Neutral Citation Number: [2024] EWHC 1074 (Comm)

Claim No. LM-2024-000030

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**KING'S BENCH DIVISION**
**LONDON CIRCUIT COMMERCIAL COURT**

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

Date: 10/05/24

**Before** :

**John Kimbell KC**
**(sitting as a Deputy Judge of the High Court)**

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**Between :**

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|---|---|
| **BARCLAYS BANK PLC** | **Claimant/ Applicant** |
| **- and -** | |
| **VEB.RF** | **Defendant/ Respondent** |

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**Peter de Verneuil Smith KC** (instructed by **Simmons & Simmons LLP**) for the **Claimant/Applicant**
**Shantanu Majumdar KC** (instructed by **Rahman Ravelli Solicitors**) for the **Defendant/Respondent**

Hearing date: 15 April 2024

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# APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 10 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**John Kimbell KC sitting as a Deputy Judge of the High Court:**

## Introduction

1. On 5 February 2024, HHJ Pelling KC (sitting as a High Court Judge) granted the Claimant ('**Barclays**') an anti-suit injunction ('**ASI**') and anti-enforcement injunction ('**AEI**') against the Respondent ('**VEB**') in the form of an interim order ('**the Interim Order'**). In his judgment HHJ Pelling KC held that proceedings commenced by VEB in the Arbitrazh Court for the City of Moscow on 19 May 2023 ('**the Russian Proceedings**') represent a clear breach of the obligation binding on VEB to submit any dispute between it and Barclays arising out of an International Swaps and Derivatives Association Master Agreement dated as of 7 June 2005 ('**the Master Agreement'**) to LCIA arbitration in London and that there were no strong reasons not to grant the order sought.

2. Barclays' application for the Interim Order was supported by two witness statements by Adam Brown, who is a partner at Simmons & Simmons: a witness statement dated 1 February 2024 ('**Brown 1**') and a witness statement dated 4 February 2024 ('**Brown 2**'). Barclays also relied on expert evidence on Russian law by Sergey Petrachkov dated 31 January 2024 ('**Petrachkov 1**') and a further report on the status of the Russian Proceedings of the same date ('**Petrachkov 2**')

3. On 15 April 2024, the parties appeared before me on the return date for the Interim Order. Barclays, represented by Mr de Verneuil Smith KC, submitted that the Interim Order should be confirmed and made permanent. VEB, represented by Mr Majumdar KC sought the discharge of the Interim Order. Mr Majumdar's two grounds of challenge to the Interim Order were described in his skeleton argument as follows:

    a. "*The arbitration agreement in this case has become inoperative or, alternatively, incapable of performance (whether by reason of frustration or otherwise*[1]*), and in any event should not be enforced, as a result of the cumulative consequences of the designation of VEB under the UK's Sanctions and Anti-Money Laundering Act 2018.*

    b. *Separately, the application by Barclays should – whether as a matter of discretion or "strong reasons" – be refused on the grounds of lengthy and unjustified delay (which has caused significant prejudice to VEB and others).*"

4. In support of these two grounds of challenge, Mr Majumdar relied on evidence contained in a witness statement of Mr Syedur Rahman dated 13 March 2024 ('**Rahman 1**'), a partner in Rahman Ravelli Solicitors, who represent VEB and an expert report by Vladimir Pestrikov dated 13 March 2024 ('**Pestrikov 1**'). Barclays responded to Rahman 1 by serving a third witness statement by Mr Brown dated 28 March ('**Brown 3**') and to Pestrikov 1 by serving a supplementary expert opinion from Mr Petrachkov dated 28 March 2024 ('**Petrachkov 3**').

[1] In his oral submissions, Mr Majumdar said that the words "or otherwise" had been a placeholder. In the event he advanced no alternative to his main argument based on frustration.

5. The bundle containing the exhibits to Brown 1 – 3, Rahman 1, Petrachkov 1-3 and Pestrikov 1 ran to 2000 pages. Following the hearing, both parties made short supplemental submissions in writing on 16 April 2024.

## The order dated 19 April 2024

6. Having considered all the submissions made to me and the evidence described above, I advised the parties on 19 April 2020 that I would make the order sought by Barclays. Neither party made any suggested changes to the form of the order which I had circulated to the parties and it was sealed by the Court on 23 April 2024. My reasons for making the order are as follows.

