Neutral Citation Number: [2025] EWHC 1060 (Comm)

Case No: CL-2023-000796

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2 May 2025

Before :

Dame Clare Moulder DBE

- -

Between :

JSC DTEK KRYMENERGO	**Claimant**
- and –	
THE RUSSIAN FEDERATION	**Defendant**

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- -

Miss Emily Wood KC and **Mr Anton Dudnikov KC** (instructed by Covington & Burling LLP) for the **Claimant**
Mr Vernon Flynn KC and Mr Mark Wassouf (instructed by Curtis, Mallet-Prevost, Colt & Mosle LLP) for the **Defendant**

Hearing dates: 9 and 10 April 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 2 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Dame Clare Moulder DBE :

Introduction

1. There are two applications before the Court, an application by the Defendant, the Russian Federation ("Russia") for a stay and an application by the Claimant for the stay to be refused or in the alternative for the stay to be granted subject to a condition for Russia to make a payment into Court.
2. The applications arise out of an arbitration award in JSC DTEK Krymenergo v. The Russian Federation, PCA Case No. 2018-41 which was made on 1 November 2023 in an amount of USD 207,800,000 plus interest in favour of the Claimant (the "Award").
3. The Claimant was given permission to enforce the award by an order of Andrew Baker J on 15 November 2023 (the "Enforcement Order").
4. The Defendant made an application on 1 February 2024 to annul the award before The Hague Court of Appeal on the basis that the tribunal did not have jurisdiction to hear the dispute (the "Annulment Proceedings").
5. By an application dated 22 October 2024 the Defendant made an application in the English Courts to set aside the Enforcement Order on the grounds of State Immunity or for a stay of the Immunity Application (the "Stay Application") until the Annulment Proceedings have been finally determined by the Dutch Courts and no further appellate recourse is available to the parties.
6. The Immunity Application is an application by the Defendant asserting that (i) the Defendant is immune from the jurisdiction of the English Courts pursuant to s.1(1) of the State Immunity Act 1978 (the "SIA"); and (ii) the Defendant has not agreed to submit this dispute to arbitration in writing or otherwise pursuant to s.9(1) of the SIA and therefore, the Enforcement Order should not have been granted.
7. By an application dated 10 December 2024 the Claimant applied for the Stay Application to be refused or the Stay Application be granted subject to the Defendant paying the amount of the Award, interest and costs into Court (the "Security Application").
8. By a consent order issued by Bryan J dated 18 November 2024 the parties agreed that the Stay Application would be heard before the Immunity Application and by a consent order issued by Cockerill J dated 14 January 2025 the parties agreed that the Security Application and the Stay Application would be heard together.
9. This is the reserved judgment on the Stay Application and the Security Application following a remote hearing on 9 and 10 April 2025. The hearing was held remotely as directed by Henshaw J, Judge in charge of the Commercial Court, due to the fact that leading counsel for the Defendant is presently overseas on another matter.

Evidence

10. In support of the Stay Application the Defendant relied on the First Witness Statement of Ms Luciana Ricart, a partner at the law firm of Curtis, Mallet-Prevost, Colt & Mosle LLP ("Curtis") having conduct of this matter on behalf of the Defendant, dated 22 October 2024 and her Second Witness Statement ("Ricart 2") dated 3 February 2025.
11. In support of the Claimant's response to the Stay Application and in support of the Security Application, the Claimant has filed the second witness statement of Mr Jonathan Gimblett ("Gimblett 2"), partner in the law firm of Covington & Burling LLP ("Covington") having conduct of this matter on behalf of the Claimant, dated 10 December 2024 and the witness statement of Mr Oleksandr Fomenko, the

Chairman of the Management Board of DTEK Energy B.V., dated 10 December 2024. There is also a third witness statement from Mr Gimblett dated 17 February 2025 in reply to Ricart 2.

12. By a consent order dated 4 March 2025 Henshaw J granted permission for the parties to rely on expert evidence as to Dutch law and procedure. Accordingly the Court has before it the following:
    a. Letter dated 31 January 2025 from Mr Cornegoor ("Cornegoor 1") of Hoff Advocaten commenting on Gimblett 2;
    b. Letter from Ms Mirjam van de Hel-Koedoot partner of NautaDutilh NV dated 17 February 2025 ("Nauta 1");
    c. A further letter dated 3 March 2025 from Mr Cornegoor ("Cornegoor 2") replying to Nauta 1; and
    d. A further letter from Ms van de Hel-Koedoot dated 28 March 2025 commenting on paragraph 4 of Cornegoor 2 ("Nauta 2").

Background

13. The Claimant in the Arbitration Proceedings and in these proceedings is JSC DTEK Krymenergo, a Ukrainian company indirectly majority-owned by DTEK Energy B.V., which is a Dutch subsidiary of DTEK Group B.V.
14. The DTEK Energy Group is a Ukrainian energy group whose ultimate beneficial owner is Ukrainian oligarch Mr Rinat Akhmetov.
15. The Respondent in the Arbitration Proceedings and the Defendant in these proceedings is Russia.

The Arbitration Proceedings

16. The arbitration proceedings which led to the Award concerned the alleged breaches by Russia of Articles 2, 3 and 5 of the Agreement between the Government of Russia and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments, dated 27 November 1998 (the "BIT" or the "Treaty").
17. The terms of the arbitration agreement are at Article 9 of the Treaty. Article 9 of the Treaty states (so far as material):

    "1. Any dispute between one Contracting Party and an investor of the other Contracting Party arising in connection with investments, including disputes concerning the amount, terms, and payment procedures of the compensation provided for by Article 5 hereof, or the payment transfer procedures provided for by Article 7 hereof, shall be subject to a written notice, accompanied by detailed comments, which the investor shall send to the Contracting Party involved in the dispute. The parties to the dispute shall endeavor to settle the dispute through negotiations if possible.

    2. If the dispute cannot be resolved in this manner within six months from the date of the written notice mentioned in paragraph 1 of this article, it shall be referred to:

    …

    c) an "ad hoc" arbitration tribunal, in accordance with the Arbitration Rules of the United Nations Commission for International Trade Law (UNCITRAL).

    3. The arbitral award shall be final and binding upon both parties to the dispute. Each Contracting Party agrees to execute such award in conformity with its respective legislation."

18. The dispute is summarised at paragraph 2 of the Award:

    "The claimant is a Ukrainian joint stock company …which owned the formerly State-owned electricity network in Crimea, buying electricity from a Ukrainian

state-owned wholesaler, and then selling the electricity to industrial and domestic customers in Crimea. Claimant alleges that it held an investment protected under the Treaty and that the Russian Federation took a series of measures that led to the dispossession and nationalization of its electricity network and associated assets in Crimea without any compensation. It therefore requests an award of USD 421.2 million ... plus fees, costs, and interest in compensation for its expropriated assets."

19. By letter of 5 April 2017, pursuant to Article 9(1) of the Treaty, the Claimant notified the Defendant of the existence of an investment dispute arising from the expropriation of its assets. Having received no response, and after more than the six months specified in Article 9(2) of the Treaty had elapsed, the Claimant commenced the ad hoc arbitration on 16 February 2018, by filing a notice of arbitration in accordance with the Rules of the United Nations Commission for International Trade Law 1976 (the "UNCITRAL Rules").
20. On 16 February 2018, the Claimant appointed Mr J. William Rowley KC as its co arbitrator. Following the Defendant's failure to appoint an arbitrator within 30 days of notification of the appointment of the Claimant's party-appointed arbitrator, the Claimant requested that the Secretary General of the Permanent Court of Arbitration (the "PCA") designate an appointing authority to appoint an arbitrator on behalf of the Defendant. The Secretary-General of the PCA designated an Appointing Authority which proceeded to appoint Professor Vladimir Pavic as co-arbitrator on 18 June 2018.
21. On 3 July 2018, the co-arbitrators appointed Mr Stanimir A. Alexandrov as presiding arbitrator.
22. On 7 December 2018, the Claimant submitted its Statement of Claim.
23. The Defendant initially did not participate in the proceedings. However on 5 April 2019, the Defendant wrote to the Tribunal indicating its desire to participate in the proceedings and requesting an extension of six months to the procedural timetable. In its Procedural Order No. 3 dated 23 April 2019, the Tribunal granted the Defendant until 23 May 2019 to file its Statement of Defence.
24. On 21 June 2020, Mr Alexandrov resigned as presiding arbitrator. On 29 June 2020, arbitrators Rowley and Pavic appointed Professor Juan Fernández-Armesto as the new presiding arbitrator.
25. Thereafter, both Parties participated in the arbitration proceedings, which involved rounds of written briefs, a week-long hearing in The Hague in September 2021, post-hearing briefs, and submissions on costs.

The Award

26. Before the Tribunal Russia raised four jurisdictional objections and one admissibility objection, all of which were dismissed by the Tribunal in its Award.
27. The first jurisdictional objection was whether the investment was made in the territory of Russia.
28. As set out in the Award (paragraphs 227-228) Russia's position was that the BIT is not applicable to Crimea since there is a territorial dispute between Russia and Ukraine regarding the status of Crimea.
29. There was also an issue before the Tribunal (Award paragraph 287) as to the relevant date for the determination of the territory: Russia's contention was that the relevant date to establish whether a territory forms part of the geographical scope of protection is the date when the Treaty was signed: since in this case Crimea was not part of the territory of Russia at the time when the BIT was entered into, Ukrainian investments in Crimea would not enjoy protection.

30. The First Jurisdictional Objection was dismissed by the Tribunal. The first reason was set out at paragraph 292 of the Award, the Tribunal concluding, by majority, that the proper interpretation of Article 1(4) of the BIT is that "*territory of the Russian Federation*" refers to the geographical area which, at the relevant date (which was held to be the date of the impugned measures), was under the control of Russia.
31. The Second Jurisdictional Objection was whether the investment met the "*temporal requirements*".
32. Article 12 of the BIT provides as follows:
"*Application of the Agreement - This Agreement shall apply to all investments (made)/ [carried out] by investors of one Contracting Party in the territory of the other Contracting Party, on or after January 1, 1992*" (Claimant's translation in round, Defendant's in square brackets)
33. Russia's position (Award paragraph 302) was that the BIT only applies to investments which have been "*carried out*" by a positive action on or after 1 January 1992.
34. The Tribunal concluded (Award paragraph 344) that
"*…the proper interpretation of Article 12 of the BIT implies that investments, to be protected, must have been "made" or "carried out" by the investor post-1992; and investments are "made" or "carried out" when the investor acquires ownership (or some other ius in rem over such assets).*"
35. At paragraph 358 the Tribunal found that
"…Krymenergo acquired the Soviet Assets after 1992 - and these assets thus comply with the temporal requirement established in Article 12 of the BIT."
36. The Tribunal rejected the further argument by Russia (Award paragraphs 360-361) that Article 12 of the BIT requires that the investments must have been cross-border from the outset.
37. The Tribunal also dismissed (Award paragraphs 364 and 365) the argument by Russia that the Claimant did not play any active role in the acquisition of ownership. At paragraph 366 the Tribunal held that:
"*Russia's argument is contradicted by the facts. Krymenergo's role in 1995, when it was incorporated, was anything but passive: it took the corporate decision to issue shares and to deliver these shares for subscription by the State. In exchange, as capital contribution for the new shares, the State transferred and Krymenergo acquired certain rights over the Soviet Assets (be it ownership rights, as defended by Claimant, be it the right of economic authority, as submitted by Respondent - the transfer of both types of rights requires the consent of the acquirer)."*
38. The Tribunal (by a majority) dismissed the Second Jurisdictional Objection (Award paragraph 371).
39. The Third Jurisdictional Objection was whether the investor made an investment under Article 1(1). Russia's position (Award paragraph 387) was that the Claimant did not have a protected investment under Article 1(1) because it put no assets into Russia in compliance with its legislation, nor could it have done so prior to 2014, as it could only make domestic investments in Crimea that would have been subject to Ukrainian law.
40. The Tribunal concluded (Award paragraph 407) that:
"*In sum, the Tribunal agrees with Respondent that, under Article 1(1) of the BIT, investments must meet three requirements (activity, cross-border and compliance with local legislation). But the Tribunal disagrees with Respondent's additional*

contention that the three requirements must be met concurrently at the inception of the investment."

