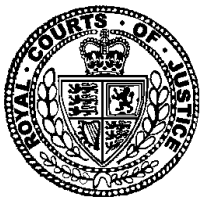

Neutral Citation Number: [2022] EWHC 2444 (Comm)

Case No: CL-2022-000420

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

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

Date: 06/10/2022

Before :

HIS HONOUR JUDGE PELLING KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

LLC EUROCHEM NORTH-WEST-2	**Claimant**
- and –	
(1) TECNIMONT SpA	
(2) LLC MT RUSSIA	**Defendants**

- -

Roger Stewart KC, **Hugh Mercer KC** and **George McDonald** (instructed by **Vinson & Elkins LLP**) for the **Claimant**
Michael McLaren KC, Robin Lööf and **Christopher Knowles** (instructed by **Curtis, Mallet-Prevost, Colt & Mosle LLP**) for the **Defendants**

Hearing date: 29 September 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling KC:

Introduction

1. This is the substantive return date hearing in respect of an anti-suit injunction ("ASI") granted by Butcher J on 9 August 2022 on a without notice application by the Claimant ("Eurochem"). Directions for this hearing were given at a hearing on 23 August, with the ASI continuing in the meantime.

2. It is agreed that there are three issues that arise being:

   i) whether the ASI should continue and if so on what terms, or be discharged on its merits ("Merits Issue");

   ii) whether the ASI should be discharged by reason of Eurochem's alleged failure to give full and frank disclosure at the without notice hearing before Butcher J ("Disclosure Issue"); and

   iii) Assuming that the ASI should continue on its existing terms or should be re-granted on those terms, whether the Defendants should nonetheless be permitted to commence proceedings in France or Italy to restrain banks in those jurisdictions honouring calls made on various on-demand bonds issued by those banks in favour of Eurochem or requiring Eurochem to suspend its calls on the bonds and refrain from making more calls on them, or both ("Derogation Issue").

3. These proceedings are being case managed together with separate proceedings (with the Case Number CL-2022-456) commenced by Eurochem against the banks that issued the on-demand bonds with which these proceedings and this application are concerned ("Banks Claim"). The Defendants to these proceedings have been joined as parties to the Banks Claim.

Factual Background

4. The factual background is not in dispute, at any rate for the purpose of the application I am now considering. Eurochem is a company incorporated in Russia for the purpose of owning and operating a fertiliser plant ("Plant") in the Russian Federation. It entered into three contracts ("Contracts") with the Defendants for and in connection with the construction of the Plant. The Contracts are expressly governed by English law and provide for disputes between Eurochem and the Defendants under the Contracts to be resolved by arbitration under the ICC Rules seated in London. This is not in dispute between the parties. It is also common ground that any dispute between Eurochem and the Defendants concerning the enforceability of the bonds comes within the scope of the parties' arbitration agreement.

5. Under the Contracts, the Defendants were required to procure that various on-demand bonds be issued, under which Eurochem was the beneficiary. Although the issuing banks were not identified in the Contracts, the form of the bonds was. As such, each

of the bonds was required to incorporate and each incorporates a governing law and an exclusive jurisdiction clause in these terms:

> "This Bond, and any non-contractual obligations arising out or in connection with this Bond, shall be governed by and construed in accordance with the laws of England and Wales.
>
> Each party irrevocably submits to the exclusive jurisdiction of the courts of England with regard to all matters arising from or in connection with this Bond and agrees that a judgment on any proceedings brought in the courts of England shall be conclusive and binding upon them and may be enforced in the courts of any other jurisdiction."

6. The total value of the Bonds with which these proceedings are concerned is currently EUR 244,785,694.32. Of the eight bonds issued, two were issued by Russian banks and are not relevant for present purposes. The remaining six were issued by Societe Generale Paris, Societe Generale Milano and the Milan branch of ING Bank NV ("Banks"). It is the bonds issued by those banks that are the subject of the Banks Claim and these proceedings ("Bonds").

