Neutral Citation Number: [2025] EWHC 1842 (Comm)

Case No: CL-2025-000010 and CL-2025-000091

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

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

Date: 18/07/2025

Before :
MR JUSTICE FOXTON

- -

Between :

J.P. MORGAN INTERNATIONAL FINANCE LIMITED	**Claimant/ Part 20 Defendant**
- and -	
WEREALIZE.COM LIMITED	**Defendant/ Part 20 Claimant**
And Between :	
(1) CHARALAMPOS KARONIS **(2) DIMITRIOS MAVROGIANNIS** **(3) DIMITRIOS MICHALOGIANNAKIS** **(4) THEODOROS KATSAS**	**Part 8 Claimants**
- and -	
J.P. MORGAN INTERNATIONAL FINANCE LIMITED	**Part 8 Defendant**

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- -

Rosalind Phelps KC, **Rupert Allen KC**, **Christopher Langley** and **Gillian Hughes** (instructed by **Freshfields LLP**) for the **Claimant / Defendant to Part 20 Defendant in CL-2025-000010 and the Defendant in CL-2025-000091**
Richard Lissack KC, **Robert Weekes KC**, **Timothy Lau**, **Warren Fitt** and **Charles Redmond** (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **for the Defendant / Part 20 Claimant in CL-2025-000010 and the Claimants in CL-2025-000091**

Hearing dates: 24, 25 and 26 June 2025
Additional written submissions 3 and 7 July 2025
Draft to the parties: 10 July 2025

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Approved Judgment

This judgment was handed down remotely at 2.30pm on Friday 18 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Foxton :

1. This is the expedited hearing of claims brought by WEREALIZE.COM LIMITED (**"WRL**") and four directors ("**the Directors**") of Viva Wallet Holdings Software Development S.A. ("**Viva**") nominated by WRL.

2. WRL and the Directors seek anti-suit injunctions to prevent J.P. Morgan International Finance Limited ("**JPM**") pursuing claims against the Directors in Greece arising out of their management of Viva, in which JPM is a shareholder ("**the Greek Proceedings**"). They argue that the claims brought in the Greek Proceedings involve a breach by JPM of a contract between JPM and WRL (and/or the Directors), or are vexatious and oppressive. Those claims are resisted by JPM, who also denies the court has jurisdiction to hear the Directors' claims.

THE BACKGROUND

The transaction and its aftermath

3. Viva is a Greek fintech company. JPM holds 48.51% of the shares in Viva, having acquired them by a contract dated 24 January 2022 for EUR 809m ("**the SPA**"). JPM injected EUR 100m into Viva at the same time. The remaining 51.49% in Viva is held by WRL.

4. The relationship of JPM and WRL as shareholders in Viva is, in the usual way, governed by a shareholders' agreement ("**the SHA**"). Viva became a party to the SHA by a Deed of Adherence executed on 16 December 2022. It will be necessary to consider some of the terms of the SHA in more detail in due course, but the following features should be noted:

    i) The SHA creates call options, and defines the circumstances in which JPM can acquire WRL's shares. In brief, JPM's call option was potentially exercisable in four periods at six-monthly intervals, but for the first three of these four periods, WRL was not bound to accept it if Viva had been valued below EUR 5 billion. WRL also had a call option, on different terms (in particular, JPM did not benefit from a "floor" valuation).

    ii) There was provision for Viva to have a board of 7 directors, four to be nominated by WRL, two by JPM, with a seventh "independent and non-executive director" to be nominated by JPM (the other six directors not being required to be "independent"). Voting was by simple majority, save that decisions on certain issues (so-called "Reserved Matters") required a level of shareholder approval which gave JPM a veto.

    iii) Clause 33 contained what was introduced as a "whole agreement" clause which created certain limitations on the types of claim which could be brought by and against certain persons. This clause is of central importance to the parties' dispute. Clause 38.5 provided for the enforcement of clause 33 by certain categories of person under the Contracts (Rights of Third Parties) Act 1999 ("**the 1999 Act**"), the operation of which was otherwise excluded by clause 38.6 of the SHA.

iv) Clause 41 provides that "this Agreement and any non-contractual obligations arising out of, or in connection with, it shall be governed by and interpreted in accordance with, English law."

v) Clause 42 contains a tiered dispute resolution clause, clause 42.5 of which provides for the exclusive jurisdiction of the English courts ("**the EJC**").

vi) Clause 43 provides for JPM and WRL to appoint and maintain agents in this jurisdiction for the service of process.

5. Viva's relationship with its shareholders is also governed by its articles of association ("**the Articles of Association**") which are governed by Greek law, and which, reflecting an obligation to this effect in the SHA, have been amended so as to replicate the various rights and obligations of shareholders set out in the SHA.

6. The co-founder of Viva, and the first claimant in the claim brought by the Directors, is Mr Charalampos Karonis ("**Mr Karonis**"). Mr Karonis is also a director of WRL, and is a Greek national domiciled in Greece.

7. The relationship between JPM, WRL and Viva has been acrimonious, albeit a fruitful one for the legal community in two jurisdictions.

8. On 17 January 2024, Viva issued defamation proceedings in the Greek courts against the three JPM nominated directors ("**the JPM Directors**") in relation to their interactions with the Bank of Greece. The following day, the Directors issued their own defamation proceedings in the Greek courts against the JPM Directors.

9. On 14 February 2024, JPM and WRL each commenced proceedings against the other in the Commercial Court, principally in connection with the valuation of Viva for the purposes of the call options, and an issue raised by WRL by amendment as to the circumstances in which JPM's call option became exercisable:

i) In its Particulars of Claim for what was essentially a dispute on the construction of the SHA, JPM made some broad and generalised assertions about WRL's and Mr Karonis' conduct in relation to the management of Viva in one paragraph. WRL responded by asserting (correctly) that the allegations were irrelevant. They did not subsequently feature.

ii) Dame Clare Moulder DBE in 2024 ([2024] EWHC 1437 (Comm)) upheld JPM's case that JPM's call option could be exercised anew in each option period, provided the earlier exercise of the option did not result in a concluded share transfer.

iii) WRL succeeded on appeal ([2025] EWCA Civ 57), the Court of Appeal holding that JPM had, in effect, "one shot" at exercising the JPM call option. There is a dispute between JPM and WRL, which has yet to be resolved, as to whether that shot has already been fired and missed its intended target. There were other issues of construction in the case, on which there was mixed success.

10. On 13 September 2024, Mr Karonis and WRL made a criminal complaint to the Greek authorities against 14 current and former JPM executives and associates, which made

allegations of attempted fraud and extortion in relation to WRL's entry into the SPA and the SHA. The complaint was dismissed by the Greek prosecuting authorities.

11. On 7 January 2025, JPM commenced a second set of proceedings in the Commercial Court seeking declaratory and injunctive relief premised on the assertion that WRL intended to act otherwise than in accordance with the "Reserved Matters" provisions of the SHA. By way of further explanation:

    i) JPM alleged that WRL "has wrongly threatened and/or caused Viva to threaten various actions that would be clear breaches of the SHA and are designed to undermine and remove JPM's rights under the SHA …".

    ii) There were a series of complaints about what WRL had asserted, or caused Viva to assert, or planned to do, using its control of Viva's board of directors.

    iii) WRL served a Defence denying any intention to breach the SHA, or to carry out the actions which JPM had alleged. It also served a Counterclaim asserting that the Greek Proceedings (addressed below and which had been commenced on 2 January 2025) should be restrained by an anti-suit injunction.

    iv) JPM no longer seeks to pursue its claims in that second set of Commercial Court proceedings. I have been unable to match the enthusiasm shown by the parties on the issue of whether this is because they had no merit in the first place, or because they achieved what they were intended to achieve in the light of WRL's Defence.

The Greek Proceedings

12. On 2 January 2025, JPM commenced proceedings against the Directors before the Multi-Member Court of First Instance of Athens. The claim was brought under Article 919 of the Greek Civil Code ("**GCC**") which provides:

> "Infringement against good morals (bonos mores)
>
> Whoever intentionally caused damages to another against good morals (bonos mores) is liable to compensate them."

13. Article 332 of the GCC provides:

> "Any agreement made in advance which excludes or limits liability from intentional conduct or gross negligence shall be null and void."

14. While the Greek law experts (Professor Valtoudis for WRL/the Directors and Professor Gortsos for JPM) failed to sign up to a single joint memorandum (an unsatisfactory state of affairs which does little to assist the court) the following matters regarding Articles 919 and 332 are common ground:

    i) Article 919 applies where the defendant intentionally causes damage to the claimant contrary to good morals.

    ii) The ingredients for Article 919 liability are (a) the commission by the defendant of acts or omissions contrary to good morals; (b) the commission of those acts with the intent to cause damage to the claimant or consciousness and a willingness

to accept the risk of such damage; (c) damage on the part of the claimant; and (d) the requisite causation.

iii) For the purposes of determining when conduct is contrary to good morals, regard is had to the conduct of the defendant taken as a whole, the purposes, means and methods used, and the "social morality" of "a person generally regarded as decent and reasonable thinking."

iv) There is no requirement for the defendant to breach some legal obligation (e.g. a contract or regulation). As the Greek Supreme Court noted in Case 661/2025, Article 919 is:

> "supplementary to Civil Code 914 and extends tortious liability, when there is no infringement of a particular right or legally protected interest, nor a violation of a provision of law, but the legal and moral sense requires compensation for the damage."

v) The effect of Article 332 is that liability under Article 919 cannot be excluded as a matter of Greek law.

15. It is also common ground that Article 919 claims can be made by shareholders of companies against the directors where the directors' conduct causes "direct damage" to the shareholders. Examples of cases in which such claims have succeeded include the violation of a shareholder's right of first refusal which had the effect of diluting or nullifying the shareholder's shareholding; the failure to distribute dividends; and the stripping of assets which prevented the shareholders from benefitting from expected future growth. It is clear that liability will be easier to establish in these circumstances where a direct intention on the part of the directors to harm the minority shareholder(s) can be proved. I was referred by Ms Phelps KC to an article by Associate Professor Eleftheriadis, discussing a number of cases deploying Article 919 in minority shareholder contexts.

