IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
OF ENGLAND & WALES
COMMERCIAL COURT (KBD)

No. CL-2023-000516

[2023] EWHC 2510 (Comm)

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday 31 August 2023

Before:

THE HON. MR JUSTICE BRYAN

B E T W E E N :

COMMERZBANK AG — Claimant

- and -

RUSCHEMALLIANCE LLC — Defendant

MR P MCGRATH KC and MR M GREGOIRE (instructed by Allen & Overy LLP) appeared on behalf of the Claimant.

THE DEFENDANT did not appear and was not represented.

Hearing date: 31 August 2023

APPROVED JUDGMENT

MR JUSTICE BRYAN:

1 There is before me this afternoon an urgent without notice application under section 37(1) of the Senior Courts Act 1981 ("the SCA 1981") for an interim anti-suit injunction ("ASI") seeking to restrain the Respondent ("RusChem") from pursuing proceedings before the Arbitrazh Court of St. Petersburg and Leningrad Oblast ("the Arbitrazh Court") against Commerzbank in breach of an arbitration agreement ("the Arbitration Agreement") contained in an On Demand Performance Bond dated 1 October 2021 ("the Bond").

2 The background to this application is set out in the first witness statement of Andrew Alaistair William McGregor of 30 August 2023. Commerzbank is a financial institution incorporated under the laws of the Federal Republic of Germany. The defendant, RusChem, is a company incorporated under the laws of the Russian Federation.

3 On 25 October 2011, Commerzbank entered into a German law governed guarantee and a letter of credit facility with Linde GmBH ("Linde"), which has been amended several times ("the Guarantee Facility Agreement"). Pursuant to clause 1 of the Guarantee Facility Agreement, Commerzbank guaranteed a facility of €466,800,000 to Linde in connection with Linde's Ust-Luga GPP and LNG project ("the Ust-Luga Project").

4 On 28 September 2021, pursuant to the Guarantee Facility Agreement, Linde sent Commerzbank an instruction to issue an on-demand performance bond in the amount of €93,477,156.55 in favour of RusChem. The instruction refers to an engineering, procurement and construction contract entered into by Linde and RusChem on 9 September 2021 in relation to a liquified natural gas processing plant in the Leningrad region of the Russian Federation, as part of the Ust-Luga project ("the EPC Contract").

5 In terms of the draft provided by Linde, Commerzbank issued the Bond on 1 October 2021. The Bond was transmitted via Swift to Gazprombank as RusChem's bank. The key terms of the Bond include clauses 11 and 12. Clause 11 provides:

> "This bond and all non-contractual or other obligations arising out of or in connection with it shall be construed under and governed by English law."

6 Clause 12 provides:

> "In case of dispute arising between the Parties about the validity, interpretation or performance of the Bond, the Parties shall cooperate with diligence and in good faith to attempt to find an amicable solution. All disputes arising out of or in connection with the Bond (which cannot be resolved amicably) shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (ICC) by one or more arbitrators appointed in accordance with the said ICC's Rules. The place of arbitration shall be Paris and the language to be used in the arbitral proceedings shall be English."

7 It will be seen therefore that English law is the law governing the Bond, per Clause 11, and, per Clause 12, if the parties are unable to resolve a dispute arising out of or in connection with the Bond amicably, they had agreed to refer such dispute to arbitration seated in Paris, conducted in English with an arbitral tribunal appointed in accordance with the ICC Rules.

8 At the time of the issuance of the Bond, no EU sanctions applied to any of the entities involved in the transaction or the sector at issue. However, that changed in 2022 following the Russian invasion of Ukraine.

9 The evidence before me from Mr McGregor, on information from his German colleagues, is that, due to changes in the sanctions regime, Linde suspended work on the Ust-Luga Project as of 28 May 2022, after it received confirmation from the German Federal Office for

Economic Affairs and Export Control that the export of liquefied natural gas from the processing plant was prohibited from 28 May 2022 under Article 3(b) [3] of Council Regulation (EU) 833/2014.

10 On 27 April 2023, Commerzbank received a SWIFT message from Gazprom, on behalf of RusChem, demanding full payment under the Bond. In response, Commerzbank stated, on 4 May 2023, that it was legally prohibited from making the payment due to EU sanctions, in particular Article 11 of Council Regulation (EU) 833/2014. RusChem disagreed with Commerzbank's position and issued a notice of dispute on 26 May 2023, stating that the non-payment was a violation of the terms of the Bond and English law (as its applicable law). Commerzbank responded to this notice on 2 June 2023, stating that, as an international bank, it was aware of the nature of its obligations under the Bond, but could only fulfil them within the framework of the applicable law.

11 Following the exchange between RusChem and Commerzbank, on or about 29 June 2023, RusChem commenced the Russian proceedings. In the Russian proceedings, RusChem invites the Arbitrazh Court of St. Petersburg and Leningrad Oblast to assume jurisdiction over the dispute and grant the following reliefs:

(a) an order requiring Commerzbank to pay €93,477,156.55 under the Bond;

(b) an order requiring Commerzbank to pay a late payment interest of €211,283.98 (as of the date of the filing of the statement of claim); and

(c) an order requiring Commerzbank to pay further interest for delay in making payments under the Bond for the period from the date of filing the statement of claim to the date of the actual fulfilment of obligations by Commerzbank.

