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[2024] EWHC 2843 (Comm) Ref. CL-2023-000787

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

7 Rolls Buildings
Fetter Lane
London

Before HIS HONOUR JUDGE MARK PELLING KC
(Sitting as a Judge of the High Court)

IN THE MATTER OF

RENAISSANCE SECURITIES (CYPRUS) LIMITED
Claimant

-v-

(1) ILLC CHLODWIG ENTERPRISES
(2) ILLC ADORABELLA
(3) GEKOLINA INVESTMENTS LIMITED
(4) DUBHE HOLDINGS LIMITED
(5) OWL NEBULA ENTERPRISES LIMITED
(6) PERPECIA LIMITED
Defendants

MR P LOWENSTEIN KC, MR A DINSMORE and MR E GILMORE, instructed by CANDEY LLP, appeared on behalf of the Claimant

MR R D'CRUZ KC and MR D JAMES, instructed by Enyo Law LLP , appeared on behalf of the Second and Sixth Defendants

JUDGMENT
6 NOVEMBER 2024
(AS APPROVED)

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JUDGE PELLING:

1. This is the expedited hearing of an application by the Claimant ("Renaissance") for what is described in the application notice as 'clarification' of the effect of anti and anti-anti-suit orders previously granted to Renaissance in these proceedings. In reality, as I explain below, the application is to vary the terms of the existing order so as to require the Second and Sixth Defendants to withdraw claims each has made in Russia against entities referred to in these proceedings as the Renaissance Russia entities or RREs. Those claims are delictual claims for damages based on contractual claims that the Second and Sixth Defendants have against Renaissance. The Second and Sixth Defendants have issued their own application for an order clarifying the earlier order on which Renaissance relies so as to make clear that it applies only to proceedings in Russia by the Defendants against Renaissance alone.

2. In essence, the contractual claims by each of the Defendants against Renaissance is to recover assets held by Renaissance that it is common ground belong to the Defendants. The only reason that these assets have not been transferred by Renaissance to the Defendants is because Renaissance considers that each is sanctioned, either directly or indirectly, and thus, that it is precluded from complying with the Defendants' direction as a matter of applicable sanctions law.

3. There is a threshold issue between the parties. The Defendants maintain that they are not sanctioned in any material sense whereas Renaissance does not accept that to be so. The Renaissance evidence is that the ultimate beneficial owner of the various Defendants is Mr Andrey Guryev who is the designated person under both UK and US sanctions. There is a dispute as to whether Mr Guryev or he and his daughter are the ultimate beneficial owners of the Defendants that I cannot resolve on an application of this sort. I am satisfied that the evidence adduced by Renaissance establishes a realistically arguable case that Mr Guriev is or he and his daughter are the ultimate beneficial owners of the defendants. It is common ground that the Second Defendant is a US directly sanctioned entity and the Sixth Defendant is a subsidiary of the Second Defendant and so, is an indirectly sanctioned US entity. Given the sanctions position being as I have described, Renaissance decided to freeze the Defendants' assets. It was readily acknowledged by Mr Lowenstein KC on behalf of Renaissance that Renaissance, was and is ready and willing to transfer the Defendants' assets to the Defendants' order but for the fear that sanctions prevent it from doing so. There is therefore a dispute between Renaissance and each defendant as to whether Renaissance is obliged to freeze the defendants' assets by operation of any applicable sanctions regime.

4. The assets held by the Claimant are held pursuant to an investment service agreement ("ISA") between Renaissance on the one hand and each of the Defendants severally on the other. Each agreement is in similar terms. Each agreement is subject to governing law and arbitration agreements in the following terms:

> "43.1 This agreement and any non-contractual obligations arising in connection with it shall be governed by and interpreted in accordance with the laws of England and Wales."
>
> 43.2, If any dispute shall arise in relation to the customer document pack and it cannot be resolved within 30 business days by negotiation between the parties, such dispute should be referred to and finally resolved by arbitration under the rules of the London Court of International Arbitration which are

> deemed to be incorporated by reference into this clause 43. Such arbitration should take place in London and should be conducted by a single arbitrator appointed by agreement between the parties or failing agreement by the London Court of International Arbitration. The language in which such arbitration should be conducted should be English. Any award rendered should be final and binding on both parties and may be entered in any court having jurisdiction. An application may be made to such court for an order of enforcement as the case may require."

It is not in dispute that the phrase '*customer document pack*' refers to the ISA in which the arbitration agreement is embedded.

5. Plainly, the dispute between Renaissance and each defendant is a dispute that can and should be referred to arbitration in accordance with the arbitration agreement between Renaissance and each defendant contained in clause 43.2 of each ISA. The Defendants having demanded the return of their assets, in October 2023 each commenced proceedings against Renaissance in the courts of the Russian Federation. This was in clear breach of the arbitration agreement between Renaissance and each defendant and led on 3 November to an without notice application by Renaissance which was heard by Dias J and resulted in her ordering each of the Defendants:

> "Until after the return date or further order of the court, the court hereby grants by way of interim relief an injunction against the Defendants in order to enforce the arbitration agreements and orders the Defendants, whether by themselves, their directors, employers, officers, agents or any other person or in any other way:
>
> 4.1, not to pursue or take any further steps in or procure or assist the pursuit of any substantive claim in the Russian proceedings relating to the disputes save and for the purpose of (i) adjourning the inter partes hearings in the Russian court listed for 7 and 13 November 2023 by the Commercial Court of Moscow, Russia between the Claimant and the Sixth and Fifth Defendants respectively in the Russian proceedings and adjourning all further or other hearings listed in the Commercial Court of Kaliningrad and Moscow, Russia between the Claimant and any of the Defendants in Russian proceedings and (ii) any applications brought by the Defendants to dismiss the Russian proceedings.
>
> 4.2, not to commence, pursue, procure or assist the commencement or pursuit of any further claims or proceedings relating to the dispute or any disputes arising in relation to any of the agreements in or before any court or tribunal other than before an LCI arbitral tribunal validly constituted in accordance with the arbitration agreements.
>
> 4.3, not to commence, pursue, procure or assist the commencement or pursuit of any motion, application, claim or

