HCCT 19/2023
[2023] HKCFI 2409

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTRUCTION AND ARBITRATION PROCEEDINGS
NO 19 OF 2023

BETWEEN

LINDE GMBH	1st Plaintiff
LINDE PLC	2nd Plaintiff
and	
RUSCHEMALLIANCE LLC	Defendant

Before: Hon Mimmie Chan J in Chambers
Date of Hearing: 16 August 2023
Date of Decision: 27 September 2023

D E C I S I O N

Background

1. Dispassionately considered, this is an application for an anti-suit injunction to be continued, on the basis of an arbitration agreement contained in a contract made between the 1st Plaintiff and the

Defendant on 4 June 2021 for the engineering, procurement and construction of a gas processing plant ("**Contract**"). The obligations of the 1st Plaintiff as contractor were guaranteed by the 2nd Plaintiff (the parent company of the 1st Plaintiff) under a Parent Company Guarantee ("**Guarantee**"). Both the Contract and the Guarantee are governed by English law, and each contains an arbitration agreement which provides that any dispute shall be referred to and be finally resolved by arbitration administered by the HKIAC, the arbitration agreement to be governed by Hong Kong law, and the seat of the arbitration shall be Hong Kong.

2. None of the above is disputed.

3. The 1st Plaintiff is headquartered in Germany, and is a subsidiary of the 2nd Plaintiff, a global industrial gases and engineering company, headquartered in Ireland. The 1st Plaintiff formed an unincorporated consortium with Renaissance Heavy Industries ("**RHI**") to be, individually and in any combination, the contractor ("**Contractor**") in respect of the services undertaken under the Contract with the Defendant. The Defendant is incorporated in Russia and is a special purpose vehicle established for the implementation of a project in a gas processing complex to be constructed in Russia. It was to be the owner of a large scale complex for processing ethane-containing gas in Russia, which includes a liquefied natural gas plant ("**LNG Project**") and a gas processing plant ("**GPP Project**"). The Contract was made between the 1st Plaintiff and RHI as Contractor and the Defendant as Owner of the GPP Project. A substantially similar contract was made between the same parties on 9 September 2021 in respect of the LNG Project.

4. Disputes arose when regulations for sanctions were introduced by the European Union ("**EU**") as a result of Russia's invasion of Ukraine ("**Sanctions**"), which on the Plaintiffs' case caused the Contractor to suspend performance of its obligations and works under the Contract.

5. It is not disputed that on 31 July 2014, prior to the Contract made between the parties, Regulation 833/2014 ("**Regulation 833**") had been introduced by the Council of the EU, which included prohibitions and restrictions on the sale, transfer and export of certain goods, technologies and services to Russia. On 25 February 2022, Regulation 328/2022 of the EU ("**Regulation 328**") extended the prohibition and restrictions to goods and technology suited for use in oil refining (by virtue of "**Article 3b para 1**" thereof). Article 3b para 2 also extended the prohibition to the provision of technical as well as financing or financial assistance related to the relevant goods and technology. On 8 April 2022, the prohibitions and restrictions on the sale, transfer or export were extended to natural gas in the oil sector.

6. The Contractor in fact applied to the German authority responsible for implementing the Sanctions ("**BAFA**") for export permission in respect of the design, export and construction of the natural gas liquefaction plants for the GPP Project and the LNG Project. On 18 May 2022, BAFA issued a decision, declaring that the export of the natural gas liquefaction equipment was prohibited from 28 May 2022, as the plant which was the subject of the Contractor's application falls within the ambit of the goods and technologies set out in Annex X of Regulation 833, and was prohibited pursuant to Article 3b para 1.

7. On 23 May 2022, the Contractor issued a Sanctions Notice to the Defendant ("**1st Sanctions Notice**"), notifying the Defendant (as "Owner" under the Contract) of the complete suspension of works in respect of the GPP Project, pursuant to the occurrence of a Sanctions Prevention Event as defined in the Contract, and with effect from 28 May 2022. A similar notice was issued for the LNG Project. Shortly thereafter, on 18 July 2022, the 1st Plaintiff claimed from the Defendant suspension costs in relation to the GPP Project, in an amount equivalent to Euros 7,327,310.45 ("**Suspension Costs Claim**").

8. As summarized in the Skeleton Submissions filed on behalf of the Defendant, its case is that the amendments to Regulation 833 had limited impact on the GPP Project, and that the 1st Plaintiff had breached the Contract by suspending those portions of the work that were not affected by the Sanctions. According to the Defendant, the actions of the 1st Plaintiff as Contractor created a deadlock for the parties, as no work could be further performed under the Contract. The Defendant considered that the 1st Plaintiff's unilateral suspension of works with no definite end date was unlawful and in material breach of the Contract, and on 6 June 2022, the Defendant issued its Notice of Purported Breach pursuant to the Contract. After the 1st Plaintiff failed or refused to remedy its breach pursuant to the notices served by the Defendant, the Defendant issued a termination notice of the Contract on 23 September 2022 ("**1st Termination Notice**").

9. Under the Contract, the Defendant had paid to the Contractor a total sum of approximately Euros 962 million as advance payment for the performance of works under the Contract ("**Advance Payment**").

Approximately Euros 662 million of this was paid to the 1st Plaintiff, and a similar amount was paid for the LNG Project. The Defendant claims that upon its lawful termination of the Contract, it was contractually entitled to reimbursement of the Advance Payment, as well as damages.

10. On 21 November 2022, the Defendant made demands against the 2nd Plaintiff under the Guarantee, for the return to the Defendant of the Advance Payment which had not been accounted for by way of works executed and earned under the Contract, in an amount of Euros 946,543,608 ("**Unearned Advance Payment**"). The Defendant also made calls for payment under guarantees issued by third party banks for the GPP Project. These demands were not met, the banks notifying the Defendant that they could not make good on the guarantees as a result of the Sanctions and the restrictions imposed under Regulation 833 and in particular, Article 3b(2)(b) in connection with Article 11(1)(a) of Regulation 833.

11. Article 11(1) of Regulation 833 states:

> "1. No claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this Regulation, including claims for indemnity or any other claim of this type, such as a claim for compensation or a claim under a guarantee, notably a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, of whatever form, shall be satisfied, if they are made by:
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> (a) entities referred to in points (b) or (c) of Article 5, or listed in Annex III;
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> (b) any other Russian person, entity or body;

(c) any person, entity or body acting through or on behalf of one of the persons, entities or bodies referred to in points (a) or (b) of this paragraph."

12. Article 3b was inserted by Regulation 328, and provides as follows:

"Article 3b

1. It shall be prohibited to sell, supply, transfer or export, directly or indirectly, goods and technology suited for use in oil refining, as listed in Annex X, whether or not originating in the Union, to any natural or legal person, entity or body in Russia or for use in Russia.

2. It shall be prohibited to:

(a) provide technical assistance, brokering services or other services related to the goods and technology referred to in paragraph 1 and to the provision, manufacture, maintenance and use of those goods and technology, directly or indirectly to any natural or legal person, entity or body in Russia or for use in Russia.

(b) provide financing or financial assistance related to the goods and technology referred to in paragraph 1 for any sale, supply, transfer or export of those goods and technology, or for the provision of related technical assistance, brokering services or other services, directly or indirectly to any person, entity or body in Russia or for use in Russia.

3. The prohibitions in paragraphs 1 and 2 shall not apply to the execution until 27 May 2022 of contracts concluded before 26 February 2022, or ancillary contracts necessary for the execution of such contracts."

13. On 25 October 2022, the Defendant issued a Dispute Notice in respect of the 1st Termination Notice, thereby challenging the Contractor's rejection of the purported termination of the Contract.

14. On 30 November 2022, the Defendant applied to the Russian Court for an injunction to freeze assets owned by the Plaintiffs and their subsidiaries in Russia. The application was stated to be for the grant of preliminary interim measures to secure property interests before the filing of a claim, which can be made by the court at any stage of arbitration proceedings. In the application for interim measures, the Contract and the Guarantee were referred to, together with the provisions therein contained for settlement of disputes by submission to arbitration by the HKIAC in Hong Kong.

15. The above application for interim measures was withdrawn, but was followed by a second application made by the Defendant to the Russian Court, which was also withdrawn. Finally, on 23 December 2022, the Defendant made its third application for an injunction which was, on 30 December 2022, granted by the Russian Court. On the Defendant's case, its withdrawal and amendments made to the application for injunctive relief were for the purpose of refining the list of assets against which the freezing order was sought. It was also the Defendant's case that the original application was made to the Russian Court in aid of prospective arbitration proceedings against the Plaintiffs under the Contract and the Guarantee.

