbitrations against the Bank by filing a Request for Arbitration with the LCIA. Two other arbitrations were commenced by Coniston on 14 February 2018. Accordingly there are now ten arbitrations between the parties, one under each of the Pledge Agreements and the Pledge Termination Agreements. The same tribunal, finally constituted on 25 April 2018, has been appointed in each arbitration. I understand that the arbitrations have been or will be consolidated.

24. In the arbitrations the claimants seek declarations that each of the Termination Agreements is valid and that each of the Pledge Agreements has been validly terminated. They seek also an anti-suit injunction such as is sought in the present application before me. By its response, the Bank has indicated that it intends to advance a defence and possible counterclaim based on its contention that the August transactions were fraudulent and that the Termination Agreements are void or should be set aside. However, this is without prejudice to its position that (1) the arbitrations

were improperly commenced because the claimants ought to have filed a separate Request for Arbitration for each arbitration, and (2) the tribunal lacks jurisdiction.

<B>The Cypriot proceedings</B>

25. There are two sets of proceedings in Cyprus. First, on 15 January 2018 Nori and Centimila applied without notice for an order in support of the LCIA arbitrations to prevent the Bank from taking any steps to register any pledges of shares in O1 Properties. The court directed that the application be served on the Bank and dealt with at a hearing <I>inter partes</I>, but no such hearing has yet taken place.

26. Second, on 19 January 2018, the Bank commenced further substantive proceedings in the courts of Cyprus against the claimants and nine others. It alleged that the August transactions were the result of a fraudulent conspiracy to defraud it and that the purchase of the bonds and termination of the loans and pledges were unlawful and void. It sought orders annulling these transactions and restoring the Pledge Agreements and/or damages. Thus the Cypriot proceedings essentially duplicate the Russian proceedings so far as the relief sought and the grounds for such relief are concerned, but they do not depend in any way on insolvency-related issues. So far these proceedings have not progressed. I understand that there is likely to be a hearing of an application by the Bank for interim relief some time later this year.

<B>This application</B>

27. This application for a final anti-suit injunction was made on 20 February 2018 by the issue of an arbitration claim form. The claimants seek an injunction to restrain the further pursuit of the proceedings against them in Russia and Cyprus and requiring the Bank to terminate the proceedings against them. They do so on the ground that the pursuit of those proceedings constitutes a breach of the arbitration clauses in the Pledge Agreements and the Pledge Termination Agreements. They accept, however, that the proceedings will continue in Russia and Cyprus against the other parties sued there and that this will or may mean that the Russian and Cypriot courts have to determine the essential issue between the parties which arises also in the LCIA arbitrations, whether the August transactions were genuine commercial dealings or a fraud carried out by companies in the O1 Group.

<B>Legal framework</B>

28. The legal framework within which this application has to be determined is well established. Where court proceedings are brought (otherwise than in the courts of an EU or Lugano Convention state) in breach of an agreement to arbitrate, the court will generally grant an anti-suit injunction to prevent any further breach unless there are strong reasons not to do so: see <I>The Angelic Grace</I> [1995] 1 Lloyd's Rep 87, in particular <I>per</I> Millett LJ at 96, cited with approval by the Supreme Court in <I>AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC</I> [2013] UKSC 35, [2013] 1 WLR 1889. The court's power to grant such an injunction is derived from section 37 of the Senior Courts Act. It does not depend on whether an arbitration has been or is about to be commenced. When such an injunction is sought, it is for the court to determine whether there is a binding arbitration agreement and whether the pursuit of the foreign proceedings constitutes a breach of the agreement. Moreover, an arbitration agreement is distinct from the

contract of which it forms part and will be binding notwithstanding the invalidity of the main contract unless the ground for invalidating the main contract applies equally to the arbitration agreement: see section 7 of the Arbitration Act 1996 and <I>Fiona Trust & Holding Corporation v Privalov</I> [2007] UKHL 40, [2008] 1 Lloyd's Rep 254.

<B>The issues</B>

29. In the present case there may be an issue about the validity of the arbitration clauses in the Pledge Termination Agreements if (as the Bank alleges) the August transactions were fraudulent. However, I do not need to decide that issue. The arbitration clauses in the original Pledge Agreements are untainted by any allegation of fraud. Those clauses apply to any disputes arising in connection with the Pledge Agreements. There can be no doubt that the disputes which are the subject of the Bank's proceedings in Russia and Cyprus include disputes arising in connection with those agreements. The Bank did not suggest otherwise.

30. Nevertheless the Bank advances five reasons why no injunction should be granted:

(1) Any application for anti-suit relief should be made to the arbitral tribunal now that it has been constituted and the court should not intervene.

(2) The Russian proceedings are not in breach of the arbitration agreements because (a) the arbitration clauses should be construed as not extending to an insolvency claim to set aside a transaction at an undervalue which is within the exclusive jurisdiction of the Moscow Arbitrazh Court and/or (b) such claims are not arbitrable.

(3) There can be no injunction to restrain proceedings in Cyprus, an EU member state: see <I>West Tankers Inc v Allianz SpA</I> (Case C-185/07) [2009] AC 1138.

(4) There are strong reasons why no injunction should be granted, in particular because the Russian and Cyprus proceedings will continue in any event and those jurisdictions comprise the natural forums in which to determine the dispute.

(5) As a matter of discretion there should be no injunction to restrain the Russian proceedings because the claimants have delayed in making this application.

31. I deal with each of these in turn.

(1) <B>The application should be made to the arbitrators</B>

32. Mr Stephen Houseman QC for the Bank submitted that any application for anti-suit relief should be made to the arbitral tribunal which had been constituted since 25 April 2018. He adopted what is said in <I>Merkin & Flannery, The Arbitration Act 1996</I>, 5th ed. (2014) at page 195, as making good procedural sense:

> "What this [the Supreme Court decision in <I>AES</I>] still leaves open is the extent to which, when granting a temporary anti-suit injunction [i.e. under section 37 of the Senior Courts Act 1981], the court is required to have regard to the

matters arising under section 44 (i.e. urgency and the tribunal's inability to act effectively). Our view is that in cases where the tribunal is able in some way to act effectively once constituted, the court should do no more than 'hold the ring' pending the constitution of the tribunal. If the tribunal is unable to act effectively (or there is no arbitration pending), it is hard to see why the section 44 criteria are relevant."

33. Accordingly Mr Houseman submitted that there was no need for the court to intervene and that the court should allow the arbitrators to make their own decision whether to grant an anti-suit injunction or declaratory relief.

