Judgments

JSC BTA Bank v Ablyazov and others (stay of proceedings)

[2011] EWHC 587 (Comm)

QBD, COMMERCIAL COURT

Christopher Clarke J

28 March 2011

Arbitration – Stay of court proceedings – Dispute as to existence of arbitration agreement – Claimant bringing proceedings against defendants – Third defendant company seeking stay on ground that arbitration agreement made between it and claimant – Seventh defendant company owner of third defendant seeking stay on case management grounds – Whether proceedings against third and seventh defendants should be granted.

Judgment

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

MR JUSTICE CHRISTOPHER CLARKE:

1. This is an application by the Third Defendant (“Tekhinvest”) for a stay of the claims against it pursuant to section 9 of the Arbitration Act 1996 (“the Act”) and by the Seventh Defendant (“Colligate”) for a stay of the claims against it on case management grounds.

2. The applications, as contained in the application notice, are applications for a declaration that the English court has no jurisdiction over these defendants or for a stay on forum non conveniens principles. Applications on these grounds, which were doomed to failure, have effectively been abandoned. Reference was made in the affidavit of Anastasia Belyavskaya filed in support of Tekhinvest's application to the relevant arbitration clause, as one of the factors that made English jurisdiction inappropriate, but no application was made for a stay under section 9 of the Act.

3. The claimant (“the Bank”) objects to the application notice on the part of Tekhinvest being amended to claim such a stay. I am satisfied, however, that permission to amend should be granted since the Bank has suffered no prejudice which cannot be dealt with in costs. By the time of the hearing it was apparent that a stay under section 9 (or alternatively the inherent jurisdiction of the court) was being sought by Tekhinvest. I also permit Colligate to amend its application so as to apply for a stay on case management grounds.

4. These proceedings are but one of several different sets of proceedings (6 in the Commercial Court, 1 in the Chancery Division) now pending before the High Court against the first defendant ("Mr **Ablyazov**") and others, including these proceedings, Claims No. 2009 Folio 1099 ("Drey"), 2010 Folio 93 ("Chrysopa"), 2010 Folio 1519 ("Paveletskaya") and 2010 Folio 706 ("Granton").

The subject matter of Bank's claim

5. The principal claim brought by the Bank in these proceedings is against the First Defendant ("Mr **Ablyazov**"), a former Chairman and majority shareholder of the Bank and the Second Defendant ("Mr Khazhaev"), a former employee of the Bank and Mr **Ablyazov**'s associate, in respect of:

> i) a loan facility of US$199 million made available by the Bank to Tekhinvest, a company incorporated in the Russian Federation, purportedly pursuant to a Master Facility Agreement dated 22 July 2004 (the "MFA"), various amending agreements ("the Additional Loan Agreements") and various individual drawdown agreements ("the Individual Loan Agreements") (together, "the Tekhinvest Loans");
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> ii) the advance of a further US$108,276,500 by the Bank to the Fourth to Sixth Defendants (companies incorporated in the Russian Federation) in the following amounts:
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> a) US $ 29,925,500 to the Fourth Defendant ("Konvis");
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> b) US $ 38,325,500 to the Fifth Defendant ("PaladioExport"); and
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> c) US $ 40,025,500 to the Sixth Defendant ("CityBestPlus"), (together, the "KPC Companies").
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> Purportedly pursuant to various master facilities, amending agreements and individual drawdown agreements (together, the "KPC Loans"); and
>
> iii) the release of the Bank's security taken in respect of the Tekhinvest Loans by the signing of a pledge order with no replacement security whatsoever being provided in its place.

6. Mr **Ablyazov** and Mr Khazhaev have been served and do not contest the jurisdiction. They have also made clear their lack of objection to Tekhinvest's application to stay. The KPC Companies have not yet been served. Insofar as the application under section 9 requires them to be served, I propose to dispense with it. I cannot see that they are in any way prejudiced thereby and, in any event, according to the Bank, they are the puppets of Mr **Ablyazov**.

The Bank's claim

7. The Bank's claim is as follows. The Tekhinvest and KPC Loans were invalid because each of the Third to Sixth Defendants was owned and/or controlled by Mr **Ablyazov** and was a participant in his dishonest scheme to defraud the Bank. The current sole shareholder of Tekhinvest is Colligate.

8. Mr **Ablyazov**'s interest in these companies was not disclosed to the Bank prior to the execution of the Tekhinvest and/or KPC Loans, as required by Articles 67(3), 71 and 72 of the Law of the Republic of Kazakhstan on Joint Stock Companies dated 13 May 2003 ("the JSC Law") and/or Article 40 of the Law of the Republic of Kazakhstan "On Banks and Banking Activities" dated 31 August 1995 (No 2444) ("the Banking Law"). Nor was the lending expressly approved, as also required by Article 73 of the JSC Law, by a majority of the Bank's Board of Directors not interested in the transaction. Such disclosure was required because Mr **Ablyazov** was both (i) a (disguised) majority shareholder and Chairman of the Board of the Bank and (ii)

Chairman of the Board of Tekhinvest and its ultimate controller. Tekhinvest was thus a related party to the Bank because Mr **Ablyazov** was an “affiliate” of each of the Bank and Tekhinvest.