41. The Fourth Jurisdictional Objection was whether the Claimant met the definition of investor. At paragraph 452 of the Award this objection was dismissed.
42. Russia also raised an Admissibility Objection (Award paragraph 453) that the Claimant's claims were not admissible because the Claimant's ultimate beneficial owner, Mr. Rinat Akhmetov, acquired the Claimant through fraud and corruption. This was dismissed.
43. Having dismissed the Jurisdictional Objections and the Admissibility Objection and declared that the Tribunal had jurisdiction to hear and adjudicate the claims against Russia, the Tribunal declared that Russia had breached Articles 2, 3, and 5 of the BIT. It ordered Russia to pay to the Claimant damages in the amount of USD 207,800,000, together with interest over this amount at the rate of LIBOR applicable to three-month deposits denominated in USD (or the equivalent SOFR rate), plus a margin of 1%, compounded annually, from 22 January 2015 until the date of payment plus certain costs.

The Annulment Proceedings

44. Given that the Arbitration Proceedings were seated in The Hague, the courts of The Netherlands are the curial courts which have jurisdiction to hear the challenge to the Award. On 1 February 2024, Russia filed an application to The Hague Court of Appeal seeking to set aside the Award on the basis that the Tribunal did not have jurisdiction to hear the dispute as the dispute does not fall within the scope of the BIT's arbitration provision. The Annulment Proceedings are ongoing.

The parties' position in outline on the Stay Application

45. The grounds for the Stay Application as set out in Russia's evidence are that:
    a. The outcome of the Annulment Proceedings may have the effect of nullifying these proceedings in their entirety, such that the Immunity Application becomes academic.
    b. If these proceedings were simultaneously to continue alongside the Annulment Proceedings, it could result in a situation where the English Court permits the Claimant to enforce, and potentially then execute, the Award against Russia, but the Dutch Courts ultimately set aside the underlying Award. That would almost certainly cause significant and irreversible prejudice to Russia.
    c. The Claimant's case for enforcement is inextricably linked to the Award and the outcome of the Annulment Proceedings, such that it would be more efficient to allow the Annulment Proceedings to conclude before proceeding to hear the Immunity Application and, if that is unsuccessful, any other application related to the Award.
46. In summary the Claimant's position (skeleton paragraph 6) is that:
    a. The Defendant has not shown that its set-aside challenge has any realistic prospect of success: the grounds advanced have been rejected by the Tribunal and are contrary to the weight of decided authority.
    b. Russia has no intention to pay the Award.
    c. The Annulment Proceedings could take up to 5 ½ years to conclude. A delay of that length is inherently prejudicial to the Claimant.
    d. There would be no real prejudice to the Defendant if the stay is refused. There is no risk of any proceeds of enforcement being dissipated and in any event the Claimant has proffered undertakings to dispose of this issue.

Relevant Legal Principles

47. Under CPR r.3.1(2)(g) the Court has power to stay the whole or part of any proceedings or judgment either generally or until a specified date or event. (Prior to amendments effected in October 2024, this sub-rule was numbered as CPR r.3.1(2)(f).)

48. The relevant principles which apply where the Court exercises its case management powers in relation to a stay were set out by Henshaw J in *Hulley v The Russian Federation* [2021] EWHC 894 (Comm) at [64] - [67]. Although Henshaw J in *Hulley* was concerned with whether to lift or continue a stay, the principles are the same

"*64. Though their relevance is disputed for the reasons considered later, it is convenient to refer here also to the principles applicable where the court exercises its power to grant a stay pursuant to its general case management powers under the CPR.*

65. The approach applying standard case management considerations would be to lift the Stay "if that is in accordance with the overriding objective (CPR 1.1) and if it is in accordance with the requirements of justice": King Felix Sunday Bebor Berebon & Ors v The Shell Petroleum Development Company of Nigeria [2017] EWHC 1579 (TCC) § 48.

66. A case management stay may be justified where there are related parallel proceedings in a foreign jurisdiction: see e.g. Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd [2020] UKSC 37 § 99 per Lord Reed:

"The English courts have wide case management powers, and they include the power to impose a temporary stay on proceedings where to do so would serve the Overriding Objective: see CPR 1.2(a) and 3.1(2)(f). ... A temporary stay may be ordered where there are parallel proceedings in another jurisdiction, raising similar or related issues between the same or related parties, where the earlier resolution of those issues in the foreign proceedings would better serve the interests of justice than by allowing the English proceedings to continue without a temporary stay [see Reichhold Norway ASA v Goldman Sachs International [2000] 1 WLR 173]. But this would be justified only in rare or compelling circumstances ...".

67. Factors identified in the cases as justifying a case management stay in the context of parallel proceedings include the following:

i) The risk of inconsistent decisions in proceedings in different jurisdictions is "always capable of amounting to a very strong reason for granting a stay, as the cases ... show and emphasise": Bundeszentralamt v Heis [2019] EWHC 705 (Ch) § 113; Ferrexpo AG v Gilson Investments Ltd [2012] EWHC 721 (Comm) § 155.

ii) The "costs and inconvenience of duplicated proceedings" to the parties, the court and other court users may favour a stay: Citigroup Global Markets Ltd v Amatra Leveraged Feeder Holdings Ltd [2012] EWHC 1331 (Comm) § 76; Reichhold at p.182; Department of Trade and Industry v British Aerospace plc and Rover Group Holdings plc [1991] 1 CMLR 165 §§ 12-13.

iii) The existence of issues that are more appropriate for determination in the foreign proceedings is a factor favouring a stay. For example:

a) In Bundeszentralamt, Hildyard J granted a stay pending parallel litigation in Germany involving issues of systemic importance to German law, holding that:

"[T]he 'potential disaster from a legal point of view', as in The El Amria ... Brandon LJ (as he then was) described the risk of inconsistent decisions in concurrent proceedings in different jurisdictions, is the more acute when

in one of the jurisdictions the issue is a systemic one or may be decided in a manner which has systemic consequences." (§ 116)

b) *In Department of Trade and Industry v British Aerospace plc, the validity of a decision of the EC Commission was regarded as more appropriate for determination by the CJEU than by the English court (§§ 12-13).*

c) *In Prifti it was held to be "inherently inappropriate" for the English court to determine questions of Spanish law bearing on the validity of the first instance Spanish judgment while a Spanish appeal remained pending (§ 22).*

iv) A stay is more likely to be appropriate where there is a greater degree of overlap of issues between the English proceedings and the foreign proceedings, or where the foreign proceedings are likely to be determinative of all or part of the English proceedings: Department of Trade and Industry v British Aerospace §§ 12-13; Prifti §§ 21 and 34.

v) The grant of a stay is more likely where any prejudice to the party resisting a stay can adequately be compensated by an award of interest or is outweighed by the prejudice which would be caused by refusing a stay: Prifti § 34; Reichhold p.181 (see § 62.vii) above)." [emphasis added]

49. As in *Hulley* it was common ground between the parties that the case law on section 103(5) of the Arbitration Act 1996 (the "1996 Act") is of assistance at least by way of analogy or guidance when considering whether or not to grant the Stay.

50. Section 103 of the 1996 Act provides:

"103.- Refusal of recognition or enforcement.

(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.

(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves-

(a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;

(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;

(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));

(e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;

(f) that the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.

…

(5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court

before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award. It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security."

51. Both parties referred the Court to the decision in *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corp* [2005] EWHC 726 (Comm), ("IPCO") and the reference in that judgment to *Soleh Boneh v Uganda Government* [1993] 2 Ll Rep 208. Henshaw J in his judgment in *Hulley* at [60] summarised the principles arising from these authorities as follows:

"*The principles relevant to granting a stay under section 103(5) were summarised by Gross J in IPCO at [14]-[15] (references removed):*

"s.103(5) achieves a compromise between two equally legitimate concerns. On the one hand, enforcement should not be frustrated merely by the making of an application in the country of origin; on the other hand, pending proceedings in the country of origin should not necessarily be pre-empted by rapid enforcement of the award in another jurisdiction. Pro enforcement assumptions are sometimes outweighed by the respect due to the courts exercising jurisdiction in the country of origin-the venue chosen by the parties for their arbitration.

…the Act does not furnish a threshold test in respect of the grant of an adjournment and the power to order the provision of security in the exercise of the court's discretion under s.103(5). In my judgment, it would be wrong to read a fetter into this understandably wide discretion (echoing, as it does, Art. VI of the New York Convention). Ordinarily, a number of considerations are likely to be relevant:

(i) whether the application before the court in the country of origin is brought bona fide and not simply by way of delaying tactics;

(ii) whether the application before the court in the country of origin has at least a real (i.e., realistic) prospect of success (the test in this jurisdiction for resisting summary judgment);

(iii) the extent of the delay occasioned by an adjournment and any resulting prejudice.

Beyond such matters, it is probably unwise to generalise; all must depend on the circumstances of the individual case. As it seems to me, the right approach is that of a sliding scale, in any event embodied in the decision of the Court of Appeal in Soleh Boneh v Uganda Government [1993] 2 Ll Rep 208 [("Soleh Boneh")] in the context of the question of security:

'… two important factors must be considered on such an application, although I do not mean to say that there may not be others. The first is the strength of the argument that the award is invalid, as perceived on a brief consideration by the Court which is asked to enforce the award while proceedings to set it aside are pending elsewhere. If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security. In between there will be various degrees of plausibility in the argument for invalidity; and the Judge must be guided by his preliminary conclusion on the point.

The second point is that the Court must consider the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult … if enforcement is delayed. If that is likely to occur, the case for security is stronger; if, on the other hand, there are and always will be insufficient assets within the jurisdiction, the case for security must necessarily be weakened.'" [emphasis added]

The Merits of the Challenge

52. As set out above the approach of the Courts on an application for a stay is to consider the strength of the argument that the award is invalid. This is to be "*as perceived on a brief consideration by the Court which is asked to enforce the award while proceedings to set it aside are pending elsewhere*" (*Soleh Boneh*).

