Approved Judgment

Neutral Citation Number: [2022] EWHC 2690 (Comm)

Case No: CL-2015-000396

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/10/2022

Before :

THE HON MR JUSTICE BUTCHER

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IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION CLAIM

Between :

(1) HULLEY ENTERPRISES LIMITED
(2) YUKOS UNIVERSAL LIMITED
(3) VETERAN PETROLEUM LIMITED — **Claimants**

- and –

THE RUSSIAN FEDERATION — **Defendant**

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- -

Jonathan Crow KC and David Peters (instructed by **Stephenson Harwood LLP**) for the **Claimants**
The Defendant did not appear and was not represented at the hearing but put in written submissions

Hearing date: 11 October 2022

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Approved Judgment

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The Hon Mr Justice Butcher:

1. This was an application by the Claimants for the lifting of the stay on the proceedings which the Claimants have brought to seek to enforce arbitral awards ('the Awards') against the Defendant.

Introduction

2. By way of very brief introduction, the Awards were issued by the Permanent Court of Arbitration on 18 July 2014. By those Awards, the Claimants, who are former shareholders of OAO Yukos Oil Company ('Yukos') were awarded over US$50 billion in compensation, arising out of allegations that the assets of Yukos had been unlawfully expropriated by Russia.

3. The present proceedings, seeking recognition and enforcement of the Awards under the Arbitration Act 1996 ('the 1996 Act'), were issued on 30 January 2015. On 25 September 2015 the Defendant issued an application ('the Jurisdiction Application') disputing the court's jurisdiction on the basis that it was immune pursuant to s. 1(1) of the State Immunity Act 1978 ('the 1978 Act'). The Claimants' position was (and is) that the exception in s. 9(1) of the 1978 Act is applicable, on the basis that the Defendant had agreed to submit the dispute to arbitration.

4. In early 2016 a List of Issues was agreed between the Claimants and the Defendant of the issues arising on the Defendant's Jurisdiction Application. They were, in summary, as follows:

   (1) Whether the provisional application of the Energy Charter Treaty ('ECT') by the Defendant pursuant to Article 45(1) of the ECT means that the Defendant had offered to submit disputes arising under the ECT to arbitration pursuant to Article 26 of the ECT.

   (2) Whether, as a matter of the construction of the ECT, Articles 1(6) and 1(7), the Claimants were 'Investors', whether there was a relevant 'investment', and whether the Claimants were entitled to invoke the dispute resolution provisions of Article 26 of the ECT.

   (3) Whether Article 21 of the ECT (relating to 'taxation measures'), when read together with Article 26 of the ECT, means that there was no written agreement to submit the parties' dispute to arbitration.

5. By a judgment of 20 April 2016, The Hague District Court (being a court of the Netherlands which was the seat of the arbitration) set the Awards aside. This was on the sole ground that the Defendant was not bound by the dispute resolution provisions of the ECT under the regime of provisional application contained in Article 45 of the ECT. In light of that decision, and given that it was being appealed to the Court of Appeal of The Hague, the parties agreed that the English proceedings should be stayed. The Order of Leggatt J of 8 June 2016, which was made to give effect to that agreement, and which was made by consent, was in part as follows:

   '1. The proceedings are stayed from the date of this order (the "Stay").

...

3. The parties each have liberty to apply, without showing a change of circumstances, to lift the Stay following the handing down of the judgment of the Court of Appeal of The Hague. ...'

6. On 18 February 2020, The Hague Court of Appeal, after considering the matter *de novo*, handed down judgment quashing The Hague District Court's decision and reinstating the Awards. On 15 May 2020, the Defendant initiated a cassation appeal before the Supreme Court of the Netherlands ('the Dutch SC'). That was declared admissible on 19 June 2020.

