Neutral Citation Number: [2024] EWHC 2981 (Comm)

Claim Nos. CL-2024-000524 &
LM-2024-000030

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Date: Tuesday, 19th November 2024

Before:

HIS HONOUR JUDGE PELLING KC
(Sitting as a Judge of the High Court)

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Between:

BARCLAYS BANK PLC	**Applicant**
- and -	
VEB.RF	**Respondent**

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- -

PETER DE VERNEUIL SMITH KC and **EMMA HUGHES** (instructed by **Simmons & Simmons LLP**) appeared for the **Claimant.**
TONY BESWETHERICK K.C. and **MATTHEW CHAN** (instructed by **Candey Solicitors**) appeared for the **Defendant.**

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Approved Judgment

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HIS HONOUR JUDGE PELLING KC:

1. This is the hearing of an application by the claimant:

   i) pursuant to section 32 of the Arbitration Act 1996 ("Act") for a declaration that an arbitral tribunal, constituted by the London Court of International Arbitration ("LCIA") in arbitration number 246285 between the defendant (as claimant in the reference) and claimant (as respondent to the reference) ("Arbitration") comprising Mr Michael Tselentis KC as sole arbitrator ("Arbitrator"), has no jurisdiction to hear the Dispute the subject of the Arbitration;; and

   ii) to amend the terms of an anti-suit injunction dated 17th April 2024.

2. Section 32(2) of the Act provides that an application under section 32 may not be considered unless it is made with either the written consent of all parties (a condition not satisfied in this case) or with the permission of the arbitral tribunal, which is the condition satisfied in this case. However, when an application is made with the permission of the arbitral tribunal, the court must be satisfied of three threshold conditions set out in s.32(2)(b) of the Act before determining the application on its merits. These conditions are that:

   i) the determination of the question is likely to produce a substantial savings in costs;

   ii) the application has been made without delay; and

   iii) there is good reason why the matter should be determined by the court.

3. Section 32 takes effect as a derogation from the basic principles set out in section 30, which enables the tribunal to determine its own jurisdiction subject to the right of a party to challenge such a decision under section 67 of the Act. Since section 32 envisages that a court will decide the jurisdictional issue without the tribunal doing so, contrary to the default position established by section 30, the conditions set out in section 32(2) summarised above are intended to restrict the circumstances in which the court will exercise its section 32 power and ensure that recourse to the court under section 32 remains the exception rather than the rule - see Oovee Ltd v S3D Interactive Inc [2022] EWCA (Civ) 1665; [2023] 4 WLR 1 *per* Popplewell LJ at [36].

4. The determination of whether the criteria identified in section 32(2)(b) are satisfied is a threshold issue that must be determined affirmatively in favour of the claimant before determining the jurisdiction issues on their merits. Normally, this issue is decided without a hearing - see CPR Practice Direction 62, paragraph 10.1, which applies to arbitration applications in the Circuit Commercial Court, as it does to applications in the Commercial Court - see paragraph L1.5 of the Circuit Commercial Court Guide.

5. However, in this case, the defendants maintained that there should be two hearings, one relating to the threshold conditions and one relating to the substantive challenge. That would have been inefficient, a waste of time and costs and in the end, I directed that there should be a single hearing, with judgment being given in relation to the

threshold issue before any argument on the substantive issue concerning jurisdiction. This judgment is concerned only with the threshold conditions. However, it is convenient that I set out the relevant chronology in this judgment so that this part of this judgment can be incorporated by reference into the substantive judgment, assuming that I am satisfied that the threshold conditions are to be treated as satisfied in the circumstances of this case.

