Neutral Citation Number: [2020] EWHC 1557 (Comm)

Case No: CL-2018-000102

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17/06/2020

Before :

THE HONOURABLE MRS JUSTICE MOULDER

- -

Between :

Public Joint Stock Company ("Rosgosstrakh") **Claimant**

- and –

Defendants

1. **Starr Syndicate Limited**
2. **Dornoch Limited**
3. **Caitlin Insurance Company (UK) Ltd**
4. **Antares Underwriting Limited**
5. **Antares Capital Limited**
6. **Treimco Limited**
7. **Antares Capital III Limited**
8. **F&G UK Underwriters Limited**
9. **April Grange Limited**
10. **QBE Corporate Limited**
11. **Kiln Underwriting Limited**
12. **ICP Capital Limited**
13. **SCOR Underwriting Limied**
14. **Munchener Ruckversicherungs-Gesellschaft AG**
15. **Oriental Insurance Company Limited**
16. **New Indian Assurance Co Ltd**
17. **General Insurance Corporation of India**
18. **Assicurazioni Generali S.P.A**
19. **Swiss RE Europe S.A**
20. **Starr Insurance and Reinsurance Ltd**

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Mr Akhil Shah QC and **Mr Richard Blakeley** (instructed by **Temple Bright LLP**)
for the **Claimant**
Mr Michael McParland QC and **Mr Samar Abbas Kazmi** (instructed by **Clyde & Co LLP**)
for the **Defendant**

Hearing dates: 12 and 13 May 2020
- -

Approved Judgment

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

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30 ON 17 June 2020.**"

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THE HONOURABLE MRS JUSTICE MOULDER

MRS JUSTICE MOULDER :

1. This is the reserved judgment on the claimant's application for summary judgment on its claim for recognition and enforcement of three judgments obtained in its favour in the Russian courts in 2015 and 2016 (the "Summary Judgment Application"). The main judgment obtained relates to a policy of reinsurance (the "Reinsurance Policy") which was written by the defendant reinsurers (with others, together the "reinsurers") for JSC Kapital Insurance ("Kapital") which had written a policy (the "Insurance Policy") in favour of Sukhoi Civil Aircraft Company ("Sukhoi"). The two further judgments relate to interest and costs.

2. The claimant is PJSC Insurance Company "Rosgosstrakh" ("RGS") which it is accepted, has succeeded to the benefit of the judgments of which recognition and enforcement are sought.

3. The hearing was held remotely in light of Covid-19 but the court had the benefit of lengthy written submissions as well as oral submissions from leading counsel on each side.

4. The application was supported by two witness statements of Mr Smirnov, the lawyer having conduct of the litigation for the claimant, dated 5 November 2019 and 3 April 2020 and two expert reports of Professor Roman Bevzenko dated 5 November 2019 and 3 April 2020.

5. In response the defendants have filed witness statements of Mr Ninkovic, Head of Claims, Specialty, at Brit Syndicates Limited dated 14 February 2020, and Mr Lawson dated 5 May 2020. The defendants also rely on expert reports from Mr Karabelnikov dated 13 February 2020 and from Dr Labin dated 14 February 2020.

6. Although it is an application for summary judgment, the Court notes that the bundle of evidence ran to some nine lever arch files with five further lever arch files of authorities.

Background

7. At the relevant time Kapital was a subsidiary of RGS. RGS was originally a state-owned insurance company and around 2005 - 2006 control of the RGS group of companies passed to Mr Denil Khachaturov ("Mr Khachaturov") and his associates (paragraph 37 -41 of the witness statement of Mr Ninkovic).

8. According to the defendants' evidence, in about December 2016 RGS was in severe financial difficulties and Mr Khachaturov was forced to transfer control and ownership of RGS to Otkritie FC Bank. In August 2017 the Central Bank of Russia took over the administration of Otkritie effectively nationalising RGS and the other companies in the RGS group including Kapital (paragraph 42 of the witness statement of Mr Ninkovic).

9. Sukhoi is an aircraft manufacturer and a division of PJSC United Aircraft Corporation, the aerospace and defence conglomerate that is majority owned by the Russian State (paragraphs 12 - 17 of the witness statement of Mr Ninkovic).

10. The Insurance Policy was entered into in respect of the period 1 January 2012 – 31 December 2012 and covered four specific aircraft part of the Superjet programme. It is the defendants' case that the development of the Sukhoi Superjet-100 was part of a development project which was being supported by the Russian Ministry of Industry and Trade. One of the aircraft crashed in 2012 killing all 45 people on board. This led to a claim under the Insurance Policy both in respect of the Hull "All Risks" section and the Third-Party Legal Liability cover.

11. Although Kapital initially resisted payment to Sukhoi it did make payment under the Insurance Policy and then sought an indemnity under the Reinsurance Policy.

12. The Reinsurance Policy provided under the heading "Interest":

> "To indemnify the Reinsured in respect of a Policy or Policies issued by them to the Original Insured as follows: -
>
> Section 1
>
> 1) Hull All Risks: covering against all risks of physical loss of or damage.
>
> 2) Aircraft legal liability.
>
> arising from the test flights of Sukhoi Superjet 100 aircraft following production, as original."

13. Under the heading "Original Conditions" it stated:

> "Uses: Test and Certification flights"

14. It is the defendants' case that the Reinsurance Policy also expressly incorporated AVN1C which excludes liability where the aircraft is being used for any illegal purposes or for any purpose other than the purpose stated in the schedule to the Reinsurance Policy and AVN41A under which it is a condition precedent that no amendment to the terms and conditions of the original insurance policy is binding unless prior agreement has been obtained from the reinsurers. Under the Heading "Conditions" it stated:

> "Reinsurance Underwriting and Claims Control Clause AVN41A (excluding rate and retention) and with notice of loss within seven days"

and under the heading "Original Conditions" the relevant paragraph stated:

> "Original Policy Wording includes the following: –
>
> Original Policy Number: 01-004-000 or 04
>
> Section 1
>
> Original policy as per AVN1C"

15. Around December 2012 the reinsurers were presented with a Hull claim for approximately US$32 million. At that stage all but two of the reinsurers refused to accept the claim on the basis that the accident flight did not fall within the Reinsurance Policy. The reinsurers refused to pay out on the Reinsurance Policy on the basis that the flight in question was a demonstration flight which was outside the scope of the cover which the reinsurers said was limited to "test and certification flights" in accordance with the conditions of the Policy. The defendants took the view that Kapital's amendment of the original insurance policy to remove any limitation to test and/or certification flights was not binding on the reinsurers unless their prior agreement had been obtained.

16. The Reinsurance Policy contained the following choice of law and jurisdiction clause:

> "This reinsurance shall be governed by and construed in accordance with the law of Russia and each party agrees to submit to the exclusive jurisdiction of the Courts of Russia."

17. In May 2013 Kapital commenced proceedings in relation to the issue of liability in respect of the Hull "All Risks" section of the Reinsurance Policy in the courts of a town in Siberia where RGS had its registered office, that is the *arbitrazh* court of the Khanty-Mansi Autonomous region -Yugra (the "KM Court").

18. On 9 September 2013 Mr Khachaturov sent a letter to the CEO of each of the non-paying insurers. It included the following:

> "we would like to mention here that our group and our client have made the decision to initiate PR-campaign within the players of the Russian insurance/reinsurance market. The aim of that campaign is to inform other players about the named reinsurers breaking of contractual obligations. The campaign is going to take place in mass media as well as in the insurance and reinsurance pools and unions where our group is represented.
>
> We are going to reconsider our cooperation with the nonpaying companies and groups which they represent as we cannot be sure they will be ready to support us on future claims. Our lawyers investigate the possibility of putting the arrest on the reinsurers' assets in Russia if any exist"

19. On 19 September 2013, one of the reinsurers, Allianz, decided to settle the claim under the Reinsurance Policy and on 4 November 2013, another reinsurer, AIG, also decided to settle the claim.

Moscow Actions

20. The defendants brought actions against Kapital in the Moscow Arbitrazh Court to recoup advances paid to Kapital under the legal liability section of the Reinsurance Policy. The first action (the "First Moscow Action") brought by certain of the defendants was heard before Judge Larina and judgment was given in December 2014. Before Judge Larina Kapital did not dispute that the crash took place during a

demonstration flight. Judge Larina found that the relevant reinsurers had the right to return of the funds since "the parties have defined that insured events under the contract can only be test flights" and also "taking into account" that the plane crash took place during a demonstration flight.

21. An appeal by Kapital to the Ninth Arbitrazh Appeal Court in Moscow was rejected in April 2015. A further appeal to the Moscow Regional Arbitrazh Court was rejected in July 2015.