16. The Defendant's advocates highlighted in their submissions to this Court that in the order made by the Russian Court on 30 December 2022 for the grant of injunctive relief ("**Freezing Order**"), the Russian Court determined that the Plaintiffs were withholding the Unearned Advance Payment in bad faith, and that the "unlawful sanctions" against Russia "entail the impossibility of fulfilling the arbitration award outside

Russia". The Russian Court further reasoned that because of the 1st Plaintiff's bad faith conduct with regard to the Unearned Advance Payment, the 1st Plaintiff would not take any action with regard to "voluntary reimbursement", and therefore, it was likely that even after obtaining an arbitration award, the Defendant would be required to take action to enforce the award, but because of the Sanctions, the Defendant would only be able to enforce the award in Russian courts, and only against assets located in Russia. The Russian Court also found that the Plaintiffs had been actively alienating their Russian assets, and that refusal of injunctive relief to the Defendant would cause it significant damage. It was on these bases that the Freezing Order was granted.

17. On 21 February 2023, the Defendant applied to the Russian Court to amend the Freezing Order to expand its scope. It is not disputed by the Defendant, that in its Motion, the Defendant stated to the Russian Court that it intended to commence proceedings in Russia in reliance on part 4 of Article 248.1 of the Arbitrazh Procedural Code of the Russian Federation ("**Procedural Code**"), which grants exclusive jurisdiction to Russian courts over disputes related to sanctions or restrictive measures applied by a foreign state, in relation to Russian citizens and entities. The Defendant submitted to the Russian Court in February 2023 that it was appropriate for the Court to amend the scope of the Freezing Order (which required the Defendant to commence arbitration in Hong Kong in accordance with the Contract and the Guarantee), to allow claims to be made by the Defendant in the Russian Court, and for interim measures to support those Court proceedings instead. The Russian Court granted an Amended Freezing Order on 1 March 2023 ("**Amended Freezing Order**").

18. On the same day, the Defendant filed its Statement of Claim in Case No A 56-129797/2022 in the Russian Court ("**Russian Proceedings**"), seeking recovery from the 1st Plaintiff of the Unearned Advance Payment, and losses in the total sums of Euros 985,873,684 and RUB 7,726,762,962.

19. On 4 March 2023, the 1st Plaintiff commenced arbitration proceedings against the Defendant in Hong Kong ("**Arbitration**"), by which it seeks declarations (inter alia) that the Defendant's 1st Termination Notice is invalid, that the Contract remains extant until validly terminated in accordance with its terms, that the Defendant has no entitlement to payment arising out of or in connection with its invalid purported termination, and for costs incurred as well as compensation.

20. Shortly after commencement of the Arbitration, the Plaintiffs issued these proceedings in Hong Kong to apply for, and on 17 March 2023 obtained, an interim injunction, whereby the Defendant was ordered to "take all necessary steps to seek a stay of and take no further steps in" the Russian Proceedings, and was further restrained from commencing or pursuing, either within Russia or elsewhere, any other proceedings relating to disputes, differences or controversies arising out of, relating to or having any connection with the Contract and the Guarantee, otherwise than by way of arbitration in accordance with the Contract, pending the final determination by the Tribunal in the Arbitration ("**HK Injunction**").

21. The HK Injunction was varied on 24 March 2023, to permit the Defendant to take steps to preserve the Freezing Order obtained in the Russian Proceedings.

22. On 31 March 2023, the Defendant applied by summons to discharge the HK Injunction, firstly on the ground of the Plaintiffs' material non-disclosure that the Plaintiffs were likely unable to make good their undertaking as to the payment of damages to the Defendant, should the Court subsequently determine that the grant of the HK Injunction caused loss to the Defendant. In this respect, the Defendant pointed out that the Plaintiffs had stated that they were subject to the Sanctions which prohibit them from satisfying any claims in relation to the Defendant. Secondly, the Defendant submits that the HK Injunction should be discharged as it is likely to result in the lifting of the Amended Freezing Order and the Defendant's loss of the only security available to redress its significant losses under the Contract. Thirdly, the Defendant claims that the Russian Proceedings involve claims made by the Defendant for losses which are outside the scope and ambit of the arbitration agreement in the Contract, including claims against third parties not subject to the arbitration agreement. Fourthly, the HK Injunction should not be continued for comity considerations, when the Russian Proceedings have made substantial progress. The Defendant further claims that it "genuinely desires" determination of the disputes "by trial in a foreign country" because that is the only way for it to receive adequate redress for its claims, including for recovery of amounts that are not disputed by the 1st Plaintiff, and there is no prejudice to the Plaintiffs from a trial in a foreign country. According to the Defendant, any losses that may be suffered by the Plaintiffs as a result of having to pursue the Russian Proceedings can be adequately compensated in monetary terms.

23. In the alternative, the Defendant seeks fortification from the Plaintiffs should the HK Injunction be continued.

Applicable legal principles

24. The position concerning anti-suit injunctions in the arbitration context is now clear from the authorities. The Court will be ready to grant an injunction to restrain proceedings brought in breach of an agreement to arbitrate, and will ordinarily exercise its discretion to grant such an injunction unless the defendant can show that there is a strong reason to the contrary (*Donohue v Armco Inc* [2002] CLC 440; *Angelic Grace* [1995] 1 Lloyd's Rep 87). The principles have been applied in Hong Kong in *Ever Judger Holding Co Ltd v Kroman Celik Sanayii Anonim Sirketi* [2015] 2 HKLRD 866, *Sea Powerful II Special Maritime Enterprises (ENE) v Bank of China Ltd* [2016] 1 HKLRD 1032 and *Giorgio Armani SpA v Elan Clothes Co Ltd* [2019] 2 HKLRD 313.

25. *The Angelic Grace* decided in 1995 concerned an application for an injunction to restrain a party from proceeding in a foreign court in breach of an arbitration agreement. On the facts, the Court found that the defendant's maintenance of proceedings in Italy were vexatious and that the tortious claims made arose out of the contract to fall within the scope of the arbitration clause. Lord Justice Millett expressed his observations on anti-suit injunctions, as follows:

> "In my judgment, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution. There have been many statements of great authority warning of the danger of giving an appearance of undue interference with the proceedings of a foreign Court. Such sensitivity to the feelings of a foreign Court has much to commend it where the injunction is sought on the ground of forum non conveniens or on the general ground that the foreign proceedings are vexatious or oppressive but where no breach of contract is involved. In the former case, great care may be needed to avoid casting doubt on the fairness or adequacy of the procedures of the foreign Court. In the latter case, the question whether the proceedings are vexatious or

> oppressive is primarily a matter for the Court before which they are pending. But in my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them.
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> In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause as in *Continental Bank N.A. v. Aeakos Compania Naviera S.A.*, [1994] 1 W.L.R. 588. The justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case." (Emphases added)

26. The rationale behind the grant of anti-suit injunctions was also explained by Lord Bingham of Cornhill in *Donohue v Armco Inc* (in 2002) at para 24:

> "If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise is discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word 'ordinarily' to recognize that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should

> ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's *prima facie* entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case."
> (Emphases added)

27. In the case of *Ever Judger Holding Co Ltd* decided in 2015, G Lam J (as His Lordship then was) pointed out that what constitute "strong reasons" has not been elaborated upon in the authorities. At paragraph 58 of his judgment, His Lordship observed:

> "In his speech in *Donohue v Armco Inc*, *supra*, at para 24, Lord Bingham referred to dilatoriness and other unconscionable conduct, but added that the question would depend on all the facts and circumstances of the particular case. In my view the answer is not to be found by assessing, under the ordinary principles of forum *non conveniens*, which jurisdiction is the appropriate forum for the trial of the action, for, as Lord Hobhouse said in *Turner v Grovit*, *supra*, at para 25:
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> > 'The applicant does not have to show that the contractual forum is more appropriate than the other; the parties' contractual agreement does that for him.'
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> Nor in my view can mere complaints of inconvenience suffice. The power is ultimately a discretionary one, to be exercised in the interests of justice, and the factors raised against the injunction must be sufficiently strong to warrant not holding the opposing party to his contract."

28. At paragraph 45 of the judgment, His Lordship concluded:

> "It is clear, therefore, as a matter of Hong Kong law that the court in this jurisdiction should ordinarily grant an injunction to restrain the pursuit of foreign proceedings brought in breach of an agreement for Hong Kong arbitration, at any rate where the injunction has been sought without delay and the foreign proceedings are not too far advanced, unless the defendant can demonstrate strong reason to the contrary."

29. It is significant that distinction has been drawn between, on the one hand, an injunction to restrain breach of an arbitration agreement (which is akin to an exclusive jurisdiction clause) and, on the other hand, an injunction to restrain proceedings on *forum non-conveniens* grounds or an injunction to restrain foreign proceedings which are vexatious or oppressive. The justification for the grant of relief in the first type of case is that the injunction is to uphold and enforce the positive promise of a party to arbitrate the dispute, and the negative right not to be vexed by proceedings brought in breach of the arbitration agreement. Accordingly, there is no need to prove that the arbitral tribunal is the more convenient forum, and (as Lord Justice Millett observed) no need to feel diffidence in granting the injunction, or to exercise the jurisdiction sparingly and with great caution, for fear of giving an appearance of undue interference with proceedings of a foreign court.