34. Mr Stephen Midwinter QC for the claimants submitted that the Bank could not advance this submission while continuing to challenge the jurisdiction of the arbitrators and contending that the arbitrations had been improperly commenced.

35. That arbitrators can grant anti-suit relief on a final basis has been clear since at latest the decision of Cooke J in <I>Starlight Shipping Co v Tai Ping Insurance Co Ltd</I> [2007] EWHC 1893 (Comm) at [24] to [30] and is not affected by anything said in the <I>AES</I> case [2013] UKSC 35, [2013] 1 WLR 1889. Arbitrators can also grant such relief on a provisional basis where the parties so agree, as they do in the case of an LCIA arbitration, although such a provisional order would not qualify as an award capable of recognition or enforcement under the New York Convention: see section 39 of the Arbitration Act 1996, Article 25.2 of the LCIA Rules and<I> Starlight Shipping</I> at [26].

36. Nevertheless it is clear from <I>AES</I> that (in a case outside the Brussels/Lugano regime) the court has jurisdiction to grant anti-suit relief and should ordinarily do so in accordance with the principles summarised above. Where a court has jurisdiction the 1996 Act provides a mechanism for a party who wishes to contend that the jurisdiction should not be exercised because the claim should be decided in arbitration. That mechanism is section 9 which gives effect in domestic law to Article II (3) of the New York Convention.

37. A question might therefore have arisen whether it would have been open to the Bank to obtain a stay of the present claim in favour of arbitration pursuant to section 9 of the 1996 Act. This provides:

> "(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> (2) …
>
> (3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed."

38. A dispute as to whether the pursuit of foreign court proceedings is a breach of an arbitration clause is a matter which falls within the scope of a conventional arbitration clause. It is therefore "a matter which under the agreement is to be referred to arbitration". If that were not so, an arbitral tribunal would not have jurisdiction to order anti-suit relief, as its jurisdiction is limited to determination of the matters which the parties have agreed to refer to it. Accordingly it may be that a defendant to court proceedings claiming anti-suit relief can obtain a mandatory stay of the proceedings under section 9.

39. In practice, however, that does not happen for the obvious reason that the position of the defendant in the court proceedings is that it is not in breach of the arbitration clause, either because that clause is "null and void, inoperative or incapable of being performed" or because it does not apply to the claim in the foreign proceedings. It is hard to see how a defendant to a claim for anti-suit relief could assert that it was entitled to a stay while at the same time denying any breach of the arbitration clause.

40. That is the position here. The Bank denies the jurisdiction of the arbitral tribunal and (at least so far as the Russian proceedings are concerned) denies that its foreign proceedings are in breach of any arbitration clause. In those circumstances it is hard to see how it could have applied for a stay under section 9. In any event it has not done so but has resisted the claimants' claim for anti-suit relief on the merits. It is therefore too late for any application for a stay.

41. Where there has been no application for a stay under section 9 there is no reason why the court should not exercise the jurisdiction to grant anti-suit relief which it undoubtedly has. As Lord Mance explained in the <I>AES</I> case [2013] UKSC 35, [2013] 1 WLR 1889 at [58] to [60], there is nothing in the 1996 Act to abrogate the power to grant an anti-suit injunction or to qualify the established principles for the exercise of that power:

> "58. <I>The Angelic Grace</I> [1995] 1 Lloyd's Rep 87 in particular was a highly prominent decision, expressed in emphatic terms during the very period when the DAC was preparing the Bill for the Act and its own report. Nothing in the DAC report of 1996 addresses either it or the long-standing and well recognised jurisdiction which was its subject matter. Yet a regime under which the English court could no longer enforce the negative rights of a party to a London arbitration agreement by injunctive relief restraining foreign proceedings would have been, and would have been seen, as a radical diminution of the protection afforded by English law to parties to such an arbitration agreement. It would have aroused considerable interest and, no doubt, concern. The only sensible inference is that the drafters of the Act never contemplated that it could or would undermine the established jurisprudence on anti-suit injunctions.
>
> 59. It was only later that the Court of Justice in Luxembourg restricted the use of such injunctions; and then only in relation to foreign proceedings in the area covered by the Brussels/Lugano regime and on the basis of the mutual trust affirmed to exist between courts within that regime. The interest and concern that

this aroused witnesses to the interest that would have been aroused had the Bill or 1996 Act been seen as having any such radical intention or effect in relation to courts worldwide. The <I>West Tankers </I>case (Case C-185/07) [2009] AC 1138 suggests that it did not occur to anyone until this case that it did.

60. The power to stay domestic legal proceedings under section 9 and the power to determine that foreign proceedings are in breach of an arbitration agreement and to injunct their commencement or continuation are in truth opposite and complementary sides of a coin. Subject to the recent European inroad, that remains the position. The general power provided by section 37 of the 1981 Act must be exercised sensitively and, in particular, with due regard for the scheme and terms of the 1996 Act when any arbitration is on foot or proposed. It is also open to a court under section 37, if it thinks fit, to grant any injunction on an interim basis, pending the outcome of current or proposed arbitration proceedings, rather than a final basis. But, for the reasons I have given, it is inconceivable that the 1996 Act intended or should be treated <I>sub silentio</I> as effectively abrogating the protection enjoyed under section 37 in respect of their negative rights under an arbitration agreement by those who stipulate for an arbitration with an English seat."

42. In these circumstances the availability of anti-suit relief from the arbitrators is not a reason for the court to refuse an injunction now. Nor is it appropriate to grant only a limited injunction, in force only until such time as the arbitrators have had a chance to consider whether to grant equivalent relief. If the claimants can establish that the Russian and Cypriot proceedings are brought in breach of the arbitration clause and that an injunction is otherwise appropriate, the appropriate order in circumstances where it is common ground that those proceedings will continue against other parties is a final mandatory order requiring the Bank to discontinue the proceedings as against the claimants.

<B>(2) The Russian proceedings are not in breach of the arbitration agreements</B>

43. Mr Houseman submitted that there was no breach by the Bank in bringing the Russian proceedings because the claims pursued there to set aside the August transactions at an undervalue in the context of insolvency proceedings within the exclusive jurisdiction of the Moscow Arbitrazh Court do not fall within the scope of the arbitration agreements as a matter of construction and/or are not arbitrable as a matter of legal analysis.

