Neutral Citation Number: [2019] EWHC 2729 (Comm)

Case No: CL-2019-000572

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/10/2019

Before :

MRS JUSTICE CARR

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Between :

A	**Claimant**
- and –	
(1) OOO "Insurance Company Chubb" **(2) Chubb Russia Investments Limited** **(3) Chubb European Group Se** **(4) Chubb Limited**	**Defendants**

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Mr Steven Gee QC and Mr William Buck (instructed by **Shearman & Sterling LLP**) for **A**
Mr David Bailey QC and Mr Marcus Mander (instructed by **Kennedys Law LLP**) for the **Defendants**

Hearing date: 15 October 2019

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Approved Judgment

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MRS JUSTICE CARR

Mrs Justice Carr:

Introduction

1. These are proceedings for anti-suit relief by way of injunction, together with associated relief, against four defendants in respect of proceedings in Russia ("the Russian Proceedings") commenced by the First Defendant ("Chubb Russia"), a Russian insurance company which is part of the Chubb Insurance Group. The proceedings are said to have been issued in breach of and disregarding a written arbitration agreement providing for arbitration in London.

2. The Claimant ("A") is an international construction and engineering joint stock company. It entered into a contract dated 27 June 2012 with Energoproekt Closed Joint Stock Company ("Energoproekt") for boiler and auxiliary equipment installation works at the Berezovskaya Power Plant ("the Contract") ("the Plant"). Clause 50 of the Contract ("Clause 50") contained what is said to be the arbitration agreement between the parties. It provided for arbitration under the rules of the International Chamber of Commerce with a seat in London and using the English language. There were also terms in the Contract concerning insurance at Article 32, for example, providing for all risk coverage of A's works on the project as well as a subrogation waiver and the provision for limited liability.

3. The Contract was the subject of an assignment of rights and obligations dated 21 May 2014 between A, Energoproekt and EON Russia ("Unipro") whereby Unipro replaced Energoproekt as the contracting party with A under the Contract.

4. Chubb Russia issued an insurance policy to Unipro which it alleges covered losses arising out of a fire at the Plant on 1 February 2016. Chubb Russia alleges that it paid out some US$400 million to Unipro in respect of those losses. It claims to be subrogated to the claims of Unipro under Russian law and to be entitled to sue in Russia in its own name in respect of those claims.

5. Chubb Russia notified a claim in respect of losses at the fire to A in April 2019. A rejected the claim (albeit not to Chubb Russia but Unipro), stating that its works were unrelated to the fire. It made reference to the provisions of the Contract, why there was no subrogation and invoked the arbitration clause in Clause 50.

6. Chubb Russia has issued the Russian proceedings against ten other respondents alongside A including by reference to claims in tort/delict under Russian law. The respondents are collectively said to be liable "solidarily" for "jointly caused harm".

7. The present application has been listed before me as a matter of urgency following directions on paper by Mr Justice Teare on 30 September 2019, whereby he permitted service of the claim form and this application on Chubb Russia in Moscow, on the Third Defendant ("Chubb Europe") in France, and the Fourth Defendant ("Chubb Holding") in Switzerland. The validity of the claim form was also extended to a period of 18 months.

8. My understanding is that service of the claim form and this application has been effected on the Second Defendant ("Chubb Investments") and Chubb Europe, but not

Chubb Russia or Chubb Holding, although Kennedys Law LLP have recently indicated that they are now authorised to accept service on behalf of Chubb Russia.

9. The current application is made ex parte but on notice to the Defendants. A seeks, first, a mandatory order against Chubb Russia requiring it to cause the Russian courts to grant a stay and withdrawing/waiving its claims against A. Secondly, for interim purposes only against Chubb Europe, a mandatory injunction requiring it to procure and cause Chubb Russia to take the necessary steps to comply with the mandatory order against it, to instruct Chubb Russia to take those steps and restraining Chubb Europe from instructing, procuring or causing Chubb Russia to take any steps to continue with the claim in the Russian proceedings against A. The broad allegation against the Second to Fourth defendants is that they are "pulling the strings" behind the Russian proceedings. A also seeks an order dispensing with service of the application notice on all Defendants except Chubb Investments.

10. The application, as I have indicated, has been listed as a matter of urgency on the basis that A has issued a motion for stay of the Russian proceedings which is due to be heard on Wednesday of next week, being 23 October 2019.

Procedural history

11. A letter of claim was sent to A by lawyers for Chubb Russia on 24 April 2019. A did not respond directly to Chubb Russia or its lawyers, although it appears that it did write in response to Unipro.