53. The challenge in the Annulment Proceedings is being advanced on three grounds which can be summarised as follows:
    a. The "*active investment*" issue. Pursuant to Article 12, the BIT applies only to investments "*made ...on or after January 1, 1992*". Russia's case is that the making of an investment within the meaning of Article 12 of the BIT requires a particular action, that "*passive acquisition*" is insufficient.
    b. The "*cross-border investment*" issue. Russia's case is that pursuant to Article 12, the investment must have been cross-border in nature from the outset: at the time of the Claimant's acquisition of the network Crimea was part of Ukraine and, as such, it was a domestic investment.
    c. The "*territory*" issue: Russia's case is that the alleged investment was not made in the territory of Russia since there is a territorial dispute between Russia and Ukraine regarding the status of Crimea.

54. Both parties referred to the merits as being "*pivotal*". Both parties were agreed that the test is not whether Russia has a "*real prospect*" of success but it is the sliding scale referred to in *Soleh Boneh*.

55. However Miss Wood KC submitted that:
    "the exercise that the Court is invited to perform ... it's weighing up the merits of the challenge as just one factor amongst others to determine whether, taking all factors in the case in the round, it's in the interest of justice to stay these proceedings, and if so whether that should be done on terms".

56. The Claimant submitted that Russia's arguments stand no real prospect of success but even if the prospects were better than the test for summary judgment its prospects lie at the (very) low end of the scale (paragraph 51 skeleton).

57. Mr Flynn KC however submitted that the factors were "*not all of the same degree of importance*".

58. I accept that the strength of the argument on the merits will impact the weight to be given to the merits as a factor in the balancing exercise. Beyond that it is not possible to give any precision in the abstract.

59. Mr Flynn KC stressed that it was enough for Russia to succeed on any one of the three issues for the Award to be annulled.

60. As referred to above, the Court has before it expert evidence from Dutch law experts. I note that Mr Cornegoor according to his letter has been practising law in the Netherlands since 1993 and states that he has "*considerable experience in litigation relating to arbitral awards rendered under investment treaties*". Cornegoor 1 concludes that:
    "*each of the arguments advanced by the Russian Federation has at least a realistic prospect of success*".

61. I also have the conflicting opinion from Ms van de Hel-Koedoot who is instructed by the Claimant. She is a lawyer who specialises in international arbitration and litigation matters. She is a partner of the international law firm NautaDutilh. In Nauta 1 she concludes that she:
    "*strongly disagree[s] with Mr Cornegoor's assessment of the merits of the Russian Federation's case in the [Annulment] Proceedings...I do not consider the arguments advanced by the Russian Federation to have a realistic prospect of success*".

62. I also bear in mind that although the Netherlands does not have a *stare decisis* rule and therefore the Hague Court of Appeal is not bound by previous decisions, nevertheless as stated by Ms van de Hel-Koedoot, previous court decisions do have "*significant persuasive authority*" (paragraph 9 of Nauta 1).

The Active Investment Issue

63. There are two issues which are raised by Russia under this ground:
    a. whether Article 12 requires the acquisition of an asset to be "*actively made*",
    b. whether if this is a requirement it was in any event satisfied by virtue of the Claimant having issued shares to its shareholders.

64. As set out above, the relevant provisions of the BIT are Articles 1(1) and 12, which read as follows:

    "*Article 1: Definitions - (1) The term "investments" means any kind of tangible and intangible assets which are (invested)/ [put in] by an investor of a Contracting Party in the territory of the other Contracting Party in accordance with its legislation […]".*

    "Article 12: Application of the Agreement - This Agreement shall apply to all investments (made)/ [carried out] by investors of one Contracting Party in the territory of the other Contracting Party, on or after January 1, 1992" (Claimant's translation in round, Defendant's in square brackets).

65. In its submissions in support of the issue in subparagraph (a) the Claimant relied on:
    a. the reasoning of the Tribunal;
    b. the decision of the tribunal in *Naftogaz v The Russian Federation* (PCA Case no 2017-16) and the decision of The Hague Court of Appeal on the appeal in that case;
    c. the judgment of Butcher J in *Tatneft v Ukraine* [2018] 1 WLR 5947.

66. In support of subparagraph (b) the Claimant relied on:
    a. the finding of the Tribunal;
    b. a submission that (contrary to the views expressed by Mr Cornegoor) what occurred in this case (the issue of shares in return for the assets) would qualify as the making of an investment.

67. As referred to above one of the submissions made for the Claimant in resisting the Stay Application is that the grounds advanced have been rejected by the Tribunal. In my view the Tribunal was not directly addressing the issue now raised by Russia as it was focussed on the question of whether the investment was made after 1 January 1992:

    "*it is not sufficient that an investor simply holds or maintains an investment; an action by the investor, performed after 1 January 1992, is required*" (Award paragraph 331).

68. I accept however that the Tribunal did address the argument by Russia that the Claimant "*did not play any active role in the acquisition of ownership*" (Award paragraphs 364) At paragraph 366 the Tribunal found:

    "*Russia's argument is contradicted by the facts. Krymenergo's role in 1995, when it was incorporated, was anything but passive: it took the corporate decision to issue shares and to deliver these shares for subscription by the State. In exchange, as capital contribution for the new shares, the State transferred and Krymenergo acquired certain rights over the Soviet Assets (be it ownership rights, as defended by Claimant, be it the right of economic authority, as submitted by Respondent – the transfer of both types of rights requires the consent of the acquirer)."*

69. However I bear in mind that the experts agreed that The Hague Court of Appeal will review "*de novo*" whether the dispute was the subject of a valid agreement to arbitrate: Mr Cornegoor states (paragraph 5 of Cornegoor 1) that the annulment court will not limit its review to whether the tribunal correctly applied the Treaty but will independently review whether there was a valid agreement to arbitrate and Ms van de Hel-Koedoot agrees with that statement at paragraph 7 of Nauta 1.

70. As to the decision in *Naftogaz,* Mr Cornegoor in his evidence addressed the argument that in *Naftogaz* the Dutch court had already rejected the argument that Article 12 requires that an investment is "*actively made*" and that the passive acquisition of an asset after 31 December 1991 is insufficient (paragraph 8 of Cornegoor 1). His view was that in *Naftogaz* "*the court declined to decide whether the investments …had been made after 31 December 1991*" and the tribunal did not consider the alternative argument that the mere acquisition of an investment constitutes the making of an investment as meant in Article 12. He went on to say that the manner in which the court in *Naftogaz* formulated its decision "*strongly suggests*" that it is not inclined to accept the argument that the "*mere acquisition*" of an investment constitutes the making of an investment. Mr Cornegoor referred to paragraph 5.7.5.2 and 5.7.5.8 of the judgment.

71. Mrs Van de Hel-Koedoot in her evidence accepted that The Hague Court of Appeal in *Naftogaz* did not consider whether Article 12 requires the acquisition of an asset to be "*actively made*". However she expressed the view that in prior Crimea cases, including *Naftogaz,* The Hague Court of Appeal rejected the argument that Article 1(1) contained an action requirement. She stated that "*it is difficult to see why Article 12 would contain a material limitation to what counts as an 'investment'*" (paragraph 12 of Nauta 1).

72. Mr Cornegoor responded to this point in Cornegoor 2 (at paragraph 2) that her argument is contrary to the system of the Treaty which is that Article 1(1) defines what qualifies as an "*investment*" and Article 12 then determines to which of those investments the Treaty applies.

73. Mr Cornegoor is of the view (Cornegoor 2 paragraph 3) that the requirement of an action in the making of an investment follows from the meaning of the word "*made*" in the original Russian and Ukrainian language versions of the Treaty.

74. The argument which the Court of Appeal in *Naftogaz* was addressing is set out at 5.7.2:

"The Russian Federation contends that the correct interpretation of Article 12 BIT 1998 is that only investments actively made on or after January 1, 1992 are protected, and thus investments that simply existed at the time of a violation of the BIT 1998 committed on or after January 1, 1992 and an arbitration initiated after that date…The Russian Federation elaborated this as follows.

5.7.2.1 The text of Article 12 BIT 1998 states that the BIT 1998 is applicable only to "investments made (...) on or after January 1, 1992." <u>According to the Russian Federation, the word "made" indicates that an active act of investing must be done after January 1, 1992 and not that investments need only be "held." In international treaties as well, a distinction is made between "making" an investment and the mere "existence" of an investment.</u> The latter is indicated by the terms "owned," "held," "controlled," "maintained," or "existing." Language experts Prof. Tyulenev (associate professor in translation studies, affiliated with Durham University) and dr. T. Kurokhtina (research associate affiliated with the Institute for Slavic Studies of the Russian Academy of Sciences) confirm that the wording used in the authentic

Russian and Ukrainian texts of Article 12 BIT 1998 signifies that an investment must have been actively made on or after January 1, 1992…". [emphasis added]

75. The Hague Court of Appeal held:

"5.7.5.1 The court of appeal finds that Article 12 BIT 1998 must be interpreted in such a way that only investments made on or after January 1, 1992 come under the protections of the BIT 1998, on the following grounds:

(i) the verbatim wording of Article 12 does not specify investments that are held, but rather investments that have been made at a specific moment;

(ii) an interpretation of Article 12 BIT 1998 in conformity with the rules of Article 31 VCLT, whereby the three elements of that provision (text, context, and "object and purpose") are applied together-"in good faith"-in a single operation leads to the conclusion that the protections of the treaty do not extend to investments made before 1992;

(iii) the interpretation is also confirmed by the travaux préparatoires and state practice.

5.7.5.2 In Article 1(1) BIT 1998, the designation "assets which are invested" or (in another English translation:) "assets which are put in" (Tyulenev, par. 9 no. 111) is used in connection with the description of investments. The verb here is in the present tense in Russian and in Ukrainian. This verb form signifies a situation that is not linked to a specific time. In Article 12, in contrast, a perfective passive past participle is used, translated in English as "investments made" or "investments carried out" (Kurokhtina and Tyulenev), or a tense that expresses an idea of completeness at a specific moment (Fortuin). Although Kurokhtina and Fortuin arrive at a different outcome, they do agree that the tense used does not refer to an action in the past, but rather to the result and the consequences of that at the moment in which we are speaking.

More importantly, however, Fortuin also endorses Kurokhtina's analysis that the investments had already been made at the moment at which the articles conferred investment protection; it is a completed act, and therefore it is grammatically and semantically correct to use the past tense. From the fact that the article named the year 1992, the court of appeal deduces that in Article 12 the act to be assessed must have taken place in the past. Otherwise it would be pointless to name the year. The term "carried out" that is used in one of the English translations also indicates an act performed in or after 1992."

76. I do not consider that *Naftogaz* "*strongly supports*" the inference for which Mr Cornegoor contends, with its focus clearly being on the temporal limitation in Article 12 and how that operated. However I cannot dismiss Mr Cornegoor's views as fanciful and I do not read the opinion of Mrs Van de Hel-Koedoot as saying that Russia's case on this issue is fanciful. Rather in her evidence (paragraph 12 of Nauta 1), she moves to consider the second issue which is that if Russia is right, the Claimant did make an active investment. Mrs Van de Hel-Koedoot states (paragraph 12 of Nauta 1) that:

"…Be that as it may [the Claimant] has also argued in the [Annulment Proceedings] that it has in various ways actively made its investments in Crimea".