44. He submitted first that the appointment of a temporary administrator and the commencement of proceedings to set aside the August transactions pursuant to the provisions of the Bankruptcy Law should be characterised as insolvency proceedings under Russian law. There was a dispute about this between the parties' Russian law experts but nobody suggested that the experts should be called to give oral evidence. It is therefore difficult to determine this issue when both experts are well qualified. However, I will proceed on the basis that Mr Houseman's submission is correct. Nevertheless this can only apply to the claim to set aside the August transactions pursuant to Article 189.40 of the Bankruptcy Law on the ground that they were concluded with unequal consideration. It does not apply to the claim brought pursuant to the provisions of the Russian Federation Civil Code to set the transactions aside as

being an abuse of rights. That is a claim which has nothing to do with Russian insolvency law.

45. From the premise that the Russian proceedings are insolvency proceedings Mr Houseman argued that the rights created by statutory avoidance provisions exist for the benefit of the general body of creditors in an insolvency or insolvency-related context and that a company's pre-insolvency management would not ordinarily contemplate including avoidance claims within the scope of an arbitration agreement. Accordingly, he submitted, an arbitration clause in wide general language should ordinarily be construed as not extending to a claim in insolvency proceedings to avoid a transaction as being a transaction at an undervalue.

46. Alternatively Mr Houseman submitted that the claims made in the Russian proceedings are non-arbitrable, both as a matter of Cypriot law (which the parties agreed was materially the same as English law) and Russian law.

47. For these submissions Mr Houseman relied on the decisions of the Singapore Court of Appeal in <I>Larsen Oil & Gas Pte Ltd v Petroprod Ltd</I> [2011] SGCA 21, [2011] 3 SLR 414 and the English Court of Appeal in <I>Fulham Football Club (1987) Ltd v Richards </I>[2011] EWCA Civ 855, [2012] Ch 333.

48. Mr Midwinter submitted, in outline, that there is no reason to limit the wide and general terms of the parties' arbitration clause, that Russian law (including the way in which claims brought by a temporary administrator under the Bankruptcy Law are characterised under Russian law) is irrelevant to a contract governed by Cypriot law and providing for London arbitration, and that there was no reason why the arbitrators could not determine the parties' dispute, giving effect if appropriate to any Russian law cause of action which the Bank might have. Mr Midwinter also relied on the <I>Fulham</I> case [2011] EWCA Civ 855, [2012] Ch 333.

49. I propose first to examine the authorities and then to deal with the issues of construction and arbitrability in that order.

50. In <I>Larsen Oil & Gas</I> [2011] SGCA 21, [2011] 3 SLR 414 the liquidator of a company applied to set aside payments made to a management company on the ground that they constituted unfair preferences or transactions at an undervalue. The payments had been made pursuant to an agreement containing an arbitration clause. The management company's application for a stay in favour of arbitration was dismissed. As the court noted at [10] of the judgment of V K Rajah JA, the claims made were founded entirely on the provisions of Singapore insolvency legislation. The court held that as a matter of construction the claim was not within the scope of the arbitration clause and that, even if it did fall within the scope of the clause, in any event the claim was not arbitrable.

51. The court's reasoning on the issue of construction appears from [20] and [21] of the judgment:

> "20. The underlying basis for a generous approach towards construing the scope of an arbitration clause is the assumption that commercial parties, as rational business entities, are likely to prefer a dispute resolution system that can deal with all types of claims in a single forum. This assumption is reasonable in relation to

> private remedial claims, which may arise either before or during the period when a company becomes insolvent. It is conceivable that the company's pre-insolvency management would prefer all these claims to be dealt with in a single forum. However, this reasoning cannot be applied to avoidance claims pursued during insolvency proceedings. The commencement of insolvency proceedings results in the company's management being displaced by a liquidator or judicial manager. Since avoidance claims can only be pursued by the liquidators or judicial managers of companies, there is no reason to objectively believe that a company's pre-insolvency management would ordinarily contemplate including avoidance claims within the scope of an arbitration agreement.
>
> 21. For the reasons stated above, it makes sense to draw a line between private remedial claims (either common law or statutory), which the company's pre-insolvency management have good reason to be concerned about, and claims that can only be made by a liquidator/judicial manager of an insolvent company, to which they are completely indifferent. We therefore hold that arbitration clauses should not ordinarily be construed to cover avoidance claims in the absence of express language to the contrary … and that the Arbitration Clause did not cover Petroprod's claims against Larsen."

52. Thus the Singapore Court of Appeal created a general presumption applicable to the construction of arbitration clauses that in the absence of express language (which must be unusual) such clauses do not extend to claims to avoid a transaction made by a liquidator or other office holder in insolvency proceedings.

53. Although recognising at [22] that this conclusion was sufficient to decide the case, the court went on to consider what approach should be adopted towards an arbitration agreement which did expressly apply to such claims. After citing (among other cases) the decision of Judge Weeks QC in <I>Exeter City Association Football Club Ltd v Football Conference Ltd</I> [2004] 1 WLR 2910 in which it was held that certain statutory rights including the right of shareholders to present a winding up petition on the ground of unfair prejudice were "inalienable and cannot be diminished or removed by contract or otherwise", the court stated its conclusions at [45] and [46]:

> "45. A distinction should be drawn between disputes involving an insolvent company that stem from its pre-insolvency rights and obligations, and those that arise only upon the onset of insolvency due to the operation of the insolvency regime. 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 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.

> 46. We, therefore, are of the opinion that the insolvency regime's objective of facilitating claims by the company's creditors against the company and its pre-insolvency management overrides the freedom of the company's pre-insolvency management to choose the forum where such disputes are to be heard. The court should treat disputes arising from the operation of the statutory provisions of the insolvency regime <I>per se</I> as non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement."

54. The court went on to say that different considerations applied to disputes involving an insolvent company stemming from its pre-insolvency rights and obligations. Even there, however, the court considered that there were policy issues militating against giving effect to arbitration agreements between the insolvent company and its contractual counterparties. These included at [48] that "compelling parties to arbitrate inevitably deprives them of their fundamental right of access to the courts" and at [50] that "such agreements should not be allowed to be enforced against the liquidator where the agreement affects the substantive rights of other creditors". The court's conclusion was that when the agreement to arbitrate affected the substantive rights of other creditors it would not be enforced but at [51] that "in instances where the agreement is only to resolve the prior private <I>inter se</I> disputes between the company and another party there will usually be no good reason not to observe the terms of the arbitration agreement".

55. It is not entirely clear, with respect, whether in drawing this distinction between the two categories of cases concerned with pre-insolvency rights and obligations the court intended to lay down a rule about the nature of arbitrable disputes or to indicate how the Singapore courts should exercise their discretion in deciding whether to stay a claim for arbitration. The latter possibility arises because the application before the court was for a discretionary stay pursuant to the Singapore legislation dealing with domestic arbitration – as distinct from international arbitration where it would be mandatory to stay an arbitrable dispute under the New York Convention: see for example [6] of the judgment.

