

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



**BETWEEN:-**

**VTB CAPITAL PLC**

**Claimant**

**-and-**

**(1) THE REPUBLIC OF MOZAMBIQUE  
(2) MOZAMBIQUE ASSET MANAGEMENT SA**

**Defendant**

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**PARTICULARS OF CLAIM**

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**The Parties**


1. The Claimant (**VTBC**) is a public company incorporated under the laws of England which operates as an investment bank. It is a part of the VTB Group, a global provider of financial services headquartered in Moscow, Russia.
2. The First Defendant (the **Republic**) is a sovereign state in Southeast Africa.
3. The Second Defendant (**MAM**) is a company incorporated under the laws of Mozambique. MAM is ultimately owned and controlled by the Republic.

**The Facility Agreement**

4. On 20 May 2014 MAM (acting as Borrower), VTBC (acting as mandated lead arranger, Original Lender and Facility Agent) and Palomar Capital Advisors Ltd (**Palomar**, acting as mandated lead arranger) entered into a facility agreement (the **MAM Facility Agreement**).
5. Under the terms of the MAM Facility Agreement (the full terms of which VTBC will refer to and rely upon as necessary) and adopting the definitions used therein:



- (1) By clause 2.1, the Lenders agreed to make available a USD term facility in an aggregate amount equal to the Total Commitments (which at the time of signing were zero), subject to a Facility Limit of USD 549,000,000.
- (2) By clause 2.3, the rights of each Finance Party (which included *inter alia* the Lenders, Arrangers and Facility Agent) were expressed to be several, with such rights being separate and independent rights, with any debt due to a Finance Party from an Obligor being a separate and independent debt.
- (3) By clause 3.1, the Borrower agreed to apply all amounts borrowed under the Facility towards advance payment for services to be provided by the Contractor in relation to the Project under the Procurement Contract, and related costs and expenses.  
  
(the 'Procurement Contract' was in turn defined at clause 1.1 to mean, in summary, the main contract dated on or about the same date made between the Borrower and the Contractor, which was defined in turn as being Privinvest Shipbuilding Investments LLC (*Prinvest Shipbuilding*)).
- (4) By clause 5.1, the Borrower could issue a Utilisation Request by delivering such a request (the requirements of which were set out at clauses 5.2 and 5.3) to the Facility Agent no later than the Specified Time.
- (5) By clause 6.1, the Borrower was to repay the Loans in four instalments, each comprising 25% of the outstanding Loans, on Repayment Dates which fell 24, 36, 48 and 60 months from the First Utilisation Date.
- (6) By clauses 8.1 and 8.2, the Borrower agreed to pay Interest on the Loan on each Interest Payment Date at a rate of LIBOR plus Margin (7.0%). By clause 8.3 (and subject to the detailed terms set out therein), Default Interest was payable on any overdue amount due under the Facility Agreement at a rate of 2.0% above the otherwise applicable rate, compounding at the end of each applicable Interest Period.
- (7) By clauses 13.1 and 13.2 the Borrower agreed to pay the Arrangers the fees set out in the Arrangement Fee Letter and in each Increase Fee Letter.

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- (8) By clause 16, the Borrower provided various indemnities, including:
- (a) By clause 16.2, an indemnity to each Finance Party (payable within 30 days of demand) in respect of any cost, loss or liability incurred by that Finance Party as a result of *inter alia*:
    - (i) the occurrence of any Event of Default; or
    - (ii) a failure by an Obligor to pay any amount due under a Finance Document on its due date.
  - (b) By clause 16.3, an indemnity to the Facility Agent, each Lender and each of their respective officers, directors, employees, agents and representatives (payable within 30 days of demand) in respect of any cost, loss or liability howsoever incurred or suffered by it as a result of:
    - (i) investigating any event of which it is notified or reasonably believes is a Default; or
    - (ii) acting or relying on any notice, request or instruction which it believes to be genuine, correct and appropriately authorised.
- (9) By clause 18.3, the Borrower agreed to pay to each Finance Party within 30 days of demand the amount of all costs and expenses (including, but not limited to, legal fees) incurred by the Finance Party in connection with the enforcement of, or the preservation or any rights under, any Finance Document (including any investigation or enquiries as regards any actual or potential Event of Default).
- (10) By clause 19, the Borrower made the various representations and warranties set out in clauses 19.1-19.21 to each Finance Party on the date of the Agreement (and repeated in accordance with the terms of clause 19.22) and acknowledged that the Finance Parties have entered into the Agreement in reliance on those representations and warranties.
- (11) By clause 22, various events or circumstances were agreed to be Events of Default, including (by clause 22.1) a failure by the Borrower to pay any sum due from it under the Finance Documents at the time, in the currency and in



the manner specified and a failure by the Guarantor to pay such Overdue Amount within three Business Days.