9. It seems that Mr **Ablyazov** did disclose his interest in Tekhinvest to the Board to some extent. This appears from a Board Resolution of 1 December 2006 which purportedly approved one of the various increases in funding. The Board Resolution did not, however, amount to proper disclosure of Mr **Ablyazov**'s interest in Tekhinvest to the Board and did not meet the requirements for express Board approval under Kazakh law, because Mr **Ablyazov** voted on this resolution notwithstanding his conflict of interest. Further, since the Board Resolution only refers to a single increase in the loan facility, it does not approve either the earlier or subsequent lending made by the Bank to Tekhinvest, or the MFA itself.

10. The Bank claims against Tekhinvest, so far as presently relevant:

> a) that the Tekhinvest Loans are “liable to be invalidated” pursuant to Article 74 of the JSC Law (Particular of Claim [“POC “] para. 78);
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> b) that Tekhinvest:
>
> “procured the preparation, approval, execution, variation and implementation of the [Tekhinvest Loans], in that it applied for the purported loans represented by those agreements, approved the acceptance of those agreements and the corresponding purported loans from the Bank, executed those agreements, and received the sums purportedly paid pursuant to those agreements” (POC para. 116);
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> c) that in acting as set out in (b) Tekhinvest acted with a want of good faith and/or dishonestly and/or unconscionably (POC para. 117) and breached Article 8 of the Civil Code (para 118). Tekhinvest was a front or nominee for Mr **Ablyazov** (either alone or with others), and Mr **Ablyazov**'s knowledge and intentions are attributable to Tekhinvest; and
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> d) that Tekhinvest acted unconscionably and/or dishonestly in receiving the loan moneys and/or in assisting Mr **Ablyazov** in breaching fiduciary duties that he owed to the Bank (POC para. 119). This is an English law claim.

11. The Bank's claim against Colligate is that it was ultimately owned and/or controlled by Mr **Ablyazov** (either alone or with others), and was instrumental in implementing the release of the Bank's security by signing a pledge order, with no replacement security whatsoever being provided. An interest in Colligate is admitted by **Ablyazov** in his Defence (Paras 96(9) and (12)).

The relief sought

12. The Bank seeks declarations, pursuant to Articles 74(1) of the JSC Law and Articles 157-159 of the Civil Code of the Republic of Kazakhstan[1], that the Tekhinvest Loans are invalid and/or not binding on the Bank (Prayer (1) (a)), and the return of all monies paid under the Tekhinvest Loans, together with all profits and interest which have arisen thereon, and the delivery up of all assets to which all or part of the monies have been applied together with any interest or other income or profit made with the said assets (Prayer (1) (c)). Similar relief is sought in relation to the KPC Loans.

13. The Bank claims against Tekhinvest damages under Article 8 and other Articles of the Civil Code, or for dishonest assistance in a breach of fiduciary duty or for knowing receipt in English law. The Bank has a like claim against Colligate.

14. The Bank has pleaded an alternative claim that, in the event that the Tekhinvest Loans are not declared invalid, the sums advanced pursuant to these loans should be repaid under the terms of the relevant contracts (POC paragraphs 29 to 30 and 106 to 113 and Prayer (4) (b)). Paragraph 29 of the POC includes the following sentence:

> "In light of the contentions made in Section F below as to the invalidity of the purported loans, all references to loans and the like are references to purported loans and the like".

Section F is the section in which are pleaded the various provisions of Kazakh Law as a result of which the Tekhinvest Agreements are said to be liable to be invalidated.

The commercial background

15. According to the applicants the commercial background to the claim is this. Mr Pavel Fuks is an experienced property developer. In 2003, he acquired an option to lease land rights and to develop Plot 12, Moscow International Business Centre. Mr Fuks formed Tekhinvest, for the purpose of this development project. He then searched for a business partner who would be responsible for financing the project. In 2004, Mr **Ablyazov** expressed interest in assuming this role and subsequently did so.

16. In 2004, Tekhinvest conducted extensive negotiations with banks in order to fund the project, as a result of which Tekhinvest entered into a loan agreement with the Bank. The initial funding was used to exercise an option to acquire a lease of the site as well as to undertake the necessary design work and obtain planning consents. The Bank was aware of Mr Fuks' involvement in Tekhinvest and in the project. No allegations of dishonesty are made against him or, with the exception of Mr **Ablyazov**, against any other present or former officer or employee of Tekhinvest.