77. The Claimant in its submissions on this issue also relied on the judgment of Butcher J in *Tatneft*. It was submitted that in *Tatneft*, Butcher J rejected an argument that there must be an "*active relationship*" between the investor and the investment under Article 1(1) of the Treaty.

78. Butcher J held that:

"*67 The second and third strands of Ukraine's argument are closely intertwined. The first of the two is, as Mr Edey put it, the investor must actually do something. It can also be put as an argument that there must be an active relationship between the investor and the investment: the investor must actively invest or put in resources. The second of the two is that the investment must be made, or the resources put in, within the territory of Ukraine. These two aspects flow, as Ukraine submits, from the words "are invested by an investor of one contracting state within the territory of the other contracting state" which appear in article 1(1). Given that what Tatneft did was to acquire the shares of a Swiss and a US company, in each case from a shareholder which was a Seychellois company, there was no investment within the territory of Ukraine.*

68 I do not consider that this argument is correct. In my judgment the phrase "are invested by" does not import a requirement that, in order to be an investment, there should have been an active process of the commitment of resources by the investor therein. The purpose of the words "are invested by" is to permit, within the definition of "investment" , a link between the specification of the types of assets which are comprised within the term and the person who owns or is otherwise interested in those assets (who must be an investor of the other contracting state) and also with the requirement that that investor must have acquired those assets in accordance with the legislation of the home state. They do not mean that even though the asset would ordinarily and naturally be described as an investment of an investor of the other contracting state, nevertheless they will not qualify as such because the investor has not actually made an active contribution of resources to the host state." [emphasis added]

79. *Tatneft* as a decision of the English courts is not addressed in the expert evidence which is before the Court and thus is not considered by the experts in reaching their conclusions.

80. It was submitted for the Claimant that Butcher J "*had well in mind the terms of (inter alia) Article 12 of the Treaty*" referring to the judgment at [57]. However that paragraph merely stated:

"*There are also references to making investments or investments being made in the relevant territory in articles 2, 4, 5 and 12; and article 3 refers to investments made by investors. Ukraine contends that these provisions show that only an investment made in Ukraine (or Russia) is a qualifying investment*".

81. It is clear from the judgment at [63] that the language that Butcher J was construing was Article 9 and Article 1:

"*As is apparent, Ukraine case depends on the proper construction of investments in article 9 of the BIT, which itself depends on a construction of the definition in article 1(1)…*".

82. Whilst therefore there may be some support to be gleaned from the reasoning in *Tatneft* it does not show that the case advanced on the first issue raised under "*active investment*" by Russia is fanciful.

83. As to the second issue, Mr Cornegoor takes the view that the Claimant became the owner of the assets in the context of what he described as "*an organisational restructuring*" and that it had "*no or little involvement in the events which resulted in it becoming the owner of the assets*". His opinion (Cornegoor 1 paragraph 9) is that:

"*The object and purpose of Article 12 and of the Treaty do not support that an asset which is excluded by Article 12 would be brought within the scope of the Treaty by it being shifted between corporate entities which are part of the same group*".

84. Further Mr Cornegoor states (Cornegoor 2 paragraph 4) that while the Claimant asserts that it acquired the assets by way of contribution on newly acquired shares it has not submitted any evidence in respect of the alleged issuance of shares and the Claimant bears the burden of proof that there was an agreement to arbitrate.

85. In Nauta 2 Mrs Van de Hel-Koedoot disputes that the Claimant has not put in any evidence but does not respond on the substantive issue on whether the share issuance amounted to an active investment. She merely cross referred to the statement of defence without responding further to Mr Cornegoor:

"In its statement of defence in the Set Aside Proceedings, DTEK Krymenergo sets out its case that, even if Article 12 of the BIT contains an "action requirement", DTEK Krymenergo has complied with it. In that respect, it is specifically alleged that the share issue by DTEK Krymenergo which formed the consideration for the assets contributed to its share capital by the Ukrainian State was the relevant investment 'act'."

86. In his submissions Mr Flynn KC for Russia relied on Teare J in *Gold Reserve Inc v Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm). He submitted that whilst the Claimant says that making an investment extends to the acquisition of assets in exchange for issuing shares, Teare J did not agree and although Mr Flynn KC accepted that Teare J was interpreting a different treaty, it was submitted that the "*substance of the point*" was the same.

87. The relevant passages from the *Gold Reserve* case are set out in the judgment of Butcher J in *Tatneft* at [76]-[77]:

"76 In the Gold Reserve case, Teare J had to construe a bilateral investment treaty between Venezuela and Canada. The issue which arose before him was as to whether the entity which had claimed in the arbitration, Gold Reserve Inc (or "GRI") was "an investor" within the meaning of that treaty. That was the relevant question for the purposes of ascertaining whether the exception to state immunity in section 9 of the SIA was applicable ... The definition of "investor" was

"in the case of Canada: (i) any natural person possessing the citizenship of Canada in accordance with its laws; or (ii) any enterprise incorporated or duly constituted in accordance with applicable laws of Canada, who <u>*makes the investment*</u> *in the territory of Venezuela and who does not possess the citizenship of Venezuela . . ."* (Emphasis added [in original].)

There was also a definition of "investment" which provided that the term meant "any kind of asset owned or controlled by an investor of one contracting party either directly or indirectly, including through an investor of a third state, in the territory of the other contracting party. . ."

77 In construing the definition of "investor", Teare J reasoned at para 35 of his judgment that "the ordinary meaning of making an investment includes the exchange of resources, usually capital resources, in return for an interest in an asset". He further said in para 37 <u>*that to make an investment, "what is required is an active relationship between the investor and the investment", and that for a person to make an investment there must be "some action on his part". On that basis he concluded that GRI had not made an investment when, under a restructuring in the Gold Reserve group of companies, from being a subsidiary of Gold Reserve Corpn, and one which had no direct or indirect ownership of the Brisas concession, GRI had become the parent of Gold Reserve Corpn which was the indirect owner of the Brisas concession*</u>*... "."* [emphasis added]

88. Butcher J rejected the relevance of the *Gold Reserve* case:

"*78 In my judgment that case involves the construction of provisions which, though dealing with similar concepts, are materially different. Specifically, the Gold Reserve case was concerned with the meaning of "investor", and not, at least directly, with the meaning given to the term "investment". Further, the definitions of both "investor" and "investment" in that case were different from the definitions in the present case…".*

89. In my view precisely the same objections can be raised in this case and accordingly I find no assistance from that authority.

Conclusion on the merits of the "active investment" issue.

90. I return to the test in *Soleh Boneh* namely that the Court has to consider:
"*the strength of the argument that the award is invalid, as perceived on a brief consideration by the Court… If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security. In between there will be various degrees of plausibility in the argument for invalidity; and the Judge must be guided by his preliminary conclusion on the point.*"

91. There is no suggestion that the Award is manifestly invalid. In relation to the strength of Russia's arguments I have before me expert evidence in support of Russia's case which on its face is from an experienced practitioner in this field. I further note that Mr Cornegoor was appointed counsel to Russia in the Annulment Proceedings by a decision of the Dean of The Hague Bar Association pursuant to a law which provides for such a decision where a litigant is unable to secure the services of a lawyer. It would appear therefore that on the evidence before the Court I have the opinion of an experienced Dutch lawyer who is independent.

92. Mr Cornegoor's evidence in relation to the "*active investment*" issue is that Article 12 has not been directly addressed by the Dutch courts in other cases and Ms van de Hel-Koedoot accepts this although she doubts the conclusions reached by Mr Cornegoor.

93. In relation to the factual position of whether there was an active investment (if that is found to be required) this again has not been resolved by the authorities as discussed above.

94. The task of this Court is not to determine the issues but to consider the strength of the argument "*as perceived on a brief consideration"* that the award is invalid. In terms of where this ground of "*active investment*" lies on the sliding scale, on the evidence before the Court, I cannot say that Russia's case is fanciful or that it has no realistic prospect of success.

The cross-border investment issue

95. It was submitted for Russia that in order for the alleged investments to attract the protection of the Treaty, they had to have been "*cross border*" at the time they were made. Russia's position is that this is a requirement of Article 12 of the Treaty, which requires that investments be "*carried out by investors of one Contracting Party in the territory of the other Contracting Party…*". Given that at the time of the alleged making of the investment the territory on which they were made (Crimea) was in Ukraine, Russia's position is that this threshold requirement for protection under the Treaty has not been satisfied and the Tribunal therefore did not have jurisdiction over the alleged investments and any disputes in relation to them (skeleton 32.2).

96. It was submitted for the Claimant that:

a. Russia conflates the requirement under Article 12 which requires the investor to have acquired ownership of the assets after 1 January 1991 and the requirement under Article 1 that the assets have to be invested in the other state at the date of the impugned measure.
b. Russia's case is contrary to the decision in *Naftogaz.*

97. Mr Cornegoor in his evidence (paragraph 10 of Cornegoor 1) states that:
"*…in Naftogaz The Hague Court of Appeals merely ruled that the definition of "investment" in Article 1(1) of the treaty does not require that the investment was cross border at the time that it was made (par 5.8.8) …The court did not address the argument made in the present case namely that Article 12 (rather than Article 1(1)) requires that the investment was cross border at the time it was made."*

98. Mrs Van de Hel-Koedoot response was (at paragraph 16 of Nauta 1):
"*although it is true that the Russian Federation's cross-border argument in Naftogaz was based on Article 1(1), it is difficult to see why such a limitation would be laid down in Article 12 where, according to the Court of Appeal, it is not laid down in Article 1(1), which contains the definition of the term 'investment' for the purposes of the Treaty. That would render irrelevant the Court of Appeal's extensive discussion on the interpretation of Article 1(1)."*

99. Mr Cornegoor responded in his second witness statement (paragraph 5 and 6) noting that Mrs Van de Hel-Koedoot conceded that Article 12 was not addressed directly in *Naftogaz*. Mr Cornegoor is of the view that this misunderstands the system of the Treaty and an asset which is located within the territory of the other state might be an investment under the definition of Article 1(1) without it being a protected investment under Article 12 because it was not made in the territory of the other state.

100. Although in its submissions the Claimant relied on the arguments that were made in the *Naftogaz* proceedings and findings in those proceedings, the experts are agreed that the arguments were based on Article 1(1). In my view although the Claimant's arguments on the interrelationship of the two Articles appear to have considerable merit, it cannot be said that Russia's case is fanciful.

The Territory Issue

101. Mr Cornegoor's evidence (paragraph 7 of Cornegoor 2) is that:
"…the current debate addresses the specific situation where the territory of a state expands and such expansion is not accepted by the other treaty state. Whilst Naftogaz concerned the same scenario the debate did not focus on its implications."

102. Mr Cornegoor also relied (paragraph 8 of Cornegoor 2) on the evidence of diplomatic communications that twelve sovereign entities have taken the view that their bilateral investment treaties do not apply to territories recently incorporated into the Russian Federation.

103. It was submitted for the Claimant that The Hague Court of Appeal has already concluded – in other Crimean cases involving Russia – that Crimea formed part of Russia's "*territory*" for the purposes of the Treaty: as The Hague Court of Appeal put it in *Naftogaz* at [5.5.18]:
"*A good faith interpretation of the wording of the BIT 1998 in its context and in the light of its object and purpose is that treaty obligations rest on the party to the treaty which has the power to provide the relevant protection effectively in a territory, by exercising jurisdiction and effective control over that territory and, as a corollary thereof, has assumed responsibility for foreign relations in respect of that territory*."