12 In its statement of claim in the Russian Proceedings, RusChem also makes explicit reference to the existence of the Arbitration Agreement. RusChem expressly recognises that the Arbitration Agreement was agreed by the parties and implicitly recognises it covers the dispute which is the subject matter of the Russian Proceedings. However, RusChem maintains that the Arbitration Agreement is unenforceable because it impairs RusChem's access to justice. In this regard, RusChem specifically argues that:

(a) the existence of sanctions imposed on it is sufficient for it to unilaterally transfer any disputes to Russia;
(b) it has serious doubts that the resolution of the dispute in a State applying sanctions against Russian (i.e. France) will be fair and impartial; and
(c) its legal representation would be impaired due to restrictions on cross-border payments from Russia.

13 The evidence before me is that RusChem sent the statement of claim by courier, which Commerzbank received on 17 July 2023. Again, the evidence before me, which is recounted by Mr McGregor in relation to another fee-earner qualified to give advice on Russian law, Igor Gorchakov, is that this does not qualify as valid service of process under Russian law. Mr Gorchakov has accessed the publicly available Russian court database and the Arbitrazh Court of St Petersburg and Leningrad Oblast accepted the statement of claim on 11 July 2023 and scheduled a preliminary hearing for 24 January 2024.

14 However, by order of 28 July 2023, at RusChem's request, the Arbitrazh Court rescheduled the date of the preliminary hearing to 18 October 2023 and then, on 24 August 2023, Commerzbank were served by the Local Court, Frankfurt, through judicial assistance, in accordance with the procedure to effect valid service of process. According to the court

order served, the preliminary hearing is scheduled for 24 January 2024, but the evidence before me is that, as at the date of the witness statement of Mr McGregor, Commerzbank would be compelled to appear in the Russian proceedings currently scheduled for 18 October.

15 The evidence before me from Mr Gorchakov, as recounted by Mr McGregor, is that if Commerzbank were not to appear at such a hearing, there is a risk that the Arbitrazh Court of St Petersburg and Leningrad Oblast may issue its judgment *ex parte*. Mr McGregor makes clear that Commerzbank has not taken any steps in respect of the Russian proceedings and has no intention to submit to the jurisdiction of the Arbitrazh Court of St Petersburg and Leningrad Oblast. The consequence though of a potential hearing on 18 October is that that court could grant some relief to RusChem as at that time.

16 Commerzbank is also concerned that there is a possibility that even those proceedings could further be brought forward. It is against that background that Commerzbank submitted that unless RusChem is restrained from continuing those proceedings, Commerzbank will be denied its English law contractual right to have the dispute resolved as per the Arbitration Agreement and runs the very real risk of being subject to some form of default judgment unless Commerzbank is forced to submit to the Russian jurisdiction.

17 It is against that backdrop that Commerzbank submits to me, firstly, that this matter is urgent and should be heard urgently and, secondly, that it should be heard on a without notice basis. I am satisfied that this matter is urgent and should also be heard on a without notice basis, because if the matter was on notice to RusChem and/or indeed was on an *inter partes* basis with RusChem, there would be a real risk that RusChem would take steps to prevent anti-suit relief being granted by taking steps in Russia to obtain an order seeking to

prevent any such steps being taken. In those circumstances, I have heard this matter urgently today as the Vacation Commercial Court Judge, and have also been satisfied that it is appropriate to proceed on a without notice basis.

18 The applicable principles in relation to granting anti-suit relief are well known. It is now well established that anti-suit injunctions can be granted in support of arbitration proceedings and to restrain the breach of an agreement to arbitrate. This has been clear since the decision of the Court of Appeal in *The Angelic Grace* [1995] 1 Lloyd's Rep 87, where Millett LJ made it clear that as long as an application is made promptly and there are no exceptional circumstances, an anti-suit will be granted as a matter of course:

> "In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause as in *Continental Bank NA v. Aeakos Compania Naviera S.A.,* [1994] 1 W.L.R. 588. The justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case."

19 I am satisfied that the authorities since *The Angelic Grace* are fairly summarised by Professor Merkin in *Arbitration Law* at [8.94], as follows:

> "Although the criteria for the grant of an anti-suit injunction are generally strict, the conditions are relaxed where the purpose of the injunction is to prevent the defendant from commencing proceedings in breach of a contractual provision in the form of an arbitration clause or an exclusive jurisdiction clause. The general effect of the authorities … is that an anti-suit injunction will readily be granted if: (a) the claimant can demonstrate with a high degree of probability the existence of an arbitration clause to which the defendant is a party and

> which covers the dispute; and (b) there are no exceptional circumstances which militate against the grant of relief."

20 I will foreshadow at this point that I am satisfied to a high degree of probability that the relevant agreement exists in this case and has the terms, including Clauses 11 and 12, that I have identified; it is subject to English law and subject to ICC Arbitration in Paris. I am also satisfied that the Arbitration Agreement itself is subject to English law so far as this court is concerned, in the light of the case of *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, *per* Lord Hamblen and Lord Leggatt at [170] and *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48 *per* Lord Hamblen and Lord Leggatt at [35] and [39]. This is, I am satisfied, so even though it is possible that a French court might take a different view about the law of the Arbitration Agreement. (See *Enka* at [170(vi)]).

21 I am also satisfied to a high degree of probability that the proceedings that have been commenced in the Arbitrazh Courts are a breach of the Arbitration Agreement and/or of the agreement itself. It follows that, in principle, the agreement should be honoured and if this court has jurisdiction, it will generally give its support to a party wishing to ensure that an agreement is honoured by its counterparty. This includes arbitration agreements.