16. Finally, I should record that it is common ground between the Greek law experts that a director has no relationship with the shareholder who nominates the director to the board and the shareholder is not liable for the acts of such a director nor liable to indemnify the director in respect of any liability the director incurs. Rather the director's duties are owed solely to the company. A Greek commentator has stated of a director appointed by a shareholder that the director:

> "is not linked by any particular legal relationship with the shareholder or shareholders who nominated him or her to the Board, nor is he or she certainly a representative of them."

17. So far as the factual case in the Greek Proceedings is concerned, in very brief summary, it is alleged that the Directors had "co-ordinated with each other in order to 'dominate' the Board of Viva and therefore Viva itself …" and "through a number of actions and omissions contrary to the legislative and regulatory framework … and to the accepted principles of morality … have violated and circumvented the rights of the plaintiff company as a shareholder in Viva" and "impaired the very essence of the plaintiff's shareholding rights in Viva". JPM has itself summarised the effect of its claims as follows:

> "[Mr Karonis], assisted by the other [Directors], has planned and implemented a series of wrongful actions concerning the administration, operation, business activities and transactions of Viva, as well as the relationship with the supervisory authorities of Viva, in order to:
>
> (a) on the one hand, purposefully and systematically deprive [JPM] of any ability to exercise influence over Viva, through the exercise of its statutory and contractual rights, in accordance with the Articles of Viva, Law 4548/2018, and the SHA; and
>
> (b) on the other hand, deprive [JPM] of its economic rights in Viva."

18. The damages sought in the initial complaint filed in the Greek Proceedings are EUR 916,939,161.45 (the total amount invested by JPM in Viva). This is said to constitute JPM's loss on the basis that the conduct of the Directors has effectively deprived JPM of the benefits of its shareholding, given the limited means by which JPM can derive economic value from the shareholding. While it would be very surprising if JPM's shareholding turned out to have no value (the premise of the quantification in the Greek Proceedings to date), the argument that the rights attached to a shareholding have been so curtailed as to amount to "constructive expropriation" is one which is encountered in legal argument (e.g. in "disguised expropriation" cases in investment treaty arbitration), and the argument that a minority shareholding has a lower value to the extent that the shareholders are at the mercy of the majority shareholder is a recognised principle of share valuation. While WRL may well be right that the quantum of the case advanced against the Directors in the Greek Proceedings is exaggerated, that is not a matter on which I can reach a final decision in these proceedings. Insofar as it is said that the size of the claim of itself reflects a subjective intention to vex the Directors or WRL, ambitious quantum claims are a common feature of litigation, and their effect on the recipient undermined when, as here, the pleaded case offers limited explanation or justification for the amount claimed.

19. Finally, there is a dispute between the parties as to whether a Greek court will apply Greek or English law to the claims. I return to this issue later.

The Commercial Court proceedings

20. As I have indicated, WRL sought anti-suit relief in respect of the Greek Proceedings in its counterclaim to the Commercial Court proceedings. It seeks an anti-suit injunction ("**ASI**") on the following bases:

    i) On the proper construction of the SHA, JPM has breached obligations owed to WRL under clauses 33 and 42 of the SHA in bringing the Greek Proceedings against the Directors.

    ii) On the so-called "quasi-contractual" basis that JPM is effectively asserting rights subject to the EJC in the Greek Proceedings.

    iii) The bringing of the Greek Proceedings against the Directors is vexatious and oppressive conduct by JPM so far as WRL is concerned, and should be restrained on that basis.

21. The Directors have also commenced proceedings in the Commercial Court, by way of a Part 8 Claim Form. The Directors seek ASI relief on the following bases:

    i) They are parties to and/or able to enforce clauses 33 and 42 of the SHA, which JPM has breached by bringing the Greek Proceedings.

    ii) The rights asserted against the Directors are derived from the SHA, and cannot conscionably be exercised otherwise than in accordance with the EJC.

    iii) The Greek Proceedings are vexatious and oppressive so far as the Directors themselves are concerned.

22. Issues arise as to whether the Directors' claim has been properly served and, more fundamentally, whether it could be served out of the jurisdiction.

CLAIMS FOR FIRST PARTY CONTRACTUAL ASI RELIEF

Clause 33 of the SHA

23. In my view, the best entry point to this complex set of claims is clause 33 of the SHA, because this lies at the heart of WRL and the Directors' complaints. Clause 33 appears under the heading "Whole Agreement". Paragraph 2.1 of Schedule 16 ("Definitions and Interpretation") states that "unless the context otherwise requires … headings do not affect the interpretation of this Agreement". Fortunately, it was not necessary to explore when "the context" might require a heading to affect the interpretation of a term in the SHA, because the "whole agreement" language appears in the body of the text as well.

24. Clause 33 provides as follows:

> "33.1 This Agreement sets out the whole agreement between the parties in respect of the subject matter of this Agreement and supersedes any previous draft, agreement, arrangement or understanding between them, whether in writing or not, relating to it. In particular it is agreed that:
>
> (a) no party has relied on or shall have any claim or remedy arising under or in connection with any statement, representation, warranty or undertaking, made by or on behalf of any other party (or any of its Representatives) in relation to the subject matter of this Agreement that is not expressly set out in this Agreement;
>
> (b) the only right or remedy of a party in relation to any provision of this Agreement shall be for breach of this Agreement; and
>
> (c) except for any liability in respect of a breach of this Agreement, no party (nor any of its Representatives) shall owe any duty of care or have any liability in tort or otherwise to any other party (or its respective Representatives) in relation to the subject matter of this Agreement.
>
> 33.2 Nothing in Clause 33.1 shall limit any liability for (or remedy in respect of) fraud or fraudulent misrepresentation.

33.3 Each party agrees to the terms of this Clause 33 on its own behalf and as agent for each of its Representatives".

25. To complete the references to clauses of the SHA relied upon in the context of this part of the case:

i) "Representative" is defined as:

> "in relation to a party, any Affiliate of that party and any director, officer, employee, agent, consultant, adviser or representative (including auditors, investment advisers and investment managers and independent valuers) of that party or any of its Affiliates, in each case from time to time".

ii) Clauses 38.5 and 38.6 provide:

> "38.5 The Representatives specified in Clause 33 shall have the right to enforce the relevant terms of that clause by reason of the Contracts (Rights of Third Parties) Act 1999. This right is subject to: (i) the rights of the parties to amend or vary this Agreement without the consent of any Representative; and (ii) the other terms and conditions of this Agreement".
>
> 38.6 Save as set out in Clause 38.5, a person who is not a party to this Agreement shall have no right under the Contracts (Rights of Third Parties) Act 1999 or any other statutory provision to enforce any of is terms."

iii) Clause 37 addresses "invalid terms" and provides:

> "37.1 Each of the provisions of this Agreement is severable.
>
> 37.2 If and to the extent that any provision of this Agreement:
>
> (a) is held to be, or becomes, invalid or unenforceable under the Law of any jurisdiction; but
>
> (b) would be valid, binding and effective if some part of the provision were deleted or amended,
>
> then the provision shall apply with the minimum modifications necessary to make it valid, binding and enforceable. All other provisions of this Agreement shall remain in force.
>
> 37.3 The parties shall negotiate in good faith to amend or replace any invalid, void or unenforceable provision with a valid, binding and enforceable substitute provision or provisions, so that, after the amendment or replacement, the commercial effect of the Agreement is as close as possible to the effect it would have had if the relevant provision had not been invalid, void or unenforceable."

iv) Paragraph 2.1(b) of Schedule 16 provides that "unless the context otherwise requires … references to an English legal term or concept will, in respect of any jurisdiction other than England, be construed as references to the term or concept which most nearly corresponds to it in that jurisdiction".

26. A number of issues arise as to the scope of this clause which I will resolve at this stage.

27. First, JPM contends that clause 33 is essentially concerned with the position at the date the SHA is concluded ("stopping the clock at the date of the shareholders' agreement and wiping the past away", as Ms Phelps KC put it) seeking to preclude the argument that there are collateral undertakings or promises which form part of the parties' bargain but are not to be found in the SHA, and to avoid claims based on pre-contractual conduct (most obviously claims for some species of misrepresentation or actionable non-disclosure). I accept that is one of the important functions which clause 33 serves, most obviously in the "chapeau" (which is an "entire agreement" clause in the *Alman & Benson v Associated Newspapers Group Ltd* 20 June 1980 sense) and clause 33.1(a). However, the argument that the remainder of clause 33.1 is so confined is more challenging, even accepting the requirement for clear words before a party is taken by contract to have given up their "normal rights and obligations" under the principle in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 and *Triple Point Technology Inc v PTT Public Co Ltd* [2021] UKSC 29, [108]:

i) Clause 33.1(b) appears to be directed at events occurring during the performance of the SHA, this being when breaches of the SHA would occur and when rights and remedies in relation to such breaches would arise.

ii) Clause 33.1(c) appears to be similarly so directed, because it has a carve-out of "liability in respect of a breach of this Agreement". The language of this sub-clause also appears to be forward-looking, in stating that no party or its Representatives "shall owe any duty of care … in relation to the subject matter of this Agreement" (language which is much wider than simply liability in tort for pre-contractual statements), and the same is also true, albeit perhaps less compellingly, about the words "shall … have any liability … in relation to the subject matter of this Agreement."

iii) The clear impression that clause 33.1(c) is forward-looking is reinforced by the definition of "its Representatives" which applies to Affiliates, directors, officers, etc "from time to time", as well as a category of identified Representatives (e.g. investment advisors, managers and valuers) who are unlikely candidates for pre-contractual liabilities. While I accept that the definition of "Representative" is used elsewhere in the SHA (e.g. in relation to confidential information), the use of the same definition in clause 33.1(c) in terms which are obviously forward-looking remains significant. It is also reinforced by the words "in relation to the subject matter of this Agreement", the SHA essentially seeking to regulate matters occurring after its conclusion.