104. It was submitted for Russia that Mr Cornegoor's evidence is that the decision in the *Naftogaz* case concerned the meaning of the word "*territory*" in the Treaty generally; whereas the point at issue in Russia's third ground is whether territory subsequently (i.e. post signature) obtained by one State Party in circumstances where the other State Party does not recognise sovereignty is "*territory*" within the meaning of that term (skeleton 37.1).

105. The decision of The Hague Court of Appeal was upheld by the Dutch Supreme Court in the following terms:

"In its contested considerations, the court of appeal assessed whether the notion of territory in Article 1(4) BIT 1998 refers solely to sovereign territory. In doing so, it – rightly – took as a starting point that a treaty must be interpreted in good faith according to Article 31 VCLT in accordance with the ordinary meaning given to its terms in their context and in light of its object and purpose (para. 5.5.7). Subsequently, among other things, it considered that there is no indication from the wording of BIT 1998 that the parties intended to limit its application to sovereign territory (paras. 5.5.8-5.5.9) and that this does not appear from the travaux préparatoires related to the treaty either (para. 5.5.14). According to the court of appeal, such an interpretation would also not fit with the intention of the contracting parties, which was and remains to encourage and protect investments reciprocally on their territories (paras. 5.5.15-5.5.18). <u>The court of appeal concluded that there is no reason to assume that Crimea does not fall under the territory of the Russian Federation as intended in the treaty, and this is not affected by the fact that the parties did not foresee the current factual situation at the time, as it depends on what aligns with the intentions of the parties regarding the operation of the treaty at the time of its conclusion (para. 5.5.20). In doing so, the court of appeal has clearly applied the rule of treaty interpretation laid down in Article 31 VCLT</u> and has not otherwise shown an incorrect interpretation of the law regarding that provision or any other provision of that treaty, nor given an incomprehensible judgment. Therefore, the complaint fails." [emphasis added]

106. In my view even though Dutch law has no rule of *stare decisis,* the reasoning of The Hague Court of Appeal approved by the Dutch Supreme Court in relation to the position of Crimea under the Treaty provides a complete answer to the Defendant's submissions in this case. I note that Ms van de Hel-Koedoot states (paragraph 9 of Nauta 1) in this regard that:

"*although it is correct that the Netherlands does not have a stare decisis rule…previous court decisions do hold significant persuasive authority in the Dutch legal system. That is more so in circumstances where, as here, the relevant issue is the same (namely the meaning of the term "territory" in the [Treaty] and the same party is advancing an argument that was - in essence -only recently rejected by the Court of Appeal and that Court of Appeal decision was subsequently upheld by the Supreme Court…".*

107. I do not regard the diplomatic communications between states in relation to other treaties as having any real evidential force to the interpretation of the Treaty.

108. Accordingly in my view the "*territory issue*" has no real prospect of success although I acknowledge that this merely places this ground at the bottom of the sliding scale as to the weight which the Court places on this ground.

Conclusion on Merits

109. Although I have concluded that the merits of Russia's arguments on the "*territory issue*" are weak, in assessing the overall strength of the challenge that the Award is

invalid, the Court has to take into account the other grounds considered above where in my view there is a real prospect of success (in the summary judgment sense of not "*fanciful*"). I bear in mind that it is enough for Russia to succeed on any one of the three grounds before the Dutch Court of Appeal for the Award to be annulled.

110. I therefore proceed to weigh the other factors relied on by the parties in their submissions for and against a stay having regard to my conclusion on the merits.

Delay and Prejudice to Claimant

111. I turn then to consider the delay and prejudice to the Claimant if the Stay Application is granted.

112. It was submitted for Russia that the Dutch litigation is proceeding properly and awaiting the outcome of those proceedings would not involve unjustified delay: that it is broadly common ground between the parties that the delay will be in the order of a further 1.5 to 4.5 years (the Claimant says 2.5 to 4.5 years).

113. This submission as to the likely length of the delay is borne out by the evidence before the Court. The evidence of Ms Ricart is:

"*30.8. …While it is difficult to provide an accurate time estimate for the full Annulment Proceedings, Mr Cornegoor considers that the likely timetable, from the time of commencement of the Annulment Proceedings and including any appeal brought by either party before the Dutch Supreme Court, is estimated at anywhere between 2.5 to 5.5 years…".* (Ricart 2)

114. Mr Gimblett's evidence is:

"*44. …Without waiving privilege, I am informed by Nauta of the following:*

(a) The likely timetable for the set-aside proceedings before The Hague Court of Appeal is approximately two years. However, it is possible that The Hague Court of Appeal could take as long as three years to render its judgment.

(b) If the Defendant subsequently seeks an appeal of The Hague Court of Appeal judgment to the Dutch Supreme Court, the likely timetable for the Dutch Supreme Court to render its judgment is approximately 1.5-2 years. However, it is possible that the Dutch Supreme Court could take as long as 2.5 years to render its judgment." (Gimblett 2)

115. Russia made two further submissions on the potential length of the delay:

   a. If the Claimant is right that Russia's case before The Hague Court of Appeal will easily be rejected (contrary to Russia's case), the Dutch proceedings before The Hague Court of Appeal may well be concluded in the second half of 2026.

   b. It stands to reason that if the Claimant is right, and Russia's case is weak such that it will be rejected by the Dutch Court of Appeal then the magnitude of the delay occasioned will be commensurately shorter - closer to 1.5 years than 4.5.

116. I do not accept the submission in subparagraph (a) that the strength of Russia's case will affect the timing of the conclusion of the proceedings before The Hague Court of Appeal. There is no evidence before this Court that the merits of the case will affect the timetable for submissions and the hearing before The Hague Court of Appeal and I cannot see any basis for finding that this is likely to be the case.

117. I do accept that it is possible that if Russia's case is rejected by The Hague Court of Appeal, then this may impact the likelihood of a further appeal to the Dutch Supreme Court but this is very difficult to factor into the timetable at this point. Further if Russia's case is accepted by The Hague Court of Appeal, there could be an appeal by the Claimant to the Supreme Court, which would again affect the timetable for the ultimate disposal of the Annulment Proceedings.

"Not an inordinate delay"

118. Russia submitted (skeleton 60) that the delay likely to be occasioned by the Dutch proceedings is "*relatively modest in the context of the Parties' dispute*". It was submitted for Russia (skeleton 62) that even on the basis that proceedings take the full additional 4.5 years, however - i.e. concluding sometime in 2029 - that is "*not an inordinate delay in the context of complex proceedings involving an investment treaty arbitration which have, in any event, been on foot since 2018*".

119. As to whether the delay is "*relatively modest*" or "*not an inordinate delay*" given the nature of the dispute, Russia referred to the overall length of time that it took to resolve the dispute in *Hulley*.

120. In my view the potential delay is a very significant factor in the exercise of the Court's discretion in this case because of the potential length of the delay in this case from this point in time. This can therefore be distinguished from *Hulley* where at the point at which Henshaw J was deciding whether to continue the stay, although it could have been longer, the likely timetable (at least to the decision of the Supreme Court) was a matter of months.

121. The position in terms of the length of the delay was set out in the judgment of Henshaw J at [174]:

"*It is common ground that the Dutch Supreme Court is likely to issue its decision later this year or early next year, thus within about the next 10 months. There will be a further delay of uncertain duration if the Supreme Court decides to remit issues to the Court of Appeal. If the Dutch Supreme Court decides to refer any question(s) to the CJEU, then both parties would expect a decision by late 2024 or early 2025, i.e. about an additional 3 years' delay*."

122. I also bear in mind that the Court is exercising its case management powers under the CPR and thus is required to have regard to the Overriding Objective that:

"dealing with a case justly and at proportionate cost includes, so far as is practicable-…
(d) ensuring that it is dealt with expeditiously and fairly…".

123. In this case a stay could add a delay to the resolution of the dispute which could be in the region of 4-5 years and bearing in mind the obligation on the Court to seek to give effect to the Overriding Objective when it exercises any power given to it by the Rules, the Court has to decide whether such a delay should be countenanced when weighed against the other factors in favour of granting a stay.

124. In that respect it is no answer to the issue of delay to submit that the Claimant could be compensated by an award of interest. The Court is required to ensure that, so far as practicable, disputes are dealt with expeditiously and that includes the process of enforcement.

125. I do not consider that it is necessarily helpful to refer to decisions in other cases which are by their nature fact specific in weighing the factors applying in those cases. However to the extent that the Defendant placed reliance on *Hulley* I note that as referred to above, in that case the period in issue was determined to be likely to be significantly shorter than in the present case. I also note the comparatively short delay anticipated in cases such as *Stati v Kazakhstan* [2015] EWHC 2542 (Comm) (4 months) and *Travis Coal Restructured Holdings LLC v Essar Global Fund Ltd* [2014] EWHC 2510 (Comm) (8 months) which are notable differences on the facts of those cases.

"A strategy calculated to maximise delay"

126. It was submitted for the Claimant that the evidence shows Russia adopting:

"a strategy calculated to maximise delay (e.g., it has been careful not to accept that the Dutch court's findings would be dispositive for the purposes of the Immunity Application; and it appears to envisage yet another phase of challenge in England, even if the Immunity Application fails)."

127. I note the evidence of Ms Ricart (relied on by the Claimant at paragraph 80.4 of its skeleton) that Russia has also expressly reserved the right to bring a further challenge to the Enforcement Order on other (non-immunity) grounds:

"…The Russian Federation's rights to raise any grounds other than state immunity for challenging the Award, including under s. 103 of the AA, are expressly reserved, in particular but without limitation to the patent defects in the Award and the public policy concerns of enforcing it given the serious red flags of fraud, corruption and illegality that taint the Award…". (1-Ricart §11).

128. It seems to me that there are two separate points here: the first is whether the findings of the Dutch court will raise an issue estoppel. Mr Flynn KC in his Reply submissions [Day 2 p64 and p70] appeared to acknowledge that as a result of the Court of Appeal's decision in *Hulley* [2025] EWCA Civ 108 there may well be an issue estoppel but also submitted that it does not necessarily mean that everything will be decided by the foreign court that is relevant to the immunity issue before the English courts. Given that, as discussed below, the issues overlap but are not identical I accept that submission. The evidence does not support a finding that this of itself can be characterised as a strategy which is calculated to maximise delay.

129. In relation to the second point that there may be another phase of challenge in England after the Immunity Application it is true that this is referred to in the evidence for Russia. Whilst the Claimant naturally wishes to bring the enforcement proceedings to a conclusion as soon as possible I cannot see that the fact that Russia may well pursue other objections open to it in the English courts after the Immunity Application bears on whether to grant a stay of the Immunity Application. It seems to me that it would only be possible to characterise the actions of Russia in applying for a stay of the Immunity Application a "*strategy to maximise delay*" in the circumstances where it could be said that there is no merit in the grounds raised in the Dutch proceedings and the risk of inconsistent judgments can clearly be ignored.