6. The claimant is a UK-based bank and the defendant is a Russian registered bank. They entered into an agreement under which they undertook currency swap transactions. The agreement was in the 1992 ISDA Master Agreement form, with a schedule of bespoke specified terms. That schedule included at paragraph 5(k) a jurisdiction and arbitration agreement in the following terms:

> "(1) Subject to (2) and (3) below, any dispute arising out of, or in connection with, this Agreement, including any question regarding the existence, scope, validity of termination of this Agreement ('dispute') or subsection (b), jurisdiction, shall be referred to and finally resolved under the rules of the London Court of International Arbitration at the LCIA, which rules are deemed to be incorporated by reference into this subsection. The parties hereby expressly agree that any dispute which arises out of, or in connection with, the Agreement will necessarily require resolution as a matter of exceptional urgency. There should be one arbitrator and the appointing authority should be the LCIA, such appointment to be made by the LCIA within four days of filing and a request for arbitration with the LCIA. The chosen arbitrator will be a practising English lawyer. The seat of the arbitration shall be London, England. All hearings shall take place in London, England. The arbitration proceedings shall be conducted in the English language and the award shall be in English. The arbitral tribunal shall not be authorised to order and [the defendant] shall not be authorised to seek from any judicial authority any interim measures of protection or pre-award relief against [the claimant] notwithstanding any provision of the LCIA rules.
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> "2. Notwithstanding the above paragraph 1 [the claimant] may by notice in writing require that all disputes or any specific dispute be heard by a court of law. Any notice must be given within 14 days of service on [the claimant] of a request for arbitration. If [the claimant] does so require, the dispute to which the notice refers will be determined in accordance with paragraph 3 below.
>
> "3. (a) Subject to (1) and (2) above, the courts of England shall have exclusive jurisdiction to settle any dispute; (b) the parties agree that the courts of England are the most appropriate and convenient courts to settle disputes and accordingly that no party will argue to the contrary; (c) notwithstanding subparagraph (a) above, nothing in this subsection (b) jurisdiction shall prevent [the claimant] from taking

> proceedings in any other court. With jurisdiction to the extent allowed by law [the claimant] may take concurrent proceedings in any number of jurisdictions."

By paragraph 4(h), the agreement between the parties ("Agreement") is governed by, and is required to be construed in accordance with, English law. In addition to these provisions, there are provisions at section 9(b) and (f) providing, respectively, a formality and a non-waiver clause. These provisions are not relevant to the preliminary issues I am now considering and it is inappropriate that I refer to them other than in passing at this stage.

7. In December 2019, the parties varied the terms of the Agreement so as to make the sanctioning of the defendant a termination event. It is common ground that between 22nd February and 1st March 2022, the defendant became a sanctioned person under the sanction regimes of the United States of America, European Union and United Kingdom. In consequence, on 5th March 2022, as it was entitled to do, the claimant gave notice of early termination of the Agreement and as a result the claimant became obliged to pay the defendant US$147,770,000. The claimant accepts that it owes this sum to the defendant, but maintains that it is unable lawfully to pay that sum because the defendant is sanctioned and so has a defence to any claim for payment by the defendant.

8. On 19th May 2023, the defendant commenced proceedings in Arbitrazh Court of the City of Moscow ("Moscow Court") in breach of the jurisdiction and arbitration agreement referred to earlier.

9. On 3rd December 2023, the claimant challenged the jurisdiction of the Moscow Court and, on 1st February 2024, commenced proceedings in the London Circuit Commercial Court seeking against the defendant both anti-suit and anti-enforcement injunctive relief. On 5th February 2024 I made the orders sought on the without notice application and on the return date (15th April 2024) Mr. John Kimbell KC, sitting at a deputy judge of this court granted final anti-suit and anti-enforcement injunctions. In each case, the orders granted included orders prohibiting the defendant from commencing or pursuing "..... *any other claim or proceedings arising out of, or in connection with, the agreement dated 7th June 2005 between the applicant and respondent in the form of the 1992 ISDA Master Agreement, along with the Schedule, and the 1995 ESDA Credit Support Annex, as subsequently amended, 'the Agreement', in Russia or otherwise, other than by means of LCIA arbitration in accordance with Part 5(k)(1) of the Agreement .....*".