56. The <I>Fulham</I> case [2011] EWCA Civ 855, [2012] Ch 333 was concerned with a petition under section 994 of the Companies Act 2006 to restrain conduct by the Premier League which was alleged to be unfairly prejudicial to the petitioner club. Vos J held that the dispute was arbitrable and stayed the petition under section 9 of the Arbitration Act 1996. The petitioner appealed on the ground that a petition under section 994 was in respect of unfair prejudice which affected the members as a whole and that, either as a matter of construction of the arbitration clause or because the claim was not arbitrable, the petition should be allowed to go ahead. The Court of Appeal dismissed the appeal.

57. Patten LJ dealt first with the issue of arbitrability. He pointed out at [28] that "there is no express provision in either the Arbitration Act 1996 or the Companies Act 2006 which excludes arbitration as a possible means of determining disputes of this kind" and referred to the provision for a mandatory stay contained in section 9. He held at [33] that it was necessary to distinguish between the dispute (i.e. whether there was unfair prejudice) and the relief which might be granted. In the <I>Fulham</I> case [2011] EWCA Civ 855, [2012] Ch 333 the relief sought (an order to restrain Sir David Richards from acting as an agent for a football club and requiring him to resign as chairman of the Premier League) was relief which arbitrators could grant, although

they would not have been able to grant an order for the winding up of the company or an order binding other shareholders who were not parties to the arbitration. Patten LJ's conclusion was that in a case where the relief sought was for an order which the arbitrators had power to make and the dispute was essentially contractual, there was no reason why the dispute should not be arbitrated, but that even where an order (such as a winding up order) was sought which arbitrators had no power to make, they could legitimately decide whether there was unfair prejudice and winding up proceedings should be brought, which proceedings could then be brought before the court.

58. So far as construction was concerned, Patten LJ held that in the absence of any statutory restriction or rule of public policy preventing the parties from agreeing to submit certain types of claim to arbitration, it was impossible to read into the wide language of the arbitration clause any limitation excluding claims for unfair prejudice from its scope.

59. Longmore LJ dealt with the issues in reverse order. In relation to construction, he held that the wide expressions "all disputes" and "all differences" meant what they said, while there was no express or implied prohibition in the Companies Act 2006 to prevent arbitration of a dispute about unfair prejudice. Nor was there any principle of public policy to such effect. The fact that an arbitrator could not give all the remedies which a court could give did not afford any reason for treating an arbitration agreement as of no effect.

60. Turning to the construction of the arbitration clause in the present case, the arbitration clause in the Pledge Agreements is in wide and general terms ("any dispute or disagreement arising under, or in connection with, this Agreement"). Plainly there is no express exclusion of disputes of any kind. In agreement with the approach of the Court of Appeal in the <I>Fulham</I> case [2011] EWCA Civ 855, [2012] Ch 333, I consider that these words mean what they say. Nor is there any 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 being a transaction at an undervalue. It is unnecessary to do so and accordingly the proposed implication fails the standard test of necessity for implication of terms recently reaffirmed in <I>Marks & Spencer Plc v BNP Paribas Securities Services Trust Company (Jersey) Limited</I> [2015] UKSC 72, [2016] AC 742. It is unnecessary because if such matters are not arbitrable as a matter of law, there is no need to imply any exclusion of such claims in the parties' arbitration clause. Conversely, if the general law does not prohibit the arbitration of such claims, the justification for limiting the clause as a matter of construction falls away.

61. It follows in my judgment that the presumption which applies to the construction of arbitration clauses in Singapore, as established by <I>Larsen Oil & Gas</I> [2011] SGCA 21, [2011] 3 SLR 414, does not form part of English law.

62. I deal next with whether the parties' dispute is arbitrable. For this purpose it is irrelevant in my judgment whether the claim is properly characterised as an insolvency claim under Russian law. It is necessary to focus on the nature of the particular claim and to consider whether that claim is capable of being determined in arbitration. In my judgment it plainly is.

63. 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.

64. This view of the matter is in accordance with the decision of the Court of Appeal in the <I>Fulham</I> case [2011] EWCA Civ 855, [2012] Ch 333. The arbitrators can decide whether the claimants defrauded the Bank and, moreover, can grant any remedy to which the Bank may be entitled if they did. There is, in this case, no remedy claimed such as a winding up order which would affect the status of the Bank or which would affect the position of third parties in such a manner as to take the case beyond the consensually derived jurisdiction of the arbitrators. It is not, therefore, a case which needs to be decided in two stages, with the arbitrators deciding the factual issue and leaving the Moscow Arbitrazh Court to decide the remedy to which the Bank is entitled if it can make good its factual case.

65. Again, therefore, I do not accept that the approach of the Singapore Court of Appeal in the <I>Larsen Oil & Gas</I> case [2011] SGCA 21, [2011] 3 SLR 414 is in accordance with English law. As already noted, the reasoning of the court was to some extent (although not entirely) founded upon the decision of Judge Weeks QC in this jurisdiction in <I>Exeter City Association Football Club Ltd v Football Conference Ltd</I> [2004] 1 WLR 2910, which viewed arbitration as a procedure depriving a party of its inalienable rights. This view was picked up in the judgment at [48] with the comment already noted that "compelling parties to arbitrate inevitably deprives them of their fundamental right of access to the courts".

66. However, the decision of HHJ Weeks was not followed in the <I>Fulham</I> case [2011] EWCA Civ 855, [2012] Ch 333 and the view that arbitration represents a deprivation of inalienable rights is with respect a very outmoded view. The days have long gone when arbitration was regarded as an unacceptable "Alsatia … where the King's writ does not run" (see <I>Czarnikow v Roth Schmidt & Co</I> [1922] 2 KB 478 per Scrutton LJ at 488, warning in cataclysmic terms that there was every probability of arbitrators going wrong on questions of law if left to their own devices). The modern view in English law, as is apparent from the Arbitration Act 1996, is that commercial parties who agree to arbitrate do not deprive themselves of fundamental rights. They merely choose an alternative method of resolving disputes between them. The law does not regard arbitration as intrinsically better or worse than litigation. It is just different, having both advantages and disadvantages. Where parties agree to arbitrate, it is the policy of the law that they should be held to their bargain.

67. Accordingly I reject the Bank's submission that the parties' dispute is not arbitrable because one of the ways (but not the only way) in which the Bank puts its case in the Russian proceedings involves a claim initiated by a temporary administrator under Russian insolvency law. It makes no difference, in my judgment, that this way of putting the claim is assigned by Russian law to the jurisdiction of the Moscow Arbitrazh Court.

