



Neutral Citation Number: [2024] EWHC 3088 (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

Thursday, 28th November 2024

**Before:**

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

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**Between:**

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

**Claimant**

**Defendant**

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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:**

### **Introduction**

1. By a judgment delivered *ex tempore* on 19th November 2023, ([2024] EWHC 2981 (Comm)) (“first judgment”), I gave permission to the claimant to continue its application under section 32(2) of the Arbitration Act 1996 (“Act”) for a declaration that an arbitral tribunal, constituted by the London Court of International Arbitration (“LCIA”), had no jurisdiction to determine the dispute the subject of the reference.
2. The substantive jurisdictional issue between the parties was fully argued following the delivery of the first judgment and this judgment determines that jurisdiction issue and also an application by the claimant for an order varying the terms of a final anti-suit injunction granted to the claimant against the defendant on 17th April 2024.

### **Background facts**

3. This judgment incorporates by reference paragraphs 6-13 of the first judgment where the relevant background and chronology is set out in detail. What appears below is a short summary of those points of the background and chronology relevant to the issues I now have to decide:

(a) the claimant and defendant are respectively a UK based and a Russian registered, regulated and located bank. The parties entered into an agreement for the currency of swap transactions ('the Agreement'). The Agreement was varied so as to make the sanctioning of the defendant a termination event.

(b) Between 22nd February and 1st March 2022, the defendant became a sanctioned party under the sanction regimes of the United States of America, the European Union and the United Kingdom. As it was entitled to do, on 5th March 2022, the claimant gave notice terminating the Agreement. As a consequence, the defendant became liable to pay the defendant US\$147,000,770. The claimant accepts that it is obliged

to pay this sum, but maintains that it is unable to do so by operation of the sanction regimes to which the defendant is subject.

(c) The Agreements were subject to a jurisdiction and arbitration agreement set out in paragraph 5(k) of the Schedule of Special Terms annexed to the Agreement in the terms set out in paragraph 6 of the first judgment, that is to say,

**Jurisdiction.** Section 13(b) of this Agreement shall be deleted in its entirety and replaced with the following:

(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 "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 resolution as a matter of exceptional urgency, ...

(ii) Notwithstanding the above paragraph (i), Party B<sup>1</sup> 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 Party B of a request for arbitration. If Party B does so require, the Dispute to which the notice refers shall be determined in accordance with paragraph (iii) below.

(iii) (A) Subject to (i) and (ii) 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 sub-paragraph (A) above, nothing in this subsection (b) (Jurisdiction) shall prevent Party B from taking proceedings in any other courts with jurisdiction. To the extent allowed by law, Party B may take concurrent proceedings in any number of jurisdictions.."

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<sup>1</sup> The Claimant, Barclays Bank Plc

Section 5(k) of the Schedule to the Agreement deleted section 13(b) of the main text of the Agreement and substituted a new section 13(b). References hereafter to section 13(b) are to the section 13(b) inserted by the Schedule

(d) The events relevant to the jurisdictional dispute start on 19th May 2023 when the defendant commenced proceedings in the Arbitrazh Court of the City of Moscow ('Moscow court') against the claimant, seeking to recover the sums referred to earlier ('the Moscow claim'). The Moscow claim was commenced in breach of the Jurisdiction and Arbitration Agreement contained in paragraph 5(k) of the Schedule to the Agreement and on 1st February 2024, the claimant commenced proceedings in the London Circuit Commercial Court seeking both anti-suit and anti-enforcement injunctions.

(e) On 15th April 2024, final orders in the terms sought by the claimant were granted by Mr. John Kimbell KC, sitting as a Deputy Judge of the London Circuit Commercial Court. I refer to this order below as the "final ASI".

(f) On 21st June 2024, the defendant commenced the LCIA Arbitration referred to earlier ('the Arbitration'). After a hiatus that does not matter for present purposes, on 4th July 2024, the arbitrator originally appointed by the LCIA resigned and Mr. Michael Tselentis KC was appointed as the replacement arbitrator ("Arbitrator").

