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Court grants anti-suit injunction and upholds UK sanctions

Barclays Bank PLC v VEB.RF [2024] EWHC 1074 (Comm)

Overview

The English Commercial Court (the "**Court**") has granted an anti-suit injunction in favour of Barclays Bank Plc (the Claimant), preventing VEB (the Respondent) from pursuing a claim against Barclays in Russia in breach of an LCIA arbitration agreement. The Court refused to accept VEB's argument that the arbitration agreement had been frustrated as a result of sanctions imposed on VEB.

Facts

1. VEB (the state development bank for the Russian Federation) and Barclays entered into an International Swaps and Derivatives Association Master Agreement in 2005 (the "**Master Agreement**"). The Master Agreement was a framework agreement under which VEB and Barclays concluded currency swap transactions.
2. The Parties agreed for disputes arising out of the Master Agreement to be governed by English law and referred to LCIA arbitration:

 Clause 4 (h): *"This Agreement will be governed by and construed in accordance with the law of England".*

 Clause 5 (k): *"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 "LCIA"), which Rules are deemed to be incorporated by reference into this subsection..."*

 (the "**Dispute Resolution Clause**")
3. In 2019, the Parties made amendments to the Master Agreement addressing the possibility that

VEB may become subject to sanctions by the UK, the US or the EU (the "**2019 Amendment**"). The purpose of the 2019 Amendment was to add a further termination event to the Master Agreement. No changes were made to the Dispute Resolution Clause.

4. Shortly after Russia's invasion of Ukraine in February 2022:
 - a. VEB was added to the list of designated persons under the Russian (Sanctions) (EU Exit) Regulations 2019 (the "**UK Sanctions**");
 - b. the Council of the European Union included VEB in a list of sanctioned persons thereby blocking VEB from the SWIFT payment system (the "**EU Sanctions**"); and
 - c. VEB was added to the list of sanctioned persons by the United States (the "**US Sanctions**"), together the ("**VEB Sanctions**").
5. In light of the VEB Sanctions, on 5 March 2022, Barclays served notice of early termination of the Master Agreement in reliance on the 2019 Amendment which described sanctions as a possible termination event. VEB did not dispute the validity of the notice.
6. The Parties agreed that USD 147,770,000 was due from Barclays to VEB (the "**Final Payment Amount**"). A dispute arose in relation to how interest should be calculated on the Final Payment Amount, and whether interest should be payable at all.
7. VEB proposed various methods of payment for Barclays, notwithstanding the VEB Sanctions which made it difficult for VEB to make and accept payments. Barclays were of the view that none of the methods proposed by VEB were permitted under the VEB Sanctions. This is because the effect of the UK Sanctions as a matter of English law is to suspend VEB's right to demand payment or to excuse non-payment by Barclays unless or until

either (i) the UK Sanctions were removed, or (ii) special permission is obtained to make the payment.

8. VEB sent a letter of demand to Barclays demanding payment of the Final Payment Amount and threatened that failure to pay within 10 days would lead VEB to commence "*litigation proceedings at the Arbitrazh Court in Moscow*". Barclays referred VEB to the Dispute Resolution Clause in the Master Agreement stating that any proceedings in Russia would be contrary to this clause.
9. VEB nevertheless commenced proceedings in Russia in May 2023 in relation to the Final Payment Amount and default interest of USD 6,854,572 (the "**Russian Proceedings**").
10. On 3 December 2023, Barclays filed an application in the Russian Court challenging jurisdiction.
11. On 1 February 2024, Barclays filed its application in the English Commercial Court for an anti-suit injunction and anti-enforcement injunction (the "**Application**"). This was granted on 5 February 2024 in the form of an Interim Order.
12. On 15 April 2024, the Parties appeared before the English Commercial Court on the return date for the Interim Order:
 - a. Barclays' position was that the Interim Order should be confirmed and made permanent; and
 - b. VEB sought the discharge of the Interim Order on the grounds that (1) the arbitration agreement had been frustrated, and (2) Barclays had delayed in filing its Application, which had caused significant prejudice to VEB.

