

Neutral Citation Number: [2021] EWHC 623 (Comm)

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

IN THE MATTER OF AN ARBITRATION CLAIM

The Honourable Mr Justice Jacobs
12 March 2020

B E T W E E N :

- (1) QUADRA COMMODITIES S.A.**
(2) IFCHOR (SWITZERLAND) SA
(formerly named Ifchor S.A.)
(3) AMAGGI S.A.

Claimants

-and-

INTERNATIONAL BANK OF ST-PETERSBURG
(JOINT-STOCK COMPANY) (IN LIQUIDATION)

Defendant

Jawdat Khurshid QC and Sushma Ananda for the Claimant
David Allen QC and Jason Robinson for the Defendant

Hearing dates: 12th March 2021

JUDGMENT

Corrected pursuant to CPR 40.12

The Honourable Mr Justice Jacobs

Friday, 12 March 2021

Judgment by **THE HONOURABLE MR JUSTICE JACOBS**

(5.23 pm)

1. The issue before me is how to interpret an undertaking which was given by the claimants in the context of an anti-suit injunction granted by His Honour Judge Pelling QC on the 30 September 2020. The undertaking is in paragraph 8 of the order:

“Provided that the rights and obligation of the parties to the Discharge Agreements and the LC Issuance Agreements, and all issues of fact with respect thereto, shall be determined by reference to English law as the law governing those agreements, each of the Claimants undertakes not to contend before the tribunals in the Arbitrations that it is not open to the Defendant to pursue in the Arbitrations the claims in respect of the Discharge Agreements and the LC Issuance Agreements currently being brought by or in the name of the Defendant in the Russian Proceedings under Article 61.2 of the Bankruptcy Law and to obtain the relief claimed in respect of the same in the event the requirements of Article 61.2 of the Bankruptcy Law are found to have been satisfied.”

(Emphasis supplied)

The underlined words are those which are the focus of issues which developed between the parties.

There is no lack of clarity in the remaining words of the undertaking, but the question is how the underlined words, and the proviso contained therein, affects the undertaking so given.

2. The background to this dispute is well known to the parties and can be summarised very briefly. There is a dispute between the parties as to the validity of certain discharge agreements which were concluded between the claimants and the defendant Bank which is now in liquidation. In broad summary the claimants wish to uphold the validity of those agreements which, in practical terms, will have the effect that further monies will not be owed to the defendant. The defendant wishes to argue to the contrary.
3. To that end, the defendant brought certain proceedings in Russia relying upon certain provisions of the Russian Bankruptcy Law referred to in the undertaking. It is not necessary to describe those

proceedings in detail. They were effectively stopped by the anti-suit injunction which HHJ Pelling granted. He granted that injunction originally on a without notice application. The order made on 30 September 2020 was at an inter partes hearing. In the event, however, the defendant made its points in correspondence and did not attend that hearing. HHJ Pelling was addressed, therefore, only by Mr Khurshid QC, who appeared for the claimants and who appears before me today.

4. The nature of the undertaking, including the proviso, was explained by the claimants to HHJ Pelling in a written skeleton argument prepared in advance of the hearing. It was also addressed before the judge orally. There is a transcript of the hearing which I have read on a number of occasions. The judge asked various questions of Mr Khurshid which were answered. In the end, HHJ Pelling was persuaded to grant the injunction with the undertaking in the terms which Mr Khurshid had proposed.
5. The claims and counterclaims have thereafter been pursued in London arbitration proceedings which are ongoing. Issues between the parties arose as to the meaning and effect of paragraph 8 of the undertaking in the context of the claims and counterclaims so advanced in the arbitration. These led to the present application which seeks declaratory relief as to the effect of the undertaking and the proviso, as well as a declaration that the claimants have not hitherto breached the undertaking.
6. There is a considerable history to the correspondence, some of which I have been taken through and some of which I looked at when the matter was before me some weeks ago. During the course of the hearing this afternoon, however, I have endeavoured to understand what exactly it is that each side is now saying that the other can or cannot do or argue in the London arbitration proceedings in the context of the claims and counterclaims which have there been made. Accordingly, rather than focusing upon the history, I have tried to identify and understand the parties' current positions.
7. On the defendant's side, the position has now been reached that the defendant says that there is no fetter at all on the arguments which the claimants can advance in support of their case in relation both to the claims and the counterclaims. Nor is there any fetter on the arguments that the defendant