22 I am also satisfied that Commerzbank has acted promptly following the commencement of the proceedings in Russia and the service of the statement of claim therein, so delay is not a factor in this case.

23 Therefore, subject to addressing matters in relation to jurisdiction and whether, overall, it is just and convenient to grant an injunction under section 37, *prima facie*, this would be an archetypal case for the granting of anti-suit relief in the form in which it is taken. The only additional factor which would need to be considered is the fact that the seat of the arbitration

is not London, not in England, but is in Paris, and that is a matter which needs to be addressed.

24 At first blush, it might be thought that the present application is a relatively straightforward application for the granting of an interim anti-suit injunction. However, this is not the only case which has arisen recently in relation to which such issues have arisen. There have been two recent cases of the Commercial Court in the last few weeks, and in relation to not dissimilar factual scenarios. The first of these is another application brought by a different bank in relation to performance bonds akin to the Bonds issued by Commerzbank in relation to the Ust-Luga project. That was considered by Bright J in the case of *SQD v QYP* [2023] EWHC 2145 (Comm). In that case, Bright J was not willing to grant an anti-suit injunction in circumstances where the agreement was governed by English law, as was the Arbitration Agreement, but the seat was, as in this case, in Paris. It will be necessary to return to that case in due course.

25 Commerzbank says, as I address in due course below, that whether or not the decision of *SQD* is rightly decided, there are distinguishing factors between that case and this case, as a result of which it is appropriate in this case to grant anti-suit relief. I foreshadow at this point that one important difference between this case and *SQD* is that, although there was some expert evidence as to French law which had been obtained overnight during the course of the hearing in that case, I have had the benefit of a detailed expert report, to which I will refer in due course, from Professor Audit, a professor at the Sorbonne, which expresses very different views, and reaches very different conclusions, as to the position under French law.

26 Turning to the applicable legal principles, the starting point is that the English court must have personal jurisdiction over RusChem under CPR 6.36 and 6.37 (see *Ust-Kamenogorsk*

Hydropower Plant JSC v AER Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35 ("*Ust*") in which Lord Mance said, at [48]:

> "Where an injunction is sought to restrain foreign proceedings in breach of an arbitration agreement - whether on an interim or a final basis and whether at a time when arbitral proceedings are or are not on foot or proposed - the source of the power to grant such an injunction is to be found not in section 44 of the 1996 Act, but in section 37 of the 1981 Act. Such an injunction is not "for the purposes of and in relation to arbitral proceedings", but for the purposes of and in relation to the negative promise contained in the arbitration agreement not to bring foreign proceedings, which applies and is enforceable regardless of whether or not arbitral proceedings are on foot or proposed."

27 I am satisfied in this case that CPR Practice Direction 6B, [3.1](6)(c) applies because the ASI application is made in respect of the Arbitration Agreement and the Bond, and the Arbitration Agreement is a contract governed by English law as I have already foreshadowed by reference to *Enka per* Lord Hamblen and Lord Leggatt at [170] and *Kabab-Ji SAL* supra per Lord Hamblen and Lord Leggatt at [35] and [39], notwithstanding that French law may take a different view (see *Kabab-Ji* [2023] ILPr 6, to which I was expressly taken).

28 I am also satisfied that England and Wales is the proper place to bring the claim for an anti-suit injunction because:

(a) both the Arbitration Agreement and the Bond are governed by English law;

(b) as I will come on to address in a moment, English law provides a juridical advantage in the form of an anti-suit injunction which the French courts do not; and

(c) neither Russia (which appears to have accepted the initiation of proceedings notwithstanding clause 12 of the Bond), nor France (which cannot offer the type of

relief sought, nor, I interpose, any relief according to Professor Audit) are the proper places to obtain the type of relief sought.

29 I do not consider, for reasons which I will develop in due course, that such factors are trumped by reference to Paris being the seat of the putative arbitration (contrast *SQD* at [92] to [93]).

30 In terms of potential avenues of redress, Mr McGrath, who appears on behalf of Commerzbank, identifies in his skeleton argument that, conceptually, there would be four potential avenues of redress, but, on closer examination, only one is, in fact, available, and I agree that that is the position:

(1) It is plainly futile to take steps in Russia;

(2) as I will come on to, the expert evidence of Professor Audit is that no appropriate relief is available from the French court;

(3) the ICC is not able to act without notice; but

(4) appropriate relief, in the form of the anti-suit injunction, is available, in principle, under English law on *Angelic Grace* principles.

31 Turning then from jurisdiction, in circumstances where I am satisfied that the English court does have personal jurisdiction over RusChem, the power to grant anti-suit injunctions is that given under section 37(1) of the SCA 1981. Section 37(1) of the SCA 1981 provides as follows:

> "The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."

32 As already noted and quoted from Lord Mance at [48] in *Ust*, the power extends to granting an injunction sought to restrain foreign proceedings in breach of an arbitration agreement whether on an interim or final basis and whether at the time when the arbitral proceedings are or are not on foot or proposed.