The First Application to Lift the Stay

7. On 6 July 2020, the Claimants issued an application to lift the stay of these proceedings which had been imposed by the order of 8 June 2016. They sought that the proceedings should be permitted to continue; alternatively they sought that any continuation of the stay should be made conditional on the Defendant's providing security in an appropriate amount, which they proposed should be US$7 billion. The Defendant submitted that the stay should continue pending the outcome of the cassation appeal to the Dutch SC and that no security could or should be ordered.

8. The Claimants' application to lift the stay came before Henshaw J for a hearing in March 2021. At that point, the cassation appeal to the Dutch SC was still pending. In his judgment, handed down on 14 April 2021, ([2021] EWHC 894 (Comm)), Henshaw J dismissed the application. The judgment is thorough and meticulous. I will have to consider its reasoning in somewhat more detail hereafter but, in brief:

(1) Henshaw J held that the Defendant's challenge to the jurisdiction, brought by the Jurisdiction Application, would have to be determined as a preliminary matter, and that, unless and until it was dismissed, the Court's power under s. 103(5) of the 1996 Act to adjourn the enforcement proceedings and/or to require the provision of security as a condition of such adjournment, would not arise.

(2) Henshaw J considered that parts of the Defendant's challenge to the Awards in the courts of the Netherlands had a real prospect of success. Those grounds included a challenge to the jurisdiction of the arbitral tribunal, on bases which overlapped substantially with the Jurisdiction Application; and an argument that The Hague Court of Appeal had erred in refusing to consider certain allegations of procedural fraud in the underlying arbitration.

(3) Henshaw J concluded, having weighed up the competing factors, that the stay should be continued. The prejudice to the Claimants arising from further delay in potential enforcement measures, without security in the meantime, was 'outweighed in the present case by the advantages referred to in §213(viii) and 213(ix) above of awaiting the ultimate outcome of the viable challenge which Russia is bringing in the courts of the Netherlands' (para. 214). The matters referred to by reference to paragraphs 213(viii) and (ix) were: (213(viii)), 'the advantages, where a challenge in the curial court has a realistic prospect of success, of allowing that process to run its course, in the interests of comity, avoidance of inconsistent decisions and efficiency'; and (213(ix)), 'the specific risk of unfairness that would arise if Russia were to be unable

to advance (or to fail in) its full case on state immunity as a result of a binding effect of the decision of the Hague Court of Appeal on essentially the same issues, only for that decision to be later reversed by the Dutch Supreme Court (with or without a reference to the CJEU).'

Events since Henshaw J's Decision

9. Since Henshaw J's decision, the Dutch SC has, on 5 November 2021, given its judgment in the cassation appeal. By that judgment, the Dutch SC dismissed the grounds of challenge to the Awards which went to the arbitral tribunal's jurisdiction. I will consider this aspect in somewhat more detail below. The Dutch SC, however, found in favour of the Defendant on one ground, namely that The Hague Court of Appeal had erred in refusing to allow it to advance certain allegations that the Awards were contrary to Dutch public policy because of alleged frauds perpetrated by the Claimants in the course of the arbitration. That matter has been referred to, and is currently being litigated before the Amsterdam Court of Appeal. The parties have served various statements of case. The expert report on Dutch law served by the Defendant in this action estimates that the proceedings before the Amsterdam Court of Appeal will last at least until mid-2023, and may conclude in late 2023 or early 2024.

10. Also since Henshaw J's decision, on 24 February 2022, the Defendant launched its invasion of Ukraine. This, and the international reaction to it, has, according to the Claimants, significant implications for the present proceedings.

11. The Claimants have also been pursuing attempts to enforce the Awards in other jurisdictions. Thus, on 13 April 2022, the US District Court for the District of Columbia refused an application by the Defendant to reinstate a stay of the proceedings to enforce the Awards which had automatically expired upon the conclusion of the proceedings before the Dutch SC. Further, on 28 June 2022, The Hague Court of Appeal reinstated attachments against certain Russian assets in the Netherlands. The Defendant is appealing that decision to the Dutch SC.