## VEB

7. VEB is a Russian state development corporation. It was originally founded in 1922 as the Soviet Union's first international bank. In April 2018, it changed its name from Vnesheconombank State Development Corporation to VEB. VEB became the state development bank of the Russian Federation. Its role is to support and develop the economy of the Russian Federation. Since May 2018, the Chairman of VEB has been Igor Shuvalov. Mr Shuvalov had previously served as the Deputy Prime Minister in the cabinet of Dmitry Medvedev and before that in the cabinet of Vladimir Putin.

## The Master Agreement

8. The Master Agreement is a framework agreement under which VEB and Barclays concluded currency swap transactions. Clause 4 (h) of the Master Agreement provides that: *"This Agreement will be governed by and construed in accordance with the law of England."*. Clause 5 (k) of the Schedule to the Master Agreement contains a dispute resolution clause ('**the Dispute Resolution Clause'**). It is this clause which is at the heart of Barclays' application. It provides as follows:

> "*(b) Jurisdiction.*
>
> *(i) Subject to (ii) and (iii) below, any dispute arising out of or in connection with this Agreement, including any question regarding the existence, scope, validity or termination of this Agreement ("Dispute") or this subsection (b) (Jurisdiction), shall be referred to and finally resolved under the Rules of the London Court of International Arbitration (the "LC1A"), which Rules are deemed to be incorporated by reference into this subsection…*"

### The 2019 Amendment

9. The Master Agreement was amended three times: in 2013, 2015 and 2019. In the 2019 amendment ('**the 2019 Amendment'**), VEB and Barclays addressed the possibility that VEB might be subject to sanctions by the UK, the US or the EU. The effect of the amendment was to add a further termination event, as follows:

> "*(iii)* [VEB], *or any affiliate or an entity related to* [VEB] *has been designated as a Specially Designated National ("SDN") or named to an*

> *equivalent list of sanctioned persons by an authority in the United States, the United Kingdom, the European Union or any member state thereof, or the United Nations; or*
>
> *(iv) The imposition of any economic or financial sanctions or trade embargoes or other prohibitions against transaction activity pursuant to anti-terrorism laws or export control laws imposed, administered or enforced from time to time by the United States of America, the United Kingdom, the European Union or any member state thereof ("Sanctions"), that make it illegal or impossible for any of the parties to perform their obligations under any Transaction or would result in any party being in violations of any Sanctions.*"

10. No consequential amendments were made to any other clauses in the Master Agreement as a result of the 2019 Amendment. In particular, no changes were made to the Dispute Resolution Clause.

## The VEB Sanctions

11. As a result of the attempted invasion by the Russian Federation of Ukraine on 24 February 2022, VEB was added to the list of designated persons under the Russian (Sanctions) (EU Exit) Regulations 2019 and the Sanctions and Anti-Money Laundering Act 2018 ('**the UK Sanctions**').

12. On 1 March 2022 the Council of the European Union included VEB in the list of persons covered by Regulation EU No. 833/2014 of 31 July 2014 and Decision 2014/512/CFSP of 31 July 2014 ('**the EU Sanctions**') thereby blocking VEB from the SWIFT payment system.

13. In addition to the above measures, VEB had already been added to the list of sanctioned persons issued by the United States Office of Foreign Assets Control on 22 February 2022 ('**the US Sanctions'**). The US, UK and EU Sanctions were referred to collectively at the hearing as the VEB Sanctions.

## Notice of Early Termination

14. On 5 March 2022, Barclays served notice of early termination of the Master Agreement on the ground of the VEB Sanctions pursuant to the 2019 Amendment. The notice designated 9 March 2022 as the date on which transactions under the Master Agreement would be terminated for the purposes of calculating a net final payment as defined in the Master Agreement.

15. VEB did not dispute the validity of the notice of early termination.

## The Final Payment Amount

16. Following an exchange of correspondence, the parties eventually agreed that a net final payment amount of USD147,770,000 ('**the Final Payment Amount'**) as a result of the swaps performed under the Master Agreement was due from Barclays to VEB. Barclays undertook to hold the Final Payment Amount in its capacity as a banker rather than as a trustee or agent.