iv) While I accept that exclusion and limitation clauses are a context in which surplusage might be expected (given the tendency for "saturation bombing" in clauses of this type), JPM struggled to identify a realistic scenario where clauses 33.1(b) and (c) would have a substantive effect not achieved by clause 33.1(a) in a pre-contractual context. The absence of a realistic liability for the clauses to bite

on if JPM's time-limited construction is to be adopted is a matter which can be relied upon to give the sub-clauses an interpretation consistent with their language (the only candidate offered was a claim in lawful means conspiracy relating to events leading up to the conclusion of the SHA). This was recognised as a relevant consideration in the construction of exemption clauses even in the context of a more hostile approach once adopted to the construction of exclusion and limitation clauses, in the third of the *Canada Steamship Lines Ltd v R* [1952] AC 192 guidelines for the construction of clauses said to exclude liability for negligence.

v) Ms Phelps KC suggested that any construction which did not limit the operation of clause 33.1(c) to claims arising out of matters occurring at or prior to the completion of the SHA would have surprising and uncommercial consequences, because the clauses would restrict the ability to claim against directors of Viva for misfeasance in office. However, clause 33.1(c) only takes away claims by members of one grouping (a party and its Representatives) against another grouping (another party and its Representatives) and therefore nothing would prevent Viva, which became a party to the SHA and which I shall assume for present purposes is a "party" for the purposes of clause 33.1(c), suing its own directors. Nor would clause 33.1(c) prevent the derivative exercise of such rights (which would still involve the assertion of a liability of Viva's directors to Viva). JPM accepted that, if it applied post-contract, clause 33.1(c) could be engaged by a claim by JPM qua shareholder of Viva against the directors of Viva appointed by WRL. However, I would not regard a clause which excluded a direct claim by a shareholder against the directors of a company, but left the company's claims against the directors intact, as a particularly unusual outcome, still less one sufficiently surprising to reverse the construction argument back in JPM's favour.

28. Second, an issue arises as to whether those who have agreed that "no party (nor any of its Representatives) shall owe any duty of care or have any liability in tort or otherwise to any other party (or its respective Representatives) in relation to the subject matter of this Agreement" have also implicitly promised not to bring proceedings asserting such a liability. If I was approaching this question with a blank legal canvas, I would see strong grounds for concluding that they had:

i) If the parties had been asked, when concluding clause 33.1(c), whether it would be open to one party to bring proceedings to assert a liability which they had agreed with the defendant the defendant should not have, or to do so in a jurisdiction in which the court would not give effect to the "no liability" promise they had made, I would have expected a particularly testy "of course not" to be forthcoming.

ii) It has been held that a promise by A to B to indemnify C against a liability or loss involves an implied promise by A to B not to sue C to establish such a liability. In *Deepak Fertilisers and Petrochemicals Corporation v ICI Chemicals and Polymers Ltd* [1998] 2 Lloyd's Rep 139; [1999] 1 Lloyd's Rep 387 (CA), both Rix J at first instance and the Court of Appeal had little difficulty in accepting this proposition. Rix J at p.166 stated "in the present case, it seems to me that a promise to indemnify ICI or to give ICI the benefit of their insurance is an implicit promise not to sue ICI (of course within the scope of the indemnity and the insurance). After all, a promise to hold harmless or to procure waiver of

subrogation is wholly incompatible with a right to sue." The Court of Appeal, at [77], agreed:

> "An agreement to indemnify and hold harmless contains within it by necessary implication an implied term not to sue. It meets any or all of the well known tests for implication of terms. It would be absurd to allow Deepak to sue ICI with the consequence that ICI sues Davy and Davy then have to sue Deepak for acting in breach of art. 10.10.3 by suing ICI."

iii) That conclusion receives some impetus from the effect of Article 15 of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ("**Rome II**") which provides that the law applicable to a non-contractual obligation will govern "the grounds for exemption from liability, any limitation of liability and any division of liability". Where a contract between the parties provides for an exclusion of liability in tort in a manner permitted by the applicable law of the contract, but such an exclusion is not valid under the applicable law of the tort, the prevalent view appears to be that the law applicable to the non-contractual obligation is determinative. That view has the formidable support of Professor Andrew Dickinson, who states in *Dicey, Morris & Collins on the Conflict of Laws* (16th), [34-019]:

> "[A] situation may arise in which the defendant relies on the terms of a contract in answer to a claim made against it otherwise than for breach of contract. If a term contained within a contract between the claimant and defendant purports to exclude or restrict the defendant's liability, the question arises as to whether that term can be successfully pleaded as a defence to a claim based (for example) on a tort/delict which is governed, under the Rome II Regulation, by a law different from that which governs the contract. In principle, this question should be taken to be concerned with 'the grounds for exemption from liability' or 'limitation of liability', which must, in accordance with Art.15(b) of the Rome II Regulation, be addressed under the law applicable to the non-contractual obligation and not the law applicable to the contract. If, however, the law to which Art.15(b) points recognises the possibility that a contractual term may offer a defence to the non-contractual claim, the law applicable to the contract must then be referred to in order to determine any matters incidentally in dispute concerning the validity and interpretation of that contract (for example, whether the liability falls within the scope of an exclusion clause)."

To similar effect, Professor Dickinson states in *The Rome II Regulation* (2008), [14-15]:

> "Under Art 15(b), the law applicable to a non-contractual obligation under the Rome II Regulation will determine whether liability with respect to that non-contractual obligation may be excluded or limited by a prior agreement between the parties or by a unilateral act. The agreement in question may be embodied in a contract between the parties or may be expressed or implied in circumstances where there is no intent to create a legally binding relationship, for example in the case of participants in sporting activities. If the law applicable under the Rome II Regulation requires a contract, the validity and construction of any contract will be a matter for the law

> applicable to that contract under the Rome I Regime. Otherwise, the effectiveness of an agreement or other act in excluding or limiting liability will be a matter for the law that applies under the Rome II Regulation, without prejudice to the possibility that a contracting party may argue that the commencement of proceedings based on a non-contractual obligation constitutes a breach of contract entitling it to a remedy."

iv) That choice of law outcome is capable of having a negative impact on attempts by parties to agreements with an international operation but governed by English law to regulate their mutual liabilities (or those of related parties) in tort, in circumstances in which the English law of contract is not itself sufficient to make English law the applicable law of the non-contractual obligation in issue (see [180]-[182] below). However, those consequences will be avoided to the extent that the provision limiting or restricting non-contractual liability in the English law contract is interpreted as a promise not to bring proceedings to assert such a liability. For example footnote 167 to [34-019] of *Dicey* provides:

> "In some cases, the bringing of a non-contractual claim may be argued to involve a breach of contract, in which case the law applicable to the contract may apply directly to determine whether, for example, that claim may be restrained by an injunction (see, e.g. National Westminster Bank Plc v Utrecht-America Finance Co [2001] EWCA Civ 658, [2001] 3 All E.R. 733; National Westminster Bank Plc v Rabobank Nederland [2007] EWHC 1742 (Comm), [2008] 1 Lloyd's Rep. 16)."

29. However, far from being blank, the canvas has been significantly completed (and on one view finished) by contributions from higher courts, including from judges universally acknowledged as "Old Masters" of the common law world:

i) The starting point is *Gore v Van der Lann* [1967] 2 QB 31. The claimant had obtained a free bus pass from the Liverpool Corporation, on terms which provided "neither the Liverpool Corporation nor any of their servants or agents responsible for the driving, management, control or working of their bus system, are to be liable to the holder ... for ... injury ... however caused." After being injured, the claimant sued the bus conductor for negligence, the conductor seeking to rely on the "no liability" provision. Liverpool Corporation applied to stay the claim under s.41 of the Supreme Court of Judicature (Consolidation) Act 1925.

ii) The stay application failed. It was accepted in that case that the conductor's own reliance on the term could not succeed (due to privity of contract issues which do not arise here). Wilmer and Salmon LJJ also found that the relationship between the claimant and the Liverpool Corporation was one in contract, with the result that the "no liability" term was rendered void by s.151 of the Road Traffic Act 1960. This provides that "a contract for the conveyance of a passenger in a public service vehicle shall, so far as it purports to negative or to restrict the liability of a person in respect of a claim which may be made against him in respect of the death of, or bodily injury to, the passenger while being carried in, entering or alighting from the vehicle, or purports to impose any conditions with respect to the enforcement of any such liability, be void." That would appear to have rendered any implied promise not to sue invalid as well, given the words "or

restrict" and the reference to "impos[ing] any conditions with respect to the enforcement of any such liability."

iii) Wilmer LJ reached this conclusion by applying the contra proferentem rule in its full pre-UCTA 1977 rigour ("in my judgment the conditions are to be construed strictly against the corporation who put them forward. It is not enough to say that a promise not to sue the employee is to be implied. At the best for the corporation, the condition relied on is ambiguous, and any ambiguity must be resolved in favour of the plaintiff.") Salmon LJ dealt with the issue even more briefly, noting that the argument "presupposes a contractual promise by the plaintiff not to sue the corporation's servant. I do not think that any such promise can be implied." Harman LJ did not address this issue, proceeding on the basis that the Liverpool Corporation had not shown a sufficient interest in obtaining a stay.

iv) While only one of two reasons for Wilmer and Salmon LJJ's conclusion, that does not prevent the conclusion on construction being part of the ratio of the case (*Miliangos v George Frank (Textiles)* [1975] QB 487). However, *Gore* might be successfully parried by the observations of Lord Wilberforce and Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 843 and 851 as to the fact that the strained construction of exemption clauses was no longer necessary, now that Parliament had intervened in the form of UCTA 1977. However, matters do not end there.

v) In *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715, a clause on a bill of lading provided "It is hereby expressly agreed that no servant or agent of the carrier (including any person who performs work on behalf of the vessel on which the goods are carried or any of the other vessels of the carrier, their cargo, their passengers or their baggage, including towage of and assistance and repairs to the vessel and including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act neglect or default on his part while acting in the course of or in the connection with his employment."