The Current Application

12. The application which is presently before me was issued by the Claimants on 3 March 2022. It seeks the lifting of the stay, alternatively an order that the Defendant should pay security as a condition of not lifting the stay, either under s. 103(5) of the 1996 Act or under the court's general case management powers. The grounds of the application are two-fold: first, that the Dutch SC has given judgment in the Defendant's cassation appeal; and, second, that the Defendant's invasion of Ukraine, and responsive steps taken by other governments, will make enforcement of the Awards in this jurisdiction materially more difficult and will encourage the Defendant to remove from this jurisdiction such assets as it is able to.

13. At the point that this application was issued, the Defendant was represented by White & Case LLP. On 11 March 2022, White & Case LLP issued a press release stating that it would be ceasing representation of Russian and Belarusian state and state-owned entities. It nevertheless continued to act for the Defendant for a period, in order to seek to secure an orderly handover to replacement lawyers. In that period, the Defendant appeared (represented by White & Case LLP) at a directions hearing in front of Henshaw J on 1 April 2022. On that occasion, Henshaw J laid down a timetable for the

hearing of the current application. This included an order that the Defendant should serve its evidence in response to the application by 6 May 2022, and that the hearing of the application should be on the first available date after 3 October 2022. On 5 April 2022, the current application was listed to be heard on 10-12 October 2022.

14. On 8 April 2022, the Defendant made an application for permission to rely on an expert report of Prof Albert Jan van den Berg in the field of Dutch law for the purposes of the hearing of the present application. I subsequently made an order permitting the service of such evidence (and of evidence of Dutch law on behalf of the Claimants). The Defendant served both factual and expert evidence on 6 May 2022. On 1 June 2022, White & Case LLP issued an application to be removed as solicitors of record for the Defendant. On 7 June 2022, Andrew Baker J made an order removing White & Case LLP as solicitors of record for the Defendant. On the same day the Claimants served their evidence in reply on the present application to lift the stay.

15. The Defendant did not supply an address for service within the jurisdiction compliant with CPR 6.23(1) and 6.24, pursuant to Practice Direction 42 paragraph 5.1. As a result, the Claimants applied for permission to serve documents in these proceedings by an alternative method. On 1 July 2022, Robin Knowles J made such an order, permitting service by email to four addresses, and by post to the Defendant's embassy at 6-7 Kensington Palace Gardens, London W8.

16. On 19 September 2022, Mr Mikhail Vinogradov, Director General of the General Directorate for International Legal Cooperation of the Prosecutor General's Office of the Russian Federation, wrote to the Court seeking an adjournment of the hearing of the Claimants' application. Mr Vinogradov stated that, while the Defendant had been seeking to engage alternative counsel and had entered into an agreement in principle to that end, and while the alternative counsel had filed an application with the Office of Financial Sanctions Implementation ('OFSI') to ensure that all applicable requirements were complied with, no substantive response from the OFSI had been received. An adjournment was sought until alternative counsel – who Mr Vinogradov said the Defendant was very reluctant to identify – should have obtained a licence or confirmation from OFSI that they could act and communicated to Stephenson Harwood LLP that they were in a position to proceed.

17. To that letter Stephenson Harwood LLP replied on behalf of the Claimants, stating that an adjournment would be inappropriate, in particular for the following reasons:

(1) That at the directions hearing on 1 April 2022 Henshaw J had indicated that a future change of the Defendant's legal representation was unlikely to result in a postponement of the hearing once listed.

(2) The Defendant had failed to provide proper particulars of the efforts it had made to obtain alternative representation.

(3) The Defendant itself is not subject to sanctions, and as far as Stephenson Harwood LLP were aware, there were no sanctions in England and Wales which would prevent a solicitor or barrister from acting for the Defendant in connexion with the present proceedings.

(4) The Claimants would be prejudiced by an adjournment of a hearing which had been fixed since 5 April 2022.