(g) On the same day, 4th July 2024, the claimant gave notice to the defendant pursuant to clause 13(b)(ii) of the Jurisdiction and Arbitration Agreement. The notice 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 to 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. 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."

(h) On 20th August 2024, the defendant declined to act on the notice maintaining at that stage that the claimant had waived its right to require it to do so and on 10th September 2024, the Arbitrator gave permission to the claimant to bring this application under section 32(2) of the Act.

4. As I said earlier by my order made and judgment given on 19th November 2024, I gave the claimant permission to continue its section 32(2) application. The defendant's case on the substance is that (a) the notice given by the claimant purporting to require it to withdraw the arbitration was invalidly given because at the time it was given, the effect of the final ASI was to preclude the defendant from commencing any proceedings other than the arbitration and therefore it was impossible to comply with the notice; and/or (b) the claimant had waived its right to rely on the asymmetric exclusive jurisdiction agreement by 4th July 2024 when it purported to give its notice requiring the defendant to withdraw the arbitration. The claimant disputes each of these contentions

### **The Formal Validity Issue**

5. Section 13(b)(i) of the Jurisdiction and Arbitration Agreement requires the defendant to submit any relevant dispute to arbitration in accordance with the detailed provisions within that clause. Although the defendant commenced the Moscow claim in the Moscow court in breach of the Agreement and appears not to have withdrawn those proceedings in apparent breach of the final ASI, the defendant accepts that the clause at least permits it to commence arbitration.
6. Clause 13(b)(ii) permits the claimant, by notice in writing, to require "*... any specific dispute [to] be heard by a court of law....*" There is no dispute that the notice served by the claimant on 4 July 2024 satisfies this particular requirement. The clause requires that any such notice "*... must be given within 14 days of service on the claimant of a request for arbitration....*" Again, there is no dispute that this requirement has been satisfied if the notice is otherwise valid.

7. It is common ground but in any event I find that if the notice was not valid for the reasons contended for by the defendant, the time for serving such a notice has now long since passed. If the notice was valid, its effect was not to require the defendant to commence a claim, but merely to discontinue the arbitration. Its effect is that any claim by the defendant had to be brought in the courts of England, but there was no requirement to commence such a claim, much less require such a claim to be brought by any particular future date, which could have been brought if the defendant chose to issue such a claim, at any time thereafter, subject to the usual limitation constraints.
8. The defendant's case on this issue is that on a proper construction of clause 13(b) read as a whole, the claimant is only permitted to serve a notice requiring a termination of the arbitration in favour of court proceedings if at the time the notice is served, the defendant is able lawfully to commence court proceedings. The defendant submits that "*were it otherwise, VEB would find itself in a situation where it was prevented from continuing the arbitration and yet could not go to court either*".
9. The underlying basis for this submission concerns the terms of the final ASI. As I have said, that order was made five weeks prior to the commencement by the defendant of the arbitration, at a time when the only proceedings that the defendant had commenced were those in the Moscow court. The final ASI was made in the following terms:

"1. The Respondent shall not:

(1) take any further steps to continue or pursue the claim issued by it in the Arbitrazh Court of the city of Moscow... ('the Russian proceedings'),

(2) commence or pursue any other claim or proceedings arising out of, or in connection with, the Agreement dated 7th June 2005 between the Applicants and Respondent... ('the Agreement') in Russia or otherwise other than by means of LCIA Arbitration in accordance with Part 5(k)(i) of the Agreement.

2. The Respondent shall forthwith take all necessary steps to withdraw from and/or discontinue the Russian proceedings.

3. The Respondent shall not enforce, and shall not take any steps to enforce, any judgment or order made in the Russian proceedings in any jurisdiction. For the avoidance of doubt, this applies regardless of any compliance or attempted compliance with either paragraph 1 or 2 above, whether in whole or in part..."

Thus, the order restrained the defendant in these proceedings from taking any further steps in the Moscow claim and required it to take all necessary steps to discontinue those proceedings. Paragraph 1(2) of the order restrained the defendant from commencing any proceedings other than an arbitration pursuant to paragraph 13(b)(i) of the Agreement, erroneously referred to in the order as Part 5(k)(i).

