Neutral Citation Number: [2021] EWHC 151 (Comm)

Case No: CL-2020-000049

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/02/2021

Before :

DAVID EDWARDS, QC (SITTING AS A JUDGE OF THE HIGH COURT)

- -

Between :

PREMIER CRUISES LIMITED	**Claimant/ Respondent**
- and -	
(1) DLA PIPER RUS LIMITED **(2) DLA PIPER UK LLP**	**Defendants/ Applicants**

- -
- -

Philippa Hopkins, QC and John Robb (instructed by **Tatham & Co**) for the **Claimant/Respondent**
George Spalton and Joshua Folkard (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Defendants/Applicants**

Hearing dates: 24-25 November 2020

- -

Approved Judgment

.....

DAVID EDWARDS QC SITTING AS A JUDGE OF THE HIGH COURT

Covid-19 Protocol: This judgment will be 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 will be deemed to be 10:30 AM on 01 February 2021.

David Edwards QC:

Introduction

1. The Claimant in these proceedings is Premier Cruises Limited ("PCL"), a company originally domiciled in the British Virgin Islands and now domiciled in the Seychelles, which owns or operates two vessels: a river cruise vessel, the MS "Volga Dream", and an ocean-going cruise vessel, the MS "Serenissima."

2. The Defendants are entities within the DLA Piper Group of legal practices. The First Defendant is DLA Piper Rus Limited ("DLA Russia"), an English company with operations in Russia. The Second Defendant is DLA Piper UK LLP ("DLA UK"), an English LLP. Where it is not necessary to distinguish between them, I will refer to the Defendants together as "DLA".

3. On 29 January 2020 PCL commenced proceedings against DLA in the Commercial Court claiming damages in contract and/or in tort for professional negligence. The nature of, and the factual basis for, the claims and allegations made against DLA, set out in the Particulars of Claim, is explained in the paragraphs below.

4. DLA filed an Acknowledgement of Service on 25 February 2020 indicating that it intended to contest the jurisdiction of this court. On 14 April 2020 DLA issued an Application Notice applying for an order that the proceedings against both Defendants should be stayed pursuant to section 9 of the Arbitration Act 1996 ("the 1996 Act") and CPR Rule 11(1)(a) on the grounds that:

> "1. By the engagement letter signed by the Claimant and dated 26 May 2015, the Claimant and the First Defendant agreed that in the event that any dispute could not be settled through negotiation, the matter shall be resolved under arbitration, under the rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation ('the Arbitration Agreement'). The Arbitration Agreement is set out in full in the attached evidence. It encompasses all matters which are the subject of these proceedings, including on the basis that the Second Defendant was agent of, or sub-contractor to, the First Defendant in respect of the matters which are the subject of the claim".

5. DLA UK subsequently accepted that, as it was not itself party to the arbitration agreement relied upon, there was no basis upon which the court could stay the proceedings against it under section 9 of the 1996 Act. DLA UK's application, it was explained, was for a stay of the English proceedings on case management grounds.

6. PCL, through its solicitors, Tatham & Co ("Tatham"), sensibly indicated in a letter dated 2 July 2020 that, although it disputed that such a stay should be granted, it did not require the application for a case management stay to be the subject of a further application notice.

Factual Background

7. The facts, insofar as they are relevant to the present application, are largely common ground.

(i) The Shipbuilding Contract

8. On 21 June 2013 PCL entered into a contract ("the Shipbuilding Contract") with a Croatian shipyard, Brodosplit d.d. ("the Shipyard"), for the construction and purchase of a passenger vessel that was given the provisional name "Volga Dream II" ("the Vessel").

9. The purchase price for the Vessel was €20,000,000, which was payable in staged instalments in the usual way. The Delivery Date, set out in clause X of the Shipbuilding Contract, was 15 March 2015. Clause XVII provided that the Shipbuilding Contract was governed by English law with any disputes between the parties to be resolved by London arbitration.

(ii) Early communications with DLA Russia

10. At some point in late 2013 or early 2014 – the precise date is irrelevant for present purposes – Philip Lamzin, at the time a Legal Director of DLA Russia, met Dmitry Esakov, the son of Vladimir Esakov, who was the principal representative of PCL. Dmitry Esakov asked Mr Lamzin for help in finding financing for the Vessel.

11. On 10 September 2014 Mr Lamzin sent PCL a "Know Your Customer" request in anticipation of PCL engaging DLA Russia to carry out tax and restructuring work. There was apparently some discussion of precisely which company would engage DLA Russia, but in the event the potential engagement of DLA Russia in relation to tax and restructuring matters came to nothing.

12. Mr Lamzin says in paragraph 19 of his first witness statement that PCL chose not to proceed with instructing DLA Russia at that point in time and that he did not hear from PCL again until December 2014.

(iii) December 2014 – May 2015

13. In the second half of 2014 the relationship between PCL and the Shipyard deteriorated when the Shipyard began to seek extensions of the Delivery Date for what it contended was permissible delay.

14. Between December 2014 and May 2015 there were a number of communications between Mr Lamzin and Vladimir Esakov in relation to PCL's position under the Shipbuilding Contract.

15. The full nature and extent of these communications, and whether PCL was entitled to rely upon what Mr Lamzin did and said, is not a matter that I need to decide for the purposes of the present application. It is common ground, however, (or, insofar as it is not, I find) that at least the following communications took place:

i) On 16 December 2014 Vladimir Esakov sent an email to Mr Lamzin indicating that he would send Mr Lamzin copies of letters exchanged between PCL and the Shipyard. Mr Lamzin responded saying that he would revert with any comments or questions;

ii) On 23 December 2014 Mr Lamzin sent an email to Vladimir Esakov in which Mr Lamzin explained that:

> "I have studied carefully the [Shipbuilding Contract] and forwarded correspondence. I enclose my comments below."

The email went on to make a number of remarks about the Shipyard's claims, the parties' respective rights under clause XII(2) of the Shipbuilding Contract, and the information and documents that Mr Lamzin needed to assess PCL's position;

iii) On 24 December 2014 Mr Lamzin sent an email to Vladimir Esakov attaching a draft letter to be sent by PCL to the Shipyard rejecting its claim for permissible delay. A further draft letter, in response to subsequent correspondence from the Shipyard, was sent by Mr Lamzin to Vladimir Esakov on 16 January 2015;

iv) On 25 March 2015 Mr Lamzin sent an email to Vladimir and Dmitry Esakov attaching a further draft letter and setting out his thoughts on the termination provisions in the Shipbuilding Contract. The email referred to two provisions, clauses XI.A(b) and XII, which Mr Lamzin suggested were somewhat contradictory. It concluded:

> "Accordingly,
>
> a) the Yard can dispute the point at which the Buyer's right to cancel the contract arose (and expired) if it proves that the Buyer knew about this at an earlier point. To be on the safe side, we need to double-check whether the Yard expressly communicated a time frame for the delay. If not, we will treat their reply to our attached letter as such a notice.
>
> b) I would recommend seeking further advice from our English colleagues as concerns how to interpret the conflict between the two clauses of the contract. If we are to take the more cautious position, it would be advisable to send them formal notice of cancellation on the earlier date (when we formally learned of the delay in delivery). Do let me know if, at this stage, it is worth bringing in London to ask them for comment."

v) On 19 April 2015 Mr Lamzin sent an email to Vladimir Esakov attaching a draft letter to be sent by PCL in response to a notification from the Shipyard that it intended to deliver the Vessel on 4 August 2015. The draft was headed "Warning Letter". It said that:

> a) The Shipyard was in breach in failing to deliver the Vessel by 30 March 2015 (taking account of 15 days admitted permissible delay);

b) PCL was willing to accept a new Delivery Date of 4 August 2015, but only on certain conditions, including an acceptance that neither party had any claim against the other in connection with the delay;

c) If those conditions were not accepted by the Shipyard, then PCL would have no choice other than to initiate termination of the Shipbuilding Contract and to demand the refund of the purchase price plus damages for breach of contract.

A letter in these terms was duly sent by PCL to the Shipyard on 20 April 2015;

vi) On 28 April 2015, following a response from the Shipyard, Mr Lamzin sent an email to Vladimir Esakov attaching a draft letter. The draft, headed "Notice of Rescission", purported to rescind the Shipbuilding Contract with immediate effect under clause XII.4 and demanded the repayment of that part of the purchase price that had already been paid.

16. On 29 April 2015 PCL sent a Notice of Rescission to the Shipyard in the terms of the draft provided by Mr Lamzin referred to in paragraph 15 vi) above. The Shipyard responded on 21 May 2015 alleging, *inter alia*, that:

i) PCL did not have a contractual right to terminate the Shipbuilding Contract; and

ii) PCL had failed to pay the fifth instalment of the purchase price which had now fallen due.

The Shipyard said that it was rescinding the Shipbuilding Contract pursuant to clause XV.3, alternatively that it was treating PCL's Notice of Rescission as a repudiatory breach, which it accepted, bringing the Shipbuilding Contract to an end.

(iv) Mr Lamzin's approach to DLA UK

17. In paragraph 31 of his witness statement Vladimir Esakov explained that on 19 May 2015, before the Shipyard had responded to the Notice of Rescission, he was advised by Mr Lamzin that PCL should start to prepare arbitration proceedings for the recovery of the instalments of the purchase price on the basis that it was unlikely that the Shipyard would agree to repay them voluntarily.

18. Mr Lamzin did not dispute in his second witness statement that this occurred, and the fact that there was such a conversation is consistent with an email that Mr Lamzin sent to Vladimir Esakov on 19 May 2015 setting out the text of a proposed email to the Shipyard asking for an update on the position in relation to the return of the purchase price.