can deploy. Accordingly, the position of Mr Allen QC, who appears for the defendant, is that any order that the court makes on the present application should simply be as follows:

"The proper meaning and effect of the undertaking is that the Defendant is entitled to pursue its Russian counterclaim under Article 61.2 of the Bankruptcy Law and the Claimants agree that they will not argue in the arbitrations that the Defendant is not entitled to do so. The parties are free to argue in the arbitrations whatever they wish as to the circumstances in which that counterclaim is to be considered and resolved by the tribunals."

8. The only fetter for which Mr Allen has argued is that the claimant is not in a position to dispute the jurisdiction of the tribunals in relation to the counterclaim. It is, as I understand it, common ground that that is indeed the effect of the undertaking, whatever the initial words of the proviso may mean. As I understand Mr Khurshid's position, he does not contend that the tribunal has no jurisdiction in relation to the counterclaim.
9. Were he so to contend, I do not consider that that would be consistent with the way in which the matter was presented to His Honour Judge Pelling and nor do I consider that it would be a submission which I should accept. This is because the reason that the undertaking was given to the court was in order to enable the claimants to avoid having to address a potential argument which could have been raised against the granting of the anti-suit injunction. That potential argument had been raised and addressed in the decision of Mr Justice Foxton in the decision in *Riverrock Securities Limited v International Bank of St-Petersburg (Joint Stock Company)* [2020] EWHC 2483 (Comm). That case also involved the present defendant, and the claimant in *Riverrock* also gave an undertaking which meant that the argument did not need to be addressed. The terms of the *Riverrock* undertaking were as follows:

"AND UPON the Claimant further undertaking not to object to the substantive jurisdiction of any validly constituted arbitral tribunal to determine any claim brought by or in the name of the Defendant under Article 61.2 of the Bankruptcy Law in respect of any of the Contracts".

10. The potential argument which this undertaking sought to avoid was, in essence, that the court should not grant an anti-suit injunction if its effect would be to prevent the pursuit of a claim in Russia under Russian bankruptcy law, with the result that there would then, as Mr. Allen put it, be no “home” for that claim at all. The effect of conferring jurisdiction on the arbitral tribunal in the *Riverrock* case was to provide a home for the claim within the London arbitration proceedings between the parties in that case. The present claimants were prepared to give an undertaking in the terms set out above, thereby also providing a home for the claim under Article 61.2 of the Bankruptcy Law, albeit subject to the effect of the proviso in the opening words of paragraph 8 of the order.

11. It is therefore not possible for the claimants to deny the jurisdiction of the arbitrators to deal with the claim, and Mr. Khurshid on behalf of the claimants does not seek to do that. The question which arises, however, is as to the basis upon which that jurisdiction exists. Specifically, the question is, or at least appeared to be, whether the effect of the proviso is to limit the circumstances in which the arbitrators’ jurisdiction arises; either because the defendant is restricted in the arguments that it can present to the tribunal, or because the tribunal’s approach to the arguments is circumscribed or dictated by the proviso, or both. At one stage at least, the claimants were contending that the arbitrators’ jurisdiction would only arise in certain circumstances. By contrast, the defendant contends that the arbitrators have jurisdiction over their counterclaim, and that this is not a limited jurisdiction.