vi) An important issue in the case was whether the shipowner, on the assumption that it was not the contractual carrier, was entitled to rely on the quoted text as a defence. The cargo claimants argued that it was not, for various reasons including that the text was "merely a promise not to sue third parties, enforceable only by the carrier" (i.e. a *Gore v Van der Lann* case). The case was not concerned with the question of whether the clause was capable of operating both as a defence by the party sued and an agreement not to sue.

vii) At first instance ([1999] CLC 1769, 1785), Colman J accepted that argument, on the basis that were the quoted text to constitute an exclusion of liability, it would entirely supersede the narrower and more nuanced exclusion and limitation of liability in the text which followed. He concluded:

> "that first part has the contractual function of prohibiting actions against the servants or agents of the carrier, a prohibition which can be enforced by the carrier by injunction: see *Nippon Yusen Kaisha v International Import & Export Co Ltd ('The Elbe Maru')* [1978] 1 Ll Rep 206."

viii) The Court of Appeal ([2001] CLC 696, Morritt VC, Chadwick and Rix LJJ) agreed ([116]), although Rix LJ noted that he was concerned only with what the text in question was seeking to do, not with its effectiveness as a promise not to sue.

ix) Before those courts, possibly due to the failure to spot the unintentional omission of some of the words in the relevant clause, the argument proceeded on the basis that if the clause took effect only as an agreement not to sue and not as an exclusion, it could not avail the shipowner on privity of contract grounds.

x) However, in the House of Lords, that conclusion was reversed. Lord Bingham at [24] stated:

> "Colman J [2000] 1 Lloyd's Rep 85, 99-100 interpreted this provision as a covenant not to sue, enforceable by injunction, such as was considered in *Nippon Yusen Kaisha v International Import and Export Co Ltd (The Elbe Maru*) [1978] 1 Lloyd's Rep 206. All three members of the Court of Appeal [2001] 1 Lloyd's Rep 437, 461, para 116; 471, para 169; 476, para 201 agreed with him. Given this unanimity of opinion, one is reluctant to disagree. But it is in my judgment impossible to spell a covenant not to sue out of the language of this clause, as the Court of Appeal found it to be in *Gore v Van der Lann* [1967] 2 QB 31. The language construed in *The Elbe Maru* was strikingly different."

The House of Lords concluded that the relevant clause would have been effective to exclude liability, but for the fact that the apparent width of the first sentence of the bill of lading was qualified by another term: the bill was a contract of carriage for Hague Rule purposes, those rules were incorporated by clause 2 as a matter of contract, and they had "paramount" effect by virtue of Article III Rule 8 and set the minimum level of the contractual carrier's liability.

xi) Lord Steyn said that part 1 of the clause was "not capable of being read as a mere" – that word again – "covenant not to sue" ([55]).

xii) Lord Hoffmann dealt with the matter at rather greater length. First, he noted at [94] and again at [97] that the carrier had contracted on the shipowner's behalf in entering into that part of the bill of lading contract contained in part 1 of clause 5. At [100] he stated of the "mere covenant not to sue":

> "[I]n my opinion, and I understand it to be that of all your Lordships, part (1) simply cannot be read as a covenant not to sue. It does not say that the shipper is not to sue the third party. It says that he shall not be under any liability. A similar point arose in *Gore v Van der Lann* … in which the plaintiff contracted with the Liverpool Corporation that their bus drivers would not be liable to her for any damage however caused. The corporation did not purport to contract as agent for the drivers and when the plaintiff sued a driver it was conceded that he could not rely upon the exemption … But the corporation intervened to claim that the contract was a covenant not to sue the drivers which they could enforce. The Court of Appeal rejected this argument, saying that the agreement could not be construed as containing such a covenant. So it seems to me that either part (1) is a

contract of exemption between shipper and third party or it is wholly ineffective. In my opinion it is the former."

xiii) Lord Hobhouse at [145] stated "as regards the argument that the first part of the second paragraph of clause 5 should be construed as a contract not to sue, I do not consider that this is a possible construction of the wording." While it is possible to read this paragraph as rejecting the argument that part 1 could "only" be read as a covenant not to sue, that would not be a fair reflection of the tenor of the judgments overall.

xiv) Lord Millett at [195] stated that "the opening words of the clause are words of exemption; they cannot be construed as a covenant not to sue. They are the very antithesis of such a covenant, which presupposes the continued existence of liability, albeit a liability which the covenantor undertakes not to enforce. The present clause by contrast operates to prevent any liability from arising in the first place."

30. Mr Weekes KC sought to distinguish *The Starsin* on two bases:

i) First, on the basis that it was "a very narrow decision based upon the wording of that particular clause". However, subject to one point arising from the circumstances of this case to which I return below, I am unable to discern a material difference between the "no servant …. shall in any circumstances whatsoever be under any liability whatsoever" clause in *The Starsin* and the "no party (nor any of its Representatives) shall owe any duty of care or have any liability in tort or otherwise to any other party (or its respective Representatives)" here. Further, the House of Lords reached its decision by applying a general proposition which *Gore v Van der Lann* was held to establish.

ii) Second, because in this case clause 38.5 gave the Representatives the right "to enforce" clause 33.1. I was not persuaded that this point went anywhere:

a) In this case, as contracting parties to clause 33 by virtue of clause 33.3, the Representatives are in the same position as the shipowners in *The Starsin* who were held to be contracting parties to the relevant promise (see Lord Hoffmann at [100]). However, the relevant exclusion of liability in that case did not create a promise not to sue. If that is the position as between the contracting parties, it is difficult to see why a provision for third party enforcement justifies a different outcome.

b) In any event, clause 38.5 is a rather curious clause. It purports to confer a third party right on the Representatives under the 1999 Act, albeit one capable of being "defeased" by "the parties"' agreement to amend or vary clause 33. Yet those same Representatives are, by virtue of clause 33.3, original contracting parties to clause 33.1, and it is difficult to see how the acts of other parties to clause 33.1 could modify its terms to their disadvantage without their consent. This suggests that clause 38.5 was either unnecessary, or intended to have a "back-up" operation in circumstances in which the attempt to create contractual privity in clause 33.3 had failed. It is difficult to see why the wholly unnecessary step of purporting to confer lesser, third party, rights on Representatives who

already enjoyed first party rights in relation to clause 33.1 impacts the issue of construction here.

c) To the extent that Mr Weekes KC relied on the words "shall have the right to enforce the relevant terms of that clause" in clause 38.5, that simply parrots the language of s.1(6) of the 1999 Act ("Where a term of a contract excludes or limits liability in relation to any matter, references in this Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation."). As Tomlinson LJ noted in *Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP* [2013] EWCA Civ 367, [28]:

> "I do not consider that the distinction drawn by the judge between a right of action and a contractual defence can in this context be sustained. Section 1(6) of the 1999 Act effectively provides that for the purposes of the Act no such distinction shall be drawn. In the language of ss. 1(6) and 8(1)(a) the third party availing himself of the exclusion is the equivalent of his enforcing a term in the contract. The question therefore whether the right to 'enforce' the exclusion is subject to the arbitration clause cannot be resolved simply by characterising it, rightly, as a contractual defence."

31. At the hearing, Mr Weekes KC supplemented his argument by reference to two implied terms. The first is an implied covenant not to sue save where clause 33.2 applies. The second is an implied covenant not to sue in a jurisdiction which would not give effect to clause 33.1(c), save where clause 33.2 applies. The second formulation has given me real pause for thought, and I have carefully considered whether I can accept it while remaining faithful to decisions which bind me. In that regard, I have been acutely aware that court decisions as to the construction of particular types of clause may influence one party's decision (with the benefit of legal advice) to give that clause a free pass in negotiations when they would not otherwise have done so (c.f. Lewison, *The Interpretation of Contracts* (8th), [4.61], text to footnote 165). While arguments of that kind can lead to "islands" of increasingly unrealistic contractual interpretations, they have an undoubted traction at first instance, even if more senior courts may feel able to "draw a line under the authorities to date and make a fresh start" (cf. *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [12]).

32. None the less, and not without some diffidence, I have concluded that neither *Gore* nor *The Starsin* preclude me implying the second term for which Mr Weekes contends, prohibiting suit in a jurisdiction which would not give effect to the agreement that the Directors were not to have the relevant liability:

i) While in *Gore v Van der Lann*, the relevant clause would not have been effective as an exclusion in the place where proceedings were brought, this was either because it could not be availed of by the defendant in those proceedings as a matter of privity of contract (which is not the position here) or because it was unenforceable as a matter of statute law, a conclusion which would appear to have applied as much to a covenant not to sue. It was not, therefore, a case in which an otherwise effective agreement between parties that one of them was to have no liability of a certain kind to the other was being negated by proceedings in a forum which would not give effect to that agreement.

ii) The entire premise of *The Starsin* was that the exception would be effective on the terms of the agreement if it was open to the shipowner to rely upon it. At first instance and in the Court of Appeal, it was held it was not (for privity reasons), but not otherwise. In the House of Lords, it was found that there was no privity issue, and that the exception took effect save as contractually qualified by other terms in the contract between the shipowner and the carrier (viz. the paramount clause).

iii) Neither case, therefore, addresses a position in which there is a contract, valid under its applicable law, between two parties that they will each have no liability to the other in certain circumstances, the effects of which one party wishes to avoid by bringing proceedings in a jurisdiction which will not give effect to their agreement.

iv) Reverting to Lord Millett's formulation at [195], the implied term here is subservient to the purpose of preserving clause 33's role in ensuring that no liability arises, rather than accepting that such a liability has arisen but agreeing not to enforce it.

v) These are the circumstances here, and in such circumstances, I am satisfied that the implied term accepted so readily by Rix J and the Court of Appeal in *Deepak Fertilisers* is equally applicable, and is not precluded by authority.

