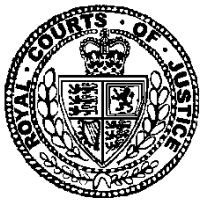

Neutral Citation Number: [2021] EWHC 718 (Comm)

Claim No CL-2021-000092

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice. Rolls Building
Fetter Lane, London, EC4A 1NL
25 March 2021

Before: Sir William Blair sitting as a Judge of the High Court

IN AN ARBITRATION CLAIM

BETWEEN:

VTB BANK (PJSC)

Claimant/Applicant

- and -

VALERI DZHANIBEKOVICH MEJLUMYAN

Defendant/Respondent

- -

Mr Peter Stevenson
(instructed by Keystone Law)
appeared for the Claimant/Applicant

Mr Vernon Flynn QC and **Mr Stephen Donnelly**
(instructed by King & Spalding International LLP)
appeared for the Defendant/Respondent

Hearing date: 23 March 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10:00am on 25 March 2021.

SIR WILLIAM BLAIR:

1. There are two applications before the court. The first is an application by the Claimant, VTB Bank (PJSC), a Russian bank ("VTB"), for an anti-suit injunction against Mr Valeri Dzhanibekovich Mejlumyan ("Mr Mejlumyan"), an Armenian businessman. The application is made on the basis of proceedings begun by Mr Mejlumyan in the courts of Armenia which VTB claims is in breach of a London arbitration clause in a share pledge agreement. The second is an application made on behalf of Mr Mejlumyan to adjourn the hearing to a date to be fixed in a few weeks' time on the ground that his present ill health prevents him from giving effective instructions.

Factual background to the share pledge agreement

2. VTB has set out the facts in some detail in its evidence (particularly that of Mr Vahagn Dallakyan dated 19 February 2021), but it should be made clear that this is not presently the subject of a substantive response on behalf of Mr Mejlumyan. With that caveat, the position so far as relevant to the application for an anti-suit injunction is as follows.
3. In 2004, an Armenian company called Armenian Copper Programme CJSC ("ACP") which was within Mr Mejlumyan's Vallex group of companies was granted a licence to develop and exploit a copper and molybdenum mine in the Lori region of the Republic of Armenia. The licence was subsequently assigned to ACP's wholly owned subsidiary Teghout CJSC ("Teghout").
4. In 2011, the Armenian subsidiary of VTB provided Teghout with a facility of US$283.3m to finance the construction of the mine, and as part of the arrangements, the shares in Teghout were transferred to Teghout Investments Ltd ('TIL') a Cypriot registered company owned 50.05% by ACP and 49.95% by VTB's nominee, Nairi Infrastructure Capital Ltd.
5. The 2011 loan was restructured in 2016 under a facility agreement dated 30 September 2016 between Teghout as borrower and VTB as lender, which was guaranteed by four companies in the Vallex group. The facility agreement is governed by English law and provides that all disputes arising out of or in connection with the agreement should be referred to and resolved by arbitration in London under the LCIA Rules.

6. Further security was provided by way of two pledge agreements. One is a pledge granted by ACP on 12 October 2016 over its 50.05% shareholding in TIL – the TIL pledge is subject to Cyprus law and to the exclusive jurisdiction of the Cyprus courts.
7. The other is a pledge granted by Mr Mejlumyan on 30 September 2016 over his 100% shareholding in ACP – the ACP pledge is the relevant pledge for present purposes. It contains various provisions enabling VTB to foreclose by giving the necessary instructions to the Central Depository of Armenia OJSC ("CDA"), though the effect of these is in dispute.
8. Clause 10 of the ACP pledge deals with governing law and jurisdiction. It provides for Armenian law and LCIA arbitration in London:

> "10.1 This Agreement shall be construed and governed in accordance with the laws of the Republic of Armenia.
>
> 10.2 Any dispute (a 'Dispute') arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or, termination of this Agreement or the consequences of its nullity) (or any non-contractual obligations arising out of or in connection with this Agreement) shall be referred to and finally resolved by arbitration under the LCIA Rules (the "Rules") of the London Court of International Arbitration ("LCIA").
>
> …
>
> 10.3.4 The seat of arbitration shall be London, England and the language of the arbitration shall be English."