7. Various disputes concerning the performance of the Contracts have arisen between Eurochem and the Defendants as a consequence of which Eurochem alleges it has validly terminated the Contracts. It is common ground those disputes will have to be resolved by arbitration in accordance with the arbitration agreements contained in the Contracts. The Defendants referred this dispute to arbitration ("Reference") on 15 August 2022 and applied to an emergency arbitrator appointed under the ICC Rules for an order restraining Eurochem from continuing to claim payment under the Bonds. The emergency arbitrator dismissed that application on 20 August 2022 on the basis that the Defendants had failed to establish a good arguable case that it was unlawful for Eurochem to demand payment.

8. On 4 August 2022, Eurochem had called on the banks to pay under the Bonds as it maintains it was entitled to by reason of what it alleges to be the Defendants' breach of the Contracts. The Banks (supported by the Defendants) have so far declined to honour the Bonds on the basis that it would be unlawful for them to do so by reason of among other things the operation of Article 11 of each of (i) EU Regulation 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine ("Regulation 269/2014") and (ii) EU Regulation 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine ("Regulation 833/2014") and/or French or Italian domestic law giving effect to those Regulations. Eurochem maintains that is wrong and commenced the Banks Claim for the purpose of securing orders designed to enforce compliance by the Banks with the Bonds. The Defendants have been joined as Defendants to those proceedings.

9. This claim is an arbitration claim that Eurochem commenced on the basis identified expressly in the Claim Form namely that:

> "The Claimant is concerned that the Defendants will seek to restrain payment under some of the bonds in foreign proceedings. In similar circumstances in 2019, the Defendants sought and obtained a temporary restraining order from the Italian courts preventing bonds being paid to another company in the Claimant's group. Those bonds had been issued in respect of the construction of a neighbouring plant on the same site. The temporary restraining order was ultimately set aside by the Italian courts, but it delayed payment of the bonds whilst the matter proceeded in the Italian court despite the jurisdiction and arbitration clauses in the bonds and the relevant contracts respectively."

It is in that context, Eurochem seeks various declarations and orders including:

> "A final anti-suit injunction, pursuant to section 37 of the Senior Courts Act 1981, restraining the Defendant from commencing or pursuing any claims and/or proceedings in the courts of any jurisdiction for the purpose of restraining, delaying or otherwise impairing payment of certain bonds in any jurisdiction, save:
>
> (a) by proceedings brought by the Defendants in the courts of England; or
>
> (b) by arbitration in London in accordance with the arbitration clauses in the contracts; or
>
> (c) with the written consent of the Claimant,
>
> unless for practical reasons the application can only sensibly be made to some other court(s) and in making the application in such court(s) the Defendants are not acting in an attempt to outflank the arbitration agreement(s)"

The Defendants oppose the making or continuation of an order in those terms because they wish to preserve their ability to apply to the courts in either Italy and/or France to restrain the Banks from honouring the Bonds on the basis identified above, although it is accepted by all parties that there would appear to be no realistic prospect of the Banks paying unless required, or at least permitted, to do so by a court with jurisdiction to make such order.

The Merits Issue

10. The Defendants contend that the ASI should be discharged because:

    i) They are not contractually prohibited from bringing the proceedings they may wish to bring in Italy or France because:

a) the exclusive jurisdiction clause in the bonds does not bind them because they are not parties to the contract contained in or evidenced by the Bonds; or

b) the arbitration agreement in the Contracts permits the Defendants to seek conservatory relief in any court not merely the courts of the seat of the Reference; or

ii) Even if the Defendants are confined to issuing claims for conservatory relief in courts of England and Wales as the court of the Reference's seat, any application for orders precluding enforcement of the Bonds comes within the exception identified in U&M Mining Zambia Ltd v Konkola Copper Mines plc [2013] 2 Lloyd's Rep. 218 and/or the courts of France and Italy are more appropriate than the English Court to resolve the issues that arise because of what is said to be the unavailability of certain arguments in England that would be available in proceedings in Italy or France.