33. The conclusion on this issue has a significant impact on the remainder of the case:

i) If I am right in my view that JPM has promised the Directors not to bring the Greek Proceedings, then I did not understand JPM to submit that an ASI should not follow on conventional *Angelic Grace* principles (see *National Westminster Bank plc v Utrecht America Finance Co* [2001] EWCA Civ 658, [35] for their application in this closely analogous area), provided the Directors could establish that the court had and should exercise jurisdiction (matters of which, as I explain below, I am satisfied). To the extent that it is said that the defamation proceedings commenced against the JPM Directors, or the criminal complaint filed and rejected, are reasons why the court should refuse to enforce what I have found to be JPM's promise not to sue the Directors in the manner of the Greek Proceedings, I am wholly unpersuaded by this. The former may well have involved a breach of clause 33.1(c), but JPM did not advance an argument to this effect, and I would not in any event have treated the Directors' assumed breach as a reason to refuse to enforce JPM's promise. The criminal complaint did not, in my view, constitute a breach of clause 33 – clause 33.1(c) is concerned with private law liabilities "to any other party", language wholly inapposite to a criminal complaint to public authorities.

ii) If I am wrong, then the contrary conclusion has the potential significantly to impact the other arguments in this case, because it would mean that in the place in which any obligation limiting JPM's right to sue the Directors would most obviously be found, it is not there.

34. Third, there is the issue of whether clause 37.2 has the effect that clause 33.1 ceases to operate to the extent that it is inconsistent with Greek law (given the common ground at [14(v)] above). This point was dealt with briefly by JPM at the hearing, and I am

satisfied that this assessment of its merits when deciding where to allocate time was amply justified:

i) The SHA is governed by English law, which famously leaves a relatively limited role for illegality under foreign law to prevent enforcement of the contractual bargain or liability for failing to do so (*Banco San Juan Internacional Inc v Petróleos De Venezuela S.A.* [2020] EWHC 2937, [75]-[83]). It would be extremely surprising if the contractual immunities afforded by the SHA were to be rendered ineffective merely because there are jurisdictions which would not give effect to them, because of this fairly standard piece of contractual boilerplate.

ii) I am satisfied that clause 37 is concerned with those jurisdictions where the SHA requires conduct to be performed, or its applicable law (i.e. illegality under the governing law of the agreement or of a place where the contract as interpreted in accordance with its governing law required particular steps to be taken).

iii) That construction is consistent with the terms of clause 37.2 and, especially, clause 37.3, which appear to contemplate a single adjustment to the relevant clause of the SHA, rather than the jurisdiction-by-jurisdiction or "lowest common construction" solution which JPM's argument would necessitate.

iv) By contrast, JPM's construction would allow any party to bring proceedings in a jurisdiction of no relevance to the contract for the purpose of securing a finding that clause 33.1(c) was not valid, which would then trigger an obligation to re-negotiate the clause for all purposes to the extent necessary to overcome that finding.

35. Fourth, there is the question of whether the liability asserted against the Directors in the Greek Proceedings is "a liability … in relation to the subject matter of" the SHA. In my view, it clearly is:

i) The subject matter of the SHA is broadly defined in Recital (C) as follows:

> "JPM and WRL are entering into this Agreement in order to set out the terms governing: (a) their relationship as shareholders in the Company; (b) the management and administration of the affairs of the Company; and (c) the potential exit by either JPM or WRL as shareholders in the Company, in each case following the Effective Date."

ii) The SHA addresses the governance of Viva, including which matters require JPM approval (clause 5), the appointment and removal of directors and the conduct of board meetings (clause 6), the conduct of shareholder meetings (clause 7) and information and reporting (clause 10). Under clause 5.6, each party "agrees that it shall comply with, and fully and punctually perform any obligations to which it is subject under, the Articles, and the Company shall, so far as it is legally able, procure that (and the Shareholders shall, so far as they are legally able, exercise their rights in relation to the Company to procure that) each other Group Member shall comply with, and fully and punctually perform any obligations to which it is subject under such Group Member's constitutional documents."

iii) The Greek Proceedings assert claims against the Directors arising from their conduct as directors of Viva which are alleged to have adversely affected JPM's rights as shareholders in Viva and its rights under the SHA in relation to the conduct of Viva. The complaints include interference with JPM's rights to nominate directors and the activities of the directors so nominated or intimidation intended to cause JPM to part with its shares in Viva.

iv) The complaints in the Greek Proceedings centre on three types of rights: governance rights, information rights and veto rights. Rights of all three kinds form part of the subject matter of the SHA and have featured in varying degrees in correspondence and statements of case concerned with disputes between JPM and WRL under the SHA. The fact that they may also be found in the Articles of Association (amended to reflect the SHA, as the claim in the Greek Proceedings notes) or Greek company law in the form of Law 4548/2018 does not change the position. Clause 33 is not concerned with claims related to a subject matter *only* dealt with in the SHA, and the clause would lose almost all of its effect and utility if this was not the case (cf. the finding that minority shareholder claims formulated by reference to a company's articles of association which mirrored the terms of the SHA fell within the arbitration agreement in the latter in *NDK Ltd v Huo Holding Ltd* [2022] EWHC 1682 (Comm)).

v) A connecting factor like the "subject matter" of an agreement requires the test for the relevant nexus to be approached with a degree of abstraction, rather than at an unduly granular level. It is not sufficient, to establish a lack of connection, to point to individual features of the broader allegations in the complaint in the Greek Proceedings which have no counterparts in the SHA (see by analogy *Lombard North Central Plc v GATX Corpn* [2013] Bus LR 68, [14]).

vi) JPM raised a similar argument as to whether the Greek Proceedings involve "a dispute … arising out of or in connection with" the SHA for the purposes of clause 42 (putting the identity of the parties aside). That argument was referred to only briefly in a footnote in JPM's skeleton, and not otherwise developed, a decision which fairly reflected its merits.

36. Fifth, there is the question of whether the Greek Proceedings fall within the proviso in clause 33.2, and particularly whether paragraph 2.1(b) of Schedule 16 has the effect that the Article 919 claim falls within clause 33.2:

i) Clause 33.2 is a provision of a kind commonly found in entire agreement clauses. There is a rule of English law that a party cannot, as a matter of public policy, exclude liability for its own fraud (*S Pearson & Son Ltd v Dublin Corporation* [1907] AC 351). The contours of the operation of this principle outside the tort of deceit are not entirely clear (*Chitty on Contracts* (33rd), [18-067]).

ii) In *Thomas Witter Ltd v TBP Limited* [1996] 2 All ER 573, Jacobs J held that a widely worded entire agreement clause which did not expressly exclude fraud purported to apply to fraud, and was for that reason alone unreasonable and unenforceable under s.3 of the Misrepresentation Act 1967. That controversial decision (see *Zanzibar v British Aerospace (Lancaster House) Ltd* [2000] 1 WLR 2333), which counterintuitively incentivised claimants to argue for an expansive reading of "entire agreement" clauses and defendants for a narrower scope, led

transaction lawyers drafting agreements which were subject to English law to include fraud carve outs in entire agreement and other exemption clauses (see *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd* [2016] EWHC 2908 (Comm), [124]).

iii) The concept of fraud under English law generally connotes conscious dishonesty or impropriety of some kind, and it is generally treated as a "thing apart" under English law because parties contract with one another in the expectation of honest dealing (*MAN Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm), [209]).

iv) It has been held that a "fraud" carve out from an exemption clause will generally only be engaged by "liability in relation to which fraud is a necessary averment" and that "the only workable criterion is whether an allegation of fraud is a necessary ingredient of the legal basis on which loss is claimed: in other words whether an allegation of fraud is a necessary averment to support a cause of action" (*Interactive E-Solutions JLT v O3B Africa Ltd* [2018] EWCA Civ 62, [23], [25]). While that interpretation is not determinative of this aspect of the present case, the practical considerations which led Lewison LJ to construe the carve-out before him in this way apply with equal force in this case. This construction ensures that the parties can, when the relevant claim is formulated, determine whether or not the carve out is engaged. This would not be the case if the proviso was capable of being triggered by a claim which did not have fraud as a necessary averment, but where it might be found at trial that the conduct giving rise to the claim had involved dishonesty. I do not accept that the fact that clause 33.2 falls to be applied to a claim under Greek law justifies a different approach in this case. It is first necessary to interpret clause 33 as a matter of English law, as the applicable law of the agreement. Having done so, that interpretation will fall to be applied to claims under other applicable laws with the benefit of paragraph 2.1(b) of Schedule 16. If, as a matter of English law, clause 33.2 requires claims of which fraud is a necessary averment, then it extends to claims under some other law where the concept which most nearly corresponds to fraud is a necessary averment.

v) While English law prohibits a party excluding liability for its own fraud, it has no similar rule of public policy in relation to excluding liability for intentional harm. Indeed, the intentional causing of harm is not, per se, tortious under English law (*Allen v Flood* [1898] AC 1), nor does a bad motive make the exercise of a contractual right unlawful (*SNCB Holding v UBS AG* [2012] EWHC 2044 (Comm), [73]). Were matters otherwise, there could be no concept of efficient breach of contract. The exclusion of liability for loss intentionally caused is a well-known drafting option (e.g. Article 25 of the Warsaw Convention Relating to International Carriage by Air) but that option was not adopted here. The Law Commission and Scots Law Commission, *Exemption Clauses*, rejected the suggestion that clauses which excluded liability for intentional acts should be made void regardless of any assessment of their reasonableness, noting that some deliberate or intentional breaches of contract "would be innocent or even praiseworthy" (Law Com. No.69, Scot. Law Com. No.39 (1975) paras 287–289). Similarly, "gross negligence" occupies no special status so far as the ability to exclude liability under English law is concerned. When the parties have used that

expression as a proviso to an exclusion or limitation clause, the courts have held that it involves a difference of degree, rather than kind, from negligence simpliciter (*The Hellespont Ardent* [1997] 2 Lloyd's Rep 547, 587; *Armitage v Nurse* [1998] Ch 241, 254 and *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] 1 CLC 627, [161]).