- (12) By clause 22.16, on and at any time after the occurrence of an Event of Default (which was continuing) the Facility Agent (if so directed by Majority Lenders) was entitled to issue a notice to the borrower *inter alia* cancelling the Total Commitments and declaring all or part of the Loans, together with accrued interest and all other amounts accrued or outstanding under the Finance Documents be immediately due and payable.

### **The Government Guarantee**

6. Also on 20 May 2014, the Republic (acting by and through its Ministry of Finance as Guarantor), Palomar (acting as Dollar Arranger) and VTBC (acting as Dollar Arranger and Dollar Facility Agent) entered into a guarantee (the ***MAM Government Guarantee***) which related to the obligations assumed under the MAM Facility Agreement (which is defined in the MAM Government Guarantee as the ‘Dollar Facility Agreement’).
7. Under the terms of the MAM Government Guarantee (the full terms of which VBTC will refer to and rely upon as necessary) and adopting the definitions used therein:
- (1) By clause 2.1, the Guarantor (i.e. the Republic) irrevocably and unconditionally:
- (a) guaranteed to each Finance Party punctual performance by the Borrower (i.e. MAM) of all of its payment obligations under the Finance Documents so that whenever the Borrower does not pay any amount due and payable by it under the Finance Documents, the Guarantor shall, within three business days of receipt of a demand for payment by the Dollar Facility Agent (i.e. VTBC) pay the amount as if the Guarantor instead of the Borrower were expressed to be the primary obligor; and
- (b) indemnified each Finance Party against any loss or liability suffered by any of them if any obligation guaranteed by the Guarantor is or



becomes unenforceable, invalid, void or illegal, such payments to be made by the Guarantor within three Business Days of receipt of a Demand for Payment.

- (2) By clause 2.2, the Guarantee was a continuing one which extended to the ultimate balance of all sums payable by the Borrower under the Finance Documents, regardless of any intermediate payment or discharge in whole or in part under the Finance Documents.
- (3) By clause 2.5, and notwithstanding any rights the Guarantor may have under any law or regulation to the contrary, the Guarantor waived any right it may have of first requiring any Finance Party to proceed against or enforce any other rights or Security or claim payment from any person before claiming from the Guarantor under the Guarantee.
- (4) By clause 3.1, various terms of the Dollar Facility Agreement (i.e. the MAM Facility Agreement) were incorporated into the Guarantee, including clause 2.3.
- (5) By clause 3.2, the Guarantor agreed that if a Finance Party made a demand under the Guarantee the Guarantor would pay interest on each sum demanded (before and after judgment, and to the extent interest at the default rate was not otherwise being paid on such sum(s)) from the date of demand until the date of payment calculated on a daily basis as determined in accordance with clause 8.3 of the Dollar Facility Agreement.

**Arrangement Fee Letter**

- 8. By an Arrangement Fee Letter dated 23 May 2014 VTBC (as Arranger and Facility Agent) and MAM agreed *inter alia* that the Arrangement Fee payable to VTBC would be USD 35,000,000, or a lesser prorated amount if a Loan of less than USD 535,000,000 is advanced on the First Utilisation Date.



### **Increase Notices and Utilisations**

9. On 23 May 2014 VTBC (as 'Arranger' and 'Increase Lender') and MAM (as 'Borrower') issued to VTBC (as 'Facility Agent') an "Increase Notice" as contemplated by clause 2.2 and in the prescribed form at Schedule 5 of the MAM Facility Agreement, pursuant to which VTBC assumed an Increased Facility Commitment of USD 435,000,000.
10. On the same day, MAM (as 'Borrower') issued a Utilisation Request to VTBC (as 'Facility Agent'), requesting drawdown of USD 535,000,000 (or, if less, the Available Facility) that day, with the drawdown being used as follows:
  - (1) to pay the Arrangement Fee to VTBC;
  - (2) the balance to be paid to Privinvest Shipbuilding.
11. A payment of USD 406,542,056.07 (representing the balance of the Available Facility of USD 435,000,000 following deduction of VTBC's Arrangement Fee as pro-rated) was duly made by VTBC to Privinvest Shipbuilding on 23 May 2014.
12. On 9 June 2014 VTBC entered into a funded participation transaction with Banco Comercial Português SA (**BCP**) pursuant to which BCP funded a USD 100,000,000 participation in the Facility. The transaction was on the Loan Markets Association's standard form of Funded Participation Agreement (par/distressed) in force at that time (3 March 2014 version) (the **LMA Funded Participation Agreement**), and would settle on 11 June 2014 with BCP as 'Participant' and VTBC as 'Grantor'.
13. On 11 June 2014 VTBC and MAM issued a further Increase Notice, where an Increased Facility Commitment of USD 100,000,000 was established, thereby increasing the Total Commitments to USD 535,000,000.
14. By an Increase Fee Letter pursuant to clause 13.2 of the MAM Facility Agreement dated 11 June 2014, VTBC (acting as Arranger and Facility Agent) and MAM agreed that MAM would pay to VTBC an Increase Fee of USD 6,542,056.07.
15. Also on 11 June 2014, VTBC issued a Transfer Certificate (within the meaning of clause 23.5 of the MAM Facility Agreement) whereby it (as Existing Lender)