19. On the same day, *i.e.*, also on 19 May 2015, Mr Lamzin sent an email to Linos Choo, a partner in DLA UK, headed "Volga Dream II – potential litigation" in the following terms:

> "We've got a potential request for assistance from a company called Premier Cruises Limited. The company operates one

> luxury river cruiser in Russia and has a contract for construction of a new ship in Croatia with Brodosplit (see copy attached).
>
> The vessel was due to be delivered on 30 March 2015, but the builder delayed delivery (claiming delays in provision of drawings by the buyer) for a few months.
>
> After series of negotiations and formal correspondence the buyer decided to terminate the contract and claimed refund of the PDPs in total amount of $5m + interest. The deadline for payment is 29 May 2015 at which point Premier Cruises Limited is considering to enforce the contract through arbitration.
>
> We are asked to provide a fee proposal for assisting the client with enforcing the contract and our estimation of associated costs/timing.
>
> The contact [sic] provides for mediation and then arbitration. It does not look like mediation is going to succeed so the client would appreciate our views on whether we do need to follow it or can skip this step in practice."

20. Mr Choo responded by email on 20 May 2015 explaining that the mediation clause was fully enforceable, and that PCL should, therefore, propose mediation, but providing an estimate for the likely cost of an arbitration if that was required. Mr Choo explained that, if PCL was successful in any arbitration, it would be entitled to recover about 75% of its legal costs, and that:

> "It is therefore critical to analyse the claim on the merits in the first instance and provided the merits are in clients favour parties will usually proceed with arbitration having the above in mind."

21. Mr Lamzin forwarded Mr Choo's email, fee proposal and comments to Vladimir Esakov on the same day, saying that he was happy to discuss it when convenient. Vladimir Esakov's evidence, in paragraph 33 of his witness statement, was that, after receiving the Shipyard's notice of termination and after speaking to Mr Lamzin, he told Mr Lamzin that he accepted the proposal.

(v) The Engagement Letter

22. On 26 May 2015 Mr Lamzin sent an email to Vladimir Esakov in the following terms (the English translation is obviously not perfect):

> "I inform you below about the current status of work.
>
> We analyse and systematize with colleagues all available documentation and correspondence for a more detailed analysis out [sic] position in the Arbitrage. I think it will take a few more days.

> Colleagues assured me that there is no rush with our reply to the Yard. Every next should be taken after we have completed our analysis.
>
> As discussed on the last week, please find attached our standard engagement letter. We will also need to go through KYC procedures."

23. The document attached to Mr Lamzin's email was in the form of a letter on DLA Russia headed paper addressed to PCL dated 26 May 2015. It bore the heading "Engagement Letter" and, immediately below that, contained a reference number "Contract No. 2014-188". Following the salutation, the document ("the Engagement Letter") said this:

> "Please find set out in this engagement letter (the 'Engagement'), the terms and conditions under which DLA Piper Rus Ltd. (the 'Company') will be pleased to provide PREMIER CRUISES LIMITED (the 'Client') with legal advisory services.
>
> **Scope of Services**
>
> We will respond to your requests for advice regarding various legal issues and other ancillary services that the Client may encounter. The scope of the services to be provided (the 'Services') will be defined upon a case-by-case basis by mutual agreement between the Company and the Client. The Company's Services may be rendered orally or in writing (including by facsimile or unencrypted electronic mail). The Company shall be entitled to accept instructions, oral or written, from any person representing the Client, unless notified in writing in advance of any restrictions in this respect.
>
> …
>
> **Fees and Billing Procedures**
>
> Compensation for our Services will consist of professional fees and reimbursement of expenses. Professional fees will be based on the hours worked by the various levels of personnel, at the rates applicable to each. Reimbursement of expenses will include travel time; any out of pocket expenses such as airfare, lodging and meals; per diems; telecommunication expenses such as cost of business calls by the personnel's mobile phones; any other expenses directly related to the Services.
>
> ***Current Billing Rates for Moscow office (exclusive of VAT)****
>
> [Table of US dollar hourly rates for staff of various levels of seniority]
>
> …

Payment of our invoices shall be made within **14 (fourteen) days** from the date the invoice is issued. Each invoice shall be accompanied by an act of acceptance wherein the Client shall confirm its acceptance of the rendered Service and return to the Company signed act of acceptance within **14 (fourteen) days** from receipt of the same. If the Company does not receive the signed act of acceptance or a substantiated refusal to sign such act within the above period, the parties acknowledge that the act of acceptance shall be deemed signed, and the Services shall be deemed rendered by the Company and accepted by the Client within the scope and conditions as stated in such act of acceptance. Invoices shall be denominated in United States Dollars, depending on the applicable schedule for charge out rates as agreed with the client. Payments shall be made in United States Dollars or Russian Roubles to the bank account indicated in the invoice, quoting the invoice number.

…

Liability and Confidentiality

…

It may be necessary from time to time to enlist any person or entity to assist in providing Services to you without obtaining your prior approval. When we use the Services of such person or entity in connection with this Engagement we take liability for their activities as if they were in all respects our own activities. Considering the above, no person or entity, including either our affiliate or member firm of DLA Piper Group, assumes any responsibility to the Client in connection with this Engagement.

…

Dispute Resolution

This Engagement shall be governed by the Russian law. All disputes and disagreements, which may arise from the terms of this Engagement, as outlined above, or in connection therewith, shall be settled by the parties through negotiations. In the event that the parties fail to reach an agreement, the matter shall be forwarded to the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation to be settled under the court's statutory rules.

Term and Termination

This Engagement becomes effective from the date it is accepted and signed by the Client and shall continue to be in full force and effect until it is terminated by either the Client or the Company by giving at least ten (10) working days prior written notice. The

> Client will be responsible for payment of all fees and expenses incurred by the Company prior to the date of termination.
>
> **Other Matters**
>
> …
>
> Please sign one copy of this letter acknowledging your acceptance of the offer of terms set forth herein, and return it to DLA Piper Rus Ltd. Please retain one copy of this signed letter for your files. If you have any questions concerning our Engagement, please contact me."

24. The Engagement Letter was issued by Anna Otkina, a partner in DLA Russia. It was countersigned as acknowledged and agreed by Savvas Costa Themistocleous, a director of PCL, on 26 May 2015 and returned to Mr Lamzin the following day. It is common ground that there were no discussions between the parties concerning its terms.

(vi) The Arbitration

25. In late May or early June 2015 PCL served a mediation notice on the Shipyard, although it is not clear to me whether any mediation ultimately took place. On 7 July 2015 Hill Dickinson LLP, the Shipyard's solicitors, wrote to PCL commencing arbitration proceedings ("the Arbitration").

26. Mr Lamzin's evidence was that, throughout the Arbitration, he was DLA's primary point of contact with PCL. The only invoices rendered by DLA, however, were invoices from DLA UK (denominated in sterling), and it is common ground that DLA UK did all the substantive work in preparing for and conducting the Arbitration. No invoices were ever rendered by DLA Russia for any work it carried out.

27. The Arbitration proceeded to a hearing in London, which took place between 23 and 27 May 2016. On 27 June 2016 the Tribunal issued an Award in which it held that:

    i) PLC's 29 April 2015 Notice of Rescission was premature, ineffective and constituted a renunciation of the Shipbuilding Contract entitling the Shipyard to bring it to an end, as it had done;

    ii) PCL was obliged to pay the Shipyard the fifth instalment of the purchase price, which had fallen due for payment prior to the termination of the Shipbuilding Contract;

    iii) The Shipyard was additionally entitled to compensation for its proven losses in accordance with a formula set out in the Shipbuilding Contract in an amount to be quantified, and also to its costs of the arbitration.

28. On 12 July 2019 PCL paid €4.4 million to the Shipyard in settlement of its various liabilities.

The Proceedings

29. As stated in paragraph 3 above, the present proceedings were commenced by PCL on 29 January 2020 seeking damages against DLA in contract and/or in tort for professional negligence.

30. The claims made against DLA Russia and DLA UK are dealt with separately in the Particulars of Claim. As pleaded, the allegations concern different activities carried out by the two DLA entities over different periods of time:

    i) The claim against DLA Russia (see paragraphs 6 to 25) is for negligence on the part of Mr Lamzin in the advice that he gave in the period from December 2014 to April 2015 in relation to the termination provisions of the Shipbuilding Contract and in his drafting of the Notice of Rescission;

    ii) The claim against DLA UK (see paragraphs 26 to 42) is for negligence on the part of Mr Choo in the period from May 2015 onwards in failing to advise PCL of the risks inherent in defending the Shipyard's claims and in pursuing its own counterclaims in the arbitration, and in advising PCL to commence and pursue proceedings to obtain security for its claim against the Shipyard in Croatia.[1]

31. So far as the claim against DLA Russia is concerned, PCL asserts that the work done by it prior to May 2015 was carried out pursuant to an implied contract of retainer and/or that, regardless of any retainer, DLA Russia assumed responsibility to PCL in respect of the advice that it gave and the work that it carried out and that it owed a duty to exercise reasonable skill and care in tort.

32. PCL asserts (see paragraph 10) that the Engagement Letter is irrelevant to DLA Russia's duties in respect of the advice given and the work carried out by it during this period:

> "10. For the avoidance of doubt, although PCL and DLA Russia did sign a written engagement letter on 26 May 2015 ('the Engagement Letter'), which was said to set out the terms on which DLA Russia was to provide PCL with 'legal advisory services' going forward and to invoice PCL in respect of those services, the Engagement Letter did not have retrospective effect and is therefore of no relevance to the obligations owed by DLA Russia to PCL in respect of work done prior to the date of its signature."

33. Although not stated explicitly in the Particulars of Claim, it is PCL's position that the Engagement Letter is also irrelevant to the claim brought against DLA UK on the

---

[1] Whilst the claim against DLA UK principally concerns the period in and after May 2015 and the pursuit of the arbitration, paragraph 39 of the Particulars of Claim contains this *caveat*: "If and insofar as [DLA UK] had any involvement in the advice given by Mr Lamzin in March-April 2015 and/or the drafting of the Notice, it was negligent or in breach of the duties owed to PCL for the reasons identified in paragraph 9 above, which are repeated." There is no positive allegation, however, that DLA UK did have any such involvement.

basis that DLA UK was not party to, and was not engaged by PCL to represent it in the Arbitration on the terms of, the Engagement Letter, but separately.