9. In June 2018, Teghout failed to pay interest which failure VTB treated as an event of default under the facility agreement. It exercised its right under the TIL pledge to transfer ACP's 50.05% shareholding to a VTB nominee. This has given rise to various proceedings in the Cyprus courts and by way of arbitration which are not directly relevant to the present application.
10. On 3 September 2018, VTB called for accelerated repayment of the principal debt and remuneration under the facility agreement totalling US$289,469,803.
11. Those sums not having been repaid, VTB took enforcement steps against the primary and secondary parties (i.e. the guarantors) to the facility agreement, and sought to enforce its rights under the shares pledges. This included the institution of arbitration proceedings.

The court proceedings in Armenia

12. There are two sets of proceedings that have been begun by Mr Mejlumyan in the Yerevan Court of General Jurisdiction against both VTB and the share depositary, CDA. These followed a confiscation notice sent by VTB to Mr Mejlumyan on 19 July 2019 notifying him that, following the failure of Teghout and the guarantors to make payment of the accelerated debt due under the facility agreement, it intended to exercise its rights under the pledge. It is in dispute whether Mr Mejlumyan received that notice.
13. The first set of proceedings, which VTB calls the "*Termination Proceedings*", and which are the relevant proceedings so far as the anti-suit injunction is concerned, were commenced by Mr Mejlumyan on 25 September 2019 (Claim No.31505/02/19). These seek (i) a declaration that the ACP pledge was terminated; and (ii) an injunction prohibiting VTB from enforcing its rights under the pledge as contemplated in the confiscation notice. As summarised on behalf of Mr Mejlumyan, its gravamen is that VTB's enforcement of the TIL pledge discharged the ACP pledge.
14. The Yerevan Court granted the *ex parte* injunctive relief sought by Mr Mejlumyan on 7 October 2019, but according to VTB the correct procedure was not complied with. In any case, on 9 December 2019 the injunction was filed with the Enforcement Service of Armenia.
15. However, in the meantime, according to VTB, on 3 October 2019 the ACP shares were transferred by the CDA to VTB's nominee, and as a consequence, the injunctive relief granted by the Yerevan Court was ineffective.
16. On 15 October 2019, Mr Mejlumyan began further proceedings before the Yerevan Court of General Jurisdiction (Claim no.31497/02/19) seeking a declaration that the transfer of shares was unlawful and an order compelling the CDA to cancel the transfer and to register Mr Mejlumyan's title to them. According to VTB, the central ground relied on is that pursuant to the CDA's Rules, no transfer should have been authorised unless and until the CDA had been provided with evidence that the notice of enforcement had been received by Mr Mejlumyan. VTB calls these the "*Enforcement Proceedings*".
17. Though VTB does not seek anti-suit relief in respect of the Enforcement Proceedings, it has put in evidence the steps that it says were taken in the proceedings throughout 2020 because, according to Mr Dallakyan's evidence, the litigation of the

Enforcement Proceedings "was the principal focus of the parties in Armenia during 2020, during which period the Termination Claim has been in effective abeyance".

18. This is denied by Mr Mejlumyan, whose case is that the Termination proceedings have gone forward apart from a brief period of adjournment in mid 2020, and that delay on the part of VTB in making its application to the English court bars the grant of anti-suit relief.

19. Of the various steps explained in Mr Dallakyan's evidence, in a judgment issued on 16 March 2020 by the Court of First Instance of General Jurisdiction of the City of Yerevan of the Republic of Armenia, VTB's application to dismiss the Enforcement Proceedings in favour of arbitration was refused. According to VTB, this was on the grounds that the CDA was a party to the proceedings but was not a party to the arbitration agreement, and consequently that dismissing the claim would violate Mr Mejlumyan's right to bring court proceedings against CDA under the constitution.