17. There is a dispute between Barclays and VEB as to how interest on the Final Payment Amount should be calculated and potentially whether it is payable at all.

## Non-payment

18. VEB proposed various methods to Barclays by which the Final Payment Amount might be paid notwithstanding the VEB Sanctions. Barclays took the view that none of the proposed means of payment were permitted under the VEB Sanctions.

19. The effect of the UK Sanctions as a matter of English law is to suspend the right of VEB to demand payment of the Final Payment Amount or (to put it another way) to excuse non-payment by Barclays unless or until either the UK Sanctions were removed or special permission is obtained to make the payment – see: Arab Foreign Bank v Bankers Trust Co [1989] 1 QB 728. Barclays further took the view that an application for a specific licence to pay the Final Payment Amount would not be successful.

## VEB's demand

20. On 13 March 2023, VEB wrote a letter to Barclays in which VEB demanded payment of the Final Payment Amount. VEB said that failure to make the payment within 10 days would lead VEB to commence "litigation proceedings at the Arbitrazh Court in Moscow". In response, Barclays referred VEB to the dispute resolution clause in the Master Agreement and stated that the threatened proceedings would be a breach of that clause.

21. On 14 April 2023 Barclays sent a further letter to VEB reiterating that the threatened proceedings in the Moscow Arbitrazh Court would represent a breach of the agreement to arbitrate.

## The Russian Proceedings

22. On 19 May 2023 VEB issued proceedings in the Abritrazh Court of the City of Moscow (the "**Russian Court**"). In those proceedings VEB claims the Final Payment Amount and default interest amounting to USD 6,854,572 ("**the VEB Claim**").

23. VEB's statement of claim:

    a. Lists the swaps transactions entered into by Barclays and VEB under the Master Agreement.

    b. Describes the agreement between VEB and Barclays on the calculation of the Final Payment Amount due to VEB.

    c. Pleads that English law is applicable to the Master Agreement

    d. Pleads that the VEB Sanctions prevent Barclays from paying the Final Payment Amount as a matter of English law.

    e. Sets out a claim for interest based on English law.

f. Contends that English law as the applicable law may be overridden where the consequences of its application would contravene basic principles of Russian law and that the VEB Sanctions contravene Russian law.

g. States that the Russian Court has jurisdiction despite the Dispute Resolution Clause because it is overridden by Articles 247 and 248 of the Arbitrazh Procedure Code ('**APC**')

24. The statement of claim was accompanied by 29 exhibits including an opinion on English law.

## The First Ruling

25. On 26 May 2023 in a ruling by Judge M.V. Larin ('**the First Ruling'**), the Russian Court scheduled a preliminary hearing to take place on 5 December 2023. The purpose of this hearing was stated to be:

> "to clarify the circumstances relating to the merits of the stated claims and objections, the disclosure of evidence supporting them, the need to provide additional evidence, explain to the parties their rights and obligations, the consequences of committing or not committing".

26. Judge Larin's ruling also contained a reference to a further potential hearing:

> If it is impossible to proceed to the consideration of the case on the merits at the court hearing on 05.12.2023, the case will be scheduled for trial on 12.03.2024 at 11:00 a.m., hall 3098, floor 3, in the courtroom at the address: 115191, Moscow, st. Bolshaya Tulskaya, d. 17.

27. Barclays learned of the First Ruling on 31 May 2023 because it had been monitoring the Arbitrazh Court judicial database.

28. Barclays received a copy of the VEB Claim on 13 June 2023 from VEB. According to the Russian Court database, the VEB Claim together with its exhibits and a copy of the First Ruling were subsequently sent to Barclays by the Court. Barclays has no record of receiving the documents. However, nothing turns on this.

29. On 26 June 2023, VEB applied to expedite the Russian Proceedings. This was rejected by the Russian Court by a ruling issued on 3 July 2023 by Judge Larin.

30. On 3 December 2023, Barclays filed an application challenging the jurisdiction of the Russian Court.

31. On 5 December 2023, the preliminary hearing scheduled in the First Ruling took place. It lasted only 30 minutes. The hearing was attended by lawyers for Barclays and VEB. At that hearing, VEB applied to amend to claim further interest and filed initial objections to Barclays' jurisdiction challenge. Judge Larin listed the case for trial on 9 February 2024 at 10 am. He ordered Barclays to file a statement of defence and VEB to respond to the arguments made in the defence.

