Neutral Citation Number: [2008] EWHC 237 (Comm)

Case No: 2006 Folio 460

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 February 2008

Before :

THE HON. MR JUSTICE TOMLINSON

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Between :

GATER ASSETS LIMITED	**Claimant/ Respondent**
- and -	
NAK NAFTOGAZ UKRAINIY (translated as NATIONAL JOINT STOCK COMPANY NAFTOGAZ OF UKRAINE)	**Defendant/ Applicant**

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Colin Edelman QC, Charles Dougherty
(instructed by **Messrs Clyde & Co LLP**) for the **Claimant**
John Higham QC, Messrs White & Case LLP, for the **Defendant**

Hearing dates: 29-31 October, 1-2, 5-6 & 8 November 2007

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Judgment

The Hon. Mr Justice Tomlinson :

1. This is an application by the Defendant to set aside an Order made ex parte by Colman J on 23 May 2006 whereby the Claimant was permitted to enforce in the same manner as a judgment an arbitration award rendered as long ago as 31 May 2000 by the International Commercial Arbitration Court of Moscow in a dispute between Monégasque de Réassurances S.A.M. and the Defendant. Judgment was entered for US$88,256,704.49 together with a further amount in respect of the costs of the arbitration. The award being a New York Convention award, Russia like the UK being a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, this was an order made pursuant to section 101 of the Arbitration Act 1996 which provides:

> "101(1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.

> (2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
>
> …
>
> (3) Where leave is so given, judgment may be entered in terms of the award."

2. In the ordinary way the order made by Colman J made provision for the Defendant to apply within twenty-one days to set aside the order and made further provision staying enforcement of the award if such an application were made. Such application was duly made by the Defendant, invoking section 103 of the Arbitration Act 1996 which gives effect in domestic law to the relevant provisions of the New York Convention. Section 103 provides:

> "103. Refusal of recognition or enforcement
>
> (1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.
>
> (2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves—
>
> a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;
>
> b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
>
> c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
>
> d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));
>
> e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;
>
> f) that the award has not yet become binding on the parties, or has been set aside or suspended by a

> competent authority of the country in which, or under the law of which, it was made.
>
> (3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.
>
> (4) An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.
>
> (5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.
>
> It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security."

3. I have set out the section in full. Various grounds were relied upon by the Defendant both in its Application Notice and at the outset of the hearing before me. By the end of the hearing however it was clear that the only basis upon which the Defendant could realistically seek to resist recognition and enforcement of the award is that such recognition and enforcement would be contrary to public policy. Equally, an application to set aside the order of Colman J on the basis of a failure to make full and frank disclosure turns on precisely the same considerations and as a matter of analysis adds nothing to the debate. Mr Higham QC for the Defendant did formally keep open an argument to the effect that relief was available under section 103(2)(d) on the basis that the arbitration tribunal lacked jurisdiction to entertain the dispute. However this point has already twice been decided against the Defendant by the competent Russian supervisory courts. There can be no prospect of the Defendant escaping the preclusive effect of such determinations unless it succeeds in its argument rooted in public policy and moreover in a manner relevant to the finding that the arbitration tribunal enjoyed jurisdiction.

Background

4. The Defendant, to which I shall refer hereafter as "Naftogaz" is a state enterprise in Ukraine. It was created by the merger of a number of state enterprises including Ukrgazprom to which it is successor in title. Naftogaz as did its predecessor Ukrgazprom distributes natural gas in Ukraine. That natural gas is and was at all material times supplied by the Russian company Gazprom. The supply of natural gas by Gazprom to Ukrgazprom in 1998 was governed by Contract No. 1GU-98 dated 31 December 1997.

5. Of greater significance than these purely domestic arrangements is the fact that the "Brotherhood" pipeline through which Gazprom supplies gas to Western Europe passes through Ukraine. This pipeline is also the source of supply for Ukraine itself, Moldova and certain other consumers in the south of the Russian Federation. Gazprom pays for the transit of gas through and over the territory of the Ukraine by permitting now Naftogaz, in 1998 Ukrgazprom, to withdraw a certain amount of gas from the pipeline. In 1998 the use of the "Brotherhood" pipeline was governed by Contract No. 2GU-98 between Gazprom and Ukrgazprom.

6. The "Brotherhood" pipeline also passes through Moldova and Belarus. It seems that in the years before 1998 it was not unusual for it to be asserted by Gazprom that the state gas companies of former Soviet Bloc countries had abstracted natural gas in quantities which were not authorised by arrangements of the sort which I have described. It is no part of my function to determine whether such abstractions took place. It is of course well known that similar such allegations have been made in more recent times but again I am not concerned with that. All that is relevant for present purposes is that in early 1999 Gazprom alleged that in the month of December 1998 Ukrgazprom had misappropriated 1,482,678,000 cubic metres of gas, i.e. taken a quantity greater than that to which it was entitled pursuant to Contract No. 2GU-98. The value of the allegedly misappropriated gas at the price at which Gazprom could then sell it to Western European consumers was US$90,057,861.72.

7. Contract No. 2GU-98 contains at Article 9.2 an arbitration clause providing for the resolution of disputes arising in connection with the contract. Such disputes if not amicably resolved are to be submitted for "final settlement" to the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the state where the claimant has its permanent seat in accordance with the procedure of the said court. The dispute is "to be considered by three arbitrators of the arbitration court". The resolution of the arbitration court is to be final and binding and not subject to appeal.

8. According to the evidence before me it was in the period with which I am concerned difficult for Gazprom or its subrogated captive insurer Sogaz to press home its entitlement to recover in respect of unauthorised extractions of natural gas. The state gas companies of the former Soviet Bloc countries would apparently often succeed in insisting that the matter be dealt with at an inter-governmental level rather than in arbitration, with the result that Gazprom might fail to make a full or any recovery. Mr Michael Payton, the Senior Partner of Messrs Clyde & Co, the London solicitors acting for the Claimant, puts it this way in his fourth witness statement at paragraph 27:

> "…my understanding of the background to this was that it was politically embarrassing for Gazprom to proceed in its own name (or that of its captive insurer Sogaz) against its erstwhile partners in the various countries in the event that gas was misappropriated. Also, if any debts were due, Gazprom would be exposed to potential interference by the Russian Government. It had happened in the past that debts had been forgiven as part of an overall country to country deal. However, if Gazprom were able to say that the debt was due to others, it would be less likely to be affected by this."

9. In order to overcome this perceived problem in or around 1996 Gazprom and Sogaz devised an insurance and reinsurance structure with the intention of in such circumstances vesting in a subrogated non-Russian reinsurer the right to pursue Gazprom's claim against its contractual partner for unauthorised abstraction of gas pursuant to a transit contract. I should mention that pursuant to Russian law and procedure subrogated claims are brought in the name of the subrogated insurer or reinsurer as the case may be. Such a non-Russian party would not it was thought be susceptible to the suggestion that the dispute be resolved at inter-governmental level. I should also mention that Gazprom could not achieve this objective by the more simple and straightforward expedient of assignment, this being prohibited by Article 10.7 of Contract No. 2GU-98 which is in this respect I presume typical. I set out Articles 9.3 and 10.7 of the Contract which both cross-refer to each other and refer back to the arbitration provision itself, Article 9.2, the effect of which I have already summarised above:

> "9.3 Paragraphs 9.2 and 10.7 of the present contract referred to the arbitration, shall be bound for the parties, their authorised representatives and successors and their actions shall remain in force notwithstanding to the expiration of the validity or termination of validity of the present contract.
>
> …
>
> 10.7 None of the parties shall be entitled to delegate its rights and liabilities under the present contract to the third parties without written consent of the other party, excluding the rights and liabilities connected with fulfilment of the procedures as provided in the paragraph 9.2, Article 9 of the present contract."

10. Apparently there were in place between December 1996 and the end of December 1997 such insurance and reinsurance arrangements relating to the risk of misappropriation of gas passing through Moldova and Ukraine. The reinsurers were certain syndicates at Lloyd's. The relevant contracts were not in evidence before me although I was told that their structure was similar to those contracts which were. Essentially, neither insurer nor reinsurer carried any financial risk – indeed they stood to make a certain profit. The premium payable equated precisely to the proved loss through misappropriation. Subrogated recoveries were to be returned to the reinsured and insured respectively. The premium was no more than a fund out of which the insurance and reinsurance indemnity was to be paid and from which the insurer and reinsurer could deduct their reward for allowing their name to be used. This structure was devised by Professor Valeriy Musin in collaboration with Mr Payton. Professor Musin is a senior and distinguished academic lawyer in St. Petersburg who also practised as Senior Partner of the law firm Musin & Partners in St. Petersburg. At the relevant time Messrs Clyde & Co practised in Russia in association with Musin & Partners. Mr Payton accepted in evidence that, looked at through English eyes, the arrangements which I have described were hardly usual. He described it as a form of fronting arrangement. It is however common ground that the arrangements which I have to consider were governed by Russian law. Mr Payton at all times believed that, as he had been advised by Professor Musin, the arrangements were valid and effective

in Russian law to achieve their purpose, the vesting in the reinsurer of a subrogated right of suit against the party responsible for the misappropriation.

The arbitration proceedings

11. Thus it was that in April 1999 it was Monégasque de Réassurances S.A.M. of Monaco rather than Gazprom who commenced proceedings at the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation in Moscow. I shall refer to this body as simply the "ICAC". I shall refer to Monégasque de Réassurances S.A.M. as "Monde Re". The institution of proceedings was preceded by a letter before action of 19 March 1999 sent to Naftogaz by Clyde & Co London acting on behalf of Monde Re. Both Clyde & Co and Musin & Partners had been granted a power of attorney by Monde Re in or around the early part of 1999. After reciting contracts 1GU-98 and 2GU-98, setting out the misappropriation and referring to an "Acceptance Certificate" by the terms of which Naftogaz had apparently indicated its acceptance that it had misappropriated gas in the amount to which I have already referred, Messrs Clydes continued:

> "The risk of wrongful receipt or misappropriation is covered under a Contract of Insurance dated 30.10.98 concluded between OAO 'Gazprom' and Sogaz Insurance Company. The risk of 'wrongful receipt or misappropriation of natural gas' was reinsured by Sogaz Insurance Company with Monégasque de Réassurances S.A.M. (Monde Re) in accordance with the terms of a Reinsurance Contract No. 98CG160R01 dated 27.11.98.
>
> As a result of breach of the provisions of the Delivery Contracts committed by AO 'Ukrgazprom', OAO 'Gazprom' applied to Sogaz Insurance Company for reimbursement of the loss in the amount of US$90,057,861.72. The amount of loss was calculated in relation to the volume of natural gas misappropriated by AO 'Ukrgazprom' which was equal to 1,482,678 thousand cubic metres and its average non-C.I.S. countries' price for the said period which was US$60.74 per thousand cubic metres (1,428,678 th.cm.xUS$60.74/th.cm=US$90,057,861.72).
>
> Having accepted the claim Sogaz Insurance Company paid the insurance indemnification in the amount of US$88,256,704.49. In accordance with the Reinsurance Contract No. 98CG160R01 dated 27.11.98 the aforementioned claim was submitted to CIE Monégasque de Réassurances S.A.M. (Monde Re) and paid by the latter in the amount of US$88,256,704.49.
>
> Thus, CIE Monégasque de Réassurances S.A.M. (Monde Re) is fully subrogated, up to the amount paid, in rights and actions of OAO 'Gazprom' against AO 'Ukrgazprom' or its legal successors in respect of misappropriation of natural gas. Bearing in mind that aforementioned sum has not been paid by AO 'Ukrgazprom' until now and to avoid the expense of the

> plaintiff being required to pay arbitration fees we request you immediately to pay the amount of US$88,256,704.49 to Monégasque de Réassurances S.A.M. (Monde Re) by remitting the sum to the account of Clyde & Co, details as follows:
>
> …
>
> If we do not receive this sum or other adequate proposals for settlement by 29th March 1999, we will without further notice commence arbitration as contemplated by the Delivery Contracts."