20. However, following a hearing in February 2021, it was (according to VTB's summary) ruled in a judgment issued on 3 March 2021 that, as a matter of Armenian law, parties to a pledge are entitled to agree their own procedure for notification of enforcement, and that the CDA's rules are satisfied if the agreed procedure is followed – it is said that Mr Mejlumyan has 30 days to appeal that ruling.

The present position of the Termination Proceedings (Claim No.31505/02/19)

21. VTB's case, disputed on behalf of Mr Mejlumyan, is that while the Enforcement Proceedings have been progressed to a conclusion, the Termination Proceedings have been effectively dormant. VTB's case is that it was under no obligation to take any steps in these proceedings until formally notified that the claim had been accepted by the Yerevan Court in May 2020 following which it challenged the jurisdiction of the Yerevan Court on the grounds that a claim for a declaration that the ACP pledge was terminated was within the scope of the arbitration agreement. VTB filed a defence, but according to Mr Dallakyan, if it had not done so, it would have lost any right to defend the claim in the event that its challenge to the jurisdiction was unsuccessful.

22. On 8 February 2021, VTB's jurisdiction challenge was heard. Following the hearing, judgment on the jurisdiction challenge was anticipated on 22 February 2021 but was not handed down. According to Mr Egishe Dzhazoyan's evidence served in support of Mr Mejlumyan's application to adjourn, the judge handling the proceedings has been

"on extended sick leave since 22 February 2021" and it "is not presently known when the judge is expected to resume work". VTB says that it has been able to confirm that the judge is presently absent due to illness but has not been able to ascertain how serious the illness is or how long it is anticipated to last. It says that a judgment could be handed down at any time.

23. As noted, there are significant disputes as to the position as to the proceedings in Armenia, and a principal object of Mr Mejlumyan's application for an adjournment is to enable him to put in evidence in this respect in support of his case as to delay.

The directions given in respect of the applications

24. These proceedings were begun by VTB on 19 February 2021, and VTB's application for an anti-suit injunction against Mr Mejlumyan was issued the same day.
25. By an order dated 22 February 2021, Foxton J (1) gave VTB permission to serve the proceedings on Mr Mejlumyan out of the jurisdiction by stated alternative methods, (2) directed an *inter partes* hearing of the anti-suit application on the first available date in the week commencing 22 March 2021 (which in the event was 23 March 2021), and (3) ordered the defendant to file any evidence in opposition by 10 March 2021 and the claimant to file any evidence in reply by 17 March 2021.
26. It is not in dispute, as I understand it, that Mr Mejlumyan (and his Armenian lawyer) have been served with the proceedings in accordance with the judge's order, which recites that as the order was made *ex parte*, the defendant (i.e. Mr Mejlumyan) may apply to set it aside or vary it.
27. In accordance with the judge's order, the first witness statement of Mr Egishe Dzhazoyan was filed on 10 March 2021. In it, Mr Dzhazoyan seeks an extension of time for service of the substantive evidence, on the basis that his firm had only recently been instructed, that Mr Mejlumyan was suffering from Covid-19 related illnesses as a result of which he has been unable meaningfully to participate and give instructions in these proceedings, and that it would take time to prepare evidence of Armenian law. An application for the extension and consequent adjournment was filed the same day, the draft order asking for the *inter partes* hearing of the anti-suit application to be adjourned to the first available date in the Easter 2021 term.
28. On 16 March 2021, Mr Mejlumyan's lawyers wrote to the court to the effect that they had heard from VTB's lawyers that the next available dates for a one-day hearing was

October 2021, but that they (Mr Mejlumyan's lawyers) hoped that the court would be able to accommodate a substantive hearing in April 2021 or shortly thereafter. (It remains Mr Mejlumyan's position that this is the right way to dispose of the case presently, and that an early date would largely render the present dispute between the parties academic.)