> proceedings which seeks to restrain, require the termination of or impose sanctions upon or otherwise interfere with the pursuit of this application or this action or any future applications in relation to there to by the Claimant and/or any proceedings that the Claimant may initiate before an LCIA arbitral tribunal relating to disputes or any disputes arising in relation to any of the agreements."

6. Although the wording of these orders is very wide, in my judgment, it is clear that they were intended to regulate and only regulate claims by the Defendants against Renaissance and not claims by any of the Defendants against any other Renaissance entity. That is apparent from the exchanges between Mr Lowenstein KC and Dias J at pages 100 to 101 of the transcript of the hearing. These exchanges included:

> "13 Mrs Justice Dias: I think what you need here is 'any further claims or proceedings relating to any other dispute arising in relation to any of the agreements' because 'disputes' has now been defined in such a way as only to refer to those disputes covered by the existing proceedings.
>
> Mr Lowenstein: Yes …"
>
> Mrs Justice Dias: But what you are concerned about is that no other Claimants falling within the scope of the arbitration agreement should be prosecuted."
>
> Mr Lowenstein: I'm also concerned about, for example, a Defendant who feels constrained to withdraw these proceedings because of your Ladyship's injunction but unless specifically restrained from otherwise doing so, just starting again on the same dispute.
>
> Mrs Justice Dias: Alright, Mr Lowenstein, so that is Dias J relating to the disputes or any other dispute arising under any of the agreements …
>
> Mr Lowenstein, "Thank you."
>
> Mrs Justice Dias: Or otherwise other than before a validly constituted LCIA arbitration, tribunal in accordance with the arbitration agreements."
>
> Mr Lowenstein: Yes."

If and to the extent it is suggested by Renaissance that the order was intended to apply to claims by the Defendants against anybody apart from Renaissance, I reject that submission for two reasons. Firstly, it is plainly inconsistent with the exchanges to which I have referred between Mr Lowenstein and the judge, but secondly, because no such proceedings were in contemplation or known to Renaissance at that stage. The first mention of claims against the RREs appears in the letter of 17 November 2023 from Renaissance's London solicitors to the Defendants' Moscow lawyers. Although the Defendants maintain that Renaissance's legal advisors were in breach of their full and frank and fair presentation duties by failing to draw

the attention of the Judge to the fact that the wording of the order extended or was capable, when read in isolation of extending to claims by third parties, I disagree. It was not at that stage understood by Renaissance that the RREs were framing claims in Russia. And as Mr Lowenstein had made clear, Renaissance was not then considering the applicability of the order to any claims other than the claim by the Defendants against Renaissance in breach of the Arbitration Agreement.

7. The order made by Dias J was continued following a hearing before Butcher J on 23 November 2023. The issue of claims by the defendant against companies affiliated to Renaissance was drawn to Butcher J's attention by Mr Dinsmore who appeared for Renaissance - see transcript, page 13, line 21 to page 14, line 6. All that the Renaissance said was that it was reserving its position as to whether it was "*a breach*" though whether that was a reference to Dias J's order or of the Arbitration Agreements is not clear. What is clear is that Renaissance was not asserting at that hearing either that Dias J's order applied to claims by the Defendant against any affiliate of Renaissance or that there had been a breach of the order by such claims being threatened or commenced, nor was any relief being sought on the basis such claims would be a breach of the arbitration agreements. Overall, the purpose of the order being sought was to maintain the status quo by continuing what in effect was Dias J's order until after a contested return date. In the result, the order that Butcher J made was materially similar to that made by Dias J.

8. It was submitted on behalf of the Defendants that Mr Dinsmore should have drawn Butcher J's attention to the width of the language and its potential inconsistency with the limitations recognised by Mr Lowenstein in his submissions to Dias J. I disagree. At that stage, it was not being suggested that the order extended to claims by third parties, thus the issues simply did not arise and was not argued. Had it been, then I agree that the limitations recognised by Mr Lowenstein in the course of his submissions before Dias J would have had to have been drawn to the attention of Butcher J. However, that was not Renaissance's position before Butcher J.

9. The next hearing was before Henshaw J on 23 April 2024. In the skeleton filed for that hearing, Mr Lowenstein drew specific attention at paragraph 21.3 to an application by the Sixth Defendant to add the RREs as co-defendants to the claim against Renaissance before the Russian courts. This was suggested to be a breach of the prohibitory injunction - see paragraph 25.1 of Mr Lowenstein's skeleton for that hearing. At paragraph 34-35 of his skeleton, Mr Lowenstein acknowledged Renaissance's obligations to draw to the attention of Henshaw J, any factual or legal point of benefit to the Defendant. This duty arose from the hearing being, technically, at least, on notice hearing that was, however, not attended by any of the Defendants.

10. The affiliates claims issue was addressed at paragraph 42 of Mr Lowenstein's skeleton in these terms:

> "Fifthly, the Defendants may say that the mandatory order should not require withdrawal of the Russian proceedings against the Claimant's affiliates, since they are not party to the Arbitration Agreements. Claimant responds. Such an argument would be misplaced because the Defendants' joinder applications to bring those affiliates into the Russian proceedings, which are brought in breach of the Arbitration Agreements. The Claimant reserves its position in relation to

> any further or separate proceedings brought against its affiliates, that are not a direct breach of the Arbitration Agreements."