10. Five weeks after Mr Kimball had granted the final anti-suit and anti-enforcement injunctions, on 21st June 2024, the defendant commenced an LCIA arbitration by filing a request for arbitration, as it was bound to do if it was to claim payment from the claimant of the sum referred to above in a manner that was compliant with its obligations under the jurisdiction and arbitration agreement referred to earlier. On 25th June 2024, the LCIA confirmed the appointment of an arbitrator and on 2nd July 2024, the defendant filed an application in the Moscow Court for an order that its claim be suspended - see the judgment of the Russian court and paragraph 24(c) of Ms. Kurbanova's first witness statement, where she states:

> " On 9 September 2024, VEB therefore caused the Russian proceedings to be discontinued by filing a motion to suspend the Russian proceedings until LCIA (a forum agreed upon the parties) resolved the matter. The Russian court agreed to step out with the assurance of both parties that LCIA was the forum of the choice. The current Russian legislation reviews the courts of unfriendly countries towards Russia as venues of unequal treatment and Russian Courts would have undoubtedly refused to stay the proceedings. Should the English court rule in favour of Barclays latest application, the Russian court would go on and the ruling would be made in Moscow."

It is submitted by the defendant that the purpose of this application should have been the termination of the Russian proceedings. As it was, it was an application for suspension only with the consequence that if a conclusion is reached on this application that the bank has validly invoked the requirement for the dispute to be referred to a court of law, then the defendant will resurrect the Moscow Court proceedings. I reject the submission made on behalf of the defendant that any resurrection of the Moscow Court proceedings would occur on the Moscow Court's own motion. I suggested in the course of argument, that the parties to proceedings before Moscow Court are as in control of such proceedings as they are in any other.. In any event, the relevance of these issues to the threshold questions I am currently concerned with is limited.

11. On 4th July 2024 the arbitrator originally appointed by the LCIA resigned and was replaced by the Arbitrator. On the same day the claimant gave notice pursuant to section 13(b)(ii) of the Agreement that:

> "... it required the dispute to be heard in a court of law accordingly pursuant to section 13(b)(iii) as set out in Part 5(k) of the Schedule of the Agreement. The courts of England and Wales shall have exclusive jurisdiction to determine the dispute and the parties have agreed that the courts of England and Wales are the most appropriate and convenient courts to settle the dispute and no party will argue to the contrary. You are therefore required to withdraw the arbitration proceedings as soon as possible. If you are minded to pursue the dispute, you must do so in the English courts."

The defendant relies on the fact that the claimant did not thereafter itself start proceedings before the courts of England and Wales. In my judgment, that is irrelevant for present purposes. The dispute concerned the claim by the defendant to be entitled to payment from the claimant of the sum referred to earlier. If the claimant was entitled to serve the notice I referred a moment ago, it was fully entitled to require the defendant to commence proceedings in this court if it chose to pursue its claim. It is also said by the defendant that the claimant has not explained why it requires the defendant to commence proceedings in this court. Again, that is an immaterial issue because there is no requirement for it to do so.

12. On 20th August 2024 the defendant disputed the validity of the notice and on 27th August 2024 it rejected the claimant's request that it consent to an application made

under section 32(1) to the court. On 30th August 2024 the defendant responded, maintaining the claimant had lost the right to require the dispute to be tried by a court, as a result of waiver.

13. On 2nd September 2024 the Arbitrator heard submissions as to whether he should give permission under section 32(2)(b) of the Act. In a ruling given on 10th September 2024 he concluded that he should. The ruling ran some 57 paragraphs, set out over 15 pages. In summary, the Arbitrator:

    i) Rejected the defendant's submissions that the jurisdiction issue would involve a wide-ranging inquiry or would concern extensive and complex legal issues with substantial witness testimony - see paragraph 36 - because the legal principles relating to the various species of waiver it relied on were well settled, the factual issues narrow and determining them would not be particularly time consuming and would likely require no more than half a day of court time;

    ii) Concluded that if the tribunal decided the jurisdictional issue it was probable there would be a s.67 challenge by whichever party lost on the issue, and, therefore, a substantial saving in costs was likely to result from a determination by the court under section 32 - see paragraphs 42, 44 and 50, where it was concluded there was a strong likelihood of a section 67 challenge if the tribunal proceeded to resolve the jurisdictional issues;

    iii) Concluded that the application had been made without delay, as was common ground - see paragraph 45; and

    iv) Concluded that considerations of efficiency and resulting finality were good reasons that pointed strongly towards the grant of permission - see paragraphs 36-37, 41-44 and 50.