33 Turning in a little more detail to the applicable principles in relation to the exercise of jurisdiction to grant an anti-suit injunction, the underlying principle is that the jurisdiction is to be exercised "where it appropriate to avoid injustice" (*Castanho v Brown and Root (UK) Ltd* [1981] AC 557 at [573]). The leading authority, as already identified, is that of *The Angelic Grace*. The principles set out in *The Angelic Grace* have been followed in numerous subsequent cases,

34 The key issue that arises in this case is as to the relevance of the seat of the arbitration being in Paris, and whether or not that gives rise to exceptional circumstances. The submission of Commerzbank is that there are no exceptional circumstances in this case and that it is appropriate to grant an interim anti-suit injunction. Mr McGrath accepts, and recognises, that the many authorities following *The Angelic Grace* are cases in which the seat of the arbitration was in England, but he submits that that does not conceptually mean that it is not just and convenient to grant an anti-suit injunction where there is an agreement governed by English law and there is an agreement to arbitrate governed by English law. He points out, rightly, that the approach of the English courts is that parties should be held to their contractual bargain and that agreements to arbitrate should be upheld. A related point in

relation to that is that England and other jurisdictions, including France, are signatories to the New York Convention and the regime in relation to arbitration agreements and their recognition thereunder.

35 I turn then to consider when the English court will exercise the jurisdiction to grant anti-suit relief. I am satisfied that the position is as follows:

(1) The jurisdiction "may be exercised by the English court regardless of whether it is the court at the seat of the arbitration or the agreed forum under an exclusive jurisdiction clause as long as there is *in personam* jurisdiction over the defendant". (See *Gee on Commercial Injunctions* at [14]-[021], citing *LV Finance Group v IPOC International Growth Fund Ltd* [2006] Bda LR 69, affirmed on appeal [2007] Bda LR 43). This was "accepted [by both parties] as a matter of correctness as a matter of English law" and adopted without demur before the Court of Appeal in *Enka v Chubb* [2020] EWCA Civ 574; [2020] BLR 1688 at [56]. The same view has been reached by the BVI courts. (See *Finecroft Ltd v Lamone Trading Corp.* BVIHCV2005/264, High Court, 27 April 2006.) I have been taken by Mr McGrath both to the passage in *Gee*, the *IPOC* decision, the *Finecroft* decision and the judgment of the Court of Appeal in *Enka v Chubb*, and I am satisfied that the propositions that I have just identified are made out in those cases. I consider that, in those circumstances, whilst the seat may be of some relevance, its overall relevance is likely to be limited.

(2) This is consistent with the fact that an anti-suit injunction is grounded "not upon any pretention to the exercise of judicial … rights abroad" but on the fact that the party to whom the order is directed is subject to the *in personam* jurisdiction of the English

court. (See *Portarlington v Soulby* (1834) 3 My & K 104 at [108] *per* Lord Brougham LC and Dicey & Morris at [12-122] and Gee on Commercial Injunctions at [14-004]).

(3) As such, while comity may be decisive where the English court is asked to grant an anti-suit injunction when the case has no relevant connection with England, I do not consider there is any special need for caution beyond the normal care required before granting an injunction where it is sought in the context of an agreement to refer disputes to the exclusive jurisdiction of the English court or to arbitration (*per* the principles in *Angelic Grace* itself), as also referred to in *Dicey & Morris* at [12-145] and *Merkin on Arbitration Law* at [8.94]. On the contrary, as is explained by *Dicey & Morris* at [12-150], strong reasons are required to outweigh the *prima facie* entitlement to an injunction in those circumstances.

(4) I am satisfied that, in this case, there is a real reason to involve the English court in applying English law. As I have already identified, the three other potential routes to remedy are foreclosed and the negative promise not to sue in a foreign jurisdiction contained within the Arbitration Agreement gives rise to rights under English law. I consider that the English court is plainly the proper forum to provide relief in respect of such rights.

36 I turn then to the case of *SQD*. In that case, in which Bright J refused an interim anti-suit injunction, Bright J placed great emphasis on the fact that the "seat of the arbitration is not in this jurisdiction", which he described as the "critical point". He considered that this was relevant, both to the jurisdictional question of whether England and Wales was a proper place to seek the relief sought under CPR 6.37 (see *SQD* at [92] - [93]) and as to whether it

could constitute "exceptional circumstances" which militate against the grant of the relief as part of the exercise of the court's discretion. (See *SQD* at [36]).

37 Mr McGrath, on behalf of Commerzbank, submits that the logic of Bright J's approach and reasoning leads to what he characterises as an extraordinary conclusion:

(1) Neither the English nor the French court could take any steps at all to prevent the Russian Proceedings in breach of the Arbitration Agreement, thereby enabling RusChem to continue with impunity. It is submitted that that is not an attractive conclusion.

(2) The French courts, acting in their capacity as the seat of the putative arbitration, would not grant an anti-suit injunction to prevent a breach of the Arbitration Agreement, but would, according to *SQD*, countenance granting an anti-ASI to defeat Commerzbank's attempts to facilitate adherence to the Arbitration Agreement. (See *SQD* at [86]).

(3) Even if, which Commerzbank submits is not the case, French law held some "philosophical" aversion to anti-suit injunctions (see *SQD* at [82]), Commerzbank submits that it would be remarkable to suggest that such a stance would outweigh the pro-arbitration policy of a signatory to the New York Convention of giving effect to the parties' agreement to arbitrate.

38 I understand that Bright J gave permission to appeal the refusal of the anti-suit injunction and that this is likely to lead to an appeal which will be heard by the Court of Appeal in the early part of September. Much of what Bright J said was in the context of section 44 of the Arbitration Act and also was strongly predicated on the limited evidence as to French law which was before him.