11. What was being alleged, therefore, was not that the claims against the RREs were in breach of the Arbitration Agreements (that was an issue, in respect of which Renaissance merely reserved its rights). Rather what was being submitted to be objectionable was to seek to join the claims against the RREs to proceedings which have been brought originally against Renaissance in breach of the Arbitration Agreements.

12. This was the basis on which the argument continued, orally, before Henshaw J. Having been told that the attempt to prevent joinder of the claims against the subsidiaries was objected to by the Defendants, Henshaw J then asked whether Renaissance was contending that the subsidiary claims were a breach of the Arbitration Agreement "*…or is that based on something else?*" There then followed this exchange between Henshaw J and Mr Lowenstein:

> "Mr Justice Henshaw: No, in your application, I mean, to prevent it from happening. Are you saying that they are bound by the arbitration clause not to do that?
>
> Mr Lowenstein: Well, what we are saying is that there is – there should be no claim against my clients in Russia. If the Defendants wish to bring a freestanding claim against the affiliates in Russia ---
>
> Mr Justice Henshaw: Yes.
>
> Mr Lowenstein: --- let them take their chances.
>
> Mr Justice Henshaw: Right.
>
> Mr Lowenstein: But ---
>
> Mr Justice Henshaw: So you are not seeking relief – the relief you are seeking at the moment is to restrain the current action which is against your clients, albeit they are trying to join affiliates to it.
>
> Mr Lowenstein: Yes.
>
> Mr Justice Henshaw: Yes.
>
> Mr Lowenstein: Yes.
>
> Mr Justice Henshaw: Yes, so it is squarely based on the arbitration clause.
>
> Mr Lowenstein: Yes, it is."

This is consistent with what had been said in the skeleton. It is clear to me, as it was clear to Henshaw J, that the application was for mandatory order orders that required the defendants

to discontinue the proceedings in Russia against Renaissance and that if that had the collateral effect of requiring the joined claims against the RREs to be discontinued that would not present a problem because any claims against the RREs could be made in new proceedings to which the RREs would respond as and when they thought fit, and in whatever manner they thought fit. Renaissance was not maintaining that by commencing the RRE claims the defendants were acting in breach of the Arbitration Agreement at that stage. That being so, I accept Mr Lowenstein's submission that there was no duty on him to disclose the legal issues that would have arisen and relevant case law that would have been material had such an application been made.

13. In those circumstances I reject the suggestion that Renaissance was in breach of its fair presentation duty by failing to draw Henshaw J's attention to the legal issues that would have arisen had Renaissance been applying at that stage for an order precluding the Defendants from bringing claims against the RREs in Russia.

14. Although it is suggested, on behalf of the Defendant, that the position changed with the hearing before Butcher J, that took place in August 2024, I am not able to agree. By that stage, it would appear that freestanding proceedings had been commenced against the RREs by the Sixth Defendant and in that context, Mr Dinsmore referred expressly to Mr Lowenstein's comment before Henshaw J, in relation to that possibility, i.e., "… *If the Defendants wish to bring a freestanding claim against the affiliates in Russia … let them take their chances*." Butcher J then asked Mr Dinsmore:

> "No doubt I am being stupid, but are you asking me to make an amendment…to the order made by Henshaw J."

The response was, "*I am not asking you to make an amendment on this point…*" and when Butcher J asked, "… *you are just drawing this to my attention*." Mr Dinsmore responded, "*I am drawing this to your attention, there is no application before the court…*" Thus the position was not any different at that hearing to what it had been before Henshaw J. This only changed with the present application, which in substance is principally for an addition to the Henshaw order of paragraphs which

a. require the Sixth Defendant to take all steps necessary, to withdraw and discontinue its joinder claims against the RREs; and

b. require the Second Defendant to withdraw and discontinue its new proceedings brought against the RREs.

15. In paragraph 7 of his skeleton for this hearing, Mr D'Cruz, KC submits on behalf of the Defendant that there are three issues that arise on this application being

a. whether Renaissance has breached its full and frank and/or fair presentation duties in relation to the hearings before Dias J and Henshaw J;

b. whether the court has jurisdiction to grant an anti-suit injunction in relation to the claims against the third parties; and in any event,

c. whether the court should decline to grant such an order, given the delay that has occurred.

16. In relation to the first of these issues, notwithstanding the substantial amount of time taken over it both at the hearing and in this judgment, and for that matter in the skeleton argument, I conclude for the reasons already given that this issue should be resolved in favour of Renaissance. As I have said, the issue concerning third parties was not a live issue at any stage prior to the hearing before Henshaw J, and even then Renaissance did not seek an amendment to the order to the effect now sought. Whilst Renaissance's solicitors may have suggested differently in correspondence, that position was maintained so far as the proceedings are concerned until this present application was issued. All Renaissance did, throughout the period when appearing before judges was to reserve its position. It is possible that could be material in relation to the delay issue that arises, if the question of discretion or remains a live one at the end of this judgment. But I have no hesitation in rejecting the suggestion that there was either an absence of fullness and frankness before Dias J, or an absence of fair presentation before Henshaw J.

17. I now turn to, to what in truth is the main issue in this application, which is whether the court has jurisdiction to grant an ASI in these proceedings, that prevents the Defendants from continuing their tortious claims against the RREs before the Russian courts. I accept for present purposes that by definition these are claims (a) by Russian claimants; (b) against Russian based defendants; (c) framed in Russian delict law; and (d) brought before the Russian courts.