"If the Claimant suffers prejudice by virtue of a delay, it can be compensated by entitlement to interest"

130. The Claimant submitted (skeleton paragraph 6.3) that it is common ground that the Annulment Proceedings could take up to 5½ years to conclude and any delay - a fortiori, of that length - is inherently prejudicial to the Claimant, particularly given the size of the Award.

131. It was submitted for Russia that to the extent the Claimant suffers prejudice by virtue of a delay, it can be compensated by an award of interest in due course (skeleton paragraph 63).

132. There are potentially conflicting statements in the authorities as to the extent to which any prejudice suffered by the Claimant by reason of the delay can properly be compensated by the award of interest.

133. The authorities were helpfully summarised by Henshaw J at [62(vii)] in *Hulley:*

"*However, entitlement to such interest is not necessarily an answer to any prejudice caused by delay. Russia refers to Prifti v Musini Sociedad Anonima de Seguros y Reaseguros [2005] EWHC 832 (Comm) ("Prifti"), a non-arbitration case where Christopher Clarke J did not regard delay in payment as a ground for refusing a stay, given that the relevant party if successful would recover interest, and simple*

interest would be sufficient compensation for the delay (§§ 29-30). In Reichhold Norway ASA v Goldman Sachs International [2000] 1 WLR 173 ("Reichhold") (stay of proceedings pending arbitration), Lord Bingham MR quoted with apparent approval the first instance judge's statement that

"the only prejudice which Reichhold is likely to suffer if this action is stayed is a delay of about a year. Since delay of that kind can be compensated by an award of interest if Reichhold is ultimately successful, that might be considered a small price to pay for the prospect of avoiding complex and costly litigation." (p.181)

On other hand, in the arbitration enforcement case IPCO Gross J said:

"Given the size of the award, it may be inferred that any delay in enforcement is likely to prejudice IPCO. Very few commercial entities would not be prejudiced by delay in the availability of US$152 million. It must be right to seek to minimise any such prejudice, so far as it is practicable and appropriate to do so." (§ 52(v))

Similarly, in Continental Transfert Technique v. Nigeria [2010] EWHC 780 (Comm) Hamblen J said "given the very large amounts at stake, it is apparent that any delay in being able to obtain the fruits of the judgment is likely to cause significant prejudice" (§ 28).

Thus a right to interest can be viewed as merely a quantification of one form of prejudice which the award creditor suffers as a result of delay to payment of its award." [emphasis added]

134. I note that in *Prifti* referred to by Henshaw J (above) Christopher Clarke J said at [34]:

"…If there is a stay I do not believe that Musini will suffer any real prejudice that cannot be compensated for by an award of interest…"

but that was in the context of a relatively short delay.

135. On the other hand the Court in *AIC Ltd v The Federal Airports Authority of Nigeria* [2019] 2 Lloyd's Rep 211 recognised that being kept out of a significant amount of money is prejudicial even where a substantial rate of interest (in that case 18% pa) was accruing. At [53] the judge held:

"FAAN also submitted that there could be no prejudice to AIC because of the 18% interest rate applicable to the Award per annum. They submitted that 18% per annum is a very significant rate of interest on an Award denominated in US dollars and has been since the 2008 financial crisis. However, whilst that is no doubt correct, the fact of the matter is that AIC will continue to be kept out of its money. The Award was in the sum of US$48,124,000 and interest totalling some US$74,590,881 had already accrued by 10 January 2019. These are significant sums by any standards and represent money that AIC would otherwise have available for use in its business. In my judgment that alone is sufficient to give rise to prejudice…" [emphasis added]

136. The Claimant additionally submitted that the post-judgment rate of 8% is significantly less than Russia's borrowing cost.

137. The Defendant submitted that:

"*the Claimant is a corporate vehicle for an extremely wealthy individual. It has no residual business other than pursuing this claim. There can be no question of any non-compensable prejudice arising for it."*

138. I have referred above to the obligation on the Court to seek to deal with disputes expeditiously pursuant to the Overriding Objective. In my view it is fundamental that a creditor should be entitled to receive payment promptly when due and although the interest rate in this case is not low in absolute terms nevertheless the Claimant is as it submitted a "*forced creditor*". It is no answer that the ultimate

beneficial owner of the Claimant may be wealthy. If the debt is due, a creditor is entitled to his money to invest in whatever way he deems fit and not to accept a forced investment in a debt even one which bears a reasonable rate of interest by reference to current interest rates.

139. There is therefore a prejudice to the Claimant by any delay in enforcement and the potential length of the delay and the size of the debt means that interest is not an answer to the prejudice which will arise if the Stay Application is granted.

"The list of creditors is growing and the claimant risks getting bumped progressively further down the queue of those trying to enforce the judgments against a diminishing pool of accessible assets"

140. This is a factor which was recognised by Dias J in *Hulley Enterprises Ltd v The Russian Federation* [2024] EWHC 1934 (Comm) at [12]:
"Furthermore, it is now ten years since the awards were issued. The prejudice to the claimants in being kept out of their money is increasing daily. Nothing has been paid and all the indications are that the Russian Federation will not pay voluntarily and that the claimants will be required to search out assets for enforcement. <u>In the current climate, following Russia's invasion of Ukraine and the imposition of sanctions on the state, it seems more than likely that it has taken and is taking steps to place as many of their assets as possible out of the reach of the sanctions regime. Meanwhile, the list of creditors is growing and the claimants risk getting bumped progressively further down the queue of those trying to enforce the judgments against a diminishing pool of accessible assets</u>." [emphasis added]

141. The ability of Russia, as a state, to pay its debts is not affected by the passage of time in the way that a corporate entity could be affected. There is no evidence that Russia will be less able to pay its debt due to the Claimant as a result of any delay occasioned by the stay.

142. There is I accept the issue of "*accessible assets*" and the assets in this jurisdiction may well be diminished as a result of enforcement action by other creditors.

143. However I am not persuaded that the natural desire of the Claimant to find assets against which it can enforce its judgment before those assets are seized by other creditors should be a factor in the decision whether to grant a stay of the Immunity Application. It is at its highest, part of the consequences of the delay.

144. I note the observations of Dias J and the evidence of certain press reports referred to in the evidence of Mr Gimblett. However Ms Ricart refutes the suggestion these press reports support the allegation of moving assets out of England and Wales:
"*None of the press articles to which Mr Gimblett refers even state (let alone prove) that the Defendant is moving assets in order to "insulate sovereign assets from… creditors" – this is an artificial gloss by Mr Gimblett which finds no reflection in the evidence on which he relies."*

145. The Court was not taken in oral submissions to these press articles. Rather it was submitted [Day 2 p48] that the "*real question*" was:
"*does Russia have the motive, the means and the opportunity to remove or to protect assets from enforcement by DTEK in circumstances where DTEK is an entity from Ukraine, where the award debt relates to an expropriation in Crimea, where Russia is a well−resourced and sophisticated litigant with access to offshore structures that can facilitate the transfer and secretion of value?"*

146. In my view there is no evidence before the Court that would support a finding that a stay would result in the Claimant having access to a diminishing pool of accessible assets by reason of Russia taking steps in the future "*to place as many of their assets*

as possible out of the reach of the sanctions regime" bearing in mind that Russia is currently subject to sanctions and has now been subject to sanctions for several years although I accept that the position on sanctions may change over time.

No Intention to Pay

147. It was also submitted for the Claimant that the Court should take into account as a factor that Russia had no intention to pay voluntarily.

148. In Ricart 2 (paragraphs 60 and 61) Russia responded on this issue as follows: "*60…From discussions with the Defendant, over which I waive no privilege, <u>I am instructed that the Defendant has paid (or is in the process of payment of) all costs orders made against it in this jurisdiction and in other jurisdictions</u> in which it is resisting actions for enforcement of arbitral awards made against it.*
61. Third, Mr Gimblett states at paragraph [54] of Gimblett 2 that "there is no indication that the Defendant will make payment voluntarily" and that the Russian Federation has "pursued a consistent policy of refusing to comply with investment arbitration awards". That is not right. In fact, the Russian Federation has fully engaged with legal processes (including here in England) related to the enforcement of arbitration awards which it considers were rendered in the context of unfair and legally unsound arbitration proceedings. Furthermore, from discussions with the Defendant, over which I waive no privilege<u>, I am instructed that the Defendant has settled arbitration awards rendered against it in at least 4 cases</u>. At paragraph [55] of Gimblett 2, Mr Gimblett refers to the case of Mr Franz Sedelmayer who he states "was forced to spend some 15 years trying to enforce a USD 2.3 million arbitral award against the Defendant". He characterises this as an example of the Russian Federation "evading its legal obligations" [Gimblett 2, 56]. I disagree with Mr Gimblett's characterisation of the Russian Federation's conduct. In fact, in the Sedelmayer case, the Russian Federation resisted enforcement using ordinary legal mechanisms available to any award creditor and to a sovereign award creditor on grounds of state immunity from execution [JG2/199-202]. There is no question of improper "eva[sion]". Mr Gimblett omits to mention that Mr Sedelmayer's enforcement proceedings were ultimately successful (for Mr Sedelmayer) in both Germany and Sweden. After the Russian Federation's objections to enforcement in those jurisdictions were dismissed, properties belonging to the Russian Federation in Stockholm and Cologne were sold by order of the relevant court. I understand, on the basis of publicly available reports, that the proceeds of those sales resulted in Mr Sedelmayer recovering around US$6.8 million, far in excess of the US$2.3 million award in his favour". [emphasis added]

149. It was submitted for the Claimant that there is no evidence before the Court as to the arbitration awards that are said to have been settled or whether the costs orders have in fact been paid. The Claimant referred to the judgment of Dias J in *Hulley* where she made reference at [13] of her judgment to Russia taking 6 months to pay a costs order.

150. In my view the prejudice to the Claimant in waiting for its money has already been taken into account as discussed above. In weighing the prejudice to the Claimant against the factors pointing in favour of a stay of the Immunity Application I do not see that any further support for refusing a stay can be derived from the fact that Russia has not voluntarily made payment either in this case or in some of the other cases and has taken steps in the courts to challenge the awards and to resist enforcement.

Pro Enforcement Philosophy

151. The Claimant relied on the "pro-enforcement philosophy" which has been recognised in the authorities as underlying the New York Convention and the 1996 Act: Henshaw J in *Hulley* at [213 (ii)] and Gross J in *IPCO* at [11].

152. However I accept the submission for Russia that this does not really take the issue of whether to grant a stay much further. As stated in *IPCO* in relation to s103(5) the issue of whether to grant a stay is a compromise between conflicting purposes:
"*s.103(5) achieves a compromise between two equally legitimate concerns. On the one hand, enforcement should not be frustrated merely by the making of an application in the country of origin; on the other hand, pending proceedings in the country of origin should not necessarily be pre-empted by rapid enforcement of the award in another jurisdiction. Pro enforcement assumptions are sometimes outweighed by the respect due to the courts exercising jurisdiction in the country of origin-the venue chosen by the parties for their arbitration…".*

153. It is a factor which reinforces the disadvantages of a delay to the judgment creditor, namely that he will be kept out of his money for longer but this has already been taken into account in considering the prejudice to the Claimant and in particular the discussion above as to whether interest is a sufficient answer to any prejudice.