The letter was signed by Mr Payton expressly described therein as Senior Partner of Clyde & Co.

12. Payment was not made and the arbitration proceedings were duly begun. The Statement of Claim dated 19 April 1999 was also signed by Clyde & Co London, this time by Mr Trevor Barton, a partner in the London partnership but who was at the time based in the St. Petersburg office of Musin & Partners, who were as I have already mentioned Clyde & Co's then associate law firm in Russia. The Statement of Claim made similar assertions to those contained in the letter before action, with the exception that whereas formerly it had been said that the risk of wrongful misappropriation was reinsured by Sogaz with Monde Re now it was said that "the risk of payment of insurance indemnity assumed by … Sogaz was reinsured" by Sogaz with Monde Re by means of the contract of 27 November 1998. Beyond the fact that the latter formulation is the more strictly accurate, I do not think that there is any significance in the precise form of words adopted on either occasion.

13. The tribunal was duly constituted comprised of Professor Makovsky, nominated by Monde Re and Professor Pobirchenko, a Ukrainian lawyer, nominated by Naftogaz. Pursuant to the Rules of the ICAC those two gentlemen should have nominated a third arbitrator and Chairman of the tribunal within a prescribed thirty day period, but for whatever reason they did not do so. This meant that under the ICAC Rules the President of the ICAC had the power to appoint the Chairman of the tribunal from the ICAC List of Arbitrators. The President of the ICAC, Professor Komarov, duly appointed Professor Kostin as the Chairman. It so happens that Professor Kostin was the reserve arbitrator nominated by Monde Re, but the Rules did not prohibit his appointment as Chairman and nothing now turns on this. Professor Kostin is a Vice President of the ICAC, a respected and experienced arbitrator and is also Head of the Department of Private International Law of the Institute of International Relations at the Ministry of Foreign Affairs. It seems a fair inference that Professor Makovsky is also a lawyer although this is not in evidence. It is now accepted that the composition of the tribunal was in accordance with the agreement of the parties. There is not and never has been any suggestion that the arbitrators acted in anything other than a fair, impartial and independent manner.

14. The substantive hearing of the arbitration took place in Moscow on 14 April 2000. At the hearing Monde Re was represented by Professor Musin and by his then partner Professor Fadeyeva, who has since retired. Mr Barton was also present, as were a number of employees of Sogaz and Gazprom. Naftogaz was represented by Mr Reva, then the Head of its Legal Department. It seems safe to infer that he is a lawyer

although there is actually no evidence to that effect and I have been invited to regard it as significant that there is before the court on this application no evidence from him. Although it is not relevant to anything which I have to decide, it is appropriate to point out that Mr Reva seems not seriously to have challenged the allegation that Naftogaz had received the amount of gas alleged by Monde Re to be an unauthorised abstraction. There was evidently some discussion whether the off-take could be said to be unauthorised having regard to the terms in the contract which made provision for various forms of settlement and set-off as gas was delivered via Ukrainian territory. The principal argument at the hearing seems to have concerned the competence of the tribunal to assume jurisdiction, the claimant party not having its permanent seat in the Russian Federation.

The award

15. On 31 May 2000 the ICAC issued its reasoned award. The award was in favour of Monde Re against Naftogaz in the sum of US$88,256,704.49 plus US$117,697 in respect of the costs of the arbitration. Professor Pobirchenko issued a dissenting opinion. He thought that the arbitrators lacked jurisdiction because the arbitration clause called for arbitration before the ICAC at the Chamber of Commerce and Industry at the place where the Claimant had its permanent seat. The permanent seat of the Claimant Monde Re was Monaco, not Moscow. To English eyes, accustomed to subrogated claims being pursued in the insured's own name, it is second nature that a subrogated claim is bound to be brought in the forum or by the procedure to which the insured is contractually committed. The argument of Naftogaz seems the more plausible where the subrogated claim is not pursued in the name of the insured. But the suggestion that each party agreed to be bound to arbitrate in the place at which any of its counterparty's successors might be found seems unlikely, and it is also as the majority arbitrators pointed out incompatible with Articles 9.3 and 10.7 of the Transit Contract. To an English lawyer it is therefore no surprise that this challenge to the jurisdiction failed although that consideration is of course of no relevance to the matters in issue.

The application to the Moscow City Court to set aside the award

16. On 8 December 2000 Naftogaz lodged a Petition at the Moscow City Court seeking to set aside the award. I shall have to discuss in more detail the course taken by those proceedings. A hearing took place on 20 and 21 March 2001 before Judge Yemysheva. Naftogaz was on this occasion represented by Messrs Harald Giebner & Co, a law firm practising in Munich. Specifically there were present the Senior Partner Mr Giebner and another member of his firm Mrs Valentina Sourjikova, an Ukrainian national and herself a lawyer qualified in Ukraine with experience of sitting as an arbitrator in international commercial arbitrations conducted in that country. Also present for Naftogaz was a Russian lawyer, Mr Dimitri Matveyev. Mrs Sourjikova played the leading part in presenting the appeal. Monde Re was represented by Professor Musin and Mr Barton, although Mr Barton did not address the court.

17. The court gave a written judgment, apparently on the second day of the hearing. At all events the written judgment bears the date 21 March 2001. The court directed itself by reference to Article 34 of the Law of the Russian Federation on International Commercial Arbitration, holding that an arbitration decision may be annulled only on

proof by the party submitting a petition for annulment that the parties or the award were affected by one or more of a list of considerations. The considerations listed in Article 34, and in the judgment of the court, are those set out in Article V of the New York Convention. Article V, to which of course section 103 of the English Arbitration Act 1996 also gives effect, provides as follows:

> "*Article V*
>
> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

> b) The recognition or enforcement of the award would be contrary to the public policy of that country."

The petition of Naftogaz to annul the award was rejected.

The appeal to the Russian Supreme Court

18. On 30 March 2001 Naftogaz lodged with the Russian Supreme Court an appeal against the decision of the Moscow City Court. The hearing took place on 24 April 2001 before a three judge court, Presiding Judge Nechayev and Judges Kharlanov and Kyeby. Naftogaz was on this occasion represented by Mrs Sourjikova, Mr Matveyev and Mr Ostanenko. Monde Re was represented by Professor Musin and Mr Barton. The written decision of the court dismissing the appeal is dated 24 April 2001. Like the lower court, the court directed itself by reference to Article 34 of the Law of the Russian Federation on International Commercial Arbitration.

Attempt to enforce the award in New York

19. In September 2000 an attempt was made in New York to enforce the award against Naftogaz and the State of Ukraine, on the basis that the one was the alter ego of the other. Monde Re was unsuccessful before both the US District Court for the Southern District of New York and the US Court of Appeals for the Second Circuit, principally on the basis of *forum non conveniens*. There does not appear to have been any challenge to the validity of the award as such, whether on the grounds enunciated in the New York Convention or at all. The judgment of the US Court of Appeals for the Second Circuit was delivered on 15 November 2002.

The assignment to Gater

20. On 3 May 2006 Monde Re, by now in liquidation together with its parent company Reinsurance Australia Corporation Limited, assigned to Gater Assets Limited, the Claimant in this action, the benefit of the ICAC award of 31 May 2000. The liquidator joined in the assignment. There was so far as I can see no consideration for this assignment but it is accepted that the Deed of Assignment is effective. Gater Assets Limited is a British Virgin Islands corporation and I know nothing about it. I have no idea what if any commercial considerations lay behind this transaction. There is I am sure an ongoing contractual relationship between Gazprom and Naftogaz. It is common knowledge that there are arrangements pursuant to which natural gas is supplied from Russia to Ukraine. There is so far as I am aware no ongoing contractual relationship between Gater Assets Limited and Naftogaz. Indeed although I know nothing about Gater Assets Limited I suspect that it carries on no commercial activity and it would not surprise me if it has no assets other than the benefit of this claim. None of these considerations however is of any relevance to the task with which the court is confronted, which is the exercise of a jurisdiction entirely constrained by section 103 of the Arbitration Act. The court is invited to refuse to recognise or to permit enforcement of an arbitration award rendered in a New York Convention state in circumstances where the competent supervisory courts in that state have twice considered and rejected challenges to its validity made on grounds which on analysis bear a close resemblance to those deployed on this application. It was no doubt in recognition of the heavy burden placed upon a party making such an application that Naftogaz has on this application alleged that the award was procured

by dishonest means perpetrated by Sogaz, Monde Re and the lawyers who represented them in the arbitration.

Proceedings in England

21. It was on 23 May 2006 that Colman J made the order to which I have already referred. He also granted a domestic freezing order over the assets of Naftogaz in England and Wales, which were alleged by the Claimant to include shares in an English company JKX Oil and Gas plc, or the proceeds of sale thereof. On 4 December 2006 Naftogaz issued the application which is now before the court seeking to set aside the order of Colman J and the freezing order which had in the interim been continued. The grounds of the application are:

> "(a) There was no valid arbitration agreement between the Claimant and the Defendant;
>
> (b) The Claimant was not entitled to be subrogated to any right of Gazprom to claim arbitration pursuant to Contract No. GU-98 of 16 January 1998 between Gazprom and the Defendant ('the Transit Agreement');
>
> (c) The arbitral award dealt with a difference not contemplated by and not falling within and/or contained decisions on matters beyond the scope of the submission to arbitration contained in Article 9 of the Transit Agreement;
>
> (d) The composition of the arbitral tribunal was not in accordance with Article 9 of the Transit Agreement;
>
> (e) The arbitral award was obtained by fraud;
>
> (f) Enforcement of the arbitral award would be contrary to public policy;
>
> (g) Enforcement of the arbitral award should accordingly be refused in accordance with section 103(2)(b), (d) and (e) and (3) of the Arbitration Act 1996; and
>
> (h) The Claimant failed to make full and frank disclosure on its without notice applications to the Court on 23 May and 16 June 2006."

22. The allegation that the award had been obtained by fraud arose principally out of a document exhibited to the first affidavit of Mr Payton dated 24 May 2006. That affidavit was placed in draft before Colman J. It will be recalled that both the letter before action and the Statement of Claim recited that Sogaz had been reinsured by Monde Re pursuant to a contract of reinsurance dated 27 November 1998. The Statement of Claim had appended to it as Appendix 4 what was described (in Russian) as "text (the Russian word is identical) of contract of reinsurance No. 98CG160R01 dated 27.11.98 (five pages)". The five-page printed document appended (with Russian and English texts side by side) was unsigned, although dated at the top of the

first page 27.11.98. Mr Payton at paragraph 11 of his draft affidavit referred to the reinsurance cover for the period 1 November 1998 to 31 December 1999 and exhibited "a copy of the reinsurance contract". What he exhibited was an eight page document. The first five pages were the same as the "text", the first page therefore bearing the date 27.11.98, but each page was additionally at the bottom signed, stamped and dated by Monde Re on 17 March 1999. The fifth page had an undated signature for Sogaz. There followed three separate printed Addenda again in Russian and English. Each one is signed by Sogaz on, probably, 6 January 1999 (the numeral corresponding to the month is indistinct and could in two places just possibly be a "2"). All three Addenda were signed by Monde Re on 17 March 1999.