18. Renaissance's case is that these claims are either (a) claims which is a matter of construction of the Arbitration Agreement between it and the Defendants, are claims that are required to be submitted to arbitration in accordance with those agreements – see paragraph 24 of Mr Lowenstein's skeleton submissions for this hearing; or (b) in any event, are claims which have been brought vexatiously or oppressively for the purpose of circumventing the arbitration agreements between Renaissance and the Defendants – see paragraph 25 of Mr Lowenstein's skeleton; and so should be prohibited by injunction, or should be required to be discontinued by mandatory order. In advancing its submission based on vexation and oppression, Renaissance maintains that the claims against RREs are "*a naked collateral attack on the Claimant's arbitration rights*" commenced for the purpose of evading (a) Henshaw J order, (b) the arbitration agreement, and (c) the international sanctions regime.

19. Before turning to the applicable principles, it is convenient to start by attempting to summarise the delictual claims that have been made against the RREs. I do so in relation to the claim by the Sixth Defendant, by referring to its petition, submitted to the Russian Court, seeking the joinder of its claims against the RREs to its present claim against Renaissance. That petition starts by asserting that Renaissance is, and always was, part of a group of companies that include the RREs. This section of the petition culminates with the averment that "*thus despite the fact that the Cypriot and Russian companies that are part of the Renaissance Capital Financial Group are, formally, autonomous legal entities, in fact, they have a single decision-making centre, a single brand, are built into a single corporate structure, and are positioned as a single hole, where each link can and should be responsible for each other's debts*". Having referred to the various RREs, as being "*part of the Renaissance Capital Group as a single person*", this section of the petition then adds, "*the Russian companies that are part of the single Renaissance Capital Group, should be jointly and severally liable to him for the losses caused by Respondent One – that is to say Renaissance – as to the de facto Cypriot subsidiary of the Renaissance Capital Group*".

20. The petition then turns to the basis on which the claim is advanced against the RREs, which it describes in these terms.

> "According to the legal positions formulated in the resolutions of the Constitutional Court of the Russian Federation … compliance with the sanctions regime against Russia and its business entities established by an estate outside the due process of international law, and in contradiction to multilateral international treaties, to which Russia is a party, is considered unfair conduct.
>
> Meanwhile, by paragraph 4 of article 1 of the civil code of the Russian Federation, no one has the right to take advantage of his illegal or unfair behaviour.
>
> In this regard, Renaissance Capital Group cannot benefit from the fact that [Renaissance] which is part of it, under the pretext of anti-Russian sanctions, does not return the funds due to the Claimant, and continued to unlawfully retain those funds within the Group.
>
> The Claimant entered into the contract with [Renaissance], as well as the Cypriot subsidiary of Renaissance Capital Group. The companies included in the Renaissance Capital Group [Renaissance and the RREs] had to take joint actions aimed at adapting relations with the Claimant, to the changed regulation in the foreign legal order, and timely fulfilment of obligations to the Claimant. Taking into account the affiliation and control of these persons by a single decision-making centre, it was not difficult for them to transfer the performance of obligations from Defendant One to Russian legal entities, which are not subject to the sanctions regulation at Western countries. Defendant One's refusal to fulfil its obligations to the Claimant cannot be justified solely by legal formalism.
>
> The legal basis of the joint and several liability of Defendant One and [RREs] which are part of the Renaissance Capital Group, for losses caused to the Claimant, are the provisions at paragraphs 1 and 2 of article 3.2.2, as well as article 1080 of the civil code of the Russian Federation, according to which, persons who have jointly caused the damage, are jointly and severally liable to the victim…"

The relief sought is the alleged value of the assets which the Sixth Defendant claims from Renaissance, that Renaissance has frozen, because of what it alleges the effect of US, UK or EU sanction schemes, as is apparent from the final paragraph of the petition, which summarises the remedy sought as being "*…to recover jointly and severally… in favour of Perpecia Limited, 16,602,068.39 US dollars and 39 cents … in Russian Rubles, the exchange rate of the Central Bank of the Russian Federation, at the date of actual execution of the judicial act, which are the value of the blocked securities in investment accounts number BRA961 and BRA967… 425,528.60 US dollars and 60 cents, in Russian Rubles, at the exchange rate at the Central Bank of the Russian Federation … and 52,538,211 Rubles, which are the amount pending transfers or settlements on the investment accounts BRA961 and BRA967."*

21. Turning to the Second Defendant, its claims against the RREs follow, broadly, the same scheme. Its statement of claim starts by pleading the ISA between the Second Defendant and Renaissance. It then pleads that the Second Defendant's:

> "… assets, securities and cash located in investment account number BRA744 were legally blocked due to unfriendly actions by a number of foreign states against Russia, its citizens, and legal entities, in connection with US sanctions against the Plaintiff.
>
> On 11 July 2023, the Plaintiff sent to a letter to [Renaissance] in which he indicated that the broker's monthly reports contained the following phrase in each page, 'The account is blocked for trading and assets, and are frozen due to sanctions.' The Plaintiff denied that [Renaissance] explained the reasons why the Plaintiff's investment accounts were blocked and assets were frozen … [Renaissance] did not respond to the Plaintiff's letter."