(5) Any prejudice to the Defendant fell well short of a reason for an adjournment. The Defendant had already served its evidence. The Defendant could, if it wanted to, avail itself of English qualified assistance in Russia. The letter enclosed a list of solicitors registered with the Law Society who are based in Russia. Further, the Defendant could represent itself. Moreover, the hearing was procedural in nature, being only concerned with whether the stay should be lifted.

(6) In any event, any difficulties faced by the Defendant were of its own making. It had invaded Ukraine. If it withdrew and paid reparations, doubtless sanctions against Russian entities would be lifted.

18. On 22 September 2022, Calver J refused to adjourn the hearing, stating that the points made by Stephenson Harwood LLP appeared to him to be unanswerable.

19. Mr Vinogradov sent to the Commercial Court Listing Office, on 27 September 2022, another letter seeking the adjournment of the hearing. On 29 September 2022, Stephenson Harwood LLP sent a letter to the Defendant expressing the Claimants' preference for the hearing to be in person, but asking the Defendant to state whether it wished to attend the hearing, and if so whether it wished to attend in person or by video link, stating that if it wished to attend by video link, the Claimants would ask for a hybrid hearing. The letter also referred to the fact that the draft hearing bundle had been served on 20 June 2022 and included the proposed index for a supplemental bundle. That letter was sent by post and email, in accordance with Knowles J's order for alternative methods of service.

20. On 5 October 2022, the Prosecutor General's Office of the Russian Federation sent, by email, submissions in relation to the current hearing. These submissions were signed by Mr Vinogradov. In them, the Defendant (1) submitted that the hearing should be adjourned, on substantially the same grounds relating to the Defendant's not having alternative counsel as it had previously put forward; (2) contended that the Claimants' application was a 'transparent attempt to take advantage of a situation in which the Defendant is bereft of legal representation in the jurisdiction', (3) argued that the application for a stay 'seeks to ignore the pending fraud challenge to the arbitral awards before the Dutch courts', and (4) contended that the interests of justice militated in favour of awaiting the final outcome of the proceedings before the Dutch courts.

21. Further papers for the hearing were served on the Defendant on 6 October 2022. On 7 October 2022, in response to a request from the Claimants' solicitors to indicate whether the hearing would be conducted in person or remotely, I indicated by email, which was sent to the Defendant's representatives, that I would sit in person on 11 October 2022; and that if an application was made for remote attendance by a party, and thus a hybrid hearing, I would consider it on its merits.

22. A further letter was sent by Stephenson Harwood LLP to the Defendant, dated 10 October 2022, which referred to the fact that the hearing would take place on the following day, and identified the courtroom where and the time at which the hearing would commence. That letter also stated that if the Defendant intended to make an application to attend remotely, it should do so urgently.

23. No such application was made, and nor was any representative of the Defendant present on 11 October 2022, when the hearing took place. It appeared clear that the Defendant had decided not to appear, given that it was aware of the hearing and had made no application to appear by video link.

The Issue of Adjournment

24. Given the terms of the submissions served on behalf of the Defendant on 5 October 2022, the first matter which was considered at the hearing was whether it should be adjourned. I concluded that it should not be. I considered that there had not been a material change in circumstances since Calver J's decision. In any event, I did not consider that there were grounds for adjourning the present hearing. Of particular importance were the facts that the Defendant had not given any specific information as to its communications with potential alternative counsel, or with OFSI, and was proposing an adjournment of indefinite length. Furthermore, the case was not one in which the Defendant's position was not known: it had served both factual and expert evidence and had put in written submissions on 5 October 2022.

The Current Application: Applicable Principles

25. As I have already said, the Claimants seek the lifting of the stay. The legal principles applicable to a decision as to whether the stay should be continued or lifted were carefully examined by Henshaw J in his judgment, at paragraphs 53-67. I adopt that analysis.