34. Mr Spalton, who appeared with Mr Folkard at the hearing for DLA, submitted that this gave rise to the extraordinary factual scenario whereby two parties went to the trouble of agreeing a written contract with an arbitration clause but it did not, in fact, capture any of the substantive work that must have been intended to fall within its scope.

35. The total amount of damages claimed by PCL against DLA is in excess of €12 million.

The Section 9 Application

36. DLA Russia applied for a stay of the claim against it under section 9 of the 1996 Act relying upon the Dispute Resolution section of the Engagement Letter set out in paragraph 23 above. As I have explained, DLA UK ultimately applied for a case management stay. It is convenient to deal with the two applications separately.

37. As the hearing involved an arbitration claim, on the application of both parties I ordered that the hearing before me should take place in private pursuant to CPR 62.10(3)(b). There was rightly no dispute, following circulation of my judgment to the parties in draft, that this judgment should be given in public and that no form of anonymisation was appropriate or required.

(i) Principles

38. Section 9(1) of the 1996 Act provides that:

> "**9 Stay of legal proceedings**
>
> (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter."

39. The word "matter" in section 9 of the 1996 Act has been interpreted as meaning

> "… any issue which is capable of constituting a dispute or difference which may fall within the scope of an arbitration agreement":

see *Sodawiczny v Ruhan* [2018] EWHC 1908 (Comm), [2018] 2 Lloyd's Rep 280 *per* Popplewell J at [43(1)]. The search is not confined to the main or the most substantial issues in the proceedings, but the relevant issue must be reasonably substantial: *Republic of Mozambique v Credit Suisse International* [2020] EWHC 2012 (Comm) *per* Waksman J at [90].

40. Where the issues are not clearly identified or developed, the court should proceed by seeking to identify the issues which it is reasonably foreseeable may arise, including

any defence. What matters is the nature and substance of the claim and the issues that arise and not the way in which they have been formulated by the claimant: *Lombard North Central plc v GATX Corporation* [2012] EWHC 1067 (Comm), [2012] 2 All ER (Comm) 1119 *per* Andrew Smith J at [14]-[15]; *Sodawiczny* at [43(2)], [43(4)] and [46].

41. The burden lies upon the party seeking a stay to establish that the matter in respect of which proceedings have been brought falls within the scope of the arbitration agreement. The standard of proof is the ordinary civil standard of the balance of probabilities: see *JSC Aeroflot Russian Airlines v Berezovsky* [2013] EWCA Civ 784, [2013] 2 Lloyd's Rep 242 *per* Aikens LJ at [73].

42. There was no dispute between PCL and DLA Russia that they were party to an arbitration agreement – the agreement contained in the Dispute Resolution section of the Engagement Letter ("the Arbitration Agreement"). The issue between the parties was whether the present proceedings were:

> "… in respect of a matter which under that agreement is to be referred to arbitration".

43. The point is, thus, a short one.

    i) The Arbitration Agreement provides that it applies to:

    > "All disputes and disagreements, which may arise from the terms of this Engagement, as outlined above, or in connection therewith, …";

    ii) Do those words extend to the claim made by PCL against DLA Russia in this action in respect of advice allegedly given and the work allegedly carried out by DLA Russia prior to 26 May 2015 when the Engagement Letter came into force, *i.e.*, does the arbitration agreement have retroactive effect in that sense?[2]

44. PCL's submission was that the answer to this question is "no". Its case, as summarised in paragraph 5 of its skeleton argument, is that:

> "The Engagement Letter post-dates the matters giving rise to PCL's claim against DLA Russia, and is forward-looking in its terms. It is PCL's case that the Arbitration Agreement, on its proper construction, cannot apply retroactively to a previous legal relationship between DLA Russia and PCL, and in particular where the matters giving rise to PCL's cause of action had already taken place."

45. DLA, in contrast, submits in paragraph 5(a) of its own skeleton argument that:

---

[2] Following the course taken by counsel, when I refer in this judgment to an arbitration agreement being "retroactive" what I mean is whether it covers disputes between the parties arising out of legal relations between them that predate the conclusion of the arbitration agreement.

> "(a) First, properly construed, the Arbitration Agreement encompasses all work done by DLA Russia before and/or after the date of the agreement."

(ii) The proper approach

46. Where an issue as to the existence, validity or scope of an arbitration agreement arises in the context of a section 9 application, there are a number of approaches that a court may take. In *Birse Construction Ltd v St David's Ltd* [1999] BLR 194 at 196 HHJ Humphrey Lloyd, QC identified four options:

    i) The court can decide on the basis of the written evidence that there is a valid and enforceable arbitration agreement and that the dispute falls within its scope, in which case a stay will be granted;

    ii) The court can grant a stay under the court's inherent jurisdiction in order to leave the issue as to the existence, validity or scope of the arbitration agreement to be determined by the arbitral tribunal;

    iii) The court can order an issue to be tried as to the existence, validity or scope of the arbitration agreement; or

    iv) The court can decide on the basis of the written evidence that there is no arbitration agreement, or that the claim falls outside the scope of the arbitration agreement, in which case the application for a stay will be dismissed.

47. HHJ Humphrey Lloyd, QC's guidance was referred to with approval by Waller LJ in *Al-Naimi v Islamic Press Agency Inc.* [2000] 1 Lloyd's Rep. 522 at 524-5. At page 526, Waller LJ went on to say this:

> "I of course accept that there may be situations where despite [an agreement between the parties that the matter could be resolved on affidavit evidence] the Court may simply feel that it cannot resolve the issue without hearing witnesses. But it also seems to me that the Court should be looking for the most economical way of deciding what is after all, a dispute about where the real disputes should be resolved. On an application under s. 9 a Court is bound to have to consider the affidavit evidence, and to spend time in so doing. There is bound to be argument about the strength or otherwise of the case as to whether the arbitration clause covers the subject matter of the action in considering what course to take. It thus also seems to me that in the interests of good litigation management and the saving of costs, the Court should see whether it can resolve that point on the affidavit evidence. Certainly, it should try and do so if both parties are agreed that they would like the matter resolved on the affidavits. I would add that in addition, if the parties do not come agreed, as in the instant case, depending on how important any factual disputes appear to be to the ultimate resolution of the disputes about jurisdiction, it may be worth exploring whether they would

> agree, or even in some circumstances where the disputes on fact seem immaterial, using the powers under CPR 32.1."

48. See also *Albon v Naza Motor Trading SDN BHD* (No 3) [2007] EWHC 665 (Ch), [2007] 2 All ER 1075 at [14] and [24] where Lightman J said the following:

> "[14] I turn now to the first issue. The first question raised is what (if anything) Naza Motors needs to establish as conditions precedent to invoking the jurisdiction conferred by s 9(1) to grant a stay of court proceedings. In my judgment the language of s 9(1) plainly establishes two threshold requirements. The first is that there has been concluded an arbitration agreement and the second is that the issue in the proceedings is a matter which under the arbitration agreement is to be referred to arbitration. The first condition is as to the conclusion and the second is as to the scope of the arbitration agreement. Accordingly, unless and until the court is satisfied that both these conditions are satisfied the court cannot grant a stay under s 9.
>
> …
>
> [24] I must accordingly turn to the second issue whether it would be right in the present circumstances to exercise the inherent jurisdiction to grant a stay and (in effect) remit the issue whether the JVA was concluded to be decided in the arbitration proceedings. The absence of jurisdiction under s 9(1) to order a stay for this purpose does not preclude the existence and exercise by the court of its inherent jurisdiction to order a stay for this purpose. The court may in exercise of its inherent jurisdiction in its discretion order such a stay both where the issue is as to the conclusion or as to the scope of the arbitration agreement. But the court should only exercise its inherent jurisdiction to order such a stay and decline to decide the issue of the conclusion of the arbitration agreement or of the scope of the arbitration agreement in an exceptional case."

49. On reading the parties' respective skeleton arguments, it appeared to me that both parties were inviting me to decide the issue as to the scope of the arbitration agreement myself; however, in light of one particular passage in DLA's skeleton argument, I raised the matter with Mr Spalton near the start of his oral submissions.

50. Mr Spalton confirmed that his clients' primary position was that I had enough factual and expert evidence to decide the scope of the arbitration agreement one way or another; but, he said, if I felt uncomfortable doing so, a stay of proceedings, leaving the matter to a future arbitral tribunal (no arbitration had been commenced by the date of the hearing before me), was an option.

51. As I indicated to the parties at the time, I was comfortable that I had the material I needed to decide the issue, and that I should do so. The issue involves a short point of construction, which requires expert evidence of Russian law (see below), but in relation

to which it seemed to me there was unlikely to be much more relevant documentation or factual evidence than was put before me.

(iii) Russian law

52. The Engagement Letter provided that the Engagement contained therein was governed by Russian law, and it was common ground between the parties that Russian law also governed the Arbitration Agreement. The answer to the question posed in paragraph 43 ii) above, therefore, concerns the proper construction of the Arbitration Agreement as a matter of Russian law.

53. With the permission of the court, both parties adduced expert evidence on Russian law principles of construction applicable to arbitration agreements:[3]

    i) DLA's expert was Maxim Kulkov, a member of the Moscow Bar, currently the managing partner at a Russian law firm, Kulkov, Kolotilov and Partners and a member of the ICC's Russia Arbitration Committee;

    ii) PCL's expert was Alexander Muranov, a qualified Russian lawyer, the managing partner of Muranov, Chernyakov & Partners Law Firm in Moscow and an Associate Professor on Conflict of Laws, International Litigation and International Commercial Arbitration at the Moscow State Institute of International Relations.