11. The Court may grant an ASI where (i) there is between the claimant and defendant a jurisdiction agreement requiring that disputes be submitted for determination by the courts of England and Wales; or (ii) where there is an arbitration agreement requiring such a dispute to be referred to arbitration in England and Wales; or (iii) where the respondent to the application for an ASI is founding a claim on rights arising from a contract which contains a relevant jurisdiction or arbitration agreement – a basis sometimes referred to as the "quasi contractual" ground. As to this last alternative, Eurochem submits that it obviously applies in the circumstances of this case and that to decide otherwise would be to permit the Defendants to "outflank" the jurisdiction clauses in the Bonds so as thereby to engage the quasi contractual ground. The Defendants maintain this is wrong since they are not seeking to rely on rights conferred on them by the contracts contained in or evidenced by the Bonds.

12. I turn first to the contractual bases on which the ASI application is advanced. In relation to contractual claims, before a court can consider making such an order it must be satisfied to a high degree of probability that there is a binding and applicable jurisdiction or arbitration agreement – see QBE Europe SA and others v. Generali España De Seguros Y Reaseguros [2022] EWHC 2062 (Comm) *per* Foxton J at [10(iv)]. Subject to that requirement, the court will ordinarily exercise its discretion to restrain the pursuit of proceedings brought in breach of a forum clause unless the defendant can show strong reasons to refuse the relief. In my judgment that framework is the context against which the issues that arise in this case should be resolved.

13. As to the requirement to establish a binding and applicable contract, it is common ground that the Defendants were not parties to the contract contained in or evidenced by the Bonds. It follows that the exclusive jurisdiction clause contained within the Bonds is binding contractually only between the Banks and Eurochem and thus does not form even an arguable basis for seeking an ASI against the Defendants subject to the availability of the quasi contractual basis, to which I return below to the extent that it is necessary to do so.

14. However, it is common ground that the arbitration agreement is binding between Eurochem and the Defendants and that any cause of action between them concerning

the enforceability of the Bonds comes within the scope of that agreement. However there is a dispute between the parties as to whether it nevertheless remains open to the Defendants to apply for relief in aid of the Reference to state courts other than the courts of its seat namely England and Wales. It is to that issue that I turn now.

15. The arbitration agreements between Eurochem and the Defendants do not prohibit (indeed the ICC Rules incorporated into the arbitration agreements expressly permit in defined circumstances) applications for interim relief to state courts and do not provide, at any rate expressly, that such applications should be made only to the Courts of the seat of any arbitration commenced in accordance with those agreements. The claimant argues that notwithstanding that, as a matter of English law, save in exceptional circumstances, any application must be made to the courts of England and Wales as the courts of the seat of the Reference. The Defendants submit that there is no such requirement but in any event on proper analysis this case is one of those falling within the exceptions to that rule.

16. Both parties rely on the judgment of Blair J in U&M Mining Zambia Ltd v Konkola Copper Mines plc [2013] EWHC 260 (Comm) and in addition Eurochem relies on two subsequent first instance judgments that it submits followed U&M Mining Zambia Ltd v Konkola Copper Mines plc (ibid.), being Orient Express Lines (Singapore) PTE Limited v Peninsular Shipping Services Limited [2013] EWHC 3855 (Comm) and Evergreen Marine (Singapore) Ltd v Fast Shipping and Transportation Co Ltd [2014] EWHC 4893 (QB). The principles to be derived from those authorities are in dispute however.

17. In my judgment the exception identified by Blair J in U&M Mining Zambia Ltd v Konkola Copper Mines plc (ibid.) is limited in scope. The claimant was the Zambian registered subsidiary of a Brazilian parent company and the defendant was a Zambian registered owner of a copper mine located in Zambia, which was being operated by the claimant under a contract governed by Zambian law and jurisdiction but which provided for LCIA arbitration in London. The defendant terminated the contract and obtained orders from the Zambian courts requiring the claimant to vacate the mine and deliver up equipment used in operation of the mine. The claimant sought an ASI in London on the basis that the claims in the Zambian courts were in breach of the LCIA arbitration agreement. Blair J held the natural forum for the proceedings was Zambia, and that commencement of the proceedings was not a breach of the arbitration agreement and the injunction previously granted was discharged.