17. The MFA was executed on behalf of the Bank by Mr Arsen Saparov, the Deputy Chairman of the Bank's Management Board. He is not alleged to have been party to Mr **Ablyazov**'s alleged fraud or to have been dishonest. The facility had a revolving limit of US $15m and was unsecured. It contained the following choice of law and arbitration clause:

> "10. DISPUTE SETTLEMENT PROCEDURE AND APPLICABLE LAW
>
> 10.1 This Agreement shall be governed by the legislation of the Republic of Kazakhstan.
>
> 10.2 Any disputes, differences or claims arising from this contract (agreement) or in connection therewith, including the ones relating to its performance, breach, termination or invalidity, shall be resolved at the International Commercial Arbitration Court (ICAC) at the Russian Federation Chamber of Commerce and Industry (RF CCI) in accordance with its Procedure Rules.
>
> 10.3 The parties agree[d] to perform awards of the International Commercial Arbitration Court at the RF CCI voluntarily. In case where a Party declines to perform an award of the ICAC at the RF CCI voluntarily, the Party in which favour the award was made may seek enforcement of the court award."

18. The MFA was an "umbrella" agreement. Under clause 1.2.2 the Bank warranted that the MFA was duly authorised. The original overall lending was to be granted until 31 August 2009. The MFA provided for loans to be granted on terms and conditions of facility agreements to be agreed by the parties which were to be an integral part of the MFA (clause 3.5.). In addition it provided (clause 12.1.) that any contracts entered into within its framework were to be an integral part thereof.

19. The Additional and Individual Loan Agreements were entered into pursuant to the MFA. The former dealt with the lending limits and security. The latter were the agreements pursuant to which individual credits were granted. These agreements either, as in the case of the Additional Agreements, incorporated the terms of the MFA by reference (because they were expressed to form an integral part of it) or, as in the case of the Individual Agreements, expressly incorporated the same or substantially the same arbitration clause.

20. Between July 2004 and June 2008, the amounts of the facilities provided to Tekhinvest by the Bank under the agreements increased. The Bank agreed to the following increases in Tekhinvest's limits:

a) On 18 April 2005, from US $ 15m to US $ 40m under Additional Agreement No. 1.

b) On 2 November 2006, from US $ 40m to US $ 164m under Additional Agreement No. 2.

c) On 28 December 2007, from US $ 164m to US $ 194m under Additional Agreement No. 3.

d) On 16 June 2008, from US $ 194m to approximately US $ 345m under Additional Agreement No. 4 (which specified a general credit limit of US $ 199 million and also that the Bank would provide a guarantee of Tekhinvest's obligations to another bank, Sberbank, for RUB 4.2bn).

Repayments of over US $69m and € 20m were made by Tekhinvest in July and August 2008.

21. Construction on the site of what is now called the Eurasia Tower commenced in 2005 and substantial construction work has taken place. When completed, the Tower will be a 70 storey, mixed-use building. The Bank does not presently allege that the amounts drawn down by Tekhinvest were applied other than for their intended purpose: see POC para. 28. Moreover, the evidence of Ms Belyavskaya in her witness statements as to the purpose of the loans and their use for the construction of Eurasia Tower has not been disputed by the Bank.

22. Initially the initial loan to Tekhinvest was unsecured. The Bank's case is that security for the loans was later provided, and also removed, as follows:

Stage 1: On 1 June 2005, the KPC Companies agreed to amend pledges of certain shares which they had previously granted to the Bank in order also to cover the Bank's loans to Tekhinvest. The shares pledged under these pledge agreements were shares in six companies: CJSC Technostroy, CJSC Technoinvest, CJSC Rover, CJSC WestcomLine, CJSC Discovery and CJSC Ingeocom.

Stage 2: In August 2006, the above pledges were extended in order to cover the increase in Tekhinvest's credit facility from US$40m to US$164m.

Stage 3: In October 2006 and March 2007, the Bank's Regional Credit Committee (RCC) resolved to require a pledge of 100% of the shares in Tekhinvest and a pledge of the lease of the Site (subject to a delay of a few months in each case). However, no such pledges were put in place.

Stage 4: Later in March 2007, the RCC resolved to remove the previous requirement for a pledge of 100% of the shares in Tekhinvest, and also that there should be a limit of US $23,417,000 on the requirement for a pledge of Tekhinvest's lease of the Site.

Stage 5: On 22 May 2007, the RCC resolved that no pledge of the lease of the Site would be required at all.

> Stage 6: On 28 December 2007, the RCC resolved to impose a requirement for a pledge of Tekhinvest's lease of the Site (delayed until 15 March 2008) and for a pledge of 100% of the shares in Tekhinvest (delayed until 15 February 2008). In February 2008, seven pledge agreements were entered into by the seven shareholders in Tekhinvest,[2] but no pledge of the lease of the Site was entered into.
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> Stage 7: Between February and June 2008, the Bank removed the requirement for a pledge of the lease of the Site, cancelled the seven pledge agreements and did not create any new security over the shares in Tekhinvest. In June, July and November 2008, the RCC approved the replacement of the seven pledge agreements with a pledge of 100% of the shares of Colligate, but no such pledge was ever executed.