54. Mr Kulkov served a first report, and then, in response to the single report served by Mr Muranov, a second report. A joint memorandum was prepared by the two experts, which demonstrated that, although some points were contentious, there was, in fact, a considerable measure of agreement. Each expert gave oral evidence and was cross-examined for around half a day.

55. As is well-known, the proper role of an expert in relation to the interpretation of an agreement governed by a foreign system of law is to identify the relevant foreign law principles of interpretation, the application of which is then a matter for the court: see *BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA* [2019] EWCA Civ 768, [2020] 1 All ER 762 *per* Hamblen LJ at [45]-[48].

---

3 The reports also addressed the relationship between DLA Russia and DLA UK. The day before the hearing I was informed by counsel that an agreement had been reached between them as follows:

> "The parties agree the following, for the purposes of this application only, with reference to section 1.3 of Mr Kulkov's first report, sections IV and V of Mr Muranov's report, section 3 of Mr Kulkov's second report and Block 3 of the Joint Memorandum:
>
> 1. The English court is not invited by either side at this hearing to make any findings based on that evidence (or otherwise) as to the nature of the relationships between (i) DLA Russia and DLA UK and (ii) PCL and DLA UK;
>
> 2. PCL accepts that, if Russian law applies to determine the nature of those relationships (which PCL disputes), it is arguable as a matter of Russian law that DLA UK was a sub-contractor of DLA Russia."

56. Mr Kulkov's report went beyond that, expressing an opinion on whether the Arbitration Agreement covered the claim against DLA Russia. Although as an experienced expert, one might have expected him to know better, it is fair to say that fault probably lies less with Mr Kulkov than with DLA's solicitors who expressly asked him to opine on that question. I have simply disregarded these passages in his evidence.

57. Subject to this *caveat*, I was satisfied that both parties' experts were qualified to give the evidence they did, and that they did so, consistent with their duties as independent experts, with the aim of assisting the court.

58. DLA sought to attack Mr Muranov's credibility by suggesting that he should have disclosed in his report the facts that:

    i) He had written articles critical of the Russian International Commercial Arbitration Court ("ICAC") under the auspices of which, if DLA Russia's stay application was successful, any arbitration would be heard; and

    ii) He had instigated litigation against ICAC, unsuccessfully challenging ICAC's decision, following the publication of these articles, to remove him from its recommended list of arbitrators (although, as Mr Muranov explained, he continued to sit as an arbitrator in ICAC arbitrations).

59. I was unimpressed by this. Mr Muranov's published views about the extent to which the Russian state controls ICAC (as to the correctness of which I say nothing) and the fact that he had contested his removal from ICAC's list of recommended arbitrators are far removed from the issues on which he was asked to give expert evidence. I do not consider that they cast doubt upon Mr Muranov's appropriateness to act as an expert.

60. The proposition advanced on behalf of DLA, that Mr Muranov's evidence might be affected by a desire to deprive ICAC of an administrative fee that it would be able to charge if PCL and DLA Russia were required to arbitrate their dispute in Russia is, in my judgment, far-fetched. In short, I do not consider that Mr Muranov can properly be criticised by failing to disclose the matters in question.

61. The Joint Memorandum prepared by the two experts indicated that the following matters were common ground:

    i) There are no rules in the Law of the Russian Federation "On International Arbitration", No. 5338-1 dated 7 July 1993 ("the ICA Law"), either in its original form or as amended in 2015, or in any other Russian legislation on arbitration, explicitly governing the retroactive effect of arbitration clauses (paragraph 10.2);[4]

    ii) An arbitration clause cannot have a retroactive effect by default. A rule of law can provide to the contrary, or the parties can agree otherwise (paragraph 10.4). So far as party agreement is concerned, Russian law allows (and allowed) parties

---

[4] The only change made to Article 7(1) of the ICA Law, which contained a definition of an arbitration clause, was the addition of language that made clear that an arbitration clause could be limited to a specific part of the parties' legal relationship, although Mr Kulkov made clear in his reply report that such a possibility had existed before the 2015 reforms.

to conclude both "narrow" and "wide" arbitration clauses (paragraphs10.6 and 10.7);

iii) The principles and rules of Russian law applicable to the construction of contracts generally are also applicable to the construction of arbitration clauses. Russian courts construe arbitration clauses in particular on the basis of Article 431 of the Civil Code of the Russian Federation ("the RF CC"), namely:

> "… taking into consideration primarily the principle of literal interpretation of a contract and secondarily other relevant evidence including the correspondence and factual relations of the parties"

(paragraph 10.14).

62. So far as this last point is concerned, Article 431 of the RF CC provides (in translation) as follows:

> "**Article 431 Interpretation of a Contract**
>
> In the interpretation of the terms of a contract a court shall take into account the literal meaning of the words and expressions contained in it. The literal meaning of a term of a contract, in case the term is not clear, shall be established by comparison with the other terms and the sense of the contract as a whole.
>
> If the rules contained in the first part of the present Article do not allow the determination of the content of the contract, the real common will of the parties must be ascertained, taking into account the purpose of the contract. In such a case, all surrounding circumstances shall be taken into account, including negotiations and correspondence preceding the contract, the practice established in the mutual relations of the parties, business customs and the subsequent conduct of the parties."

63. This article, as the experts agreed in their oral evidence, provided for a stepped approach.

64. The first step, addressed in the first sentence of the first paragraph of the article, is the literal interpretation of the particular contract term. If, but only if, that approach does not yield a clear meaning, the second step, dealt with in the second sentence, allows the court to consider the contractual context, including the other terms and the subject matter of the contract.

65. If that second step does not produce an answer, the third step permits the court to consider a much broader range of material, including negotiations and post-contractual conduct, in order to establish the parties' true intentions. A *contra proferentem* approach to interpretation may also be used either after, or as part of, this third stage.

66. I should also mention Article 425 of the RF CC, which provides that:

> "**Article 425 Effect of a Contract**

> 1. A contract shall enter into and become obligatory for the parties from the time of its conclusion.
>
> 2. The parties have the right to establish that the terms of a contract concluded by them shall be applied to their relations that arose before the conclusion of the contract."

67. The principal area of disagreement between Mr Muranov and Mr Kulkov, which took up the bulk of their respective cross-examinations, concerned whether there was a presumption under Russian law against contracts, and specifically arbitration agreements, operating retroactively, and, if there was, the strength of that presumption.

68. Mr Muranov's evidence in paragraphs 14.7, 85 and 89 of his report was that the effect of Article 425, in particular the second numbered paragraph, was that a contract would only have a retroactive effect if the parties expressly provided for it to do so, and that there was, thus, a presumption against retroactivity, a principle that he said was equally applicable to arbitration agreements.

69. Mr Muranov accepted in cross-examination that Article 425(2) did not say *in terms* that express wording was required before a contract would be interpreted to have retroactive effect, but he said that this was the way in which the article was interpreted by the Russian courts.

70. Mr Muranov was asked in cross-examination about three particular cases in that regard.

71. The first case, the Resolution of the Presidium of the Supreme Arbitrazh (Commercial) Court of the Russian Federation, Case A40-2108311-141-178 dated 10 April 2012, concerned a contract concluded on 19 December 2005 between two companies, referred to in the Resolution by the acronyms FGC UES and IDGC, in connection with electricity transmission services.

72. The contract had been repeatedly amended by supplementary agreements (or addenda). There were two potentially relevant arbitration agreements:

i) Paragraph 7.1 of the contract, as amended by addendum no. 5 dated 28 December 2007, which was stated to apply to the legal relations between the parties from 00:00 on 1 January 2008, provided that:

> "… all disputes, disagreements and claims arising from this agreement or in connection herewith, including those related to its conclusion, modification, execution, violation, termination, expiry and validity shall be subject to resolution at the Arbitral Court at the non-profit organization – the Fund 'Law and Economics of the Fuel and Energy Complex' (Moscow) in accordance with its rules in force as of the date of filing of the statement of claim";

ii) Paragraph 7 of addendum no. 8 dated 4 March 2010, which was stated to apply to the legal relations between the parties from 00:00 on 1 January 2010, as subsequently amended on 12 May 2010, provided that:

> "… all disputes, disagreements and claims arising from this agreement or in connection herewith, including those related to its conclusion, modification, execution, violation, termination, expiry and validity shall be subject to resolution at the Arbitral Court at the Russian Union of Industrialists and Entrepreneurs (Moscow) in accordance with its rules in force as of the date of filing of the statement of claim."

As will be apparent, the terms of the two arbitration agreements were substantially the same, save that they provided for arbitration under the auspices of different bodies.

73. The dispute between the parties concerned settlements for services rendered in the period January to May 2009, *i.e.*, after the execution of addendum no. 5 but before addendum no. 8 came into force. FGC UES referred the dispute to the Arbitral Court at the Fund 'Law and Economics of the Fuel and Energy Complex' (Moscow) in July 2010, *i.e.*, after addendum no. 8 came into force.

74. IDGC challenged the jurisdiction of the Arbitral Court at the Fund 'Law and Economics of the Fuel and Energy Complex' (Moscow) on the basis that after 2010 the competent tribunal was, in fact, the Arbitral Court at the Russian Union of Industrialists and Entrepreneurs. The challenge was rejected by the tribunal, but upheld by both the first instance and appellate courts.