32. On 1 February 2024, Barclays filed its application in this court for an ASI and AEI.

33. On 2 February 2024, VEB filed further submissions in the Russian Court in opposition to Barclays' jurisdiction challenge and further submissions on the calculation of interest on the Final Payment Amount.

34. On 9 February 2024, the Russian Court adjourned the case for reconsideration at a hearing on 3 May 2024. This adjournment was at the request of VEB in response to the Interim Order granted by HHJ Pelling KC on 5 February 2024.

35. Barclays has not yet served a Defence to VEB's Claim and the Russian Court has not yet ruled on Barclays' jurisdictional challenge.

## The burden of proof on this application

36. In his oral submissions, Mr Majumdar accepted the following submission taken from Mr de Verneuil Smith's skeleton dated 1 February 2023:

> "It is the strong predisposition of the English Courts to enforce and uphold arbitration agreements and the burden is on the respondent to show strong reasons why the Court should do otherwise".

The submission is well supported by authority – see e.g. The Angelic Grace [1995] 1 Lloyd's Rep 87, per Millett LJ at 96, cited with approval by the Supreme Court in AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC [2013] UKSC 35, Donohue v Armco [2001] UKHL 64 at [24] and, most recently, UniCredit Bank GmbH v RusChemalliance LLC [2024] EWCA Civ 64 at [39] and [81].

37. With the burden of proof well in mind, I turn now to the two grounds advanced by Mr Majumdar on the basis of which the Interim Order should be dismissed.

## Ground (1): Frustration

## The legal test

38. There was no dispute between the parties as to the legal test for frustration. Mr Mujumdar referred me to the decision of Marcus Smith J in Canary Wharf (BP4) T1 Ltd & Ors v European Medicines Agency [2019] EWHC 335 (Ch) ('*Canary Wharf*'). This contains at [26] a summary of the history of the doctrine. Marcus Smith J goes on to say that since the decision of the House of Lords in National Carriers v. Panalpina Ltd, [1981] 1 AC 675 *('Panalpina')* , the prevailing wisdom is that whether a contract is frustrated depends upon

> "a consideration of the nature of the bargain of the parties when considered in the light of the supervening event said to frustrate that bargain. Only if the supervening event renders the performance of the bargain "radically different", when compared to the considerations in play at the conclusion of the contract, will the contract be frustrated."

39. Mr Majumdar submitted that I should apply this test and in doing so I should follow the multi-factorial approach described by Rix LJ in *Swinton Commercial Corporation v. Tsavliris Russ (Worldwide Salvage and Towage) Ltd, The "Sea Angel*:

> "In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances."

40. The three factors identified by Rix LJ which are to be taken into account when considering circumstances as at the time of the contract were:

    (1) The terms of the contract itself.

    (2) Its matrix or context.

    (3) The parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, at any rate so far as these can be ascribed mutually and objectively.

41. Mr de Verneuil Smith did not seek to persuade me that I should apply any other test or any narrower approach. He did, however, submit that when applying the radically different criterion, I should bear in mind that if an unexpected turn of events had made performance of a contract merely "more onerous" this is not sufficient to meet the frustration test. In support of that proposition, he cited Davis Contractors Ltd. v Fareham Urban District Council [1956] AC 696. Mr Majumdar did not demur.

42. Mr Majumdar was not able to cite any reported or unreported decision in which an arbitration agreement governed by English law had been held to be frustrated. In Peace River Hydro Partners v Petrowest Corp. [2022] SCC 41, cited by Mr Majumdar in his skeleton argument, the Supreme Court of Canada at [145] gave some examples of when an arbitration agreement *might* conceivably be said to be "incapable of being performed". These included: (1) inconsistencies, inherent contradictions or vagueness in the arbitration agreement itself that cannot be remedied by interpretation or other contractual techniques; (2) the non-availability of the arbitrator specified in the agreement; (3) the dissolution or non-existence of the chosen arbitration institution (4) political or other circumstances at the seat of arbitration rendering arbitration impossible; and (5) legal measures in the stipulated seat of arbitration making the arbitration impossible to perform such as a statutory provision which "overrides" the parties' agreement to arbitrate.