The application under the Arbitration Act 1996

23. Section 9 of the Arbitration Act 1996 provides:

> "Stay of legal proceedings
>
> (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> … … …
>
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

24. There are, accordingly, three questions for decision:

> i) Is there any arbitration agreement within section 9 (1)?
>
> ii) If so, can the Bank satisfy the court that it is "null and void, inoperative, or incapable of being performed"?
>
> iii) If not, does it cover all of the matters in the present proceedings and, if not, which ones does it not cover?

25. As to the first question, the MFA and the Additional and Individual Loan Agreements are all agreements which contain or incorporate arbitration agreements. Further, as Mr Richard Handyside QC for the applicants pointed out, the Bank does not by its pleading either in its original or amended form contend that it has exercised a right under the law of Kazakhstan to avoid any of the agreements, as opposed to seeking an order from the Court to invalidate them. The Points of Claim are replete with averments of the agreements, the amendments thereto, the obligations arising thereunder; and the pledges which were or should have been granted to secure them: see POC paras 19, 20, 21-26, 30, 31, and 32. Reference is made – see para 66 (c) – to Article 74(1) of the JSC Law, which provides that a failure to comply with the applicable disclosure provisions provides a ground for the invalidation of the relevant transactions on the claim of an interested party.

26. Part of the claim involves the contention that Mr **Ablyazov** and Mr Khazhaev failed to require enforceable pledges over the lease of plot no 12, a contention which necessarily assumes an obligation to be secured. In section I of the POC Tekhinvest is alleged to have "procured the preparation, approval, execution, variation

and implementation" of the agreements. There is then a claim for a declaration that the agreements are "invalid and/or not binding" on the Bank.

27. Mr Stephen Smith QC for the Bank submits that the critical issue between the parties is whether or not the agreements are valid and binding. If, as the Bank alleges, they are not, then there is no valid arbitration agreement. But whether or not there is a valid agreement depends upon whether the Bank's contentions are well founded. Until that issue has been ruled upon it cannot be said that such an agreement exists. The Court is, in effect, being required to grant specific performance of the arbitration agreement, which it would not do if there were good grounds to believe that the agreement was invalid.

28. In those circumstances, as he submits, the court has a number of choices. Four of them were considered in Birse Construction Ltd v St David Ltd [1999] BLR 194:

> i) To determine that an arbitration agreement was made on the affidavit evidence;
>
> ii) To stay the proceedings on the basis that the arbitrator will decide that issue;
>
> iii) To order an issue to be tried under what is now CPR 62 (8) which provides:
>
> "(3) Where a question arises as to whether –
>
> (a) an arbitration agreement has been concluded; or
>
> (b) the dispute which is the subject-matter of the proceedings falls within the terms of such an agreement,
>
> the court may decide that question or give directions to enable it to be decided and may order the proceedings to be stayed pending its decision."
>
> iv) To decide that there was no arbitration agreement and dismiss the application for a stay.

29. Choices (i) and (iv) are not, in truth, different approaches. Each of them involves deciding the issue on affidavit evidence, but in opposite ways. In Al Naimi v Islamic Press [2000] 1 Lloyd's Rep 523 the Court of Appeal indicated that, in the absence of consent by the parties, the Court should not normally determine the question itself on affidavit evidence rather than by ordering an issue. In Albon v Naza Motor Trading SDN BHD [2007] EWHC 665 (Ch) Lightman J took the view that it was only in an exceptional case that the court should exercise its inherent jurisdiction to stay the proceedings in order that the arbitrator, as opposed to the court, might determine whether there was an arbitration agreement.

30. Mr Smith submits that there is a fifth way, which he invites me to adopt, which is to decline to make any order on the footing that the issue to be resolved, so far as any arbitration agreement is concerned, is the principal issue in the action. If the Bank is right all the agreements are invalid including the arbitration agreements which form part of them. It makes no sense, he submits, to have this central issue determined separately in an arbitration from which the principal players, Mr **Ablyazov** and Mr Khazhaev are absent, and when the litigation against them is to continue in any event.

The structure of the Act

31. The Act requires the court first to examine whether or not there is a written arbitration agreement (defined as an "agreement to submit to arbitration present or future disputes (whether they are contractual or not)"), which covers the subject matter of the action. If there is such an agreement a stay is mandatory unless the

court is “satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed”. The onus of satisfying the court lies on the party resisting a stay.

32. In Albon Lightman J observed that there was a distinction to be drawn, in this field, between whether an arbitration agreement had been “constituted” i.e. brought into existence, and whether it “exists “(which may mean that it has been brought into existence or that it still subsists) and as to its “validity” i.e. whether it is legally binding. The Court must determine whether an agreement was concluded before considering the application of section 9 (4).

33. It is apparent from the dichotomy inherent in sections 9 (1) and (4) that a party seeking a stay may establish that an arbitration agreement has been concluded which the other party says is null and void, inoperative or incapable of being performed. There are a number of grounds upon which one or more of these matters might be established, e.g. that the agreement was induced by fraud, misrepresentation or mistake or by bribery or other vitiating cause, or that it was illegal or cannot legally be performed. It is inconsistent with the scheme of the Act that the party who proves a written arbitration agreement and seeks a stay must establish that the agreement is not null and void or inoperative or incapable of being performed. The onus in that respect is on the party resisting the stay. If the applicant shows that it is arguable that the arbitration agreement is not “null and void etc”, a stay will be granted.