75. In its Resolution, upholding the challenge, the Supreme Court said this:

> *"On the basis of paragraph 2 of Article 1 of the Federal Law dated 24.07.2002 No. 102-FZ 'On Arbitral Tribunals in the Russian Federation' (hereinafter referred to as the Law on Arbitral Courts), by agreement of the parties to the arbitration proceeding, any dispute arising from civil legal relations may be submitted to the arbitral tribunal, unless otherwise provided by federal law.*
>
> *By virtue of paragraph 2 of Article 5 of the Law on Arbitral Tribunals, an arbitration agreement may be concluded by the parties in respect of all or certain disputes that have arisen or may arise between the parties in connection with any particular legal relationship.*
>
> *In this case, a new arbitration agreement comes down to the submission of all disputes arising from the agreement dated 19.12.2005 No. 144-P and in connection therewith, to another tribunal – the Arbitral Court at the Russian Union of Industrialists and Entrepreneurs.*
>
> *Consequently, the will of the parties, expressed in the addendum dated 04.03.2010 No. 8, is aimed at submitting all disputes related to the said agreement to the competence of another tribunal from the moment the said addendum is concluded.*

> *As a general rule, the arbitration clause included in the agreement is intended for this agreement and is one of the provisions thereof. In the situation under consideration, the arbitration clause formulated by the parties in the addendum dated 04.03.2010 No. 8 refers to the agreement as a whole and applies to a different period of relations than the addendum in which it is contained."*

76. The Supreme Court accordingly held that, although the arbitration clause in addendum no. 8 requiring reference to the Arbitral Court at the Russian Union of Industrialists and Entrepreneurs was effective only from 1 January 2010, once it became effective it was intended to apply to all disputes between the parties under the contract, including disputes arising out of matters prior to 2010.

77. Mr Muranov's evidence was that, whilst there was no express reference to the arbitration agreement in addendum no. 8 being retroactive, the language had been found by the court to have that effect because the new arbitration agreement was intended to replace the old arbitration agreement; it was to apply as if it had been in the contract from the outset and to "the agreement as a whole".

78. Commenting on this decision, Mr Kulkov said in paragraph 78 of his reply report that:

> "Thus, the Supreme Court of the Russian Federation applied an arbitration clause to the relations which appeared prior to its conclusion. The court expressly established the presumption that, unless otherwise indicated, a wide arbitration clause covers all disputes related to the contract, including those based on facts/circumstances that occurred prior to the signing of such arbitration clause."

Thus, he said, "wide" arbitration agreements, *e.g.*, arbitration agreements not limited to disputes arising "under" a contract, were presumed to operate retroactively.

79. In my judgment, however, this passage in Mr Kulkov's report goes too far.

80. First, the judgment of the Supreme Court says nothing about a presumption about wide arbitration agreements, nor do I think it can sensibly stand for a presumption in the terms Mr Kulkov suggests.

81. Secondly, the Supreme Court's decision was rooted in the language the parties used in addendum no. 8; as the Supreme Court explained, the arbitration clause was to apply to "the agreement as a whole" and was thus intended from the date it became effective to apply to all disputes between the parties arising from or in connection with the contract.

82. The decision is, in this respect, consistent with Mr Muranov's opinion that an arbitration agreement will only apply retrospectively if it is clear either from the language of the agreement or from the other provisions of the contract in which it is contained that it should do so. The Supreme Court decision was a case where this was found to be the case.

83. Mr Kulkov ultimately agreed in cross-examination that the mere fact that an arbitration agreement was expressed in wide terms was not enough for it to apply to legal relations predating the arbitration agreement. There needed to be some kind of indication that the parties intended that it should apply retroactively.

84. The second case put to Mr Muranov was the Resolution of the Presidium of the Supreme Arbitrazh (Commercial) Court of the Russian Federation, Case A40-35039/11/-8-304, dated 5 November 2013.

85. This case concerned a tri-partite agreement (referred to as "the Complex Contract") dated 31 January 2008 which provided for the carrying out of certain works at a power facility. The Complex Contract contained a jurisdiction clause (clause 8.1) providing for disputes to be resolved in the Arbitrazh (Commercial) Court of Moscow.

86. On 22 October 2008, and as contemplated by the terms of the Complex Contract, the parties concluded a further agreement, the General Contractor Agreement (or Principal Agreement). According to clause 24.1 of the General Contractor Agreement, it applied to all the contractor's obligations arising due to the implementation of the preliminary stage of the Complex Contract.

87. The General Contractor Agreement contained an arbitration clause (clause 21.1) providing for disputes to be resolved by ICAC arbitration:

> "… all disputes, disagreements or claims arising out of or in connection with this Agreement, including those related to its conclusion, modification, performance, violation, termination, expiry or invalidity shall be resolved at the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation".

88. The General Contractor Agreement required the contractor to put up bank guarantees embracing, *inter alia*, the return of the advance payments made under the Complex Contract. There was a dispute about the guarantees provided, the General Contractor Agreement was cancelled, and the counterparty sought to recover the advance payments that had been made.

89. The dispute between the parties was referred to arbitration pursuant to the arbitration agreement in the General Contractor Agreement. The arbitral tribunal determined that it had jurisdiction and made an award in favour of the claimant. Competing court proceedings were then brought to enforce the tribunal's award and to set it aside.

90. The trial and intermediate appellate courts set aside the tribunal's award, but their decision was reversed by the Supreme Arbitrazh (Commercial) Court. This held as follows:

> "In accordance with Article 425(2) of the RF CC, the parties have the right to establish that the terms of the contract they have concluded apply to their relations that arose before the conclusion of the contract.

> Based on this rule, concluding the General Contractor Agreement, the parties agreed that it shall apply to all obligations of the contractor arising from the execution of the preliminary stage of the Complex Contract, and to liability associated with such execution, and the obligations of the parties arising from the Complex Contract and not fulfilled for the date of entry into force of the General Contractor Agreement, shall be executed in accordance with the terms of the Complex Contract, unless otherwise expressly specified in the General Contractor Agreement, at the same time any provisions of the Complex Contract, contrary to the terms of the main contract shall not apply (paragraph 24.1 of the General Contractor Agreement). The parties also determined the total cost of reconstruction of the facility, taking into account advance payments made during the term of the Complex Contract.
>
> The aforementioned terms of the Complex Contract and the main contracts allow us to conclude that the Complex Contract was intended to regulate the relations of the parties in the period until they agreed on the terms of the General Contractor Agreement. At the same time, having concluded the main contract, the parties explicitly and unambiguously expressed their will to extend its effect to the relations of the parties from the Complex Contract, and the parties did not make exceptions to this rule in relation to the dispute settlement procedure for the fulfilment of the contractual obligations established by the Complex Contract.
>
> Consequently, the courts did not have grounds for concluding that, with the entry into force of the General Contractor Agreement, the Complex Contract remained valid with regard to the clause on the consideration of disputes arising from it in the Arbitrazh (Commercial) Court of the city of Moscow. The arbitration clause on referring the dispute to the ICAC at the RF CCI enshrined in the General Contractor Agreement, is also subject to extension to the claims to return the advance payments paid by the plaintiff in accordance with the Complex Contract. The arbitral tribunal, considering the dispute in this part, acted within the scope of the arbitration agreement."

91. It was put by Mr Spalton to Mr Muranov that the arbitration agreement in the General Contractor Agreement did not itself contain language that extended to previous disputes. Mr Muranov agreed, but he said that Russian law was not so restrictive: it was sufficient that there was language in the rest of the contract that indicated that the arbitration clause was intended to operate retroactively.

92. Mr Kulkov had addressed this case in paragraph 85 of his reply report, and he was asked about this case in his cross-examination.

    i) Mr Kulkov agreed that the case showed that, when considering the meaning of an arbitration agreement, although the arbitration agreement was a separate and

severable contract the court would look at it in the context of the contract of which it formed part;

ii) He did not agree that the case demonstrated that, although parties can agree that an arbitration agreement can apply to relations predating its conclusion, they must do so "explicitly and unambiguously". He said that, although the judgment used those words, that did not mean that some less direct expression of the parties' will would not suffice;

iii) Mr Kulkov did not agree that the need for an explicit and unambiguous expression of the parties intent that the arbitration agreement should apply retroactively reflected the terms of Article 425 of the RF CC and the presumption against retroactivity. Mr Kulkov said that:

> "I agree that the parties should somehow express their will, but I disagree that it should be explicit expression. So, it could be any kind of evidence that the parties meant that the arbitration clause could apply to a predating contract – a contract predating relations."

93. The third case that Mr Muranov was asked about in cross-examination was the Resolution of the Arbitrazh (Commercial) Court for the Moscow Circuit, Case No. A40-862/2019, No. F05-21400/19, dated 31 December 2019. The summary that Mr Muranov was shown stated that:

> "The effect of the arbitration clause may extend to relations that arose prior to the conclusion of the arbitration agreement, if this is indicated in the contract contained such a clause."

Mr Muranov said that this case simply developed the position established in the case referred to in paragraphs 84 to 92 above to which the decision in this case, one of the few cases directly to address retroactivity, expressly referred.

94. Mr Kulkov was asked about this case in cross-examination. It was put to him by Ms Hopkins, QC that, if an arbitration agreement was to extend to relations pre-dating the arbitration agreement, that must be indicated in the contract. Mr Kulkov disagreed:

> "Well, first, it is – there is no word 'must', such a strong word. Here it is 'If this is indicated …' And again, so there is no test here, so the court didn't elaborate what kind of indication. But somehow it should be indicated, I agree, according to the rules of contract law interpretation."

95. So far as Mr Kulkov is concerned, he had dealt with the issue of retroactivity in section 1.2 of his first report. In paragraphs 59 and 60, the first two paragraphs of that section, he said this:

> "59. According to the general rule it was previously the case that an arbitration agreement does not have retrospective effect unless the parties specifically provided for that. The parties did

> not include such terms expressly stating on retrospective effect of such clause.
>
> 60. However, the strict approach on absence of retrospective effect of an arbitration clause was reconsidered as a result of the recent arbitration reform in September 2016. The reform was intended to modernize the legal framework in the Russian Federation by bringing it into line with the UNCITRAL Model Law on International Commercial Arbitration of 1985 and address those issues some of the perceived problems associated with using arbitration in the Russian Federation."

96. It was put to Mr Kulkov by Ms Hopkins, QC that what Mr Kulkov was referring to in the first sentence of paragraph 59 was Article 425 of the RF CC (see paragraph 66 above), and that what he was saying in these two paragraphs was that, prior to the September 2016 reforms, it was the case that arbitration agreements generally did not have retroactive effect.