43. Mr Majumdar could not submit that any of the first of the four categories identified by the Supreme Court of Canada applied in the present case. As to the fifth category, he expressly accepted that the legal effect of the VEB Sanctions was not such that the Dispute Resolution Clause was *impossible* for VEB and Barclays to perform. Instead, his submission was that the practical effect of the VEB Sanctions was to impede VEB's access to justice and to render the performance of the arbitration agreement so radically different from that which had been envisaged when it had been concluded that it was frustrated.

## The evidence

44. In support of his submissions on frustration, Mr Majumdar relied on the evidence of the practical impediments faced by VEB in paragraphs 10 – 23 of Rahman 1. This fell into three broad categories: (i) alleged difficulties with securing legal representation; (ii) alleged problems paying legal fees and LCIA fees; and (iii) the inability of witnesses / party representatives to attend live in person at a hearing. Barclays responded to this evidence in paragraphs 4.1 – 4.8 of Brown 3.

45. In relation to legal representation, Mr Rahman's evidence amounted to no more than an assertion that: (i) many barristers and law firms are refusing to act for sanctioned entities associated with the Russian Federation; (ii) two leading English law firms who previously had offices in Moscow (Freshfields and Linklaters) had terminated their relationship with VEB; and (iii) that there had been an 'exodus' of international law firms from Moscow.

46. I have no doubt that because of the VEB Sanctions the pool of lawyers potentially available to represent VEB (both in Moscow and England) has shrunk significantly. However, I am not persuaded that the evidence before me shows that this occurred to the extent that VEB can say that it has effectively been denied adequate legal representation. It is obvious that VEB has been able to find both specialist solicitors and leading counsel to represent it at this hearing. There are many reported cases involving sanctioned entities in the Commercial Court in which those entities are represented by established counsel and solicitors. Mr Rahman did not in his statement describe any particular difficulties experienced by VEB in finding counsel or solicitors for this hearing or that either were willing only to assist VEB for the limited purposes of dealing with this application. I also take note of the evidence in Brown 3 that the Bar Council had sent a reminder to barristers that the 'cab rank' rule continues to apply regardless of the existence of sanctions.

47. Taking all the evidence together, I am satisfied that that had VEB referred its dispute to LCIA arbitration, it would have been able to secure adequate legal representation from specialist solicitors and counsel. VEB may well in other circumstances have expected to be able to choose from a wider pool of lawyers. However, in my judgment, this evidence does not begin to get near to a denial of access to justice. The evidence in relation to legal representation, in my judgement, falls squarely in the category of performance being more difficult or onerous but does not meet the "radically different" test or give rise to a real risk of injustice.

48. In terms of difficulty paying fees for legal representation and to the LCIA, the evidence of Mr Rahman referred to "routine delays" in particular caused by VEB's exclusion from the SWIFT system. He also referred to procedures requiring "multiple rounds" of questions and requests for documents. However, the evidence of Mr Brown 3, which was not contradicted in any response from Mr Rahman, was that it is still possible for international payments to be made by VEB (albeit in slower form outside SWIFT). I also accept the evidence that the LCIA has confirmed that it has a general licence to accept payments in respect of arbitrations (albeit subject to compliance checks). Where such checks had led to delays because of the need to apply for particular licences or otherwise, LCIA tribunals had granted extensions of time. It was noteworthy that Mr Rahman did not refer to any difficulty in having his own firm's fees paid or even any delays or difficulties in making those payments. His evidence was rather generic and vague.

49. In my judgement, the evidence in relation to payment difficulties, such as it was, amounted to no more than evidence of increased inconvenience and administrative effort but not a radically different performance or a denial of justice.

50. Mr Rahman's evidence in relation potential difficulties in VEB's witnesses attending an LCIA arbitration hearing was based on an assertion that remote participation in the arbitration will "often be neither sufficient nor fair". In response, Barclays indicated that it would consent to any LCIA arbitration being conducted entirely virtually so that the parties would in that respect be on an equal footing. However, in my judgment, the more significant point is that the use of remote hearings is now firmly established and has been found to operate well both in the Commercial Court and international arbitration. It is in particular often adopted when the issues are largely legal in nature. In this case, the Final Payment Amount is not in dispute and the issues between the parties centre on: the legal effect of the VEB Sanctions on Barclays and how interest is to be calculated. These are not issues in relation to which, in my judgement, remote attendance by both parties is likely to lead to injustice or unfairness.