34. In Albon Lightman J observed:

> “In this context “null and void” means “devoid of legal effect”. This is made clear by the decision in 1983 of the US 3rd Circuit Court of Appeals in Rhone Mediterranee v Achille Lauro 712 F.2d50. The court in that case had to determine the construction of identical wording in Article 11.3 of the 1959 New York Convention. On this issue the court said:
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> “We conclude that the meaning of Art 11 section 3 which is most consistent with the overall purpose of the Convention is that an agreement to arbitrate is 'null and void' only (a) where it is subject to an internationally recognised defence such as duress, mistake, fraud or waiver or (b) when it contravenes fundamental policies of the forum State. The 'null and void' language must be read narrowly for the signatory nations have jointly declared a general policy of enforceability of agreements to arbitrate.” (Pages 3 – 4)
>
> Likewise in this context for an arbitration agreement to be “inoperative” it must have been concluded but for some legal reason have ceased to have legal effect; e.g. by reason of acceptance of a repudiation as in Downing v. Al Tameer Establishment [2002] EWCA Civ 721 (“Downing”) at paragraphs 26-35.”

35. The obligation on the party seeking a stay is to establish an agreement in writing, which is defined by the Act in the following terms:

> “5 Agreements to be in writing
>
> (1) The provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.
>
> The expressions “agreement”, “agree” and “agreed” shall be construed accordingly.
>
> (2) There is an agreement in writing–
>
> (a) if the agreement is made in writing (whether or not it is signed by the parties),

> (b) if the agreement is made by exchange of communications in writing, or
>
> (c) if the agreement is evidenced in writing.
>
> (3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.
>
> (4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.
>
> (5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.
>
> (6) References in this Part to anything being written or in writing include its being recorded by any means."

36. This wide definition allows, in appropriate cases, considerable scope for argument as to whether an agreement has been concluded. There may be dispute as to whether, in English law terms, the written communications establish the making of an offer which was accepted; or whether there was an agreement otherwise than in writing which is evidenced in writing by an accurate record made with the authority of the parties; or whether there has been an oral agreement by reference to written terms (e.g. an oral agreement on LMAA terms); or whether an alleged agreement which was recorded on tape amounted to one.

37. There may, also, be a dispute as to whether or not an apparent written agreement is the act of the party resisting a stay, as where there is a plea of forgery or non est factum or the equivalent, or because the agreement is said to have been made by someone who had no authority to make it so that no arbitration agreement came into existence.

38. In such circumstances the Court has open to it the four options specified in Birse. However, it is not, as it seems to me, open to it to adopt none of these options, and leave the question whether (say) the agreement relied on is a forgery to be determined in an action, on the footing that, even if it is genuine, the rights of the parties under it will be determined in that action. That would be to sidestep the Act.

39. In the present case the contention in the POC is that the absence of disclosure;

> "provides[3] a ground for the invalidation of such transactions on the claim of an interested party" (para 66 (c))

and that by

> "Articles 157 to 159 of the Kazakh Civil Code … a Court can inter alia declare [the] transaction invalid" (para 67)

and that such a declaration should be granted.

40. The Expert Report of Mr Sergei Yureyevich Vataev of Chadbourne & Parke Kazakhstan LLC, who is fluent in English, is that the effect of the violation of law on which the Bank relies is:

> "that not only the [MFA] is voidable but the arbitration clause therein is voidable, and would have been voidable even if it had been entered into as a separate agreement to the [MFA]. Without disclosure and approval by the board of directors, the Claimant and anyone acting on its behalf had no authority to enter into any agreement with Tekhinvest including an agreement to arbitrate".

41. I take the use of the English law term "voidable" used by a legal expert to mean what it says. It is not a contention that there was no agreement, or that the agreement has come to an end, only that it can be invalidated by the Court in accordance with the Articles pleaded. The purpose of the action is to secure a declaration that it is not binding.

Separability

42. The arbitration clause provides that disputes, differences or claims arising from the contract or in connection therewith, including ones as to its "invalidity", should be referred to arbitration. In Fiona Trust and Holding Corp v Privalov [2007] Bus LR 1719 at [17], the House of Lords considered the principle of separability. Lord Hoffmann observed:

> "17 The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the arbitration agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a "distinct agreement", was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement.
>
> 18 On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorised or for improper reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have no authority to enter into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration."

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43. Lord Hope of Craighead said:

> "35 ……The owners' argument was not that there was no contract at all, but that they were entitled to rescind the contract including the arbitration agreement because the contract was induced by bribery. Allegations of that kind, if sound, may affect the validity of the main agreement. But they do not undermine the validity of the arbitration agreement as a distinct agreement. The doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside. This is an exacting test. The argument must be based on facts which are specific to the arbitration agreement. Allegations that are parasitical to a challenge to the

> validity to the main agreement will not do. That being the situation in this case, the agreement to go to arbitration must be given effect."