68. Before leaving this issue I should note that it was not suggested that the Russian proceedings are entitled to recognition under the Cross-Border Insolvency Regulations 2006 (SI 2006 No. 130).

(3) <B>No injunction to restrain proceedings in Cyprus </B>

69. Mr Houseman did not attempt to deny that it was a breach of the arbitration clause for the Bank to pursue its Cypriot proceedings. He maintained, however, that because Cyprus is an EU member state, the decision of the CJEU in <I>West Tankers Inc v Allianz SpA</I> (Case C-185/07) [2009] AC 1138 prevents the grant of an anti-suit injunction to restrain the pursuit of those proceedings. Mr Midwinter accepted that if <I>West Tankers</I> remains good law, no injunction can be granted. He submitted, however, that it does not. He relied on recital 12 of the Recast Brussels Regulation (Council Regulation 1215/2012) and the reasoning of Advocate General Wathelet in <I>Proceedings concerning Gazprom OAO</I> (Case C-536/13), [2015] 1 WLR 4937 as having effectively reversed the decision in<I> West Tankers</I>. Mr Houseman challenged this interpretation of these developments, pointing out that the CJEU in <I>Gazprom</I> did not adopt the Advocate General's Opinion and maintaining that <I>West Tankers</I> remains an authoritative statement of EU law.

70. It is therefore necessary to examine the grounds on which the CJEU held in <I>West Tankers</I> that no injunction can be granted to restrain the pursuit of proceedings in another EU member state and to consider to what extent these grounds have been undermined by subsequent developments.

71. In <I>West Tankers</I> the CJEU began by recalling at [22] that in order to determine whether a dispute falls within the scope of the Brussels Regulation, reference must be made solely to the subject matter of the proceedings. For this it cited <I>Marc Rich & Co AG v Societa Italiana Impianti PA</I> (Case C-190/89) [1992] 1 Lloyd's Rep 342. Applied to the facts of<I> West Tankers</I>, that means that in order to determine whether an application for an anti-suit injunction falls within the scope of the Regulation, what matters is the subject matter of proceedings in which that application is made. Those proceedings, i.e. the English proceedings claiming an injunction, were not within the scope of the Regulation, as the court held at [23].

72. However, that was not the only question. As the court explained at [24]:

> "… even though proceedings do not come within the scope of Regulation No 44/2001, they may have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. This is so, <I>inter alia</I>, where such proceedings prevent a court of another member state from exercising the jurisdiction conferred on it by Regulation No 44/2001."

73. That led on to two further questions, identified at [25]. The first question was whether the Italian proceedings which it was sought to restrain were proceedings within the Regulation. If so, the second question was whether the anti-suit injunction had the

effect of preventing the Italian court from exercising the jurisdiction conferred on it by the Regulation, including the exclusive right to decide for itself whether it had such jurisdiction.

74. The court answered the first of these questions at [26]. Considering the subject matter of the Italian action as a whole, it was obvious that it fell within the Regulation. It was an ordinary civil claim in tort for damages as a result of the shipowners' vessel colliding with a jetty. The only possible complication was the applicability of the arbitration clause in the charterparty, which had given rise to a challenge in Italy to the jurisdiction of the Italian court – that is to say, an application for a stay pursuant to Article II (3) of the New York Convention which the Italian court had not yet determined. The CJEU described this as "a preliminary issue concerning the applicability of an arbitration agreement" and held that this preliminary issue also came within the scope of the Regulation.

75. The court continued at [27] by saying (emphasis added):

> "It follows that the objection of lack of jurisdiction raised by the claimant before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No 44/2001, and that it is <I>therefore</I> exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to articles 1(2)(d) and 5(3) of the Regulation.

76. It may be a possible reading of this paragraph that it was only because the "preliminary issue" fell within the Regulation that it was exclusively for the Italian court to rule on its own jurisdiction. I doubt, however, whether that was what the CJEU meant or intended to say. In circumstances where the claim in the Italian action was an ordinary civil claim in tort, the court was simply making the obvious point that the existence of the "preliminary issue" did not take the Italian action outside the scope of the Regulation and did not affect the fact that it was for the Italian court to rule on whether to exercise jurisdiction under the Regulation.

77. Having answered the first of the two questions, the CJEU had no difficulty in answering the second question, holding at [28] that the use of an anti-suit injunction "necessarily amounts to stripping that court [i.e. the Italian court] of the power to rule on its own jurisdiction under Regulation No 44/2001".

78. The result of the court's answer to these two questions meant that even though the application in England for an anti-suit injunction was not itself within the scope of the Regulation, it was an action with consequences which undermined the effectiveness of the Regulation. From this conclusion the court derived three further points. These were, in essence, illustrations of the way in which the grant of an injunction would undermine the effectiveness of the Regulation.

79. The first, at [29], was that an anti-suit injunction was contrary to "the general principle which emerges from the case law of the Court of Justice on the Brussels Convention, that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it". Second, at [30], "an anti-suit injunction also runs counter to the trust which the member states accord to one another's legal systems and judicial institutions and on which the system of

jurisdiction under Regulation No 44/2001 is based". Third, at [31], an anti-suit injunction would deprive the party enjoined of its right of access to a court having jurisdiction under the Regulation in order to argue that the arbitration agreement was void, inoperative or incapable of being performed, which was a matter for that court to determine in accordance with the New York Convention.

80. Accordingly the fundamental point decided by <I>West Tankers</I> was that a court order which undermined the effectiveness of the Regulation by preventing a court in another member state from deciding for itself whether it had or should exercise jurisdiction under the Regulation was incompatible with the Regulation, regardless of whether the proceedings in which the order was made were themselves within the scope of the Regulation.

