English High Court Declines Jurisdiction to Hear Claims Against Sberbank of Russia

7 July 2021

Debevoise & Plimpton LLP has represented Russia's largest bank, Sberbank of Russia ("Sberbank"), in its successful challenge to the jurisdiction of the English courts to hear claims brought by a subsidiary of another Russian bank, VTB Commodities Trading DAC ("VTB").

In her judgment in *VTB Commodities Trading DAC v Sberbank & Ors* [2021] EWHC 1758 (Comm), handed down on 2 July 2021, Mrs Justice Cockerill confirmed that VTB is not entitled to use the procedure under Part 20 of the Civil Procedure Rules to add Sberbank as a party to existing English court proceedings and that in any event, England is not the appropriate forum to hear claims concerning matters that took place almost entirely in Russia.

Background. The factual background to this case was complex. In 2019, VTB commenced a series of London-seated LCIA arbitrations against JSC Antipinsky Refinery ("Antipinsky"), the operator of one of Russia's largest oil refineries. In support of those arbitrations, under s.44 of the Arbitration Act 1996, VTB commenced proceedings in the English courts for interim relief and obtained a worldwide freezing order over Antipinsky's assets and a specific injunction (the "Cargo Injunction") preventing transfer of certain cargoes of vacuum gas oil ("VGO") to third parties.

Swiss oil trader Petraco Oil Company SA ("Petraco") intervened in VTB's court proceedings, claiming that it had purchased and was entitled to delivery of VGO affected by the Cargo Injunction. Petraco applied to vary the freezing order and the Cargo Injunction and sought compensation under the cross-undertaking given to the court by VTB when the injunctions were granted. VTB countered by claiming that Petraco was aware that the VGO it purchased had already been sold by Antipinsky to VTB, so Petraco could not have taken valid title. Petraco denied the allegations. Following a hearing, Mr Justice Blair ordered that the disputed VGO cargoes be sold and the proceeds paid into court and that there be an expedited trial as to the entitlements of VTB and Petraco to those proceeds (the "Cargo Trial").

Subsequently, VTB purported to invoke Part 20 of the CPR to introduce into the Cargo Trial additional claims against two third parties, Sberbank and a trading company, JSC VO Machinoimport, which VTB alleged were involved in a conspiracy with Antipinsky to "double sell" cargoes of VGO, including to Petraco. The additional claims were advanced almost entirely under Russian law and related to events alleged to have occurred in Russia. Sberbank denied the claims and further challenged the jurisdiction of the English court to hear them, arguing that they should instead be determined by the Russian courts.

Sberbank's Successful Challenge. Sberbank's jurisdiction challenge was made on four bases:

- The court proceedings had been started as an arbitration claim against Antipinsky, in which VTB was the claimant. VTB therefore could not use Part 20 of the CPR to try to add Sberbank as a party because Part 20 is only available to defendants.

- Even if VTB could use Part 20, the court should not exercise its discretion to add Sberbank as a party. The existing proceedings were an arbitration claim, in which the function of the court is to support or supervise the relevant arbitration proceedings. However, VTB was instead trying to use the Cargo Trial to drag in freestanding damages claims against third parties, unrelated to any arbitration.

- Relatedly, there is no applicable "gateway" under the CPR under which VTB could obtain permission to serve out its claims on Sberbank.

- England was not the *forum conveniens*. The actions alleged by VTB almost all took place in Russia, the evidence would be in Russian from Russian witnesses and the claims were almost all brought under Russian law, including under provisions of law around which there was a degree of controversy and academic debate, which would benefit from consideration and development by a Russian court. The obvious place for the claims to be heard was instead Russia.

In her judgment, Cockerill J found in Sberbank's favour on all points.

First, building on previous decisions in *CT Bowring & Co v Corsi & Partners* [1994] BCC 713 (CA), *JSC VTB Bank v Skurikhin* [2018] EWHC 3072 (Comm) and Cockerill J's own previous judgment in *JSC Karat-1 v Tugushev* [2021] EWHC 743 (Comm), the Judge confirmed that the process for adding a party to proceedings under Part 20 of the CPR is only available to defendants.

Further, when a claimant has given a cross-undertaking to the court, for example as a condition for the grant of an interim injunction, and a third party makes a claim for

compensation under that cross-undertaking, such claim by the third party does not change the characterisation of the parties in the proceedings. The Claimant does not become a defendant to the third party's application for compensation but rather remains as a claimant and therefore cannot invoke Part 20 of the CPR. In the instant case, that Petraco had intervened to seek compensation under VTB's cross-undertaking did not change VTB's characterisation as the claimant.

Secondly, the Judge held that, even if Part 20 of the CPR had been available to VTB, she would not exercise her discretion to add Sberbank to the proceedings. Referring to the purpose of court proceedings in support of arbitration, Cockerill J doubted that there would ever be circumstances in which it would be appropriate to use Part 20 to add a third party to such proceedings. In any event, the Judge did not consider that it was appropriate to add VTB's proposed wide-ranging and "substantially freestanding" claims against Sberbank to the existing narrow injunction proceedings between VTB and Petraco.

Thirdly, the parties were in agreement that there was *"a very considerable body of factors which (subject to questions about the weight to be attached to them),* [pointed] *to Russia as the forum conveniens."* The Judge concluded that, overall, VTB's proposed additional claims were "truly a Russian case". Although there was potentially a risk of irreconcilable judgments from the Cargo Trial and any Russian proceedings on VTB's additional claims, that risk was not a "trump card". The Judge rejected VTB's argument that the Supreme Court's decision in *Lungowe v Vedanta Resources PLC* [2020] 2 AC 1045 should be read narrowly, confirming that the risk of irreconcilable judgments was only one factor to be taken into account and that, while it was a weighty factor, it could be outweighed by the other circumstances of the case.

Cockerill J held that there was limited overlap between VTB's proposed additional claims and the issues in the Cargo Trial and that the case was before the English court "*purely*" because VTB had chosen to bring an arbitration claim in England. The Judge held that this was not a good basis for the additional claims to be pursued in England; as she put it, *"the tail of the proceedings accessory to a now defunct arbitration should not wag the dog of a substantive dispute which is truly a Russian case."* Accordingly, the Judge held that VTB had failed to discharge its burden of establishing that England is *"clearly and distinctly"* the most appropriate forum.

The Judge therefore upheld Sberbank's jurisdiction challenge in its entirety, holding that Russia was the proper forum for VTB's proposed additional claims. The judgment provides welcome clarification of the English courts' approach to assessing the *forum conveniens* and of the limits of the ability to add parties to existing proceedings under Part 20 of the CPR.

Sberbank was represented before the court by Debevoise London Co-Managing Partner Lord Goldsmith QC and barristers James Willan QC and Georgina Petrova. The Debevoise team was led by partner Chris Boyne and international counsel Gavin Chesney in London, and international counsel Evgeny Samoylov in Moscow.

* * *

Please do not hesitate to contact us with any questions.

LONDON

Christopher Boyne
cboyne@debevoise.com

Gavin Chesney
gchesney@debevoise.com

Catalina Diaconeasa
cdiaconeasa@debevoise.com