44. Separability is an internationally recognised concept. It is apparent from Mr Vataev's first report that it is now recognised in Kazakhstan.

45. The applicants contend that the Bank's arguments as to the invalidity of the arbitration clause in the present case are "parasitical" to the challenge to the validity of the main agreement. They draw attention to para 5 (d) of Mr Sciannaca's evidence in which he says:

> "The Bank claims that Mr **Ablyazov** failed to disclose his connection to Tekhinvest to the Bank as required by the laws of the Republic of Kazakhstan, and failed to seek the approval of the majority of the Bank's board of directors not interested in the transaction, prior to the execution of the General Loan Agreement (or at all) or the Additional Agreements or the Credit Contracts, save for one resolution on 1 December 2006 (which, the Bank contends to be inadequate as a matter of Kazakh law). As a result, it is the Bank's case that the General Loan Agreement, the Additional Agreements and the Credit Contracts are invalid, and likewise the Arbitration Clause contained therein, so that there is also no binding agreement in place between Tekhinvest and the Bank.".

46. As to the burden of proof, it is submitted that where, as here, the applicant can raise an arguable case in its favour of the validity of the arbitration clause, a stay should be granted: see Merkin, Arbitration Law, at para. 8-33, citing Downing v Al Tameer Establishment [2002] 2 All ER (Comm).

47. The Bank contends that the case comes within the last sentence of para 17 of Lord Hoffmann's speech, namely that the agreement including the arbitration agreement was made without authority.

48. As to that it seems to me, firstly, that in the light of Mr Vataev's evidence it could be said that the agreements, including the arbitration agreement, were entered into without authority but that it is not said that no agreement and no arbitration agreement with the Bank came into existence; only that they are voidable by the court. They are not said to have been avoided by the Bank.

49. In those circumstances the applicants have shown that an arbitration agreement was concluded but the Bank has not shown that it is null and void, inoperative or incapable of being performed. It may be that the Bank will later establish one or more of those propositions but they have not yet done so. In those circumstances Tekhinvest has established that there is an arbitration agreement and the Bank has not satisfied me that it is null and void, inoperative or incapable of being performed. That should ordinarily lead to a stay and in this case should do so.

50. It is open to the Court to order the trial of an issue as to whether or not the apparent agreement is "null and void, etc". But it is unlikely to do so unless such a trial can be confined to "a relatively circumscribed area of investigation" (per Colman, J in A v B [2007] 1 Lloyd's Rep 237, 261) as opposed to requiring findings on matters of fact or law which, themselves, are said to give rise to the substantive rights of the claimant, and which are to be determined by whichever tribunal is to hold sway.

Prevalence

51. Article 26 of the Kazakhstan Civil Procedure Code ("Prevalence of the Court's jurisdiction") provides that:

> "(1) When several interrelated claims, some of which are subject to the jurisdiction of the court and others to jurisdiction of non-judicial bodies, are joined, all these claims shall be subject to the jurisdiction of the court.
>
> (2) In case of doubts or conflict between the legislative acts in effect in relation to the jurisdiction over a specific dispute, such dispute shall be decided by the court."

52. Reliance was placed on this provision by the Bank which submits that, in the present case, there were several interrelated claims, some of which (i.e. those against the defendants other than the 3rd Defendant) were subject to the jurisdiction of the court and others of which were, if the applicants were right, subject to arbitration. The effect of Article 26 is that all these claims should be subject to the jurisdiction of the court.

53. I do not accept this. Section 26 is a provision which applies to civil proceedings in Kazakhstan. It cannot apply to proceedings in England & Wales nor oust the provisions of the Act. Nor does it provide that, as a matter of Kazakh law, an arbitration agreement calling for arbitration in Russia, is inoperative if invoked in a non Kazakh jurisdiction in circumstances which, if the proceedings were in Kazakhstan, would come within Article 26 (1).

54. In those circumstances I do not intend to determine whether or not there are here "several interrelated claims" and, if so which ones are interrelated to which others.

Scope of the Arbitration Agreement

55. The parties have agreed to arbitration in respect of:

> "Any disputes, differences or claims arising from this contract (agreement) or in connection therewith, including the ones relating to its performance, breach, termination or invalidity."

56. The Bank contends that this definition does not extend to intentional wrongs and does not, therefore, extend to the non contractual claim against Tekhinvest. This contention did not appear until Mr Vataev's supplemental report of 17 February 2011.