22. The second action brought by the other defendants (the "Second Moscow Action" and together with the First Moscow Action, the "Moscow Actions") was heard by Judge Ponomareva who found in favour of those defendants by a judgment in September 2015. The judge stated:

> "…under the heading of Interest in the section on liability in the reinsurance contract the risk of post-production test flights was accepted for reinsurance. The parties acknowledge that the owners' liability arose as a result of the aircraft carrying out a demonstration flight. Consequently, this liability is not covered by the reinsurance.
>
> Furthermore, according to the clause on reinsurance underwriting the obligation to pay a reinsurance settlement is contingent upon the original policy being unchanged. The terms of the original policy were initially defined by the London aviation insurance policy; this is shown by a note in the text of the insurance policy. <u>The London aviation insurance policy contains an exclusion which is applicable to all sections of the policy</u>: aviation Hull, passenger liability and third party liability. This exclusion state that the insurance is not valid if the aircraft is not used in the ways that have been agreed by the parties. The parties agreed that the aircraft should be used only for in-flight testing in the form of test …flights…" [emphasis added]

23. In December 2015 the Ninth Arbitrazh Appeal Court in Moscow rejected the claimant's appeal in the Second Moscow Action.

KM Main Action

24. The judgment of the KM Court (Judge Podgurska) in the proceedings brought by Kapital (the "KM Main Action") was delivered on 8 April 2015 in favour of Kapital. In that judgment Judge Podgurska noted that it was accepted by the parties that the aircraft was carrying out a demonstration flight but rejected the arguments that the obligations of the reinsurers had not arisen. The judge found that under section 1 of the Reinsurance Policy reinsurance was effected:

> "for two main objects:
>
> 1 Hull all-risks: the coverage of all risks and material loss or damage (applicable to all losses including total loss);

> 2 Liability connected with the exploitation of an aircraft, being the result of the experimental flights by the Sukhoi Superjet 100 aircraft, as set out in the original contract (original insurance policy).
>
> As can be seen from the case files, and undisputed by the parties, an insured event took place involving the total loss of an aircraft, and therefore paragraph 1 of section 1, Hull all-risks, is applicable: the coverage of all risks and material loss or damage, including total loss.
>
> Therefore the hull insurance coverage is applied to all material losses (including total loss of an aircraft), regardless of what type of flight was being executed."

25. Judge Podgurska also stated:

> "…the court finds it necessary to remark that half of the Respondents have voluntarily executed the claim demands and in so doing have accepted that is well-founded and justified."

26. In July 2015 the decision of the KM Court was upheld on appeal by the Eighth *Arbitrazh* Court of Appeal. In a brief section in the judgment, the Appeal court held (apparently on the basis of Section 1 of the Reinsurance Policy) that the Hull insurance covered all risks regardless of the type of flight performed. The *Arbitrazh* court of the West Siberian circuit rejected a further appeal in March 2016. The court also found that the Hull insurance applied to all losses irrespective of the type of flight and dismissed the argument that the Reinsurance Policy was subject to the provisions of the London market referred to in the Reinsurance Policy.

27. A further appeal was stayed pending the intervention of the Supreme Court Collegium in relation to the Moscow Actions: in December 2015 Kapital's second appeal in the First Moscow Action was transferred to the Judicial Collegium for Economic College of the Supreme Court (the "Collegium") by Judge Kapkaev. The judge ordered the transfer on the basis that the court should examine whether the incident event was an insured event but, in the ruling, appeared to accept that the use of the aircraft for demonstration was not covered.

28. The Collegium is chaired by Judge Sviridenko. In its judgment the Collegium appeared to accept that the obligation to pay under the Reinsurance Policy was associated with "inalterability of the original policy the terms and conditions of which were defined by London Aircraft Insurance Policy" and that London aircraft insurance policy includes an exception that is applied "to all sections of the policy" which provides that insurance "shall not be applied until an aircraft is used otherwise than agreed by the parties". The court held (page 4 of its judgment) that it was reasonable for the courts to conclude that the insurance cover did not cover the risks associated with payments of other types of flight not stipulated by the Reinsurance Policy and thus it was "essential" to resolve the occurrence of an insured event and for the court to determine by reference to the evidence the type of flight performed by the aircraft at the time of its crash.

29. The First Moscow Action was referred back to the original judge for reconsideration. In light of the decision of the Collegium the Arbitrazh court of Moscow overturned the first instance decision in the Second Moscow Action and ordered that the case be reconsidered.

30. Judge Ponomareva invited Sukhoi to provide an explanation as to the type of flight which it did by letter in August 2016 (the "August letter"). In the August letter Sukhoi described the flight executed by the aircraft as "part of the Programme… as were all of the flights executed during the tour of South East Asia".

31. In September 2016, Judge Ponomareva found in favour of the defendants.

32. In the Second Moscow Action Judge Larina invited a further explanation which was given in the form of a letter in October 2016 in which Sukhoi described the flight as "execution of test-demonstration flights" and stated that during "test-demonstration" flights to show the aircraft to potential customers,

> "a comprehensive evaluation of the working of the navigational equipment was carried out that is to say testing and evaluation of the operation of the aircraft in normal conditions".

33. The defendants filed a motion to call evidence from the Russian Investigative Committee to provide documentary evidence as to the nature of the flight which they had obtained during their criminal investigation. This motion was rejected. On 25 November 2016 Judge Larina entered judgment in favour of the claimant.

34. Judge Ponomareva's second judgment was overturned on appeal on 6 February 2017 by the Ninth *Arbitrazh* Court of Appeal and a further appeal was dismissed by the *Arbitrazh* Court of the Moscow Circuit on 23 May 2017.

35. An application to appeal the KM judgment to the Supreme Court was rejected on the basis that it did not raise grounds for consideration by the Supreme Court.

36. Further applications by the defendants against the judgment of the KM Court have been refused in September 2016 and February 2018 by Judge Zarubina and by Judge Sviridenko respectively.

37. An application in March 2018 to the Constitutional Court of the Russian Federation asking the court to declare part 1 of Article 249 of the APC to be unconstitutional (relied on by the judge in the KM judgment) was rejected for consideration on the merits by a ruling of 28 June 2018.

38. An application for review for new circumstances was filed by the defendants in September 2018 but was dismissed in July 2019.

Relevant legal principles on summary judgment application

39. CPR 24.2 sets out the test for summary judgment:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

40. The claimant referred the court to the summary of the principles from the various authorities by Cockerill J in *Daniels v Lloyds Bank Plc* [2018] EWHC 660 (Comm).

41. Although I note that Cockerill J stated that she was not setting out a generalised summary of the principles, it seems to me that the factors which she identifies in her judgment at [49] are also relevant to the facts of this case:

> "[49] The test in question is that of "no real prospect of success". The relevant principles are well known and have been considered inter alia in *TFL Management Services v Lloyds TSB Bank* [2014] 1 WLR 2006 and *EasyAir Ltd (trading as Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) . I do not attempt any generalised summary of the principles to be drawn from the various cases but note in particular the following factors:
>
> i) The burden of proof is on the applicant for summary judgment;
>
> ii) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
>
> iii) The criterion 'real' within CPR 24.2 (a) is not one of probability, it is the absence of reality: Lord Hobhouse in *Three Rivers DC v Bank of England (No.3)* [2001] 2 All E.R. 513 [2003] 2 A.C. 1 at paragraph 158;
>
> iv) At the same time, a 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
>
> v) The court must be astute to avoid the perils of a mini-trial but is not precluded from analysing the statements made by the party resisting the application for summary judgment and weighing them against contemporaneous documents (ibid);
>
> vi) However disputed facts must generally be assumed in the [respondent's] favour: *James-Bowen v Commissioner of Police*

> *for the Metropolis* [2015] EWHC 1249 per Jay J at paragraph 3;
>
> vii) An application for summary judgment is not appropriate to resolve a complex question of law and fact, the determination of which necessitates a trial of the issue having regard to all the evidence: *Apovdedo NV v Collins* [2008] EWHC 775 (Ch) ;
>
> viii) If there is a short point of law or construction and, the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725 ;
>
> ix) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial. The court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550, *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63 ;
>
> x) The same point applies to an extent to difficult questions of law, particularly those in developing areas, which tend to be better decided against actual rather than assumed facts: *TFL* at [27]."

42. The claimant also referred the court to *ED & F Man Liquid Products v Patel* at [10] and it is helpful to set this out in full:

> "[10] It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in *Swain v Hillman* [2001] 1 All ER 91 at 95 in relation to CPR 24 . However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable: see the note at 24.2.3 in *Civil Procedure (Autumn 2002)* Vol 1 p.467 and *Three Rivers DC v*

> *Bank of England (No.3)* [2001] UKHL/16, [2001] 2 All ER 513 per Lord Hope of Craighead at paragraph [95]."

43. The defendants relied on dictum of Arden LJ in *JSC "Aeroflot-Russian Airlines" v Berezovsky* [2014] EWCA Civ 20 at [45]

> "45. I shall now draw the threads together. The issue is whether the second Savelovsky judgment is final and binding and therefore preclusive of any further order uplifting compensation by reference to inflation. Because of the choice of law rules set out in paragraphs 29 and 30 above, the court in these proceedings must resolve the question of the incidents under Russian law of the second Savelovsky judgment before it can consider whether to recognise or to refuse to recognise the judgments on which Aeroflot sues in these proceedings. It can only do that at trial since it must make findings on questions of Russian law about which there is conflicting expert evidence. Aeroflot may or may not win at trial, but the only question for this court is whether there should be summary judgment without a trial, which for the reasons given I would answer in the negative." [emphasis added]

Grounds for summary judgment

44. There are in summary two grounds on which the defendants seek to defend the claim and the claimant submits that both are fanciful.