39 I consider that the decision in *SQD* is distinguishable from the present because I have much fuller and different French law advice. I consider that if Bright J had the French advice that is before me today, and accepted such advice, then that would have significantly impacted upon a number of paragraphs of the reasoning in his judgment. I consider that I must determine the application before me based on the evidence that is before me today, in particular the evidence as to French law, which puts a very different complexion upon the position so far as French law is concerned.

40 I turn at this point, therefore, to identify the French law evidence that is before me. That evidence is given by Mathias Audit, who, as I have already noted, is a professor at the Sorbonne Law School, University of Paris 1. He is also a French-qualified lawyer and partner in the law firm Audit Duprey Fekl in Paris, France. He has been provided with various documents which include the anonymised judgment of Bright J in *SQD*. He sets out the relevant factual background in similar terms to that which I have recounted, accurately, and he is then asked two questions:

(a) Will a French court grant interim relief to safeguard an arbitration seated in Paris but otherwise unrelated to France?

(b) Are French courts hostile to anti-suit injunctions and would they recognise an interim anti-suit injunction issued by this court to safeguard arbitral proceedings seated in France?

41 His report is worthy of reading and consideration in full, but he summarises the position so far as the French courts are concerned, concerning their jurisdiction to grant pre-arbitration interim relief, at [25], where he states as follows:

> "• The seat of the arbitration is not relevant to determine their jurisdiction to order interim relief under Article 1449 of the *Code de procédure civile.*
>
> • Rather, the French courts' jurisdiction to order relief under Article 1449 depends on whether France is a proper forum according to the usual French principles of conflict of laws."

42 He then turns to answer the question whether, in the present circumstances, the French courts, applying that test, would consider that they are empowered to order any form of pre-arbitration interim relief, and he answers that in the negative in [27], for reasons which he then sets out.

43 At [28], he states:

> "Based on the foregoing, I am of the view that French courts will consider that they lack jurisdiction to entertain any application for pre-arbitration interim relief from the Claimant against the Respondent."

44 At [29]:

> "In other words, French courts would fundamentally consider that it is not their place to intervene in the present configuration."

45 He then expresses his conclusion on the first of the questions as follows, at [30]:

> "Consequently, I believe that, while Mr Justice Bright's reasoning has my utmost deference, his concerns over 'a conflict or clash' with French courts or that 'the support of this court would be unwelcome' are ill-founded. Despite the seat of the arbitration being in Paris, French arbitration law does not consider that, at this stage, French courts should be the ones to deal with this situation here, i.e. a situation that presents no link to France other than the seat."

46 He then addresses the question of whether the French courts are hostile to anti-suit injunctions, and would they recognise an interim anti-suit injunction issued by this Court to safeguard arbitral proceedings seated in France. He makes a preliminary point at [32] of his report, where he stresses that the French courts may well never have to consider the question of recognition of this Court's potential anti-suit injunction. He posits what interest could there be for the claimant, or the respondent for that matter, to apply to a French court for the recognition of this court's anti-suit injunction order? In commercial matters, the recognition of a foreign judgment is generally a pre-requisite for a party wishing to avail itself locally of the effects of that foreign judgment, through the attachment of local assets for example.

47 In the present case, however, he points out that he does not envisage a scenario where the claimant would have any interest in applying to a French court for the recognition of an anti-suit injunction issued against a Russian party and targeting proceedings pending in the Russian Federation. Moreover, even if the claimant wanted to produce the anti-suit injunction order before the Paris-seated arbitral tribunal, there is no rule in French arbitration law that requires a party wishing to produce a foreign judgment before an arbitral court to have that judgment recognised by the French courts.

48 He then states as follows at [33]:

> "Because of this, the question of the reception by French courts of this court's anti-suit injunction order is, at best, hypothetical. Having said that, if that hypothesis were to materialise, I am of the view the French courts would recognise the anti-suit injunction order for the reasons set out hereinafter."

49 He then goes on to address that issue. At [36], he states that the French courts are not fundamentally hostile to the concepts of anti-suit injunctions and that they have had no issue recognising foreign anti-suit injunction orders in the circumstances that he identified. He

refers to Bright J's stating in his judgment that French law has a "philosophical objection to anti-suit injunction" ([82]) and that:

> "The seat of the arbitration being Paris, the procedural law that the parties have agreed upon is French law. I therefore understand this to be a case where the French court would not enforce an interim [anti-suit injunction] granted by this court, were I to grant one. On the contrary, if requested to do so in its capacity of court of the seat of the arbitration, the French court might well grant an anti-[anti-suit-injunction]." (*SQD* at [86].)

50 Professor Audit states as follows at [38]:

> "I respectfully disagree with Mr Justice Bright's reading of French law in this respect, for essentially two reasons.
>
> First, it is a matter of fact there have been precedents where French courts have recognised foreign anti-suit injunctions."

51 He refers to a decision of the *Cour de Cassation* published in its 2009 Bulletin (the *Cour de Cassation* being, of course, the highest French civil court), where they stated:

> "… does not contradict international public order the "anti-suit-injunction" whose purposes, outside the scope of conventions or of Community [EU] law, is to sanction the breach of a pre-existing contractual obligation."