The advantages of waiting for the outcome of the Dutch proceedings/the risk of conflicting decisions

154. This leads on to a consideration of the advantages of waiting for the outcome of the Dutch proceedings.

155. It was submitted for Russia (skeleton 45 and 46) that the arguments Russia will advance in its English jurisdiction challenge "*overlap*" with the grounds for its action in the Dutch courts. If the stay were not to be granted, the English Court would then be asked to decide a number of issues relating to Russia's Immunity Application that are currently before The Hague Court of Appeal for determination.

156. The potential overlap arises because in the Immunity Application in the English proceedings, Russia contends that the exception in section 9 of the State Immunity Act, on which the Claimant relies, is said by Russia not to apply because Russia has not agreed in writing to submit the present dispute to arbitration.

157. In the Immunity Application Russia relies on six grounds to support this conclusion, as set out in Ricart 1 of which four are said to "*substantially overlap*" with the grounds advanced in the Annulment Proceedings.

158. Thus in the English proceedings the issues of whether (a) investments made in Crimea at a time when it was part of Ukraine do not qualify for protection and (b) the Russian Federation only offered to arbitrate disputes concerning investments made after 1 January 1992 substantially overlap with the first ground in the Netherlands (pre 1992 and not "made"/ "*active investment*" issue).

159. The issue in the English proceedings that Russia only offered to arbitrate disputes concerning investments which were cross-border when they were made substantially overlaps with the second ground in the Netherlands (the "*cross-border investment*" issue).

160. The issue that Russia did not offer to arbitrate disputes over investments that were not invested in the territory of the Russian Federation in the English proceedings substantially overlaps with the third ground in the Netherlands (the "*territory*" issue).

161. It was submitted for Russia that the risks that would arise if the stay were not granted are the following:

a. a risk of inconsistent judgments being given by the English Courts and the Dutch courts, the curial courts, on the same issues (skeleton 45);
b. a risk of inconvenience and inefficiency for the parties, the Court and other court users (skeleton 49);
c. a real risk of serious prejudice to Russia in the circumstances of this case, in light of the arguments that the Claimant implies it may argue on the potential application of issue estoppel (skeleton 50).

"A risk of inconsistent judgments"

162. I accept the submission for Russia (skeleton 48.1) that on the authorities the risk of inconsistent judgments is "*always capable of amounting to a very strong reason for granting a stay*" (*Bundeszentralamt Fuer Steuern v Heis* [2019] EWHC 705 (Ch) at [113]).

163. As the authorities referred to in the judgment of Hildyard J in *Bundeszentralamt* illustrate, the issue is the significance of the inconsistent findings and whether in the circumstances the stay would remove the risk of inconsistent findings:

"112. The first such factor is the point at the forefront of Mr Smith's (and indeed Mr Fisher's) submissions and has particular weight in consequence of the fact that the Later MFGUK Refund Claims are to be adjudicated in Germany. If no stay is granted, broadly the same issues would fall to be considered by the court here and the court there at (again speaking broadly) the same time and between the same parties. There is an obvious risk of inconsistent, indeed conflicting, judgments.

113. That is always capable of amounting to a very strong reason for granting a stay, as the cases I have referred to in paragraph [61] above show and emphasise. Thus, in Curtis v Lockheed Martin UK Holdings Ltd, it was because the grant of a stay would not, in circumstances where the claimant was not a party to the foreign proceedings and would not be bound by their result, remove the risk of inconsistent findings that such stay was refused; but the potential weight of the possibility of inconsistent findings (and a fortiori decisions) was expressly recognised. And in Prifti (again see paragraph [61] above) the fact that there were concurrent proceedings in Spain in which the Spanish court would be required to determine also the principal issue in the English proceedings, being whether a 'pre-existing conditions' clause had been validly incorporated into the parties' contractual arrangements, so that there was a risk of inconsistent determinations on a fundamental issue, appears to have been the decisive factor in favour of a stay (although the judge considered also that the stay would be unlikely to cause material prejudice which could not be compensated for by an award of interest)." [emphasis added]

164. It was submitted for the Claimant (skeleton 90) that the Defendant is careful not to accept that the Dutch court's findings would be dispositive in England so to the extent that there is a risk of inconsistent judgments it would not be eliminated by granting a stay.

165. The Defendant accepted (skeleton 50.2) that issue estoppel "*may found this Court's conclusion on immunity*" and as referred to above, in its Reply submissions Mr Flynn KC for Russia appeared to accept the possibility of estoppel arising in the light of the recent Court of Appeal decision in *Hulley*. Mr Flynn KC said:

"…if we lose, that will certainly, at the very least, considerably narrow the issues that arise in the English Court as matters stand in light of the Court of Appeal judgment" [Day 2 p64]

166. In considering the weight to be given to the risk of inconsistent judgments, I have considered the circumstances of this case in light of the authorities.

167. This is not a case where it can be said there are "*systemic*" issues as was the case before Hildyard J in *Bundeszentralamt*. Hildyard J said at [115]-[116]:
"*115….the legal issues at stake are <u>not only plainly matters of German law, but controversial and complex issues of statutory construction of systemic importance and substantial public interest</u> in terms of the legitimate interests of the public in the protection of its taxation system from what are alleged to be colourable schemes.*
116. As it seems to me, the "potential disaster from a legal point of view", as in The El Amria [1981] 2 Ll. Rep. 119 (at 128) Brandon LJ (as he then was) described the risk of inconsistent decisions in concurrent proceedings in different jurisdictions, is the more acute when in one of the jurisdictions the issue is a systemic one, or may be decided in a manner which has systemic consequences…". [emphasis added]

168. This is not a case which is governed by the domestic law as was the case in *Prifti* (at [22]):
"...it is, as it seems to me, inherently inappropriate that this Court should have to determine questions of Spanish law bearing on the validity of the first instance Spanish judgment during the pendency of an appeal to a superior court against that judgment."

169. Rather it is a case which largely involves the interpretation of a Treaty by reference to the applicable rules of interpretation in the Vienna Convention on the Law of Treaties.

170. I also am of the view that it is unlikely in practice, given the time that is likely to elapse before the Immunity Application (and any other challenges to enforcement) is finally resolved and enforcement action taken, that it would be a "*disaster*" in the sense of enforcement taking place before the Dutch courts have finally determined the Annulment Proceedings.

171. However, as Mr Flynn KC submitted, to refuse a stay would allow "*two horses to be running*" at the same time. There are various possible outcomes and one of those is that if no stay is granted, some of the same issues would fall to be considered by the English Court and the Dutch courts at (broadly) the same time and between the same parties. There is an obvious risk of inconsistent and possibly conflicting judgments.

172. I note that in *The El Amria* it was also the case that it was not dependent on the domestic law:
"*…the clause paramount (clause 2) in the bills of lading expressly incorporated the Hague Rules, and there is no evidence to show that an Egyptian court would interpret or apply those rules any differently in any material respect from an English court*."

173. Yet Brandon LJ still concluded in that case that:
"...I do not regard it merely as convenient that the two actions, in which many of the same issues fall to be determined, should be tried together; rather that <u>I regard it as a potential disaster from a legal point of view if they were not, because of the risk inherent in separate trials, one in Egypt and the other in England, that the same issues might be determined differently in the two countries</u>." [emphasis added]

174. It is possible that whether or not a stay is granted, the English Court reaches a decision on immunity by reference to grounds which were not before the Dutch courts. To that extent there would be inconsistent judgments which risk cannot be eliminated by the grant of a stay. However I note that it is not necessary that all of the same issues should be before the other court. It is as Brandon LJ said

"*...the risk inherent in separate trials ...that the same issues might be determined differently in the two countries*."

175. It was submitted for the Claimant (skeleton paragraph 88) that the prospects of having the Award set aside in the Netherlands are "*so low*" that the risk of the English proceedings being rendered unnecessary is not a real one.

176. However given the overlap in relation to three of the grounds raised in the Annulment Proceedings and my findings (above) on the merits of the challenge, there is the possibility of conflicting judgments.

177. The Claimant chose to start an arbitration under UNCITRAL rules and having started the arbitration that is a factor in allowing that process to run its course prior to the determination by the English courts. This is reinforced by this Court's finding that, at least in part, the challenges before the curial court have a realistic prospect of success and are not bound to fail.

178. As Henshaw J concluded at [213]-[214] in *Hulley* one of the advantages of a stay (and in his view one of the key advantages which led to his decision) was:
"*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*".

"A real risk of serious prejudice to Russia"

179. As part of its submissions on inconsistent judgments, it was submitted for Russia (skeleton 50.4) that there would be "*real unfairness*" if Russia's immunity claim is rejected even in part due to issue estoppel based on the decision of the Hague Court of Appeal, and Russia may not be able to resurrect that immunity even if the decision of the Hague Court of Appeal is later overturned and the basis for any issue estoppel accordingly falls away.

180. This appears to be a submission alluding to the circumstances in *Hulley* where having lost before The Hague Court of Appeal Russia appealed to the Supreme Court.

181. It is not entirely clear how these submissions square with Russia's proposal, made in the course of oral submissions (in response to the Court's concerns about the potential length of the delay), that a stay should be granted only until the determination by The Hague Court of Appeal. The submissions in Russia's skeleton appear to imply (as was submitted for the Claimant) that were the Court to accept the alternative proposal by Russia and to order a stay only until the determination by The Hague Court of Appeal, Russia would then seek to extend the stay by making the same arguments as were made before Henshaw J in *Hulley* and thus the stay would then be continued in any event.

182. However in his oral submissions Mr Flynn KC submitted that although the parties may seek to take the matter to the Dutch Supreme Court and a subsequent court in the English proceedings may agree to extend the stay, it may resolve matters or at least may narrow the issues.

183. I accept this submission. I note that it appears from the decision of the Supreme Court in *Naftogaz* (paragraph 4.1.3) that the powers of the Supreme Court to review the decision of the Hague Court of Appeal are limited in certain respects: that points of Dutch law or procedure go to the Dutch Supreme Court not substantive questions of treaty interpretation.

184. By contrast the position in *Hulley* was that The Hague Court of Appeal had overturned the Tribunal decision and the pending appeal to the Dutch Supreme Court was determined by Henshaw J to have a realistic prospect of success. In those

circumstances Henshaw J decided to grant a stay to avoid the unfairness which could result if the decision of The Hague Court of Appeal was overturned.

185. The relevant passage of the judgment at [214] was as follows:

"*214. Viewing the matter in the round, I have come to the conclusion that the Stay should be continued. I consider that the prejudice to the Claimants arising from further delay in potential enforcement measures, without security in the meantime, is 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."*

186. The advantages identified and referred to at [213] of the judgment were as follows:

"*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

"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 the 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)."

187. In this case if a stay were ordered for a limited time and a subsequent application was made to extend that stay, the fact pattern could well be different from the position before Henshaw J in *Hulley*: if the Award is upheld by The Hague Court of Appeal, it may be that (unlike the position in *Hulley*) an English court may decide at that point that there is no realistic prospect of success on the grounds advanced and that at that time, the advantages of a stay do not outweigh the disadvantages such that an extension of the stay is not appropriate.

"A risk of inconvenience and inefficiency"

188. Russia also submitted that a stay would avoid the risk of inconvenience and inefficiency for the parties, the Court and other court users (skeleton 49).