10. The defendant's case is that paragraph 1(2) of the order precluded it from commencing proceedings in England in accordance with paragraph 13(b)(ii) and (iii) of the Agreement. In further support of this argument, the defendant maintains that clause 13(b)(iii) of the Agreement is engaged only after there has been a valid notice pursuant to clause 13(b)(ii) and in consequence clause 13(b) should be construed as meaning that a notice could only be given under clause 13(b)(ii) if at the time the notice was given, the defendant was able lawfully to commence court proceedings in England.
11. The defendant maintains the Agreement must be construed in a manner that does not require the impossible to be done. In support of that proposition, the defendant relies on Lewison, Interpretation of Contracts, 8th Edition, paragraph 7.175-7.177. In my judgment, the principle that applies is that set out in paragraph 7.177 of Lewison, namely:

"The courts will try to avoid construing a contract as requiring one party to perform the impossible, but where the words are clear the construction will match the words (see *Cuckow v AXA Insurance UK plc* [2023] EWHC 701 (KB)) ..."

12. The claimant's submissions on this point are: (a) the point is not one that was raised at any stage prior to the filing of the defendant's skeleton argument for the hearing, and as such is an 11<sup>th</sup> hour afterthought; (b) on its true construction the final ASI does not preclude the commencement of proceedings in this court pursuant to clause 13(b)(iii); (c) the order, even on its face, does not result in impossibility because the defendant could have applied at any stage for a

variation of the ASI so as to permit the commencement of such proceedings and the claimant would have consented to such an order or would have been precluded from objecting to such an order by the service of the notice; (d) even if that is wrong, in law any illegality merely suspends the order taking effect for the period of any illegality - see Ledeboter v Hibbert [1947] 1 KB 946, per Morris J (as he then was) at pages 972-3.

13. In my judgment, the formal validity point is one I should resolve against the defendant for the following reasons.
14. Firstly, the substance of the notice is that set out in the final two sentences. First, it required the defendant to withdraw the arbitration proceedings as soon as possible. That was a requirement that the claimant was fully entitled to make by operation of clause 13(b)(ii) of the Agreement and was not impossible in any sense either at the time when the Agreement was entered into or at the time when the notice was served.
15. Secondly, the final sentence of the notice said simply that if the defendant wished to pursue the dispute, the defendant had to do so in the English courts. There was no requirement to do so within a specific timeframe, nor even a requirement to commence such proceedings as soon as possible, as was required, rightly, in relation to the withdrawal of the arbitration. Any requirement to commence court proceedings by a certain time would have been entirely unjustified by the terms of clause 13(b) read as a whole and entirely contrary to the scheme of that provision. The only requirement was that once notice was given under clause 13(b)(ii) the arbitration had to be withdrawn. Whether and if so when the defendant chose to commence proceedings in court was a matter for the defendant alone.
16. To the extent it is relevant, there was no limitation issued that applied to the claimant at the time the notice was served, nor is there any limitation issue which is relied upon by the defendant in these proceedings for the purposes of this application. The defendant's entitlement to payment could not have arisen earlier than 5th March 2022, so no limitation issue could possibly arise until March 2028.



17. Thirdly, there was no question of any impossibility in my judgment because to the extent that the defendant considered the final ASI was a bar to the commencement of proceedings in accordance with the Agreement, it could and should have approached the claimant for a variation of the order, and given the terms of the notice the claimant had served on 4 July 2024 it is close to absurd to suppose that the claimant would not have consented to a variation so as to permit the defendant to commence its claim in the English courts; or if consent was refused, that the court would have refused such a variation, if it was applied for. Any such application would in all likelihood have been dealt with in the London Circuit Commercial Court either on paper or at a hearing in its 09.30 list within a matter of days or at the most weeks of it being issued. There is therefore simply no impossibility that arises. In my judgment, this is a complete answer to the invalidity point and renders the point unarguable or close to unarguable.
18. In those circumstances, it is not necessary to consider either the issue of construction of the final ASI or the suspension issue. However, in summary, the claimant's argument on construction of the final ASI was that the order had to be read in its relevant context in that so read it was clear that no one at the return hearing had in contemplation the notion that the defendant commencing proceedings in the High Court would be a breach of that order. The defendant's argument to contrary effect is that the final ASI was capable of being enforced by coercive means and for that reason should be approached as a matter of construction more strictly than other orders and in consequence should be construed as barring the commencement of High Court proceedings pursuant to clause 13(b)(ii) and (iii).
19. As I have said, the issue does not arise because the premise of the defendant's submission concerning impossibility does not arise. That said, I accept that an injunction or mandatory order capable of being enforced by coercive means will be construed largely by reference to the language of the order. I further accept where there is ambiguity such orders will generally be construed in a way most favourable to the respondent to such an order. But that said, (a) such orders are to be given their ordinary meaning and (b) construed in their context, including