29. On 17 March 2021, Foxton J gave further directions as follows:

> "1. On 22 February 2021, I gave the Claimant permission to serve an Application Form out of the jurisdiction for the purpose of seeking an Anti-Suit Injunction to restrain pursuit of proceedings commenced by the Respondent in Armenia ("the Armenian Proceedings"). That hearing has been fixed for 23 March 2021.
> 2. On 10 March 2021, the Defendant, who said he had only recently instructed English lawyers, and was suffering from severe illness, sought an extension of time to serve evidence in the application for the ASI and of the hearing. The Defendant is seeking an expedited hearing of that application.
> 3. The Claimant resists the adjournment application unless steps are taken to [stop] the Armenian Proceedings. The Defendant submits that he is not in a position to take such steps or that he has already taken such steps as he can.
> 4. I have concluded that the appropriate course is for the hearing on 23 March 2021 to remain in the diary, and for the Defendant's adjournment application to be heard at the start of that hearing. At that hearing, it will be open to the Judge to decide:
> a. To proceed with the hearing on its merits.
> b. To adjourn the hearing and give further procedural directions for a substantive hearing at a future date.
> c. In conjunction with (b), to grant some form of ASI relief, even if that were to be treated as effectively on a "without notice" basis, in an effort to hold the ring in the meantime.
> 5. The parties should be as prepared as they can be for these permutations. They are also asked to consider whether there is scope for resolving matters in advance of the hearing on the basis of some combination of 4(b) and (c)."

30. Subsequently, by a further witness statement dated 19 March 2021, Mr Dzhazoyan exhibited medical evidence as of 6 March 2021 to the effect that Mr Mejlumyan would be incapacitated for the first month of a medically supervised rehabilitation period of 2-3 months. He said that Mr Mejlumyan and his Armenian legal representatives had been able to retain the services of an expert on Armenian lawyer, Mr Tirayr Vardazaryan, who currently expects to be in a position to produce a first draft of his report by 26 March 2021, with a view to serving the report on VTB by 31 March 2021. As regards paragraph 5 of the judge's directions, he explained why Mr Mejlumyan was not prepared to give an undertaking pending an adjourned hearing.

The parties' contentions

31. On behalf of VTB it is argued that the hearing should proceed as a hearing on the merits. It is said that Mr Mejlumyan has had ample time to produce its evidence and prepare for the hearing, and that his lawyers waited too long before applying for an extension of time. The effect of an adjournment would be to delay determination of the application significantly. Although VTB has offered to agree an adjournment if Mr Mejlumyan undertakes not to take any steps in the Termination Proceedings during any period of delay and agrees to adjourn any hearing in those proceedings, that offer has been refused. The claim in the Termination Proceedings plainly falls within the arbitration clause in the pledge. There is no question of excessive delay by VTB in applying for the injunction, or submission by VTB to the Armenian jurisdiction. However, if Mr Mejlumyan is to be given additional time to serve evidence this should be done in a way that ensures that VTB suffers no prejudice as a result of the delay to the determination of its application. That can be achieved by adopting the approach identified by the judge as "option (c)" in his directions of 17 March: to grant "some form of ASI relief, even if that were to be treated as effectively on a "without notice" basis, in an effort to hold the ring in the meantime".
32. On behalf of Mr Mejlumyan it is argued that he has been seriously ill since at least 5–6 March 2021 and as a result has been unable meaningfully to participate and give instructions in these proceedings. The adjournment application seeks a modest 21-day extension of time to serve his evidence and the listing of the *inter partes* anti-suit application which Foxton J has already held should be expedited should come on before October 2021. There is no proper basis to shut Mr Mejlumyan out from advancing his case at an *inter partes* hearing. It would not be appropriate to grant "hold the ring" anti-suit relief on a "without-notice" basis either, because although in form an interim order, the practical effect of the anti-suit application would be final. Without prejudice to his position in this respect, there are at least two strong reasons why it would be positively inappropriate to grant even temporary relief, VTB's delay in making the application, and VTB's apparent submission to the Yerevan General Court's jurisdiction in the Termination Claim proceedings. Mr Mejlumyan invites the court, therefore, to adjourn the hearing of the anti-suit application to a 1-day hearing as soon as possible after service of evidence.

