Claim No. 2015 Folio 98/CL-2015-000396

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

IN THE MATTER OF THE ARBITRATION ACT 1996

AND IN THE MATTER OF AN ARBITRATION CLAIM

Before: Mr Justice Henshaw

Dated 1 April 2022

BETWEEN:

(1) HULLEY ENTERPRISES LIMITED

(2) YUKOS UNIVERSAL LIMITED

(3) VETERAN PETROLEUM LIMITED

Claimants

and

THE RUSSIAN FEDERATION

Defendant

Jonathan Crow QC and David Peters (Instructed by **Stephenson Harwood LLP**) appeared on behalf of the Claimants

David Goldberg (Instructed by **White & Case LLP)** appeared on behalf of the Defendant

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RULING

Digital Transcription by Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London, EC4A 1JS
Tel No: 020 7404 1400
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

1. **MR JUSTICE HENSHAW:** I am asked to give directions for the future progress of the claimants' renewed application, which I understand was served on 8 March 2022, to lift the stay, alternatively to require security to be provided in the event that the stays continues, following the decision of the Supreme Court of the Netherlands on 5 November 2021. It is not necessary to recite all the background to this matter, which is set out in my previous judgment at [2021] EWHC 894 (Comm) and the skeleton arguments for today's hearing. The essential question is what will be a sensible and reasonable procedural timetable for service of the evidence in relation to the renewed application.

2. The decision of the Supreme Court of the Netherlands significantly changes the landscape since my previous judgment on 14 April 2021, because it finally determines against Russia all the grounds which, in the hearing before me then, were advanced as being relevant to the questions of jurisdiction and immunity: i.e. the question of whether Russia had agreed in writing to submit the dispute to arbitration for the purposes of section 9(1) of the State Immunity Act 1978 (see paragraphs 45 to 50 of my previous judgment).

3. The only ground of challenge which the Supreme Court of the Netherlands' judgment leaves outstanding is whether the Awards should be set aside on the ground of alleged procedural fraud by the claimants, that being the issue discussed (to a certain extent) in paragraphs 73 to 83 of my previous judgment. Russia accepted before me at the previous hearing that that ground does not go to the question of jurisdiction in the sense I have just mentioned.

4. The Supreme Court has annulled, among other things, the Hague Court of Appeal's decision of 18 February 2020 reinstating the award. Russia suggests that the current position is, therefore, that the Awards have been set aside, in effect by reason of the original Hague District Court's decision of 20 April 2016. That may be a matter for argument on the substantive hearing of the claimants' application, to the extent that it is or may be relevant.

5. In relation to the application as it now stands, Russia says it will need to adduce evidence about the following matters:

(1) the impact of sanctions on the claimants' ability to enforce the Awards;

(2) the same factors as were raised in the previous hearing before me, including whether the efforts by Russia to set aside the Awards constituted a *bona fide* challenge; the extent to which the claimants would suffer prejudice if the stay remained in place; the extent to which Russia would suffer prejudice if the stay did not remain in place; and the risk of dissipation by Russia, in addition to a number of matters of law/argument;

(3) the effect of the Supreme Court of the Netherlands' decision;

(4) the likely length of the proceedings remitted before the Amsterdam Court of Appeal;

(5) the likely outcome of those proceedings; and

(6) Dutch law in relation to the claimants' prospects of success in those Court of Appeal proceedings.

6. As to these matters, first, the impact of the sanctions on the claimants' ability to enforce is said, as I understand it, to be potentially relevant to Russia's ability to remove assets easily from the UK; that in turn being a matter which may go to the prejudice suffered by at the claimants if the stay remains in force. On the other hand, the terms and general effect of the sanctions are a matter of law, and can be set forth with little or factual evidence being provided. Counsel for Russia was not in a position to state what, if any, further evidence might be adduced of a factual nature. For example, he was not in a position to say whether Russia might have any intention to adduce evidence of what its UK assets actually are and, hence, the difficulty or otherwise with which they might be removed from the UK. In these circumstances, I find it difficult to see this area as a matter likely to require extensive evidence. It is possible that Russia will wish to put in general high level evidence about its stated intentions or the value of its assets, but that is something that was done in the previous hearing and it seems to me could be done relatively shortly. Unless Russia were to decide to condescend to provide details of its assets – which it has not given any indication it proposes to do – it

does not seem to me that extensive or lengthy evidence of fact is likely to be required in relation to this topic.

7. Secondly, as to matters of the same nature as those which were considered in my previous judgment, regarding *bona fide* challenge, prejudice and risk of dissipation, those are matters which have already been canvassed in evidence in the previous hearing before me. This is, after all, a renewed application: and the claimants in renewing the application have not themselves put forward substantive new evidence on those points. They do say that they will invite the court to draw inferences from matters of public record, including in particular Russia's invasion of Ukraine and the West's reaction to it. But, again, unless Russia were to seek to adduce detailed evidence about its assets in the UK, which it has not indicated it plans to do, these do not seem to me to be matters which will require substantial new evidence.

8. Thirdly, the effect of the Dutch Supreme Court decision may be an issue in the sense I have already indicated: in other words, its impact on the status of the Awards. However, any such evidence seems likely to be self-contained and relatively straightforward. Moreover, the Statement of Points and Authorities filed by Russia on 10 December 2021 in the parallel proceedings before the United States District Court for the District of Colombia includes reference to Dutch law evidence adduced on that point. It therefore appears that Russia at least has a head start on what in any event is likely in my view to be relatively brief evidence.