historical context and with regard to the objective of the order - see Navigator Equities Ltd v Deripaska [2024] EWCA Civ 268, [2024] BCC 526, *per* Males LJ at [47 (viii)].

20. In my judgment, the final ASI Order in this case should be construed applying those principles. In my judgment, that approach requires that any construction issue should be resolved by adopting a construction that has no greater or wider effect than that which is required by the context in which the order was made. In this case, the relevant context was constituted by (i) the terms of the jurisdiction and arbitration agreement read as a whole, (ii) that the only proceedings commenced at the time the order was made was the Moscow claim and those had been commenced in breach of the jurisdiction and arbitration agreement; and (iii) that the defendant had not indicated any intention to commence either an arbitration or, if required to do so, English court proceedings to recover the sums due to it from the claimant. In context, therefore, paragraph 1(2) of the order was and is to be construed as applying to proceedings otherwise than as permitted by clause 13(b) of the Agreement, and if the issue had arisen in the context of a contempt application at least it is fanciful to suppose that the paragraph would have been construed in any other way.
21. That is all the more the case, in my judgment, when it is remembered that an order that purported to deprive a party of access to the courts without proportionate qualifications would almost certainly be contrary to Article 6 of the European Convention on Human Rights, just as a contract that purported to have that effect would be regarded as contrary to public policy and void - see Chitty on Contracts, Volume 1, paragraph 19-142 and footnotes 651 and 652. A court considering construction of paragraph 1(2) of the final ASI in this case would be bound to take that point into account in arriving at a conclusion.
22. In fact, paragraph 1(2) of the order is fairly typical of orders found in many final ASI orders and is designed to preclude the commencement of new proceedings in breach of the applicable arbitration or exclusive jurisdiction agreement not the commencement of proceedings in accordance with such agreements. In those circumstances I consider it fanciful to suppose that a court would have

construed paragraph 1(2) of the final ASI order as precluding the commencement of proceedings by the defendant in the High Court had the issue arisen.

23. As I have explained however, the issue does not arise because there was no relevant impossibility created by paragraph 1(2) of the final ASI order, even assuming I am wrong in what I have said concerning its true construction.

### **Waiver**

24. The defendant's alternative case as to why the claimant was unable to rely on clause 13(b)(ii) of the Agreement at the time it served its notice on 4th July 2024 was that in various ways the claimant had waived the right or was estopped from relying upon the clause that otherwise permitted it to serve notice requiring an arbitration that had been commenced to be discontinued and requiring any claim to be brought in the English courts.
25. In advancing its submissions on this issue, the defendant relies on waiver by election, pure waiver, unilateral waiver and waiver by estoppel.
26. There is no real dispute as to the legal principles that apply. In summary,
- i) In principle waiver or estoppel can apply as much to a jurisdiction or Arbitration Agreement as to any other contractual right - see Law Debenture Trust v Elektrim [2005] EWHC 1412, per Mann J at 42;
  - ii) Waiver by election arises where, but only where, a choice had been made between two alternative and inconsistent (in the sense of mutually exclusive) courses of action such that adopting one necessarily entailed forsaking the other - see Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corp [2020] PC 23, [2021] 1 WLR 5741, per Lord Leggatt JSC at paragraphs 18-21, and the earlier authorities there referred to, including Lord Diplock's well known formulation in Kammins Ballrooms Company Limited v Zenith Investments (Torquay) Limited [1971] AC 850 at 883, where in relation to conduct Lord Diplock emphasised the requirement that any actions relied on had to be