transferred USD 100,000,000 to BCP (as New Lender) to take effect on a 'Transfer Date' being "...such date on or after 21 May 2015 as notified in writing". Upon taking effect, this would constitute an 'elevation' of BCP from 'Participant' to 'Lender' pursuant to clause 19 ('Elevation') of the LMA Funded Participation Agreement agreed on 9 June 2014. As such BCP would take a direct commitment in the MAM Facility by virtue of the Transfer Certificate, and BCP's funded participation would correspondingly be terminated pursuant to clause 19.5 ('Termination of Funded Participation') of the LMA Standard Funded Participation Agreement on the Transfer Date.

16. Also on 11 June 2014, MAM issued a Utilisation Request to VTBC as Facility Agent, requesting a drawdown of USD 100,000,000 (or, if less, the Available Facility) which it stated it would apply in accordance with Clause 3.1 of the Facility Agreement, with the drawdown being used as follows:
  - (1) to pay the Increase Fee to VTBC;
  - (2) the balance (USD 93,457,943.93) to be paid to Privinvest Shipbuilding.
17. On 26 May 2015 BCP as 'New Lender' issued notice to VTBC as 'Existing Lender' and 'Facility Agent', in accordance with clause 2(b) of the Transfer Certificate dated 11 June 2014. In this, BCP notified VTBC that it required the 'Transfer Date' in respect of its USD 100,000,000 commitment to be 21 May 2015.

#### **Payment of interest**

18. The first interest payment under the MAM Facility Agreement fell due on 26 May 2015 in the sum of USD 40,786,055.88. Payment was received by VTBC on 27 May 2015.

#### **Failure to pay and Events of Default**

19. In breach of the MAM Facility Agreement MAM subsequently failed to pay to VTBC as Facility Agent interest payments (including default interest on overdue sums) and principal repayments as they fell due, or at all as set out below:



Date	Interest Due	Principal Repayment due	Default Interest
23 May 2016	USD 41,749,219.88	USD 133,750,000	N/A
23 May 2017	USD 33,760,199.74	USD 133,750,000	USD 18,234,811.98
23 May 2018	USD 23,657,810.34	USD 133,750,000	USD 39,283,603.74
23 May 2019	USD 13,242,397.84	USD 133,750,000	USD 66,564,847.91

20. On 31 May 2016, 21 December 2016, 14 March 2017, 13 June 2017, 5 June 2019 and 19 July 2019 ‘reservation of rights’ letters were issued by VTBC, acting as Facility Agent, to MAM and the Republic in respect of various Events of Default (as defined in the MAM Facility Agreement), including the failure to pay the sums set out above.

### **Demands**

21. On 26 November 2019 VTBC, acting as Facility Agent, issued a notice declaring that all outstanding overdue sums under the MAM Facility Agreement were payable with the overdue amount (including Default Interest under clause 8.3 of the MAM Facility Agreement) being USD 817,498,742.42 as at the end of that day.
22. On the same day, a demand for the same sum of USD 817,498,742.42 was made of the Republic under clause 2.1 of the MAM Government Guarantee.
23. In breach of the terms of the MAM Facility Agreement and the MAM Government Guarantee, MAM and the Republic failed to pay the sums demanded, or any sums and VTBC has accordingly suffered loss and damage.

### **Subsequent correspondence**

24. Following further correspondence (including letters of claim dated 13 December 2019 sent by solicitors for VTBC, Freshfields Bruckhaus Deringer LLP (*Freshfields*))





to both the Republic's solicitors, Peters & Peters LLP (Peters & Peters) and to MAM itself), by a letter dated 6 January 2020, Peters & Peters (acting on behalf of the Republic) stated that the Republic "*did not accept*" that the MAM Government Guarantee was valid, binding and enforceable, and asserted that it had various "*reason[s] to believe*" that this was the case.

