Neutral Citation Number: **[2024] EWHC 790 (Comm)**

Case No: **CL-2024-000040**

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

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

Date: **27 March 2024**

Before :

His Honour Judge Pelling KC

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Between :

Airbus Canada Limited Partnership	**Claimant**
- and -	
Joint Stock Company Ilyushin Finance Co.	**Defendant**

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- -

Louise Hutton KC and Owen Lloyd (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimant**

Hearing dates: **27th March 2024**

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JUDGMENT 2

His Honour Judge Pelling KC **Wednesday, 27 March 2024**
(**10:17**am)

Judgment by **HIS HONOUR JUDGE PELLING KC**

1. This is an application for final anti-suit declaratory and injunctive relief, and also for a mandatory order following upon the grant of a without notice interlocutory order in favour of the claimant by Mr Justice Butcher.

2. These proceedings arise out of a contract between the parties concerning the supply of aircraft in which the defendant seeks the recovery from the claimant of a part payment of sums previously paid to the claimant. The contract under which any such claim is to be advanced contains express provisions relating both to governing law and to the resolution of disputes by arbitration. The relevant provisions are clauses 21.1 and 21.2 of the relevant agreement which respectively provide as follows:

> "This agreement shall be governed by and construed in accordance with the laws of the State of New York, but without reference to any conflict of law rules that would lead to the application of the laws of another jurisdiction. …".

Clause 21.2 then goes on to provide:

> "Any dispute arising out of or in connection with this agreement, including any question regarding its existence, validity and termination shall be referred to and finally resolved by arbitration under the Rules of Arbitration of the London Court of International Arbitration, LCIA, by three arbitrators appointed in accordance with the said rules. Each of the parties shall appoint one arbitrator and the third arbitrator, who shall act as chairman, shall be appointed by the pre-appointed two arbitrators. The chairman of the arbitral tribunal shall not be of Canadian or Russian nationality. The arbitral tribunal shall apply the international bar association rules on the taking of evidence on international arbitration. The place of the arbitration shall be London, England. The administrative costs of the arbitration and the

arbitrators' fees, as determined by the LCIA shall be shared on an equal basis by the parties, each party shall bear its own legal fees and costs".

3. The cause of these proceedings is that the defendant has commenced proceedings in Russia, seeking declarations concerning the termination of the relevant agreement and repayment of the sums previously paid to the claimant. The claimant alleges that these are proceedings which have been commenced in breach of the arbitration agreement contained in clause 21.2 of the agreement between the parties.
4. The procedural history is relatively straightforward. On 23 January of this year the claimant commenced these proceedings seeking in the first instance a negative interim anti-suit injunction which, as I have said, was granted by Mr Justice Butcher following a without notice hearing. Since that order was granted and served, rather than engage with the process in England, or comply with the directions that Mr Justice Butcher gave and which are set out in the order he made when granting the interim anti-suit injunction, the defendant has commenced fresh proceedings in Russia in defiance of the order made by Mr Justice Butcher, seeking anti-anti-suit relief as against the claimant.
5. The principles which apply on an application of this sort are well-established and were set out by Mr Justice Butcher in his judgment on the without notice application. It is not necessary that I set out again the relevant case law all of which is set out in that judgment.
6. The first issue which has to be resolved on an application of this sort is to decide whether or not the applicant has demonstrated a high probability of success that pursuit of the foreign proceedings involves a breach of an arbitration agreement between the parties. This requires proof to that standard both of the existence of the alleged arbitration agreement and that the subject matter of the foreign proceedings comes within the scope of that arbitration agreement. There is no doubt that there is an arbitration agreement between the parties because it is expressly set out in clause 21 of the commercial agreement between the parties. An issue arises, at least theoretically, as to whether

or not the law applicable to the arbitration agreement is English law or New York law, because, as I have said, there was an express provision which makes the governing law of the substantive contract New York law and there is no express provision identifying the applicable curial law.