14. I turn next to the applicable legal principles that I must apply. As I have already noted, a section 32(2) orders should be considered the exception rather than the rule, and that it is the role of the section 32(2)(b) criteria to restrict the circumstances in which courts will make s.32(2) orders. That said,

    i) the likelihood of a section 67 challenge to the tribunal's determination of its own jurisdiction and the duplicative waste of costs that would result if the issue is relitigated has been recognised as a material consideration - see Armada Ship Management (S) Pte Ltd v Schiste Oil and Gas Nigeria Ltd [2021] EWHC 1094 (Comm), per Cockerill J, at paragraph 32(1) and the authorities there referred to; and

    ii) the reasoned decision of a tribunal giving permission in relation to the good reasons issue is a material consideration where permission is granted based on efficiency and resulting finality – see Armada Ship Management (S) Pte Ltd v Schiste Oil and Gas Nigeria Ltd (ibid.) at paragraph 32(2).

    It was submitted on behalf of the defendant that I should not rely on Armada Ship Management (S) Pte Ltd v Schiste Oil and Gas Nigeria Ltd (ibid.) because it was a judgment on a paper application with submissions from only one party. I

acknowledge that to be so, but it is nonetheless the most recent authority where the threshold issues I am now considering were considered by reference to earlier decisions. I accept that it is not binding on me, and the principles stated within the judgment are obiter given how the application in that case was ultimately disposed of. I make clear however that I rely upon it as a nonexclusive summary of relevant considerations, and for the references provided within it to earlier authorities to similar effect. The fundamental point that emerges from this authority and those referred to in it is that whether the statutory criteria set out in section 32(2) are satisfied is a fact-sensitive question which has to be resolved by reference to the particular facts of each and every case where the question arises. That is how I have approached the issues that arise.

15. I now turn to the section 32(2)(b) criteria in the circumstances of this case. It remains common ground that the application was made without delay and rightly so, in my judgment, given the chronology set out above. This application could not reasonably have been made sooner than it was and I conclude therefore that section 32(2)(b)(ii) has been complied with.

16. I next turn to whether the determination of the jurisdiction issue by a court is likely to produce a substantial saving of costs. The claimant submits that it is obvious that if the tribunal proceeded with the determination of his own jurisdiction, in the circumstances of this case there was almost bound to be a section 67 challenge by whoever was disappointed in the outcome and to ignore that as a factor would be wrong in principle. The defendant submits that I should leave out of account, or at any rate not treat as material, the possibility of a section 67 challenge, because that was a possibility in virtually every case where there is a contest as to jurisdiction.

17. On the facts of this case I consider that s s.67 challenge, at its lowest, is highly likely given:

    i) the sum in issue;

    ii) the issues in dispute in relation to jurisdiction;

    iii) the importance the claimant places on its right to rely on its asymmetric rights under the jurisdiction and arbitration agreement and;

    iv) the importance the defendant apparently places on the dispute being resolved by the Arbitrator rather than the court.

    In those circumstances, I prefer the claimant's approach on this issue for the following reasons. As I have said, whatever might be the position in relation to other cases where similar questions arise, in this case in my judgment it is almost certain there will be a section 67 jurisdictional challenge in this case, if this application fails. It follows that the relevant comparison in this case is between the court determining the jurisdiction issue now or leaving it to the tribunal with the court becoming engaged with the jurisdiction issue only after a final award or at any rate an interim award determining jurisdiction. This is likely to generate significant wasted costs, as well as significant delay for the parties. If the application is dismissed there will be a full jurisdictional hearing before the Arbitrator, though when that will happen is unclear. There is the very high probability in a section 67 challenge thereafter, as I have