57. The first report of Mr Abai Shaikenov of 22 October 2010 for the applicants included the following in paragraph 6 (c):

> "(iv) Existing Kazakhstan Laws do not provide guidelines as to the interpretation of the expressions "arising from" or "in connection therewith" in the context of the application of arbitration clauses (I note that Article 6 of the International Arbitration Law refers to "disputes arising out of civil-legal agreement").
>
> (v) In my view, the practice of using such references is adopted to provide the arbitration panel with the maximum possible authority in relation to the consideration of disputes relating to an agreement (i.e. to acknowledge its jurisdiction over such an agreement) and in the absence of any legislative guidelines, each such reference will have to be evaluated on a case by case basis.
>
> In light of the above, it can be assumed that when electing to arbitrate (rather than litigate in the courts), the parties make a choice based upon the advantages provided to them by arbitration (which advantages may not always be provided by a court of law) and their intention is to have all disputes which are related to, connected with or arising from or out of the underlying agreement settled by the arbitration tribunal, rather than to seek a settlement in a court of law. A re-

> course to a court of law may be viewed as cutting the foundation for the use of arbitration clauses in commercial agreements."

58. Mr Vataev's first report of 23 December 2010 did not contradict or comment on these paragraphs. In his supplemental report of 4 February 2011 Mr Shaikenov simply said, on this point, that he remained of the view that there was no credible basis for an argument that the arbitration clause should be considered invalid or ineffective.

59. In paragraph 21 of his supplemental report of 17 February 2011 Mr Vataev said:

> "21 In the Shaikenov Supplemental Report, Mr Shaikenov concludes at paragraph 4(ii) that there is, in his opinion, no basis for asserting that the arbitration clause should be considered invalid or ineffective. For the reasons set out in my Expert Report and this Supplemental Report, I disagree with his conclusion. In this regard, it may also be helpful to the Court for me to set out my views on the scope of the arbitration clause in relation to the claims that the bank is making against Tekhinvest, which is not a matter that I had an opportunity to comment on in my Expert Report.

60. I do not understand the last sentence which is incorrect. He could easily have commented on the scope of the clause in his first report.

61. His report then read:

> 22 In addition to its claims regarding invalidity and (in the alternative) breach of contract, I note from the Particulars of Claim that the Bank asserts claims of bad faith against each of the seven defendants in relation to certain actions that are alleged directly to have caused harm to the Bank. These claims are brought under Article 8 of the Kazakhstan Civil Code, which, broadly speaking, requires that individuals and companies act in good faith, reasonably and without causing harm to any other person. Claims for breach of Article 8 are regarded as "tortious" in nature in Kazakhstan law, although I understand "tortious" to be used in a broader sense in Kazakhstan that in common law jurisdictions such as England.
>
> 23 The Law of the Republic of Kazakhstan "On International; Commercial Arbitration" provides in Article 1 that it "…shall apply in relation to disputes arising out of civil law contracts to which individuals and legal entities are parties…" Article 6(2) of this Law provides that "An arbitration agreement may be entered into between the parties in relation to disputes which have arisen or may arise between the parties in relation to any specific civil law contract".
>
> 24 Based on these provisions, it may be stated that the default rule of Kazakhstan law is that an agreement to arbitrate may be concluded in relation to contractual claims only. Therefore it can be concluded that the legislator did not intend to include claims in tort (in the broad sense understood in Kazakhstan) within the scope of arbitrable matters generally. In my opinion, in order for such claims to be included within the scope of an arbitration, they should be expressly covered by an arbitration clause.
>
> 25 In my view, the arbitration clause in the Tekhinvest general Loan Agreement, although broad, cannot be construed to encompass intentional torts of the parties. There is no evidence in the wording of the arbitration clause that parties to the agreement clearly intended to extend the application of the arbitration dispute resolution mechanism to consequences of bad faith actions and/or fraud.
>
> 26 The arbitration clauses in each of the KPC General Loan Agreements are drafted in a similar format to the arbitration clause in the Tekhinvest General Loan Agreement. Accordingly, in

> my opinion in relation to the scope of these arbitration clauses is the same and I do not, therefore, consider that they include the Bank's claims for breach of Article 8 based on bad faith actions and/or fraud."

62. I have several difficulties with these paragraphs. Firstly, the quoted provisions do not establish any default rule and do not appear to limit arbitration to contractual claims only. Article 6 (2) refers to arbitration in relation to disputes which have arisen between the parties "in relation to" a specific law contract. Secondly, it is not suggested that, as a matter of Kazakh law, an arbitration agreement cannot extend to non contractual claims, because Mr Vataev expresses the view that they should be expressly covered: cp Abu Dhabi Investment Co v H Clarkson & Co Ltd [2006] 2 Lloyd's Rep 381 in which Morison J held that certain provisions of the law of the UAE provided that an arbitration clause could not oust the jurisdiction of the court unless it was in respect of a "dispute in the performance of a specific contract" and that the clause in suit did not apply to disputes in relation to matters, such as misrepresentations, arising before the contract was made.

63. Mr Vataev's conclusion is that the MFA cannot be construed to encompass intentional torts. It is not clear whether by that he means that it covers unintentional torts or whether he meant that it did not cover any torts, but chose that method of expression on the footing that, as he saw it, the claims in the action amounted to intentional torts.