23. The dates of the signatures give rise to questions as to the dates on which the reinsurance agreement was concluded, although there is of course nothing unusual in the world of reinsurance about wordings being signed long after the parties in fact regarded themselves as bound by an agreement in shorter form or of a more informal nature. It will be borne in mind that the contract had hitherto been asserted to be one dated 27 November 1998 and the loss occurred in December 1998.

24. The Addenda also give rise to questions as to the true nature of the reinsurance contract. The five page unsigned "text" of 27 November 1998 apparently evidences a relatively straightforward contract of reinsurance. Salient provisions include:

> "SOGAZ Insurance Company in the person of General Director Vladimir s. Denga, acting in accordance with Charter, on the one part and Monégasque de Réassurances s.a.m. (Monde Re) in the person of Managing director Michel Y. Beyens on the other part have concluded present Reinsurance Agreement in accordance with below described conditions:
>
> Original Insured
>
> OAO "Gazprom"
>
> Reinsured
>
> SOGAZ Insurance Company,
>
> Russia, 117939, Moscow, Stroiteley str., 8
>
> A/c 40701840800000000052 with GAZPROMBANK, Moscow
>
> Reinsurer
>
> Monégasque de Réassurances s.a.m. (Monde Re),
>
> Monte-Carlo Palace – 8th floor
>
> 7 Boulevard des Moulins
>
> MC98000 Monaco,

A/c 68561822 with Barclays Bank Plc, London

Property Insured

Natural Gas in Transit within the territory of Ukraine.

Period

With effect from 1st November 1998 00.00 a.m. Local Standard Time, up to 31st December 1999 24.00 p.m. Local Standard Time

This reinsurance attaches from the time the gas enters the pipeline system at a register point or storage tanks or underground storage vaults and continues whilst the gas is in transit and/or in store elsewhere including during delays within or beyond the Original Insured's control and including whilst held as stock and further including any interest whilst held for the purpose of consolidation and/or deconsolidation and until finally delivered to final destination and/or at the register point where transportation on the territory of another Country starts, as required but in any event cover shall terminate not more than 30 days after the expiry or cancellation of this insurance.

Conditions

Risks covered

The Reinsurer agrees to pay the Reinsured amounts in respect of damage to or loss of insured interest in the property of the Original Insured caused by the perils covered under "All risks" clause of 'Transport Insurance Rules' of SOGAZ Ins. Co. including loss of insured interest in the property of the Original Insured by reasons of:

- wrongful receipt or misappropriation of gas either by the consignee (buyer) or third parties which is in contradiction with the terms of deliver Contract whether with knowledge or assistance or against the will of gas carrier, or

- any use of gas (passing over to third parties, appropriation, destroying, consuming, etc.) by gas carrier which is in contradiction with conditions of gas transportation, or

- confiscation or any other expropriation of gas made by or under the law or order of government or any local authority but in conflict with conditions of transit and deliver of gas stated in respective contracts on gas transportation within the territory of Ukraine in 1999.

…

Limit of Liability

The Reinsurer is to pay 100% of a loss within the first 250,000,000 US dollars each and every claim.

Reinsurance Premium

As agreed

Legal Fund

It is a condition of this Agreement that Reinsurer shall establish, using the premium received from the Reinsured, a Legal Fund for the following purposes:

- to pay legal consultancy fees under the Original Policy and/or under contract on gas delivery;

- to pay the costs and expenses arising out of exercise of rights of recourse including legal pursuit against AO 'Ukrgazprom' or their successors in respect of wrongful receipt or misappropriation of gas.

Upon completion of recovery actions the Reinsurer shall remit to the Reinsured the remaining balance of the Legal Fund.

Initial amount of the legal Fund equals to 100,000 USD.

As sums from the Legal Fund are being paid the balance of the fund may be reinstated or increased under the agreement with the Reinsured.

Payments from the Legal Fund can be made only against the bills rendered by lawyers subject to written approval of the Reinsured.

Correspondence, Communications and Payments

All communications, correspondence and payments relating to this Agreement shall be transmitted through RRI Risk Research International (UK) Ltd., whose address is 6, Lovat Lane, London EC3R 7DT."

The provision for the setting up of a "Legal Fund" is in my experience at any rate unusual, and although it gives some small clue to what is now said to have been from the outset the true nature of this reinsurance, it is not of itself entirely illuminating. The Addenda provided:

"*Addendum No. 1*

Profit commission

> The Reinsurer shall pay the Reinsured a Profit Commission calculated as follows:
>
> Income being:
>
> Gross Premium
>
> Less Outgo Being:
>
> Losses paid and outstanding.
>
> Net of actual recoveries from third parties plus interest accrued on actual recoveries calculated on the basis of LIBOR 1 month for the period of depositing.
>
> Subject to commutation of this agreement on the resulting net balance the Reinsurer will pay as requested by the Reinsured a profit commission of up to 97%.
>
> *Addendum No. 2*
>
> Notwithstanding anything contained herein to the contrary the amount recoverable hereunder shall not exceed:
>
> 1. The amounts actually recovered from third parties
>
> Plus
>
> 2. The total of gross premium plus accrued interest.
>
> In the event of any claim under the original policies the subject of this Agreement, Monde Re shall appoint Clyde & Co, 51 Eastcheap, London, EC3M 1JP to pursue claims against third parties.
>
> It is noted and agreed that the Reinsurer or their appointed Agents will settle directly all fees and costs of Clyde & Co subject to the LEGAL FUND hereon.
>
> *Addendum No. 3*
>
> *Management Fees*
>
> It is agreed and understood that management fees of the Reinsurer shall be the greater of US$150,000 or 0.3125% of Gross Premium."

Addenda Nos. 1 and 2 when read together have the result that the reinsurer is taking no financial risk. Indeed, the reinsurer is to receive a guaranteed 3% commission. Under Addendum No. 1, if there is no claim the reinsured recovers 97% of the premium. If there is a claim, then the amount recoverable by the reinsured depends on the amount recovered from third parties. But Addendum No. 2 makes clear that

the extent of the reinsurer's liability is the sum of the amount recovered from third parties and the premium received. What is missing from these documents is of course the amount of the premium which had apparently been agreed. As to that, the agreement was apparently that the premium would be equivalent in amount to the monetary value of any insured losses which occurred during the currency of the reinsurance.

25. The nature of these arrangements became a little more clear from certain further documents exhibited by Mr Payton to his fourth witness statement dated 8 May 2007. By now the allegation of fraud had been made. At paragraphs 29 and 30 thereof Mr Payton said this:

> "29. On 20 January 1999, I was informed by Mr Woodthorpe-Browne of RRI that a claim was being made against Monde Re by Sogaz in respect of misappropriation of gas on the part of Ukrgazprom (the predecessor to Naftogaz). RRI acted in effectively a dual agency capacity for Sogaz and Monde Re. Mr Woodthorpe-Browne and Mr David Bridges ran the contact office for Sogaz in London. I understood that there was no serious dispute that the gas had been misappropriated, since this was evidenced in a Gas Acceptance Act signed by Ukrgazprom and Gazprom.
>
> 30. Shortly thereafter, payment of the claim by (sic) Sogaz was made by Monde Re to Sogaz via RRI (see pages 9-12 of Exhibit 'MAHP5')."

These four pages exhibited to Mr Payton's witness statement became Bundle E Tab 22 pages 187-190 at the hearing before me. None of these documents had hitherto been seen by Naftogaz. They were not before the arbitration tribunal. All four are dated 22 January 1999. They comprised:

a) An advice from Royal Bank of Scotland, International Operations, Payment Services at 42 Islington High Street, London N1 addressed to its customer RRI Risk Research International (UK) Limited advising that the bank had received a payment of US$50,000,000 from the Bank of New York, New York by order of Sogaz, details being reinsurance premium under Agr. No. 98CG160B01DD981120. RRI was advised that on the same day it would be credited with this amount in its account at Shipping Business Centre, London, less insignificant bank charges of the order of US$30. Subject to one difference, "B" for "R", the agreement number cited is that on the 27 November 1998 "text" of the reinsurance agreement between Sogaz and Monde Re. The agreement number and the date, 20 November 1998, in fact correspond to a yet further "placement agreement" of that date apparently executed between Sogaz and RRI whereby RRI was authorised by Sogaz to place reinsurance of its risk assumed to Gazprom for the period 1 November 1998 to 31 December 1999. The original sum insured was said to be US$8.5 billion, with premium, and premium payment schedule, "as agreed". This placement agreement was likewise exhibited by Mr Payton to his fourth witness statement. It had not hitherto been seen by Naftogaz and was not before the arbitrators.

b) Two further payment advices in identical form relating to payments of US$10,000,000 and US$37,057,861.72 respectively, the three therefore totalling the amount of the original claim by Gazprom against Ukrgazprom, US$90,057,861.72.

c) An advice from the Royal Bank of Scotland Shipping Business Centre, Great Tower Street, London to its customer RRI Risk Research (Intl) UK Limited confirming having issued a payment order by SWIFT in favour of Sogaz in account with Gazprombank Moscow via Bank of New York, New York in an amount of US$88,256,704.49 less insignificant charges. This is the amount of Gazprom's claim less 2%. Under the insurance contract of 30 October 1998 concluded between Gazprom and Sogaz, which was before the arbitrators, there was a deductible in respect of the risk of unauthorised gas off-take of 2% of the amount of the loss claimed.

26. These documents raise an obvious question as to the statements made in the letter before action and the Statement of Claim to the effect that Monde Re had paid Sogaz US$88,256,704.49 in respect of the claim. The resolution of that question might depend in part on the proper construction of the clause in the reinsurance agreement providing for payments to be "transmitted" through RRI and in part upon Russian law, which it is accepted is the law governing both the insurance and the reinsurance agreements. The documents appended to the Statement of Claim which were said to confirm payments from Monde Re to Sogaz (and from Sogaz to Gazprom) were in Appendix 7. They included:

a) A credit note issued by Monde Re on 22 March 1999 in blank, i.e. unaddressed to any person, reciting "Claim Settled by Monde Re" followed by an amount – US$88,256,769.85. The document was written on Monde Re letter paper with its Monaco address and was signed by Michel Y. Beyens.

b) A bank printout, probably generated by Royal Bank of Scotland, indicating that on 25 January 1999 a payment of US$88,256,769.85 was sent by RBS on account of its customer RRI to beneficiary Sogaz via Bank of New York, New York.

c) A Gazprombank Wire Transfer document dated 26 January 1999 which indicates that on that date Gazprombank accepted and executed instructions to debit the account of Sogaz with US$88,256,769.85 and to pay the same to an account of Gazprom with the same bank, this being "insurance benefit under … Insurance Contract No. 98CG-160."