97. Mr Kulkov agreed that he was referring in the first sentence of paragraph 59 to Article 425, but also, he said, to Russian case law and doctrine. Mr Kulkov said, however, that paragraph 60 gave the wrong impression: the change in approach in relation to the retrospective effect of arbitration agreements did not happen suddenly in 2016 but in fact started in the 1990s.

98. In support of the proposition in paragraph 60, that the strict approach to the retrospective effect of arbitration agreements had been relaxed, Mr Kulkov referred in paragraphs 61, 63 and 68 of his first report to three cases.

99. The first case was the Resolution of the Supreme Court Plenum No. 53 dated 10 December 2019. As explained in paragraph 10.8 of the Joint Memorandum, such a Resolution is a judicial clarification of the rules of substantive and procedural law that is intended to provide guidance to courts on how to apply those rules.

100. Mr Kulkov's reliance on this decision was, however, problematic:

i) The Resolution post-dated the Arbitration Agreement. As Mr Kulkov agreed in cross-examination, Russian court decisions generally do not have retrospective effect;

ii) Although Mr Kulkov said that the Resolution also reflected the practice of the Russian courts prior to 10 December 2019, not only did it post-date the 2015 amendments to Russian arbitration law but it was adopted pursuant to those laws as amended. Mr Kulkov, furthermore, accepted that court practice prior to the Resolution was inconsistent; and

iii) As he accepted in cross-examination, paragraph 21 of the Resolution to which Mr Kulkov referred in his report said nothing expressly about whether arbitration agreements were presumed to apply to disputes arising from legal relations predating the arbitration agreement.

101. The second case referred to by Mr Kulkov was the decision of the Federal Commercial Court of the Moscow Region, Case No. A40-51596/09-68-437, dated 27 August 2009. Mr Kulkov said this supported the proposition that, where an arbitration agreement was widely worded, it could extend to disputes arising out of previous relations between the same parties.

102. The case concerned a challenge to a decision by an arbitral tribunal in relation to design works carried out by an architect. The architect had carried out additional works that were outside the original scope of the contract; these had been requested by the client by email, but there was no signed agreement providing for them as the contract required.

103. The contract in question contained an arbitration agreement that provided that:

> "… any dispute, conflict or complaint arising pursuant to or in connection with, or issues of breach, termination or validity of [the contract]"

should be referred to arbitration. The tribunal held that the clause extended to the architect's claim for compensation for the additional work. The court agreed.

104. The case, as Mr Kulkov accepted in cross-examination, was not concerned with the application of an arbitration agreement to a relationship between the parties pre-dating the arbitration agreement, and in my judgment it provides little assistance. The court found that the additional work was carried out under the contract in which the arbitration agreement was contained. The result that the arbitration agreement was held to apply is, in that context, unsurprising.

105. Mr Kulkov also referred in cross-examination to an arbitration in which he had participated as counsel which he said involved a claim by an architect for fees for work carried out prior to the conclusion of the contract, but as no materials in relation to the arbitration or the tribunal's award were available, and as the tribunal's decision would have no precedential effect in Russia, I attach no weight to it.

106. The third and final case Mr Kulkov referred to, in paragraph 68 of his first report, was the Resolution of the International Commercial Arbitration Court at the Chamber of Commerce and Industry, Case No. 225/2012, dated 2 September 2013, a decision about an arbitration award. The passage in that decision referred to by Mr Kulkov in his first report said this:

> "In this regard, the ICAC at the RF CCI has jurisdiction over both disputes arising from contractual relations and disputes arising from other civil relations, including claims arising from unjust enrichment, including claims where one party to an obligation seeks the return of consideration provided under such an obligation from the other party. This conclusion is in line with Russian legal doctrine and ICAC case law.
>
> The arbitration clause agreed upon by the parties provides that 'disputes, differences or claims arising under or in connection with this Contract' shall be referred to international commercial arbitration. As a rule, such a broad scope of arbitration clause,

> covering not only disputes under the Contract but also disputes 'in connection with the Contract' is characterized in domestic and foreign practice as covering any type of disputes, whether contractual or non-contractual, as long as the basis of such dispute is the relations between the Parties relating to the underlying Contract."

107. It was put to Mr Kulkov by Ms Hopkins, QC that this case was concerned with a claim for unjust enrichment, where one party sought the return of consideration provided under the contract. Mr Kulkov said that he thought that sounded right, and he accepted that the case was not concerned with a claim relating to a contract or other relationship pre-dating the arbitration agreement.

108. In my judgment, none of the cases that Mr Kulkov referred to in his first report supported the proposition that since the 1990s (although that was not the time frame referred to in paragraph 60) there had been a change in the general rule identified by Mr Kulkov in paragraph 59, that an arbitration agreement would not have retrospective effect unless the parties specifically provided that it should.

109. As I have indicated above, Mr Kulkov served a report in response to Mr Muranov's report in which Mr Muranov expressed his own views on retroactivity. In paragraph 46 of his reply report, Mr Kulkov said this:

> "46. In practice the courts applied the wide approach to interpret arbitration clauses, extending its scope to the disputes related to the legal relationship connected to the contract, if parties themselves had not excluded such disputes from the scope of arbitration (see Section 1.4 below)."

Mr Kulkov continued in paragraph 48 as follows:

> "48. The regulation on the date of signing of the Engagement letter, as well as the case law and legal doctrine allowing arbitration clauses with a wide ambit supports a wide interpretation of arbitration clauses. Thus, the Arbitration Agreement covered all disputes, including those arising from relationships pre-dating the Engagement Letter, as I explained in paragraphs 59-69 of MK-1."

Mr Kulkov's opinion was, thus, that Russian courts applied a wide interpretation to arbitration agreements, and that a widely expressed arbitration agreement would be interpreted to embrace all disputes between the parties, including any disputes arising out of a prior relationship.

110. So far as paragraph 48 of Mr Kulkov's reply report is concerned, this referred back to paragraphs 59 to 69 of his first report, but as I have explained already none of the cases cited by Mr Kulkov in those paragraphs directly addressed the question of retroactivity. Paragraph 48 of Mr Kulkov's reply report in that regard took matters no further.

111. In paragraph 46 of his reply report, however, Mr Kulkov made reference to section 1.4 of that report (paragraphs 55 to 70) in which he referred to three further cases.

112. The first case was the Ruling of the Supreme Court of the Russian Federation, Case No. 78-G02-1, dated 18 February 2002. This was a case concerning the recognition and enforcement of a Swiss arbitration award made in relation to a Swiss law guarantee where the losing party alleged that the tribunal had issued an award in relation to a dispute outside the scope of the arbitration clause.

113. As a case concerning the interpretation of a Swiss arbitration clause, Mr Kulkov agreed in cross-examination that it did not say much about how Russian law might interpret a Russian arbitration agreement. It was a case concerning the wide application of an arbitration clause, but Mr Kulkov agreed it was not concerned with retroactivity specifically.

114. The second case that Mr Kulkov mentioned was the decision of the Federal Commercial Court of the Moscow Region, Case Nos. A40-98213/10-141-816 and A40-94450/10-8-850, dated 25 April 2012.

115. This was a case concerning a loan agreement and surety agreements entered into in connection with that loan agreement all of which contained an identical arbitration clause. Following a default on the loan agreement, the lender commenced arbitration and secured an award against both the borrower and the sureties requiring them to pay the outstanding debt and interest. The award went unpaid, and so the lender commenced court proceedings seeking its enforcement. The sureties sought to set the award aside.

116. The argument advanced by the sureties appears to have been that the claims made against them fell outside the arbitration agreements in their contracts which, like the arbitration agreement in the loan agreement, applied to all disputes "arising out of or in connection with the Loan Agreement". The court dismissed the challenge, holding that:

> "By their nature, the Surety Agreements are agreements that formalize the security for the fulfillment of obligations under the Loan Agreement. They are of accessory (secondary) nature in respect of the Loan Agreement. Therefore, all disputes under the Surety Agreements are related to the Loan Agreement and are subject to its arbitration clause."

117. Mr Kulkov agreed in cross-examination that the case had nothing to do with retroactivity. It was, he said, about the application of a wide arbitration clause. But, in circumstances where the surety agreements were entered into pursuant to the loan agreement and contained identical arbitration clauses, the connection between the claim under the sureties and the loan agreement was obvious.

118. The third case that Mr Kulkov referred to was ICAC Award, Case No. 152/2004, dated 9 August 2005. This case concerned a dispute under a lease agreement where the lessor had terminated the agreement, repossessed the leased equipment and sold it to a third party. The lessor sought to recover as damages the legal costs it had incurred in doing so from the lessee.

119. The arbitration clause in the lease provided that:

> *"… any disputes, discrepancies and claims arising from or in connection with the Agreement or connected with its conclusion, violation, termination or invalidity shall be decided by the International Commercial Arbitration Court …"*

The ICAC tribunal concluded that it had jurisdiction on the basis that the lease specifically provided that, in the event of default by the lessee, the lessor could terminate the lease and seeking damages after termination; the claim was, thus, a claim for damages for breach of the lease agreement.

120. The award indicates, furthermore, that neither party challenged the jurisdiction of the ICAC tribunal; the respondent, it seems, did not submit a defence or any submissions, or appear at the hearing. I agree with Ms Hopkins, QC that this case tells us little. Mr Kulkov himself agreed that it was not a case concerned with retroactivity.

121. It follows that none of the three new cases cited by Mr Kulkov in this section of his reply report provided any real assistance.

122. In the end, the difference between Mr Muranov and Mr Kulkov came down to a narrow point: given that it was agreed between them that an arbitration agreement would not apply retroactively by default, was there a presumption either that it will or that it will not, and what sort of language is required to displace that presumption.