25. As at the date of these Particulars of Claim, neither VTBC nor Freshfields has received any substantive response from MAM to VTBC's notice and demand for payment under the MAM Facility dated 26 November 2019 (referred to at paragraph 21 above) or to Freshfields' letter of claim of 13 December 2019 on behalf of VTBC (referred to at paragraph 24 above).

### **VTBC's Claims**

#### *Claim for declarations*

26. In light of the circumstances set out above, VTBC is entitled to, and hereby claims against the Republic and MAM declarations that the MAM Facility Agreement and the MAM Government Guarantee are valid, binding and enforceable.

#### *Claim for sums due under the MAM Facility Agreement and the MAM Government Guarantee*

27. In light of the failure to pay set out above at paragraph 23, VTBC is entitled to and hereby claims from both MAM and from the Republic (pursuant to the guarantee and/or as an indemnity, as set out above at paragraph 7(1)), that portion of the sum demanded on 26 November 2019 (see paragraphs 21 and 22 above) which is due to VTBC as a separate debt under clause 2.3 of the MAM Facility Agreement (being USD 664,695,239.17 at the end of that same day) along with further and continuing interest as set out below.
28. Further, VTBC is entitled to and claims continuing accruing interest on the sums outstanding to it since 26 November 2019, such interest to be calculated and compounded under the terms of the MAM Facility Agreement (clause 8.3) and the MAM Government Guarantee (clause 3) and to accrue daily until the date of actual payment (whether before or after judgment). At the date of the Claim Form (23



December 2019) the total amount of debt (principal and accrued interest) due and payable to VTBC under the MAM Facility was USD 670,031.819.30.

29. Alternatively, VTBC claims interest under section 35A of the Senior Courts Act 1981 for such period and at such rate as the court thinks fit.

*Claims for damages*

30. Further or alternatively, VTBC claims damages for breach of contract against the Republic and MAM for the loss suffered as a consequence of those breaches, as set out above.
31. Further, VTBC is entitled to and claims interest on the sums due under section 35A of the Senior Courts Act 1981 for such period and at such rate as the court thinks fit.

*Claims for indemnities*

32. Further, VTBC is entitled to and claims a declaration that:
- (1) upon demand and within the time periods set out in clause 16 of the MAM Facility Agreement, VTBC is entitled to be indemnified by MAM pursuant to that clause including for all its costs, losses and liabilities arising as a consequence of the Events of Default, as a result of MAM's and/or the Republic's failure to pay the sums due under the Finance Documents and/or as a result of investigating an event which it reasonably believed to be an Event of Default, such losses to include not only the sums due under the Finance Documents (and set out above) but VTBC's legal costs, including of these proceedings;
  - (2) the Republic is also similarly liable to VTBC in respect of the same sums pursuant to its guarantee and/or as an indemnity under the MAM Government Guarantee.

**AND THE CLAIMANT CLAIMS:-**

- (1) a declaration that the MAM Facility Agreement and the MAM Government Guarantee are valid, binding and enforceable;



- (2) the sum of USD 670,031.819.30 (being the sum due from MAM and the Republic to VTBC as at the date of the Claim Form – 23 December 2019), plus accrued interest to date and further accruing interest as set out below;
- (3) alternatively, damages for breach of contract;
- (4) continuing interest as set out at paragraph 28 above and/or under s 35A of the Senior Courts Act;
- (5) a declaration as to VTBC’s entitlement to indemnities as set out at paragraph 32 above;
- (6) further or other relief (including further declaratory relief); and
- (7) costs.

**DAVID RAILTON QC**

**TIMOTHY HOWE QC**

**ADAM SHER**

**STATEMENT OF TRUTH**

VTB Capital plc, the Claimant, believes that the facts stated in these Particulars of Claim are true. I am duly authorised by the Claimant to sign this statement:

Signed:  \_\_\_\_\_

Nicholas Jonathan Marc Hutt, CEO - VTB Capital plc

Served this 27<sup>th</sup> day of March 2020 by Freshfields Bruckhaus Deringer LLP, 65 Fleet Street, London EC4Y 1HS (solicitors for the Claimant).



CL-2019-000817

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**BUSINESS AND PROPERTY COURTS of**  
**ENGLAND & WALES**  
**COMMERCIAL COURT (QBD)**

**B E T W E E N :**

**VTB CAPITAL PLC**

**Claimant**

**- and -**

**(1) THE REPUBLIC OF MOZAMBIQUE**  
**(2) MOZAMBIQUE ASSET**  
**MANAGEMENT S.A.**

**Defendants**

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**PARTICULARS OF  
CLAIM**

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