vi) When asking which "term or concept" of Greek law "most nearly corresponds to" fraud or fraudulent misrepresentation, it is *conceptual similarity* which matters, not similarity of consequence. The mere fact that Greek law makes it impossible by an agreement in advance to exclude or limit liability for a wider class of conduct than is the case under English law does not mean that such types of conduct "most nearly correspond" to fraud or fraudulent misrepresentation. The concept which most closely corresponds with fraud is the deception of one party by another. The Greek law evidence did not address the concept of fraud under Greek law, and JPM resisted a late attempt by WRL to adduce evidence of Greek law on this subject. However, it is absolutely obvious that, like every civilian system, Greek law has a concept of the deliberate deception of another person. In particular, I am not persuaded by the suggestion that "the intentional infliction of harm involves or is akin to dishonesty", if dishonesty is used as a synonym for fraud. The former is not actionable per se at all under English law, the latter always so. Professor Gortsos' use of the word "dishonest" as a synonym for "contrary to good morals and [with] intent to cause damage" does not assist in determining whether Article 919 is the nearest equivalent to the English law concept of fraud.

vii) It is not a necessary averment of a claim under Article 919 of the GCC that the defendant has acted fraudulently in the sense of clause 33.2. Nor, had this been enough, am I persuaded that the allegations in the Greek Proceedings involve allegations of fraud as a matter of fact in the relevant sense, even though these were not necessary averments for the purpose of formulating an Article 919 claim. The allegation, for example, that the Directors purportedly sought to impose a board charter on Viva which had been "dishonestly designed to prevent [JPM's] nominated directors from being able to perform their duties", is not an allegation of fraud or fraudulent misrepresentation in the clause 33.2 sense.

37. Finally, there is WRL and the Directors' argument pleaded, not developed orally or in writing but not abandoned either, that JPM is precluded from contending that clause 33.1 is unenforceable as a matter of Greek law because of clause 30.1(e) of the SHA which provides:

> "30.1 Each Party warrants to each other party as at the date of this Agreement that:
>
> (e) this Agreement (and the other agreements to be entered into by it in connection with this Agreement) constitutes a legal, valid and binding obligation of it enforceable in accordance with its terms by appropriate legal remedy".

38. It is tempting to deal with this argument with the single word riposte, "really?", which would at least ensure that the effort addressing it was proportionate to that consumed in its deployment. Going a little further, I am not persuaded that this involves a promise

at the date of the SHA that every term in it will be given effect by the law of every jurisdiction in the world in any future proceedings, which is what WRL/the Directors' submission requires. Clause 33 does create enforceable rights and obligations under its applicable law (English law). Even under Greek law, clause 33 will have effect in respect of claims falling outside Article 332 of the GCC. Taken to its logical conclusion, this argument would seem to involve the improbable outcome that the parties have promised that no provision will fall foul of UCTA 1977 or the doctrine of restraint of trade. I rather suspect, although it is not necessary to decide this, that the warranty is concerned with issues of invalidity which relate to the parties or some feature of them rather than a general provision of law in a particular jurisdiction of the kind in issue here. In any event, this piece of boilerplate does not assist WRL and the Directors here.

Clause 42 of the SHA

39. The Directors' skeleton argument (in particular paragraph 76(3)) appeared to accept that they were not parties to clause 42 of the SHA. However, the position was less clear in oral argument (e.g. Day 1 page 55, lines 21-22), and in any event, the question of whether clause 42 is capable of applying to claims by or against Representatives comes in at a number of stages of the argument in this case (including whether clause 42 involves a promise between those parties in contractual privity not to bring proceedings against Representatives elsewhere than in England and Wales, and whether it can have that effect in combination with clause 33). For that reason, it is convenient to consider the terms of clause 42 in detail at this point.

40. Clause 42 provides as follows:

> "42.1 Except as expressly provided otherwise in this Agreement in respect of a dispute resolution mechanism, any Party may give notice of any Dispute (a *Dispute Notice*) to all of the other Parties. The Dispute Notice shall include a detailed description of the Dispute, against whom it is addressed and any steps taken by the Parties to resolve it. Within 10 Business Days of receipt of the Dispute Notice, those against whom the Dispute is not addressed shall notify the Party who sent the Dispute Notice if they wish to be involved in the Dispute and if so, in what capacity.
>
> 42.2 Following the Dispute Notice, the Parties, or such of them against whom the Dispute is addressed, Parties who respond to the Dispute Notice or otherwise declare themselves to be interested in the Dispute, shall attempt in good faith to resolve the Dispute through a face-to-face meeting or telephone conference call within 15 Business Days after the date that the Dispute Notice was received under Clause 42.1 (or such longer period as may be agreed in writing between the Parties) (the *First Resolution Period*). The Parties shall meet at least on one occasion in this period. Consent to a first meeting proposed by one Party shall not be unreasonably withheld by the others. The Parties' Representatives shall have full authority to engage in these negotiations and to enter into any settlement agreement on the Parties' behalf.
>
> 42.3 If the Parties are unable to resolve the Dispute by amicable negotiation within the First Resolution Period, the Dispute shall be referred to the respective Dispute Representatives of the parties within 15 Business Days

after the end of the First Resolution Period. The Dispute Representatives shall attempt in good faith to resolve the Dispute through a face-to-face meeting or telephone conference call within 10 Business Days after the date on which it was referred to them in writing (or such longer period as may be agreed in writing between the Parties). The Dispute Representatives shall meet at least on one occasion in this period. Consent to a first meeting proposed by one Dispute Representative shall not be unreasonably withheld by the Dispute Representatives. The Dispute Representatives shall have full authority to engage in these negotiations and to enter into any settlement agreement on the parties' behalf.

42.4 Except to obtain interim or provisional relief or where expressly provided otherwise in this Agreement, neither Party may bring any proceedings under Clause 42.5 in relation to any Dispute until the procedure in Clauses 42.1 to 42.3 (inclusive) has been followed.

42.5 Except as expressly provided otherwise in this Agreement in respect of a dispute resolution mechanism, the English courts shall have exclusive jurisdiction in relation to all Disputes. For these purposes, each party irrevocably submits to the jurisdiction of the English courts and waives any objection to the exercise of that jurisdiction. Each party also irrevocably waives any objection to the recognition or enforcement in the courts of any other country of a judgement delivered by an English court exercising jurisdiction pursuant to this Clause.

42.6 Each party irrevocably consents to service of process or any other documents in connection with proceedings in any court by facsimile transmission, personal service, delivery at any address specified in this Agreement or any other usual address, mail or in any other manner permitted by the law of the place of service or the law of the jurisdiction where proceedings are instituted, including but not limited to service to any party's agent for service of process in accordance with Clause 43.

42.7 Each party acknowledges that each of WRL and JPM may be irreparably harmed by any breach of the terms of this Agreement and that damages alone may not necessarily be an adequate remedy. Accordingly, each of WRL and JPM shall be entitled to seek the remedies of final or interim injunction, specific performance and other equitable relief, or any combinations of these remedies, for any potential or actual breach of its terms.

42.8 The provisions of Clauses 42.1 to 42.4 (inclusive) shall not apply in respect of any Disputes in relation to Schedule 15."

41. A "Dispute" is defined as:

"a dispute arising between the parties out of or in connection with this Agreement, including disputes arising out of or in connection with:

> (a) the creation, validity, effect, interpretation, termination, performance or non-performance of, or the legal relationships established by, this Agreement;
>
> …
>
> (c) any non-contractual obligations arising out of or in connection with this Agreement".

42. This part of the Directors' argument involves the assertion that they are "Parties" for the purposes of clause 42: a necessary requirement both for reasons of privity of contract (if that argument is being run), and because, taken as a whole, and having regard in particular to clause 42.1 which introduces the concept of "Dispute", clause 42 is expressed to apply to Disputes between the Parties.

43. Before turning to the provisions of the SHA which directly bear on this issue, it is helpful to calibrate the interpretative approach to be followed. EJCs and arbitration agreements are not restrictively construed as to their subject-matter on *Gilbert Ash* lines, even though they take away the right the parties would otherwise have had to bring proceedings in any court of competent jurisdiction, and even though a requirement to bring proceedings in a particular forum may itself prevent a party from being able to bring certain types of claim which would have been available elsewhere: *Riverrock Securities Ltd v International Bank of St Petersburg* [2020] EWHC 2483 (Comm), [57]-[61] where relevant authorities are collected (I deal with the approach to the issue of whether an EJC precludes a claim against a non-party otherwise than in the chosen forum at [76] and following below but in my view, clear words are also required for a contractual provision to have this effect).

44. Rather, they are ordinarily construed expansively, with perhaps the most striking summary of that expansive interpretation canon being Lord Hoffmann's statement in *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [13] – which applies to EJCs as well as arbitration agreements – that "the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction."

45. Mr Weekes KC sought to adopt that rationale, and harness the power of the associated interpretative presumption, for the purposes of determining who the contractual parties to the EJC in clause 42 were, suggesting that rational businessmen are likely to have intended that all claims relating to the subject matter of the SHA would be brought in a single forum: not simply those between JPM and WRL, but those between either of those entities and the other's Representatives, or between the Representatives inter se. However, I am not persuaded that the *Fiona Trust* approach is applicable in this context. Even between the same parties, the *Fiona Trust* approach must yield when the parties have entered into more than one agreement in relation to the same transaction which make different provisions for dispute resolution (*BNP Paribas SA v Trattamento Rifiuti Metropolitani SpA* [2019] EWCA Civ 768). The question of who is party to an EJC raises a fundamental issue of whether there is an EJC between the parties to the Greek Proceedings, rather than its scope. To this extent, there is some analogy with the

distinction between contract formation and contract validity drawn by the Court of Appeal in *DHL Project Chartering Ltd v Gemini Ocean Shipping Company Ltd* [2022] EWCA Civ 1555, in which the limited utility of *Fiona Trust* when addressing the former question was noted at [58] and [62]. This is a context in which the strong policy in favour of efficient, non-fragmented, dispute resolution cannot override a careful consideration of the effect of the contractual language.