12. Subject to his argument that the jurisdiction of the arbitrators to deal with the counterclaim cannot be disputed, Mr Allen's position on behalf of the defendant is that there is no limit to the points which the claimants can take in order to resist the counterclaim which the defendant makes. Mr Allen also accepts that there is nothing in paragraph 8 of the order, including the proviso, which

assists his case in relation to the merits of the counterclaim; ie in meeting the substance of whatever arguments the claimants advance. The undertaking therefore only assists the defendant, as he has correctly submitted, in establishing the jurisdiction of the tribunal.

13. Mr Khurshid on behalf of the claimants submits that whilst this may be the defendant's position now, it has not always been their position. He submits that, at an early stage of the correspondence, the defendant was saying that the effect of the undertaking was that the claimants were in some way precluded from making certain arguments as to how the tribunal should resolve the counterclaim. In particular, he submits that the defendant was arguing that the impact of the undertaking was that the claimants had to accept that the counterclaim had to be exclusively determined by reference to Russian law. That was a point which, Mr. Khurshid submitted, was of particular concern to the claimants. It was important for the claimants to preserve their argument that the arbitrators' resolution of the counterclaim would be significantly impacted by the claimants' arguments as to the validity of the agreements as a matter of English law and the arbitrators' resolution of that issue. The claimants' ability to make that argument had been expressly preserved by paragraph 8.

14. A fair reading of the transcript of the hearing before His Honour Judge Pelling, and of the skeleton argument that was put forward by Mr Khurshid on that occasion, is that the claimants were indeed concerned to ensure that they were fully able to argue that English law applied to the relevant contracts between the parties, and also that the effect of those agreements being governed by English law and (as the claimants would say) being valid under English law, would be to provide an answer in whole or in part to the defendant's counterclaim. As Mr Khurshid put it in one passage of the transcript at page 6-- and I hesitate to take any particular passages out of context, but do not consider that I am doing so:

"... I think certainly in this wording we have addressed the issue that has arisen, as we see it, from the correspondence, which is that we weren't entitled to even

reply [ie rely] upon English law for our rights and obligations and the facts and that is why we put the express proviso..."

15. I have read the entirety of the transcript and the above passage seems to me to be consistent with the way in which, on a fair reading of Mr Khurshid's skeleton argument, he was seeking to put the position to HHJ Pelling: see for example page 4D-E of the transcript ("we put it as a proviso because of the correspondence has taken place ... so that is to protect our existing rights in relation to our rights and obligations under the agreements") and the discussion which then followed. See too paragraph 28 of the skeleton argument which was before the judge: ("There is no basis for requiring the Claimants to give up their entitlement to have their rights and obligations determined by reference to English law and the Claimants decline to agree to do so").
16. Accordingly, the claimants inserted the proviso in order to preserve in full arguments which, in the course of correspondence, the defendant appeared to be saying would or might not be available to them.
17. I have digressed slightly in order to explain Mr. Khurshid's point that the defendant's current position, as explained by Mr. Allen, has not always been their position. And I will return in due course to the significance of the reasons that were given for the inclusion of the proviso. Reverting to the point which I was addressing, as to what (if anything) the defendant seeks to derive from the undertaking and the proviso: the conclusion from what I have said so far is that, subject to the jurisdiction point, the defendant does not now seek to put any fetter on any of the arguments that the claimants can advance. In particular, the defendant accepts that it will be open to the claimants to argue before the arbitrators that, if the claimants are right in their arguments that the agreements are valid under English law, that that will have an impact and, as the claimants would say, decisive impact on the merits of the counterclaim.