52 After referring to the facts of that case, the *Cour de Cassation* upheld the decision of the lower Versailles *cour d'appel*, recognising the anti-suit injunction issued by the Georgian court. Since that decision, the Paris *cour d'appel* has also reiterated this solution on several occasions. He refers to in 2019, the Paris *cour d'appel* upholding a first instance decision recognising an anti-suit injunction issued by a Californian court. In that case, the US court had issued the injunction to safeguard a contractual clause granting exclusive jurisdiction to the courts of California after a party had commenced litigation in France in breach of that clause. In doing so, the Paris *cour d'appel* stated as follows:

> "Outside the scope of conventions or community law, a so-called anti-suit injunction **whose purpose is only to sanction the breach of a pre-existing contractual obligations is not contrary to the French conception of international public order**." (emphasis added)

53 At [45], he concludes as follows:

> "In light of the foregoing, it is my opinion that French law does not have any 'philosophical objection' to anti-suit injunctions."

54 Then, at [46], he sets out as follows (in what I consider to be an important paragraph):

> "A French court would perhaps be even further inclined to recognise an anti-suit injunction issued by a United Kingdom ('UK') court [for that, I understand him to mean a Court of England and Wales] in a situation where their respective interests are aligned. I believe that would be the case here for two reasons:
>
> - First, the anti-suit injunction would be rendered to safeguard arbitral proceedings seated in France – a jurisdiction known to be a favourable venue for arbitration – in assessing where French courts are not empowered to order any interim relief. As a result, an anti-suit injunction issued by UK courts would be in line with the French 'vision' and would not, in my opinion, be deemed to contradict the 'French conception of international public order'.
>
> - Second, in the context of the international sanctions enacted against the Russian Federation following the invasion of Ukraine, the interests of French and English legal orders may be even more aligned. The anti-suit injunction would prevent the Respondent from litigating claims before the Russian courts in breach of the Bond's arbitration agreement. Ultimately, if French courts were to refuse to recognise such an anti-suit injunction, they would act against the EU and French sanctions policy – designed to undermine the Russian Federation's abilities to pursue its aggression war against Ukraine – and thus undermine French and EU public policy. It cannot be excluded that a potential adverse decision rendered by the Arbitrazh (Commercial) Court would ground attachment proceedings against the Claimant, an EU corporation."

55 Professor Audit then expresses his opinion, at [47], that he believes that the French courts would welcome within the French legal order the anti-suit injunctions issued by UK courts to safeguard an arbitration agreement. He then moved on to address a decision of the Paris

cour d'appel in 2020, based on which Bright J considered that the French courts would be reluctant to recognise an anti-suit injunction issued by a foreign court. He expresses the opinion that that decision does not contradict the abovementioned decisions. He identifies that that decision was dealing with a different setting at [48]:

> "… a foreign party attempting to undermine a French court's exclusive jurisdiction over a France-registered patent litigation pending before it, through the use of a US anti-suit injunction. The US anti-suit injunction's purpose was not to preserve 'a pre-existing contractual obligation' – be it a jurisdiction clause or an arbitration agreement – but to bar one party from 'pursu[ing] any action for patent infringement against the [opposing] companies and/or their customers, to protect the French part of EP 268 patent, that it owns and particularly before French courts'. In the *cour d'appel*'s view, this would amount to a 'manifestly unlawful disturbance' as 'it infringes the right of the holder of an industrial patent to access **the only judge competent to rule on the infringement of its title**.' i.e. the French courts. The French courts have therefore issued an injunction against this anti-suit injunction in order to preserve their own jurisdiction, which, it must be stressed, is considered by French courts themselves to be exclusive in this matter."
>
> (emphasis added)

56 Professor Audit then goes on, at [49], to state that:

> "…in the present case, the French courts are not competent to hear claims for pre-arbitration interim relief. Therefore, the risk of a French court issuing an 'anti anti-suit injunction' in response to this court's potential anti-suit injunction is [in the opinion of Professor Audit] virtually non-existent."

57 He then states, at [50]:

> "It follows that he does not interpret that decision to indicate that French courts are hostile to anti-suit injunctions, or that they would be "unwelcoming" of an anti-suit injunction against the Respondent."

58 Professor Audit expresses his conclusions at [51] of his report, where he states as follows:

> "Regarding the questions initially submitted to my analysis, my conclusions are the following:

> "(a) French courts will consider that they lack jurisdiction to grant any pre-arbitration interim relief to the Claimant against the Respondent for the purpose of safeguarding the arbitration clause in the Bond; and
>
> "(b) French courts will welcome, within the French legal order, an anti-suit injunction issued by the UK courts to safeguard an arbitration agreement."

59 I consider that Professor Audit is well qualified to express the opinions that he does and that the conclusions he expresses are reasoned, credible and supported by the authorities that he refers to. I accept, for the purpose of the application before me, the views expressed by Professor Audit.

60 In those circumstances, I do not consider that the seat of the arbitration being Paris, in the light of that evidence as to French law and the approach of the French courts, even begins to amount to exceptional circumstances which would militate against the granting of anti-suit relief in the present case.

61 With all due deference to Bright J and his focus on the seat, which was clearly at the heart of his approach, I regard such focus on the seat as contrary to the *Siskina* line of authorities, and I do not consider that there is any inherent requirement or condition in the exercise of the power under section 37(1) of the SCA 1981 that there must be mutuality between the jurisdiction over substantive dispute and that intending to provide interim relief. (See *Broad Idea v Conway* [2021] UKPC 24).

62 Bright J placed significant weight in his judgment on the case of *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, which found that the Belgian court was

the "natural court for the source of the interim relief". However, I consider that case to be distinguishable. In that case:

(a) English law, unlike here, was a "stranger to this Belgian arbitration" – the seat was Belgian and the law applicable to the contract was an "indeterminate law" as a result of an "anational" structure (see *Channel Tunnel* at [368]).