30. In the case of *Sea Powerful II Special Maritime Enterprise (ENE) v Bank of China Ltd* [2019] 3 HKLRD 352, the Hong Kong Court of Appeal also drew distinction between contractual anti-suit injunctions ("**Contractual anti-suit Injunctions**") and anti-suit injunctions on *forum non-conveniens* grounds ("**FNC anti-suit Injunctions**"), in the context of comity considerations. In her judgment, Kwan JA (as she then was) agreed that to ascertain the true role of comity considerations, a distinction should be drawn between Contractual and FNC anti-suit Injunctions, as had been made clear in *The Angelic Grace*. Her Ladyship explained (at paragraph 18):

> "However, this is not to say that for Contractual anti-suit Injunctions, comity would have no or minimal relevance, as Mr Sussex has contended. In Contractual anti-suit Injunctions,

> comity considerations would have reduced importance, not that they would have no importance."

Her Ladyship went on to observe, at paragraph 21, that "the better view is that delay and comity are related". She then referred to the English decision in *Ecobank Transnational Incorporated v Tanoh* [2015] EWCA Civ 1309 and highlighted various passages of the judgment to explain the relevance of delay:

> "I do not accept that delay was wholly irrelevant … An injunction is an equitable remedy. Before granting it the court must consider whether it is appropriate to do so having regard to all relevant considerations, which will include the extent to which the respondent has incurred expense prior to any application being made, the interests of third parties, including, in particular, the foreign court, and the effect of making such an order in relation to what has happened before it was made.
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> A relevant consideration, particularly in relation to interlocutory relief, as was sought in the present case, is whether the party seeking an injunction has acted with appropriate speed. The longer a respondent continues doing that which the applicant seeks to prevent him from doing, the greater the amount of labour and cost that he will have expended which could have been avoided. …
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> Comity has a warm ring. It is important to analyse what it means. We are not here concerned with judicial amour propre but with the operation of systems of law. Courts around the free world endeavour to do justice between citizens in accordance with applicable laws as expeditiously as they can with the resources available to them. This is an exercise in the fulfilment of which judges ought to be comrades in arms. The burdens imposed on courts are well known: long lists, size of cases, shortages of judges, expanding waiting times, and competing demands on resources. The administration of justice and the interests of litigants and of courts is usually prejudiced by late attempts to change course or to terminate the voyage. If successful they often mean that time, effort, and expense, often considerable, will have been wasted both by the parties and the courts and others. Comity between courts, and indeed considerations of public policy, require, where possible, the avoidance of such waste.

> Injunctive relief may be sought (a) before any foreign proceedings have begun; (b) once they have begun; (c) within a relatively short time afterwards; (d) when the pleadings are complete; (e) thereafter but before the trial starts; (f) in the course of the trial; (g) after judgment. The fact that at some stage the foreign court has ruled in favour of its own jurisdiction is not *per se* a bar to an anti-suit injunction: see *AES*. But, as each stage is reached more will have been wasted by the abandonment of proceedings which compliance with an anti-suit injunction would bring about. That being so, the longer an action continues without any attempt to restrain it the less likely a court is to grant an injunction and considerations of comity have greater force.
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> Whilst a desire to avoid offence to a foreign court, or to appear to interfere with it, is no longer as powerful a consideration as it may previously have been, it is not a consideration without relevance. A foreign court may justifiably take objection to an approach under which an injunction, which will (if obeyed) frustrate all that has gone before, may be granted however late an application is made (provided the person enjoined knew from an early stage that objection was taken to the proceedings). Such an objection is not based on the need to avoid offense to individual judges (who are made of sterner stuff) but on the sound basis that to allow such an approach is not a sensible method of conducting curial business.
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> ...
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> In short, both general discretionary considerations and the need for comity mean that an applicant for anti-suit relief needs to act with appropriate despatch."

31. The above principles will be applied to the facts of this case, in considering whether the HK injunction should be discharged, or continued, effectively to restrain the Defendant from pursuing or continuing the Russian Proceedings brought by the Defendant despite the arbitration agreement contained in the Contract and the Guarantee.

Whether there was material non-disclosure

32. It is the Defendant's contention that the Plaintiff had failed to make full and frank disclosure in its application to the Court for the HK Injunction, as it had failed to inform the Court that the Plaintiffs would not in fact be in a position to make good their undertaking to pay damages to the Defendant, if the Court should later find that the HK Injunction had caused loss to the Defendant. This is because, on the Plaintiffs' case, the suspension of works under the Contract was caused by the Sanctions which prohibited not only the sale, supply, transfer or export of certain goods, technologies and services to Russia but also prohibited the ***satisfaction*** of "claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under Regulation 833". The Defendant pointed out that the Plaintiffs would be prohibited by the Sanctions, and in particular Article 11(1) of Regulation 833, to satisfy its undertaking to pay damages to the Defendant, if the Court should find that the Defendant has suffered any by reason of the HK Injunction.

33. Despite the fact that, as the Plaintiffs emphasized, the application for the HK Injunction made on 17 March 2023 was made on notice to the Defendant, and the hearing was attended by Mr Georgiou for the Defendant, the application remains *ex parte* in nature and the Plaintiffs are undeniably under a duty to make full and frank disclosure at a hearing of which the Defendant only had short notice, and was not able to present its entire case to the Court.

34. The decision, on whether or not the Plaintiffs had failed to make full disclosure of the fact that under or by virtue of Regulation 833,

they would not be able to satisfy any claim that may be made pursuant to its undertaking to the Court, depends on the construction of Article 11(1) of Regulation 833, and its effect on an undertaking given by the Plaintiffs to the Court in proceedings commenced by the Plaintiffs for interlocutory relief in aid of arbitration under the Contract. The Plaintiffs maintain that Article 11(1) does *not* extend to their liability under an undertaking given to the Court, to pay damages as a result of the wrongful making of the HK Injunction. It relies on expert evidence on German law as to the scope and ambit of Article 11 on the Contract and the Arbitration.

35. The Defendant's expert takes a contrary view on this, but the position as to whether Article 11(1) prohibits a party from making payment under compulsion of a Court order as a consequence of a breach of an undertaking made by the party to the Court, is not entirely clear or definitive. The effect of Article 11 will no doubt be the subject of argument in the Arbitration, in relation to the operation and effect of the Sanctions on the Contract, the performance of works contemplated under the Contract, whether the Contractor was entitled to suspend works, and whether the Contract had been validly terminated by the Defendant as a result of the Contractor's suspension. As Mr Lewis confirmed, there will be a substantive hearing of the Originating Summons in these proceedings, when the expert evidence on foreign law will be considered in detail, if necessary. It is not a straightforward question, and at this stage, I can only say that it has not been clearly established that the Sanctions will apply to prohibit the Plaintiffs from making payment of damages to the Defendant, if such damages are ordered by the Court to be payable, as part of the HK Injunction granted in these proceedings and as a result of the undertaking which was given, not to the Defendant, but to the Court

(para 29/1/25 Hong Kong Civil Procedure 2023). The Plaintiffs' payment of damages in such circumstances arises as a result of a separate and independent obligation and liability assumed or imposed under an order of the Court, as opposed to the settlement or satisfaction of an obligation arising under the Contract which is the subject matter of the Sanctions.

36. It is also pertinent that at the hearing on 17 March 2023, Mr Georgiou did in fact raise the question of the impact of the Sanctions on the Guarantee, and whether the Plaintiffs' undertaking as to damages should be fortified by reason of the Plaintiffs' possible inability to make good any guarantee as a result of the Sanctions. The Court was therefore made aware of the issue, and was not misled, but decided that the question of fortification should be raised and dealt with on the return date of the summons for continuation of the injunction, with proper evidence filed by both parties.

37. Considered as a whole, on the facts of this case, I am not persuaded that the failure of the Plaintiffs to raise the impact of the Sanctions as rendering it unable to make good their undertaking as to damages constitutes non-disclosure of a material fact or law, to justify discharge of the HK Injunction.

Whether the HK Injunction should be granted/continued or discharged

38. The Defendant submits, in opposition to the continuation of the HK Injunction and in support of its application for the discharge, that there are strong reasons for the Court not to grant or continue the HK Injunction.

39. In its evidence, the Defendant has highlighted three matters on the question of the Sanctions, their effect on its claims against the Plaintiffs, and whether it would be just or convenient to continue the HK Injunction.

40. First, it was contended that the Russian Court has exclusive jurisdiction over the claims made respectively by the Plaintiffs and the Defendant under the Contract, as to what relief should be granted to the parties. The Defendant relies on the provisions of the Procedural Code.

41. Second, and related to the first issue, the Defendant claims that the arbitration agreement under the Contract is invalid under the Procedural Code, and that an award made pursuant to the arbitration agreement in the Contract will not be enforceable in Russia for breach of its public policy, by virtue of the Sanctions imposed against the Defendant as a Russian entity.

42. Third, it was argued that if the Russian Proceedings are prohibited and are to be abandoned by the Defendant, this would result in the Defendant's loss of the Amended Freezing Orders obtained in respect of the assets of the Plaintiffs and their subsidiaries in Russia, and these are the only security which are now available to the Defendant as redress for any of its losses under the Contract. Without the "security" under the Amended Freezing Orders, the Defendant's case is that even if there should be an award in its favor in the Arbitration, it will not be able to enforce the award against the Plaintiffs by virtue of the Sanctions.