18. I say nothing at all about the merits of that particular argument. It may or may not be a strong point, but it is ultimately a matter for the arbitrators to decide. In other words, it is for the arbitrators to decide what the impact is of any determination – as to the validity of the agreements under English law – on the counterclaim which the defendant wishes to bring. In that regard, it is open to Mr Khurshid and his clients to make whatever points they wish to the arbitrators on the merits of the counterclaim.
19. I have dealt so far with the position as far as the defendant is concerned and how, subject to the jurisdiction point, they do not seek to put any fetter on the claimants' arguments.
20. I now turn to the arguments of the claimants. At various points in the course of Mr Khurshid's submissions, it seemed to me that he accepted that there was no fetter on what the defendant could argue before the tribunal in support of the counterclaim, whose jurisdiction the claimants had accepted. This was, as it seemed to me, where Mr Khurshid finally ended up, albeit by a circuitous route.
21. The position is that when this application was first made, the order sought did unquestionably seek to fetter the points which the defendant could put before the arbitrators in relation to the counterclaim. That is the clear import of the draft order which was attached to the original application notice in November 2020.
22. Subsequent to the making of the application and prior to its determination, there was a hearing before me on 22 January 2021 on the question of whether the defendant should be debarred from making submissions on the substantive hearing of the application. At that time, I expressed certain views to Mr. Khurshid, whilst making it clear that I had not considered the matter fully. Those views led to a revised order which was served by Mr Khurshid's instructing solicitors, Reed Smith, on 8 March 2021. That revised order also, as it seemed to me, certainly in paragraphs 3 and 4, sought to some degree to fetter the approach which the defendant could take to the arguments which it could

advance, as well as the approach which the tribunal could take in relation to how they approached the issues.

23. In the course of his submissions this afternoon, Mr Khurshid from time to time argued in favour of the various fetters that had been proposed. By the end of his submissions, however, and certainly in his reply, he was no longer, enthusiastically at least, pursuing the arguments in support of a fetter. In order to clarify what his clients were seeking, he made certain revisions to the 8 March 2021 draft, and these were then provided in writing. The substance of those revisions was that the claimants were no longer seeking to fetter the arguments which the defendant could advance in support of its counterclaim, and no longer seeking to prescribe the approach which the arbitrators should take in its determination of the counterclaim. Rather, the revisions made it clear (consistent with my view of the way in which the matter was presented to HHJ Pelling) that the effect of the proviso was to enable the claimants to argue certain points before the tribunal. Thus, the principal operative parts of the proposed order, as revised, are as follows:

[1] If, on a determination of the rights and obligations of the parties to the Discharge Agreements and the LC Issuance Agreements, and all issues of fact with respect thereto, by reference to English law as the law governing those Agreements, the Discharge Agreements and the arrangements made pursuant to them are found to be valid, effective and enforceable, then each of the Claimants may contend before the tribunals in the Arbitrations that any claims pursued by the Defendant in the Arbitrations in respect of the Discharge Agreements and LC Issuance Agreements under Article 61.2 of the Bankruptcy Law will be unsustainable and will fall to be dismissed, and that the Defendant will not be entitled to any relief in respect of the same, irrespective of whether or not the requirements of Article 61.2 of the Bankruptcy Law would otherwise have been satisfied by reference to Russian law had it applied. (Emphasis supplied)

[2] Each of the Claimants may contend before the tribunals in the Arbitrations that it is only if, on a determination of the rights and obligations of the parties to the Discharge Agreements and the LC Issuance Agreements, and all issues of fact with respect thereto, by reference to English law as the law governing those Agreements, the Discharge Agreements are found to be invalid, ineffective and unenforceable that the Defendant may be able to obtain relief in respect of the claims pursued by it in the Arbitrations in respect of such Agreements and the LC Issuance Agreements under Article 61.2 of the Bankruptcy Law, if the requirements of Article 61.2 of the Bankruptcy Law are satisfied as a matter of

Russian law and subject to any defences and/or other matters raised by the Claimants. (Emphasis supplied)