The Current Application: Grounds

26. As already indicated, the lifting of the stay is now sought by the Claimants on two grounds. The first relates to the development in the Dutch proceedings consisting of the decision of the Dutch SC; the second relates to the effect of the Defendant's invasion of Ukraine and the international response to it upon these proceedings. I will consider each in turn.

The Impact of the Decision of the Dutch Supreme Court

27. A preliminary point which arises out of the decision of the Dutch SC is as to the status of the Awards. The suggestion is made on behalf of the Defendant (both in Mr Goldberg's fifth witness statement and in Professor Van Den Berg's report) that because the Dutch SC set aside The Hague Court of Appeal Judgment, the Awards are currently a nullity as a matter of Dutch law. The argument here is that: (a) the Dutch SC judgment overturned The Hague Court of Appeal judgment; (b) that leaves the original judgment of the District Court of The Hague as the only extant judgment of the Dutch courts concerning the Awards; and (c) as that Judgment set the Awards aside, they are nullities under Dutch law.

28. On the material before me, that argument appears to be a weak one. It suggests that though The Hague Court of Appeal and the Dutch SC have concluded that The Hague District Court was wrong to set aside the Awards on the ground that it did, Dutch law requires the judgment of The Hague District Court to be treated as having validly nullified the Awards. Professor Tobias Cohen Jehoram gives what appear to be convincing grounds for considering that the argument is contrary to Dutch authority

and practice which are to the effect that the only decisions which are annulled by a judgment of the Dutch SC are those which have been successfully challenged in cassation; that decisions of the court below which are not challenged or in respect of which the challenge fails remain valid; and that here The Hague Court of Appeal had annulled The Hague District Court's decision on the basis that the District Court's decision on the arbitral tribunal's jurisdiction was wrong, and the cassation challenge to that had been rejected by the Dutch SC.

29. Furthermore, it appears that the Dutch courts have themselves, since the decision of the Dutch SC, rejected the argument that the Awards are currently a nullity. On 28 June 2022, The Hague Court of Appeal reinstated certain attachments against Russian assets located in the Netherlands which had been imposed for the purposes of enforcement of the Awards. In doing so, it considered and rejected the argument currently under consideration, or one which was very similar to it, stating (at paragraph 5.5):

> 'The Court rejects the … argument of FKP and the Russian Federation. In the setting aside proceedings, The Hague District Court reversed the arbitral awards on the ground that there was no valid arbitration agreement (Section 1065(1)(a) (old) Dutch Code of Civil Procedure). On appeal, this Court ruled that no ground for setting aside existed in this respect and the grounds for cassation directed against this were rejected by the Supreme Court. In its ruling of 5 November 2021, the Supreme Court only found ground for cassation I to be well-founded. According to this ground for cassation, this Court should not have rejected on formal grounds the argument that the arbitral awards are contrary to public policy (Section 1065(1)(d) (old) Dutch Code of Civil Procedure) because HVY is alleged to have acted fraudulently in the arbitration proceedings. After cassation and referral, only this assertion is still to be handled in the setting aside proceedings, which are now being conducted before the Amsterdam Court of Appeal. No court charged with the setting aside has yet ruled on the merits of this assertion. There are therefore pending setting aside proceedings, whereby the basic principle applies that these do not suspend enforcement (Section 1066(1) Dutch Code of Civil Procedure). The lapse of the leave for enforcement by operation of law on account of the setting aside of the arbitral award, as referred to in Section 1064(4) Dutch Code of Civil Procedure, is not at issue in this situation either.'

30. In any event, even if the Defendant's argument as to the current status of the Awards has a realistic prospect of success, I do not consider that this would be a significant matter in relation to the decision which I have to make. If the argument were correct, the position would be that the Awards are currently a nullity, but are liable to be reinstated if the Defendant's remaining challenge, currently under consideration by the Amsterdam Court of Appeal, is rejected. If, on the other hand, the argument is wrong, the position is that the Awards are currently valid, but would be liable to be annulled if the Defendant were to succeed before the Amsterdam Court of Appeal. The status of the Awards is therefore yet to be finally determined by the courts of the seat. That, however, is the situation with which the court will be faced in all cases in which it is invited to exercise powers under s. 103(5) of the 1996 Act or to exercise equivalent powers under CPR Part 3. In such cases, the court is faced with a case management decision about how best to deal with enforcement proceedings where there is an unresolved challenge to the relevant award in the courts of the seat.