43. By reason of the foregoing matters, the Defendant argued that the Arbitration under the Contract would be futile, as any award that may be made could not be enforced as a result of the Sanctions and their effect.

Exclusive Jurisdiction of the Russian Court?

44. On the first issue, the Defendant relies on its expert on Russian law, who claims that the dispute between the parties under the Contract gives rise to matters of public law, rather than private law. The expert claims that matters of public law are not within the scope of the arbitration agreement in the Contract, but are within the exclusive jurisdiction of the Russian Court under the Procedural Code. Reference was made to Article 248.1 of the Procedural Code which reads as follows:

> "1. Unless otherwise established by an international treaty of the Russian Federation or by agreement of the parties, according to which the disputes involving them shall be considered by a foreign court or an international commercial arbitration located outside the territory of the Russian Federation, the exclusive competence of arbitrazh courts in the Russian Federation covers cases: a) on disputes involving persons in respect of which restrictive measures are applied by a foreign state, association and (or) union of states and (or) state (interstate) institution of a foreign state or association and (or) union of states; b) on disputes of one Russian or foreign person with another Russian or foreign person, if the basis for such disputes are restrictive measures introduced by a foreign state, association and (or) union of states and (or) state (interstate) institution of a foreign state or association and (or) union of states in relation to citizens of the Russian Federation and Russian legal entities.
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> 2. For the purposes of this chapter, persons in respect of whom restrictive measures are applied by a foreign state, association and (or) union of states and (or) state (interstate) institution of a foreign state or association and (or) union of states include: a) citizens of the Russian Federation, Russian legal entities in respect of which restrictive measures are applied by a foreign state, association and (or) union of states and (or) state (interstate) institution of a foreign state or association and (or) union of states; b) foreign legal entities in respect of which

restrictive measures are applied by a foreign state, association and (or) union of states and (or) state (interstate) institution of a foreign state or association and (or) union of states and the basis for the application of such measures are restrictive measures introduced by a foreign state, association and (or) union of states and (or) state (interstate) institution of a foreign state or association and (or) union of states in relation to citizens of the Russian Federation and Russian legal entities.

3. The persons specified in part 2 of this article have the right to:

a) apply for resolution of the dispute to the arbitrazh court of the subject of the Russian Federations at the place of its location or place of residence, provided that in the proceedings of a foreign court or international commercial arbitration located outside the territory of the Russian Federation, there is no dispute between the same persons, on the same subject and on the same grounds;

b) apply, in accordance with the procedure provided for in Article 248.2 of this Code, with an application for a ban on initiating or continuing proceedings in a foreign court, international commercial arbitration located outside the territory of the Russian Federation.

4. The provisions of this article shall also apply if the agreement of the parties, according to which the consideration of disputes with their participation is referred to the competence of a foreign court and international commercial arbitration located outside the territory of the Russian Federation, is unenforceable due to the application in relation to one of the persons, participating in the dispute, restrictive measures of a foreign state, association and (or) union of states and (or) state (interstate) institution of a foreign state or association and (or) union of states, creating obstacles for such a person in access to justice.

5. The provisions of this article do not prevent the recognition and enforcement of a foreign court decision or a foreign arbitral award adopted upon lawsuit of the person specified in part 2 of this article, or if this person did not object to the consideration of the dispute with his participation by a foreign court or international commercial arbitration located outside the territory of the Russian Federation, including that such person did not apply for a ban on initiating or continuing proceedings in a foreign court or international commercial arbitration located outside the territory of the Russian Federation."

45. Foreign law is decided by this Court as a question of fact, on the basis of the expert evidence. Article 248.1 of the Procedural Code, which is relied upon by the Defendant as conferring exclusive jurisdiction on the Russian Court over (1) disputes involving parties sanctioned by a foreign state, and (2) disputes between one Russian or foreign party and another Russian or foreign party, and the cause of action in such dispute is restrictive measures introduced by a foreign state. However, even on the face of Article 248.1, such exclusive jurisdiction is stated to apply "unless otherwise established [by international treaty], or by an agreement between parties pursuant to which disputes involving them shall be considered by a foreign court, or an international commercial arbitration located outside the Russian Federation". On a plain reading of Article 248.1, the exclusive jurisdiction of the Russian Court may not apply if there is an agreement between the parties to submit their dispute to international arbitration.

46. This construction on the ordinary and plain reading of Article 248.1 is supported by the opinion of the Plaintiff's Russian law expert, who considered that the Russian Court may *not* accept its exclusive jurisdiction under Article 248.1 if the parties have entered into an arbitration agreement, citing a ruling of the Supreme Court of the Russian Federation in case No A60-36897/2020 dated 9 December 2021.

47. The Plaintiffs' expert also considered that the Defendant cannot invoke Article 248.1 since it is not a Russian entity which is named on any sanctions list. I do not consider that it is necessary to make a conclusive finding on this, when Article 248.1 is made expressly subject to the absence of an agreement between the parties to submit their dispute to arbitration.

48. The Defendant argued that the arbitration agreement under the Contract is not enforceable under Russian law, relying on Article 248.1(4) of the Procedural Code. This specifically provides that the Article shall apply if the parties' agreement to refer their disputes to arbitration is unenforceable "due to the application, in relation to one of the persons participating in the dispute, of restrictive measures of a foreign state creating obstacles for such a person in access to justice".

49. Even accepting for present purposes that it is not necessary for the Defendant to be named in any applicable sanction list of a foreign state, Article 248.1(4) refers only to restrictive measures which create obstacles for a party in terms of its access to justice as a result of the application of sanctions.

50. The Defendant's preliminary application to the Russian Court for injunctive relief and the Freezing Order was made on the basis of such relief being granted in aid of the arbitration in accordance with the Contract. It was only in its application made on 20 February 2023 that the Defendant claimed that, taking into account "the limitations in access to justice" and in compliance with the provisions of the Procedural Code, the Defendant intended to file a claim in the Russian Court, and not with the HKIAC, and sought the Russian Court to replace the injunctive interim measures granted by amending the Freezing Order to permit the Defendant to commence court proceedings in Russia, to pursue its claims against the Plaintiff.

51. The Defendant's stance on its inability to gain access to justice by arbitration in Hong Kong is also reflected in the Statement of Claim

filed by it in the Russian Proceedings ("**SOC**") on about 1 March 2023. It deals with the jurisdiction of the Russian Court at paragraphs 18 and 19 of the SOC, as follows:

> "... The Claimant draws attention to the following facts, which indicate that the arbitration agreement concluded between the Claimant and Linde is unenforceable and that the Arbitration Court of Saint Petersburg and the LO has jurisdiction:
>
> - the subject matter of the dispute is not customary civil law relations, but a dispute regarding the application of punitive public rules of the EU to the Contract and the Claimant, which is not denied by Linde and follows from the enclosed evidence;
> - Russia is the only country where sanctions will not be applied to the Claimant;
> - Article 11 of the EU Regulation expressly prohibits the satisfaction as part of sanctions supervision of any claims under contracts that are affected by the EU sanctions, and due to the fact that the Contract is partially affected by sanctions, the Claimant may only have funds that are unlawfully withheld by Linde returned through courts in Russia;
> - the Contract is governed by English law, which implies the need to engage experts in English law, who have massively refused to cooperate with Russian persons, since 24 February 2022;
> - the Contract has a closer connection with Russia and Leningrad Region, since the construction site is located in Leningrad Region, and Russia is the place of implementation under the Contract;
> - the Contract hearings under the Arbitration Agreement must take place in Stockholm (Sweden), where Claimant's access is limited because Sweden as part of the EU has imposed sanctions on Russia and complicated visa controls;
> - the Claimant is an "SPV" (design) company that was set up solely for the construction of the facility and complex specified in the Contract; the Claimant does not engage in any other activity. The introduction of the EU sanctions against this type of work actually blocks the Claimant's collaboration with European contractors and continued

work at the construction site, which is equivalent to blocking sanctions.

- Hong Kong, unlike mainland China, has a close connection to the UK, which is unfriendly towards Russia, which also limits the Claimant's access to justice.

- If the Claimant had known that such EU sanctions would be imposed against the Claimant's core business, the Claimant would never have entered into an Arbitration Agreement where disputes are to be considered outside Russia in jurisdictions that apply the EU sanctions.

- The Claimant's refusal to have the dispute dealt with in Russia will not only lead to consequences in private law, but also in public law, since the Claimant raised money from state-owned banks for the performance of the Contract, which is now being withheld unlawfully by Linde and cannot be returned in the HKIAC proceedings due to the application of the EU sanctions.