27. It is the contention of Naftogaz that the documents at Bundle E Tab 22 evidence a pre-ordained circular payment transaction between Sogaz and its London representative RRI, all effected on the same day, pursuant to which far from receiving payment of compensation from Monde Re Sogaz in fact made a net payment to RRI of US$1,801,157.23. I might add, although it is probably irrelevant to anything I have to decide, that the evidence before me, although not I think before the arbitrators, tends to suggest that this sum found its way back to Gazprom. On 22 January 1999 Gazprom and Sogaz entered into Addendum No. 2 to the insurance agreement of 30 October 1998. The 2% deductible was removed and it was expressly agreed that Sogaz should pay to Gazprom the additional insurance compensation in the sum of

US$1,801,157.23 now due to them in respect of "an insurance event which took place earlier".

28. Mr Payton was of course asked in cross-examination why he had felt it necessary to exhibit the Bundle E Tab 22 documents to his fourth witness statement. He answered that it had "seemed to [him] fair in all the circumstances to do so on the basis probably if one hadn't done so one might be open to criticism". This was in the context that it had already been suggested that in applying to Colman J for the orders which Naftogaz now seeks to set aside Mr Payton had failed to make full and frank disclosure that there was material on the basis of which it was open to Naftogaz to allege that the award had been procured by fraud.

29. I have already referred to the insurance contract no. 98CG160 concluded between Gazprom and Sogaz on 30 October 1998. "Insurance Contract No. 98CG160 dated 30.10.98 and addendum to it (nine pages)" was Appendix 3 to the Statement of Claim, in contradistinction to Appendix 4 which was of course "text", the unsigned five page wording of the contract of reinsurance. Both the insurance contract and Addendum No. 1 thereto dated 20 November 1998, consisting in all of nine pages in the original Russian version were thus served on Naftogaz and were before the arbitral tribunal. The description of these documents inferentially drew attention to what was in any event obvious that whereas the contract of insurance was stamped and signed the "text" of the reinsurance contract was not. Addendum No. 2 to the insurance contract to which I referred in paragraph 27 above does not appear to have been disclosed to Naftogaz nor was it before the arbitrators or the Russian courts.

30. It is as well to emphasise straightaway that Russian law and procedure recognises no process of Discovery or disclosure of documents such as that to which we are used. Rather, in Russian procedure a party produces the documents upon which it wishes to rely, there being no duty to disclose relevant documents still less documents which may harm its case. So far as concerns this arbitration there are two applicable governing provisions. First, there is the Law of the Russian Federation on International Commercial Arbitration, 1993, which so far as relevant provides:

> "Article 23. Petition to Sue and Objections Relating to Suit
>
> 1. Within the period agreed by the parties or determined by the arbitration court, the plaintiff must state all the circumstances confirming his suit demands, questions in dispute, and satisfaction demanded, and the defendant must state his objections with regard to these points unless the parties have agreed otherwise with respect to the necessary requisites of such statements. The parties may submit together with their statements all documents which they consider to be relevant to the case or may make a reference to documents and other evidence which they will submit in future. …
>
> Article 24. Hearing and Examination Relating to Documents
>
> …

> 3. All applications, documents, or other information submitted by one party to the arbitration court must be transferred to the other party. Any opinions of experts or other documents having evidentiary significance on which the arbitration court may rely when rendering its award must be transferred to the parties.
>
> Article 25. Failure to Submit Documents or Failure of Party to Appear
>
> Unless the parties have agreed otherwise, in those instances when without specifying a justifiable reason:
>
> …
>
> Any party fails to appear at a hearing or to submit documentary evidence: the arbitration court may continue the examination and render a decision on the basis of the evidence available to it.
>
> Article 27. Assistance of Court in Obtaining Evidence
>
> The arbitration court or a party with the consent of the arbitration court may apply to a competent court of the Russian Federation with a request for assistance in obtaining evidence. The court may fulfil this request, being guided by the rules affecting the securing of evidence, including judicial commissions."

I have already referred in paragraph 17 above to Article 34 of this Law which closely tracks Article V of the New York Convention.

Second, there are the Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, in force as of 1 May 1995. Article 34 provides:

> "34. Evidence
>
> 1. The parties must prove the circumstances relied on by them in support of their demands or objections. The arbitral tribunal may require the parties to present other evidence. It also may, at its own discretion, direct that expert examination be conducted and obtain evidence from third parties as well as summon and hear witnesses.
>
> …
>
> 5. Failure by either party to present an adequate evidence does not prevent the arbitral tribunal from continuing the proceedings and making of an award on the basis of the available evidence."

From this it is apparent that the tribunal may require the parties to produce documents on which they do not rely, and which may harm their case. It became apparent from the oral evidence which I heard that, as one would expect, it is open to a party to request the tribunal to direct the opponent party to produce documents. It seems that in the Russian tradition correspondence between the lawyers representing opposing parties in litigation or arbitration is very limited. Evidently it is not usual for a party simply to direct a request of this nature to his opponent in correspondence.

31. Reverting to the insurance contract between Gazprom and Sogaz, which was disclosed to Naftogaz and relied upon in the arbitration, this had some singular features. It provided, inter alia, as follows:

> "1. General provisions
>
> 1.1 This Agreement is entered into in accordance with the Russian Federation Civil Code, Russian Federation laws on insurance, the Rules of Freight Transportation Insurance (Exhibit No. 1) of Sogaz Insurance Company (hereinafter, the 'Rules') and the Insured's application in writing (Exhibit No. 3) for insurance of deliveries and transportation of natural gas dated 29 October 1998 (hereinafter, the 'Application') and is aimed at insuring property-related insurance of the Insured.
>
> 1.2 The insurer hereunder assumes the obligation to reimburse, within the limits of the agreed amounts (limits of liability) and in consideration of the advance payment made by the insured (insurance premium), the insured's losses caused by unauthorised offtake of gas in transit through the territory of Ukraine.
>
> 2. Insured Property
>
> 2.1 The Insurer undertakes to insure natural gas shipped by the Insured under Contract No. 2GU-98 dated 16 January 1998 and contracts with other gas transporters on the territory of Ukraine in 1999, its [illegible] possession, use, storage and disposal of the insured property."

Pausing there, this apparent limitation of the cover to "shipments" in 1999, which is repeated in Article 3 which I set out below, is inconsistent with Article 6 which provides:

> "6. Term of Agreement
>
> 6.1 This Agreement shall take effect at midnight local time on 1 November 1998.
>
> 6.2 This Agreement shall terminate:
>
> a) at midnight on 31 December 1999;

b) as of the moment the insured amount up to the limit of liability is paid."

In any event Article 2.1 was amended by Addendum No. 2 which provided, so far as material, as follows:

"1. Point 2.1 shall be set out in the following formulation:

'the Insurer undertakes obligations for the insurance of natural gas supplied by the Insured for its transportation by 'Ukrgazprom' and/or other transporters of gas through the territory of Ukraine in the period of validity of this Agreement, and his property interests connected with the ownership, use, storage and disposal of the insured property."

Addendum No. 2 was of course concluded on 22 January 1999 after the alleged insured loss had occurred in December 1998 and only four days before Sogaz paid to Gazprom 98% of the claim.

Reverting to the insurance contract, further provisions included:

"2.2 Natural gas shall be delivered in accordance with the requirements to the transportation of this type of product. Natural gas shall be transported via a system of pipelines; its chart is specified in Exhibit A to the Application and forms an integral part of this Agreement.

2.3 The tentative volume of deliveries of natural gas insured hereunder is specified in Exhibit B to the Application and forms an integral part hereof.

3. Insurance Cover

3.1 This Agreement is made based on the Rules and their Section C, 'Liability for All Risks', including theft of freight as a result of unauthorised offtake of gas during its transportation across Ukrainian territory.

Subject of Insurance: natural gas shipped by gas pipeline from the border of Russian across Ukrainian territory, including storage.

Limit of Liability: US$8,506,600,000 during the term of the insurance agreement.

Terms: Insured Risks

Risk: offtake, unauthorised by the Insured, of gas by AO Ukrgazprom and/or other transporters of gas across Ukrainian territory in 1999. This insurance invariably provides the Insurer with an opportunity to file recourse claims against third parties. The Insurer is ready to pay, to the Insured, amounts

> related to its losses in connection with the insured risk, i.e., illegal removal of gas from the possession of the Insured in conflict with the terms of gas transportation and/or delivery for any reason other than physical loss of gas due to a technical malfunction or accident or damage to or destruction of gas transportation means. The following may cause an insured illegal removal of gas from the possession of the Insured:
>
> …
>
> b) any use (transfer to a third party, appropriation, destruction, consumption, etc) of gas by the shipper in conflict with the terms of gas transportation and/or delivery;
>
> …
>
> 5. Insurance premium payment procedure
>
> 5.1 The insurance premium shall be paid as per Exhibit No. 4 which shall form an integral part of the Insurance Agreement.
>
> 5.2 The insurance premium amount shall conform to the limit of liability, US$8,506,600,000. The limit of liability may be changed by agreement of the parties, with a relevant adjustment to the insurance premium."

It was common ground that the Russian text of this last provision could perhaps more clearly be translated as "the insurance premium shall be equal to the limit of liability".

> "5.3 The insurance premium shall be paid by the Insured to the settlement account of the Insurer.
>
> …
>
> 7. Obligations of the parties
>
> …
>
> 7.2.7 If a loss occurs that may prove to be an insured event and be subject to subsequent subrogation, the Insured shall immediately report this to the competent authorities and furnish the following documents:
>
> - report on an unauthorised offtake of gas (in writing);
>
> - copy of the acknowledgement of delivery and acceptance of natural gas for the month, signed by an authorised representative of OAO Gazprom and Ukrgazprom Joint Stock Company and/or other shippers of gas across Ukrainian territory in 1999; and
>
> - documents evidencing the value of the stolen gas.

…

7.5 After the Insurer pays the compensation, the right of claim of the Insured against the party liable for the losses reimbursed hereunder shall pass to the Insurer by way of subrogation within the limits of the amount paid. The Insured shall furnish the Insurer with all the documents and evidence and provide it with all the information required for the exercise by the Insurer of the right of claim that passed to it. If the Insured has waived its right of claim against the party liable for the losses reimbursed by the Insurer or the exercise of such right has become impossible through the fault of the Insured, the Insurer shall be exempted from the payment of the insurance compensation in full or in relevant part and may request that the excessively paid amount of compensation be refunded.

8. Insurance compensation payment

8.1 Insurance compensation shall be paid based on the Insured's application in writing for the payment of the insurance compensation, the results of the expert analysis by the Insurer and the acknowledgement of the event approved by the Insured.

…

8.3 Insurance compensation with respect to the risk of gas offtake unauthorised by the Insured shall be paid net of the unconditional deductible of 2% of the amount of the loss claimed and acknowledged, within 45 days of the execution of the insured event acknowledgement."