31. I turn therefore to consider the Claimants' argument that the decision of the Dutch SC is a significant factor in favour of the lifting of the stay of these proceedings. This requires some more detailed analysis of what was decided.

32. In the Dutch proceedings, the Defendant had taken a number of points going to the question of whether the arbitral tribunal had had jurisdiction to determine the dispute, and as to whether the Awards should be set aside. There were seven main points which were considered and rejected by The Hague Court of Appeal:

(1) That the Awards were procured by a fraud on the tribunal, including by the adducing of false evidence and the failure to disclose key documents.

(2) That the tribunal had no jurisdiction because the Defendant did not ratify the ECT; it had only applied it on a provisional basis, and that, pursuant to Article 45 of the ECT, provisional application was only to the extent not inconsistent with the Defendant's constitution, laws or regulations, which Article 26 would have been.

(3) That the Claimants were not 'investors' and their interests in Yukos were not 'investments' and so the tribunal had lacked jurisdiction.

(4) That the Claimants had acquired their shares in Yukos illegally and that their investments were not protected by the ECT and the tribunal had lacked jurisdiction.

(5) That the dispute related to Taxation Measures. It was therefore within the Article 21 ECT carve out, which qualified the Defendant's offer to arbitrate, and was thus a dispute which could not be referred to arbitration; alternatively that the tribunal had violated its mandate in not referring the dispute to the relevant Competent Tax Authorities under Article 21(5)(b)(i) of the ECT.

(6) That the tribunal had violated its mandate and been irregularly composed because parts of its role were delegated to an 'assistant'.

(7) That the tribunal wrongly overlooked evidence.

33. The Hague Court of Appeal decided all these points against the Defendant's arguments. The Defendant's cassation appeal to the Dutch SC sought to challenge most of them. An exception was the argument that Article 21 qualified the Defendant's offer to arbitrate, which was a point which went to the tribunal's jurisdiction. In relation to Article 21 the Defendant had pursued a cassation appeal only in relation to the allegation of a violation of mandate.

34. The Dutch SC rejected all the points on the Defendant's cassation appeal save for the first. In relation to that, as I have said, the Dutch SC found that The Hague Court of Appeal had erred in refusing to allow the Defendant to advance its case as to fraud, and that has been referred back to the Amsterdam Court of Appeal to be investigated on the merits. All the points going to the tribunal's jurisdiction which were raised before the Dutch SC, which involved in particular items (2), (3) and (4) in the above summary, were rejected.

35. I consider that this is a matter of considerable significance as to whether the stay of the present proceedings should be lifted, at least to the extent of permitting the Defendant's

Jurisdiction Application to be determined. This is particularly so for the following reasons:

(1) The fact that the Defendant's Jurisdiction Application overlapped with the jurisdictional points which were raised by the Defendant's cassation appeal to the Dutch SC was a matter heavily relied upon by the Defendant at the hearing in front of Henshaw J last year as a reason for the stay being continued until the Dutch SC had given judgment. Thus in Mr Goldberg's Third Witness Statement, served on behalf of the Defendant and dated 6 November 2020, there is, at paragraphs 48 – 57, an analysis of the basis for the Defendant's jurisdiction challenge here, and of how it overlaps with the issues which were then before the Dutch SC.