46. Subject to the issue of the interrelationship of clauses 33 and 42 which I address at [54] and following below, I am satisfied that the "Representatives" as defined in the SHA are not "Parties" for the purpose of clause 42, and are not parties to the contractual promises in relation to the bringing of proceedings in clause 42.5.

47. As originally executed, the SHA introduced JPM and WRL as "Parties". It is not without interest that when the SHA was amended and restated some months later, JPM and WRL were formally defined at the start as "the Parties", although it is not necessary to grapple with the chronological complexities which might follow from relying on the terms of the restatement as an interpretative aid. There are also numerous provisions which treat "the Parties" as synonymous with JPM and WRL (e.g. clauses 10.6, 15.2 and 29.3). JPM and WRL are the sole signatories to the SHA.

48. The SHA defines the "parties" as "the parties to this Agreement from time to time (including any person who at the relevant time is a party to, or has agreed (by executing a Deed of Adherence) to be bound by, this Agreement), and *Parties*, *Party* and *party* shall be construed accordingly":

    i) While the definition is non-exhaustive, the reference to the execution of a Deed of Adherence as one of the categories of "Party" is significant. Clause 1.4 provides that JPM and WRL will procure that Viva becomes a party to the SHA by executing a Deed of Adherence. That contemplates a formal process for becoming a Party by execution of a Deed. There is no provision for the Representatives to execute such a Deed, nor have the Directors done so.

    ii) The contractual form of the Deed of Adherence is in Schedule 11. There is provision for adhering parties to take the steps which JPM and WRL are to take under the SHA: give addresses for notices (clause 4) and appoint agents for service (clause 5). Significantly, there is express provision for clause 42 to apply (clause 8). The adhering parties sign and execute the Deed.

    iii) By contrast, as explained below, there is no provision for Representatives to give contractual notice addresses, nor appoint agents for service, nor to comply with the other elements of clause 42. The Representatives do not sign and execute any similar document.

49. Clause 29 contains a provision regulating how parties give notice to other parties. Clauses 29.1 and 29.2 regulate the giving of "any notice to be given by one party to another party in connection with this Agreement". Clause 29.3 assumes that the only Parties are WRL and JPM, providing "the addresses and email addresses of the parties for the purpose of Clause 29.1 are" addresses for JPM and WRL. As noted above, there is provision for this clause to operate in the case of those who become parties to the SHA by executing Deeds of Adherence, but no mechanism for Representatives or the Directors.

50. The terms of clause 33 are also inconsistent with the suggestion that Representatives are "Parties" for the purposes of clause 42 (as opposed to parties to the separate contract, of narrower scope, constituted by clause 33 itself):

    i) The "chapeau" to clause 33 provides that the SHA sets out "the whole agreement between the parties in respect of the subject matter of this Agreement". Clauses 33.1(a) and (b), which are also concerned with the position as between contracting parties, also refer to "the parties".

    ii) By contrast, the concept of "Representatives" is used in clause 33.1 in contradistinction to the parties ("any party (or its respective Representatives)").

    iii) Clause 33.3 adopts a similar contradistinction, providing "each party agrees to the terms of this Clause 33 on its own behalf and as agent for each of its Representatives."

    iv) Further, the narrow terms of clause 33.3 by which the parties act as agents of the Representatives only in relation to clause 33 tells strongly against the suggestion that the Representatives are parties to other provisions of the SHA in relation to which there is no equivalent of clause 33.3, such as clause 42.

51. Clauses 38.5 and 38.6 are also significant in this regard:

    i) Clause 38.5 gives the Representatives a limited "third party right" to enforce parts of clause 33 ("the relevant terms"). While that provision is something of a curiosity when clause 33.3 gives the Representatives a "first party right" to enforce clause 33 (see [30(ii)] above), the language of clause 38.5 once again is inconsistent with the suggestion that the Representatives are "Parties" to the SHA more generally, as is the provision allowing "the parties" (in contradistinction to the Representatives) to amend the terms of clause 33.

    ii) The limited scope of clause 38.5 (viz a right to enforce part only of clause 33) is inconsistent with the Representatives having contractual rights in relation to clauses other than "the relevant terms" in clause 33 (and, specifically, clause 42).

    iii) The limited and focussed nature of clause 38.5 is reinforced by the wider exclusion of third party rights in clause 38.6. That expressly refers to the limited right of third party enforcement given by clause 38.5, and states that, subject to that, "a person who is not a party to this Agreement shall have no right under [the 1999 Act] or any other statutory provision to enforce any of its terms". Clause 38.5, therefore, characterises the right given to Representatives by the preceding sub-clause as an exception to the general rule that persons who are not parties to the SHA (sc. including the Directors) have no right to enforce its terms.

52. Finally, the terms of clause 42, and the closely associated clause 43, are also inconsistent with persons other than JPM, WRL and those who execute Deeds of Adherence being parties to that clause:

    i) The entry point to clause 42, which is a tiered dispute resolution clause, is a Party giving notice of a Dispute. The first stage in the process is good faith negotiation between the Parties' Representatives (clause 42.2), who are to have

full authority to settle, with a further escalation if no settlement is reached to the Parties' Dispute Representatives.

ii) While I accept a natural person could appoint a representative in this context, the definition of Dispute Representative is:

> "Dispute Representative means in the case of each party, such individual nominated in writing in the case of JPM and WRL to each other party as soon as possible following the date of this Agreement and in the case of any other party as soon as possible after adherence to the terms of this Agreement".

iii) Once again, this contemplates that the parties to clause 42 are JPM, WRL and those who adhere to the terms of the SHA, which, in context, means someone who has executed a Deed of Adherence.

iv) Clause 42.4, which mandates the following of the tiered process save in limited cases, states "*neither* Party may bring any proceedings under Clause 42.5 in relation to any Dispute until the procedure in Clauses 42.1 to 42.3 (inclusive) has been followed" (emphasis added). While a point with very limited weight, particularly given the scope for Deeds of Adherence which expressly incorporate clause 42, this naturally contemplates two parties (JPM and WRL).

v) Clause 42.6 provides for service of court documents in relation to proceedings, "including but not limited to service to any party's agent for service of process in accordance with Clause 43." Clause 43 appoints agents for service for JPM and WRL, but no one else (with Deeds of Adherence expressly addressing the position of subsequent joiners). Clause 43 is an integral part of the dispute resolution mechanism, and operates even-handedly between the parties. However, the Representatives and Directors do not appoint agents for service, which, if they were nonetheless parties to clause 42, would give them the ability to serve proceedings on JPM and WRL in this way, without being subject to such service themselves.

vi) Clause 42.7, intended to assist the specific enforcement of clause 42, involves acknowledgements by JPM and WRL, but no one else, about the significance of the clause. "New joiners" will give equivalent acknowledgements through their Deeds of Adherence, but there is no such provision for the Representatives and Directors. Once again, this points against the Directors being contractual parties to clause 42, and would lead to asymmetry in clause 42's operation if they were.

53. The textual arguments arising from clauses 42 and 43 of the SHA are sufficiently strong to displace the argument that, because clause 33 contemplates claims against Representatives, clause 42 must apply to such claims. An argument along those lines appealed to Teare J in *Dell Emerging Markets (EMEA) Ltd v IB Maroc.com SA* [2017] EWHC 2397 (Comm), a case in which the EJC in question was much less hostile, textually, to the inclusion of Dell affiliates. Even so, this construction would appear to have involved IB Maroc assuming an obligation in relation to claims against Dell affiliates which was not reciprocated by those affiliates in relation to claims against IB Maroc. The ASI granted in *Dell Engineering* is one which was also justifiable on the quasi-contractual basis (see [19] and [21]-[34] of that decision).

Clause 33.3 and 38.5

54. It is necessary separately to address a narrower, and more formidable, formulation of the Directors' argument, namely that the undoubted rights of the Directors to enforce clause 33 (as "first parties" under clause 33.3, and as "third parties" under clause 38.5) carries with it the right to enforce clause 42 to the extent that the proceedings in question engage the clause 33 rights. I shall refer to this as "**the Narrow Construction**."

55. Taking clause 33.3 first, I accept that it gives rise to a separate contract between the Parties and the Representatives (either a "separate or collateral" contract, adopting Lord Millett's phrase in *The Starsin* at [196], or "collateral", as Lord Hoffmann described it at [114], or with the Representatives only being parties to the SHA "to a limited extent", in the language used by Lord Bingham at [26]). I will refer to this as the "**Clause 33 Contract**". To the extent that clause 33 cross-refers to other provisions of the SHA – to take an obvious and uncontroversial example, the definitions – I accept that these too are terms of the Clause 33 Contract. Similarly, given that the substantive content of clause 33 must be the same for those who are just parties to the Clause 33 Contract, and the parties to the SHA, I accept that the interpretation of the terms of Clause 33 will be influenced by the other terms of the SHA.

56. There is scope for argument as to whether other SHA terms are terms of the Clause 33 Contract and, if so, which – for example the "no oral modification", assignment or choice of law clauses (cf. the issue in another "agreement within an agreement" context, albeit where there are the same parties to both, as to the effect of an express choice of law clause in the matrix contract and whether it forms part of the arbitration agreement or operates as an implied choice of law for the arbitration agreement). The fact that the parties to the Clause 33 Contract are not (all) the same as those to the SHA has the potential to raise further issues as to incorporation of the kind which have generated an extensive jurisprudence when considering which clauses of a charterparty or primary insurance are incorporated into a bill of lading or reinsurance (for example the width of the language of incorporation, the "germaneness" of the incorporated term or whether the language of that term prevents its operation in the incorporated context), albeit in the present context the agent entering into the Clause 33 Contract on the Representatives' behalf is necessarily aware of all the provisions of the SHA, making arguments for incorporation easier.