12. On 25 May 2019 Chubb Russia commenced the subrogation action in the Russian proceedings. It contends that it was fully entitled to do so and, in doing so, has in no way acted in contravention of any arbitration agreement, including Clause 50.

13. On 29 May 2019 A discovered that Chubb had issued the Russian proceedings. A statement of claim was received by A on 6 June 2019. In the statement of claim Chubb Russia seeks compensation of losses by way of subrogation concerning the fire alleging defects of the supplied equipment, violations of the law requirements during engineering, construction and installation, as well as deviations during development phases. A is said in the statement of claim to be the general contractor, something which A says is a misrepresentation since it played only a limited role to perform its particular subcontract.

14. On 3 June 2019 A received the first ruling of the Russian court which essentially raised queries about Chubb Russia's claim.

15. On 29 July 2019 A received a second ruling from the Russian court in which Chubb Russia was asked for further information and given time to cure outstanding deficiencies.

16. On 4 September 2019 A received a third ruling from the Russian court dated 3 September 2019, accepting Chubb Russia's claim and formally initiating proceedings.

17. On 13 September 2019 A wrote to Mr Joseph Wayland, general counsel for the Chubb Insurance Group raising questions on the merits and, amongst other things, pointing to clause 50 asking for the Russian proceedings to be withdrawn on 16

September 2019. Mr Wayland's response was to ask for reasonable time to provide a considered response. An email on 20 September 2019 indicated that that the position within the Chubb Insurance Group was still being investigated.

18. The present claim was issued on 16 September 2019. Further, on 17 September 2019 A issued the motion for a stay in Russia to which I have already referred. A has objected to the Russian court's jurisdiction on grounds, amongst others, that the dispute between the parties should be referred to ICC arbitration in London. As indicated, this motion is to be heard next Wednesday.

19. Chubb Russia submits that the purpose of this present application appears to be an attempt by A to pre-empt the Russian court's right to decide its own jurisdiction by obtaining a determination from the English court on the same question in advance of the hearing on 23 October 2019.

20. On 23 September 2019 A issued its application for leave to serve out of jurisdiction and interim injunctive relief. On 30 September, as already indicated, Mr Justice Teare gave directions. He declined to make directions for an urgent hearing to take place, but commented that the matter appeared urgent to him and that A could apply on notice for a one-day hearing between the parties. The application before Mr Justice Teare was supported by a short skeleton argument on behalf of A and two short affidavits from A's chief counsel of international affairs.

21. On 2 October 2019 A obtained a hearing date for its application for interim injunctive relief of 15 October 2019. Kennedys Law LLP for the Defendants opposed such a hearing and suggested a hearing for mid to late November 2019.

Current position

22. Bundles for today's hearing were received by the court last Friday, 11 October 2019. Evidence from the Defendants, in the form of a witness statement from Mr Michael Wells of Kennedys Law LLP, was served on the same day. Over the weekend, following an indication that that would be when the court was in a position to pre-read, the court received a helpful "Executive Summary" of the Defendants' case.

23. On Monday, that is to say yesterday, at 10am, the court received a full skeleton from the Defendants. At 1.10pm the court received a skeleton argument from A, together with a supplemental document addressing some of the authorities relied upon by the Defendants. The skeleton was not cross-referenced; it contained no list of issues; it was not accompanied by a chronology, nor any reading list. It does not comply with Appendix 5 of the Commercial Court Guide.

24. Each skeleton cited some 20 to 30 authorities, albeit with some overlap. I find it difficult to accept that paragraph F.13.3 of the Commercial Court Guide has been respected. No authorities bundle was received until 9.30 am today, and then only from the Defendants. Those bundles contained 45 authorities, four textbooks and two articles.

25. Further, yesterday, a new bundle of evidence was received from A containing for the first time a Russian law expert report and an affidavit from the partner at Shearman & Sterling LLP, solicitors acting for A. The bundle contained over 300 pages. Amongst

other things, reading the expert report, there appears to be a dispute between the parties as to whether there is a proper basis for joint liability as Chubb Russia asserts.

26. Overall, as matters stood at the end of play yesterday, the court had been provided with some 1,400 pages of material, ignoring authorities bundles.

27. Around 00.30 this morning A's representatives emailed certain documents now cross-referenced to my clerk. At 9.30am today I received a note from A on "Options regarding the hearing on 23 October in Russia" together with a chronology.