51. In summary, in my judgement, the evidence submitted by VEB comes nowhere near establishing that the conduct of an LCIA arbitration as a sanctioned entity would be so radically different from how the parties envisaged the arbitration would have been conducted at the time they agreed the Dispute Resolution Clause that it is frustrated. The most that can be said on the evidence is that there is a reduced pool of lawyers for VEB to choose from, potential delays and extra bureaucracy in relation to paying lawyers and arbitral fees and a need to conduct the arbitration remotely. All of that, in my judgement, falls squarely in the category of more onerous performance but not a practical impediment of such a nature or degree as to amount to a denial of access to justice or frustration.

52. I should also say that I have noted the various comments made in Russian cases about alleged practical difficulties presumed or actually experienced by other sanctioned parties who have invoked the exclusive jurisdiction provisions of Article 248.1 of the APC. Mr Majumdar could not place direct reliance on these comments made in other Russian proceedings. He said they added colour to the evidence of Mr Rahman. I have based my decision on the evidence tendered of actual alleged impairments said to be faced by VEB in respect of a potential LCIA arbitration concerning the Final Payment Amount, which I have found to fall far short of meeting the agreed legal test of frustration.

53. However, there is another separate reason why, in my judgment, the arbitration argument is not frustrated. The parties foresaw in 2019 the risk that sanctions might be imposed on VEB and agreed an amendment to the Master Agreement in response to that risk. It was open to them at that stage to make an amendment to the Dispute Resolution Clause but they did not do so. As a matter of the objective construction of the Master Agreement (as amended in 2019), in my judgment, both parties thus must be taken to have agreed that the Dispute Resolution Clause was to continue to be binding (on both parties) even in the more onerous circumstance of sanctions being imposed on VEB. The risk of sanctions was not therefore an unforeseen risk at all.

54. This is thus a case which falls within the following category of cases referred to by Marcus Smith J at [29] *Canary Wharf* in which the construction of the agreement is sufficient to resolve the agreement:

> "In some cases – the vast majority, for frustration is a doctrine not easily invoked – the construction of the contract will resolve the issue between the parties, including whether a subsequent "unforeseen event" has allocated a risk to one party (by requiring that party to perform in more onerous circumstances) or to the other party (by an interpretation bringing the contract to an end because of those onerous circumstances)."

55. The first ground of challenge therefore fails.

## (1) Delay

### The law

56. In relation to the legal test to apply as to the potential effect of delay, Mr de Verneuil Smith made the following submissions on the law which were not challenged by Mr Majumdar and which I accept:

    a. The length of the delay "*is of less importance than the extent to which the foreign proceedings have progressed during the delay and whether those foreign proceedings have been allowed to progress on the merits*" (A v B [2020] EWHC 3657 (Comm) per Calver J at [36]).

    b. The touchstone is whether delay has materially increased the perceived interference with the foreign court process or led to a waste of the foreign court's time or resources (Ecobank Transnational Inc v Tanoh [2015] EWCA Civ 1309 [129 - 135])('*Ecobank*').

    c. The courts will take into account the extent to which the delay held to be justifiable or excusable in the circumstances; and will weigh delay against the importance of enforcing the forum clause (Raphael in The Anti-Suit Injunction (2019, 2nd. ed.) at §8.21).

57. Mr de Verneuil Smith referred me to the following examples from the case law where delay had been held to be justifiable was justifiable:

    a. In *Ecobank* the claimant waited to see if it lost the jurisdiction challenge before seeking relief; there was "*no good reason*" for the delay in seeking injunctive relief at [123].

    b. In Ecom Agroindustrial Corp. Ltd v Mosharaf Composite Textile Mill Ltd [2013] EWHC 1276 (Comm) Hamblen J found that a one-year delay between the commencement of Bangladeshi proceedings and the anti-suit application was explained by "*good reasons*" that the claimant "*thought it might be able to deal with the Bangladeshi proceedings more quickly and efficiently in the Bangladeshi courts themselves*" and no prejudice had been caused to the defendant [33].

    c. In Africa Finance Corporation and others v Aiteo Eastern E&P Company Ltd [2022] EWHC 768 (Comm) Teare J held that the lender had not acted promptly in issuing an anti-suit application thirteen months after notice of the Nigerian proceedings [74]. However, he found that this delay was caused by attempts to restructure the lending agreement and that this was a "*reasonable explanation*" for the delay [76] and a final injunction was granted.