Ground 1: Frustration

There was no dispute between the Parties as to the legal test for frustration.

Whether a contract is frustrated depends on "*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*" (*Canary Wharf (BP4) T Ltd & Ors v European Medicines Agency* [2019] EWHC 335 (Ch)). (Emphasis added).

The Court applied the test in *Swinton Commercial Corporation v. Tsaviris Russ (Worldwide Salvage and Towage) Ltd*, which identifies the following factors to be taken into consideration when establishing whether the supervening event renders performance "*radically different*":

- a. The terms of the contract;
- b. Its matrix or context; and

- c. The parties' knowledge, expectations, assumptions and contemplations, in particular as to risk.

It was also noted by the Court that a supervening event that would make the contract merely more onerous to perform is not sufficient to meet the test for frustration.

VEB relied on the practical impediments they faced as a result of the VEB Sanctions. These were (i) difficulties with securing legal representation, (ii) problems paying legal fees and LCIA fees, and (iii) the inability of witnesses/party representatives to attend in person at a hearing.

The Court's Decision

At the outset, the Court explained that the burden of proof is on the respondent to convince the Court why it should not uphold the arbitration agreement.

- a. The Court acknowledged that as a result of the VEB Sanctions, the pool of lawyers available to represent VEB had shrunk significantly. However, the Court was not persuaded that this had denied VEB adequate legal representation. VEB had been able to secure both specialist solicitors and leading counsel to represent them. The Court concluded that difficulty in relation to legal representation fell squarely in the category of performance being more difficult or onerous but did not meet the "*radically different*" test or give rise to a risk of injustice.
- b. VEB's evidence referred the Court to the routine delays they faced caused by their exclusion from the SWIFT payment system as well as payment procedures requiring multiple rounds of KYC. Barclays argued that it was still possible for VEB to make international payments, albeit slower than SWIFT. The LCIA also has a general licence to accept payments subject to compliance checks. The Court concluded that what VEB experienced amounted to no more than an increased inconvenience and administrative effort, but not a "*radically different*" performance or a denial of justice.
- c. VEB cited the potential difficulties for witnesses attending an LCIA arbitration hearing in person in London and that remote participation would not be fair. The Court rejected this and commented that the use of remote hearings is firmly established and has been found to operate well in both the Commercial Court and international arbitration.

The Court concluded that the evidence submitted by VEB in support of its case on frustration did not come close to establishing that the participation by VEB as a sanctioned entity in an LCIA arbitration would be so "*radically different*" from how the parties would have envisaged an arbitration being conducted at the time they agreed the Dispute Resolution Clause, so as to deem the arbitration agreement frustrated.

The Court was also persuaded that the Parties foresaw the risk that sanctions might be imposed on VEB when they made the amendment to the Master Agreement in 2019; that was the purpose of the amendment. The Court commented that it was open to the Parties at that stage to make an amendment to the Dispute Resolution Clause, however they did not do so.

Ground 2: Delay

Barclays became aware of the Russian Proceedings on 31 May 2023 and issued the Application on 1 February 2024; a delay of 8 months. VEB argued that this delay was "lengthy and unjustified" and caused significant prejudice to VEB.

Barclays argued that the eight months it took to issue the Application was prompt and reasonable in the circumstances of the case, but that in any event, the Russian Proceedings were not far advanced enough therefore the delay did not materially increase the alleged interference in the Russian Court's process or lead to a waste of the Russian Court's time and/or resources.

Barclays explained that the eight months taken to challenge the Russian Proceedings were justified on the grounds that Barclays needed to:

- a. take advice on Russian procedure, with which it was unfamiliar;
- b. consider the risk of submission to jurisdiction of the Russian Court, both as a matter of Russian and English law;
- c. consider its obligations under the relevant sanctions in light of the civil and criminal penalties that arise from breach; and
- 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 / political environment, and that it was only in December 2023 that Barclays had mitigated its risk sufficiently to seek relief in the English courts.