18. In support of the application for continuation of the order, U&M Mining Zambia Ltd had submitted that " … *the courts of the seat have exclusive supervisory jurisdiction subject to valid contrary agreement* …" – see paragraph 50 of Blair J's judgment. This led Blair J unsurprisingly to conclude that the " … *central point is whether U&M is correct to submit that the English court, as the court of the seat, and only the English court, has power to grant interim relief*" – see paragraph 51. Having accepted that in principle " … *the natural court for the granting of interim injunctive relief must be the court of the country of the seat of arbitration, especially where the curial law of the arbitration is that of the same country* …", he qualified that by stating that "… *a party may exceptionally be entitled to seek interim relief in some court other than that of the seat, if for practical reasons the application can only sensibly be made there, provided that the proceedings are not a disguised attempt to outflank the*

arbitration agreement …". As will be apparent from this formulation the exception identified by Blair J was very limited and applied only where the only court to which the application could sensibly be made was a court other than that of the seat of the arbitration.

19. The narrowness of the exception was emphasised by Burton J in Orient Express Lines (Singapore) PTE Limited v Peninsular Shipping Services Limited (ibid.) where he summarised the applicable principle as being that the jurisdiction of a court other than that of the seat " … *would ... be considered with circumspection, and only given in exceptional circumstances* ..." but he did not undertake the detailed analysis undertaken by Blair J and in my judgment nothing Burton J said was intended to qualify what Blair J has said. In Evergreen Marine (Singapore) Ltd v Fast Shipping and Transportation Co Ltd (ibid.) Leggatt J referred to both authorities I have referred to and then added:

> "The reason why there can and must be exceptional cases where it is appropriate to seek interim relief in another jurisdiction include, for example, the fact that assets may be located in another jurisdiction and interim relief may be appropriate to seek to freeze or secure assets in aid of the arbitration proceedings. For that reason, it cannot be a blanket rule that applications for interim relief can only ever be brought in the jurisdiction where the arbitration has its seat. Nevertheless, it seems to me clearly correct as a matter of general principle for the reasons advanced by Mr Gardner that that must ordinarily be the position. I respectfully endorse the statement of Blair J as to the applicable test."

In my judgment the effect of the first instance authorities is that (subject to any provision that expressly varies the position contained in the relevant arbitration agreement) applications in support of arbitral references seated in England and Wales must generally be brought in the courts of England and Wales as the courts of the seat of the arbitration unless (a) for practical reasons the application can only sensibly be made elsewhere and (b) only then provided that the proceedings are not a disguised attempt to outflank the arbitration agreement. That being so, the permissory terms of the ICC (and for that matter the LCIA) Rules are merely the starting point for deciding whether proceedings in a court other than the Court of England and Wales should be permitted and an ASI seeking to prevent such proceedings should be granted or maintained.

20. That being so, it is necessary to consider whether the Defendants have demonstrated that they have made out an entitlement to rely on the exception on the facts of this case. The argument depends on an assertion by the Defendants that Eurochem is a sanctioned entity within the meaning of the Regulations. That is in dispute between the parties but I am not asked to resolve that dispute on this application and could not do so. Assuming that payment by the Banks to Eurochem would be contrary to, among other provisions, Article 11 of either or both of the Regulations, I am nonetheless satisfied that the Defendants have not established an entitlement to rely on the exception to the general rule requiring applications for injunctions in aid of

arbitration seated in England to be made to the Courts of England and Wales. My reasons for reaching that conclusion are as follows.

21. The governing law of both the Bonds and the Contracts is English law. There is a dispute between the parties as to whether as a matter of English law, it is open to a bank to resist payment on grounds other than because payment is precluded by the express terms of the bonds or on the ground that the claim to payment is fraudulent. I am prepared to accept that it is realistically arguable that a bank would be entitled to refuse to pay under a bond if to pay would be unlawful. However, the limits that apply to such an issue as a matter of English law are well established – see Lamesa Investments Limited v. Cynergy Bank Limited [2019] EWHC 1877 (Comm) at [11]. It is open to the Banks to assert in the Banks Claim that performance would be unlawful in the place of performance applying Ralli Brothers v. Campania Naviera Sota Y Aznar [1920] 2 KB 287 and if the Defendants have a cause of action available to them at all concerning the Bonds (which is not an issue I am asked to or can resolve on an application of this sort) that entitles them to rely on that principle, then any issue concerning whether Eurochem should be restrained from pursuing its call for payment can equally be resolved by a court in England applying that principle with expert evidence as to the relevant law of Italy or France as the case may be.