Exhibit 4 to the agreement was not produced and I have not seen it. Before me it was common ground that no-one reading this agreement can seriously have believed that a premium of US$8.5 billion would be paid in advance, as apparently prescribed by Article 1.2, or indeed paid at all save in the unlikely event that insured losses amounted to that sum. Further light as to the nature of this contract of insurance is cast by Addendum 1 thereto dated 20 November 1998 which provided, inter alia:

"For the purpose of reducing possible losses connected with an increasing number of cases of unauthorised tapping of gas by AO Ukrgazprom and/or Naftogaz Ukrainiy National Joint Stock Company, the Parties agreed to amend the Article 9, paragraph 9.10 as follows:

1. In case the Insurer exercises its right of recourse in accordance with paragraph 7.2.7 of the Contract No. 98CG160 dated October 30, 1998, and receives the money under such claim, the Insurer shall:

> within an agreed term, regardless of whether the compensation is complete or partial, pay the insured 95% of the net, returned and recovered insured interest received by the insurer as a result of exercising the rights of recourse;
>
> send to the Insured proposals as to adjustment of an amount of funds committed to reducing losses connected with unauthorised tapping of gas, and the amounts of insurance premiums due under the Insurance Contract;
>
> - regularly, but not less than once in every quarter, submit to the Insured a report on measures taken by the Insurer in the exercise of the rights of recourse accrued by the Insurer as a result of payment of the insurance money."

I should perhaps mention that there is no paragraph 9.10 in Article 9 of the main agreement, but nothing turns on this.

32. On any view this is a far from conventional insurance agreement. The premium is equal to the limit of indemnity and that amount is obviously not going to be paid in advance. At no stage during the arbitration did Naftogaz raise any point as to the absence of Exhibit No. 4 which presumably, as described in the contract, explains how and when insurance premium is to be paid. When paid, it is to be paid by Gazprom into the settlement account of Sogaz, which in turn is likely to be the account out of which Sogaz would pay the "insurance compensation" due. Subject only to a 3% retention, all subrogated recoveries accrue to the benefit of the insured Gazprom. Whilst Exhibit No. 4 is missing, it is nonetheless tolerably clear that this is an agreement under which the "insurer" Sogaz takes no financial risk. The purpose of Addendum No. 1 is said to be reducing possible losses connected with an increasing number of cases of unauthorised tapping of gas by Ukrgazprom. From this and from other express terms of the insurance contract it is not difficult to infer that the real purpose of the insurance contract is, for whatever reason, to vest in Sogaz the ability to pursue subrogated recoveries in the event of unauthorised offtake of gas in transit through Ukraine.

33. The reinsurance contract in the limited form disclosed to Naftogaz is not of course similarly explicit so far as concerns the destination of subrogated recoveries. The contract disclosed is incomplete in the sense that it expressly provides that the reinsurance premium is "as agreed" without revealing what the agreement is. The provisions concerning the mandatory use of the premium to create a "Legal Fund" to pay the costs and expenses arising out of the pursuit of subrogated recoveries are consistent only with Sogaz retaining an interest in those recoveries – it is difficult to understand why else on completion of recovery actions the balance of the Legal Fund is to be remitted to the reinsured. In any event, payments from the Legal Fund can by express provision only be made by the reinsurers against the bills rendered by lawyers and subject to the written approval of the Reinsured. It is plain therefore that the reinsured Sogaz is to have control of the pursuit of subrogated recoveries. Furthermore it would not be difficult to infer that the reinsurance contract must in fact have taken broadly the same shape as the underlying insurance contract as otherwise the reinsured Sogaz would not be in a position to return to Gazprom 95% of

subrogated recoveries, since Sogaz would not absent a corresponding obligation on Monde Re have the funds out of which so to do.

34. There was attached to the Statement of Claim as Appendix 2 an Indemnity Form signed and stamped by each of Gazprom, Sogaz, Monde Re and RRI. It set out the claim in respect of the misappropriation, quantified at US$90,057,861.72 to which the 2% deductible was then applied. Against Monde Re's stamp and signature dated 4.2.99 were the words in manuscript:

> "Claim noted and agreed subject to the full premium for the revised agreement…"

It would have been apparent to Naftogaz, and to the arbitration tribunal, that there were further words in manuscript which had been cut off in the photocopying process. It would also have been obvious that Monde Re's agreement to settle the claim apparently post-dated remittance of US$88,256,769.85 by RRI to Sogaz on 25 January 1999 and on-payment of that sum by Sogaz to Gazprom on the next day, 26 January 1999.

35. It was also apparent to Naftogaz that Monde Re was a small reinsurance company with an authorised capital of only about US$72.6 million. It would not have had sufficient assets to pay the instant claim, let alone claims of up to US$250,000,000 each and every loss with no aggregate limit save the limit on the liability of Sogaz, which was US$8.5 billion. Mrs Sourjikova made these very points to the Moscow City Court, together with the points that there was no proof of the conclusion of a reinsurance agreement or of any payment actually emanating from Monde Re. In that regard, as Mrs Sourjikova also pointed out, Monde Re produced as Appendix 7 to the Statement of Claim the Credit Note dated 22 March 1999 to which I have already referred at paragraph 26(i) above.

36. It is against this background that I must examine the allegations now put forward by Naftogaz as to the manner in which they and the arbitrators were deliberately misled. Two overriding points should be borne in mind from the outset. The first is that Naftogaz knew, or had the material from which they could derive an understanding as to, the nature of the insurance contract between Gazprom and Sogaz. Indeed Mrs Sourjikova highlighted some of the oddities of that arrangement in both her written and her oral presentation to both the Moscow City Court and the Russian Supreme Court. The second point is that the material in the light of which the allegation came to be made that the award was procured by fraud comprises in the first instance the documents exhibited by Mr Payton to his draft affidavit which was deployed before Colman J on the application under section 101, i.e. the signed nine page version of the reinsurance agreement. Then, after the allegation of fraud had been made, Mr Payton exhibited to his fourth witness statement the documents demonstrating that, only three days before RRI remitted to Sogaz US$88,256,704.49, it had itself received from Sogaz US$90,057,861.72 by way of reinsurance premium referable to the Monde Re reinsurance of Sogaz. The gravamen of the allegation of fraud is that Monde Re wished to conceal from Naftogaz and from the arbitrators (a) the date on which the "reinsurance" contract between Sogaz and Monde Re was made and (b) the pre-ordained circular nature of the transaction pursuant to which Gazprom apparently received indemnity for its loss thereby generating in, respectively, insurers and reinsurers, an entitlement to pursue a subrogated claim. That being so, it is evident

that Mr Payton at any rate was making little effort in these proceedings to conceal the documents said to have been deliberately withheld in the earlier Russian arbitration. In the light of this the suggestion that Mr Payton had himself in 1999 been knowingly party to fraudulent conduct was always extravagant, even putting on one side as I do the counter-intuitive nature of such an allegation as it would strike anyone with a familiarity with Mr Payton's reputation and standing in the London legal community. Happily the allegation of wrongdoing against Mr Payton was withdrawn after he had given evidence. In his evidence Mr Payton did his best subtly to caution that the allegation against Professor Musin would be similarly counter-intuitive to anyone familiar with his reputation and standing in the Russian legal community.

The allegation of fraud

37. By the end of the case Mr Higham was somewhat shy of persisting in the allegation that the arbitration award had been procured by fraud. He preferred to put his case in terms of reprehensible or unconscionable conduct, although he did not ultimately shrink from his submission that the conduct of the arbitration and the subsequent proceedings before the Russian courts by Monde Re and Sogaz, and by Professor Musin on their behalf, had been fraudulent. If not fraudulent it was he said reprehensible or unconscionable, the latter formulation being applied also to Mr Barton's contribution. In his final address Mr Higham also developed an argument to the effect that the English court retains a residual power to intervene in the event that the course of the arbitration proceedings could be said to have offended against English notions of substantial justice.

38. In the latter regard Mr Higham relied principally upon *Pemberton v. Hughes* [1899] 1 Ch 781 and *Adams v. Cape Industries* [1990] Ch 433, both of which were concerned with the enforcement in this jurisdiction of judgments rendered by foreign courts, rather than with the enforcement of foreign arbitration awards. Moreover those cases as I read them are concerned with what broadly one might call procedural injustice – some defect in procedure which gives rise to what the English court perceives as substantial injustice. Section 103 of the Arbitration Act, deriving of course from the New York Convention, already makes provision for such cases, particularly at section 103(2)(e) which deals with a case where the arbitration procedure was not in accordance with the agreement of the parties. However in the present case there is no suggestion that the procedure followed was anything other than that to which the parties agreed by their choice of arbitration venue. It is true that in *Minmetals Germany GmBH v Ferco Steel Limited* [1999] CLC 647 Colman J recognised that in very exceptional cases there may be room for the invocation of this residual power, perhaps where the powers of the local supervisory court are so limited that it cannot intervene even where there has been an obvious and serious disregard by the arbitrators of basic principles of justice. However the present is plainly not such a case.

39. I turn therefore to the primary way in which Mr Higham put his case, which principally relates to suppression of documents although it embraces also misrepresentation as to the date of the reinsurance contract and the availability of a subrogated remedy, misrepresentations which would, suggests Mr Higham, have been revealed to be false had disclosure of the suppressed documents been made.

40. Section 68 of the Arbitration Act 1996, dealing with challenges to an English award on the ground of serious irregularity, draws a distinction between an award being obtained by fraud, and an award, or the way in which it was procured, being contrary to public policy. In *Profilati Italia S.r.l. v. Paine Webber Inc* [2001] 1 Lloyd's Rep 715, a section 68 case, Moore-Bick J concluded that where an important document is deliberately withheld and as a result the party withholding it has obtained an award in his favour, the court may well consider that the award was procured in a manner contrary to public policy. "After all," observed Moore-Bick J, "such conduct is not far removed from fraud". More difficult however was the case where there has been a failure to disclose a document as a result of negligence or a simple error of judgment. Proceeding with a reference following an innocent failure to disclose a document, even one of importance, could not properly be described as acting contrary to public policy. What would normally be required to be demonstrated, for the court to conclude that an award has been procured by a party in a way which is contrary to public policy, will be some form of reprehensible or unconscionable conduct on his part which has contributed in a substantial way to obtaining an award in his favour. In *Elektrim S.A. v. Vivendi Universal S.A.* [2007] 1 Lloyd's Rep 693, also a section 68 case, Aikens J in agreeing with and adopting the analysis of Moore-Bick J, observed that, for the purposes of section 68(2)(g), at least in the context of allegations of perjury and deliberate concealment of relevant documents, the phrase "an award procured contrary to public policy" goes no wider than the phrase "an award obtained by fraud".

41. The public policy referred to in section 103 of the Act is of course the same as that referred to in section 68, and it is never wise to attempt an exhaustive definition of its content. For present purposes however I am satisfied that nothing short of reprehensible or unconscionable conduct will suffice to invest the court with a discretion to consider denying to the award recognition or enforcement. That means conduct which we would be comfortable in describing as fraud, conduct dishonestly intended to mislead.

42. Monde Re played little or no part in the conduct of the arbitration. As already recorded it provided powers of attorney to Clyde & Co and to Musin & Partners to enable them to pursue the subrogated recovery. Mr Payton received various documents from RRI in London, who were effectively acting as agents of both Sogaz and Monde Re. Some of these documents he sent to Mr Barton in St. Petersburg. Professor Musin received both documents and instructions from Sogaz, who were so far as I can judge responsible for driving the claim forward.