It then pleads that the Second Defendant commenced proceedings in Russian against Renaissance, relying on the jurisdiction conferred on the Russian Courts, by article 248.1 of the arbitration procedural code of the Russian Federation, and then pleads,

> "Following the initiation of case number A2112792 of 2023 in the Arbitration Court, of the Kaliningrad region. [Renaissance] obtained an anti-claim order from the English Court, dated 23 April 2024 … which ordered the Claimant, under penalty of criminal liability, to make a statement at the Russian Court, that the Claimant's claims against [Renaissance] "are no longer supported". Due to its sanctioned status, the Claimant was unable to ensure representation of its representation of its interest by English lawyers in the English Court, and was deprived of the right of access justice in England."

The Second Defendant then pleads that it terminated its claim against Renaissance in compliance with the ASI granted by Henshaw J; that Renaissance was part of a group that included the RREs, and that they are "*… all part of one corporation, which is managed not as separate entities, but as a single structure that pools its resources, to achieve a common business goal*"; and that because Renaissance and the RREs are part of a single corporate structure, each "*… can and should be responsible for each other's debts*". The Claim culminates with a calculation of the amount of the claims by reference to the assets held by Renaissance, which is claimed under article 12 and 1064 of the civil code, which governs delictual claims.

22. On the basis of this material, I accept Renaissance's submission that the delictual claims by the Defendants against the RREs, are claims to recover damages in a sum equivalent to what is alleged to be the value of the assets that that have been frozen by Renaissance and I accept that the claims have been brought in Russia because the Defendants are precluded from recovering their assets from Renaissance, other than in LCIA arbitration proceedings against Renaissance in London, in which the Defendants would have to prove their case that they were not properly to be regarded as subject to any relevant sanctions.

23. Against that background, I now turn to the principles that apply to these proceedings. The Defendants submit, and I do not understand Renaissance to disagree, that if A (in this case, Renaissance) is to obtain an order prohibiting B (here, the Defendants) from commencing or continuing proceedings against a third party (here the RREs) - then A must demonstrate either that the arbitration agreement between it and B requires B to bring its claims against C exclusively in accordance with that agreement, or that B's claim against C is vexatious and there is an available alternative jurisdiction in which B could bring its claims. There is one other possibility, sometimes referred to as the quasi-contractual route, but that is not relied upon, and I need not take up time referring to it.

24. If Renaissance is to succeed on the contractual basis, it is required to demonstrate to a high degree of probability, that its contractual case is correct - see Qingdao Huiquan Shipping Company v Shanghai Dong He Xin Industry Group Co Ltd [2018] EWHC 3009 (Comm) *per* Bryan J, at [27]. In this context, therefore, it is for Renaissance to establish, to a high degree of probability, that the arbitration agreement has the effect for which it contends, which is, essentially, a matter to be approached as an issue of construction, applying the usually applied rules of construction that English law requires to be adopted when construing contracts. All this is common ground.

25. There is a dispute between the parties as to the starting point for such an exercise. The Defendants submit that the starting point is that either an exclusive jurisdiction clause or an arbitration agreement, operates contractually only between the parties to the contract. In support of that approach, the Defendant relies on Cavendish Square Holding BV v Ghossoub [2017] EWHC 2401 (Comm), a decision of Mr Laurence Rabinowitz QC sitting as a Deputy High Court Judge, where it was concluded that:

a. Plain language would generally be required before it was concluded that the parties had intended to affect third party rights;
b. Where elsewhere in the contract third party rights have been addressed expressly, that they were not referred to expressly in the exclusive jurisdiction or arbitration clause may indicate that it was not intended that those clauses apply to third parties; and
c. Where a clause expressly indicates that third parties were not to acquire rights, that may lead to a similar conclusion; and that overall
d. Clear words expressing an intention to regulate claims by or against the parties that would be required and would be required.

26. This authority was considered in Clearlake Shipping Pte Limited v Ziang Da Marine Patient E Limited [2019] EWHC 2284 (Comm), a decision of Andrew Burrows QC, as he then was, sitting as a Deputy High Court Judge . Having identified the grounds on which an ASI might be granted, as I have summarised them above, Mr Burrows then turned to the issue that arises in this case, albeit in the context of an exclusive jurisdiction clause - see paragraph 20. He noted in the final sentence of that paragraph the well-established principle that where A promises B not to sue C, B may obtain an injunction or stay to stop A proceeding against B. I see no reason why in principle if A has agreed with B that it will bring a claim it has against C in arbitration, that should not be enforced in the same way. The only question that remains is whether, as a matter of construction, that is the effect of the relevant agreement.

27. Mr Burrows then referred to the well-known dictum of Lord Scott in Donohue v Armco Inc [2001] UKHL 64; [2002] 1 Lloyds Rep 425, where at [60] Lord Scott drew attention to language used in the clause in play in that case and concluded that to construe that language

as applying only to a contractual party and not also to a joint tortfeasor, would be unsatisfactory for at least the reasons he identified in that paragraph. That was to be compared and contrasted with the point made in Cavendish, which was that the principle that rational business people would have intended all disputes to be decided by the same court or tribunal did not apply with the same force when considering claims against, or brought by non-contracting parties. Plainly, Lord Scott's dictum (which has been criticised academically) is in conflict with what was said in Cavendish. I consider that convention requires that I should follow how that was resolved in Clearlake, unless satisfied it is plainly wrong, even though technically it is not binding on me. I am satisfied that the Clearlake approach is correct. Indeed, I followed it previously - see Cupreus SARL v Whiteshell Group Ltd [2023] EWHC 3449 (Comm) at 13 to 14.