81. These conclusions were reaffirmed by the CJEU in <I>Gazprom</I> (Case C-536/13), [2015] 1 WLR 4937, where the court was concerned with the Regulation in its original form. In <I>Gazprom</I> the issue was whether an order by the Lithuanian court recognising and enforcing an anti-suit order made by arbitrators was compatible with the Regulation. The reasoning of the CJEU repeats and affirms the reasoning in <I>West Tankers</I>, which is repeatedly cited:

> "32. It should be recalled that the court held in <I>West Tankers</I> …, that an injunction issued by a court of a member state restraining a party from having recourse to proceedings other than arbitration and from continuing proceedings brought before a court of another member state, which has jurisdiction under Regulation No 44/2001, is not compatible with that Regulation.
>
> 33. An injunction issued by a court of a member state requiring a party to arbitration proceedings not to continue proceedings before a court of another member state is contrary to the general principle which emerges from the case law of the court that every court seised itself determines, under the applicable rules, whether it has jurisdiction to resolve the dispute before it. It should be borne in mind in that regard that Regulation No 44/2001, apart from a few limited exceptions, does not authorise the jurisdiction of a court of a member state to be reviewed by a court in another member state. That jurisdiction is determined directly by the rules laid down by that Regulation, including those relating to its scope. In the case is a court of one member state in a better decision to determine whether the court of another member state has jurisdiction: the <I>West Tankers</I> case, para 29.
>
> 34. The court has held in particular that obstructing, by means of such an injunction, the exercise by a court of a member state of the powers conferred on it by Regulation No 44/2001 runs counter to the trust which the member states accord to one another's legal systems and judicial institutions and liable to bar an applicant who considers that an arbitration agreement is void, inoperative or incapable of being performed from access to the court before which he nevertheless brought proceedings: the <I>West Tankers</I> case … paras 30 and 31."

82. Having affirmed the decision in <I>West Tankers</I>, the CJEU then distinguished it at [35] on the ground that in <I>Gazprom</I> the court was not concerned with an anti-suit injunction by a court in another member state but with recognition and

enforcement of an arbitral award. Different considerations applied in such a case, notwithstanding that the order made by the arbitrators took effect as an anti-suit injunction. In particular, the Regulation governed conflicts of jurisdiction between courts (see [36]), there was no infringement of the principle of mutual trust as that principle applies only between courts ([37]), there was no denial of access to a court as the party enjoined could contest court proceedings for the recognition and enforcement of the award ([38]), and failure by a party to comply with an award was "not capable of resulting in penalties being imposed upon it by a court of another member state". Accordingly recognition and enforcement of the award was not incompatible with the Regulation.

83. It may be that some aspects of this reasoning are open to criticism. For example, recognition and enforcement of an award of injunctive relief (at any rate in this jurisdiction under section 66 of the Arbitration Act 1996) may result in a court order in the same terms which would carry with it the possibility of proceedings for contempt. Be that as it may, however, the decision of the court is crystal clear that an anti-suit injunction ordered by a court is incompatible with the original Brussels Regulation, while an award of arbitrators to the same effect is not, even when made the object of court proceedings for recognition and enforcement of the award.

84. The question arises whether the position is different under the Recast Regulation. As is well known, the decision in <I>West Tankers</I> was controversial. It led to a number of proposals to readjust the relationship between the Regulation and arbitration. The result was a new recital (12) in the Recast Regulation, as follows (with paragraph numbering added):

> "(1) This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.
>
> (4) A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.
>
> (5) On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with [the New York Convention], which takes precedence over this Regulation.
>
> (6) This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators,

the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award."

85. Article 1.2(d) of the Regulation itself continued to exclude arbitration from its scope, while a new Article 73.2 provided that:

> "This Regulation shall not affect the application of the 1958 New York Convention."

86. In my judgment the effect of recital (12) is clear. Effect is given to it by the combination of Article 1.2(d) and Article 73.2 of the Regulation. Thus paragraph (1) affirms the exclusion of arbitration from the scope of the Regulation while making clear that a court with jurisdiction under the Regulation can and should apply Article II (3) of the New York Convention in determining whether to exercise that jurisdiction or to stay the proceedings in favour of arbitration. That determination will result in a ruling, the status of which is dealt with in paragraph (2).

87. Paragraph (2) makes clear that such a ruling is not "subject to the rules of recognition and enforcement laid down in this Regulation". That is a reference to the rule of recognition contained in Chapter III of the Regulation. For this purpose it makes no difference whether the ruling is dealt with "as a principal issue or as an incidental question". As a matter of language there is no reason, and no need, to read paragraph (2) as saying anything more than that a ruling as to the applicability of an arbitration clause on an application for a stay under Article II (3) of the New York Convention is not entitled to recognition or enforcement under the Regulation. That is so regardless of whether or not the ruling is in favour of a stay.

88. If the court rules against a stay, the action on the substantive claim will continue in that court. Paragraph (3) makes clear that, even though the ruling that the claim is not arbitrable is not entitled to recognition or enforcement under the Regulation, the court's judgment on the merits will be. The second sentence of the paragraph explains that this is without prejudice to recognition and enforcement of arbitral awards under the New York Convention, which takes precedence over the Regulation. It contemplates that for the same dispute there may be both a court judgment on the merits and an arbitral award which may conflict with each other, for example if the party whose application for a stay is refused nevertheless commences arbitration. In that event recognition and enforcement of the award under the New York Convention is to take precedence. This is by no means an impossible scenario. It is a theoretical possibility in the present case, if both the arbitration and the Cypriot proceedings were to continue to a decision on the merits reaching opposite conclusions.

89. Finally, paragraph (4) confirms the decision in<I> Marc Rich </I>(Case C-190/89) [1992] 1 Lloyd's Rep 342 that court proceedings ancillary to arbitration, for example for the appointment of an arbitrator, fall within the "arbitration" exception in Article 1.2(d) and thus outside the scope of the Regulation.

90. It may be observed that there is nothing here to undermine, or even to address, the fundamental principles concerning the effectiveness of the Regulation which were affirmed in the <I>West Tankers</I> case and reiterated in <I>Gazprom</I>. Neither the Recast Regulation itself nor its recitals say expressly that those principles no

longer apply or that an anti-suit injunction in support of arbitration issued by a court in a member state takes precedence over them. If the EU legislature intended to reverse the <I>West Tankers</I> decision, it chose an odd way in which to do so.

91. Nevertheless Advocate General Wathelet concluded in <I>Gazprom</I> (Case C-536/13), [2015] 1 WLR 4937 that this was the effect of the Recast Regulation. <I>Gazprom</I> was a case decided under the original Regulation but the Advocate General said at [91] that recital (12) of the Recast Regulation should be taken into account because it was "a retroactive interpretative law [which] explains how that exclusion [i.e. the exclusion of "arbitration" in Article 1.2(d)] must be and always should have been interpreted". Before examining his reasoning further, three points should be noted. First, his views were not adopted by the court. That itself is significant. Second, if recital (12) explained how the original Regulation should always have been interpreted, it must follow that the Recast Regulation did not bring about any change in the law and that (if the Advocate General is right) <I>West Tankers</I>, a decision under the original Regulation, was wrongly decided. There are suggestions in the Advocate General's reasoning that this is indeed what he thought. Third, however, the court in <I>Gazprom</I> plainly regarded <I>West Tankers</I> as a correct statement of the position under the original Regulation. Hence the repetition of its reasoning and the numerous citations referred to above. In my judgment these points alone are sufficient to demonstrate that the opinion of the Advocate General on this issue on was fundamentally flawed.