9. Fourthly, the likely length of the Dutch proceedings will equally not require extensive evidence, and Russia has again already prepared evidence on this point to put before the US District Court on its application to continue the stay there: see page 11 of the Statement of Points and Authorities.

10. Fifthly, some evidence may be relevant as to the likely outcome of the proceedings now remitted to the Amsterdam Court of Appeal, albeit within the constraints indicated by the case law referred to in paragraph 60 of my previous judgment, i.e. that the court has to form a view based on a brief consideration. However, Russia must, first of all, have prepared evidence already in support of its original petition to the Dutch Court of Appeal (the Hague Court of Appeal) seeking to set aside the awards on the

ground of the alleged fraud, and counsel for the claimants indicated on instructions that Russia had indeed done so. It is also apparent from pages 6 to 11 of Russia's Statement of Points and Authorities before the US District Court that it has produced evidence on that issue in the form of a Declaration by its attorney, exhibiting documents. Whilst the legal test and form of evidence may differ in the US, the underlying facts and narrative can scarcely be any different. Counsel for Russia told me that in the proceedings now pending in the Amsterdam Court of Appeal, the claimants served in February this year a response of the order of 100 pages to the fraud allegations, to which Russia is due to respond by a date in mid May: and that is something I need to take into account.

11. Sixthly, counsel for Russia indicated that it may be appropriate for Dutch law evidence to be adduced as to the prospects of success of the fraud allegations. I will return to the question of expert evidence at the end of this ruling. It seems to me, subject to the question of permission, that it is possible that Dutch law evidence may be necessary on that point, although (again) Russia must have taken such advice from Dutch counsel before it advanced its fraud argument before the Hague Court of Appeal. I note, as the point was canvassed during argument, that it is not necessarily the case that Russia would need for the purpose of the forthcoming application to seek independent expert evidence. As paragraph F8.10 of the Commercial Court guide indicates, it will frequently be satisfactory for expert evidence of foreign law for an interim application to take the form of an opinion by an appropriately qualified lawyer who acts for the party.

12. Viewing the matter more generally, I take into account, first, that Russia has now had the claimants' application for several weeks since its service early last month. I also take into account the point that both parties anticipate that it will not be possible to list the hearing before October this year.

13. I find it of limited help to seek to anticipate problems about possible delay arising from the intended change of legal representation on Russia's part, following the resignation of Russia's counsel team and White & Case's decision to cease to act once there can be a handover to another firm. Importantly, though, Russia makes clear that it does not rely on a change of representation to justify the timetable it seeks, nor its current lack

of counsel (barrister) representation. The claimants urge me to order that the evidence be produced in a particularly short timetable, in order to avoid the problem that the evidence is not filed before the time when White & Case cease to act and there is then a long delay proposed while a new firm and/or new counsel read in and get up to speed with the case. The difficulty with that approach, though, is that I do in any event need to set a timetable which is realistic. Moreover, the possibility of a future change of legal representation is not a matter that is likely to result in the court agreeing to postpone the hearing once listed. Whatever timetable I set today, Russia will be aware of that timetable and it will know that it needs to get on with producing and filing and serving the evidence as quickly as possible: all the more so if there is some risk of disruption caused by a change of legal representation. In those circumstances, it does not appear to me that this is a factor which I should take account of, in the sense of setting a timetable shorter than that which I would otherwise order.

14. However, having had regard to all the circumstances I have mentioned, I do not consider that Russia needs as much time as it proposes, namely until 1 June. Conversely, I consider the claimants' proposed deadline, viz 14 days from today, to be too short given that there are some areas, as I have identified, where factual evidence will be required. I consider that Russia should have 5 weeks from today, i.e. until Friday 6 May, to file its evidence.

15. I shall hear submissions on the subsequent deadlines, but I am presently minded to say they should include the claimants serving any reply evidence by Friday 27 May. The hearing should then be listed for the first available date on or after 3 October, with deadlines for the bundle and skeletons working back from the listing actually obtained.

16. As to expert evidence, the current position is that no application has been made, either in writing or indeed orally today, for permission to adduce such evidence. The evidence in question would be Dutch law evidence of the kind I have indicated, going to (i) the effect of the decision of the Supreme Court of the Netherlands and possibly (ii) the prospects of success of the extant fraud argument being run in the Amsterdam Court of Appeal.

17. The claimants urged me to rule in effect pre-emptively now that no expert evidence can be adduced, for fear of possible future disruption to the timetable. Russia asks me to rule that it may have until 15 April to make an application to adduce expert evidence.

18. I am not attracted by either proposal. I do not consider Russia's proposal acceptable because it will simply result in a substantial further delay in the whole process, because it would be necessary then to list and resolve the application (unless it were dealt with by consent) with evidence presumably following after that. That, it seems to me, would result in far too protracted a timetable, and would put the hearing in the Michaelmas term at risk. Conversely, I am not persuaded that I should pre-emptively decide now that expert evidence of Dutch law may not be adduced. One of the factors that would need to be considered in that regard would be the precise scope of the evidence, which at the moment, based on the submissions heard today, remains somewhat unclear. I do, though, put down a marker that the Commercial Court Guide makes clear that a party wishing to adduce expert evidence, including evidence of foreign law, should do so at an early stage. It will be a matter for the court to consider whether, no such application having been made hitherto, any Dutch law evidence should be permitted. However, I do not consider it right to make a pre-emptive ruling on that point today.

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Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400
Email: civil@epiqglobal.co.uk