"...consistent only with [the electing party] having chosen to rely on one ... "of the available alternatives;

- iii) Pure waiver occurs where a party abandons a right sufficiently unequivocally that the conduct of the party concerned thereafter proceeded as if the provisions supposedly waived did not exist - see Banning v Wright [1972] 1 WLR 972, per Lord Hailsham C at 979 C-D;
- iv) Unilateral waiver arises where a party has the benefit of a particular contractual right and decides unilaterally not to exercise the right. To my mind, it is doubtful whether there is any meaningful difference between unilateral and pure waiver given the terms of its formulation by Potter LJ in Flacker Shipping Ltd v Glencore Grain Ltd [2002] EWCA Civ 1068, [2002] 2 All E. R. (Comm) 896 at 64 and the authorities there referred to;
- v) Waiver by estoppel arises where a party represents by word or conduct that he does not intend to enforce a particular right and the representee acts in reliance on that representation to the extent that it would be inequitable for the representor thereafter to be permitted to enforce its rights. The point that matters for present purposes is that it differs from other forms of waiver by looking at the position of the representee (that is to what if anything that party did in reliance upon the representation) rather than that of the representor - see Flacker Shipping Ltd v Glencore Grain Ltd *ibid*, per Potter LJ at paragraph 64.

27. Before turning to the facts relied on as part of the defendant's case, I should note that the claimant relies on clause 9(b) of the Agreement which provides:

"(b) *Amendments*. No amendment, modification or waiver in respect of this Agreement will be effective unless in writing (including a writing evidenced by a facsimile transmission) and executed by each of the parties or confirmed by an exchange of telexes or electronic messages on an electronic messaging system."

The claimant maintains the effect of this provision is to preclude the defendant from relying on any alleged waiver unless it is in writing and either signed by both parties or otherwise confirmed as provided for in the clause, applying the principles set out in MWB v Rock Advertising Ltd [2018] UKSC 24, [2019] AC 119. It is noteworthy that authority was concerned with variation, which would be almost bound to involve all parties to the relevant agreement and therefore lends itself to a requirement that any variation must be in writing. However, The reasoning in Rock Advertising was applied to waivers in European Bank for Reconstruction and Development v Teodori SHPK & Others (2020) Unreported 20th December. However the clause in issue in that case concerned unilateral waivers and provided that a waiver by EBRD "*shall be in writing signed by EBRD...*" This is materially different from clause 9(b) since that clause contemplates a waiver only in a document signed by both parties. That leads the defendant to submit that the clause does not apply to waiver but only to variations.

28. Given the express use of the word "*waiver*" in clause 9(b) it is difficult to see how that can be so. I do not accept that Andrew Smith J's judgment in Kaupthing Singer v UBS AG [2014] EWHC 2450 at paragraph 101 has the effect contended for in paragraph 101 of the defendant's skeleton for the hearing. Andrew Smith J held merely that the clauses in issue in that case were of no application to UBS's estoppel defences, something that the claimant does not dispute - see paragraph 48(2) of its skeleton in these proceedings.
29. It was submitted on behalf of the defendant that clause 9(b) could only apply to an agreed waiver and could be of no application to a unilateral waiver given its requirement that the waiver be recorded in writing signed by both parties. I reject that submission. I do not see why in principle the parties' agreement should not be given effect to as a starting point – that is that it was agreed between the parties that no waiver that would be effective unless (a) it was in writing and (b) executed by each of the parties. That gives effect to Lord Sumption's reasoning in MWB v Rock Advertising, *ibid*, at paragraphs 10-11. There was no reason why the parties should not adopt this principle in relation to waivers, if that is what they chose to do. Each of the reasons identified by

Lord Sumption in his judgment at [12] apply to a non-oral modification clause that applies to waiver as much as it does to variations. Such a provision avoids any attempt to undermine the written agreement, it avoids a dispute as to the scope of any waiver and it makes it easier to give effect to internal rules concerning the modification of contracts. As Lord Sumption observed, there is no policy reason for not giving effect to such a provision (see [12]). That is as much the case in relation to waiver as it is in relation to variation.