28. In my judgment, therefore, the correct approach where this issue arises is that identified by Mr Burrows in paragraph 23 of his judgment in Clearlake, namely:

> "23. In principle and consistently with what Lord Scott and Laurence Rabinowitz QC have said, and with the other authorities listed in paragraph 20 above, I would express the correct approach to this question (of whether the contracting party (B) can enforce against the other contracting party (A), an exclusive jurisdiction clause by an anti-suit injunction so as to prevent tort proceedings by the other contracting party (A) against a third party (C) in the following way:
>
> (i) It is a matter for the interpretation of the jurisdiction clause whether the clause extends to cover the tort proceedings against the third party. Applying the general law contract, the correct approach to that question of interpretation requires the application of the modern contextual and objective approach. One must ask what the clause, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge recently available to the parties at the time the contract was made, excluding the previous negotiations to the parties and their declarations of subjective intent. Business common sense and the purpose of the term which appear to be very similar ideas may also be relevant …
>
> (ii) If as a matter of interpretation the jurisdiction clause does extend to cover the tort proceedings against the third party, the contractual basis for an anti-suit injunction applies so that as regards an application by the contracting party (B), the injunction will be granted unless there are strong reasons not to do so.
>
> (iii). Applying privity of contract, only the contracting party (B) and not the third party (C) can enforce the jurisdiction clause against (A) by an anti-suit injunction on the contractual basis unless an exception to privity of contract applies, but the jurisdiction clause may be a relevant factor in granting the third party (C) an anti-suit injunction on the alternative basis that the foreign proceedings are vexatious and oppressive. It is also presumably possible in certain circumstances that the

> jurisdiction clause, even though not contractually enforceable by the contracting party (B) in favour of third party (C), may be a relevant factor in granting the contracting party (B) an anti-suit injunction against the other contracting party (A) on the basis that the foreign proceedings are vexatious or oppressive.
>
> 24. In expressing the correct approach in the way I have just done, I accept that Lawrence Rabinowitz QC in the *Ghossoub* case was correct, that absent express words as to the jurisdiction clause extending to claims against non-parties, the starting point in interpreting a jurisdiction clause covering, let us say, all disputes arising out of the contract will be that only the parties to the contract are covered but I also agree with Lord Scott in the *Donohue* case, that where one has an alleged joint tort committed in relation to a contract by a contracting party and a non-contracting party, the objective interpretation of the jurisdiction clause covering all disputes arising out of the contract will tend to include a tort claim against the non-party because this will help to prevent forum fragmentation on essentially the same issues. Such fragmentation is contrary to what the parties are likely to have objectively intended. Ultimately there may be no real conflict between the speech of Lord Scott and the judgment of Laurence Rabinowitz QC because the resolution of the issue turns on the interpretation of the particular contract in the light of the particular facts."

29. When Mr Burrows refers to "*the particular facts*" in the final sentence of paragraph 24, he must surely be referring to only those facts known or which could reasonably be known to the parties, down to the date the relevant contract is concluded, since those are the only facts which are relevant to the true construction of the relevant agreement.

30. To this general approach I would add only this. Firstly, there is a potential difference between an arbitration agreement and an exclusive jurisdiction clause because the effect of requiring a third party who is a stranger to the contract to arbitrate against its will at significant cost and in a foreign seated arbitration is something that should be approached with great caution, particularly given the asymmetry of such an arrangement, meaning that in this context the third party concern could not force arbitration in the same way. In this context, although the RREs have recently provided letters consenting to resolution of the claims by arbitration that is immaterial since as both parties accept this material is irrelevant to the true construction of the arbitration agreements since they were written and sent to the defendant long after the ISAs were entered into by the parties to them.

31. Secondly, whilst comity can be overstated, it is likely to be of particular importance in relation to claims against non-parties in the courts of their own jurisdiction against a party also located in that jurisdiction. Whilst this problem arises with exclusive jurisdiction clauses, it is potentially particularly acute where what is being imposed on the non-party is an arbitration agreement that excludes that party from access to the state courts of its own jurisdiction, but may exclude it from any access to any state court depending on the degree to which the courts of the arbitral seat exercise supervisory jurisdiction over arbitrations in its jurisdiction, as well as the fundamental point that a non-party to an arbitration agreement is being forced to arbitrate against its will by reference to agreement to which it is not a party and may not be bound.

32. In light of what I have considered so far, I conclude that the starting point is that identified by Mr Burrows at [24] of his judgment in Clearlake, For the reasons I have identified above, that is likely to be all the more the correct approach when considering an arbitration agreement as opposed to an exclusive jurisdiction clause for the reasons summarised above.

33. Against that background, I now turn to the arbitration agreement in this case. In doing so, I apply the now very well established construction principles summarised by Mr Burrows at [23(i)] of his judgment in Clearlake, set out earlier. It is not necessary that I set them out in any detail. In essence, however, it is necessary to read the arbitration agreement as a whole and to do so in the context of the contract in which it is embedded, read as a whole, for the purpose of deciding what the arbitration agreement would have meant to reasonable people with all the relevant background knowledge reasonably available to all the parties down to the time at which the contract is concluded.

34. I start with clause 43.2 itself. I accept that read in isolation, the phrase "… *any dispute ... in relation to ...*" is capable when read in isolation of applying to claims against non-parties. However, that is not to approach the construction exercise correctly. It requires the arbitration agreement to be read as a whole and in the context of the ISA in which it is embedded again as a whole. Adopting that approach, firstly, the arbitration agreement requires the negotiation of any dispute "*between the Parties …*". Who are Parties is identified at the start of the ISA as being exclusively Renaissance on the one hand and respectively the second and sixth Defendants on the other. There is a contractual expansion of that, but Renaissance has not suggested that the express contractual expansion is relevant to any issue that arises in this case.