Barclays pointed the Court to multiple examples where delay had been held to be justifiable:

- a. In *Ecom Agroindustrial Corp. Ltd v Mosharaf Composite Textile Mill Ltd* [2013] EWHC 1276 (Comm) the Court 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.
- b. In *Africa Finance Corporation and others v Aiteo Eastern E&P Company Ltd* [2022] EWHC 768

(Comm) the Court held that the lender had not acted promptly in issuing an anti-suit application thirteen months after notice of the Nigerian proceedings. 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 and a final injunction was granted.

The Court's decision

The Court was not persuaded that Barclays required eight months to take legal advice on Russian law and procedure and decided that a more reasonable timeframe would have been six to eight weeks. The Court said that Barclays should have been able to take sufficient legal advice to decide whether or not to make the Application by the end of July 2023.

However, the Court did consider that the eight-month delay was justified on the basis that it was a highly complex task to assess its own exposure to enforcement and to de-risk itself.

Furthermore, the Court made the point that even if the Application was filed a few weeks earlier, the "touchstone" is whether any unjustified delay materially increased the perceived interference with the foreign court process or led to a waste of the foreign court's time or resources.

The Court concluded that the delay between 3 December 2023 (when Barclays had concluded its investigations) and 1 February 2024 (when the Application was filed) did not cause any unjustified delay for the following reasons:

- a. All that had happened in the Russian Proceedings between the acceptance of VEB's claim by the Russian Court on 26 May 2023 and the filing of the Application on 1 February 2024, was (1) a single 30 minute hearing setting a preliminary hearing date and a further hearing date (2) a failed attempt by VEB to accelerate the proceedings (3) Barclays filed its jurisdiction challenge and VEB filed submissions in response, and (4) a further hearing which lasted five minutes resulting in an adjournment.
- b. The few procedural steps taken show that the Russian Proceedings had not reached an advanced stage by the time the Application was made.
- c. As to time and costs, the fact that there had only been two very short preliminary hearings meant that the cost incurred by VEB during the Russian Proceedings was low (a £1,756 court fee 70% of which was returnable if VEB were to withdraw its claim) plus legal costs. VEB had also predominantly used inhouse legal counsel meaning that external legal disbursements and costs were unlikely to be significant.

- d. The most significant costs incurred by VEB would have been the costs incurred in putting together its claim and exhibits. However, this work was done with the full knowledge that the Dispute Resolution Clause was expected to be respected.

The Court concluded that VEB had commenced the Russian Proceedings in breach of the arbitration agreement in order to get around the impact of the VEB Sanctions. Also, in making its decision, the Court acknowledged that weight should be attached to the requirement of the Court to uphold UK sanctions.

The Court held that neither of the grounds advanced by VEB constituted a strong reason not to hold VEB to the Dispute Resolution Clause of the Master Agreement and therefore proceeded to make the Interim Order permanent.

Comment

This case serves as reminder of the legal test for frustration and how the court will apply the test with a "multifactorial" approach, including the parties' knowledge at the time the contract was entered into. The fact that the Parties were aware in 2019 (when the amendment to the contract was made) that VEB may soon be sanctioned, was persuasive in this case.

This case also serves as a reminder that circumstances that render performance of a contract more onerous or difficult will not be sufficient to frustrate a contract.

As to delays in making anti-suit injunctions, it should be noted that the Court commented that legal advice could and should have been sought promptly. Overall, this case serves as a text-book reminder of the "dos and don'ts" of a classic anti-suit injunction application, particularly in relation to timing.

The full judgment can be found here: [Barclays Bank PLC v VEB.RF \[2024\] EWHC 1074 \(Comm\) \(10 May 2024\) \(baillii.org\)](#)

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