(2) In Henshaw J's judgment the extent of the overlap is recognised at paragraphs 45-50. As is said in paragraph 50, the first two of the Defendant's grounds in its Jurisdiction Application are the same as Grounds 2 and 3 in the cassation appeal. The third ground, as Henshaw J put it, 'overlapped' with Ground 5 in the cassation appeal. In fact, as I have set out, when the unappealed decision of The Hague Court of Appeal in relation to Article 21 is also taken into account, it can be seen that the Defendant's third point in its Jurisdiction Application has been the subject of a determination by the Dutch courts.

(3) An important part of Henshaw J's reasoning as to why the stay should not be lifted was the concern that, if the English proceedings were allowed to proceed, the Defendant might be unable to present to the English court its full case on state immunity, because it could be said to be bound by the decision of The Hague Court of Appeal, notwithstanding that that decision might itself later be reversed by the Dutch SC (see para. 213(ix)). The position in relation to this has now changed.

36. It is of course the case that there is an extant challenge to the Awards in the Dutch courts. It is clear, however, that this does not overlap with the points raised by the Defendant's Jurisdiction Application. It has, indeed, been accepted on behalf of the Defendant that all the jurisdictional points have been resolved in the Dutch proceedings and that the remaining issue does not overlap with the jurisdictional challenge. At the directions hearing before Henshaw J on 1 April 2022, the judge asked Mr Goldberg, who was appearing on behalf of the Defendant, whether it was in dispute that the Dutch SC had ruled against the Defendant on the grounds which it had put forward as going to jurisdiction, and Mr Goldberg confirmed that it was not. In his ruling on that occasion, Henshaw J stated (at paragraph 3) that the Defendant had accepted at the hearing in 2021 that the remaining ground of challenge 'does not go to the question of jurisdiction' in the sense of going to whether the Defendant had agreed in writing to submit the dispute to arbitration for the purposes of s. 9 of the 1978 Act. In Mr Goldberg's Fifth Witness Statement dated 6 May 2022, at paragraph 65, it is recognised to be a fact that the points that remain in the Dutch proceedings do not go to jurisdiction.

37. Accordingly, subject to one point which I will consider in the next paragraph, it appears to me that there is now no risk that a determination of the Jurisdiction Application in these proceedings, if and to the extent that it finds that the decision of the Dutch SC precludes any points that the Defendant wishes to take, will be based on a decision which might itself be subject to reversal in the Dutch proceedings. Furthermore, any decision by the English court on the Jurisdiction Application will not give rise to the risk of an inconsistent decision with the courts of the Netherlands on the points which

remain live there, because they do not overlap. As I have said, those points are not the same as the jurisdictional points raised on the Defendant's Jurisdiction Application.

38. The one point which has been raised by the Defendant as to why the decision of the Dutch SC may not be final, is that it has been suggested that there could be a reference by the Amsterdam Court of Appeal to the CJEU of the question of the proper construction of Article 45 of the ECT. I do not consider that the risk that this may happen is one which can be regarded as sufficiently great for it to play any role in the decision which I have to make. The Dutch SC considered the question of whether a reference would be required, and decided that it would not, because even on the Defendant's interpretation of Article 45, there was no inconsistency between the applicability of Article 26 and Russian law (see paragraphs 5.2.10 – 5.2.21 of the Judgment of the Dutch SC). There is no evidence before me which indicates that there is any realistic prospect that, in light of that, the Amsterdam Court of Appeal will make a reference. While Prof. Van den Berg refers to the point having been raised, it is conspicuous that he does not say that it stands any significant prospect of success. By contrast, the expert report submitted by Prof. Cohen Jehoram, on behalf of the Claimants, opines that there is no possibility of a reference by the Amsterdam Court of Appeal of any relevant question to the CJEU.

The Invasion of Ukraine

39. The second ground on which the Claimants seek the lifting of the stay relates to the Defendant's invasion of Ukraine. This, the Claimants contend, has had the following effects: (1) that the Defendant can be expected to be taking steps in the UK to reduce its assets here, irrespective of the position in relation to the Awards; (2) that, being shut out of the global financial system, and of dealings with the UK, the Defendant's assets here can be expected to decrease over time; and (3) that the international response has hampered the Defendant's ability to pay its sovereign debt, and has led to the Defendant's default, with the result that there is a risk that the Claimants may end up behind more recent creditors of the Defendant, namely holders of bonds in default, in attempts to enforce against the Defendant's assets.