(b) The relief sought was an injunction to restrain the defendants from suspending work – Lord Mustill considered that the applicants wrongly sought "to obtain far reaching relief through the judicial means which they have been so scrupulous to exclude" (see *Channel Tunnel* at [368]).

63 That, clearly, is not the case here. In the present case, the parties agreed for the dispute to be governed by English law and, in doing so, at least as a matter of English law, agreed for the Arbitration Agreement to be governed by English law. English law is no stranger to this dispute. Further, the nature of the relief sought in the present case is in support of the parties' bargain to arbitrate a dispute, not to thwart it (unlike the *Channel Tunnel* case).

64 Bright J also addresses the interaction between section 44 of the Arbitration Act 1996 and the power under section 37 of the SCA 1981. For my part, I consider the starting point, as identified in the *Ust* case, to be section 37 itself. I do not find it of any particular assistance to start with section 44 of the Arbitration Act and consider the reservation at the end of section 2(3) of the Arbitration Act 1996 and then read it across to section 37.

65 In section 44, of course, there is specific reference to the foreign seat. In contrast, there is no such reference in either section 37 of the SCA 1981 or CPR 6.37(3). That is, of course, consistent with the reasoning of Lord Mance in *Ust* at [48] that I have already quoted,

according to which different considerations apply to section 44 of the Arbitration Act 1996 because an injunction under section 37 of the SCA 1981 is not:

> "…'for the purpose of and in relation to arbitral proceedings', but for the purposes of and in relation to the negative promise contained in the arbitration agreement not to bring foreign proceedings…."

And, as such, I do not consider that the conditions of section 44 of the Arbitration Act 1996 are to be imported into section 37 of the SCA 1981.

66 With all due deference to the views expressed by Bright J in *SQD*, I do not consider that the seat of the arbitration is of more than very limited relevance to the granting of an anti-suit under section 37 of the SCA 1981. I say this for the following reasons:

(1) The fact of a foreign seat is no bar to the granting of relief under section 37 of the SCA 1981 in my view.

(2) The question of whether or not England and Wales is the proper forum in which to bring the claim under CPR 6.37(3) may involve consideration of whether another forum is appropriate (including the jurisdiction of the seat). However it is only one such consideration. I consider that the fact of a foreign seat does not preclude England and Wales from being the proper forum in which to bring the claim and, in this case, England and Wales is, I am satisfied, the proper forum here for the reasons which I have already identified.

(3) The fact of a foreign seat is not, in and of itself, an "exceptional circumstance" militating against the granting of an injunction in my view. There must be something "exceptional" about it to militate against an injunction.

67 I accept that it is possible that a clear clash or conflict with the law of the seat might give rise to such an exceptional circumstance by analogy with section 2(3) of the Arbitration Act 1996, for the reasons which are set out at [18] of the Supplementary Departmental Advisory Report that preceded the Arbitration Act 1996, namely that:

> "An English court should have effective powers to support an actual or anticipated arbitration … However, such powers should not be used where any other foreign court is already, or is likely, to be seized of the matter, or where the exercise of such powers would produce a clash with any other more appropriate forum."

68 I consider that Lord Mance's judgment in *Ust* at [48] suggests that such considerations would not apply to an injunction under section 37 of the SCA 1981. Whether that is so or not, I do consider that that point is moot in the present case because, on the expert evidence before me, there is no such clash or conflict arising with the French court, even assuming, for the purpose of argument, that it was, contrary to my view, the more appropriate forum.

69 I turn then to summarise the position. As I have already foreshadowed, I am satisfied to a high degree of probability that the agreement in the Bond exists and has Clauses 11 and 12 in it. It is generally subject to English law and is subject to ICC arbitration in Paris. I am satisfied that the Arbitration Agreement itself is subject to English law so far as this court is concerned. I am satisfied to a high degree of probability that the proceedings in the Arbitrazh Court in Russia are a breach of the Arbitration Agreement and/or of the Bond itself. In principle, those agreements should be honoured.

70 I am satisfied that the Court does have jurisdiction for the reasons that I have given and that this forum is the appropriate forum. On normal application of *Angelic Grace* principles, the court should grant an anti-suit injunction in such circumstances, unless there are exceptional

circumstances. For the reasons identified, I do not consider that there are exceptional circumstances in this case, and I do not consider that the fact that the seat is in Paris, and that it is not an English seat, amounts to exceptional circumstances, certainly on the facts of this case and in the context of the expert evidence I have received and accepted from Professor Audit.

71 I am also satisfied that the application has been brought promptly and that, also, there has been no submission to the jurisdiction of the Arbitrazh Court. (*Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH* [1997] 2 Lloyd's Rep. 279 at [288]).

72 I do not consider that there are any exceptional circumstances which militate against the granting of interim relief in this case. On the evidence of Professor Audit, and even assuming that the law of the seat could have the prominence that is suggested in the *SQD* case, there is, on the evidence before me, no clash or conflict with the law of the seat in the present case which would be capable of amounting to an exceptional circumstance which would justify this court refusing to exercise the discretion that it would otherwise exercise. I accept Professor Audit's explanation that there is no philosophical objection to anti-suit injunctions under French law and that, on the contrary, a French court, if seised of the matter, would be likely to welcome an anti-suit injunction issued by the England and Wales courts to safeguard an arbitration agreement and, for the reasons that I have quoted from his report.