189. Whilst I accept that on the authorities this is a factor to be taken into account, I do not accord it significant weight in the circumstances of this Application given that the estimate of the hearing time for the Immunity Application is a matter of a few days and thus the Court time is relatively short and the parties are already preparing to deal with four of the six grounds relied upon by Russia in the Immunity Application in the Dutch proceedings.

The Security Application

190. The Claimant's primary position is that no stay should be granted but its alternative position was that if a stay was to be granted it should be conditional upon security.

191. The Claimant submitted that the Court has power to order a payment into court as a condition of granting the stay. It was submitted that Russia accepts that the Court has power to exercise its case management powers under CPR 3.1 and thus it was submitted for the Claimant that as part of those case management powers the Court has power to impose conditions. It was submitted that Russia was not obliged to comply with the condition so it was not being ordered to put up security- it could choose whether to comply or to forego the stay.

192. For Russia it was submitted that what was proposed was in substance security in support of enforcement and not in support of the Stay Application. Accordingly it was an attempt to exercise a substantive power over a state before the issue of state immunity had been determined. In the same way as the authorities had held that

s103(5) could not be used before the issue of state immunity had been determined, equally the Court could not require the provision of security prior to the determination of the issue of state immunity.

193. In *Hulley* before Henshaw J similar arguments were raised by the Claimant in relation to security to the submissions made to this Court (although I accept that the application in that case was made under s103(5) (*Hulley* at [218])). As in this case the Claimant submitted (*inter alia*) that:

"…an order for security under section 103(5) would not violate Russia's sovereign immunity because it could not be treated as analogous to an injunction, citing Soleh Boneh at p. 213;

an order for security is simply the price of an indulgence which a defendant wishes the court to grant, namely an adjournment of the relevant enforcement proceedings. Here, the question of security only arises because Russia wishes these proceedings to be kept on hold pending the determination of the Cassation Appeal. Russia cannot ask this court to exercise a discretion in its favour, whilst simultaneously asserting immunity in respect of the proper price of that exercise of discretion" ([217 (i) and (ii)]).

194. Henshaw J rejected this at [221] on the basis that it would involve the assertion of adjudicative jurisdiction and immunity had not been determined:

"*I am unable to accept those submissions. In my view, any exercise of powers under section 103 would constitute the assertion of adjudicative jurisdiction over Russia which the court has not yet held to exist. There can be no question of exercising any such powers unless and until Russia's claim to state immunity has been determined and rejected.*"

195. Russia submitted that there is no authority directly on point which Russia submitted points to the fact that no such power exists.

196. The Claimant relied on *Zhongshan Fucheng Investment Co Ltd v Nigeria* [2023] 2 CLC 105 (a case concerning the need by a State to comply with the rules for relief from sanctions) for the proposition that a State was required to abide by the procedural rules of the English court even before immunity had been determined.

197. In his judgment in that case Sir Julian Flaux VC said:

"32. … Of course, it was open to Nigeria, given that the order was made ex parte, to make an application to set aside the order on grounds of state immunity or any other grounds, but if it wished to do so, it had to comply with the procedural timetable laid down by the court, which in fact gave a generous period of 74 days for such an application to be made.

…

34. That jurisdiction must encompass the imposition of whatever procedural rules are appropriate for that determination. This is clear from what Kerr LJ said in JH Rayner where he spoke of the issue of state immunity being determined 'in whatever form and by whatever procedure the court may consider appropriate'. In the present case, Nigeria was given two months and 14 days under the CPR to make an application to set aside the enforcement order and raise state immunity if so advised. If Nigeria needed more time to make an application, it was incumbent upon it to make an application in time under CPR 3.1(2)(a) for an extension of time. If such an application was not made in time (as in the present case) then Nigeria would need to seek relief from sanctions as the notes in the White Book make clear and, if it could not satisfy the Denton criteria (as the judge found here), then the sanction of not obtaining an extension of time would follow, so that Nigeria could not raise state immunity because it was too late. <u>There is nothing in the CPR or the authorities</u>

which suggests that these normal procedural consequences do not follow merely because the defendant is a state." [emphasis added]

198. I do not regard the absence of direct authority as persuasive but I do accept the submissions for Russia that the purpose of the security sought is to protect the Claimant in seeking to enforce its debt against the assets of Russia. That this is the purpose of the Security Application is clear from the evidence of Mr Gimblett (Gimblett 3 paragraph 65):

"*The Claimant's Security Application pursuant to CPR r. 3.1(3) is made on the basis that the delay occasioned by the stay requested will make it substantially less likely that the Claimant will be able to execute the full Award amount, or any substantial portion thereof, against the Defendant's assets in England and Wales, if the Stay Application is granted without requiring the posting of security."*

199. I therefore distinguish *Zhongshan* which was dealing with the requirement for a State to comply with procedural requirements from what is in my view a substantive exercise of jurisdiction.

200. Accordingly I do not accept that the Court has the power to require a payment into Court where the purpose of such payment would be to support the enforcement of the judgment debt and not the Stay Application or the Immunity Application. In my view to attach such a condition would be to exercise substantive jurisdiction over Russia before the issue of state immunity has been determined.

201. Even if I were wrong on the issue of whether the Court has the power to order security, in the circumstances I would not have ordered the provision of security. As set out above in my view it would not be appropriate to order security which is in fact to protect the enforcement of the Award and not to support the Stay Application.

202. This was a factor referred to by Henshaw J in considering whether if he had the power to order security under section 103(5) he would have done so. In setting out his reasons why he would not have exercised the discretion to award security (at [255]), he took into account as one of four factors tipping the balance against security that:

"*the evidence does not indicate, in my view, that the continuation of the Stay creates a risk or augmented risk of dissipation of assets, or of other events that would likely make enforcement more difficult, though (as also noted earlier) there is always a chance that events over time could have that effect. Rather, a requirement for security would probably in effect give the Claimants the bonus of a significant enforcement advantage."*[emphasis added]

203. In my view this factor is equally applicable to the exercise of the Court's discretion under CPR 3.1 in this case.

204. I note that in its skeleton the Defendant sought to rely by analogy on the jurisdiction under section 70 of the 1996 Act in the context of a section 67 challenge and submitted that this militated against the imposition of security.

205. It was submitted for the Claimant that this is not an application under section 70 and it applies in different circumstances.

206. This again was an argument advanced before Henshaw J at [256] although in the event he did not decide on that basis:

"I mention only for completeness that there also appears in my view to be some force in the view that where an award defendant has a properly arguable challenge that goes to the jurisdiction of the tribunal, then an analogy may be drawn with challenges under section 67 of the 1996 Act. In that context, section 70(7) permits the court to order that any money payable under the award be brought into court or otherwise secured pending the determination of the application or appeal. In that

situation it has been held that security should be ordered only where the challenge is "flimsy" and any delay caused by the challenge will prejudice enforcement of the award, and security should not be used simply to help the claimant enforce the award (see Peterson Farms Inc v C&M Farming Ltd [2003] EWHC 2298 (QB) § 30, IPCO (Supreme Court) § 43 and X v Y [2013] EWHC 1104 (Comm) § 32)."

207. Although in oral submissions the Claimant suggested that the reference to a "*flimsy*" challenge may not be correct by virtue of dicta of Males LJ in *Czech Republic v Diag Human SE and another* [2023] EWCA Civ 1518 at [51]-[56] I note that Males LJ said at [52]:

"... in general, the primary and usually the only question is whether the making of the challenge is likely to prejudice the ability of the award creditor to enforce the award or the ability of the award debtor to honour it."

208. Thus to the extent that an analogy can be drawn (as Henshaw J was so inclined), it seems that the principle is that security should be ordered only where any delay caused by the challenge will prejudice enforcement of the award, and security should not be used simply to help a claimant enforce the award. On the facts of this case the stay does not prejudice the ability of the Claimant to enforce the Award nor does it diminish Russia's ability to honour the Award for the reasons discussed above.

209. It was submitted for the Claimant that if the Court concluded that it did not have power to order a payment into Court under its case management powers this of itself militated against a stay.

210. A similar argument (but apparently in stronger terms) was advanced and rejected by Henshaw J in *Hulley* at [248]:

"*As the Claimants submit, the result is that the court has a stark choice between no adjournment, and an unconditional adjournment. I do not though agree with the Claimants' further submission that the balance of prejudice between the parties then becomes decisive and falls clearly in the Claimants' favour. In reaching my decision as to whether the Stay should be continued, I have already taken account of the fact that (in my view) there is no power to require security."*

211. In my view the Court has already considered the prejudice to the Claimant if the Stay is granted. In my view no additional weight is to be given to the prejudice occasioned by the delay because the Court does not have the power to order the provision of security as a condition of the Stay where the purpose of such security would be to support the enforcement of the judgment debt and not the Stay Application or the Immunity Application.

Conclusion on the Stay Application and the Security Application

212. As I indicated in the course of the hearing, I was very concerned about the length of the potential delay in this case if the Stay Application was granted and the prejudice to the Claimant which, as discussed above, will result from that delay.

213. Having considered (above) the individual factors for and against a stay and in particular in this case the risk of conflicting judgments (taking into account the merits of the challenge in the Annulment Proceedings), I find that the balance lies in granting a stay but that the potential prejudice to the Claimant can be mitigated by ordering a stay only until the determination of the Annulment Proceedings by The Hague Court of Appeal and not until the final determination of the Annulment Proceedings.

214. I recognise that there is a risk that one of the parties may seek to extend the stay beyond the decision of The Hague Court of Appeal but I am also of the view that the decision of The Hague Court of Appeal, especially if it confirms the decision of

the Tribunal, may resolve matters or at least may narrow the issues and the risk of inconsistent judgments will be reduced (though not eliminated).

215. Further by limiting the stay in this way the English Courts will retain a measure of control over the progression by the parties of the proceedings in the Netherlands as, if a further stay is sought, the parties will be obliged to satisfy the Court that the matter is being progressed with appropriate expedition and the Court will also be able to reassess whether a stay is appropriate, weighing the relevant factors at that time which will include the merits of the issues in light of the decision of The Hague Court of Appeal.

216. I will also give liberty to the Claimant to apply so that if the Dutch proceedings are not pursued with due expedition the Stay Application can be brought back before the Court.

217. For the reasons set out above I find that the Court has no power under CPR 3.1 to make the grant of the stay conditional upon the payment into court where the purpose of such payment would be to support the enforcement of the judgment debt and not the Stay Application or the Immunity Application.

Post Hearing Correspondence

218. In a letter of 24 April 2025 the Claimant's solicitors informed the Court that on 17 April 2025, the US District Court for the District of Columbia rejected both the Defendant's motion to dismiss the US Enforcement Proceedings and its motion for a stay of the US Enforcement Proceedings pending determination of the set-aside proceedings issued by the Defendant in the seat of the arbitration in The Hague as well as other purportedly related cases in the US. The letter enclosed the US Court's decision "*should it be helpful to the Court as it considers the parties' Applications*".

219. The pending US proceedings were not relied on (or referred to) in the submissions made by either party to this Court at the hearing of the Applications (although I note that no decision had been made at the time of the hearing). I do not propose to consider the US Court's decision or to invite further submissions since I see no basis to infer that a decision which was taken in another jurisdiction and where the test applied may well be a different one is relevant to this Court's decision.