43. So far as concerns Monde Re, Mr Higham submitted that:

    a) Monde Re deliberately produced an incomplete text of the Monde Re reinsurance agreement knowing that:

        i) production of the signed complete Monde Re reinsurance agreement would reveal that it had not been signed until 17 March 1999;

        ii) the undisclosed text radically transformed the nature of the agreement between Monde Re and Sogaz; or

iii) it did not reflect the true nature of the arrangements between Monde Re and Sogaz; or

b) that Monde Re deliberately decided not to produce the bank print-outs at Bundle E/22 in order to prevent it being said that there had been no payment of reinsurance compensation by Monde Re.

44. Monde Re did not itself deliberately do any of those things because it played no part in the arbitration beyond authorising its lawyers to commence it and to prosecute it on its behalf. Obviously however if the allegations made separately against Sogaz, Professor Musin and Mr Barton can be made good the conduct so proved must be attributed to Monde Re in whose name the arbitration was conducted.

45. Mr Higham submitted that the conduct of Sogaz and Professor Musin was fraudulent or, if not fraudulent, reprehensible and unconscionable and that the conduct of Mr Barton was also reprehensible and unconscionable. Specifically Mr Higham submitted, as regards Sogaz:

a) It knew of the arrangement into which it had entered and the date upon which Monde Re had signed the Monde Re Agreement;

b) It therefore knew that Monde Re was assuming no "risk" under the Monde Re reinsurance agreement and that the statement to that effect in the Statement of Claim was untrue. Sogaz was clearly aware of the contents of the Statement of Case and attended the arbitration hearing before the ICAC in Moscow;

c) It also knew, having signed an agreement and Addenda, the latter on 6 January 1999, at that time unsigned by Monde Re, that there was no reinsurance agreement of 27 November 1998 and that the statement to that effect in the Statement of Claim was untrue;

d) It was plainly party to the deliberate decision not to produce the signed and complete Monde Re Reinsurance Agreement to the Tribunal as:

i) it produced only the unsigned and incomplete text of the Monde Re Reinsurance Agreement to Musin & Partners in mid February 1999;

ii) an inference can be drawn from its conduct in the subsequent Guardrisk arbitration where it produced a signed copy of the Reinsurance Agreement to Musin & Partners without the signed Addendum;

e) It knew that the statement in the Statement of Claim that Monde Re had paid reinsurance compensation to Sogaz was untrue because:

i) Sogaz had obviously organised the circular payment transaction; and

ii) it knew that it had paid no funds, or at most US$1.8Million, to RRI for transmission to Monde Re pursuant to the Monde Re Reinsurance Agreement.

As regards Professor Musin, Mr Higham submitted:

a) He knew that Monde Re was assuming no "risk" under the Monde Re Reinsurance Agreement and that the statement to that effect in the Statement of Claim was untrue. Professor Musin had such knowledge:

   i) from his knowledge of the "structure" that had been used in the Lloyd's/Moldova matter and which he knew was being used again in the Monde Re claim; and

   ii) from his knowledge of the signed Monde Re Reinsurance Agreement which must have been provided to him by Mr Barton.

b) He knew that there was no reinsurance agreement of 27 November 1998 and that the statement to that effect in the Statement of Claim was untrue;

c) It is to be inferred from (a)(ii) above that he made a deliberate decision not to produce the signed Monde Re Reinsurance Agreement to the ICAC Tribunal or Naftogaz;

d) It is to be further inferred that he did so to conceal the facts:

   i) that the Monde Re Reinsurance Agreement was not signed until 17 March 1999; and

   ii) that Monde Re was assuming no risk;

e) At the very least, he knew that production of the signed and complete Monde Re Reinsurance agreement would reveal:

   i) that it had not been signed until 17 March 1999; and

   ii) that the undisclosed text radically transformed the nature of the agreement between Monde Re and Sogaz;

f) He, in any event, knew that the "text" of the Monde Re Reinsurance Agreement produced to the ICAC Tribunal and Naftogaz did not reflect the structure of the real arrangements between Monde Re and Sogaz;

g) He knew that Monde Re had no paid reinsurance compensation to Sogaz and that the statement to that effect in the Statement of Claim was untrue. He possessed such knowledge as a result of his discussion concerning the bank print-outs with Mr Barton;

h) He made a deliberate decision not to produce the bank print-outs to the ICAC Tribunal or to Naftogaz to avoid showing that what was stated in the Statement of Claim was untrue;

i) In any event, he made a deliberate decision not to produce the bank print-outs in order to prevent it being said that there had been no payment of reinsurance compensation by Monde Re.

46. So far as concerns Mr Barton, Mr Higham submitted:

a) He signed the Statement of Claim appending a "text" of the Monde Re Reinsurance Agreement knowing that the text did not reflect the structure of the real arrangements between Monde Re and Sogaz;

b) He signed the Statement of Claim alleging a reinsurance agreement of 27 November 1998 when, on his own evidence, he had no belief that it had been signed;

c) He was party to Professor Musin's deliberate decision not to produce the bank print-outs in order to prevent it being said that there had been no payment of compensation by Monde Re.

Mr Barton found himself, submitted Mr Higham, in an incongruous position and allowed himself to be overborne by Professor Musin. Whilst that may explain his behaviour, it does not excuse it.

47. Mr Higham also submitted that had the signed and complete Monde Re Reinsurance Agreement and the Bundle E/22 bank print-outs been placed before the arbitration tribunal it would not have made the award it did because Monde Re would have been shown not to have paid any indemnity to Sogaz. Furthermore it would also have demonstrated that there was no valid reinsurance agreement until after the insured event had already, to the knowledge of Sogaz, occurred. Under Russian law it is not possible to insure against an event which is known to have occurred. Finally, production to the arbitrators of the addenda to the reinsurance contract would in any event have demonstrated that the agreement could not properly be characterised in Russian law as a reinsurance contract, so that payment pursuant thereto could have given rise to no rights of subrogation.

Discussion and conclusions

48. It is necessary first to mention the evidence concerning the availability to Professor Musin of (i) the signed reinsurance contract with addenda and (ii) the E/Tab 22 bank documents showing the circular payments on 22 January 1999.

49. So far as concerns the signed reinsurance contract and addenda, copies thereof were received by Mr Payton from Mr Bridges of RRI on 18 March 1999. Mr Payton had already in October 1998 been supplied with a slip which apparently evidenced a reinsurance agreement between Sogaz and Monde Re, signed by Monde Re on 8 September 1998. The scope of that reinsurance included gas in transit through Ukraine in December 1998, although it in fact covered gas in transit through other territories and over a longer period. Later in 1998 Mr Payton was provided with a "Placement Agreement" dated 20 November 1998 between Sogaz and RRI which apparently authorised the placement of reinsurance on terms very similar to those which appear in the unsigned five-page "text" dated 27 November 1998. Mr Payton sent a copy of the signed reinsurance contract and addenda by fax, consisting of 21 pages in all, to Mr Barton in St Petersburg on 18 March 1999. Having sent the reinsurance contract and addenda thereto it did not occur to Mr Payton to send copies of either the slip or the Placement Agreement as he believed that the reinsurance contract dated 27 November 1998 would have superseded the slip.

50. Professor Musin said in evidence that had he had in his possession when drafting the Statement of Claim a signed copy of the reinsurance agreement he would have appended it, although he did not regard attaching a signed reinsurance contract as crucial to his case. There was in his mind no doubt that an agreement had been reached – he pointed to the fact of the subrogation forms and the fact that payment had been made. The key documents so far as he was concerned were the subrogation forms and proof of receipt of the indemnity. As for Mr Barton, for whose attention the 18 March 1999 fax had been sent by Mr Payton to St. Petersburg, he had no recollection of seeing the signed contract and addenda and can only assume that he overlooked it. I find Mr Barton's explanation entirely plausible. I hope that I do not do Mr Barton an injustice when I record my firm impression, in the light of his evidence given at the hearing, that he did not contribute very much to this exercise. I find it entirely credible that the significance or potential significance of various documents would not have been apparent to him. In fairness to him his role was entirely subordinate to that of Professor Musin and he was little more than a go-between. No doubt it was thought that for the Statement of Claim to appear on Clyde & Co London letter paper added to it a certain cachet, but it was in my view somewhat incongruous that it was the signature of Mr Barton which appeared on this document, rather than that of Professor Musin. The conclusions set out were conclusions of Russian Law, and this was a pleading for use in a Russian arbitration. I should also say in fairness to Mr Barton that his honesty was transparent. His embarrassment at what he recognised as an incompetent performance was almost tangible and plainly occasioned him some distress. Mr Barton is no longer a partner in Messrs Clyde & Co and is pursuing other interests, although his career move has nothing to do with these events.

51. So far as concerns the bank print-out documents these too were sent by Mr Payton to Mr Barton in St. Petersburg some time in February 1999. Mr Barton accepts that he received the documents and that he saw them. I am not convinced that he has any recollection of what happened thereafter, as opposed to a reconstruction of what he thinks would have occurred. However Mr Barton suggested that he discussed these documents with Professor Musin and that a decision was made not to submit them as they were not necessary to prove the case. Professor Musin cannot now remember looking at the documents. He does not rule out that there may have been a discussion of the sort which Mr Barton surmises. He was adamant that he does not in fact regard the documents as relevant. His view was that what was necessary was to provide evidence proving receipt of the insurance indemnity by the reinsured and the insured. This was based on what had proved sufficient in relation to an earlier similar case dealt with in the same arbitral forum concerning an unauthorised abstraction in Moldova and on his understanding of Article 316 of the Russian Civil Code.

52. In relation to all these matters it should be borne in mind that Mr Payton would not have been suggesting to Professor Musin that any question mark arose over either the date of execution of the reinsurance arrangements or their validity. I am left in no doubt that Professor Musin thought at the time that the reinsurance arrangements were valid and effective as a matter of Russian law – he had devised them and had advised Mr Payton as to their validity. I assume that he had given similar advice to Sogaz, or at the very least that he intended his advice to be communicated to them by Mr Payton. Of course Professor Musin may have been wrong, but that is not to the point. His honesty has to be judged in the context of his contemporary belief as to what was

required of him and of his clients by Russian law and procedure. There was a suggestion made to Professor Musin that he did not at the time entertain his current view as to the effectiveness of the arrangements. This is to my mind implausible. He must have had a view, and if it was not his view when he devised the scheme that it was valid and effective as a matter of Russian law then he was misleading both Mr Payton and his ultimate clients, Sogaz/Gazprom. He can have had no reason so to do.