## The evidence

58. The basic fact is that Barclays became aware of the Russian Proceedings on 31 May 2023 and issued the Application eight months later on 1 February 2024.

59. Barclays submits that the 8 months taken to issue the application for an ASI is prompt in the circumstances of this case, there is a reasonable explanation for it and, in any event, the Russian proceedings are not far advanced so any delay has not materially increased the perceived interference with the foreign court process or led to a waste of the foreign court's time or resources.

60. Mr Majumdar on behalf of VEB submits that there has been unexplained long delay in making an application which was made at an advanced stage in the Russian proceedings.

61. Mr De Verneuil Smith submitted that the 8 months taken to challenge the Russian Proceedings were justified because Barclays had to:

    a. take advice on Russian procedure, with which it was unfamiliar (Brown 1 §3.9);

    b. consider the risk of submission to jurisdiction of the Russian Court, both as a matter of Russian and English law (Brown 1 §3.10(C));

    c. consider its obligations under the relevant sanctions in light of the civil and criminal penalties that arise from breach (Brown 1 §3.10);

    d. take advice on the risks posed by the Russian Proceedings and to take steps to de-risk its exposure in Russia in respect of assets, operations, and commercial relationships in an unprecedented market and political environment caused by the Ukraine War and the imposition of sanctions on Russian entities and that it was only in early December 2023 that Barclays had mitigated its risk sufficiently to seek relief in the English courts (Brown 1 §13.9-3.17 & §3.20).

62. Further he submitted that:

    a. When assessing "*promptness*", a degree of commercial sensitivity should be shown to the *non*-defaulting party, especially where such default is the root cause of commercial and operational risks that must then be mitigated by the *non*-defaulting party.

    b. Barclays never adopted a 'wait & see' approach to its jurisdiction challenge.

63. I am not persuaded that the need to take legal advice on Russian law or English law can be relied upon as justifying more than 6 - 8 weeks of the time period in question. Given the sum involved, I would have expected Barclays to start taking advice on Russian law as soon as VEB first threatened to bring proceedings in Russia. On the basis of the evidence filed by both parties, it is clear that in May 2023 there was nothing novel or unusual about the situation that Barclays found itself in because:

    a. The use of Article 248.1 of the APC as a foundation for jurisdiction by sanctioned Russian Parties was well-established. It was based on the guiding precedent decision of the Russian Supreme Court in JSC Uraltransmash v PESA of 9 December 2021 (Petrachkov 1 §1.1 – 1.2 / Pestrikov I §§19-410).

b. According to the prevailing case law in numerous cases a defence based on sanctions derived from foreign applicable law (in this case English law) would not be upheld if it would contradict Russian public policy. On the basis of this case law, a defence based on the effect of the VEB Sanctions in English law would be highly unlikely to be available to Barclays for the reasons pleaded by VEB (see Petrachkov 1 §3 / Pestrikov §12 and §§59 – 66).

64. Similarly, I would have expected Barclays to be able to obtain advice on the relevant English law principles for anti-suit injunctions and any other regulatory aspects within 4 - 6 weeks at the very most.

65. I therefore do not accept the first three points relied upon by Mr de Verneuil Smith as justifying the 8 month period between receiving the VEB Claim and applying for an ASI/AEI. Barclays ought to have been able to take sufficient legal advice to decide whether or not to apply for an ASI/AEI by the end of July 2023.

66. However, I do accept the evidence of Mr Brown that Barclays faced a highly complex task in assessing its own exposure to potential enforcement and interim measures and how best to de-risk itself. Even though as Mr Majumdar pointed out Barclays had already been engaged on a de-risking exercise in 2022, I have no reason not to accept Mr Brown's evidence that it was not until early December 2023 that Barclays had sufficiently de-risked itself to feel confident that it could safely seek anti-suit relief in England. I do not accept Mr Majumdar's submission that Barclays evidence in this respect is unacceptably vague and unspecific. It would, as Mr de Verneuil Smith submitted, be unrealistic to expect Barclays to make public the details of its investments and relationships in Russia and the precise means adopted to de-risk itself in response to the Russian Proceedings not least because of the risk that VEB might take immediate counter-measures to undo some of those measures.