123. In the end, on both points I preferred the evidence of Mr Muranov, which was consistent with the statutes and decisions that I was shown. Mr Kulkov's evidence, in contrast, contained propositions that the authorities he referred to did not clearly support, and I think Ms Hopkins, QC was right when she said that his evidence morphed somewhat between his first and his reply reports. Mr Muranov's evidence was the more consistent and coherent.

124. The relevant principles of Russian law, I find, are the following:

i) The principles of Russian law applicable to the construction of contracts generally are also applicable to the construction of arbitration clauses, including Article 431 of the RF CC;

ii) In accordance with Article 431, it is necessary to adopt a staged approach to the exercise of construction:

a) The starting point in relation to construction is the literal meaning of the particular provision in question;

b) If the literal meaning is unclear, Russian law allows consideration of the contractual context; and

c) If the meaning of the provision remains unclear, it is permissible to consider a broader spread of evidence, including subjective evidence, to establish the actual intent of the parties. The *contra proferentem* canon of construction may also be relevant;

iii) In accordance with Article 425 of the RF CC, an arbitration agreement will not be construed to have retroactive effect by default. Accordingly, in the absence of any contrary provision, the arbitration agreement will not apply retroactively, and to that extent there is a presumption that it will not;

iv) This presumption is not affected by the fact that the arbitration agreement is expressed in wide terms, *e.g.*, embracing not just disputes arising under but also in connection with a contract, and thus non-contractual claims. The use of wide language does not mean that the arbitration agreement will be interpreted as operating retroactively;

v) The parties can, however, agree that that an arbitration agreement should operate retroactively. Such an agreement, however, requires language either in the arbitration agreement itself, or in the remainder of the contract in which the arbitration agreement is contained; there needs to be clear expression of the parties' will that the arbitration agreement should apply retroactively.

125. So far as this last point is concerned, the principle that I have identified is, in fact, consistent with paragraph 59 of Mr Kulkov's first report, where he said:

> "According to the general rule it was previously the case that an arbitration agreement does not have retrospective effect unless the parties *specifically* provided for that."
>
> (emphasis added)

I was not persuaded by the remainder of Mr Kulkov's written evidence or his oral evidence that the position had changed in any relevant respect.

(iv) Submissions

126. I turn then to the interpretation of the Arbitration Agreement, and the Engagement Letter in which it was contained, in light of these principles of Russian law. The parties' submissions were as follows.

127. Mr Spalton submitted that the claim against DLA Russia concerning the advice it gave was caught by the Arbitration Agreement in the Engagement Letter when properly construed. He submitted that this was so simply as a matter of the literal interpretation of the Arbitration Agreement, but insofar as necessary he relied upon the broader contractual context and also on the factual evidence.

128. So far as the wording of the Arbitration Agreement itself was concerned, the crucial words, Mr Spalton submitted, were the words "or in connection with". These words he said, in response to a question from me, contained the requisite "expression of will".

129. The words "in connection with" Mr Spalton accepted were linked with the Engagement; the Engagement was defined as the Engagement Letter, which he said was slightly unclear but should broadly be understood to mean the legal services provided by DLA Russia to PCL. If one then asked what those services were, Mr Spalton submitted that there was a continuum from 2014 onwards so they included all services provided by DLA Russia.

130. The Engagement referred to in the Engagement Letter thus embraced all the work done by DLA Russia, both before and after the execution of the letter. Mr Spalton submitted that one could not divorce the advice given by DLA Russia in relation to the notice to terminate the Shipbuilding Contract from the subsequent arbitration.

131. If I was not satisfied that the Arbitration Agreement was retroactive applying the literal test, then Mr Spalton invited me to take into account paragraph 28 of Mr Lamzin's witness statement. What Mr Lamzin said there was:

> "28. We had not discussed anything about the Engagement Letter covering events before it was entered into. This was, as far as I was concerned, because everything before the Engagement Letter was not formal advice and we had decided by the Engagement Letter to formalise the relationship."

So, Mr Spalton submitted, the relationship was there before; the purpose of the Engagement Letter was simply to formalise it, and thereby to capture the entirety of the relationship.

132. Mr Spalton submitted that in fact, if one looked at the Particulars of Claim, the claim against DLA Russia was caught by the Engagement Letter on any view. He drew my attention to paragraph 24 of the Particulars of Claim, which alleged that:

> "24. Following the sending of the Notice, and again in accordance with Mr Lamzin's advice, PCL made no further payments under the Shipbuilding Contract."

133. This, he said, involved a plea by PCL of continuing reliance upon Mr Lamzin's advice. In circumstances, however, where it was accepted that, for one reason or another, the Shipbuilding Contract had been brought to an end by 21 May 2015, it is not clear how any reliance could have extended beyond that date and into the period after 26 May 2015 when the Engagement Letter came into force.

134. Ms Hopkins, QC submitted that that the Arbitration Agreement itself contained nothing that suggested that it was intended to apply to the parties' previous relationship. Both the Arbitration Agreement and the Engagement Letter in which it was contained, she submitted, were forward-looking. Ms Hopkins, QC emphasised in that context:

i) The date of the Engagement Letter;

ii) The Scope of Services, the Fees and Billing Procedures, and Dispute Resolution provisions; and

iii) The Term and Termination provision, explaining that the engagement only became effective from the date on which it was accepted and signed.

She submitted that there was nothing to rebut the presumption of retroactivity.

135. Ms Hopkins, QC's primary submission was that, having regard to the staged approach to construction required by Russian law, the wording of the Arbitration Agreement and

the Engagement Letter in which it was contained was clear so that there was no need for me to proceed to the third stage and to consider wider evidence.[5]

136. Insofar as I considered it appropriate to do so, however, Ms Hopkins, QC submitted that there was nothing in that broader evidence to support DLA Russia's case. In fact, the evidence showed that there was a demarcation:

i) Mr Lamzin and DLA Russia had been advising from December 2014 through the first months of 2015, leading to the draft Notice of Termination sent on 29 April 2015, sent on by PCL to the Shipyard;

ii) Thereafter, nothing occurred for a period of around three weeks, and then on 19 May 2015, according to Vladimir Esakov's evidence, Mr Lamzin suggested that PCL should think about arbitration to recover its funds;

iii) Mr Lamzin then wrote to Mr Choo in London referring to a "potential request for assistance" who produced a fee estimate for conducting a putative arbitration, and then on 26 May 2015 Mr Lamzin sent the Engagement Letter.

137. Ms Hopkins, QC observed that Mr Lamzin notably did not say in his witness statement that he intended the engagement letter to cover the work done previously. What he actually said is set out in paragraph 131 above: there had been no discussion of the Engagement letter covering events before it was entered into because, as far as Mr Lamzin was concerned:

> "… everything before the Engagement Letter was not formal advice and we had decided by the Engagement Letter to formalise the relationship."

(v) Decision

138. In my judgment, interpreting the Arbitration Agreement in accordance with the principles of Russian law identified earlier, there is nothing to rebut the presumption that the Arbitration Agreement was not intended to apply retroactively, and I do not construe it as doing so.

139. First, focusing on the Arbitration Agreement itself, the agreement contains nothing that suggests a retroactive application. The clause provides for disputes or disagreements that:

> "… may arise from the terms of this Engagement, as outlined above, or in connection therewith"

to be resolved by arbitration. The term "Engagement" is defined earlier as:

---

[5] Ms Hopkins, QC suggested that English law takes a not dissimilar approach to the question of retroactivity of arbitration agreements and referred me to two cases in that context, the decision of Jacobs J in *Etihad Airways PJSC v Flöther* [2019] EWHC 33107 (Comm), [2020] QB 793 at [104] and the decision of Bryan J in *Terre Neuve Sarl v Yewdale Ltd* [2020] EWHC 772 (Comm) at [26]-[35]. In circumstances where there Arbitration Agreement is governed by Russian law, I do not think it is helpful to consider how the agreement might have been construed if governed by English law.

> "… this engagement letter (the 'Engagement') … under which DLA Piper Rus Ltd. (the 'Company') will be pleased to provide PREMIER CRUISES LIMITED (the 'Client') with legal advisory services"

140. There is nothing in the Arbitration Agreement that, read literally as required by the first stage of the process of construction under Russian law, suggests that it is intended to apply to disputes arising in connection with a legal relationship between the parties prior to the Engagement.

141. The words "in connection with", I accept, are sufficient to indicate that arbitrable disputes are not limited to disputes under the terms of the Engagement. But on the basis of the Russian law evidence that I heard, the use of wide words such as these is not enough to justify a conclusion that an arbitration agreement is intended to apply retroactively.

142. Secondly, not only is there nothing in the Arbitration Agreement itself to support its retroactive application, but there is also nothing to suggest that in the other terms of the Engagement Letter, which, to the contrary, is entirely forward looking. Specifically:

i) The Engagement is stated to become effective from the date on which the Engagement Letter is accepted and signed by PCL, which was 26 May 2015. On its face, it does not embrace matters that have occurred before that date;

ii) The opening paragraph of the Engagement Letter (see paragraph 23 above), which contains the definition of the term "Engagement", refers to the letter setting out the terms of which DLA Russia "will" be pleased to provide services to PCL;

iii) The Scope of Services provision states that DLA Russia will

> "… respond to your requests for advice regarding various legal issues and other ancillary services that the Client may encounter. The scope of the services to be provided (the 'Services') will be defined upon a case-by-case basis by mutual agreement between the Company and the Client."

This anticipates future requests for assistance and a scope of services that "will be defined". The words are inapt to embrace services that have been provided in the past.

143. Applying the staged approach required by Russian law, I consider that the position at the end of the first and second stages is clear: the Arbitration Agreement does not have retroactive application. In those circumstances, there is no need for me to proceed to the third stage and consider the wider body of evidence.

144. I should make clear, however, that even if I had done so, and even if, contrary to my view of the Russian law expert evidence, the presumption against retroactivity can be rebutted by matters outside the arbitration agreement and the contract in which such agreement is contained, I would not have regarded the evidence before me as exhibiting

the required clear expression of the parties' will that the Arbitration Agreement should apply retroactively.