53. I have already pointed out that whether it would be likely that Professor Musin would seek to conceal the nature, as opposed to the date, of the reinsurance contract needs to be assessed in the light of what Naftogaz, and the tribunal, already knew about the insurance contract, and what they could in any event infer about the reinsurance contract. The written "motion" of Naftogaz which was considered by the arbitrators contained a suggestion that no transfer of the right of claim is admissible in this case as such transfer would entail a breach of law and the intergovernmental agreements. As Professor Musin pointed out in his written Answer that argument might have involved misplaced reliance upon Article 10.7 of the Transit Contract, but the doctrine of subrogation is recognised by Article 387 of the Civil Code. At the oral hearing before the arbitrators Mr Reva withdrew what the arbitrators described in the Award as "his objection related to illegality of subrogation". Evidently therefore it did not occur to Mr Reva to suggest that what was plain to see about the insurance arrangements and what could have been seen and inferred about the reinsurance arrangements cast doubt upon their validity as a matter of Russian law. Presumably the arbitrators saw no difficulty either. In the light of this it seems unlikely that Professor Musin can have been so concerned about the content of the addenda to the reinsurance contract that he found it necessary to suppress them. Furthermore in submitting to the arbitrators an unsigned copy of the reinsurance contract Professor Musin was running the obvious risk that either the tribunal, or his opponents through the tribunal, would seek production of a signed version. This is exactly what did occur in due course in the Moscow City Court where Mrs Sourjikova in her written submissions pointed out that the "text" did not "contain any signatures or stamps of the parties who allegedly concluded it". If Professor Musin was aware that there was available to him a signed copy of the reinsurance agreement, and if he was concerned that production thereof demonstrated that there had been no reinsurance in place at the time of the loss, it is to my mind inconceivable that he would simply have proceeded to produce only the unsigned copy. If he was both concerned about the date and dishonest he would surely have procured, or attempted to procure a signed and pre-dated copy. What he in fact did is to my mind far more consistent with a complete absence of any belief that there was any doubt whatever that the reinsurance had been in place before the loss.

54. In fact if Professor Musin had been in any doubt as to the date on which Monde Re became bound to the reinsurance it seems likely that he would have made further enquiry of either his clients Sogaz/Gazprom and/or of Mr Payton. Matters might then have taken a different course. Mr Payton had the slip of 8 September 1998 to which I have already referred. This evidenced a contract of reinsurance between Sogaz and Monde Re for the period 15 June 1998 to 31 December 1998 with an option to extend for a further 12 months. The object of the reinsurance was natural gas in transit within Russia, Ukraine, Moldova and Belarus, the original insured being Gazprom. Monde Re had been paid a first instalment of premium of US$4 million in respect thereof, as to which a query was raised by Monde Re's Australian parent since it had

to be accounted for as a separate "Legal Fund" rather than dealt with in accordance with normal procedures. I heard evidence about this from Mr Maurice Kelly who was at all material times Managing Director and Chief Underwriter of both the parent company and Monde Re. It is unnecessary for me to go into enormous detail since the evidence was unchallenged. Michel Beyens, a Director of Monde Re, had scratched the slip having satisfied himself and Mr Kelly that it was appropriate business for Monde Re to accept. M. Beyens was a lawyer, qualified I think in Belgium. He had been in the reinsurance business for thirty years, latterly as the managing director of all the international operations of Kemper Reinsurance, well known in the world of international reinsurance. Although Monde Re accepted that it was bound by the terms of the slip, it seems that the slip did not in every respect conform with the terms of the agreement reached between Monde Re and RRI, acting on behalf of Sogaz. In consultation over the telephone with Mr Woodthorpe-Browne of RRI Mr Kelly re-drafted the slip agreement. No copy of that agreement is now available but Mr Kelly confirmed that the signed Monde Re contract dated 27 November 1998 accurately reflected the changes to the slip which he had agreed with Mr Woodthorpe-Browne. I have already referred to the fact that RRI provided to Mr Payton in late 1998 a "Placement Agreement" dated 20 November 1998 between themselves and Sogaz, pursuant to which RRI was authorised to effect reinsurance on behalf of Sogaz in terms which are reflected, albeit not exactly, in the 27 November 1998 "text" agreement between Sogaz and Monde Re. This confirmed Mr Kelly's belief that agreement on the revised terms had been agreed between himself and Mr Woodthorpe-Browne by 27 November 1998 at the latest. He was travelling a great deal and the fact that he did not sign the new agreement until 17 March 1999 did not indicate that Monde Re was not already bound. Miss Julie Batch, Mr Kelly's underwriting assistant, would not have been authorised to append her note, and the Monde Re stamp, to the Indemnity Form on 4 February 1999 had there been no reinsurance then in place. The full text of this note reads:

> "Claim noted + agreed subject to the full premium for the revised agreement (28/1/99) the subject of this claim having been paid in full."

The "revised agreement" cannot now be found but must, Mr Kelly thought, have related to further premium due under the contract, probably therefore over and above the US$4 million already received. The note does not mean that the claim has been paid – the claim is noted and agreed subject to payment of the premium. Mr Kelly thought that Miss Batch had first ascertained from M. Beyens, on his instructions, that the facts set out in the Indemnity Form were correct. He thought that M. Beyens had probably in fact agreed the claim on the date borne by that document, 20 January 1999. This seems to me highly likely. It seems to me unlikely that the payment procedures of 22 January 1999 would have been put in place by Sogaz and RRI before ascertaining that Monde Re was content.

55. In the light of Mr Kelly's unchallenged evidence it seems highly unlikely that there can have been any concern in Professor Musin's mind as to there having been in place at the relevant time valid and effective reinsurance arrangements. No-one at Gazprom, Sogaz, RRI or Monde Re can have had any reason to have raised any such doubts.

56. It is also worth noting that notwithstanding the date of the signature on the Indemnity Form, 4 February 1999, and the date of the Monde Re Credit Note appended to the Statement of Claim, 22 March 1999, no point was taken before the arbitrators that the claim had not been agreed by Monde Re before payment was made to Sogaz by RRI. In any event Russian law recognises a principle of ratification.

57. There was some discussion at trial as to the extent to which a slip complies with the Russian requirements as to the form of a contract. There were at the relevant time two material provisions of the Civil Code: one of general application to all contracts, one of particular application to insurance contracts. They are:

> "**Article 434. Form of a Contract**
>
> 1. A contract may be concluded in any form provided for the making of transactions, unless a statute for contracts of the given type have established a defined form.
>
> If the parties have agreed to conclude a contract in a defined form, it shall be considered concluded after giving it the agreed form, although this form was not required by a statute for contracts of the given type.
>
> 2. A contract in written form may be concluded by the compilation of one document signed by the parties and also by the exchange of documents by mail, telegraph, teletype, telephone, electronic or other communications that allow the reliable establishment that the document proceeds from a party to the contract.
>
> …
>
> **Article 940. Form of the Contract of Insurance**
>
> 1. A contract of insurance must be concluded in written form.
>
> Non-observance of the written form entails in the invalidity of the contract of insurance, with the exception of the contract of compulsory state insurance (Article 969).
>
> 2. A contract of insurance may be concluded by the compiling of one document (Paragraph 2 of Article 434) or by the presentation to the insured by the insurer, on the basis of the insured's written or verbal application of an insurance policy (or record, certificate, receipt), signed by the insurer.
>
> In the latter case, the consent of the insured to make the contract on the conditions proposed by the insurer shall be confirmed by acceptance from the insurer of the documents indicated in the first sub-paragraph of the present Paragraph.
>
> … "

Plainly Article 940(2) is intended to bring about a relaxation of the requirements of Article 434 in that it permits a document signed and sent by the insurer to the insured in response to a verbal application for insurance to be sufficient compliance with the formal requirement. In fact Professor Butler, who gave evidence on Russian law for Gater, considered that the submission to a reinsurer by the reinsured or its broker of a slip for signature, and its return signed by the reinsurer would also satisfy the requirements of Article 434(2). He may well be right about that, but I did not fully understand or find convincing the reasons given by Professor Abova, who gave evidence on Russian law for Naftogaz, for thinking that Article 940(2) would not in this case be satisfied. She seemed to maintain that for insurance (or reinsurance) of this type a written application would be required but she was unable to point to any provision of the law which has this effect and I prefer the view of Professor Butler. I do not think that a Russian court, still less a Russian international commercial arbitration tribunal, would in 2000 and 2001 as Russia was developing a market economy have been anxious to conclude that an international contract of reinsurance evidenced only by a slip was ineffective for failure to comply with formal requirements. Professor Abova is a distinguished academic lawyer. In giving her evidence however she did not draw a distinction between expounding the law as she thought it ought to be interpreted and the slightly different task of explaining how a Russian court would or might be expected to approach a given problem. Perhaps because of this her evidence sometimes came across as somewhat dogmatic.

58. I have already concluded that Professor Musin is unlikely to have had any doubts as to the date upon which the reinsurance had become effective. That is both because I accept that he believed that the structure which he had devised was valid as a matter of Russian law and because no-one would have raised with him any doubt as to existence of cover at the relevant time. Professor Musin would therefore have had no reason to conceal the existence of a signed copy of the reinsurance wording. In the light of the slip and the evidence of Mr Kelly it is also impossible to conclude that the arbitrators were in any causative respect misled as to the date upon which the reinsurance became effective. Further investigation would have revealed that, on the assumption of course that this quasi-fronting arrangement was valid in Russian law, Monde Re was in fact bound even before 27 November 1998.

59. I should add that I am satisfied that Professor Musin did in any event produce before the Moscow City Court on the second day of the hearing either the original of the signed version of the Monde Re reinsurance contract or a copy thereof, in the sense that he indicated that he had such a document with him which could be inspected if thought necessary. Professor Musin had obtained overnight from Sogaz either the original signed contract or a copy thereof. Although at the Moscow City Court Mrs Sourjikova made the point more than once that the copy of the contract upon the basis of which the arbitrators had proceeded was unsigned, and invited the court to pay close attention to both the insurance and the reinsurance contracts, she did not ask to be permitted to examine or to be supplied with a copy of the signed contract which Professor Musin had indicated he had with him in court. Furthermore the court itself did not ask to see the signed contract or a copy thereof and thus did not study the document or verify Professor Musin's assertion that it was signed. Professor Musin gave a graphic and rather effective demonstration of how a document, in this case his passport, might be brandished in court and shown to be available in proof of a point, in this case his first name, even though no-one may take up the offer to inspect. There

was I am afraid a conflict of evidence as to what had transpired in the Moscow City Court and the notes of the hearing, which are not a verbatim transcript, are inconclusive on the point whether either the original signed contract or a copy thereof had actually been produced in court, as opposed to being said to be available. The document itself did not find its way onto the court record, for the reason that it was not in fact formally tendered in evidence and inspected by the court. However what is clear from the notes is that Professor Musin told the court that "there are signatures on the agreement, we can provide a signed agreement to the court". He would not have said that had he not had available to him a signed agreement, for obvious reasons. Furthermore in his written submissions to the Supreme Court Professor Musin said "the original of the reinsurance agreement, signed by both parties, was submitted to the Moscow City Court for inspection". It should of course be borne in mind that in relation both to the notes of hearing before the Moscow City Court and indeed the written submissions to the Supreme Court I am reliant on translations, which were shown at the hearing not always to capture the appropriate nuance. It is however inconceivable that a lawyer of Professor Musin's standing in Russia could have told the Supreme Court that a signed version of the reinsurance agreement had been submitted for inspection before the lower court unless that had in fact occurred, not least because a statement of that sort could so easily be checked. I might add that my evaluation of Professor Musin's conduct overall, judged in the light of the contemporary documents, what I now know of Russian law and procedure in the context of which he was operating and the inferences which can be derived from the content of his advice to Mr Payton, leaves me in no doubt as to his complete integrity. I am glad to be able to reach that conclusion on a securely objective basis. Professor Musin is a man of great charm who gave his evidence in so engaging a manner that there is a danger, against which I have tried to guard, of finding it difficult to think ill of him.