35. Secondly, in my judgment, the requirement to negotiate between the parties means that the dispute to which this obligation applies is likely to be confined to disputes between the parties, not one of the parties and a non-party. Any negotiation on behalf of a non-party by a Party would require that Party to be authorised to negotiate on behalf of a non-party The absence of any provisions dealing with that point is inconsistent with the intention of the parties being that the arbitration agreement would apply to claims relating to the contract by a Party against a non-party.

36. Thirdly. the final sentence of the clause is inconsistent with the intention being that the arbitration agreement should apply to claims by or against non-parties, because it refers expressly to the award being binding between both parties. That is consistent with the agreement applying only to disputes between the parties, not a party and a non-party. If the agreement was intended to apply to a claim between a Party and a non-party the final sentence would either not have appeared at all or would have attempted to address finality and enforcement against the non-party concerned.

37. Fourthly, confining the applicability of the agreement to disputes between Parties is consistent with the phraseology of clause 43.3, which applies only to immunities available to the Defendant and not affiliates.

38. Fifthly, the word "*you*" is defined as referring exclusively to respectively the second and sixth Defendants. Clause 43.4 applies only to the defendant as a result of the use of the word "you" in that clause. This is consistent with the way in which third party issues are addressed elsewhere in the ISA. Sixthly, third party rights under the Contracts (Rights of Third Parties) Act 1999 are excluded. Thus the privity point made by Mr Burrows in [23(iii)] of his judgment in Clearlake would apply with full force in this case.

39. Seventhly, the Contracts (Rights of Third Parties) Act exclusion is significant also because it shows that where third party involvement is relevant, it has been addressed by the parties expressly. That point is apparent also from the set-off provisions in clause 26. That point is apparent too from clause 29, where, for example, relevant third parties are identified in clause 29.3(iii) and (iv). This is a non-exclusive list of provisions where the issue of non-party engagement arises but the point that matters is that where the parties considered it appropriate to refer to third parties, they did so expressly.

40. Applying relevant construction principles, therefore, I conclude that as a matter of construction, the arbitration was not intended to and does not apply to claims by or against either party by a non-party. Whilst a consequence of this may be that in the current circumstances there may be forum fragmentation that is unsurprising in the context of this agreement which was exclusively between Renaissance and the Defendants and was concerned exclusively with services to be provided to the relevant Defendant by Renaissance. It is highly improbable that at the time the agreement was entered into, claims by third parties relevant to the ISA, which is the focal point of the arbitration agreement, would ever be made.

41. It is necessary, therefore, to turn to the alternative basis for seeking an ASI, that is that the proceedings which the Applicant seeks to restrain are vexatious or oppressive. Where this ground is relied upon, two questions generally arise being (a) are the courts in England clearly the more appropriate forum for the trial of the claim and (b) is it necessary in the interests of justice to grant the injunction taking into account considerations of comity - see in this regard Clearlake at [18(2)] following Court of Appeal authority to that effect. As Mr Burrows emphasised in his summary of the principles, the categories of factors which indicate vexation and oppression are not closed - see Elektrim SA v Vivendi Holdings EWCA Civ 1178, [2009] I Lloyds Rep 59 *per* Lawrence Collins LJ as he then was at [83].

42. The Defendants submit that (a) unless the forum issue can resolved in favour of Renaissance, the enquiry ends at that point; (b) only if the forum in question is or can be resolved in favour of Renaissance is it necessary for the court to decide if pursuit of the foreign proceedings is vexatious or oppressive; (c) the forum issue cannot be resolved in favour of arbitration where it has been concluded that an arbitration agreement does not already exist requiring both parties, that is the Defendants respectively and the RREs to arbitrate.

43. Renaissance did not address these points at all in its skeleton submissions. It confined itself to submitting that if the claims against the RREs "*… do not fall within the arbitration agreements, they should nonetheless be restrained because they are vexatious and oppressive*". This avoids addressing the forum issue and the implications for it of a conclusion that the claims against the RREs do not fall within the arbitration agreements because on their proper construction, the RREs are not parties there to. Sat the end of this judgment I refer to one decision that might impact on this issue but which was not relied on by Renaissance or cited to me by either party which for that reason I have left out of account.

44. Renaissance submits that the RRE claims are vexatious because, "(*1) they are a collateral attack on Renaissance's rights under the arbitration agreements and (2) form part of an orchestrated attempt to evade international sanctions by Russian companies with the use of Russian legislation specifically enacted for that purpose*." This last point is wrong. Whilst the point can undoubtedly be made in relation to a claim against Renaissance by the Defendants because that depended jurisdictionally on Article 248.1 of the Arbitration Procedure Code of the Russian Federation, because that Article was enacted specifically so as

to enable disputes to be submitted for determination in Russia rather than to foreign courts or arbitral panels that would apply sanctions law to the extent it was applicable, the claims by the Defendants against the RREs are different. They do not depend on Article 246. They are tort claims brought before the Russian courts by Russian Claimants against Russian registered domicile or resident Defendants for which it is alleged to be an actionable civil wrong according to the laws of Russia. The jurisdiction of the Russian courts in relation to the claims against the RREs is not dependant on Article 248. On the arguments advanced before me there is no answer to the point that there is no alternative jurisdiction available. The arbitration agreement between Renaissance does not apply and the fact that the RREs consent to arbitration is nothing to the point unless there is an agreement by all parties to the RRE litigation that the claims be referred to arbitration.