92. There are with respect further problems with the Advocate General's detailed reasoning. First, he proceeded at [125] on the basis that the provisions of paragraph (2) of recital (12) "correspond to the second option presented by the commission in its impact assessment accompanying its proposal for a recast Regulation, which sought to exclude from the scope of the Regulation any proceedings in which the validity of an arbitration agreement was contested". However, there is no justification for assuming that the terms of what was ultimately enacted corresponded precisely with any of the previous proposals in what was a contentious area.

93. Second, this led the Advocate General to treat paragraph (2) of recital (12) as excluding from the scope of the Regulation any proceedings in which the validity of an arbitration agreement was contested. But that is far too sweeping a statement. Applied to the facts of <I>West Tankers</I>, it would mean that the Italian proceedings, which were proceedings in which the validity of an arbitration agreement was contested, were excluded from the scope of the Regulation in their entirety. That cannot be right.

94. Third, at [127] the Advocate General treated paragraph (2) of recital (12) as excluding a ruling on the validity of an arbitration agreement from the scope of the Regulation. But that is not what the paragraph says. What it says is that such a ruling should not be subject to the rules of recognition and enforcement laid down in the Regulation, that is to say those contained in Chapter III. That is a rather different thing.

95. Fourth, the Advocate General appears to have thought at [128] that (1) the decision in <I>West Tankers</I> depended upon the court's view in [26] that a "preliminary issue" as to the applicability of an arbitration clause fell within the scope of the Regulation and (2) this was no longer the position as a result of paragraph (2) of recital (12) of the Recast Regulation. As already indicated, I cannot accept this

interpretation of the court's judgment in <I>West Tankers</I> which plainly depended on much more fundamental principles underpinning the effectiveness of the Regulation.

96. Fifth, the Advocate General appears to have envisaged at [133] that a case would move in and out of the Brussels Regulation in the course of the proceedings. He said:

> "133. That means that, if the case which gave rise to the judgment in the <I>West Tankers</I> case had been brought under the regime of the Brussels I Regulation (recast), the Tribunale di Siracusa could have been seised on the substance of the case on the basis of that Regulation only from the time when it held that the arbitration agreement was null and void, inoperative or incapable of being performed (which is possible under article II (3) of the 1958 New York Convention)."

97. I cannot accept this. Proceedings are either within the scope of the Regulation or not. The Advocate General's approach is reminiscent of Devlin J's graphic image, admittedly in a very different context, of "liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail" (see <I>Pyrene Co Ltd v Scindia Steam Navigation Co Ltd</I> [1954 1 Lloyd's Rep 321 at 329 rhc), a spectacle which, as he commented, "only the most enthusiastic lawyer could watch with satisfaction". It is hard to imagine a regime less likely to promote legal certainty and predictability which are among the fundamental objectives of the Regulation. It would play havoc with jurisdictional conflicts between courts which depend on knowing which court is first seised.

98. Sixth, the Advocate General thought at [137] that paragraph (4) of recital (12) supported his "conclusion that anti-suit injunctions in support of the arbitration are allowed by the Brussels I Regulation". I do not agree. Paragraph (4) addresses a different point altogether.

99. I conclude that there is nothing in the Recast Regulation to cast doubt on the continuing validity of the decision in <I>West Tankers</I> (Case C-185/07) [2009] AC 1138 which remains an authoritative statement of EU law. For the reasons which I have explained, I respectfully disagree with the opinion to the contrary of Advocate General Wathelet. Accordingly there can be no injunction to restrain the further pursuit of the Bank's proceedings in Cyprus.

100. This does not necessarily mean, however, that the proceedings against the claimants in Cyprus will continue. It may be that the Cyprus court itself will stay the proceedings against the claimants pursuant to Article II (3) of the New York Convention, but that will be a decision for that court to make. Or it may be that in due course the arbitrators will issue an order restraining the further pursuit of the Cypriot proceedings against the claimants. If so, <I>Gazprom</I> shows that such an award will be entitled to recognition and enforcement under the New York Convention even in EU member states.

101. The claimants have an alternative claim for a declaration that they are entitled to an indemnity against (1) any costs incurred by them in connection with the Cypriot proceedings and (2) any liability they are held to owe in those proceedings. It was held in <I>The Alexandros T</I> [2014] EWCA Civ 1010 at [15] to [17] that an

order for an indemnity or an award of damages for the pursuit of proceedings in Greece in breach of an exclusive English jurisdiction clause did not interfere with the Brussels Regulation; and at [21] that as expenses were already being incurred in the Greek proceedings, there was no reason to delay in making such an order. It had previously been held by Flaux J in a judgment in <I>West Tankers</I> itself [2012] EWHC 854 (Comm), [2012] 2 Lloyd's Rep 103 after the decision of the CJEU, that arbitrators have power to award similar relief.

102. The availability of such relief from the arbitrators is a material distinction from the facts of <I>The Alexandros T</I> [2014] EWCA Civ 1010 which was concerned with an exclusive jurisdiction clause. In circumstances where the arbitrators have power to award such relief and the claimants as I understand it intend to ask them to do so, where <I>Gazprom</I> leaves no room for doubt that any award by the arbitrators, whether of an anti-suit injunction or of an indemnity or damages, would not be incompatible with the Brussels Regulation and would be entitled to recognition and enforcement under the New York Convention, and where it is not yet clear whether the Cypriot proceedings will continue against the claimants, it is preferable in my view to defer a decision on this aspect of the claimants' claim. Not surprisingly, the focus of argument at the hearing was on whether an injunction should be granted. The alternative claim received very little attention.

<B>(4) Strong reasons</B>

103. As explained above, the court will generally grant an injunction to restrain the pursuit of foreign proceedings unless there are strong reasons not to do so. The phrase "strong reasons" originated in the speech of Lord Bingham in <I>Donohue v Armco Inc</I> [2002] 1 Lloyd's Rep 425 at [24], a case concerned with breach of an exclusive jurisdiction clause:

> "24. If contracting parties agree to give a particular Court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English Court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word 'ordinarily' to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's <I>prima facie</I> entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case."

104. It was this test which the Supreme Court endorsed as applicable in arbitration cases in <I>AES</I> [2013] UKSC 35, [2013] 1 WLR 1889.