145. I agree with Ms Hopkins, QC that so far as the section 9 application is concerned, there is no serious suggestion that there is any relevant "matter" other that PCL's pleaded claim against DLA Russia, which concerns advice given and work done prior to 26 May 2015.

146. The matter which is the subject of the present proceedings against DLA Russia is, accordingly, not within the scope of the Arbitration Agreement. DLA Russia's application for a stay of these proceedings under section 9 of the Arbitration Act 1996 is, accordingly, dismissed.

DLA UK's application for a case management stay

147. As I explained in paragraph 5 above, DLA UK accepted that it was not party to the Arbitration Agreement and that it could not, therefore, seek a stay of the proceedings against it under section 9 of the 1996 Act. Its application was for a case management stay.

148. So far as that is concerned, in paragraph 68.3 of his skeleton argument – the very final paragraph – Mr Spalton invited the court:

> "If claims against DLA (Russia) are stayed, also [to] stay the claim(s) brought against DLA UK pursuant to CPR 3.1(2)((f)".

I had read that as an indication that the application for a case management stay in relation to the proceedings against DLA UK was pursued only if I were minded to grant a section 9 stay of the proceedings against DLA Russia. So too had Ms Hopkins, QC, as paragraph 61 of her own skeleton argument made clear.

149. In his oral argument, however, Ms Spalton said that this was not the case, and that the application for a case management stay of the proceedings against DLA UK was pursued *regardless* of whether I granted a section 9 stay of the proceedings against DLA Russia. His proposition was thus that, even though I have not stayed the English proceedings against DLA Russia, and they will therefore continue, the proceedings against DLA UK should be stayed.

150. I struggled to see the sense of this at the hearing, and further reflection has not removed my concerns. What Mr Spalton said at the hearing by way of explanation, as I understood his submission, however was this:

i) PCL was obliged to bring any claim against DLA Russia out of post-26 May 2015 events by way of Russian arbitration pursuant to the Arbitration Agreement;

ii) Although PCL had not in fact made any claim against DLA Russia in relation to post-26 May 2015 events, it was arguable as a matter of Russian law that DLA UK had been acting as a sub-contractor or agent of DLA Russia. In reality, therefore, the claim against DLA UK was really a claim against DLA Russia under the Engagement Letter;

iii) That being so, the English proceedings against DLA UK ought to be stayed pending the commencement and conclusion of an arbitration in Russia in relation to post-26 May 2015 events. Mr Spalton said that DLA Russia could commence such an arbitration itself; a claim against DLA UK might not be necessary if DLA Russia was liable for any failings on its part, but Mr Spalton said that an undertaking could be given that DLA UK would submit to the jurisdiction of the Russian tribunal so that any claim against it could also be brought in that forum.

151. Some of the difficulties with this suggested course are obvious.

152. First, PCL has not brought a claim against DLA Russia in respect of post-26 May 2015 events. Ms Hopkins, QC confirmed in her oral submissions that it did not intend to do so.

153. Secondly, so far as a possible arbitration commenced by DLA Russia seeking negative declaratory relief in relation to post-26 May 2015 events is concerned:

i) In circumstances where no such claim has been made or intimated against DLA Russia in respect of such events such an arbitration would seem somewhat artificial;

ii) In any event, DLA Russia has had ample opportunity to commence such an arbitration if it wished to do so, but has not done so.

154. Thirdly, so far as DLA UK is concerned, in circumstances where it is common ground that it was not party to the Arbitration Agreement, any claim against it is simply not arbitrable, absent some agreement to an *ad hoc* submission to a presently non-existent tribunal. PCL cannot be compelled to bring its claim against DLA UK by way of Russian arbitration.

155. PCL submitted that there were two further problems in the face of a case management stay.

156. The first concerns the ECJ's judgment in *Owusu*:

i) DLA UK is an English domiciled LLP, and pursuant to Article 4 of Regulation 1215/2012 ("the Recast Regulation") the English court has mandatory jurisdiction over DLA UK;

ii) In *Owusu v Jackson* (Case C-281/02), [2005] QB 801 at [46], the ECJ held in the context of Article 2 of the Brussels Convention that it was not open to an English court to stay a claim against an English-domiciled defendant in favour of a court of a non-contracting state on *forum non conveniens* grounds;

iii) Subsequent authority, see *Equitas Ltd v Allstate Insurance Company* [2008] EWHC 1671 (Comm), [2009] 1 All ER (Comm) 1137 *per* Beatson J at [64], has confirmed that it is not open to an English court to stay proceedings against an English-domiciled defendant on discretionary case management grounds where it would undermine mandatory provisions of Regulation 44/2001. The same

applies to the Recast Regulation: see *Gulf International Bank BSC v Aldwood* [2019] EWHC 1666 (QB) *per* John Kimbell, QC at [104] and [136];

iv) A stay might be permissible consistent with *Owusu* if it was temporary in effect: see *Equitas* at [64]; *Jeffries International Ltd v Landsbanki Islands LF* [2009] EWHC 894 (Comm) *per* Cooke J at [27]-[29]. PCL submitted, however, that the stay sought by DLA UK was to all intents and purposes permanent.

157. Secondly, even if a case management stay might be granted consistently with the Recast Regulation, the general principle was that:

> "… where a plaintiff has founded jurisdiction in this country as of right, there is a real burden on a defendant who seeks a stay to satisfy the court that the ends of justice would be better served by granting a stay"

See *Equitas* at [54]. In *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 All ER 679 at 690H Lord Bingham of Cornhill CJ said that such stays should only be granted "in rare and compelling circumstances". PCL submitted that there were no such circumstances here.

158. Mr Spalton argued that this court could and should grant a case management stay of the proceedings against DLA UK. He submitted that:

i) The *Owusu* line of authority could be distinguished or did not apply in the present situation because the present claim was an arbitration claim and would not undermine the Recast Regulation;

ii) The stay sought was only a temporary stay, and the authorities recognised that temporary, case management stays could be granted consistently with *Owusu*; and

iii) The present case was a case where the circumstances were rare and compelling in the *Reichhold* sense.

159. I do not accept any of these points.

160. So far as the first point is concerned, Recital (12) to the Recast Regulation provides in its first paragraph that:

> *"This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed in accordance with national law."*

Article 1(2)(d) of the Recast Regulation itself states:

> "2. This Regulation shall not apply to:
>
> …
>
> (d) arbitration".

161. As is apparent, Recital (12) contemplates an action in a matter in respect of which "the parties" have entered into an arbitration agreement. DLA UK is, it is accepted, not party to the Arbitration Agreement. The claim made against DLA UK in this action is not one in respect of which PCL and DLA UK have entered into an arbitration agreement.

162. Mr Spalton relied upon the decision of Blair J in *Autoridad del Canal de Panamá v Sacyr SA* [2017] EWHC 2228 (Comm), [2018] 1 All ER (Comm) 916 at [144]-[150] and [156]-[165]. In those passages, however, Blair J was considering the possibility of a stay of English proceedings (no stay was ultimately granted) between A and B pending the outcome of a related arbitration between A and B. The present case is different.

163. Nor do I consider that the proceedings between PCL and DLA UK can sensibly be said to fall within the scope of the arbitration exception: see *The "Prestige" (No 4)* [2020] EWHC 1920 (Comm), [2020] 2 Lloyd's Rep 365 *per* Butcher J at [106]-[108]. Arbitration is not the principal focus of the English proceedings against DLA UK; the essential subject matter of the claim made against DLA UK does not concern arbitration; and the relief sought in the proceedings is not ancillary to or an integral part of any arbitration process.

164. As for the second point, although no arbitration has been commenced to date Mr Spalton said that DLA Russia would be prepared to commence arbitration, and on that basis he suggested that the stay of the English proceedings against DLA UK would be temporary and would continue only until the conclusion of the arbitration in Russia. How long that might be is unknown: it could be a matter of years.

165. The essence of Mr Spalton's proposal, however, was that either a claim against DLA UK would be unnecessary because the Russian tribunal would address the question of whether DLA Russia was liable for any failing on its part, or that DLA UK would voluntarily submit to the jurisdiction of the Russian tribunal, and so any claim against it would also be decided there as well as any claim against DLA Russia. This is not, in substance, a temporary case management stay; it is, in effect, a jurisdictional stay, put crudely that everything should be sent off to Russia.

166. Thirdly, I am not persuaded that the present case is one of those rare and compelling cases where a case management stay should be granted.

167. Mr Spalton submitted that granting a case management stay of the proceedings against DLA UK would mean that one would avoid a situation where there was an arbitrary division between two sets of proceedings, one in Russia and the other in London. But, with respect, given my decision on the section 9 application, it does not seem to me that this follows at all.

168. Furthermore:

i) No Russian arbitration has yet been commenced by DLA Russia; there is no evidence before me as to when it might be started or how long it might take;

ii) There is no reason to suppose that any Russian arbitration that might be commenced by DLA Russia will canvass any of the matters that are the subject of the claim against DLA UK. Ms Hopkins, QC confirmed that PCL does not intend to advance a claim against DLA Russia arising out of post-Engagement Letter events;

iii) There is no obvious advantage in having any Russian arbitration proceedings go ahead first, in advance of the English court proceedings against DLA Russia which it is to be assumed, given my decision on the section 9 application, will proceed.

169. Ultimately, even if I had a discretion to grant a case management stay which, given the *Owusu* point, I consider I do not, I would not consider it to be in the interests of justice to grant such a stay here.

170. DLA UK's application for a case management stay is therefore dismissed.

Conclusion

171. I dismiss both the application by DLA Russia for a stay of the proceedings against it under section 9 of the 1996 Act and also the application by DLA UK for a case management stay.

172. I will hear counsel in relation to costs and any other consequential matters.