Discussion and conclusion

33. The basic principles governing anti-suit injunctions in case of arbitration agreements are not in dispute:

    (1) The claimant must satisfy the court "on the material adduced at the interlocutory hearing" that there is a "high degree of probability" that there is a binding and applicable arbitration agreement: *Emmott v Michael Wilson & Partners* [2018] 1 Lloyd's Rep. 299 (CA);

    (2) If it is satisfied that there is a binding and applicable arbitration agreement, the court should ordinarily restrain foreign proceedings brought in breach of the agreement unless the defendant can show "strong reasons" not to do so: *Donohue v Armco Inc* [2002] 1 Lloyd's Rep. 425 (HL) per Lord Bingham at [24] (see also *Emmott v Michael Wilson* at [38])

    (3) Anti-suit relief is a discretionary remedy and there are no absolute or inflexible rules governing its exercise: *Donohue v Armco Inc* [2002] 1 Lloyd's Rep. 425 (HL) at [24]. There are, however, well-established objections, as where the claimant has delayed in applying for relief (*Ecobank Transnational Inc v Tanoh* [2016] 1 WLR 2231, Christopher Clarke LJ at [123]–[127]), and as where the claimant has submitted to the jurisdiction of the foreign court (*SAS Institute Inc. v World Programming Ltd* [2020] EWCA Civ 599, Males LJ at [114]–[116]. A summary is found in David Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (3rd edn, 2015), para. 12.130.

34. It does not seem to be in dispute for today's purposes that the subject matter of the Termination Proceedings which Mr Mejlumyan has brought in Armenia falls within the London arbitration clause in the ACP pledge (no submissions having been made on the point on Mr Mejlumyan's behalf). On this basis, there is a binding and applicable arbitration agreement, and the proceedings have been brought in breach of that agreement. The question is whether in all the circumstances the court should nevertheless refuse to grant an anti-suit injunction.

35. The immediate question is whether that should be decided at this hearing. As noted, VTB submits that the hearing should proceed as a hearing on the merits because Mr Mejlumyan has had ample time to produce his evidence and prepare for the hearing, and his lawyers waited too long before applying for an extension of time. As to the

latter point, there is some force in the submission that given the extent of the proceedings between the parties both by way of arbitrations and proceedings in Armenia, it took some time for an application to be made seeking more time to respond to the injunction proceedings – the proceedings were served on 23 February 2021 and the application was made on 10 March 2021. It is also right to say that so far as the application relates to preparing evidence as to Armenian law, the expert who Mr Mejlumyan proposes to put forward has acted for him in the proceedings in Armenia and so may be thought to be familiar with the dispute.

36. Generally, however, I accept without hesitation the submissions made on behalf of Mr Mejlumyan that in circumstances in which he is suffering from Covid-19, something which is supported by the entirely credible medical evidence adduced for this hearing – and which was not available to the judge when he gave his directions on 17 March 2021 – it would be unfair to hold either of these matters against him. I accept that his ability to give instructions to his lawyers has been impeded by his current condition, and that he needs more time to do so effectively. I therefore reject VTB's primary submission that the first of the "options" articulated by the judge, namely to proceed with the hearing on its merits, should be adopted.

37. As noted, Mr Mejlumyan's submission is that the matter should be adjourned. The suggestion is that the hearing takes place on an early date on or after 12 April with any expert evidence and factual evidence relied on in opposition to the anti-suit application to be filed by 31 March 2021 and that any evidence of fact relied on by VTB in reply filed by 7 April 2021.