30. Lord Sumption recognised that injustice might result if a party acted on (in this case a waiver) but was then met with reliance on the formality requirements contained (in this case) in clause 9(b). Lord Sumption recognised that in such a situation estoppel would provide the answer. However, Lord Sumption was clear if that was to be relied on (1) there would have to be words or conduct constituting an unequivocal representation that the variation (or here the waiver) was valid notwithstanding that the formality requirements contained in this case in clause 9(b) had not been complied with; and (2) something more than the informal promise (or here waiver) would be required before the relevant estoppel could arise. It is for this reason that I accept the claimant's submission that for the defendant to succeed in its waiver claim it would have to show that the claimant had unequivocally represented that what is alleged to be a waiver was valid notwithstanding its informality and would have to do so by reference to something more than what is alleged to constitute the waiver. Before turning to the facts I should note in case I am wrong regarding that I understand to be the effect of Andrew Smith J's judgment in Kaupthing Singer v UBS AG, *ibid*, that Andrew Smith J's judgment in that case pre-dated Rock Advertising v MWB by almost five years and would have to be reconsidered in the light of the Supreme Court's decision in Rock Advertising.
31. Against that background, I turn to the facts on which the defendant relies. In doing so it is necessary to remember how the contractual dispute resolution machinery worked in this case. If a dispute arose between the parties, then it was to be referred to and finally resolved by arbitration under the LCIA rules (see clause 13(b)(i)). By way of derogation from clause 13(b)(i) the claimant was entitled by notice to require "*...any specific dispute be heard by...*" the

courts of England and Wales (see clauses 3(b)(ii) and (iii)). Thus, whilst the claimant could have chosen to require this particular dispute to be referred to the courts prior to the commencement by the defendant of the arbitration, if a claim in arbitration was reasonably in contemplation at least, it was under no obligation to do so, so long (as in fact was the case) the claimant gave notice to the defendant within 14 days of the date of service of the request for arbitration on the claimant.

32. In my judgment, that is factually all the more significant in this case because at no stage prior to its serving its request for arbitration had the defendant identified an intention to commence its claim by arbitration. There was therefore no good reason for the claimant to do anything prior to service of the request for arbitration, much less choose between arbitration and exercising its rights under the clause 3(b)(ii) option.

33. The following are the facts the defendant relies upon as constituting waiver or representational promises giving rise to an estoppel:

(a) the contents of the application notice for without notice relief which sought orders prohibiting the defendant from pursuing proceedings other than by way of LCIA arbitration;

(b) the claimant's skeleton argument for the without notice application containing statements to similar effect and relying on the principle that Arbitration Agreements should be upheld and that there was no injustice in the defendant being held to its promise to arbitrate disputes;

(c) the claimant's indication that in the event arbitration was commenced, the LCIA or tribunal might arrange for the disputed sum to be held in escrow;

(d) the without notice and final orders sought and granted by the LCCC that restrained the defendant from commencing a claim other than "*...by arbitration in accordance with part 5(k)(i) of the Agreement...*";

(e) various references in the skeleton submission for the final injunction hearing which alleged the Moscow claim had been brought in breach of the Arbitration

Agreement and that the Arbitration Agreement could and should be performed;  
and

(f) the indication in the course of the hearing for the final order that the claimant would consent to the arbitration being conducted fully remotely to meet any suggestion that the parties would not be on an equal footing if a claim were brought in arbitration.