Thus, the Arbitration Agreement entered into by the Claimant is unenforceable, and the Arbitration Court of SPb and LR has exclusive competence to hear the dispute. The refusal to the Claimant to have the dispute dealt with in Russia will fundamentally deprive the Claimant of access to justice. Each of the grounds is described in more detail below." (Emphasis added)

52. In submitting that the Russian Court has jurisdiction or competence, the Defendant also pleads, at paragraph 37 of the SOC:

"The Arbitration Agreement between the Claimant and Linde is unenforceable because it can no longer be enforced in accordance with the will of the parties at the time of its conclusion: the resolution of the Dispute in the HKIAC knowingly puts Linde in a prevalent position over the Claimant, because by virtue of the EU Regulations, Linde may withhold the money transferred by the Claimant, and the Claimant is not entitled to claim it back.

Therefore, when considering the Dispute based on the application of EU Sanctions, the Claimant will not have full access to justice in the HKIAC for fair and impartial resolution of the Dispute (part 4 of Article 248.1 of the Arbitration Procedure Code of the Russian Federation)." (Emphases added)

53. In particular, the Defendant pleads to the position in Hong Kong at paragraphs 48 to 51 of the SOC, as follows:

> "48. In addition, there are also other objective doubts that this Dispute will be dealt with in the HKIAC and that fair trial will be guaranteed.
>
> 49. For example, the HKIAC is located in Hong Kong. For more than 150 years, Hong Kong has been a British colony, and, while the territory of Hong Kong was officially returned to the People's Republic of China in 1997, the United Kingdom, which is a jurisdiction hostile to Russia, has retained significant influence on Hong Kong to the present day, in particular:
>
> 1) Hong Kong's location under the jurisdiction of the PRC is based on a one state two systems policy and legal concept, which states that Hong Kong operates its political, legal and economic systems that are different from those of the PRC and is largely based on systems similar to those in the United Kingdom;
>
> 2) Hong Kong's legal system is based on the Anglo-Saxon legal system and English case law;
>
> 3) British and European judges play an important part in the Hong Kong judicial system by making part of the Hong Kong Supreme Court of Appeal, which by virtue of their citizenship obligates them to comply with the sanctions imposed by the United Kingdom and the European Union, and to allow for the application of the European and United Kingdom sanctions;
>
> 4) English is one of Hong Kong's official languages.
>
> 50. So, Hong Kong is not an impartial and independent place to resolve the Dispute, the subject of which is the issue of the application of sanctions from unfriendly states, and the Dispute involving Linde (Germany), i.e. an entity located in an unfriendly state that imposes anti-Russian sanctions, will be dealt with in Hong Kong (i.e., on the territory, which remains significantly influenced by another unfriendly state that imposes anti-Russian sanctions, i.e. the UK) in breach of guarantees of fair trial.
>
> 51. In particular, if the Claimant seeks resolution of this Dispute in the HKIAC under the Arbitration Agreement:

- the arbitral tribunal will be governed by the provisions of the EU Regulation, which clearly state that 'No Claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this Regulation, [...] shall be satisfied'.

...

1) the fact that the large-scale sanctions of the unfriendly states against Russian persons have caused irreparable reputational damage to Russian persons will significantly limit the Claimant's access to effective justice in the consideration of the Dispute in the HKIAC, since the list of legal representatives and arbitrators who are willing to provide legal services to the Claimant and whom the Claimant could appoint in connection with the consideration of this Dispute in the HKIAC is significantly reduced and limited; ..."

54. The Defendant's submissions to the Russian Court on its exclusive jurisdiction include the claims that the resolution of the dispute in the Arbitration by HKIAC puts the Plaintiff in a prevalent position over the Defendant as a result of the operation and impact of the Sanctions, the arbitral tribunal will be governed by the Sanctions, the legal representatives and arbitrators who are willing to provide legal services to the Defendant or whom the Defendant can appoint are reduced and limited, and that the Defendant will face difficulties in paying the fees and costs in connection with the Arbitration in Hong Kong by virtue of lack of support from the banks in Hong Kong.

55. In my judgment, the Defendant's claims of its inability to gain access to justice and to obtain a fair trial by arbitration in Hong Kong are grossly exaggerated, if not totally based on false premises. First and foremost, the Sanctions have no legal effect in Hong Kong. Secondly, it is patently clear that the Defendant was able to have access to lawyers in

Hong Kong, who have represented them from the time of the initial *ex parte* application for the HK Injunction until now. Thirdly, as the Plaintiffs have sought to highlight, our former Chief Justice, Geoffrey Ma, has been successfully appointed to the Tribunal upon the Defendant's nomination in the Arbitration. There is no suggestion, and no basis for any complaint, that the Defendant has encountered any difficulties with the HKIAC in connection with the Arbitration, or with its representation in or conduct of the Arbitration. The Arbitration in Hong Kong is subject to and governed by the Arbitration Ordinance, under which arbitrators have duties to act independently, fairly and impartially and to treat the parties with equality. As the Plaintiffs pointed out, and I agree, the Defendant's allegation that it will not be fairly represented or heard by the Tribunal, or that somehow it will be met with hostility were its claims to be pursued in Hong Kong, is highly fanciful. The Court cannot give credence to the Defendant's unsubstantiated assertion, that the mere existence of the EU Sanctions will create obstacles for the Defendant to gain access to justice in Hong Kong, to render the arbitration agreement contained in the Contract unenforceable, under the Procedural Code or otherwise.

56. In short, I am not satisfied at this stage that the Defendant has established that the Russian Court has exclusive jurisdiction over the claims made by the Defendant in the Russian Proceedings, or in respect of the claims made under the Contract, to constitute a good reason for the Court not to exercise its discretion to grant or continue the HK Injunction. My consideration involves the following matters.

57. The Defendant's claims against the Plaintiffs, and the 1st Plaintiff's claims against the Defendant, all relate to the 1st Plaintiff's

contractual right (if established) to suspend the Contract works by reason of the Sanctions, and the validity of the Defendant's termination of the Contract as a result of the 1st Plaintiff's suspension of works. These are all claims and disputes arising under or out of or in connection with the Contract and the Contract works, and claims regarding the performance, breach or termination of the Contract to fall within the wide ambit of the arbitration clause in the Contract.

58. In the case of *Giorgio Armani SpA v Elan Clothes Co Ltd* [2019] HKCFI 530, the Court (citing *Donohue v Armco Inc* [2002] CLC 440) explained that foreign proceedings in breach of an arbitration agreement are a breach of contract which will ordinarily be restrained by the grant of an injunction restraining the party in breach from conducting such proceedings, unless there are strong reasons to the contrary shown. At paragraph 30 of the judgment, Deputy High Court Judge Field pointed out that if the arbitration clause is valid and applicable under the proper law, the fact that the foreign tribunal will not recognize the clause as valid, or give effect to it, will ***not*** normally prevent the Hong Kong or English Court enforcing it through an anti-suit injunction (citing *Youell v Kara Mara Shipping Co Ltd* [2000] CLC 1058 and *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90).

59. In *Ecobank Transnational* cited at paragraph 30 above, the learned judge referred to *AES Ust-Kamenogorsk LLP v Ust-Kamenogorsk JSC* [2013] 1 WLR 1889, as authority for the proposition that the fact that the foreign court has ruled in favour of its own jurisdiction is not per se a bar to an anti-suit injunction.

60. In *GM1 v KC* [2020] HKLRD 132, this Court further explained, at paragraph 23 of the judgment:

> "The fact that the foreign court may insist on its jurisdiction is, as held by the English court in *Tamil Nadu Electricity Board v ST-CMS Electric Company Private Ltd* [2007] EWHC 1713 (Comm), irrelevant to the court of the seat of the arbitration when it deals with an arbitration provision governed by its own law. The Mainland court may have jurisdiction as claimed by the defendant, but the issue is whether the defendant should be allowed, in view of the arbitration agreement, to invoke that jurisdiction.
>
> Whether there are indeed special circumstances, or strong reasons, which may justify a departure from the *prima facie* entitlement of a party to enforce the arbitration agreement, depends on all the circumstances of the case. However, the mere fact that the foreign court will not grant a stay of the proceedings instituted is not sufficient to refuse and injunction (para 11/1/14C, Hong Kong Civil Procedure 2020). This deals with the defendant's argument that it may not be possible for the defendant to discontinue or withdraw the Mainland Proceedings after its case had been accepted." (Emphases added)

61. The point was reiterated in *Giorgio Armani SpA v Elan Clothes Co Ltd (No 2)* [2020] 1 HKLRD 354, where this Court pointed out that whether the foreign court has jurisdiction under its own law to determine the claims made in the proceedings brought in breach of the arbitration agreement is not a relevant question, as the essential point and rationale for the grant of the injunction is that since a party had agreed to the arbitration clause, it should not be allowed to invoke any other relevant jurisdiction (citing *Tamil Nadu Electricity Board v ST-CMS Electric Company Private Ltd* [2007] EWHC 1713 (Comm), *OT Africa Line Ltd v Magic Sportswear Corporation & Others* [2005] EWCA Civ 710).

62. On behalf of the Plaintiffs, Mr Lewis has referred to *Gee on Commercial Injunctions* (7th edition), at para 14-057, which states:

> "The effect of agreeing an arbitration or jurisdiction clause is to agree to that forum including its restrictions on what claims may be presented and what remedies may be granted. This may restrict the claims or remedies which may be available in that forum to a party. Anti-suit relief will be granted to enforce that agreement."