45. The first ground can be termed "Lack of Jurisdiction" and the second is "Bias".

Lack of Jurisdiction

46. The relevant rules on recognition and enforcement of foreign judgments as set out in *Dicey, Morris & Collins on the Conflict of Laws (15th Ed.)* are as follows:

> "Rule 41: A judgment of a court of a foreign country (hereinafter referred to as a foreign judgment) has no direct operation in England but may
>
> (1) be enforceable by claim or counterclaim at common law or under statute, or
>
> (2) be recognised as a defence to a claim or as conclusive of an issue in a claim"
>
> Rule 42: Subject to the Exceptions hereinafter mentioned and to Rule 62 (international conventions), a foreign judgment *in personam* given by the court of a foreign country with jurisdiction to give that judgment in accordance with the principles set out in Rules 43 to 46, and which is not impeachable under any of Rules 49 to 54, may be enforced by a

claim or counterclaim for the amount due under it if the judgment is

(a) for a debt, or definite sum of money…; and

(b) final and conclusive

but not otherwise.

Rule 43: Subject to Rules 44 to 46, a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it was given in the following cases:

First Case—

If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.

Second Case—

If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.

Third Case—

If the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.

Fourth Case—

If the person against whom the judgment was given, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.

Rule 48: A foreign judgment which is final and conclusive on the merits and not impeachable under any of Rules 49 to 52 is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either

(1) of fact; or

(2) of law."

Rule 49: (1) A foreign judgment is impeachable if the courts of the foreign country did not, in the circumstances of the case, have jurisdiction to give that judgment in the view of English

> law in accordance with the principles set out in Rules 43 to 47 inclusive.
>
> (2) A foreign judgment cannot, in general, be impeached on the ground that the court which gave it was not competent to do so according to the law of the foreign country concerned." [emphasis added]

47. It was submitted for the claimant that there is no real prospect of establishing lack of jurisdiction as a basis for resisting enforcement of the KM judgment: the claimant relied on Rule 49(2) (quoted above) and the commentary in *Dicey* at 14-132 and 14-135:

> "[14-132] If a judgment is pronounced by a court of a foreign country whose courts have jurisdiction in the view of English law, but the particular foreign court is not the proper court in terms of the domestic rules of the foreign legal system, is the judgment capable of enforcement or recognition in England? This question must almost certainly be answered in the affirmative, at any rate so far as judgments in personam are concerned; but the authorities are at first sight in a state of some confusion." [emphasis added]
>
> "[14-135] The difficulties of the question raised and the apparent differences of opinion between judges may be reduced by the following considerations. When, e.g. a New York court, which from an international point of view is a court of competent jurisdiction, delivers a judgment in excess of the authority conferred upon the court by New York law, the judgment, though obviously not pronounced by a court having local competence, may bear one of two characters. It may be irregular but have validity in New York until it is set aside; or it may be a complete nullity, and have no legal effect whatever in New York. In the former case the judgment ought to be held valid in England unless and until it is set aside in New York. The latter case is doubtful, but most unlikely to occur in practice. A judgment pronounced by a foreign court is far more likely to be irregular than void. The practical result, therefore, is that such a judgment is generally unimpeachable in England, even though not pronounced by a court having local competence." [emphasis added]

48. It was submitted for the claimant that:

i) whether there is an agreement to submit to the jurisdiction is a question of English private international law and although questions of contractual interpretation are governed by the applicable law that does not mean that the English court considers the effect of the foreign law where that goes beyond the question of whether there has been an agreement to submit to the jurisdiction of the courts of the foreign jurisdiction;

ii) the submission to the courts of a country (as opposed to a particular court) constituted a submission to the courts of that country;

iii) "it is plain beyond argument" that Russian law would conclude that the jurisdiction clause constituted a submission to the courts of Russia.

49. It was submitted for the defendants that:

i) the issue of whether the KM Court had jurisdiction was a question of construction of the jurisdiction clause in the Reinsurance Policy which in turn is a question of Russian law;

ii) as a matter of Russian law, a clause which specified the courts of Russia without specifying a particular court would not have permitted the KM Court to take jurisdiction under the domestic rules: the position under Russian law is that at that time in Russian law there was nothing which allowed the KM Court to take jurisdiction (the position has now changed);

iii) if as a matter of construction, the KM Court had no jurisdiction, the English court will have regard to the absence of jurisdiction and will not enforce the judgment;

iv) the authority of *Pemberton v Hughes* [1899] 1 Ch. 781, (CA). (a divorce case in Miami) is not authority for a broader rule as it related to a procedural defect in the Miami proceedings and not a want of jurisdiction. The statements in *Dicey* should not be taken as a definitive statement of the law and are to be contrasted with the position adopted in *Cheshire, North & Fawcett Private International Law 15th Ed*. ("*Cheshire and North*") at 576 where the position is described as "less certain".

50. Accordingly it was submitted that there is a real prospect of the defendants establishing a basis on which recognition of the KM judgment should be refused.

Discussion

The legal principles

51. It seems to me that the claimant is correct that whether there is an agreement to submit to the jurisdiction is a question of English private international law: *Adams v Cape Industries Plc* [1990] 1 Ch 433.

> "… in deciding whether the foreign court was one of competent jurisdiction, our courts will apply not the law of the foreign court itself but our own rules of private international law. "

52. However it is also clear that the construction of an agreement to submit to the jurisdiction of the foreign court is a question of the relevant law of the agreement. *Vizcaya Partners Limited v Picard* [2016] UKPC 5 at [59] and [60]:

> "[59] Finally it is necessary to consider the implications in the conflict of laws of the distinction between terms implied in fact or from the circumstances, on the one hand, and terms implied

> by law, on the other hand. The starting point is that the characterisation of whether there has been a submission to the jurisdiction of the foreign court for the purposes of enforcement of foreign judgments depends on English law: *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 (a case on submission in the course of proceedings). But in the present context what that means is that there must have been an agreement to submit to the jurisdiction of the foreign court, and that agreement may arise through an implied term.
>
> [60] Terms implied as a matter of fact depend on construction of the contract in the light of the circumstances. Where the applicable law of the contract is foreign law, questions of interpretation are governed by the applicable law…" [emphasis added]

53. In my view therefore, contrary to the submission for the claimant (at paragraph 103 of its skeleton), the issue of construction is not to be resolved by considering how "English law eyes" would interpret the clause since questions of interpretation are governed by Russian law. Further there is no authority which in my view supports the submission (ibid) that this is a "classic example" of the submission to the courts of a country "which is held to constitute a submission in general terms to the courts of that country". The case of *JSC BTA Bank v Turkiye Vakiflar Bankasi T.A.O* [2018] EWHC 835 (Comm) relied on by the claimant in my view merely confirms that it is a question of interpretation of the relevant clause under the relevant foreign law.

54. In *JSC BTA Bank* the relevant clause stated:

> "This engagement is governed by Turkish law, place of jurisdiction is Ankara."

It was argued in that case that this was a submission to a particular court (namely the court of Ankara), and that a submission to a particular court was not of itself a submission to all the courts of that country. Butcher J held at [70]:

> "I consider that, as *Dicey, Morris and Collins* says, whether there is a submission to the courts of the country or to a particular court must depend on the proper construction of the contract and of the relevant clause within it. I conceive that there may well be cases in which a reference to the 'place of jurisdiction' as being a city in a particular country, especially if it is the capital city, is properly to be regarded as a submission to the courts of the country in question. This would depend in part, as it seems to me, on the extent to which the courts in that country operated independently of each other; whether there might be transfers between courts; and whether, in view of such matters, it was plausible that parties might have wished to choose only the courts of a particular city or place within the country rather than the courts of the country. I have no material as to whether there was any factual matrix to the making and terms of the guarantee which might be relevant to this issue,

> and do not consider that it is one on which I can take a reliable view at this stage. For that reason I would regard this as being an issue on which the Claimants have shown a serious issue to be tried and a good arguable case."

55. The dicta relied upon by the claimant in *SA Consortium General Textiles v Sun and Sand Agencies Ltd* [1978] 1QB 279 at 309 in my view do not advance the argument for the claimant as again it dealt with the effect of a submission to a particular court.