34. The defendant's case on waiver is one I must reject for the following reasons. First, as I have observed already but repeat, the defendant was required by clause 13(b)(i) of the Arbitration and Jurisdiction Agreement to refer the dispute to arbitration under the rules of the LCIA. That was all the more the case if, as was in fact the case, it chose to proceed unilaterally. It could have given prior notice of what it intended to do; but it did not. It could have sought to reach agreement with the claimant as to how the dispute should be resolved within the framework of the Arbitration and Jurisdiction Agreement; but it did not. It could have invited the claimant to waive or vary the terms of the Arbitration and Jurisdiction Agreement so as to permit the dispute to be resolved by arbitration; but again it did not. It chose first to start the Moscow claim in breach of contract, then to oppose the claimant's attempts to enforce the Agreement, then to commence the arbitration as it was required to do by the Agreement without any prior notice to the claimant.
35. The claimant could have decided to insist on court proceedings at an early stage, but it was not required to choose whether to exercise its option until 14 days after it had been served with notice of arbitration by the defendant. It is true to say that in the various ways set out in the summary above, the claimant referred to arbitration, but not to court proceedings. However, there was no necessity for the claimant to say anything about its option at that stage. The issue between the parties concerned whether the defendant should be permitted to continue the Moscow claim in breach of contract or whether the Arbitration and Jurisdiction Agreement should be enforced. Although the terms of the orders are relied on as indicating an unequivocal choice on the part of the claimant, in my judgment neither of the orders were any such thing. Each included the important phrase "*otherwise than by arbitration in accordance with Part 5(k)(i) of the*



*Agreement*", and the application notice for the final order was for a continuation of the order I made on the without notice application that included that phrase. That is a reference to clause 13(b)(i) and that clause is expressly qualified as being "*subject to (ii) and (iii) below...*", those being the paragraphs that contain the claimant's entitlement to have a dispute resolved by a court providing notice is given within 14 days of service by the defendant of notice to arbitrate. Thus in my judgment the statement in the orders relied by the defendant cannot be said to be (or be sufficiently) unequivocal to support the defendant's waiver and estoppel cases.

36. Lest that be thought unduly technical, it is to be weighed with the other statements passing between the parties that undermine the suggestion that the claimant by its statements referred to above, either collectively or individually, had unequivocally waived its right to rely on its clause 13(b)(ii) option or was understood by the defendant to have done so. In the Moscow claim the defendant described the Arbitration and Jurisdiction Agreement as containing "*... an arbitration clause...with subparagraphs conferring rights on [the claimant] alone to call on the courts of England as the competent organ for resolving disputes*". In its submissions on the without notice application, the whole of clause 13(b) was quoted by the claimant (see paragraph 4(3) of its skeleton submissions) and referred specifically to the asymmetric jurisdiction clause in paragraphs 38 and 51). There are a number of references to the potential role of the English courts in the claimant's submissions in support of its jurisdictional challenge to the Russian claim (see in particular paragraphs 1.1.2, 1.2.1, 1.2.3 and 2.2.2).
37. Unsurprising, therefore, at the return date hearing for the final anti-suit injunction neither party proceeded on the basis that the clause 13(b)(ii) option had ceased to be available to the claimant. That is apparent from the witness statement of Mr. Rahman, the solicitor who then had conduct of the anti-suit injunction proceedings on behalf of the defendant, dated 18th March 2024, which was provided expressly in answer to the claimant's application for a final ASI - see paragraphs 1 and 4. The case advanced in that statement was that set out in paragraph 4(a) namely, that "*... the Arbitration Agreement in this case*

*had become inoperative or alternatively incapable of performance whether by frustration or otherwise...*" There was then a series of paragraphs setting out evidence as to what was said to be the practical difficulties said to face Russian-based entities, including the defendant in this case, who are required to arbitrate in the United Kingdom, which were said to support the suggestion of frustration. That section of the evidence culminated with paragraph 29 which concluded "*For the avoidance of doubt, largely the same considerations apply to other forum provisions of the Agreement...*". In context, that was, and could only have been, a reference to court proceedings commenced in the event that the bank exercised its option conferred by clause 13(b)(ii) of the Agreement. That this was so was put beyond doubt by the skeleton submissions of Mr. Majumdar KC, who was then instructed on behalf of the defendant. Having developed arguments in relation to the frustration points, he concluded at paragraph 23:

"Even allowing for the fact that frustration is not likely to be invoked...it is the substantial...determination in VEB's diminution in VEB's practical ability to access and participate in the process which gives rise to frustration in this case. Materially, the same point applies to the alternative provision as to London High Court jurisdiction."