63. Mr Lewis also relies on the judgment of the English Court of Appeal in *Société Commerciale De Reassurance v Eras International Ltd* [1992] 1 Lloyd's Rep 570. In that case, the respondent opposed the application for stay of proceedings in favor of arbitration in Illinois, on the ground that there is no power under Illinois law to award contribution under the English Civil Liability (Contribution) Act 1978, such that an arbitration in Illinois would deprive the respondent of any possibility of claiming contribution against a third party. The Court of Appeal rejected the argument, upheld the arbitration agreement and granted the stay sought. Mustill LJ's judgment convincingly stated the rationale for the stay (at p 611), as follows:

> "Nothing has gone wrong with the arbitration agreement. All that has happened is that the parties have discovered that the remedies available to the arbitrator are in one respect more narrow than those which, but for the agreement, could have been awarded by the English court. We can see no ground here for refusing a stay.
>
> At first sight this result appears harsh, but the impression is misleading. It is not a question of Clarksons being deprived of a right by the grant of a stay. On the contrary, the parties have agreed that all their rights shall be fixed in Illinois according to the procedures (and by implication the substantive law) in force in that state. If the stay is refused the consequences will be that by acting in breach of their agreement, in pursuing their claim against Howdens in the English court, Clarksons have obtained for themselves the possibility of a right and remedy which they would not have possessed if they had acted as the agreement required. In the face of this we can see nothing unjust in holding Clarksons to their agreement, in accordance with the spirit of the Act of 1975 and the New York Convention on which it is breached." (Emphases added)

64. A summary of the Court of Appeal's decision in *Société Commerciale* and of the subsequent line of authorities is contained in *In Riverrock Securities Limited v International Bank of St Petersburg (Joint Stock Company)* [2020] EWHC 2483 (Comm), where the Court stated (at para 61 of the judgment), after referring to *Société Commerciale*, *Wealands v CLC Contractors Ltd* [1999] CLC 1821 and *Assaubayev v Michael Wilson & Partners Ltd* [2014] EWCA Civ 1491:

> "Consistent with that principle, an anti-suit injunction may be granted even if the effect of doing so is to prevent the respondent from invoking constitutional grounds of objection to the contract which cannot be raised outside of the foreign jurisdiction: *Aqaba Container Terminal v Soletanche Bachy France* [2019] EWHC 471 (Comm). One of the advantages of agreeing both the forum and applicable law for any disputes is that the parties may avoid exposure to certain types of claim recognized by the home courts of one or other of them. As HHJ Chambers QC noted in *Beazley v Horizon Offshore Contractors* [2005] 1 Ll Rep 231, when considering an argument that requiring adherence to the jurisdiction clause in that case would deprive the assured of the ability to pursue bad faith tort damages in Texas:
>
> > 'The exclusive jurisdiction clause confers upon underwriters the agreed benefit of not having to face claims in tort in Texas. There is no injustice in holding Horizon to its bargain because this was known at the time that the bargain was made. To deny underwriters the benefit of the bargain would be an injustice.'"
>
> (Emphases added)

65. In the light of the authorities and the principles set out therein, I accept the submissions made for the Plaintiffs that the restrictions imposed by the Sanctions were reasonably foreseeable at the time when the Contract was made, and were in fact part of the bargain struck by the parties as evidenced by the terms of the Contract. Long before the Contract was made in 2021, Article 11 of the Sanctions had been introduced by Regulation 833 on 31 July 2014. The provisions of the

Contract for the GPP Project provide for the potential evolution and impact of the Sanctions, and show that the Sanctions and their possible effect on the Contract and the works to be performed were well within the contemplation of the parties. Thus, clause 43 of the Contract provides for the Contractor's entitlement to suspend performance of activities upon the occurrence of a "Sanctions Prevention Event", as well as detailed provisions concerning the consequences of Sanctions Laws on the ability of the parties to comply with their obligations. As the Plaintiffs submitted, much of clause 43 was premised on the assumption that new sanctions might be introduced after the execution of the Contract, which sanctions might affect the ability of the parties to comply with their respective obligations under the Contract. Under clause 43.7, the parties were to notify each other as soon as they became aware of "any prospective or newly introduced Sanctions Laws or any information that an existing Sanctions Law has caused or prospective Sanctions Law will cause a Sanctions Prevention Event for such party". Further, the parties were obliged under clause 58.12 to notify each other if they, or their beneficiaries, became a Sanctioned Person.

66. In *A v B* [2022] HKCFI 1031, which concerns an application for stay of Hong Kong proceedings for determination by the Courts of the Bahamas pursuant to an exclusive jurisdiction clause, this Court stated at paragraph 25 of the judgment:

> "In this case, B is relying on the exclusive jurisdiction clause in the Deed, and Counsel has highlighted the fact that firstly, that raises a presumption and a *prima facie* entitlement to enforcement of the clause. Secondly, in a case where an exclusive jurisdiction clause exists, the approach of the courts in dealing with applications for stay on forum non-conveniens grounds is *not* applicable. A party who relies on an exclusive jurisdiction clause is entitled to hold the other party to their

> contractual bargain, and it is not necessary for B in this case to justify that it is more convenient to try these proceedings in the Bahamas, simply because the parties had agreed to the Bahamas being the proper forum for the determination of the issues covered by the scope of the clause. To demonstrate that there are 'strong reasons' or a 'strong cause' for suing in a non-contractual forum, there must be something unforeseeable at the time of the contract, or something so exceptional that goes to the interests of justice." (Emphasis added)

67. Passages of the Court of Appeal's judgment in *Noble Power Investments Ltd v Nissei Stomach Tokyo Co Ltd* [2008] 5 HKLRD 631 (at para 71(ii) and (iii)) were referred to in *A v B,* as illustration of what may constitute "strong reasons":

> "(ii) Although, in the exercise of its discretion, the court is entitled to have regard to all the circumstances of the case, the general rule is that the parties will be held to their contractual choice of English jurisdiction unless there are overwhelming, or at least very strong, reasons for departing from this rule: see eg *British Aerospace Plc v Dee Howard Co; Mercury Communications v Communication Telesystems International* at p 41; *per* Aikens J in *Marubeni Hong Kong & South China Ltd v Mongolian Government* [2002] 2 AER (Comm) 873 at p 891 (b)-(f); *per* Lawrence Collins J in *BAS Capital Funding Corp & Others v Medfinco Ltd & Others* [2004] 1 Lloyd's Rep 652 at paras 192-195; *per* Gross J in *Import Export Metro Ltd v Compania Sud America De Vapores SA* [2003] 1 Lloyd's Rep 405.
>
> (iii) Such overwhelming or very strong reasons do not include factors of convenience that were foreseeable at the time that the contract was entered into (save in exceptional circumstances involving the interests of justice); and it is not appropriate to embark upon a standard *Spiliada* balancing exercise. The defendant has to point to some factor which it could not have foreseen at the time the contract was concluded. Even if there is an unforeseeable factor or a party can point to some other reason which, in the interests of justice, points to another forum, this does not automatically lead to the conclusion that the court should exercise its jurisdiction to release a party from its contractual bargain; see cases cited *supra*. In particular, the fact that the defendant has, or is about, to institute

> proceedings in another jurisdiction, not contemplated by the non-exclusive jurisdiction clause, is not a strong or compelling reason to relieve a party from his bargain, notwithstanding the undesirability of parallel proceedings. Otherwise a party to a non-exclusive jurisdiction clause could avoid its agreement at will by commencing proceedings in another jurisdiction; see cases cited *supra* and *The El Amria* [1981] 2 Lloyd's Rep 119; *Breams Trustees Ltd v Upstream Downstream Simulation Services* [2004] EWHC 211 (Ch) *per* Patten J at paras 27-28."
>
> (Emphases added)

68. In the light of the provisions of the Contract referred to at paragraph 64 above, it cannot be said that at the time of the conclusion of the Contract and of the Guarantee, the effect of Article 11 of the Sanctions, hindrances on the Plaintiffs' ability to satisfy any award in favor of the Defendant and/or the Defendant's inability to enforce an award in a member state of the EU was unforeseen, or unforeseeable.

69. As elaborated upon in the earlier part of this Decision, I do not accept that arbitration in Hong Kong in accordance with the Contract would not or may not afford a fair trial or due process to the Defendant, or give rise to conceivable doubts as to the fairness, reliability or propriety of the arbitral process, or that any such lack of due process will not be addressed by the supervisory court in Hong Kong.

70. At most, the fact that foreign proceedings have been commenced and are at an advanced stage may be a factor to be taken into consideration on the question of whether judicial resources and time would be wasted, which is a matter of public interest, and whether that would make it unjust or inconvenient to grant or continue the HK Injunction.

71. In this case, the hearings which took place prior to the commencement of the Arbitration and the Plaintiffs' application for the HK Injunction in March 2023 relate to the Defendant's application for interim measures in the form of the Freezing Order and the Amended Freezing Order, and subsequently, whether these orders should be continued or stayed. There has not been much development so far as the substantive Russian Proceedings are concerned. If the Freezing Order is to be retained in aid of the Arbitration, it can be said that there has been no waste in costs or judicial resources.