22. It is wrong in principle to approach the question I am now considering by asking whether on balance it might be more satisfactory for the courts of Italy or France to resolve the question. The effect of U&M Mining Zambia Ltd v Konkola Copper Mines plc (ibid.) and Evergreen Marine (Singapore) Ltd v Fast Shipping and Transportation Co Ltd (ibid.) is that as a matter of English law any such application should be made to the courts of the seat unless it is established that " … *the application can only sensibly be made* ..." in the courts of another jurisdiction. This approach is consistent with the requirement for strong reasons before an ASI can be refused once the contractual requirement has been shown to be satisfied to the level identified in QBE Europe SA and others v. Generali España De Seguros Y Reaseguros (ibid.). That is not so in relation to the unlawfulness issue I am now considering. It was suggested that this was unreal because the question would in any event arise on any attempt to enforce an award or order. I do not agree that is a reason for not applying the general principle. It does not follow that because an order is obtained against an Italian or French bank it can only be enforced in either of those jurisdictions.

23. In order to meet the point that, if an injunction were to be sought restraining payment on the ground that payment was unlawful according to the laws of the place of performance, that issue could and should be resolved by the courts of England and Wales, the Defendants submitted that although the Regulations give rise to a defence if a claim were to be made against the Banks in either Italy or France, the law of Italy and France does not make it unlawful to make or satisfy a claim so that the principle in Ralli Brothers v. Campania Naviera Sota Y Aznar (ibid.) would not apply and only the courts in Italy or France could provide a remedy for the Defendants. It follows, so it is submitted, that for practical reasons the Defendants should be permitted to apply to courts in Italy or France because the remedy they seek would not be granted by either the English courts applying English law or, presumably, by an arbitral tribunal applying English law. In my judgment this argument is entirely fallacious. If the Defendants are correct, then the effect of permitting them to apply to the courts in

Italy or France for relief that they could not obtain from the courts in England (and which they would not be entitled to as a matter of English law) would be to permit the Defendants to outflank the arbitration agreement that parties have entered into – that is that there should be an arbitration seated in London, which is subject to English law and which by agreement must apply English law to resolve the disputes referred to the arbitral tribunal.

24. In those circumstances it is not necessary for me to reach any conclusions as to whether an ASI could have been granted on the quasi contractual basis.

The Disclosure Issue

25. The Defendants maintain that even if contrary to their primary case, in principle the ASI should have been granted and should be continued, it should nevertheless be discharged and not re-granted because of a failure to fully, frankly, and fairly present the without notice application.

26. The applicable principles are well known. It is the duty of the applicant to make a full and fair disclosure of all the facts which it is material for the judge to know in dealing with the application as made. Materiality is to be decided by the court and not by the applicant or his legal advisers. The duty is a strict one and includes not merely material facts known to the applicant but also additional facts which he would have known if he had made proper enquiries – see Brinks Mat Ltd v Elcombe [1988] 1 WLR 1350 per Ralph Gibson LJ at pages 1356 -1357. Critically however, an applicant does not have a duty to disclose points against him which have not been raised by the respondent or where there is no reason to suppose the respondent would raise such points if present – see Konamaneni v Rolls Royce Industrial Power (India) Ltd [2002] 1 WLR 1269 *per* Lawrence Collins J at para 180. Such allegations are not lightly to be made. They are or should be confined to points that might have a real consequence for the judge who is asked to make an order on a without notice basis – see Union Fenosa Gas SA v. Egypt [2020] EWHC 1723 (Comm); [2020] 1 WLR 4732 *per* Jacobs J at para. 125. Thus what is material depends critically on the nature of the application being made. In this case the application was for an ASI, not an order that had the effect of precluding the Defendants from asserting that performance of the bonds was unlawful either in the place of performance or otherwise.