24. These revisions, by reason of the underlined words identified above, therefore focus on the contentions that the claimants can put forward to the arbitrators. It now appears to be the case, therefore, that Mr Khurshid and his clients accept that there is no fetter on what the defendant can put to the arbitrators in support of its counterclaim. Nor do the claimants any longer seek to prescribe the way in which the arbitrators should approach the determination of the merits of the counterclaim, in relation to which the arbitrators have jurisdiction. Rather, they go no further than submitting that paragraph 8 of the undertaking does not preclude the claimants from putting forward its arguments, in particular that the validity of the relevant agreements is to be determined by English law and as to the consequences which flow from that determination.
25. Even if that had not been the approach which Mr. Khurshid ultimately took, I consider that it does reflect the true import of paragraph 8 of the undertaking and the proviso. There are a number of reasons why I would not have upheld what appeared to be the case that the claimants were originally advancing; ie that paragraph 8 and the proviso impose some express or implicit fetter on the arguments which the defendant can advance to the tribunal in support of its counterclaim, or the way in which the tribunal should approach its analysis of the points which have been made, and thereby some jurisdictional limitation. The reasons are as follows.
26. First, the reason for paragraph 8 was to deal with the same point that was raised in the *Riverrock* case. This was a potential point which Mr Justice Foxton had identified: namely, that if the effect of the anti-suit injunction would be to eviscerate a claim which was available in Russia but not in England, that potentially might be a strong reason for not granting anti-suit relief. Mr Justice Foxton did not have to resolve that issue in the *Riverrock* case because an undertaking, rather simpler than the one that was given in this case, was given. The undertaking in *Riverrock* had the effect of conferring jurisdiction on the arbitral tribunal, thereby enabling the relevant claim to be

determined on its merits within the arbitration proceedings. That was also the essential reason why the undertaking in the present case was given by the claimants to His Honour Judge Pelling. Given that this was the reason for the undertaking, I would not be attracted to a construction of the proviso which had the effect of introducing significant limitations on the jurisdiction of the arbitrators to determine the counterclaims on the merits by reason of an approach which postulated that the arbitrators' jurisdiction only arose in limited circumstances; whether by constraining the arguments which the defendant could advance, or constraining the approach which the tribunal could take in its resolution of those arguments, or otherwise.

27. Secondly, given that the reason for giving the undertaking was to avoid the potential argument that there was a strong reason to allow proceedings elsewhere to continue, and to confer jurisdiction on the arbitrators, I am not inclined to treat the proviso as impacting to any significant degree upon the clear words of the undertaking which provide that the tribunal has jurisdiction.
28. Thirdly, I do not consider that there can have been any intention on the part of His Honour Judge Pelling, or indeed on the part of the claimants, to seek to fetter the way in which arguments were to be advanced to a tribunal by the defendant in support of a counterclaim which, as a result of the undertaking, the tribunal had jurisdiction to determine. Equally, I do not consider there can have been any intention in the opening words of paragraph 8 to fetter the way in which the arbitrators, who ultimately have to resolve the dispute, were to approach their analysis of the position. Having read the skeleton argument and the transcript of the hearing, it does not seem to me that His Honour Judge Pelling was being told that the impact of the proviso was in some way to limit the tribunal's jurisdiction, whether by fettering the defendant's arguments or fettering the way in which the arbitrators could approach the counterclaim, or otherwise. Looking at the transcript of the hearing as a whole, His Honour Judge Pelling clearly thought that the argument under Russian law relating to Article 61.2 would be going to the tribunal for determination and that issues may arise within the arbitration as to exactly how that was to be approached. He also recognised that those arguments

would inevitably touch upon Russian law. But there was nothing that I have seen, either in the skeleton argument or in the transcript of the hearing, which indicates that he thought, or was given to understand, that there would be some significant fetter either on the defendant or upon the tribunal or that the tribunal's jurisdiction was somehow limited.