Arbitration agreement invalid?

72. The Defendant's assertion that the arbitration agreement contained in the Contract is unenforceable by virtue of Article 284.1(4) of the Procedural Code is premised on the Defendant's inability to gain access to justice by reason of the application of the Sanctions to the Defendant. As considered and held above, the Sanctions have no legal effect in Hong Kong, and there are neither facts nor evidence to substantiate the Defendant's bare assertion, that there are obstacles to its access to justice if the dispute is to be arbitrated in Hong Kong, in accordance with the provisions of the Contract, the Arbitration Ordinance and subject to the supervision of the Courts in Hong Kong.

73. The Defendant's contentions made in the Russian Proceedings, which were accepted by the Russian Court and formed the basis of its finding that it had jurisdiction over the Defendant's claims, were that the arbitration agreement contained in the Contract is unenforceable under the Procedural Code, due to the application of Sanctions against one of the

parties to the dispute. The Russian Court considered (in its Ruling of 8 June 2023) that the fact that measures of restrictive nature/Sanctions are put in place against a Russian person participating in a dispute in an international commercial arbitration located outside Russia can by itself be assumed to be sufficient for it to conclude that such person's access to justice is limited. The assumption was on the basis that there would be doubts as to whether a dispute involving a person located in a state that has applied restrictive measures will be fairly heard in the territory of a foreign state that has also applied restrictive measures, with the due guarantees of a fair trial and the impartiality of the court, which are essential elements of access to justice.

74. As the Plaintiffs' foreign law expert has pointed out, presumptions and assumptions can be rebutted. In this case, the premise of the Defendant participating in an arbitration which will be heard in a territory of a foreign state that has applied restrictive measures, does not even apply. Further, as highlighted by the Plaintiffs, the actual realities of the case do not support or give rise to the assumption that the Defendant does not have access or has in any way been deprived of any access to justice by arbitration in Hong Kong.

75. On the evidence before me, I am satisfied that there is a valid arbitration agreement between the Plaintiffs and the Defendant which extends to the dispute between them as to the validity of the termination of the Contract and the parties' obligations thereunder.

76. The Defendant claims that the Russian Proceedings include tortious claims made against entities within the Plaintiffs' group, which are

not parties to the arbitration agreement to be subjected thereto, and that the Defendant should not be restrained from pursuing its claims against these third parties. However, on scrutiny, the claims made in the amended SOC filed in the Russian Proceedings, whereby these entities were joined, remain to be based on the 1st Plaintiff's alleged breach of the Contract, with assertions that those entities should be jointly and severally liable for the amounts and damages claimed by the Defendant for the 1st Plaintiff's failure to comply with the Contract, and/or on the basis that the Defendant would be entitled by virtue of the corporate structure of the Plaintiffs' companies to look to the Plaintiffs' shares in and to the assets of these additional respondents for recovery and by way of enforcement - in the event of a court decision being made in favor of the Defendant in the action on the Contract, and the Defendant seeking to enforce such decision against the assets of the 1st Plaintiff including its interests in the third party entities. The third parties were accordingly joined in the Russian Proceedings for the essential if not the only purpose of including their assets in the Amended Freezing Order. The Defendant has not referred to any provision of the Contract which has the effect of making any subsidiary or affiliate of the Plaintiffs jointly liable for the obligations of the Plaintiffs under the Contract and the Guarantee.

77. I am not satisfied that the claims made against the Plaintiffs' affiliates and associated companies in the amended SOC reveal any separate cause of action against these third party companies which are separate to and not based on the Defendant's claims against the Plaintiffs, and in particular the claims made against the 1st Plaintiff only under the Contract.

Defendant's loss of security?

78. There is no dispute that when the Defendant first applied to the Russian Court for the Freezing Order, it was sought as an interim measure in aid of arbitration to be commenced by the Defendant under and pursuant to the Contract. The Plaintiffs would not have been entitled to prevent the Defendant from so applying as the application for such relief in aid of the Arbitration would not have been a breach of the arbitration agreement. It was only in February 2023, after the third application for the injunction, that the Defendant amended its application to provide for the Freezing Order to be amended to aid the Russian Proceedings contemplated, and to permit it to commence the Russian Proceedings.

79. There was much debate between the Plaintiffs and the Defendant as to whether the Plaintiffs, or the Defendant, was at fault in leading the Russian Court to make the Amended Freezing Order, to reject the application made by the 1st Plaintiff and the Plaintiffs' associated company to dismiss the Russian Proceedings, and to dismiss the Defendant's application to stay the Russian Proceedings. I do not see how these submissions would materially affect my decision on the applications before me.

80. On the Defendant's part, it claims that as a result of the Plaintiffs' allegedly unreasonable stance to seek the dismissal of the Russian Proceedings, which was rejected by the Russian Court, there is no viable procedural alternative open to the Defendant which would permit a stay of the Russian Proceedings whilst ensuring preservation of the Amended Freezing Order, and further, that it "was compelled to serve

its claim (in the Russian Proceedings) on the 2nd Plaintiff and to join it to the Russian Proceedings".

81. On the other hand, the Plaintiffs claim that if the Defendant should lose the security over the assets affected by the Amended Freezing Order (as it alleges), then it only has itself to blame for varying it to be in aid of the Russian Proceedings.

82. However, the Plaintiffs also pointed out that even in the Amended Freezing Order granted, the Russian Court did permit the Defendant to approach either the Russian Court or the arbitral tribunal competent to consider the dispute related to the performance of the Contract, for the purpose of pursuing its claims. The Defendant was still able and entitled after the Amended Freezing Order to pursue its claims under the Contract by arbitration, and I agree with the Plaintiffs that, on the face of the Amended Freezing Order, the Russian Court did not compel the Defendant to commence the Russian Proceedings. As the Plaintiffs have highlighted, the HK Injunction (as amended on 24 March 2023) also permits the Defendant to preserve the Freezing Order, as part of the steps to seek a stay of the Russian Proceedings.

83. The argument that a stay of the Russian Proceedings would mean that the Defendant would lose the benefit of the Amended Freezing Order (which has effect over the assets of the Plaintiffs and their subsidiaries or associates in Russia), with the consequence that the Defendant would not be able to enforce any award which may be made in its favour outside Russia by reason of the Sanctions, loses force when consideration is given to the authorities cited above, under the heading of

"Exclusive Jurisdiction of the Russian Court". In short, the Defendant had itself agreed to arbitration in Hong Kong of disputes arising under the Contract, subjected itself to the forum of HKIAC and of the Hong Kong courts and to the remedies which may be granted in such forum, with any restrictions or limitations as may be applicable. Knowing the jurisdiction of the Russian Courts, the Defendant accepted the bargain of ***not*** resorting to that jurisdiction.

84. At paragraph 14-057 of *Gee on Commercial Injunctions* (7th edition) (under the heading "Strong Reason For Not Enforcing A Negative Covenant"), the learned author considered the question of whether proceedings confined to obtaining security would be a breach of an arbitration or exclusive jurisdiction clause. The author observed that normally, arbitration rules permit the obtaining of security including security abroad, and that arbitration clauses do not prohibit such proceedings so long as they do not interfere with the merits being decided in accordance with the clause. The learned author then observed (citing *SRS Middle East FZE v Chemie Tech DMCC* [2020] EWHC 2904 (Comm)):

> "If security abroad through a foreign court cannot be preserved by qualifying the injunction, the court will still grant the anti-suit relief. This is a consequence of the contract to arbitrate."

85. As recited at paragraph 6 of the judgment, *SRS Middle East FZE v Chemie Tech DMCC* concerned an anti-suit injunction in circumstances when the defendant had taken steps to obtain interim relief from a court to whose jurisdiction the claimant was subject (the Court in the Emirate of Sharjah, UAE) but which is not the court of the seat of the arbitration, in support of substantive claims that the defendant had itself

referred to arbitration in London. The defendant claimed that it should not be restrained by injunction from pursuing its proceedings in the foreign court, as it would mean that it would lose the protection of the provisional measures granted by interim relief. The Court granted an anti-suit injunction to stay the foreign proceedings. The Plaintiffs highlighted paragraph 58 of the judgment, where Andrew Baker J explained:

> "I repeat that, on the point of principle raised by a case like this, in my judgment the correct approach is that if under UAE law the provisional measures cannot be maintained without litigating the substantive merits, contrary to the arbitration agreement, such that the grant of an anti-suit injunction will mean the loss of the provisional measures, then so be it. That is not good reason against the grant of an anti-suit injunction …"

86. I would only add that the rationale must be that it was the defendant's own choice to arbitrate in London in accordance with the arbitration agreement and that the proceedings in UAE were brought in simple breach of such agreement. The provisional measures obtained as a result of the breach of agreement was accordingly not a reason for the Court to decline the grant of the injunction to restrain the breach.