73 I also consider it is a valid point that, from a practical perspective, the risk of any conflict or clash is all the more remote in the present case in circumstances where the French court is

highly unlikely to be seised of the issue of whether or not an anti-suit injunction was properly granted or is enforceable in France. In this regard:

(1) The Bond contains a binding arbitration agreement, and so any resolution of the substantive dispute should be before an arbitral tribunal constituted under it, not before French (or indeed any other domestic) courts.

(2) RusChem has sued before the Arbitrazh Court, not the French courts.

(3) RusChem has done so on the basis, (it says, amongst other matters) that the European sanctions create obstacles for RusChem to access justice. It has submitted that there are:

(a) "irremovable doubts" as to whether:

> "the resolution of the dispute in the State applying restrictive measures against Russian persons, namely France, will be carried out in compliance with the guarantees of fairness and impartiality."

(b) it would be difficult for RusChem to obtain representation there;

(c) restrictions of travel compound the difficulties."

Whilst Commerzbank does not accept such matters (including, for the reasons set out by Bright J in *SQD* at [17(vi)]), I agree that RusChem's position means that it is highly unlikely that it would seek any form of relief before the French courts.

74 I have already identified why I consider the decision of *SQD* to be distinguishable, most particularly in the context of the French law advice that is before me and which I accept. It perhaps goes without saying, but this court is not bound by the findings of French law that were made in that case. English decisions on foreign law do not set any precedent. (See *Re Marseilles Extension Railway* (1885) 30 Ch D 598 at 602). Section 4(2)(a) of the Civil

Evidence Act 1972 permits earlier findings or decisions on foreign law (if reported or recorded in citable form) to be admitted in evidence for the purpose of proving the foreign law. Section 4(2)(b) provides that if such a finding or decision is adduced for that purpose, the foreign law should be taken to be in accordance with that finding or decision unless the contrary is proved.

75 But before me today, Commerzbank does not rely on the findings or decision of *SQD* as evidence of French law on the issues of anti-suit injunctions; on the contrary, it refers to the evidence of Professor Audit on the matter. That is the evidence before me, and I have made my own findings in relation to that evidence, which leads me to a different conclusion to that reached by Bright J on the basis of the different evidence that was before him then.

76 Accordingly, and whilst I have had careful regard to the decision of Bright J in *SQD*, for the reasons that I have identified, and in circumstances where the evidence before me as to French law is different, I do not consider myself either to be bound by that decision, nor indeed for that decision to assist me as to whether or not it is appropriate to grant relief under section 37 by granting an interim anti-suit injunction.

77 For the reasons that I have identified, I consider that, on *Angelic Grace* principles, and in the absence of any exceptional circumstances to the contrary, it is both consistent with authority, and appropriate, that I grant the interim anti-suit relief sought in the terms sought in the draft order.

78 I should add that, even more recently than the decision of Bright J in the *SQD* case, a further application for an interim anti-suit injunction, on very similar facts, I understand, to the present , ame before Robin Knowles J in the case of *UniCredit Bank AG v RusChem*

Alliance LLC, the same defendant as in the present case, in case number CL-2023-000498, to which my attention was drawn in the skeleton argument of Mr McGrath. It was understood that there were reporting restrictions in place in relation to that judgment; however, I have ascertained that, in fact, there are not reporting restrictions in relation to that and that Robin Knowles J has indicated that the ruling that was given was given on an open basis and that it can be reported and referred to that, in that case, he too, having had his attention drawn to the decision of *SQD*, regarded that case as distinguishable on its facts, including on the basis of the French law evidence that he received, and the outcome in that case was that he too considered it was appropriate to grant an interim anti-suit injunction against RusChem, pending a return date.

79 In the above circumstances, and for the reasons I have given, I consider it is appropriate to grant an interim anti-suit injunction in the terms sought, and do so.

80 In reaching that conclusion, I have had regard to all the matters which were identified by Mr McGrath during the course of his submissions in discharging the duty of full and frank disclosure, of which, of course, the most important were the legal issues that arise in the context of *SQD*. I confirm, however, that I have had full regard to all the matters that were disclosed to me. I do not consider that any of those matters militate against the grant or relief which I have granted.

81 The other matter which I need to address is the question of alternative service. Commerzbank seeks an order for alternative service pursuant to CPR 6.15. It seeks alternative service in the following manner, that:

> "Permission be granted to the Claimant to serve the Arbitration Claim Form, Application and supporting evidence, together with this Order on the Defendant through email to …"

And then three emails addresses are set out. Those three email addresses are email addresses which RusChem itself identified as addresses at which it can be contacted in the context of the dispute resolution provisions. I am satisfied that it is appropriate that the order I am going to make is brought to the attention of RusChem at the earliest possible opportunity and that is best achieved, and can only be achieved, by ordering service through email to those email addresses, which I do.

82 In that regard, I have evidence from a Russian-qualified lawyer with Commerzbank's solicitors that to do so would not be contrary to Russian law and in those circumstances, and to ensure that my order and these proceedings are brought to the attention of the Respondent at the earliest possible date, I also make an order for alternative service in the terms sought. I bear in mind in that regard that service under the Hague Service Convention could take up to six months, whereas service by this alternative method should be instantaneous.

83 Accordingly, for the reasons I have given, I grant both the anti-suit injunction and the order for alternative service. I will now finalise the order, together with the assistance of counsel, and set the appropriate return date.