64. In any event, whether or not the clause extends to the non contractual disputes in the present action depends on its construction, having regard to any principles of Kazakh law on the interpretation of contracts. The experts appear to be agreed that Kazakh law adopts the literal meaning. (I note, however that that appears to be based on the fact that Article 6 of the Kazakh Civil Code requires the provisions of the civil law to be interpreted in accordance with their literal meaning. It does not automatically follow that the provisions of agreements are to be so interpreted). That may mean that the court should not start with the working assumption – see Fiona Trust para 7– that the parties as sensible businessmen intended all aspects of their business relationship in respect of the contracts in question to be the subject of arbitration. But, taking a literal meaning, which appears to me to amount to mean taking the words in their ordinary meaning, the disputes between the parties in the present case, including those in relation to the non contractual claims, come within the scope of the clause. The claims either arise from the agreements or are in connection therewith – as is apparent from a perusal of the POC whether in its existing or proposed amended form. Paragraph 116 (see para 10 (b) above) which begins the section of the POC dealing with such claims and is followed by Paragraph 117 ("In doing so, Tekhinvest acted with a want of good faith and/or dishonestly and/or unconscionably") makes that clear.

65. Accordingly I propose to stay the proceedings against Tekhinvest, which has made plain its willingness to have the disputes arbitrated and to participate in the arbitration.

Colligate

66. Colligate, which was served in Cyprus without leave on the basis that the claim against it fell within Article 6 (1) of the Brussels 1 Regulation seeks a stay on case management grounds. It is the parent company of Tekhinvest. The pleaded claim against it is contained in POC paras. 56 and 120-121:

> "56 As to the second of these requirements:
>
> (a) In order to allow Sberbank to take a first ranking security over the shares in Tekhinvest, on a date unknown to the Bank but which appears to have been between 15th February 2008 and 16th April 2008, Khazhaev, on behalf of the Bank signed a Pledge Order (the "Pledge Order") purporting to release the Bank's security over the shares in Tekhinvest which had been granted to the Bank by the Seven Pledge Agreements (paragraph 50 above).

(b) Although the Pledge Order expressly referred to the Seven Pledge Agreements, it was not signed by any of those shareholders as pledgor. Instead, it was signed by Colligate, which purported at that stage to be the pledgor of the shares in Tekhinvest.

(c) It is to be inferred that, at some stage presently unknown to the Bank, the Seven Shareholders had (in breach of clause 3.1 of each of the Seven Pledge Agreements) sold or purported to sell their shares in Tekhinvest to Colligate.

……

120 Colligate provided assistance to Tekhinvest, **Ablyazov** and Khazhaev in enabling the pledges referred to paragraph 56 above to be released with no alternative security being provided in their place.

PARTICULARS

(1) Paragraphs 52 to 59 above are repeated.

121 In doing so, Colligate acted with a want of good faith and/or dishonestly and/or unconscionably.

PARTICULARS OF WANT OF GOOD FAITH/

DISHONESTY/UNCONSCIONABILITY”

Extensive particulars are then given.

67. Most of the particulars given in support of this allegation (i.e. paras. 121(1)-(5)) are aimed at establishing a connection between Mr **Ablyazov** and Colligate. The Bank further contends that Colligate “knew or is to be treated as having known” that the Tekhinvest loan agreements were contrary to the Bank's interests, and that Colligate knew that the release of the share pledges without any replacement being put in place was in breach of the Bank's requirements. Thus it is said that Colligate is liable to the Bank.

68. Mr Handyside submits that these claims against Colligate are inextricably linked not with the claims against Mr **Ablyazov** but with the claims against Tekhinvest. The Bank's primary claim against Tekhinvest is for a declaration that the Tekhinvest loan agreements are invalid. If that claim succeeds, Colligate will not have caused the Bank any loss, because the pledges only secured the performance of Tekhinvest's obligations under the loan agreements. If the claim fails, whether the Bank suffers any loss (and if so how much) as a result of the release of the pledge agreements will depend upon the extent to which it is able to recover any amounts found to be due to Tekhinvest under the loan agreements.

69. Accordingly, Colligate submits that if Tekhinvest's application succeeds, the claim against Colligate should be stayed on case management grounds pending the outcome of the Tekhinvest arbitration.

70. I agree. It seems to me to make no sense in case management terms for the case against Colligate to proceed in the absence of Tekhinvest. I am fortified in reaching that conclusion in the knowledge that Colligate has offered to have the dispute against it determined in the Tekhinvest arbitration.

71. Accordingly, I shall stay the action against Colligate as well.

72. I invite counsel for the Bank to draw up the appropriate amendments and an order reflecting these conclusions.

[1] Para 67 of the POC pleads that by these Articles a Court can, inter alia, declare a transaction invalid where certain conditions are met such as that the transaction was entered into fraudulently, or as a result of bad faith or collusion, or contrary to the provisions of Kazakh law including a duty of good faith, a duty not to inflict harm, and a duty to make disclosure of affiliations.

[2] CJSC TechstroyAlyans, JSC Vektor; JSC InveStroyHolding; JSC Technostroy; JSC Rover; JSC Technoinvest; JSC Sufleks.

[3] By virtue of Article 74 (1) of the JSC Law.