56. It was submitted for the claimant that the English court does not consider the effect of the foreign law where that goes beyond the question of whether there has been an agreement to submit to the jurisdiction of the courts of the foreign jurisdiction. However in my view the reliance on *Vizcaya* to establish this proposition is not made out. In *Vizcaya* the issue was whether a submission to the jurisdiction of the foreign court could be implied:

> "59. Finally it is necessary to consider the implications in the conflict of laws of the distinction between terms implied in fact or from the circumstances, on the one hand, and terms implied by law, on the other hand. The starting point is that the characterisation of whether there has been a submission to the jurisdiction of the foreign court for the purposes of enforcement of foreign judgments depends on English law: Rubin v Eurofinance SA [2012] UKSC 46, [2013] 1 AC 236 (a case on submission in the course of proceedings). <u>But in the present context what that means is that there must have been an agreement to submit to the jurisdiction of the foreign court, and that agreement may arise through an implied term.</u>
>
> 60. <u>Terms implied as a matter of fact depend on construction of the contract in the light of the circumstances. Where the applicable law of the contract is foreign law, questions of interpretation are governed by the applicable law</u>. In such a case the role of the expert is not to give evidence as to what the contract means. The role is "to prove the rules of construction of the foreign law, and it is then for the court to interpret the contract in accordance with those rules": *King v Brandywine Reinsurance Co* [2005] EWCA Civ 235, [2005] 1 Lloyd's Rep 655, para 68; *Dicey*, paras 9-019 and 32-144 ("the expert proves the foreign rules of construction, and the court, in the light of these rules, determines the meaning of the contract").
>
> 61. <u>The position is different in the case of terms implied by law, where the function of the expert would be to give an opinion on whether a particular term is implied by law. That is because whether there are statutory terms or other terms implied by law depends on the foreign law.</u> The common law rules, as indicated above, apply to the question whether there has been a contractual submission, and at common law "[t]he proper law of the contract does indeed fix the interpretation and construction of its express terms and supply the relevant

> background of statutory or implied terms" (*Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 , 291 (PC));… " [emphasis added]

57. The trustee in *Vizcaya* failed to establish the implied term on the evidence:

> "70. Most relevant for present purposes, there is no suggestion that there is a term implied as a matter of fact or as a matter of law that Vizcaya consented to the jurisdiction of the New York court. For a term to be implied as a matter of fact, the trustee would have to adduce evidence of New York law, not on what the contract means, but that there is a rule of interpretation or construction, on the basis of which the Gibraltar court could conclude that clause 10 in the context of the choice of law and the deemed place of contracting amounts to a choice of jurisdiction. For a term to be implied as a matter of law, the expert would have to show what relevant terms are implied under New York law. There is no relevant evidence under either head. The statements that Vizcaya agreed to the jurisdiction of the New York court by agreeing to New York as the governing law and by transacting business in New York say no more than that these factors justified the assumption of jurisdiction under New York CPLR, section 302 .
>
> 71. There is no basis on the wording of the contract or in the evidence for the trustee's suggestion that it makes a difference that the contract deems it to have been made in New York. In the English cases the fact that a contract was made in the foreign country had no weight in determining whether a party had agreed to submit. If there had been an implied term under New York law as a result of that provision, no doubt it would have been relied upon in the motion in New York for the default judgment. The unsurprising overall effect of the evidence is that, as in English law or Gibraltar law, these are factors in the exercise of long arm jurisdiction.
>
> 72. There is therefore no basis in the evidence for the assertion that there was a contractual term that Vizcaya submitted to the New York jurisdiction." [emphasis added]

58. It was also submitted for the claimant that the decision in *Viczaya* was limited to the position where there was no judgment on jurisdiction (because judgment in that case was entered in default of appearance) and is not authority for a wider proposition that the law of a foreign court is to be applied to assess its jurisdiction where there is a judgment already given by that foreign court on jurisdiction. Whilst that was clearly the factual position in that case, I see no basis in the judgment on which to confine the principle in that way and I note in particular the general observations in paragraphs 60 and 61 (quoted above) of the judgment which appear to me to be of general application. Further such a limitation would appear to be inconsistent with the general principle that recognition and enforcement of foreign judgments is conditional upon the foreign court having jurisdiction (Rule 42 of *Dicey*).

Decision of the Russian courts

59. In the KM Court the defendants objected to the competence of the KM Court. The court held that it had jurisdiction by virtue of the Russian procedural law. In addition the court noted the Information letter of the Presidium of the Supreme *Arbitrazh* Court dated 9 July 2013 No. 158 "Review of practice of consideration by *arbitrazh* courts of cases involving foreign parties" and stated that:

> "the absence of an agreement on the particular *arbitrazh* court that would have the jurisdiction over the present dispute does not entail the recognition of such an agreement as null and void and may not be regarded as an obstacle and (or) restriction for an interested person to apply to a court. The other approach would mean the denial of access to the justice, which is unacceptable."

60. The court further stated that:

> "From the text of the reinsurance agreement (section "Choice of exclusive law and jurisdiction") there follows the parties' unconditional will to acknowledge the competence of *arbitrazh* courts of the Russian Federation for consideration of dispute arising from the reinsurance agreement.
>
> "Since *Arbitrazh* procedure code of the Russian Federation contained no regulations directly determining what the court should in the absence of a clearly defined jurisdiction clause, but taking into account that the right to judicial protection is guaranteed by the constitution of the Russian Federation and a number of international legal obligations of Russia, that the dispute by virtue of express provisions of the law and the parties' agreement is within the subject matter competence of the *arbitrazh* court of the Russian Federation, and given the inadmissibility of dual ("asymmetric") interpretation of the jurisdictional arrangement the present dispute is directly within the jurisdiction of the *arbitrazh* court of the Khanty-Mansiysk Autonomous Region." [emphasis added]

61. It was submitted for the claimant (paragraph 109 of the skeleton) that the finding of the KM Court was upheld on appeal and it is fanciful to suggest that an English court will reach the opposite conclusion.

Evidence of Mr Karabelnikov

62. The evidence of Mr Karabelnikov is that the position under Russian law is that at that time in Russian law there was nothing which allowed the KM Court to take jurisdiction.

63. Over some 20 pages of his report (page 37-59) Mr Karabelnikov sets out his opinion as to why the KM Court did not have jurisdiction in this case. At paragraph 130 he states:

> "In my opinion the Khanty-Mansiysk Arbitrazh Court did not have jurisdiction over this action…It had no jurisdiction under Russian law under the terms of the jurisdiction clause in the Reinsurance Policy or under the ordinary jurisdiction rules of Russian procedural law found in Articles 34-38 of the APC."

64. In brief his reasons are (paragraph 130 of his report) that:

i) the jurisdiction clause in the Reinsurance Policy did not identify a specific *arbitrazh* court in Russia on which the parties intended to confer jurisdiction;

ii) in such circumstances under Russian law a specific Russian arbitrazh court could only lawfully assume jurisdiction over such a dispute when it had both subject matter and territorial jurisdiction based on the jurisdiction rules of Russian procedural law found in Articles 34 - 38 of the Arbitrazh Procedural Code ("APC"); this was made clear by the guidance given in the Information Letter No 158;

iii) on the facts of this case, the KM Court did not have jurisdiction under Articles 34 - 38 and should have declined jurisdiction.

65. Mr Karabelnikov sets out at paragraph 136 of his report why in his view the KM Court did not have jurisdiction under Articles 34 - 38 of the APC and his conclusion at paragraph 138 is that the judge had no power to lawfully exercise jurisdiction over the reinsurers and should have terminated proceedings.

66. Mr Karabelnikov also addresses the findings of the appeal courts which upheld the findings of jurisdiction. In the opinion of Mr Karabelnikov the basis relied upon by the *arbitrazh* court of West Siberia in March 2016 namely the "general principle of performance of defence of civil rights" does not exist in order to enable Russian courts to consider a claim in these circumstances (paragraph 144 of his report). Mr Karabelnikov makes reference to the adoption by the Supreme Court in July 2017 of Decision 23 which dealt with the position where no specific *arbitrazh* court has been selected. But in his opinion the judge in April 2015 could not apply the principles by analogy.

Evidence of Professor Bevzenko

67. Mr Karabelnikov and Professor Bevzenko agree that at the relevant time where the jurisdiction clause did not identify the specific arbitrazh court there was no jurisdiction under the procedural rules of the APC. Professor Bevzenko is of the view that the court could apply the procedural law by analogy (paragraph 87 of his report) and this practice was subsequently recognised by the legislature in 2015. Professor Bevzenko opines (paragraph 196(b) of his report) that the ruling of the Constitutional Court in June 2018:

> "confirms the correctness of the interpretation of the [procedural provisions] on jurisdiction by the [KM Court]"

68. Mr Karabelnikov's evidence (paragraph 187-190 of his report) is that the Constitutional Court did not consider the merits of the jurisdictional claim but does

establish that the jurisdiction cannot be based on an arbitrary decision but on the application of the norms of the APC. Mr Karabelnikov is of the opinion that there was no provision to "plug the gap". The law was only changed in July 2015.

Discussion

69. In my view if the interpretation of the jurisdiction clause in accordance with Russian law leads to a conclusion that the KM Court did not have jurisdiction then there is a real prospect of the defendants establishing that it would not be a judgment which was capable of being recognised or enforced under English law, applying the principles as expressed in *Dicey* under Rule 42, as it would not be a judgment:

> "given by the court of a foreign country with jurisdiction to give that judgment in accordance with the principles set out in Rules 43 to 46"

70. That appears to be confirmed by the passage in *Dicey* referred to above and relied upon by the claimant:

> "[14-132] If a judgment is pronounced by a court of a foreign country whose courts have jurisdiction in the view of English law, but the particular foreign court is not the proper court in terms of the domestic rules of the foreign legal system, is the judgment capable of enforcement or recognition in England?..."

71. It appears from the KM judgment that the KM Court found that as a matter of construction of the jurisdiction clause, the parties had submitted to the arbitrazh courts but had not submitted to a particular court. The conclusion that the KM Court had jurisdiction by relying on the procedural rules by analogy could be seen as equivalent to the position in *Vizcaya* where the court considered whether a submission to the jurisdiction should be implied. In submissions counsel for the claimant submitted that an agreement to submit to the courts of Russia included the KM Court because it was a court in Russia. However that does not appear to be the basis on which the KM court reached its decision since the judgment referred to the "absence of a clearly defined jurisdiction clause."