7. So far as that is concerned, as I have already explained, the arbitration agreement that is contained in the substantive agreement requires that any dispute be referred to and resolved by arbitration under the Rules of Arbitration of the London Court of International Arbitration and provides that the arbitration is to be seated in London. The LCIA rules contain a provision which makes English law the curial law of the arbitration instituted in accordance with the LCIA rules. Rule 16.4 of the LCIA rules provides:

> "Subject to article 16.5 below the law applicable to the arbitration agreement and the arbitration shall be the law applicable at the seat of the arbitration unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat".

Rule 16.5 of the LCIA rules provides that the LCIA rules shall be interpreted in accordance with the laws of England. In those circumstances, Ms Hutton KC submits on behalf of the claimant that the effect of the arbitration agreement between the parties has been to make the proper law of the arbitration agreement English law. So far as that is concerned, the relevant principles are those set out in Enka Imsat v OOO Insurance Company Chubb [2020] UKSC 38; [2020] 1 WLR at paragraph 170 of the judgment of Lord Hamblen and Lord Leggatt, JJSC. The principles are summarised over nine subparagraphs. Those relevant for for present purposes are the following:

> "1. Where a contract contains an agreement to resolve disputes arising from it by arbitration, the law applicable to the arbitration agreement may not be the same as the law applicable to other parts of the contract and is to be determined by applying English common law principles for resolving conflicts of law ...

2. According to these laws the law applicable to the arbitration agreement will be (a) the law chosen by the parties to govern it, or (b) in the absence of such choice the system of law with which the arbitration agreement is most closely connected ..."

Pausing there, the summary set out by Lords Hamblen and Leggatt make it abundantly clear that there is no necessary problem that arises where the curial system of law is different from the system of law which governs the contract, the substantive contract. The question which has to be asked, as identified in the summary so far, is whether or not a law has been chosen by the parties to govern the arbitration agreement. As I have explained, the parties have expressly incorporated into their agreement a requirement that any dispute be resolved by arbitration under the LCIA rules, and as I have also explained, paragraph 16.4 of the LCIA rules requires that the curial law applicable shall be the law at the seat of the arbitration. As is apparent from the arbitration agreement which I set out in full at the start of this judgment, the arbitration is required to take place in London, and, therefore, I'm satisfied that the parties have expressly chosen English law as being the law applicable to the arbitration because they have chosen, as the seat of their arbitration, London, and they have chosen to have their arbitration governed by the LCIA rules which incorporates rule 16.4 in the terms set out earlier.

8. The further points made in the summary of the law at paragraph 170 of the judgments in Enka Imsat v OOO Insurance Company Chubb take matters no further in so far as this case is concerned. In particular, the principle that the choice of a different country as the seat of the arbitration is not without more sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement, does not arise in the circumstances of this case, because what the parties have chosen to do is to incorporate by reference the LCIA rules which expressly require that the law applicable to the arbitration will be the law of the seat.

9. In those circumstances, I'm satisfied that applying the English law construction principles that I'm obliged to apply, the parties have chosen English law as the law applicable to their arbitration agreement.
10. The question that then arises is whether or not there has been a breach of the arbitration agreement by the commencement of the proceedings in Russia.
11. So far as that is concerned, I'm entirely satisfied that there has been a breach as alleged. The dispute is one that plainly comes within the terms of the arbitration agreement between the parties because the dispute is manifestly one which arises out of, or in connection with, the purchase agreement. The dispute is concerned with whether or not the purchase agreement under which the advance payments were made by the defendant to the claimant has been terminated by the defendant, or is capable of being terminated in the circumstances that have arisen, and, if it has been terminated, what the consequences are of such termination.
12. In those circumstances I needn't take up time describing what the consequences will be had I concluded contrary to what I said earlier that New York law applied as to the arbitration agreement, although it is apparent from the material that has been filed and served as part of the evidence that the outcome applying New York law will be not be materially different to the outcome applying English law.
13. It is then necessary to decide whether there are any strong reasons which justify refusal of final anti-suit relief.
14. So far as that is concerned, it's necessary to start by noting the basis on which the proceedings in Russia have been commenced. In the Russian proceedings the defendant acknowledges that the relevant agreement is that to which I have referred, and, more particularly, pleads the existence of the relevant arbitration agreement, but without suggesting that the arbitration agreement is in any way invalid. The basis on which the defendant maintains that the Russian courts have jurisdiction, is pleaded in the first Russian proceedings as arising from the fact that the defendant is a designated