explained. As is common ground, that will be a *de novo* rehearing with each party entitled to deploy new arguments and possibly new evidence. Although I regard the possibility of new arguments and additional evidence being deployed at the s.67 challenge stage as a possibility rather than a probability given the volume of evidence that has been prepared so far and the degree to which the parties have committed themselves to decided positions in relation to the issues that arise, it is nonetheless the case that a s.67 challenge would be an expensive and time consuming exercise. On the facts of this case, if this application succeeds there will be one hearing to resolve jurisdiction, whereas if the application is dismissed there will be two full hearings at a cost likely to be measured in hundreds of thousands of pounds for each. In my judgment it is close to obvious in these circumstances that there will be a substantial cost saving that will result if this application succeeds.

18. I reject the notion that this point should be given no material weight because the section 67 challenge is a possibility wherever there is a jurisdictional challenge. My reasons for doing so are because, before a section 32(2) application can get before a court, or succeed before a court, it must pass through a number of filters which together eliminate the risk to which the defendant alludes. Before a s.32(2) application can get before a court it requires the permission of the tribunal. That of itself provides a very effective primary practical filter which ensures that not every case with an effective jurisdiction issue gets to the point of being considered by a court under section 32 and is a mechanism which is highly likely to severely restrict the number of cases that come before the courts. That is why, as Popplewell LJ noted in Oovee Ltd v S3D Interactive Inc. (ibid.) at paragraph 36, that there are no more than a handful of cases in which section 32 has been successfully invoked. It is also why I respectfully agree with Cockerill J's conclusion in Armada Ship Management (ibid.) at paragraph 32(1), that the likelihood of a section 67 challenge and the waste of costs if jurisdiction were to be relitigated is plainly capable of being a material consideration and with Teare J's conclusion to similar effect in VTB Commodities Trading v Antipinsky Refinery [2019] EWHC 3292 (Comm), [2020] 1 Lloyd's Rep 332, at paragraph 28. The requirement that a party relying on s.32(2) must obtain the permission of the tribunal is an effective filter because the tribunal is required to apply the same criteria as is the court and because the s.32(2) criteria are cumulative and conjunctive, not disjunctive alternatives. It follows from the cumulative nature of the s.32(2) criteria that I also respectfully agree with the point made by Teare J, in paragraph 28 of his judgment in Antipinsky (ibid.) that even where on the facts it is probable there will be a section 67 challenge, that will not of itself be sufficient given the need for an applicant to establish good reason for the court to determine jurisdiction.

19. In any event, the court is not a rubber stamp of approval for the arbitrator's decision. Even where permission is given, the judge will examine the issue afresh giving such weight to the arbitrator's decision as the judge considers appropriate in the circumstances. If an arbitrator has been too easily persuaded on the cost issue, for example, it is highly unlikely that would influence the judge to reach a similar conclusion, quite simply because the judge approaches the issue afresh. In this case, as I have explained, I regard the cost savings as both significant and obvious.

20. I turn therefore to the good reasons criterion on the facts of this case. The defendant submits it is wrong to treat the tribunal's consent as a sufficient reason, and that the

authorities relied upon by the claimant as to the relevance of the tribunal's consent are wrong. Had those authorities decided that the tribunal's consent was a sufficient reason for concluding that jurisdiction should be decided by the court, I would agree with the defendant since to decide otherwise would mean that the court would be ceding to an arbitrator an issue a court is required to determine by primary legislation to that effect.

21. That is not however what the authorities decide. What Teare J held in Antipinsky (ibid.) at paragraph 32, was that (as happened here) where there is a reasoned ruling by a tribunal following a careful consideration of the criteria, that was:

> "... of itself a good and cogent reason for the court to determine the question of jurisdiction ...".

Cockerill J's approach in Armada Ship Management (ibid.) at paragraph 32 was similar. It was not suggested by either judge that the reasons given be the tribunal were decisive, merely that they were capable (depending on the circumstances) of being good reasons.