105. It is apparent from Lord Bingham's speech 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 [60] of judgment in <I>AES</I>, 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 <I>forum non conveniens</I>, whereas in arbitration cases a stay under section 9 of the 1996 Act is mandatory. Colman J made this point in <I>Alfred C Toepfer International GmbH v Societe Cargill France</I> [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.

107. Mr Houseman submitted that there are strong reasons to refuse an anti-suit injunction in the present case. He drew attention to the result in <I>Donohue v Armco Inc</I> [2002] 1 Lloyd's Rep 425 where an injunction was refused. The claim in New York by the Armco companies in that case was against four defendants who were alleged to have engaged in a fraudulent conspiracy, only one of whom (Mr Donohue) could rely on an exclusive jurisdiction clause. The New York proceedings would continue against the other alleged conspirators in any event and the interests of justice were best served by the submission of the whole dispute to a single tribunal, namely the New York court. This consideration was held by Lord Bingham at [33] to [36] to outweigh the exclusive jurisdiction clause as a matter of discretion:

> "36. In my opinion, and subject to an important qualification, the ends of justice would be best served by a single composite trial in the only forum in which a single composite trial can be procured, which is New York, and accordingly I find strong reasons for not giving effect to the exclusive jurisdiction clause in favour of Mr Donohue. …"

108. The qualification related to RICO claims in the New York proceedings and is not relevant here.

109. Mr Houseman submitted that the situation here is similar. There are allegations against a number of entities within the O1 Group, only three of which (the claimants) can invoke a London arbitration clause. Other entities such as Leblanc have agreed expressly to the jurisdiction of the Moscow court. The Russian and Cypriot

proceedings will continue in any event and are the appropriate jurisdictions for the dispute to be resolved as its centre of gravity is in Russia and the shares over which the pledges were given are shares of a Cypriot registered company. This is, he submitted, a paradigm case where strong reasons to refuse an injunction exist.

110. Mr Midwinter pointed out that the objective which the House of Lords sought to achieve in <I>Donohue v Armco Inc</I> [2002] 1 Lloyd's Rep 425, namely the submission of the whole dispute to a single forum, is not achievable here regardless of whether an anti-suit injunction is granted. Not only will the proceedings in Russia (and if the Bank is right, Cyprus) continue in any event, so too will the LCIA arbitrations (assuming, that is, that the arbitrators decide that they have jurisdiction).

111. It is convenient to compare the situation which will exist if an anti-suit injunction is granted with the situation if there is no such injunction. If an injunction is granted to restrain the pursuit of the Russian proceedings against the claimants (for the reasons explained above, there can be no injunction in relation to Cyprus) the Russian proceedings will continue against the other defendants which are entities within the O1 Group. The claimants do not suggest otherwise. If no injunction is granted, those proceedings will continue against all defendants, including the claimants. The proceedings in Cyprus may or may not continue against the claimants, but that will be a decision for the Cypriot court. It cannot, however, be assumed that they will.

112. Moreover, although the Bank challenges the jurisdiction of the LCIA arbitrators, it has not so far indicated the grounds of such challenge as it is not yet required to do so under the LCIA Rules. There is an issue about whether the arbitrations have been properly commenced, but that is a point which (if decided adversely to the claimants) can be corrected. More generally, no reason has been suggested why the arbitrators would not have jurisdiction and I can see none. I proceed, therefore, on the basis that there will in any event be proceedings on the merits between the claimants and the Bank before an LCIA arbitral tribunal regardless of whether an injunction is granted.

113. That being so, I accept Mr Midwinter's submission that the present case is materially different from<I> Donohue v Armco Inc</I> [2002] 1 Lloyd's Rep 425 because it is not possible to achieve submission of the whole dispute to a single forum. In those circumstances the parties' agreement to arbitrate is in my judgment the decisive factor. Some degree of fragmentation is unavoidable but, as I pointed out in <I>SCM Financial Overseas Ltd v Raga Establishment Ltd</I> [2018] EWHC 1008 (Comm) at [66], it is common for a dispute to involve multiple parties, some but not all of whom have contracts containing arbitration clauses. In such circumstances a party is entitled to a mandatory stay of domestic court proceedings notwithstanding that court proceedings will continue against other parties. If a mandatory stay of domestic proceedings and an injunction to restrain foreign proceedings are indeed opposite and complementary sides of a coin, fragmentation of proceedings does not provide a strong reason to refuse an injunction.

114. I conclude, therefore, that the Bank has failed to discharge the burden of showing that there are strong reasons to refuse an injunction in this case.

<B>(5) Delay</B>

115. Finally, Mr Houseman submitted that an injunction to restrain pursuit of the Russian (but not the Cypriot) proceedings should be refused because there had been delay by the claimants. Realistically, he acknowledged that if his previous points did not succeed, delay was unlikely to succeed as an independent ground.

116. It has been clear since at least <I>The Angelic Grace</I> [1995] 1 Lloyd's Rep 87 that an injunction may be refused where there has been delay. As has been seen, Lord Bingham referred to this factor in<I> Donohue v Armco Inc</I> [2002] 1 Lloyd's Rep 425 at [24]. More recently, the Court of Appeal returned to this topic in <I>Ecobank Transnational Inc v Tanoh</I> [2015] EWCA Civ 1309, [2016] 1 WLR 2231.

117. In the present case the claimants received a pre-action letter from the bank on 27 September 2017 and the Russian proceedings were commenced on 31 October 2017 followed by a without notice order from the Moscow Arbitrazh Court on 1 November 2017. In January 2018 the LCIA arbitrations were commenced, as were both sets of proceedings in the Cypriot courts. This application for an anti-suit injunction was made on 20 February 2018 when the arbitration claim form was issued. At that time the Russian proceedings had not advanced significantly. The Cypriot proceedings had only just begun.

118. In my judgment there has been no real delay in the making of this application or, to the extent that there has, it is outweighed by the claimants' entitlement to rely on their right to arbitration. Accordingly I would not refuse relief on the ground of delay.

<B>Disposal</B>

119. For the reasons explained above:

(1) The Bank must discontinue (or take whatever is the equivalent procedural step to terminate) the Russian proceedings as against the claimants.

(2) The Bank must not commence proceedings against the claimants seeking the same or equivalent relief in any court of a state which is not a member of the European Union or a party to the Lugano Convention.

(3) The claimants' application for an injunction to restrain the pursuit of the Bank's proceedings in Cyprus is dismissed.

(4) The claimants' application for a declaration that they are entitled to be indemnified and/or for damages in respect of the Bank's proceedings in Cyprus is deferred.