entity within the sanction regulations applicable in Canada and the UK amongst other jurisdictions. The result is that the claimant is prohibited from making payments to the defendant. It is maintained by the defendant that following its inclusion on the sanctions list it has been unable to make settlements, receive services or benefit from any work done by the claimant in these proceedings, and in those circumstances claims to be entitled to commence proceedings in the Russian court for recovery of the previously-paid advance. The basis on which the defendant maintains that jurisdiction is available to the Russian court notwithstanding the arbitration agreement between the parties is by reference to article 248 of the Arbitrazh Procedure Code of the Russian Federation. Insofar as it is material for present purposes, and acknowledging that I'm about to read from a translation from Russian of the relevant provisions, they are to the following effect:

> "1. Unless otherwise established by an international treaty to which the Russian Federation is a party or an agreement of the parties according to which the dispute resolution involving them falls under the jurisdiction of foreign courts, international commercial arbitrations outside the Russian Federation, Russian Arbitrazh courts have exclusive jurisdictions as follows: 1) disputes involving persons subject to restrictive measures imposed by a foreign state ..."

Sub-article 248.4 of the relevant law provides:

> "The provisions of this article shall also apply if the agreement of the parties, pursuant to which the dispute resolution involving them falls under the jurisdiction of the foreign court and international commercial arbitration outside the Russian Federation is unenforceable due to restrictive measures applied to one of the persons participating in a dispute by a foreign state".

15. Against that background, it's necessary now to turn to the question of whether there are any strong reasons to refuse the relevant relief sought. It's relevant to note that the defendant has not participated in these proceedings, and, therefore, it is difficult to anticipate definitively what, if anything, they might actually rely upon, and what Ms Hutton has sought to do is to identify

comprehensively points which, in fairness even at this stage, ought to be taken into account in deciding whether or not there are any relevant strong reasons.

16. The first point which needs to be addressed is whether it could sensibly be contended by the defendant that there's a strong reason to ignore the arbitration agreement because, on a proper analysis, the effect of sanctions means that it cannot access justice in an LCIA arbitration. In my judgment, this point lacks all substance, essentially for the reasons I summarised in the course of the argument: any sanctioned entity seeking to use funds otherwise frozen by the sanction regulations in England may use frozen assets providing that is permitted either by a general license issued by the office of financial sanctions implementation ("Office"), or by a specific license issued to the relevant sanctioned or designated entity. As to general licences, firstly, on 17 October 2022, the Office issued a general license which permits designated entities to make payments to the LCIA to cover LCIA arbitration costs. Secondly, on 25 October 2023, the Office issued a general license which permits UK law firms, legal advisers and counsel to receive payment from frozen assets for the provision of legal services to a designated person or entity, and, thirdly, in any event, any sanctioned entity may apply to the Office for a specific license which would enable them to expend sums in excess of that permitted by the general license to the extent that was necessary in relation to litigation or arbitration in England. Furthermore, having regard to the difficulties posed by the need to seek licences, it has become a fairly regular feature of English state court litigation, and I suspect arbitration as well, to tailor procedural orders and directions so as to facilitate the application for relevant licences as and where necessary, before requiring parties to take steps which otherwise -- they would not be able to take. In my judgment, therefore, to suggest that the defendant would not be able to access justice when conducting an arbitration in accordance with the agreement it chose to enter into is close to unarguable.

17. It might be suggested that a sanctions defence would be compromised if proceedings were permitted in Russia in a way that would not be so if the dispute between the parties were resolved by

arbitration in London. As Ms Hutton correctly submits, this is an issue which would ultimately have to be resolved by the arbitrators in the arbitration process, but the non-availability to the claimant in the Russian proceedings of a defence based on the effect of the sanctions regulations is not a good reason, but, on the contrary, is a bad reason for not giving effect to the arbitration agreement if as a matter of New York law such a defence was available to the claimant because it would involve a submission that the Russian Court would ignore part of what is the substantive law of the contract between the parties. Wishing to breach the arbitration agreement in order to litigate before a court that would ignore part of the governing law of that contract is entirely illegitimate and is not even arguably a good much less a strong reason for refusing anti suit relief.