22. Against that background the claimant submits that I should conclude that there are in the circumstances of this case good reasons for the court to determine the issue. That is so, submits the claimant, because:

i) such a process will promote efficiency and finality;

ii) the tribunal concluded that such was the case;

iii) the parties were agreed that their dispute must be resolved "*... as a matter of exceptional urgency ...*", which adds cogency to factor (i);

iv) there is a risk that if the section 32 application fails, then the tribunal will be left to determine jurisdiction and if it did so in favour of the defendant, the claimant will be exposed to the risk of enforcement in various jurisdictions, including Russia, while a section 67 challenge was pending; and

v) the claim is one of general importance because it raises issues of waiver, the formality of requirements and the enforceability of asymmetric jurisdiction and arbitration agreements.

23. As to this last point, I reject it on the basis that what this dispute is concerned about are contractual provisions which are bespoke or at the least are so in part, and because the issues of waiver do not depend upon points of legal controversy but are fact-sensitive and fact-dependant issues to be resolved applying well settled principles. That said, I reject the submission by the defendant that I should reject the point because the general rule is that arbitration proceedings are heard in private. There has long been a distinction drawn between hearings in arbitration proceedings, which tend to take place in private, and judgments following such hearings with the judgments (where they concern points of general importance) being published in the usual way but either anonymised or redacted as appropriate to the extent that necessity requires - see Newcastle United Football Club v FA Premier League Limited [2021] EWHC 450 and the cases where that determination has been followed.

24. As to efficiency and finality, I reject the submission by the defendant that this lacks force because the timetable has in fact been different from that postulated by the claimant before the tribunal. The claimant predicted that an application could be got before the court in eight weeks and in the end that has happened within a period of about nine weeks. However, whatever the rights and wrongs of that debate, it is not the critical point. Rather the point that matters is that if the section 32 application is dismissed, the jurisdiction issue will have to be determined by the tribunal at an indeterminate date in the future, with the strong probability of either a stay of the arbitration while a section 67 challenge is considered by the court with a consequential fairly substantial further delay, or with the reference proceeding to a final award with the section 67 challenge either being determined in tandem or following publication of the final award, with the attendant cost delay and uncertainty that will result.

25. In that context, the parties could have but noticeably did not offer an undertaking to agree to stay the arbitral proceedings in the event there was a section 67 challenge. This gives rise to the real possibility that, for example, the defendant could ask the arbitrator either to determine the substantive issue at the same time as jurisdiction or continue with the reference having published an interim award on jurisdiction. Either course would add very substantially to the cost of the process and those costs will be wasted in the event there was a successful challenge under section 67 by either party.

26. The delay, additional cost and uncertainty that would follow the dismissal of this application are likely to be exacerbated by the practical difficulties that may result from attempts to enforce where there was a pending s.67 challenge. The defendant criticised the claimant for making this point without identifying where enforcement was to take place. Pausing to note only that the claimant did so, at least to an extent, in its evidence in support of the anti-suit injunction, the point that matters for present purposes is that any such risk could have been eliminated by the defendant providing appropriate assurances but they were not forthcoming.

27. Each of the factors I have just summarised has to be viewed against the contextual background that the parties have agreed that their disputes are to be resolved as a matter of exceptional urgency. In the context of the parties' contractual obligation concerning exceptional urgency, I consider that the claimant's estimate of about one year from the publications of a jurisdictional award for a section 67 application to come before a court is approximately correct. In my judgment it is close to obvious that what is most consistent with the resolution of the dispute, as a matter of extreme urgency, is for the court to resolve the jurisdictional issue now. In my judgment, it is this contractual requirement is a case specific factor that provides significant additional force to the points already considered.

28. In summary, disposing of the jurisdiction issue now provides finality, eliminates substantial additional costs, eliminates the risk of costly and time-consuming issues on enforcement, and delivers substantial content to the contractual obligation concerning exceptional urgency. Given my conclusions, the conclusion of the tribunal to similar effect in the particular circumstances of this case add nothing to the conclusions I have already reached.

29. In those circumstances, I am satisfied that each of the threshold conditions is satisfied and therefore the court should determine the jurisdictional issue that arises.

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