38. Assuming that the court has time to hear the matter then, this timetable is reasonable. The real dispute between the parties at this hearing is whether there should be temporary anti-suit relief granted to "hold the ring" in the meantime. VTB is content for an adjournment on this basis – in fact it has offered it.

39. Mr Mejlumyan however declines to give an undertaking to this effect pending the restored hearing. He does so on the basis that judgment in the Termination Proceedings is not imminent, so that the relief is unnecessary, but that if judgment on VTB's jurisdiction challenge is given in Armenia soon, and he loses, he may be prejudiced by an injunction, even a temporary one. This is because in the event that VTB prevails in its jurisdictional challenge, under Armenian rules of procedure, he will only have 7 working days in which to file an appeal against such decision.

40. The position on the evidence as to when judgment will be given in the Termination Proceedings is uncertain – but I am satisfied that it could be soon. But the risk of prejudice to Mr Mejlumyan can be covered in suitable drafting. During the hearing, VTB produced a draft order which it asks the court to make and which carves out this situation – there would be no need for Mr Mejlumyan to seek permission from the English court in the event he wished to appeal an adverse decision in the Termination Proceedings.
41. It is further submitted on his behalf that such temporary relief could only be granted pursuant to an *ex parte* application by VTB, subject to the requirement of full and frank disclosure. In a case like this, where there are multiple proceedings, and many things happening, it is extremely important that the court is told that full and frank disclosure has been given, and that the court can be satisfied that it is operating on the full factual matrix that is necessary to make that decision. In the absence of such an application, there is no power in the court to order temporary relief.
42. It is submitted in answer on behalf of VTB that the court has power to adjourn the hearing on terms, and that so long as the safeguards that would come from a without notice application are observed in a tailored way appropriate in the circumstances, there is no objection in principle to making such an order. In particular, the tailored interim relief proposed in this case is not equivalent to final relief. There is no need for an *ex parte* application dependent on full and frank disclosure.
43. I agree with the submissions made by Mr Vernon Flynn QC on behalf of Mr Mejlumyan on the importance of placing the full factual position before the court fairly on an application for an anti-suit injunction. In my view, this is regardless of whether the application is made *inter partes* or *ex parte*. I also agree that a claimant should not be allowed to avoid the important duty of full and frank disclosure that would arise on an *ex parte* application by bringing the application *inter partes* and then applying for temporary relief to hold the ring until the matter can be heard by the court at a full hearing after the defendant has had the opportunity to put in evidence.
44. However, I do not think that this is the position in the present case. I approach this issue in the same way as Foxton J approached it. Option (3) is to grant some form of anti-suit relief, even if that is to be treated as effectively on a "without notice" basis, in an effort to hold the ring. I do not think that VTB is seeking to misuse the procedure by pursuing this course, or avoid a duty of full and frank disclosure that

would otherwise arise. Mr Mejlumyan has declined to give an undertaking at least so far – and I make no criticism whatever in this respect – but I am satisfied that I have power to make an order effectively on a "without notice" basis.

45. Submissions were made on behalf of Mr Mejlumyan as to delay and submission to the jurisdiction barring anti-suit relief in this case. These were made on the basis that the application for an adjournment was refused. Since I granted the application, I need say nothing more about these points. Mr Mejlumyan will now have the opportunity to put in evidence to support his case in this regard.

46. In conclusion, my view is that holding the ring is the right approach in the particular circumstances of this case where the defendant needs more time to put his position properly before the court. As mentioned above, during the hearing VTB produced a draft order to this effect which it invites the court to make. There was some discussion at the hearing as to the appropriateness of this order and its terms. I ask the parties now to agree this in the light of this judgment. In his order of 22 February 2021, Foxton J in effect ordered that the hearing should be expedited. Particularly in circumstances in which the Armenian court is considering its decision as to jurisdiction in the light of the arbitration agreement, the effective *inter partes* injunction hearing (time estimate one day) should come on as soon after 12 April 2021 as is reasonably possible.