27. If the duty is found to have been breached, the court retains a discretion to continue or re-grant the order if it is just to do so. This is most likely to be exercised if the non-disclosure is non-culpable – see Union Fenosa Gas SA v. Egypt (ibid.) *per* Jacobs J at para. 110.

28. Two allegations of non disclosure are made: Firstly that there was a failure to disclose that the claimant had assigned the bonds to a group of almost entirely sanctioned Russian banks and secondly that there was no disclosure of Article 11 of either Regulation 269/2014 or Regulation 833/2014.

29. Turning first to the sanctions issue, that was in my judgment fully and fairly disclosed – see paragraphs 70(b)(iii) and 74-78 of the skeleton deployed at the without notice hearing, where the issue was highlighted.

30. At the without notice hearing Butcher J's attention was drawn to a letter from the Defendants' solicitors sent to the claimant's solicitors on the evening prior to that hearing, a copy of which was handed to the judge and read by him - see the note of that hearing at paragraph 1.1-1.7. This letter ran to 8 pages and set out what would appear to be the Defendants' answer to the claims made against it. Nowhere in that letter is it asserted on behalf of the Defendants that it was entitled or should be permitted to apply either to the Italian or French courts for orders that prevented the claimant from enforcing the Bonds even though the Bonds are referred to in the terms of the letter. There was no mention of Regulation 269/2014 at all and the degree to which Regulation 833/2014 was being relied on is set out in full in the letter. It was not asserted that payment would be unlawful by operation of either Regulation or would be so in Italy or France. There was no indication whatsoever of the argument now relied on as the justification for wishing to commence proceedings in Italy or France.

31. Indeed, both before the Emergency Arbitrator and at the first return date on this application reliance was being placed on the Ralli principle referred to above. This was fatal to the suggestion that the ASI should not be granted or continued since, as I have explained already, under that principle a tribunal applying English law is entitled to decline to enforce an obligation that is unlawful in the place of performance and thus to any suggestion that any of these issues were material to the order actually being sought.

32. Thus although it is said to have been a serious omission not to have placed Article 11 of each Regulation before Butcher J, it is difficult to see how the claimants can be expected reasonably to anticipate points not being relied on by the Defendants' own advisors in a considered and comprehensive response to the claims being made.

33. The assignment point was not material because, unless and until an event of default occurs, the assignments are of no effect. It is not suggested that any event of default has or had occurred at the time when the without notice application had been made. Thus Eurochem was fully entitled to enforce compliance with the Bonds. It is now alleged that this was not so because Eurochem is itself sanctioned. However that allegation was contrary to the evidence available to Eurochem at the time when the without notice application was made. I do not accept that in the circumstances Eurochem could be criticised for not considering the possibility of an argument which was contrary to the evidence that it had available in the form of the positions adopted by various European regulators and which was placed before the judge.

34. For those reasons I reject the submission that the ASI should be set aside.

The Derogation Issue

35. In light of the conclusions reached earlier, it follows that I should not permit proceedings to be commenced in either Italy or France by way of derogation from the ASI. My reasons for reaching that conclusion are apparent from what I have set out above. In summary however, any question concerning the enforceability of the Bonds is one of English law to be determined by the Arbitral tribunal or the courts of England and Wales as the courts of the seat. The exception to the general rule that requires applications in support of arbitrations to be made to the courts of the seat does not apply for the reasons that I have explained. If and to the extent that

compliance by the Banks with their obligations under the Bonds would be unlawful at the place of performance, that is an issue that by agreement of the parties can and should be resolved by the tribunal or the courts of England applying English law. If and to the extent that performance is not unlawful, then no legitimate benefit could arise from proceedings in either France or Italy because the courts in each of those countries would be obliged to apply English law so the outcome would be no different. That being so, permitting the Defendants to commence proceedings in Italy or France would be vexatious because it would generate extra layers of cost, might result in delay and would distract attention from the conduct of the arbitration.

Conclusion

36. For the reasons set out above, I consider that the ASI was properly granted, should not be discharged and should be continued. Any further applications concerning compliance with the Bonds can be made either to the English courts or to the Arbitral tribunal. There is no justification for permitting applications to be made to courts in any other jurisdiction.