72. Counsel for the claimant in his oral submissions described the decision of the KM Court as "trying to give effect to the jurisdiction clause". In my view that submission supports the proposition that rather than interpreting the clear language the KM Court in construing the agreement had to have recourse to other matters beyond the literal language and there is a real prospect of the defendants establishing that as a matter of English law applying *Vizcaya*, the question of whether the KM Court had jurisdiction is a question of construction which involves the application of Russian law including the relevant procedural law; not merely whether there was an agreement to submit.

73. If the issue is not correctly characterised as a question of interpretation falling within the principle in Rule 43 (Fourth Case) but relies on a wider basis of consideration of the applicable jurisdictional rules, the issue then is whether this falls foul of the principle expressed in Rule 49(2) of *Dicey* that "in general" a foreign judgment cannot be impeached on the ground that the court which gave it was not competent to do so according to the law of the foreign country concerned.

74. It was submitted for the defendants that:

i) the English court in considering whether the written agreement constituted a binding jurisdiction clause for the KM Court had to take into account the applicable law as an English court is directing its mind to the competence or otherwise of the foreign court to summon the defendant before it and decide such matters as it has decided: *Pemberton v Hughes*;

ii) where the foreign applicable law imposes restrictions on the ability of a particular court to exercise jurisdiction, the question of whether jurisdiction was properly exercised over the defendants should and must be considered by the English court (paragraph 157 the defendants' skeleton argument);

iii) if the applicable rules of Russian law made it clear that a jurisdiction clause for the "Courts of Russia" would not confer jurisdiction on the KM Court unless that court had jurisdiction on the basis of the ordinary jurisdictional rules of the APC (and those rules could not be satisfied on the facts of this case), then the jurisdiction clause was "void or ineffective" (paragraph 160 of the defendants' skeleton).

75. It was submitted for the claimant that:

i) failure to specify a particular court does not assist the defendants because Russian law does not expressly provide that such failure makes the jurisdiction agreement void;

ii) the KM Court dealt with the failure to refer to a specific court by analogy with procedural law and with the *Sony Ericsson* case; there was a gap in the procedural law at the time and there was not a "ready answer" as to what to do if the clause did not specify a particular *arbitrazh* court;

iii) it was necessary to address the gap and the fact that the procedural code did not cover it; the decision was necessary to give effect to the claimant's procedural rights and the KM Court concluded that did not render the jurisdiction agreement void and ineffective;

iv) the English courts do not seek to apply municipal rules because the foreign court has made a decision on jurisdiction and it would undermine the rule that an English court treats as final and conclusive a foreign judgment on the issues that it has determined and it is not permissible to reargue jurisdiction: *Adams v Cape Industries; Pemberton v Hughes.*

76. In *Pemberton v Hughes* a decree for divorce had been pronounced by the proper court in Florida in an undefended action by the husband against the wife, both the parties being domiciled and resident in Florida, and the Court of Appeal held that an alleged irregularity in service of process was not a ground for questioning the validity of that decree in an action brought by the wife in the English Courts.

77. Lindley MR said at 790 of the judgment in that case:

> "If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English Courts look to is the finality of the judgment and the jurisdiction of the Court, in this sense and to this extent - namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the Court had jurisdiction in this sense and to this extent, the Courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed…" [emphasis added]
>
> "It may be safely said that, in the opinion of writers on international law, and for international purposes, the jurisdiction or the competency of a Court does not depend upon the exact observance of its own rules of procedure. The defendants' contention is based upon the assumption that an irregularity in procedure of a foreign Court of competent jurisdiction in the sense above explained is a matter which the Courts of this country are bound to recognise if such irregularity involves nullity of sentence. No authority can be found for any such proposition; and, although I am not aware of any English decision exactly to the contrary, there are many which are so inconsistent with it as to shew that it cannot be accepted.
>
> A judgment of a foreign Court having jurisdiction over the parties and subject-matter - i.e., having jurisdiction to summon the defendants before it and to decide such matters as it has decided - cannot be impeached in this country on its merits: *Castrique v. Imrie* (in rem); *Godard v. Gray* (in personam); *Messina v. Petrococchino* (in personam). It is quite inconsistent with those cases, and also with *Vanquelin v. Bouard*, to hold that such a judgment can be impeached here for a mere error in procedure. And in *Castrique v. Imrie* Lord Colonsay said that no inquiry on such a matter should be made" [emphasis added]

78. Rigby LJ concurring with the decision of Lindley MR said at 795:

> "The State had exclusive jurisdiction to deal with divorces of persons domiciled and resident within its territory, and (if that be material) the Court which pronounced the decree for a divorce was the proper court, and the only proper court, for entertaining and deciding upon divorce actions within the territory. It seems to me that, on principle and authority, the Courts of this country are bound to assume that the Florida Court understood its own procedure and law, and that the

> evidence of experts ought not to have been resorted to. I think that *Castrique v. Imrie* (a case of a judgment in rem) and *Vanquelin v. Bouard* are two of the most important authorities on the point. I think that the result of all the cases is that a decision of a proper Court having, in accordance with general principles of law recognised by our Courts, sole jurisdiction over the subject-matter of the action and the parties thereto must, by the Courts of this country, be treated as the only competent tribunal to deal with the question raised in the divorce action. Even though it were possible to point out some mistake as to the municipal procedure or law, the Courts of this country ought not, on that ground, to override the actual decision." [emphasis added]

79. In *Cheshire and North* (at p565) the scope of the principle is discussed as follows:

> "What, for many years has been less certain is whether the foreign court must have had internal competence, i.e. jurisdiction under its own law. Lindley LJ [in Pemberton v Hughes] once said that the jurisdiction which alone is important in connection with a foreign judgment is the competence of the foreign court in the international sense. "Its competence or jurisdiction in any other sense is not regarded as material by the courts of this country." According to this view, action will lie in England on a foreign judgment although delivered by a court that, according to its own internal law, had no jurisdiction whatsoever over the cause of action. If, for instance, the foreign court has adjudicated on a claim in excess of the legally permitted amount, is it to be no answer to an action on the judgment in England that the court lacked internal jurisdiction? To admit this would be inconsistent with principle. According at any rate to the English rule, a judgement delivered by a court with no jurisdiction is a complete nullity, and it seems curious that what was null and void in the foreign country can be regarded as valid for the purposes of an English action. Such a foreign judgment creates no rights whatsoever in favour of the claimant, yet it is because a right has been vested in him that, according to the doctrine of obligation, he may sue on the judgement in England. The dictum of Lindley LJ, for it was nothing more, was not applied in *Papadopoulos v Papadopoulos* where one of the grounds on which the Cypriot decree of nullity was held to be ineffective was that the court had no power by the law of Cyprus to declare the marriage null and void. Similarly in *Adams v Adams* recognition was refused to a Rhodesian divorce decree because, under Rhodesian law as interpreted in England, the decree was invalid as it had been pronounced by a judge who was not a judge *de iure* of the High Court of Rhodesia." [emphasis added]

80. The court was not taken to the decisions in *Papadopoulos* or *Adams*. Based on this view expressed in *Cheshire and North*, the issue is not whether as a matter of Russian law, the court's finding of jurisdiction is a nullity but whether the KM Court had jurisdiction as a matter of Russian law, and if it did not, the judgment of the KM Court would be a nullity as a matter of English law.

81. By contrast *Dicey* at [14-135] (quoted above) attempts to reconcile the decisions in *Vanquelin v Bouard* approved in *Pemberton v Hughes* with the decisions in *Castrique v Imrie* and in *Papadopoulos* and *Adams* by drawing a distinction based on whether the judgment is merely irregular in the foreign jurisdiction or a nullity in the foreign jurisdiction concluding that a judgment is "far more likely to be irregular than void".

82. As far as this Summary Judgment Application is concerned, whilst noting the attempt by *Dicey* to reconcile the authorities, it seems to me that the law is far from settled. It seems to me that on the facts of *Pemberton v Hughes* and the *ratio* in that case, that the defendants have a real prospect of establishing that the court in *Pemberton v Hughes* was dealing with an error of procedure and not what counsel for the defendants in this case termed "a fundamental lack of jurisdiction in the international sense" and accordingly that the English court is not precluded by the line of authority of *Pemberton v Hughes* (and the cases referred to in the judgment) from reviewing whether the KM Court had jurisdiction.

83. In my view this interpretation of that judgment in *Pemberton v Hughes* is consistent with the approach in *Cape Industries where* the following passage was cited from *Pemberton v Hughes*:

> "As Lindley M.R. put it in Pemberton v. Hughes (1899) 1 Ch. 781:
>
> There is no doubt that the Courts of this country will not enforce the decisions of foreign Courts which have no jurisdiction in the sense above explained – i.e., over the subject-matter or over the persons brought before them … But the jurisdiction which alone is important in these matters is the competence of the Court in an international sense – i.e., its territorial competence over the subject-matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the Courts of this country".

84. As to the factual position under Russian law, the expert evidence for the defendants (summarised above) concludes that the KM Court had no jurisdiction and should have declined to consider the claim and terminated the proceedings (paragraph 198 of Mr Karabelnikov's report).