This is entirely inconsistent with any understanding on the part of the defendant that the right of the claimant to rely on the clause 13(b)(ii) option had been waived or that it was estopped from relying on it.

38. Thus, in my judgment, no one was proceeding on the basis of an unequivocal election by the claimant at any stage prior to the service by the first defendant of its notice to arbitrate. Waiver by election or the other variants of waiver relied on by the defendant could not arise because (a) a choice did not have to be made by the claimant at any stage before service of the notice to arbitrate, and (b) nothing in the way the claimant advanced its applications, when understood in the context of the dispute as it stood, being whether the defendant should be permitted to proceed with the Moscow claim in breach of contract or proceed as had been agreed, constituted an unequivocal election or representation of the sort required if valuable contractual rights are to be treated in law as having been lost by waiver or estoppel.

39. In addition, if waiver by estoppel is to be relied upon then the defendant must prove that it relied on the statements it received. The material referred to above, establishes that there was no material reliance placed on the supposed election prior to the defendant giving notice to arbitrate, which as I have said occurred without prior notice to then claimant weeks after the final ASI had been granted. Unsurprisingly, therefore, the defendant relies for its detrimental reliance exclusively on having engaged Russian and English counsel to act for it in the arbitration and in preparing a 28-page reference for arbitration. It maintains that all, or most of, this would not have been unnecessary if it was required to commence proceedings in court.
40. In my judgment, that is unarguable or close to it. Firstly, the cost of preparing the request for arbitration was a cost the defendant was bound to incur if it was to comply with its contractual obligations. Had it commenced arbitration rather than the Moscow claim, it would have incurred those costs in any event. It was suggested that the costs were greater than might otherwise have been the case by reason of what it maintains were the unequivocal representations by the claimant, but it is difficult to see how that could be so. The nature and extent of the notice to arbitrate was a matter for its own judgment and it is difficult to see how sensibly the contents of the document could be driven by any ostensible belief that the claimant had waived its right to rely on its clause 13(b)(ii) option.
41. Finally, returning to clause 9(b) of the Agreement, absent evidence, Lord Sumption made clear in the paragraph of his judgment referred to earlier that something more than acts or statements alleged to constitute the variation, or here the waiver, were required if it was to be concluded that there was a representation that the waiver was valid notwithstanding its informality. There is nothing in the evidence that satisfies that requirement, nor is there suggested to be. There was no waiver as I have said but if that is wrong there was not (and there is not alleged to be) an unequivocal representation that the alleged waiver was effective notwithstanding its informality.
42. In those circumstances, I conclude that at a factual level (i) there was no sufficient unequivocal act or statement capable of supporting the allegation of waiver, (ii) in relation to the alleged waiver by estoppel, there was no promise

or representation to support that allegation but in any event no, or no sufficient, reliance to support such an allegation, and (iii) in any event, informal waiver was excluded by clause 9(b) of the Agreement, and there is no evidence that would support the proposition that the claimant is estopped from asserting reliance on the clause. The notice exercising the option was valid for the reasons given earlier. For those reasons, I consider that the claimant is entitled to declarations broadly in the forms set out in paragraphs 1 and 2 of the draft Order.

### **Final ASI Amendment Application**

43. So far as amendment to the ASI is concerned, as already explained, had the defendant applied for an amendment so as to permit proceedings to be commenced in the courts of England and Wales, the claimant would have been bound to consent to it, or a court would, in any event, have been bound to grant it. Indeed I doubt whether, had consent been sought, it would have been necessary to do anything other perhaps that exchange letters confirming the position or submitting a consent order. That said, I will make the order sought. I do so for pragmatic reasons in order that the defendant can commence proceedings without having any concern that it will be suggested that the proceedings, if brought, would be brought in breach of the final ASI Order. As indicated earlier, I consider that suggestion implausible, but the amendment means that any remaining doubts the defendant may have on that point will be eliminated as a result.

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