87. There is nothing unjust in holding the Defendant in this case to its bargain, whereas to deprive the Plaintiffs of the contractually agreed benefit of not having to face claims made in Russia would be unjust. What is sought by the Plaintiffs is an anti-suit injunction based on a breach of an arbitration agreement. This is not a case of deciding the more convenient forum, and whether it would be just as convenient, or more convenient, to have the dispute tried in the Russian Court, where the evidence may be situated, performance of the Contract is due and whether the Plaintiffs would be prejudiced as a result. Under the Contract, the parties had

already agreed to exclude the Russian Court in favour of the arbitral tribunal to be empaneled in accordance with the HKIAC rules.

88. To the extent that the Defendant should still maintain that it is not possible to obtain a stay of the Russian Proceedings or that it is not able to comply with the HK Injunction, that contention is rejected on the basis of the evidence of the Plaintiffs' expert. In any event, I see no difficulty for the Defendant to comply with the HK Injunction by not taking further steps in the Russian Proceedings, apart from the preservation of the Amended Freezing Order.

Arbitration in Hong Kong a futility?

89. I also reject the Defendant's contention that the Arbitration in Hong Kong would be futile, as any award which may be made thereunder cannot be enforced against either of the parties in any place other than in Russia. The Defendant claims that due to Regulation 833, the Plaintiffs "can only be forced to satisfy the Award by the Russian Court", meaning that the Plaintiffs and parties subject to the Sanctions cannot be compelled outside Russia to satisfy any award which may be made in favour of the Defendant in the Arbitration. As against the Defendant itself, it claims that as it only has assets in Russia, any award which the Plaintiffs may obtain against the Defendant may only be enforced there.

90. As the Plaintiffs have rightly pointed out, the Sanctions have no effect in Hong Kong, and many other countries outside the EU. The Plaintiffs claim that they are part of a corporate group with global presence, with assets outside the EU (as can be seen from extracts of their Annual

Report). Whether or not an award for payment of any amount to the Defendant would be enforced on the ground of its being in breach of public policy depends on the public policy of each state and its regard for or recognition of the Sanctions.

91. In any event, even on the Defendant's argument, the award obtained in the Arbitration can be enforced in Russia, where both the Defendant and the Plaintiffs have assets, and where the Russian Court may be able to protect its subjects from restraints under the Sanctions. On that basis, it cannot be said that the Arbitration will be futile in the sense that it will not produce any "enforceable" award.

92. An arbitration may, and often does, produce an award which may not result in any amount recoverable or recovered by the successful party. That does not render the arbitration futile in the sense that the arbitration agreement should not be enforced.

Admission of liability by Plaintiffs?

93. As part of its argument that it would be unjust to continue the HK Injunction, the Defendant claimed that the 1st Plaintiff had admitted liability to return a portion of the Unearned Advance Payment, equivalent to approximately Euros 117 million. It was argued that in circumstances when the 1st Plaintiff had admitted liability, but has withheld payment on the alleged basis of being prohibited from making payment under Regulation 833, it would be unfair and unjust to leave the Defendant without remedy and the protection of the Amended Freezing Order in the Russian Proceedings.

94. The Plaintiffs deny that there was any admission of liability on their part, as alleged by the Defendant, and claim that in any event, the 1st Plaintiff is entitled to set off from the Unearned Advance Payment amounts due to the 1st Plaintiff under the Contract, as well as damages. The amounts due from the Plaintiffs is clearly an issue in dispute which is for determination in the Arbitration, and should not be litigated at this stage and in this forum.

Conclusion on continuation of the HK Injunction

95. Having considered the relevant authorities and the available evidence at this stage, I am not satisfied that the Defendant has shown that there is any strong reason for the Court not to exercise its discretion to grant the injunction to restrain the Russian Proceedings which were brought against the Plaintiffs in breach of the agreement to arbitrate disputes under the Contract. I have considered the importance of protecting the sanctity of the Plaintiffs' contractual rights, against the Russian Proceedings which have taken place to date, and I am satisfied that there is no delay in the Plaintiffs' application for the stay and for the HK Injunction. The substantive development and hearings in the Russian Proceedings relate to the applications for the interim Freezing Orders, which were originally commenced and continued as measures in aid of the Arbitration under the Contract. They have not been futile or rendered nugatory, in the context of wasting the judicial resources of the Russian Courts. The HK Injunction permitted their retention for the Arbitration.

96. Further, I consider that the claims made by the Defendant in the Russian Proceedings are contractual in nature based on the Contract

and the parties' performance thereunder, and relate to the validity of the termination of the Contract, to fall within the scope of the arbitration agreement.

97. The effect of the Sanctions on the Contract and the parties' performance thereunder is a matter within the reasonable contemplation of the parties at the time when the Contract and the Guarantee were signed. Even in such circumstances, the Defendant had agreed to arbitration by HKIAC, rather than by way of court proceedings in Russia, and there is no good reason why it should not be held to its bargain. Depriving the Plaintiffs of their contractual right to arbitrate in accordance with the Contract, and their right not to be vexed by proceedings brought in breach of the arbitration agreement, cannot be adequately compensated in damages.

98. Bearing in mind that the HK Injunction permits the Defendant to retain the Amended Freezing Order in aid of the Arbitration between the Plaintiffs and the Defendant, I am satisfied that it would be just and convenient to continue the HK Injunction under section 21L of the High Court Ordinance. The HK Injunction remains as amended by the Court on 24 March 2023, permitting the Defendant to take steps to preserve the Freezing Order in aid of the Arbitration. The Defendant remains liable to take all necessary steps to seek a stay of and take no further steps in the Russian Proceedings against the Plaintiffs.

Fortification

99. The Defendant has obtained the Freezing Order against assets of the 1st and 2nd Plaintiffs in Russia. It remains able to retain such Freezing Order as amended, in aid of any claims it asserts against the Plaintiffs in the Arbitration.

100. An applicant seeking fortification of an undertaking must show a likelihood of a significant loss arising as a result of the injunction, and a sound basis for belief that the undertaking will be insufficient (para 29/1/24, *Hong Kong Civil Procedure 2023*). The damages for which a plaintiff may be liable under the undertaking must be confined to loss which is "the natural consequences of the injunction", and there is clearly a distinction between damages caused by the grant of an injunction and damages which flow from the fact of the litigation itself. Only the former type of damages are recoverable (para 29/1/28, *Hong Kong Civil Procedure* 2023 and the cases cited therein). The learned editors pointed out that the "but for" test is applicable in dealing with questions of causation.

101. In this case, the Defendant has not produced evidence of any losses which it may sustain as a result of, or but for, the HK Injunction in the interim of the determination of the Arbitration. As the Plaintiffs have highlighted, the losses referred to by the Defendant in its evidence are losses and damages arising out of the alleged breach of the Contract which are the subject matter of the dispute between the parties in the Arbitration.

102. Nor am I persuaded that there is any sound basis for the Defendant's claim, that the Plaintiffs will not be able to make good any

loss which may arise as a result of the HK Injunction. The 2nd Plaintiff, of which the 1st Plaintiff is a wholly-owned subsidiary, is a large global industrial gas and engineering company which is listed on the New York Stock Exchange. There is no evidence that it is under any financial difficulty, and on the publicly available financial information of the 2nd Plaintiff as of 31 December 2022, the 1st Plaintiff has an operating cash flow of approximately US$8.9 billion.

103. The Defendant referred to the 2nd Plaintiff's annual report to the US Securities and Exchange Commission, in which it was stated that the Plaintiffs' group had "cash requirements which are to be paid through 2023 and recent reorganization of the (2nd Plaintiff) with shrinking its capital to the minimum required by law", as giving rise to concerns that the Plaintiffs would not be able to make good their undertaking to the Court to pay damages to the Defendant. However, the statement in the report under "Cash Requirements" also stated that the "total cash requirements of the Russia Ukraine conflict and other charges incurred for the year ended December 31, 2022 are expected to be immaterial".

104. On the available evidence, I am not persuaded that it is necessary to order fortification of the Plaintiffs' undertaking.

Disposition

105. For all the above reasons, the Defendant's application to discharge the injunction orders of 17 March 2023 is dismissed, and the HK Injunction is continued in terms of the Plaintiffs' summons of 17 March 2023 as amended by the Order dated 24 March 2023.

106. The Defendant's application for amendment of the SOC in the Russian Proceedings referred to "offences" alleged against the 2nd Respondent, Commercium Immobilien-und Beteiligungs GmbH, on the basis of the Plaintiffs' use of a corporate structure which preclude the Defendant from satisfying its claims from the Plaintiffs' assets, in reliance on the Sanctions, and on compliance with the Sanctions. For the avoidance of any doubt, to the extent that the Russian Proceedings include claims of criminal offences under Russian law - and this has not been addressed by either party nor by the experts - the HK Injunction will not extend to such claims as they should not come within the ambit of the arbitration agreement.

107. The costs of the summons of 17 March 2023 are to be in the cause of the Originating Summons and the costs of the summons to discharge are to be paid by the Defendant to the Plaintiffs. These include any costs reserved. Orders *nisi* are made in these terms, which shall be made absolute unless application for variation is made within 14 days.

(Mimmie Chan)
Judge of the Court of First Instance
High Court

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