Criticism of Mr Karabelnikov

85. In submissions counsel for the claimant criticised the report of Mr Karabelnikov and submitted that his opinion required this court to find that the decision of the Supreme Court in the *Sony Ericsson* case (paragraphs 170 – 177 of his report) was wrong. However as I read his report, Mr Karabelnikov states that the subject matter of that case was "substantively different" in that it concerned a contract where the foreign

counterparty was allowed to submit its claims to arbitration in London or to a competent State court whilst the Russian counterparty was allowed to submit its claims only to arbitration. As well as opining that the decision is obviously wrong and was an example of a "political" case, Mr Karabelnikov states that that decision "has nothing to do with the circumstances of the Reinsurance Policy" and that no principle of "parity" exists in a case such as the present.

86. Counsel for the claimant "urged caution" with respect to the expert evidence of Mr Karabelnikov. The court was referred to the assessment of his evidence in *Maximov v OJSC "Novolipetsky Metallurgichesky Kombinat"* [2017] EWHC 1911 (Comm) at [19]:

> "19. I am in no doubt that I very much prefer the evidence of Professor Karabelnikov. He was on occasion, as Mr Brindle put it, 'over the top', he was trenchant in his views, and it is clear that he had read much about, and become critical of, Judge Shumilina's decision and the appeals therefrom as an independent commentator in academic works before he was selected, no doubt for that reason, as the expert for the Claimant. I was not persuaded by his analogy of the ' political cases '. Those of which he gave examples all related to matters in which (as referred to in paragraph 12(1) above) the Russian Government had a direct or indirect interest, and he indeed found it difficult to explain why the Russian court had gone so wrong in the decisions which I am considering, but which led him in measured tones to conclude that they must have been affected by bias. He had been far more outspoken in his reports in the Dutch proceedings, in which he was also instructed, his task there being to address the two experts' reports commissioned by the Dutch court, and it is clear that he found it difficult to understand why those experts had also gone so wrong. Certainly it seems clear, after the investigation which this Court has carried out, with the benefit of cross-examination of the experts, which is not available in the Dutch courts, that those lawyers did fall into substantial error, and indeed because of the limited nature of his brief in the Dutch courts he has been able to explain his case much more fully before me." [emphasis added]

87. Counsel for the claimant also submitted that Mr Karabelnikov's expertise appeared to be in arbitration, he had no recent experience of practising in Russia and had never appeared before the Russian Supreme Court.

88. In relation to appearances before the Russian Supreme Court, that particular submission has been refuted by evidence submitted following the hearing of this Summary Judgment Application which shows that Mr Karabelnikov appeared as counsel in two cases before the Russian Supreme Court in 1997.

89. As to his alleged lack of recent or relevant experience, his report indicates (paragraphs 2 – 8) that Mr Karabelnikov practised in Russia until he moved to Latvia in 2014. From 2007 until 2017 he was Professor of law at the Faculty of Law of the Moscow

School of Social and Economic Sciences. From 2007 until 2018 he was a judge of the Administrative Tribunal of the European Bank for Reconstruction and Development. Mr Karabelnikov has also published a number of articles and authored the National Report on the Russian Federation in the ICCA International Handbook on Commercial Arbitration Supplement 65 published in July 2007 and revised by him in December 2016 and in February 2019. He has appeared as an expert witness before numerous courts around the world and in various arbitral tribunals concerning *inter alia* contractual disputes involving Russian companies, including the *Maximov* case where (notwithstanding the observations quoted above about his manner of presentation of his evidence) I note that his evidence was preferred to that of the other expert, Dr Rachkov.

90. In relation to the claimant's expert, Professor Bevzenko, the court in *Maximov* said:

> "[17] The presence in the judgment of two grounds which the judge did not raise during the hearing is obviously a matter which is uncomfortable for an English court to address, and in any event one which raises issues under Article 6 of the ECHR. Professor Karabelnikov is very critical of this, particularly in relation to the introduction in the judgment for the first time of such an almost untested issue as arbitrability, but, as Mr Brindle points out, Professor Bevzenko has more recent experience of the Russian courts and he asserts that this kind of thing happens quite regularly, and has happened to him. Nevertheless, I conclude that he felt discomfort about this, and he faltered in his logic in attempting to defend it. He gave evidence that, if a judge raised in the hearing a point of his own motion which had not been raised by the parties, then this might give rise to a motion for him to recuse himself; but if the judge said nothing, and only raised the point in his judgment afterwards, that would not amount to a ground for recusal or challenge. This seems difficult to fathom. At the end of the day the point is either supportive of bias or it is not. If it were only an Article 6 point, it would be covered by being addressed on appeal, as these two grounds were, provided that the appeal courts were not similarly so biased.
>
> "[18]… save for the matters referred to in paragraph 17 above, Professor Bevzenko gave no evidence that was in the end material to my decision…" [emphasis added]

91. Unlike in *Maximov* which was a full hearing with oral evidence from the experts, this court has not had the opportunity of hearing from the experts orally nor have they been cross examined. I see no basis at this stage to disregard the evidence of Mr Karabelnikov or to reduce the weight which would be given to this evidence for the purposes of determining whether the defence has a real prospect of success. Mr Karabelnikov appears to be qualified to act as an expert in Russian law given his experience over the years and it is not in my view justified to dismiss his evidence by reason of the fact that he no longer practises in Russia: he would appear to have remained current in his knowledge as may be inferred from his appointments as an

expert in other proceedings and I note that in *Maximov* he appears to have been accepted as an "independent commentator in academic works".

92. As to the submission that his evidence "manifestly goes beyond the proper boundaries of expert opinion evidence", it seems to me that Mr Karabelnikov sets out the applicable principles of Russian law and procedure and to the extent the court is of the view at trial that his report goes beyond matters on which he is able to give expert evidence, the court is able to disregard those parts of his evidence. It does not mean that those aspects of his evidence which are properly given should or will be disregarded at this stage.

Conclusion on "lack of jurisdiction"

93. Having found that there is no basis to reduce the weight which is given to the evidence of Mr Karabelnikov on this issue of lack of jurisdiction, it seems to me that it is not possible for the court to resolve the differences in the views expressed by Professor Bevzenko and Mr Karabelnikov at this stage without having had the benefit of oral evidence. Having regard to the authorities discussed above as to the relevant legal principles of English law, there is sufficient in the report of Mr Karabelnikov (and its reasoning) in relation to Russian law for the court to conclude that there is a real prospect of the defendants establishing that as a matter of English law following the approach in *Vizcaya*, the question of whether the KM Court had jurisdiction is a question of construction which involves the application of Russian law and, for the reasons discussed, if it is necessary to establish that there is no breach of any broader rule of English law, the defence has a real prospect of success. If I were wrong on that latter point, then it seems to me that this is an issue of law which needs to be resolved after hearing full argument at trial and is not suitable for summary determination.

94. Accordingly for the reasons discussed in my view the claimant has not established that the defence of lack of jurisdiction has no real prospect of success and/or there is a compelling reason for a trial and the application for summary judgment on this ground fails.

Bias

Relevant legal principles

95. It is accepted for the claimant that a foreign judgment which otherwise is enforceable, cannot be enforced if it was procured by "fraud". The principle is set out in *Dicey* at Rule 50 as follows:

> "A foreign judgment relied upon as such in proceedings in England, is impeachable for fraud.
>
> Such fraud may be either
>
> (1) fraud on the part of the party in whose favour the judgment is given; or
>
> (2) fraud on the part of the court pronouncing the judgment.
>
> or not in accordance with the principles of natural justice."

96. I note that a foreign judgment can be impeached for fraud even though no newly discovered evidence is produced and even though the fraud might have been alleged in the foreign proceedings. The rule that foreign judgments can be impeached for fraud stands "in square opposition" to the principle of conclusiveness of judgments and also to the principle that English judgments can only be impeached for fraud if new evidence of a decisive character has since been discovered (paragraph 14-139 of *Dicey*).

97. At 14-144 *Dicey* states:

> "The fraud which vitiates a judgment must generally be fraud of the party in whose favour the judgment is obtained, but it may (conceivably, at any rate) be fraud on the part of the foreign court giving the judgment, as where a court gives judgment in favour of A, because the judges are bribed by some person, not the plaintiff, who wishes judgment to be given against X, the defendant. In such a case the defence of fraud tends to merge with the defence that the proceedings were opposed to natural justice."

98. The court was referred by the claimant to the authority of *Maximov*. This was an application to enforce an award of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation ('ICAC') which was set aside by an order by the Moscow Arbitrazh Court. It was a case where there was no evidence in the case of actual bias, but the court was asked to infer bias. Sir Michael Burton said at [2]:

> "There has not been a great deal of dispute between the parties as to the proper test for me to apply, on any basis a high hurdle for the Claimant to surmount, before refusing to recognise the judgment (upheld on appeal) which set aside the award. There was no evidence in the case of actual bias, but I am asked to infer bias from the perverse nature of the Russian court's conclusions (and in certain respects the manner in which they were arrived at). Effectively the test is whether the Russian courts' decisions were so extreme and incorrect as not to be open to a Russian court acting in good faith." [emphasis added]

99. At [15] he said:

> " …
>
> (1) The fact that a foreign court decision is manifestly wrong or is perverse is not sufficient (see for example *Dicey, Morris and Collins, The Conflict of Laws 15th Ed* at 14-163, *OJSC Bank of Moscow v Chernyakov* [2016] EWHC 2583 (Comm) and *Erste Group Bank AG (London) v JSC (VMZ Red October)* [2013] EWHC 2926 (Comm)). The decision must be so wrong as to be evidence of bias, or be such that no court acting in good faith could have arrived at it.