40. I find it difficult to quantify the extent of any additional difficulties which would be faced by the Claimants as a result of the invasion and the response to it in any steps which it may take to enforce the Awards in this jurisdiction. While it may be that the Defendant's incentive to attempt to remove any assets here might have increased, its ability to do so might have reduced. I nevertheless accept that the points made by the Claimants in relation to the consequences of the invasion do give some further weight to their case as to the prejudice which they are suffering as a result of the stay of the proceedings.

Assessment

41. In the light of the above, I turn to consider the issue of whether the stay should be lifted, looking at the matter in the round. The factors mentioned by Henshaw J in paragraph 213 (i)-(iv), (vii) and (x) of his judgment continue to apply, as matters favouring the lifting of the stay. For reasons I have given, the force of factor (v), as counting against the lifting of a stay, has been reduced by reason of the invasion of Ukraine and the international response thereto. Point (ix) has, significantly, fallen away. The points which Henshaw J was considering as being pursued in the Dutch courts and having a

realistic prospect of success which are referred to in point (vi) have been reduced to one.

42. What remains as a consideration in favour of maintaining the stay is that there is still an ongoing challenge to the Awards, on the ground that they were induced by fraud in the course of the arbitration, which is currently before the Amsterdam Court of Appeal. I accept that there are advantages in allowing that process to run its course before a step is taken in these proceedings which might give rise to a decision inconsistent with that which will be reached in those continuing proceedings.

43. That does not, however, appear to me to dictate that the stay should not be lifted at all. The Claimants accept that the first step in the proceedings must be the determination of the Defendant's jurisdictional challenge on the grounds of state immunity. For reasons I have given, there is now no danger of the Defendant being unable to present its full case on that issue by reason of a decision in the Dutch courts which may be overturned: the Dutch SC has decided the jurisdictional issues there. Nor would a decision on the jurisdictional challenge here disrupt the ongoing Dutch proceedings, which relate to a different matter.

44. What accordingly appears to me to be the correct course is to lift the stay for the sole purpose of permitting the resolution of the Defendant's Jurisdiction Application. Any further lifting of the stay would require a further application. It will be necessary to give directions for the determination of the Defendant's Jurisdiction Application. It may be that it will be sensible to order a preliminary issue as to whether the Defendant's challenge is capable of being advanced or whether it is now precluded by the decision of the Dutch SC. I do not, however, intend to decide that, or to give directions, as part of this judgment. I will give both parties the opportunity of making further representations in relation to those matters.

The Claimants' Application for Security

45. The Claimants' application for security was expressed as being alternative to their application that the stay be lifted. Given that I will lift the stay, at least for the purpose of the resolution of the Defendant's Jurisdiction Application, my understanding was that the Claimants did not also seek an order that the Defendant provide security.

46. In any event, I would not have ordered security. Henshaw J decided that, unless and until the Defendant's claim to state immunity had been determined and rejected, the court could not exercise any powers under section 103 of the 1996 Act, including under section 103(5) (see paragraph [221]). He also found that, if he had the power to order security under section 103(5) he would not have done so. The Claimants did not contend before me that Henshaw J was wrong in his decision that the power to order security under s. 103(5) had not arisen. Their contention was that the court might nevertheless make an order for security as a condition for continuing the stay under CPR 3.1(3). However, in circumstances where the power to order security under section 103(5) does not exist because a claim to state immunity remains unresolved, I do not consider that it is appropriate to make an order under the court's case management powers for the provision of security as a condition for the maintenance of the stay.

Conclusion

47. In the circumstances I will lift the stay, but solely for the purpose and to the extent necessary for the resolution of the Defendant's Jurisdiction Application.