29. Fourth, as discussed earlier in this judgment, it does seem to me that, when one looks at the transcript as a whole, the reason for the proviso was that the claimants wished to preserve their arguments; in particular to preserve their argument that the effect of the contracts being governed by English law was to have a decisive effect on the validity of the counterclaim. But there is, to my mind, a difference between preserving an argument and saying positively that the effect of the proviso was to fetter either the defendant or the tribunal, or to constrain the circumstances in which the tribunal's jurisdiction arises.
30. I therefore construe the first lines of the undertaking, which ultimately is the issue which has been the subject of submissions, as preserving the claimants' position to make whatever arguments it wishes as a matter of English law but not to fetter either the defendant or the tribunal. That means that the substance of the undertaking is essentially the same as it was in *Riverrock* which is, in my view, the effect that the undertaking should have had.
31. In those circumstances, I then turn to the terms of the order I should make. It seems to me that it may not even be necessary to make any order at all because the parties are, as far as I can see, no longer in substantial disagreement as to what is to happen in relation to the arguments at the arbitration.
32. However, it does seem to me that there is a great deal to be said for a simple solution and simple wording so that everyone knows where they stand. As I have indicated in the course of this judgment, it is common ground that the tribunal has jurisdiction in relation to the counterclaim. It is common ground, ultimately, that each party can make whatever arguments it wishes as to how that counterclaim should be resolved. That includes the argument which Mr Khurshid is so anxious to

advance: ie that the tribunal's determination as to the validity of the contracts under English law will have a decisive impact upon the way in which the counterclaim is ultimately addressed. That argument is open to Mr Khurshid and his clients and, as I said, will be a matter for the tribunals to determine.

33. In those circumstances, I consider that the simplest wording is the wording which Mr Robinson and Mr Allen sent me earlier in which I see nothing objectionable. I therefore decide that the wording which reflects the order should simply be:

"The proper meaning and effect of the undertaking is that the defendant is entitled to pursue its Russian counterclaim under Article 61.2 of the Bankruptcy Law and the claimants agree that they will not argue in the arbitrations that the defendant is not entitled to do so. The parties are free to argue in the arbitrations whatever they wish as to the circumstances in which that counterclaim is to be considered and resolved by the tribunals".

34. I consider that the order can say that. But in order to provide a degree of comfort, as it were, to Mr Khurshid and his clients, I do make it clear that the points which it is open to the claimant to argue are those which are set out in the revised paragraphs [1] and [2] of the draft which are set out above. I emphasise that they are points which it is open to the claimants to argue, but it is open equally to the defendant to argue against them and it is ultimately for the arbitrators to decide how they resolve those arguments. I do not believe that there is any conflict between those revised paragraphs and the wording set out above. However, if it were to be argued that there was such a conflict, the wording set out above must prevail.

35. The final matter with which I will deal is one other aspect of the order which has not been the subject of lengthy submissions to me today but nevertheless is part of the draft order which the claimant seeks. Paragraph 3, as revised, seeks declaratory relief

"There has been no breach by the claimants of the undertaking as at the date of this order [as read]."

36. I do not consider it appropriate to make that particular declaration. To some extent the issue is academic because Mr Allen has not in fact pressed any argument before me today which seeks to

persuade me that there has been a breach by the claimants of the undertaking. A breach is obviously a serious matter and potentially gives rise to separate proceedings before the court and potential committal. There may have been allegations of breach in correspondence but they have not formed any part of the argument before me today.

37. Equally, however, having not gone through all of the material and all of the correspondence, I do not consider that I am in a position to say positively that there has been no breach by the claimants of the undertaking.
38. The effect of my decision and my judgment is that the claimants have previously taken positions, as to the effect of the undertaking and how it fetters the defendant and the tribunals and limits the jurisdiction of the latter, with which I have not found favour. I have in mind the terms of the order sought in the original application and then revised on 8 March. I do not say that that in itself amounts to a breach of the undertaking. That might depend upon what the claimants have said and done pursuant to the positions which they had taken. But I do not consider it appropriate to go into any further detail as to whether there has or has not been a breach by the claimants of the undertaking. I regard that as an academic issue at the present stage, and one which is unsuitable for declaratory relief.
39. The issue of substance is how the arguments in the arbitration are going to proceed. I have addressed that in detail. I do not consider that the court should grant declaratory relief relating to whether there has or has not been a breach on the basis of the relatively brief arguments before me today and in circumstances where Mr Allen's clients have not pressed an argument that there has been a breach.