> (2) The evidence or grounds must be ' cogent '.
>
> (3) The decision of the foreign court must be deliberately wrong, not simply wrong by incompetence." [emphasis added]

100. It was submitted for the claimant that *Maximov* was instructive in that even though the judge found that the Russian court had got things "completely wrong" it was not sufficient to enable the court to conclude that it was the product of bias.

101. The defendants base their defence not only on the fraud exception but also on the basis that an English court will refuse to recognise or enforce a judgment which is contrary to public policy: *Altimo Holdings and Investment Limited and Others v Kyrgyz Mobil Tel Limited* [2011] UKPC 7 at [117]:

> "117. In any event, the rule in Abouloff may not necessarily affect the outcome of the proceedings. Thus if the April and December 2005 Judgments were corruptly obtained by the exercise of improper influence on the relevant Kyrgyz courts, or if their recognition is contrary to public policy, those judgments would not be recognised or enforced in the Isle of Man, whether or not the rule in Abouloff applies." [emphasis added]

102. The defendants also assert that a perverse refusal to apply the law will amount to a breach of natural justice: *OJSC Bank of Moscow v Chernyakov* [2016] EWHC 2583 (Comm) at [7].

103. In that latter case the Bank applied for summary judgment against the first defendant, Mr Chernyakov to enforce three judgments against him of the Meshchansky District Court, Moscow. Mr Chernyakov resisted summary judgment on the grounds that there were triable issues that the judgments were procured by the fraud of the Bank, that they were given in violation of the principles of natural justice and in breach of the right to a free trial in Article 6(1) of the European Convention on Human Rights and that their enforcement would be contrary to public policy. Cranston J stated that:

> "6. The fraud ground covers fraud on the part of the party in whose favour the judgment is given for fraud on the part of the court pronouncing the judgment. It extends to every kind of fraudulent conduct. A foreign judgment can be impeached for fraud even though no newly discovered evidence is produced and even though the fraud was alleged in the foreign proceedings: see Dicey , para. 14-139. Moreover, it is immaterial that the fraud could have been raised in the foreign proceeding but was not raised at that point.
>
> 7. The public policy ground is not easy to demarcate from the fraud and natural justice grounds. Its ambit is not precise and it may extend to an English court's refusal to recognise or enforce a judgment where the foreign court is corrupt or the judgment was obtained by the exercise of improper influence on the judges: see *Altimo Holdings v. Kyrgyz Mobil Tel Ltd* [2011]

> UKPC 7; [2012] 1 WLR 1804 , at [101], [117], per Lord Collins; *Yukos Capital Sarl v. OJSC Rosneft Oil Co* [2012] EWCA Civ 855; [2014] QB 458 , [90]. However, the principle of comity demands caution, and cogent evidence will be required if a foreign judgment is said to be infected in this way. It is not contrary to English public policy to refuse to recognise a judgment which is obviously wrong. However, if there is evidence of a perverse refusal by the foreign court to apply the law in a judicial manner, it may be possible to oppose recognition on the ground that the behaviour of the court infringed natural justice: Professor Adrian Briggs, Private International Courts in English Courts, 2014, p.480." [emphasis added]

Defence

104. The defence advanced on the basis of "bias" in essence is as follows (paragraphs 36 – 41 of the Defence):

i) the independence and impartiality of Russian courts is often undermined by interference by the State and "powerful litigants", especially in remote regions of the Russian Federation;

ii) Kapital deliberately chose to issue proceedings in the KM Court because they believed they would be able to secure a verdict in their favour;

iii) Mr Khachaturov and Kapital had the ability, connections and motive to improperly influence the KM Court as well as the subsequent appeal courts;

iv) on the balance of probabilities, judging by the "wholly perverse" decisions reached in Kapital's favour, the proper inference to be drawn is that they (and others) improperly influenced those courts.

Submissions

105. It is submitted for the defendants that:

i) The KM Court (and the two appeal courts) were the only courts to conclude that the reinsurers could be liable in respect of a demonstration flight; and

ii) Mr Karabelnikov's evidence is that no court acting in good faith could have come to a different conclusion on the law and facts at that stage.

106. It was submitted for the claimant that:

i) the breadth of the conspiracy is implausibly vast;

ii) no proper particulars are given as to what form of improper influence has been exercised and by whom;

iii) there is no evidence of actual bias and the case is largely one of "systemic" bias;

iv) the alleged bias is impossible to reconcile with the agreement to the Russian jurisdiction clause, the Moscow proceedings and the application for review in September 2018 in which no allegation of bias was raised.

Discussion

107. Applying the approach in *Maximov*, the decision of the KM Court must be so wrong as to be evidence of bias, or be such that no court acting in good faith could have arrived at it.

Judgment of KM Court

108. It was submitted for the defendants that the judge in the KM Court could not rationally conclude that the defendants were liable to the claimant under the Reinsurance Policy in circumstances where she had found that the crash occurred while the aircraft was performing a demonstration flight:

i) the judge ignored the literal wording of the Reinsurance Policy (which is required under the Russian civil code);

ii) she failed to provide any proper reasons for her departure from the clear words;

iii) Kapital had agreed that it was a demonstration flight but argued that as long as they were liable to pay under the Insurance Policy the reinsurers were liable to reimburse them. This was clearly not what the Reinsurance Policy said: the judge failed to deal with the AVN defences;

iv) the judge used the *ex gratia* payments by other reinsurers to support a finding of liability.

109. It is the evidence of Mr Karabelnikov (paragraphs 199-218 of his report) that demonstration flights were not covered by the terms of the Reinsurance Policy and that on an "honest and proper application of Russian law", the reinsurers could not have been found liable under the Reinsurance Policy in the KM Court.

110. His evidence is that the case turned on the interpretation of the reinsurance contract and ordinary general rules of Russian law. In his report he sets out Article 431 of the Russian civil code which provides for the court to take into account the literal meaning of the words and expressions contained in a contract, and if the literal meaning is not clear, the meaning is to be established by comparison with other terms and with the sense of contract as a whole. His evidence is that the limitation on Kapital's ability to amend the policy without the consent of the reinsurers was permissible as a matter of Russian law.

111. In relation to the judgment of the KM Court, Mr Karabelnikov is of the view that the judge ignored the defences regarding the effect of the London aviation insurance clauses AVN 41A and AVN1C. He describes the judge's finding as "completely wrong as a matter of law", that:

> "she provided no reference to any source of Russian law or to the parties agreement under which the coverage under the

> Insurance Policy (between Sukhoi and Kapital) could have been extended contrary to volition of the reinsurers and contrary to the terms of AVN 41 A." (paragraph 227 of his report)

112. In his opinion the findings of the *arbitrazh* courts in relation to the KM Main Action are "plainly wrong" (paragraph 235 of his report).

113. I have already addressed the challenge by the claimant to the evidence of Mr Karabelnikov by reason of his alleged lack of relevant and recent experience. In relation to his evidence on bias, it was submitted for the claimant that he opines on matters that are beyond the scope of an expert report, his opinion consists overwhelmingly of assertion and that:

> "it is impossible to see Mr Karabelnikov's and the defendants' hyperbole as anything other than an attempt to manufacture a triable issue of foreign law, where in truth, applying the correct standard there is none ."

114. It seems to me that there is no basis to impugn the independence of Mr Karabelnikov or to support the submission that he is trying to "manufacture" a triable issue nor is there any obvious motive or evidence which would lead the court to such a conclusion.

115. A concern has been raised by Mr Karabelnikov in relation to a recent tax investigation which he says has been illicitly launched in Russia against his wife (exhibited to the witness statement of Mr Lawson QC dated 5 May 2020). The position of the claimant was stated by counsel for the claimant orally to be that it has no knowledge or involvement. The matter is not currently covered in evidence from the claimant and I do not consider that this court is able to form a view on this matter although I note that Mr Lawson states that the nature, timing and manner of the approach from the Russian authorities raise questions of a similar nature to those raised by the Defence and the Defendants' evidence in opposition to the Summary Judgment Application.

116. In relation to the specific criticism of the judgment of the KM Court I note that, although it was submitted for the claimant that the KM Court was entitled to construe the section in a literal approach in accordance with Article 431 of the Russian code, Professor Bevzenko has not given evidence to that effect and has given no reason in his report why the opinion of Mr Karabelnikov is wrong on the substantive issue of the interpretation of the Reinsurance Policy as a matter of Russian law. I note that in his second report Professor Bevzenko responds to certain aspects of Mr Karabelnikov's evidence and in particular in this regard he states that the KM judgments are not unusual or atypical in their brevity or the extent to which all the arguments from the pleadings are, or are not, recorded and that he would not accuse the judge of any "malintent" solely on the basis that she did not set out in detail the counter arguments. However he does not address the substantive issue of the interpretation of the Reinsurance Policy or rebut the views of Mr Karabelnikov on the approach to interpretation under Russian law.