18. It is not open to the defendant to maintain that it has no choice but to bring the Russian proceedings because, it is at least realistically arguable the effect of article 248.1 is permissory, not mandatory.

19. In those circumstances, the question then becomes whether there are any other, more generalised reasons for refusing an order in the exercise of the court's discretion. So far as that is concerned, manifestly, damages are not an adequate remedy for breach of an arbitration agreement for the reasons identified in the Angelic Grace [1995] 1 Lloyds Rep 87, the leading authority in this area. .

20. The next question I need to ask is whether there are any comity issues which would lead to the conclusion that I should not make the order which would otherwise necessarily follow from my conclusion that there has been a breach of the arbitration agreement between the parties. So far as that is concerned, there has been no appreciable delay in this case. There have been no substantive steps taken in the Russian proceedings, as far as is known to the claimant, and in those circumstances it is difficult to see what, if any, relevance comity could have given that this is a claim advanced by reference to an agreement freely entered into between the parties, that their disputes will be resolved by arbitration. Any order I make operates on the defendant not the Russian court.

21. The only other issue which I need to address, albeit briefly, is practical utility. There are a number of authorities in English law which suggest that a court will not grant injunctions which would otherwise be appropriate where they would serve no practical utility. It might be said that in the circumstances of this case, having regard to the way in which the defendant has responded to the without notice order made by Butcher J there is a relatively high likelihood that the defendant will simply ignore any further orders made by the English court. That is undoubtedly a possibility. Aside however from such conduct being a contempt of this court which would expose the directors of the defendant to sanctions including unlimited fines and imprisonment of up to two years, there is practical utility in making of the orders sought by the claimant, essentially for two reasons. Firstly, it will be open to the claimants to commence arbitration proceedings and seek negative declaratory relief in those proceedings which would then be enforceable using the usual cross-border techniques available around the world for the enforcement of international arbitral awards using the New York convention process, and, secondly, and perhaps more importantly, an order in mandatory terms in these proceedings is likely to prove useful if, and to the extent the defendant obtains a judgment in the Russian proceedings and seeks to enforce those elsewhere.
22. In those circumstances, I'm satisfied that as a matter of discretion I should grant the orders sought.
23. The only other points that I have been asked to deal with at this stage before dealing with costs and the terms of the order concern whether or not I should make a mandatory order in addition to negative provisions that are usually found in orders of this sort. Whilst it might be said that an order positively requiring the defendant to discontinue the Russian proceedings, including now, of course, the Russian anti-anti-suit proceedings, will have no materially better effect than the negative orders previously made, by the same token, a mandatory order is likely to assist on the matters which I have taken into account when concluding that there is utility in making the orders sought. In short, a positive mandatory order requiring the defendant to discontinue the proceedings is likely to be of more influence than a merely negative order when issues concerning enforcement arise.

24. The other issue which arises concerns whether or not I should make, in addition, an anti-enforcement injunction. These are relatively rarely made, largely, as is acknowledged in the case law, because the conditions which require such orders to be made relatively rarely arise. Nonetheless, it is appropriate to make an order in the circumstances of this case because there is a real risk that the Russian proceedings will continue to a judgment and, therefore, there is a practical utility in an order which positively prohibits the enforcement of any such judgment. Furthermore, there is some suggestion in some of the Russian cases that have been decided by the Russian courts that the Russian courts will or may refuse to permit a party to withdraw proceedings pursuant to an order made by a foreign court. In those circumstances, an anti-enforcement injunction is appropriate not least because it is likely that a Russian Court will refuse to give effect to the applicable sanctions regime notwithstanding that such a regime is to be given effect rto applying the governing law of the purchase agreement. In the result, therefore, and in principle I'm prepared to make the order that is sought.