60. The undisclosed addenda to the reinsurance contract reveal that, as perhaps was only to be expected, the reinsurance was of the same basic structure as the insurance, i.e. an arrangement under which the reinsurer, like the underlying insurer/reinsured, took no financial risk. It is for that reason alone most unlikely that Professor Musin can have perceived any need to withhold from Naftogaz or from the tribunal production of the addenda. If the structure was ineffective as insurance or reinsurance in Russian law, then an essential link in the chain whereby Monde Re acquired a subrogated cause of action against Naftogaz was in any event missing because Sogaz cannot have become subrogated to Gazprom merely by payment of the indemnity. No such point was taken before the arbitral tribunal although the material necessary to challenge the efficacy of the Gazprom-Sogaz contract was in the possession of Naftogaz. Mrs Sourjikova took the point when the validity of the award was impugned before the Russian courts. In her written submission to the Moscow City Court Mrs Sourjikova pointed out that the insurance premium corresponded with the limit of liability and argued that this was contrary to the nature of an insurance agreement. In her oral argument to the court she pointed out that Sogaz carried no risk, again the clear implication being that this was not valid insurance. Mrs Sourjikova repeated this point in her written submissions to the Supreme Court. On each occasion Professor Musin responded by pointing out that no provision of Russian law prohibits the amount of the insurer's liability being the same as the insurance premium. The challenge to the award failed.

61. It is of course no part of the function of this court to decide whether the insurance arrangements were in fact effective as a matter of Russian law. That was in the first instance for the arbitrators, albeit there was before them no challenge to their validity. It was also a matter upon which the Russian courts had to be satisfied, since it went to the jurisdiction of the arbitrators to entertain a subrogated claim by Monde Re. However the evidence of Professor Butler was that Professor Musin's approach to the point in argument before the Russian courts was correct as a matter of Russian law. Professor Abova accepted that the provisions of the Sogaz contract did not violate any provision of the law. Her objection was simply that the structure of the Sogaz contract was not consistent with what she saw as the essence of insurance. Article 170 of the Civil Code invalidates "mock" and "sham" transactions but the experts were agreed that this Article is here of no application. The insurance agreement was intended to create legal consequences and it was not made for the purpose of hiding another transaction. The evidence demonstrates that in Russian law parties are free to enter into a contract of this nature and that on payment of compensation the payer becomes subrogated to the right of the payee. Naftogaz had conceded before the arbitral tribunal, in full knowledge of the relevant terms of the Sogaz contract, that a transfer of rights such as might be effected pursuant thereto would not amount to an assignment which was precluded by the Transit Contract, and it did not then seek to argue that the Sogaz contract was in fact ineffective to bring about subrogated rights. In these circumstances it is most unlikely that Professor Musin would have been concerned to conceal the addenda to the Monde Re contract. In any event the arbitral tribunal was not in this regard misled in a manner which induced it to render an award which would not otherwise have been given.

62. In support of the argument that the reinsurance agreement is not properly to be characterised as reinsurance in Russian law Naftogaz also relied upon the fact that the amount of the premium due was only fixed after the occurrence of the insured event. This is not in my view the proper analysis of the arrangements. According to the "text" of the agreement the premium was "as agreed". Mr Kelly said that he understood that the agreement which had been reached before M. Beyens accepted the business was that the premium would equal the amount of the claim. There was of course advance payment of US$4 million and Mr Kelly was unaware if there were to be other instalment payments. But the overall shape of the arrangement was clear – premium was to be equal to claim consistent with this simply being a facility pursuant to which a subrogated claim could be pursued. The premium was therefore fixed prior to the occurrence of the insured event, in that it was agreed that the premium would always equate to any loss. The mechanics of payment and whether there were to be instalments does not impinge on the basic shape of the agreement. After the occurrence of the loss the premium did not therefore remain to be agreed. The extent of the loss of itself fixed the premium. However as it happens the amount of the premium is not in Russian law an essential term of the contract. Article 942 prescribes the essential terms of a contract of insurance amongst which the amount of the premium does not appear. An insurer has the protection of Article 957, pursuant to which unless otherwise agreed a contract of insurance enters into force only from the time of payment of the insurance premium or the first instalment of it. Here it was otherwise agreed in both the insurance and the reinsurance contracts, although in the latter the first instalment of premium of US$4 million had in any event also been paid. Article 929 of the Civil Code provides:

> "**929. The Contract of Property Insurance**
>
> 1. Under a contract of property insurance, one party (the insurer) has the duty, in exchange for the payment stated in the contract (the insurance premium), upon the occurrence of the event provided in the contract (the insured event) to compensate the other party (the insured), or the other person for whose benefit the contract is concluded (the benefit-acquirer), for the losses caused as the result of this event to the insured property or losses in connection with other property interests of the insured (to pay the insurance compensation) within the limits of the sum determined by the contract (the insured sum)."

No doubt it is usually the case that the amount of the premium will be stated in the contract. However since Article 424 also provides that when in a contract for compensation the price has not been provided for, performance must be paid for at the price which under comparable circumstances usually is recovered for analogous services, which as Professor Butler explained would have to be determined by the court, it is difficult to believe that Article 929 can be intended to add to the essential terms of a contract of insurance for which Article 942 makes specific and apparently comprehensive provision.

63. So far as concerns the circular payments, as to which the arbitrators had far from the full picture, the highest that the case can be put against Professor Musin is that he decided that it was unnecessary to rely upon the four documents which fill in the canvas. If that was a conscious decision, as to which I cannot be sure, it should be borne in mind that that was not a decision to withhold the documents from production, for Monde Re was under no duty to produce documents other than those upon which it wished to rely. Indeed the very language of "withholding documents" is a product of a system which imposes an obligation to produce documents. Of course Professor Musin was under a duty not to make statements about payments having been made which he knew to be false in the light of the content of documents which he had seen. Here again however the evidence as to Russian law vindicates Professor Musin. Professor Abova accepted that the transfers evidenced by the documents did amount to payments in Russian law. Payment may in Russia also be effected by set-off. I am satisfied on reflection that the final provision in the "text" of the Monde Re contract should be regarded as apt to constitute RRI as agent of Monde Re both to receive premium and to effect settlement of the claim by payment to Sogaz. In those circumstances Monde Re can in my view properly be said to have paid Sogaz "utilising monetary funds formed by the insurer of insurance premiums paid … [or] other assets of the insurer" as required by Article 2.1 of the Law on Organisation of Insurance Business in the Russian Federation. At the end of the day Professor Abova, as I understood her evidence, accepted that there was no provision of Russian law which would cause this structure of payments to be ineffective to generate rights of subrogation. She regarded what had occurred as further evidence that the arrangements did not conform with what she saw as the essence of insurance, but this does not amount to saying that the Russian courts or a Russian arbitration tribunal would in consequence conclude that no subrogated right had been vested in Monde Re. In these circumstances it is in my judgment again unlikely that Professor

Musin can have thought that suppression of these documents was necessary in order to mislead the tribunal into thinking that payments had been made when in fact they had not. The tribunal was not misled in a manner which induced it to render an award which would not otherwise have been given.

64. I have already referred in paragraph 35 above to certain of the points made by Mrs Sourjikova to the Moscow City Court about settlement of the claim and the proof of payment upon which reliance was placed. Mrs Sourjikova was also able to submit in her written document to the Moscow City Court that the SWIFT print-out dated 25 January 1999 did not confirm payment to Sogaz on account of Monde Re. In oral argument before the Moscow City Court Mr Matveyev submitted:

> "We insist that it is necessary to proof (sic) that the two agreements have been signed, that the premium has been paid, and that the compensation has been paid as well. None of the proofs have been presented to the court."

Mrs Sourjikova for her part asked rhetorically how could the arbitrators have concluded that Monde Re had subrogated rights without consideration of the insurance and reinsurance agreements? She continued, according to the translated note of the record:

> "There can be no commercial secrets in court proceedings. Monde Re is obliged to prove the fulfilment of all the conditions of the agreement and to provide all the documents confirming that the agreement has taken place. "

She returned to the point in her written submissions to the Supreme Court. These included the following passage:

> "Moscow City Court has not provided a proper assessment of the fact that the question of assignment by Monde Re was raised by ICAC at CCI RF in absence of documents confirming conclusion by it of the reinsurance agreement, [and of] confirmation of payment of the insurance compensation. At the same time, ICAC at CCI RF has grossly violated its own set of Rules (section 34, clause 2). The circumstances of the transfer of the right to claim from OAO Gazprom to CO Sogaz, and from SO Sogaz to Monaco reinsurance company Monde Re have not been proved neither in the arbitration, nor in Moscow City Court. In the meantime, the circumstances of transfer of the right to claim to the claimant have significant bearing on the case. Without approved establishment of the right to claim, the claim cannot be satisfied in favour of the claiming party…
>
> The insurance agreement No. 98CG160 of 30.01.1998 between OAO Gazprom and CO Sogaz evidencing that the limit of liability of US$8,506,600,000 corresponds to the amount of the insurance premium cannot be classified as a risk agreement, and contradicts the RF Law 'On Organisation of Insurance Business in the Russian Federation'.

> Also in the determination is not reflected the question pertaining to the jurisdiction of ICAC over the acceptance of transfer of the demand against the claimant in the arbitration process, although without accepting Monde Re as a lawful assignee, ICAC could not consider the dispute on its merits, citing contract No. 2GU-98."

65. The Russian courts addressed and rejected the argument of Naftogaz that the arbitration award had been given in respect of a difference not contemplated by or not falling within the terms of the arbitration agreement. The Russian courts must therefore have been satisfied that Monde Re was entitled to pursue a subrogated claim. This issue went to the jurisdiction of the arbitral tribunal.

66. In these circumstances there is an argument for saying that this court should not permit the same arguments to be run again – compare the approach of Colman J to the deployment of evidence additional to that which was before the arbitral tribunal where such additional evidence has already been unsuccessfully deployed before the supervisory court, as explained in *Westacre Investments Inc. v. Jugoimport* [1999] QB 740 at 784. Here of course Naftogaz relies on additional evidence which was not available to it when it applied to the supervisory court. It is arguable to what extent that additional evidence on analysis gives rise to any further arguments over and above those which were unsuccessfully deployed before the Russian courts. I am inclined to think that the further material is on analysis no more than further ammunition to be directed at the same target. It would have permitted Naftogaz to advance the arguments which were advanced in a perhaps more focussed manner. However it is clear in my judgment that the additional material would not have caused those arguments to succeed.

67. It is also arguable whether Naftogaz should not in any event in the first instance seek to rely upon the additional evidence by way of a fresh application to the Russian court. There was some controversy as to whether at this distance in time the Russian court would entertain such an application, and a suggestion that the allegation of fraud would need first to be pursued in a criminal court.

68. I do not need to decide any of these points. I have in fact considered the additional evidence and the arguments of Naftogaz based thereon. Naftogaz has not shown that Professor Musin or anyone else engaged in reprehensible or unconscionable conduct in an attempt to mislead the arbitral tribunal. The additional evidence which has been deployed before this court which was not available to Naftogaz to deploy before the arbitrators would not in any event have resulted in Monde Re failing to obtain the award in its favour which was in fact given. In those circumstances there is no basis upon which the court can set aside the order of Colman J permitting enforcement of the award in this jurisdiction.