117. Further the submission for the claimant that the KM Court was entitled to construe the Hull All-risks provision in a literal way does not appear to accord with the claimant's

pleaded case where (at paragraph 10 of the Reply) it is admitted that the Reinsurance Policy contained a limitation by reference to test and certification flights. The argument based on a literal interpretation does not appear to have been advanced, at least expressly, in the pleadings.

118. The evidence of Mr Ninkovic (paragraph 92 of his witness statement) is that the two reinsurers which settled the claim in 2013 had the longest historical exposure to Russia. I have no evidence from the reinsurers concerned as to what lay behind the decision to settle but in the light of the evidence of Mr Ninkovic, I do not accept the claimant's submission that any inference can be drawn that these reinsurers accepted the correctness of the judgment of the KM court.

Appeals in the KM Main Action

119. As to the decisions of the two appeal courts in the KM Main Action, it was submitted for the claimant that these courts went through the arguments and upheld the construction of the KM Court setting out their view of the Reinsurance Policy.

120. As noted above, in fact the judgment of the Eighth Arbitrazh court was brief and the reasoning arguably non-existent and it is entirely unclear from the judgment of the West Siberian court why it dismissed the argument that the Reinsurance Policy was subject to the provisions of the London market provisions referred to in the Reinsurance Policy.

Moscow Actions

121. It was submitted for the claimant that the Moscow Actions are irrelevant to the issue of bias because they were concerned with a different liability clause which was more restrictive.

122. In my view whilst the Moscow Actions were concerned with the issue of legal liability, the basis of the judgments are not so limited and do support the defendants' case that the KM judgment was perverse: the original judgments of Judge Larina (as described above) refers more broadly to the policy limitation and Judge Ponomareva also appeared to accept that the limitation on test flights applied to the Hull cover.

123. Further the decision of the Collegium in the First Moscow Action (February 2016) appeared to accept that the Reinsurance Policy was limited to test and certification flights and therefore this too appears to contradict the finding of the KM Court.

Influence of Mr Khachaturov

124. The evidence of Mr Ninkovic (paragraph 56 of his witness statement) is that Mr Khachaturov was:

> " personally invested in ensuring that the reinsurers paid up…"
>
> "our sense was that RGS was run hierarchically all the way from the top…"

125. As to the letter of 9 September 2013 from Mr Khachaturov to the CEO of each of the then non-paying insurers, it was submitted for the claimant that there was nothing

untoward about threatening to publicise the refusal of the insurers to pay under the Reinsurance Policy. The evidence of Mr Ninkovic (paragraph 91 of witness statement) is that this was understood to be "a threat from the highest level within the RGS group to pay up or suffer the consequences" and that a CEO communication for a claim of this nature was "extremely unusual".

126. The defendants rely on evidence that President Putin has directed the Prosecutor General to investigate allegations made by Mr Aven, the co-owner of Alfa-Bank, in relation to the actions of Mr Khachaturov. These allegations include the fact that Mr Khachaturov is accused of corrupting the Moscow *arbitrazh* court and that decisions of the courts which are "not founded in law may be proof of the judges being subject to possible out-of-court influence by persons connected with Sergei Khachaturov" (paragraph 48 - 51 of the witness statement of Mr Ninkovic).

Choice of KM Court

127. Part of the defendants' case of alleged improper influence is the choice of the KM Court by the claimant.

128. It is the claimant's case that the KM Court was the *"natural choice"* for Kapital to initiate proceedings (paragraph 60 of the witness statement of Mr Smirnov).

129. However it is the defendants' evidence that Kapital was originally incorporated in 1992 to act as the corporate insurer for Lukoil, the energy company and became part of the RGS Group in 2007. Whilst Kapital had a registered office in the Khanty-Mansi autonomous region, the address given for Kapital in the Insurance Policy and the Reinsurance Policy was in Moscow at the corporate headquarters of RGS.

130. It is the defendants' case that the claimant preferred the courts in Khanty-Mansi – one of the reasons being the "cosy relationship between its chosen local lawyers and the local judiciary" (paragraph 115 of the witness statement of Mr Ninkovic).

131. Whilst the evidence as to the factual position in relation to the KM Court will need to be considered at trial, *prima facie* it is difficult to see why Kapital chose to take proceedings in the KM Court rather than in Moscow.

"Systemic bias"

132. It was submitted for the claimant that the success of the defendants in the Moscow Actions is evidence against "systemic bias". In response the defendants submitted that the initial success of the Moscow actions was undermined "once certain influential judges in the Supreme Court began to take interest in the proceedings" (paragraph 116 witness statement of Mr Ninkovic).

133. In December 2015 Kapital's second appeal in the First Moscow Action was transferred to the Collegium. Transfer was ordered by Judge Kapkaev and the Judicial Collegium was chaired by Judge Sviridenko.

134. Whilst the claimant submitted that it was fanciful to think that appeal courts were also biased, at this stage the court has to take the respondent's evidence at its highest and that includes the evidence in relation to Judge Sviridenko who chaired the Collegium.

It is the defendants' evidence (paragraph 118 of Mr Ninkovic's witness statement) that Judge Sviridenko has been publicly implicated in a number of corruption scandals during his career including improperly influencing judges, receiving financial inducements and fixing cases.

135. The court also has regard to the defendants' submissions concerning the "sudden change of fortune" in Moscow which the defendants say provide "strong reasons to question the process through which the judgments in favour of the claimant were entered and the judgments in favour of the defendants were overturned".

136. The defendants' submissions in relation to the judgment of the Collegium are supported by the evidence of Mr Karabelnikov's evidence. His evidence (paragraph 257 of his report) is that the Collegium ruling in February 2016 which focussed on the type of flight constituted "a severe violation of the norms contained in the APC". He refers to violation of certain articles including that by article 70 (2) facts which are agreed upon between the parties are accepted by *arbitrazh* courts; and, and article 70 (5) the facts admitted by the parties are not subjected to check in the course of further proceedings. In his opinion the Supreme Court was not allowed to revisit the issue of the type of flight as this was not done "in the interests of lawfulness".

Conclusion on "bias"

137. On an application for summary judgment:

i) the burden of proof is on the applicant for summary judgment.

ii) the court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: the test is not one of probability, it is the absence of reality;

iii) disputed facts must generally be assumed in the respondent's favour.

138. In my view in relation to the issue of "bias":

i) the defendants will not have to establish a "conspiracy" but will have to establish on the evidence improper influence both of the KM Court and the relevant appeal courts. The defendants will have to show that the courts were deliberately wrong and not merely incompetent and that is a high threshold. However the evidence for the defendants is that the KM Court was "plainly wrong" for the reasons given by Mr Karabelnikov and referred to above. To the extent that Professor Bevzenko disagrees with the evidence as to Russian law the court will need to resolve the conflicts in the expert evidence and this will need to be done at trial (*JSC 'Aeroflot-Russian Airlines' v Berezovsky*[2014] EWCA Civ 20 at [45]);

ii) in order to determine whether there is a real prospect of showing that the KM court was deliberately wrong as opposed to merely incompetent, the court has regard to the alleged "improper influence" of Mr Khachaturov; the defendants will have to show that the proper inference is that influence was exercised in this regard over the courts: at this stage the evidence of the current allegations against Mr Khachaturov's influence on other legal proceedings supports the

defendants' case taken together with the evidence of his involvement in the conduct of the claim; the extent of his involvement and the nature of any influence will have to be tested at trial;

iii) the case of the defendants rests not on showing systemic bias against all foreigners but on the facts of this case which the defendants say was high-profile by reason of the significance of the Superjet programme and the involvement of the Russian State; similarly it is not suggested by the defendants that all Russian judges are biased but that in the specific judgments influence was brought to bear;

iv) as to the original agreement for submission to the Russian courts, this is irrelevant in my view to the factual issue of whether or not the decision of the courts in the KM Main Action were perverse and whether improper influence was in fact brought to bear;

v) as to the Moscow Actions, the defendants' case is that the KM Court and the courts of western Siberia were subject to potential influence in a way which the Moscow courts were not; the initial judgments in the Moscow Actions (and the judgment of the Collegium) support the defendants' case that the courts in the KM Main Action could not properly have reached its substantive decision on the proper application of the law to the Reinsurance Policy. The subsequent reversal in the Moscow Actions was the result of the re-examination of the nature of flight following the decision of the Collegium which decision is of itself criticised by Mr Karabelnikov as a matter of Russian law and (as noted above) the factual case then advanced by Sukhoi is contrary to the position taken by Kapital in the original Moscow Actions. I therefore reject the submission for the claimant that ultimately the decisions in the Moscow Actions were consistent with the decisions of the courts in the KM Main Action as the basis for the reversal of the Moscow decisions appears to be completely at odds with the factual position previously accepted by Kapital in the KM Main Action;

vi) there is no principle of English law that the allegation of bias should have been raised in the Russian proceedings before a foreign judgment of the Russian courts is capable of being challenged before the English court for alleged fraud (bias).

139. In my view for the reasons discussed above, the claimant has not established that the defence of "bias" (as described above) has no real prospect of success and the Summary Judgment Application on this ground is dismissed.