45. In those circumstances, (a) I reject the Defendants' submission that the application should fail for breach of the duty to be full and frank or to present the application fairly to Henshaw J; (b) I reject the Claimant's application that Henshaw J's existing orders should be interpreted without amendment as extending to the claims by the Defendant against the RREs and (c) I reject the Claimant's application that Henshaw J's order should be amended by extending it to the Defendants' claim against the RREs.

46. Before ending this judgment, I should draw attention to the decision of the Court of Appeal in Joint Stock Asset Management Company v PNB Paribas [2012] EWCA Civ 644 at 81 concerning the effect of Article 22(1)(h) of the LCIA rules. That may impact on the analysis set out above concerning the availability of LCIA arbitration against non-parties to the arbitration agreement in the context of an application for anti-suit relief by reference to an LCIA arbitration agreement although that analysis was not followed in C v D1 [2015] EWHC 2126 (Comm.) at 143. However, neither party relied on these authorities and in those circumstances, I say no more about them.

(Following further submissions)

47. The first issue I have to determine is whether to grant permission to appeal. The circumstances which surround the application is urgency, said to stem from decisions which will be or perhaps may be made by a Russian court tomorrow.

48. In order to grant permission to appeal, I must be satisfied there is at least a realistic prospect of the appeal succeeding, or that permission should be given for some other reason. I am not satisfied that this case passes the permission threshold, on the basis of the arguments which were advanced. Therefore, and in those circumstances, I do not consider there is a realistic prospect of the Court of Appeal concluding that the Arbitration Agreements will be construed as extending to claims by either party to the ISAs against third parties. So far as vexation is concerned, I do not see how a vexatious argument can succeed, by reference to an Arbitration Agreement, as opposed to an exclusive jurisdiction agreement, in circumstances where the Arbitration Agreement has been held as a matter of construction, not to extend to the relevant claim. These are essentially the reasons I gave for not granting the injunction and therefore, and in those circumstances, it is not appropriate that I should grant the permission sought. I drew attention to the end of the judgment to an authority which maybe relevant, but, as I explained, that was not an authority that was relied on before me, and therefore is not something that I can sensibly take into account, at this stage.

(Following further submissions)

49. The issue I now have to determine, concerns the incidence of the costs between the parties. In order to determine who should bear the costs of an interlocutory application of this sort, it is necessary to start by asking who has been successful. On that basis, as it seems to me, the Defendants have plainly been successful, and therefore, in principle, are entitled to recover their costs.

50. The issues that were before me, as opened on behalf of the Defendants, were three in number, being whether or not the existing orders of Henshaw J and/or Dias J, had been obtained in relation to the order by Dias J, in breach of the duty to make full and frank disclosure, and in relation to the order obtained by Henshaw J, by an absence of fair presentation. The second issue concerns the contractual construction question. The third issue concerns the vexation issue.

51. So far as the first of these issues is concerned, the position adopted by the Claimant, is described by the Defendants as a having your cake and eat it type situation. They say that because if the letter from the claimant's solicitors of the 22nd of September 2024 is looked at, that suggests that it was being contended that the order made by Henshaw J applied to claims commenced by the Defendant against third parties before the courts in Russia. By the time the hearing came to take place, it was being asserted on behalf of the Defendants that there would have been an absence of fair presentation before Henshaw J because no attempt to be made to identify the authorities which applied to the questions of whether an arbitration agreement can be said to apply to parties other than the parties to the agreement in which the arbitration agreement is embedded. The answer to that, which I have accepted, is that at no stage before either Dias J or Henshaw J was an order being sought to that effect.

52. The submissions which were made to Henshaw J make it perfectly clear that the Claimants were simply not engaging with the issue of whether or not claims could be brought against the third parties with the statement being made by Mr Lowenstein on behalf of the Claimants that if such claims are brought, then the Defendant must take its chances with new proceedings, which serves to emphasise the point.

53. The transcripts of the hearing before Dias J and Henshaw J, I am told by Mr Lowenstein, were supplied in the usual way as part of the package of materials that went with the injunctions that were obtained, and in any event were exhibited to the 10th witness statement of Mr Collins. Notwithstanding all of that, the skeleton argument filed on behalf of the Defendants opened with the absence of fair presentation and the absence of fullness of frankness as being the first basis on which a challenge was advanced to what was being sought, I think on the assumption that what was going to be asserted on behalf of the Claimants was that the Henshaw J order extended to claims made by the Defendant against third parties as was foreshadowed in the letter of the 22nd of September 2024.

54. However, by then it ought to have been apparent that that was not what in fact was being sought in the hearing before either Dias J or Henshaw J, and a consideration of the basic chronology in combination with what was set out in the transcripts of the hearing would have made that clear, and particularly that is so given that the relevant parts of the transcript were set out in the skeleton argument filed on behalf of the Defendants. In the result, the Defendants chose to argue that the order from Henshaw J had been obtained by a failure fairly to present the relevant arguments. That is an argument on which they have failed for the reasons identified in the judgment, and therefore the Claimants are fully entitled to an adjustment of the costs in relation to that issue.

55. The point which arises, therefore, is whether I should make an issue-based order which, as Mr Dinsmore rightly says, would result in the need for a detailed assessment. The rules relating to costs make it abundantly clear that courts should strive to avoid issue-based orders if a more broad-brush percentage adjustment can fairly be made.

56. The relevant point is not one which took up the whole of the hearing, but it did take up a significant part of both the skeleton arguments and the oral submissions. I could not pretend that it took up more than a minority of time involved. In the circumstances, I conclude that the appropriate way of responding to the fact that on this particular issue, the Claimants have won and the Defendants have lost is by depriving the Defendants of 25 per cent of their costs, often occasioned by the application.

This transcript has been approved by the Judge