67. I accept Mr de Verneuil Smith's submission that a degree of commercial sensitivity should be shown to the *non*-defaulting party, especially where such default is the root cause of commercial and operational risks that must then be mitigated by the *non*-defaulting party.

68. I also accept the submission that Barclays did not adopt a wait and see approach. On the contrary, Barclays has been consistent that the Dispute Resolution Clause in the Master Agreement remained binding:

a. Well *before* the Russian Proceedings were commenced, Barclays made very clear it expected the Dispute Resolution Clause to be respected;

b. Barclays gave no indication *after* the Russian Proceedings were commenced that it might be open to litigating in Russia;

c. Barclays filed its jurisdictional challenge prior to the preliminary hearing date set by the Russian Court in accordance with local procedural law.

69. Having satisfied itself (according to Mr Brown) that it had de-risked sufficiently to file a jurisdiction challenge in the Russian Proceedings on 3 December 2023, I am not sure why the application for an ASI/AEI could not have been filed promptly thereafter. Nevertheless, even if the Application could and should have been filed a few weeks

earlier than it was, the touchstone is whether any unjustified delay has materially increased the perceived interference with the foreign court process or led to a waste of the foreign court's time or resources. In my judgment, the delay between 3 December 2023 and 1 February 2024 has not done so for the following reasons:

a. Between the acceptance of the VEB Claim by the Russian Court on 26 May 2023 and 1 February 2024 all that had occurred was one 30-minute hearing which set one firm preliminary hearing date and a further date, a failed attempt by VEB to accelerate the proceedings and the filing of a jurisdiction challenge by Barclays, the filing of submissions in response and a further 5 minute hearing leading to an adjournment.

b. Even if it is correct to say that by their nature the Russian Proceedings always had the potential to reach a final hearing quickly (depending on the allocated judge's own assessment of when the case was ready for a final merits hearing) the few procedural steps actually accomplished to date mean that it cannot be said that the Russian Proceedings had reached an advanced stage by 1 February 2024.

c. As to the time and court resources wasted, even taking account of the fact that in general terms in Civilian legal systems more judge work goes on behind the scenes than in court, the fact that there have only been two preliminary hearings: one of 30 mins and one of 5-10 mins means that the cost incurred by VEB in the Russian Proceedings is modest: £1,756 court fee (70% of which is returnable if VEB were to withdraw its claim) plus legal costs. VEB has mainly used in-house legal counsel to date so external legal disbursements and costs are unlikely to be significant. The assertions made in Pertrachkov 1 about the low level of costs incurred and potentially "wasted" if the Russian Proceedings were not challenged in Pestrikov I. Mr Rahman referred in his witness statement to "significant" legal costs and time being wasted but did not attempt to quantify either.

d. The most significant costs incurred by VEB seem to have been in putting together the VEB Claim and exhibits. This work was all done in full knowledge that Barclays was making it clear that they expected the Dispute Resolution Clause to be respected. These costs were not caused by any delay on the part of Barclays in the period from 3 December 2023 - 1 February 2024.

70. Finally, the Court is entitled to have regard to the wider picture. On the evidence I have seen, it seems to be clear that VEB has commenced the Russian Proceedings in breach of an arbitration agreement, which it accepts is valid under English law, in order to get round the effect of the VEB Sanctions. VEB plainly hopes to obtain a judgment in Russia which it could not obtain from an LCIA Tribunal applying English law. It then intends to enforce that judgment against Barclays' assets in Russia and in whichever other jurisdictions it can find where Barclays has assets and Russian Federation court judgments are enforceable. I accept Mr de Verneuil Smith's submission that in deciding whether or not to grant the remedy sought I should attach weight to the need for the court to uphold UK Sanctions which are part of English law.

## Conclusion

71. I am satisfied for all the reasons set out above that neither of the two objections taken by VEB constitute a strong reason not to hold VEB to the Dispute Resolution Clause in the Master Agreement and that I should make the Interim Order permanent.