28. During the course of the hearing I queried the absence of what appeared to me to be a key contractual document. I was informed that that document was indeed missing from the material so far before me. There were in fact two further bundles available but which had not been provided to the court (volume H), which contained that document. Those materials had not been formally exhibited, but I was handed the first bundle H to consider. I was also provided with a copy of the (three) authorities bundles for A for the first time during the course of the hearing. Those bundles, as became apparent even during the course of the limited submissions that I have heard so far, proved themselves to be incomplete.

29. It is apparent to me that, whichever way one considers the issues before the court, and despite the powerful submissions of Mr Gee QC for A, this is not a narrow, single-issue case. A very large number of issues are raised: even if only on an alternative basis, what is the proper governing law of Clause 50, the effect of Russian law, whether there are strong or good reasons not to grant an anti-suit injunction, whether there is any proper basis for relief against Chubb Europe. It is, on any view, a heavy application within the meaning of the Commercial Court Guide.

30. In the normal course of events, paragraph F.6 of the Commercial Court Guide would have applied. In particular, the applicant's skeleton, reading list, time estimate and chronology would have been needed to be provided by 4pm, at least two clear days before the hearing (ie 4pm on Thursday, 10 October).

31. At the outset of today's hearing, I raised my concerns as to the appropriateness of proceeding at all today in the light of the procedural position facing the court. I heard short but focused submissions on both sides on my central concerns.

Ruling

32. Having considered carefully the submissions on both sides, and the overriding objective of dealing with cases justly and at proportionate cost, I have concluded that there is a number of reasons why I should not proceed to consider granting the relief sought by A today.

33. First, it is not at all clear to me why A's application was issued ex parte in the first place, as opposed to inter partes and then on short notice. The fact that a matter is urgent does not mean that it should proceed ex parte.

34. Secondly, A has been on notice of the Russian proceedings since late May 2019, yet the current application was not made until mid to late September 2019. Any crisis on timing is, in my judgment, of A's own making. The fact that the Russian proceedings

were not accepted or formally commenced in the Russian courts until early September is not to the point: from May 2019 there was a clear threat, and on A's case, breach, by Chubb Russia from May 2019 onwards. There was always a clear risk of a tight timetable in Russia upon formal acceptance of the proceedings. A appears at all times to have had ready access to Russian lawyers who would have been in a position to advise of possible procedural developments and timetables upon formal commencement of the proceedings. If the risk to A's assets and business in Russia is as great as A says, one would have expected earlier action on its part.

35. Thirdly, there is on the material identified before me to date no compelling reason why A's claim for anti-suit relief has to be heard today or, indeed, before next Wednesday. This is not a question of saying that the application is premature, or that it would be premature to grant the application because the Russian courts have not yet ruled on the stay motion before them. It is simply identifying that no obvious real prejudice has been identified to A if its claim for relief is heard after the Russian courts have dismissed (or not) A's motion for a stay. This is so even if the Russian courts on 23 October 2019 begin their consideration of the merits. One is not at the judgment stage where there is a risk of irreparable harm through damage to A's operations in Russia, a risk which, of course, exists wherever the matter is to be litigated.

36. Fourthly, the circumstances in which the order from Mr Justice Teare was sought are unfortunate. There was a failure of full and frank disclosure by A of the fact that the Contract containing Clause 50 is expressly governed (even if only in part, on A's case), by Russian law. Attachment 17 to the Contract defines the applicable law as Russian law. Nor did A refer to its own motion for a stay to the Russian court in which A positively asserts and relies on the fact that the Contract is expressly governed by Russian law. Chubb Russia's argument by reference to Russian law was, in my judgment, one which was always obviously going to raise its head. It has been, at least until this morning, been advanced (or at least understood by the Defendants) as the central issue in the application, namely what is the governing law of Clause 50.

37. A accepts, fairly, that it should have included Attachment 17, Articles 4.1 and 4.2 of the Contract, and its motion for a stay in Russia in its evidence on the application to Mr Justice Teare. It makes due apologies. The errors are said to have been the product of the burden of work at the time. Mr Gee has emphasised before me the huge pressure under which his team have been operating in three different time zones and in circumstances of urgency.

38. Fifthly, and perhaps more fundamentally for present purposes, it is clear that the relief sought by A is, at least arguably, not only interim relief. Its effect would be (at least possibly) final. I note that A's Russian law expert contends that upon the Russian courts effectively dismissing without prejudice Chubb Russia's claim, that there would be nothing to stop Chubb starting again if the anti-suit claim were to fail. To this Mr Bailey QC for Chubb Russia not unreasonably makes the point that he has not been able to counter this new point made by A's Russian law expert for the first time yesterday in any evidence. However, on instruction he says that Chubb Russia's position is very much to the opposite effect: there would be very grave obstacles in the path of Chubb Russia seeking to revive its claim against A in circumstances where there had been an earlier dismissal by consent. Thus, the court is being asked to make

a mandatory order with potentially far-reaching, permanent consequences, something which it will not do lightly or without the merits being fully and properly ventilated.

39. As to that, exploring the merits - even scratching their surface this morning - has only served to deepen my concerns as to the preparedness of this matter for fair determination today.

40. In submission, Mr Gee made clear that, in fact, his primary case is that the proper governing law of Clause 50 is completely irrelevant. This is not something that I had understood from his skeleton, nor had Mr Bailey. Rather, Mr Gee bases his primary case on the proposition that the choice of London as a seat for arbitration means without more that the English courts have supervisory jurisdiction to grant anti-suit relief, irrespective of the governing law of the arbitration agreement. Mr Bailey describes this as an entirely novel point of law.

41. Exploration of the merits has also served to reveal a complete lack of clarity (and certainly lack of confidence on both sides) as to precisely what test this court should be applying. Mr Gee submitted that I should determine, and could readily and without difficulty, determine the question of relief and construction without hesitation on an outright basis. But he went on to say, on an alternative basis, for the purpose of granting the injunctive relief, I need only be satisfied that there would be a good arguable case in A's favour. Mr Bailey countered that by reference to the case of *Transfield Shipping Inc v Chipin Xinfa Huayu Alumina Co Ltd* [2009] EWHC 3629 (affirmed in *Ecobank Transnational Inc v Tanoh* [2016] 1 WLR 2231 at [74] to [77]). He submits that the appropriate test is that I would have to be satisfied that there was a high degree of probability that A was entitled to the relief which it sought.

42. In light of all of the above, I have reached the conclusion that the case is not ready for a fair hearing. Beyond the very late service of evidence and the late service of A's skeleton, as I have indicated during the course of submissions and in this judgment, A's skeleton does not comply with Appendix 5 (or paragraph F.6.5) of the Commercial Court Guide.

43. In circumstances such as these where the court is being required to digest a huge amount of material in a very short timeframe, I would wish to emphasise the importance of clear, succinct and tightly focussed skeleton arguments from both parties.

44. The skeleton of A as applicant needed to identify crisply the issues in the case and the test(s) that needed to be applied. I accept Mr Gee's submissions to the court that he laboured long and hard over the weekend to produce the skeleton that he has, and that he has done so to the best of his ability. It does, to my mind, nevertheless, beg the question as to why preparation of A's skeleton did not commence much earlier, even if Chubb Russia's skeleton was going to emerge later in the day and require modification/updating to A's case. A was the applicant. It had sought and obtained today's hearing date. As I indicated, the structure of A's skeleton was difficult to follow; there was no reading list or time estimate; there was no cross-referencing until documents were sent to my clerk shortly after midnight this morning; there was no chronology provided until very shortly before the court sat. In particular and as a matter of substance, the skeleton failed to identify the relevant issues and test(s) succinctly for the court at the outset.

45. This court strives at all times to assist court users, often in circumstances of urgency. However, in order to be able to provide that service, it needs proper assistance from the parties, including intelligible skeleton arguments which identify the issues and the relevant test(s) in a clear structure and all in accordance with Appendix 5 of the Commercial Court Guide (and, on heavy applications, paragraph F.6.5 of the Commercial Court Guide).

46. There are further evidential difficulties, such as that the evidence on Russian law is incomplete, in particular, so far as Chubb Russia's position is concerned.

47. Given the range of issues arising, the number of authorities cited, the fresh evidence on Russian law and the state of preparedness overall, I have also concluded that one day today would simply be insufficient time for the matter properly to be disposed of. I consider that with due preparation and properly focussed and structured written submissions, one day should be sufficient, but the case is clearly not ready for that to be achieved today.

48. I would also add that, so far as Chubb Europe is concerned, the application raises some particular complexities which would take some time to unravel if the application for interim relief against Chubb Europe were to be pursued.

Conclusion

49. In short, I am not persuaded that I should proceed to consider further granting urgent interim injunctive relief today in the light of all these matters. It is impossible for the court to consider the relevant issues properly in the time available. The time crisis is, in my judgment, largely of A's own making. There was a failure to put all relevant material before Mr Justice Teare, and ultimately and as matter of pragmatism, the case appears to me to be in chaos today. As Mr Gee himself was forced to agree, it is at least in disarray. It would not be fair to either party to proceed on such an important matter today in such circumstances. As I have indicated, with further directions for a further hearing, the position should be capable of effective disposal in a day, but for today's purposes I am not prepared to let the matter proceed further substantively.