57. I did not hear argument on many of these questions, and I have approached the issue largely as a matter of the interpretation of the SHA, and from first principles, both in relation to clause 41 (which I address at [180] below) and clause 42. At this stage of the judgment, I am only concerned with clause 42. For the reasons I set out below, I am not persuaded that clause 42 is part of the Clause 33 Contract.

58. First, clause 33.3 grants rights and imposes obligations on Representatives (which is capable of encompassing the wide class of persons appearing within the definition of that term): it provides the Representatives of one party with a defence to certain types of claim by the other party or its Representatives, but also provides a defence to those same types of claim brought by those Representatives against the other party or its Representatives. However, it does not (expressly at least) purport to confer the further right, or impose the further obligation, that any proceedings brought against or by those Representatives against the other party or its Representatives must be brought in accordance with clause 42. That is true:

i) of claims to which clause 33.1(c) would provide a defence; and

ii) of claims within the clause 33.2 "carve out."

The Narrow Construction, therefore, involves imposing obligations which find no express support in clause 33's terms.

59. Second, the extent of the rights and obligations which would follow on the Narrow Construction are unclear. The Narrow Construction could involve clause 42 operating as part of the Clause 33 Contract to the extent only of disputes as to the scope of clause 33 and whether it was engaged by a particular claim (i.e. what Tomlinson LJ referred to in *Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP* [2013] EWCA Civ 367, [29] as "the ability … to have the efficacy of that protection determined" in the clause 42 forum); or of all claims by one party to the SHA or its Representatives against another party or its Representatives in relation to the subject matter of the SHA; or only to such claims to the extent that the proviso to clause 33 is not engaged; or (per the Directors' formulation in closing written submissions) "in relation to any claim arguably falling within the scope of the exclusion clause". The first, third and fourth of those constructions involve significant scope for dispute fragmentation, and cannot lightly be attributed to the parties. The second would involve the application of clause 42 not simply to disputes concerning the engagement of clause 33 (in circumstances in which it is the Representatives' contractual right to enforce clause 33 which provides the legal foundation of their reliance on clause 42), or even disputes actually engaging clause 33, but a wider category of disputes, even though there is no language supporting a wider application (cf. the point made by Tomlinson LJ in *Fortress*, [30] in relation to the operation of s.8(1) of the 1999 Act).

60. Third, for the reasons outlined at [46] above, the terms of clause 42 do not readily lend themselves to incorporation into the Clause 33 Contract.

61. Finally, there is some (albeit limited) force in JPM's suggestion that clear (or at least some) words will ordinarily be required before a contract which comes into existence with a non-signatory pursuant to the terms of a contract between other parties will include the EJC in the latter contract. The authorities providing support for a proposition along these lines are to be found in the very different context of a Himalaya clause in a bill of lading: *The Mahkutai* [1996] AC 650, 665-669 and *Maersk Guiné-Bissau, Sarl v Almar-Hum Bubacar Baldé SARL* [2024] EWHC 993 (Comm). There are obvious grounds of distinction between that context and the present case. The beneficiaries of Himalaya clauses generally only become parties to the Himalaya contract after the bill of lading contract has been entered into and its terms fixed (by assenting to those terms through some act of performance such as discharging cargo) rather than being parties to such a contract from the outset. The connection between the place where the servant or agent undertakes the acts giving rise to liability in a Himalaya context may have no connection with the jurisdiction agreed between the shipper and carrier in the EJC. Further, in this case, clause 33 does impose burdens as well as benefits on the Representatives (in that they agree that others will have no liability to them in certain circumstances), with the result that the issue is not whether the Himalaya clause can give rise to a term of a contract imposing burdens as well as benefits on a third party becoming party to a "contract within the contract". For that reason, I have given them only limited weight. However, these authorities, and those concerned more generally with the issue of whether an EJC in a contract between two parties becomes

a part of a related contract between one of those parties and a third party (discussed in Sir Kim Lewison, *The Interpretation of Contracts* (8th), [3.66]-[3.75]), reflect a careful approach to this issue, and a reluctance to make the third party subject to the EJC in the absence of supportive language.

62. Against those matters is the fact that it would have been very easy to achieve the result contended for by express reference to clause 42 in clause 33 or clause 38.5, or for an express reference to the Representatives to be made in clause 42.

63. For those reasons, I am unable to accept the Narrow Construction that clause 42 forms part of the Clause 33 Contract.

64. Turning to clause 38.5, it is important to note in this regard that there is no general principle that third parties who acquire rights under the 1999 Act are necessarily subject to or able to invoke any dispute resolution clause in that contract. In contrast to an assignee, or statutory transferee, the third party is not exercising the right of one of the parties to the contract in its place (such that the "conditional benefits" analysis discussed at [70] below in the context of quasi-contractual ASIs is engaged). The Law Commission, in *Privity of Contract: Contracts for the Benefit of Third Parties* (1996) (Law Com No. 242) discussed the issue of jurisdiction and arbitration clauses at [14.14]-[14.20]. They proposed leaving those clauses outside of their proposed reforms, noting at [14.18] that "our preferred approach … is that arbitration and jurisdiction agreements should fall outside our reform and can neither be enforced by nor are enforceable against a third party." As is well-known, Parliament reached a different view in relation to arbitration agreements, and it is apparent from the Explanatory Notes to the 1999 Act that they were influenced by the conditional benefits analysis in assignment and statutory transfer cases in doing so. The resultant scheme created by s.8 of the 1999 Act has not been a wholly happy one (see *Fortress Valuation*, [1]). However, there was no similar attempt for jurisdiction clauses.

65. It is right to note that clause 38.5 makes the third party right afforded to Representatives "subject to … (ii) the other terms and conditions of this Agreement". However, I am not persuaded by the suggestion that this serves to incorporate clause 42 so that the Directors are able to assert the negative covenant in clause 42 against JPM. This language in clause 38.5 essentially tracks s.1(4) of the 1999 Act ("this section does not confer a right on a third party to enforce a term otherwise than subject to and in accordance with any other relevant terms of the contract") which was clearly not intended to place the third party in a position to enforce and be made subject to EJCs and arbitration agreements (the former having been disavowed by the Law Commission and the latter being dealt with separately and comprehensively in section 8 inserted after the Law Commission's bill had been prepared). Like s.1(4), this part of the proviso to clause 42 is phrased as a limit on the Representative's right to enforce clause 33, and is naturally understood as referring to some form of substantive limit on that right. Tomlinson LJ's observation in *Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP* [2013] EWCA Civ 367, [36] tells against this attempt to bring clause 42 within the ambit of clause 38.5:

> "There is no express language in the agreement to the effect that … the exclusion is subject to the arbitration clause. … [T]hat result can only be achieved by way of inference. It is however to impute to the parties a really very far-reaching intention if it is to be inferred that they positively intended to bring about the

> result that third parties would be bound by the outcome of arbitration proceedings which they had not themselves initiated in order to secure a benefit apparently conferred upon them by the agreement. … [T]he consequences are so far-reaching that very clear language is I think required to bring about the result that the right of a third party to avail himself of an exclusion clause in an agreement to which he is not party is in turn subject to an arbitration clause in the same agreement."

66. Finally, clauses 38.5 and 38.6 limit the Directors' third party rights to the enforcement of clause 33. That precludes the argument that the Directors' third party rights extend to clause 42 as well.

The Deed of Covenant executed by Mr Karonis

67. Mr Karonis did not execute a Deed of Adherence to the SHA, but he, and another shareholder in WRL, Mr Antypas (together "**the WRL Shareholders**"), executed a Deed of Covenant with JPM (but not WRL or Viva). This describes the SHA as an agreement between JPM and WRL, and acknowledged that JPM had provided consideration for the promises made by the WRL Shareholders in the Deed of Covenant by, inter alia, entering into the SHA.

68. In the Deed of Covenant:

    i) The WRL Shareholders made various promises relating to the disposal of their shares in WRL and about not encumbering or procuring the encumbering of those shares. They also agreed to procure WRL's compliance with regulatory capital obligations and obligations relating to Intellectual Property in the Sale and Purchase Agreement (not the SHA).

    ii) Mr Karonis agreed to procure that WRL complied with clause 20.8 (default and trigger events) and clause 30.4 (warranties) of the SHA.

    iii) The WRL Shareholders agreed not to place themselves in certain positions of conflict of interest or seek to entice away certain employees or customers of the business.

    iv) JPM and the WRL Shareholders gave certain warranties to each other.

    v) Clause 7 provided how notices were to be given "in connection with this Deed", with notification details for JPM and each of the WRL Shareholders.

    vi) Clause 8 provided for JPM and each of the WRL Shareholders to maintain an agent for service "in England and Wales or any other proceedings in connection with this Deed."

    vii) By clause 9, the parties agreed to incorporate various clauses of the SHA "mutatis mutandis" including clause 33, 35, 41 and 42.

69. The Directors (I hope it is fair to say, faintly) argued that this gave Mr Karonis the benefit of clause 42 of the SHA so far as the claims against him in the Greek Proceedings are concerned. However, the effect of the words "mutatis mutandis" and "as if they were set out in this Deed" is that the anchor point of clauses 33 (and hence 35), 41 and 42 of the Deed of Covenant is, naturally enough, claims with the requisite

connection to the subject matter of the Deed of Covenant. The Directors did not seek to develop the argument that there was such a connection here. Indeed, the terms of the Deed of Covenant rather suggest that when individuals were to be given the benefit of an EJC and associated provisions, then just like subsequent adherents to the SHA, this was achieved expressly and formally. The Deed of Covenant does not, therefore, provide Mr Karonis with a distinct basis not open to the other Directors to seek ASI relief.

QUASI-CONTRACTUAL ASI RELIEF

70. I can deal with the next basis on which WRL and the Directors seek ASI relief comparatively briefly. The parties were content, at least at first instance, to adopt the summary of the law relating to quasi-contractual ASIs which I gave in *QBE Europe SA/NV v Generali Espana de Seguros y Reaseguros* [2022] EWHC 2062 (Comm), [12]-[27]. While much of that summary was specifically concerned with claims under insurance contracts by reason of foreign direct action statutes, the principles which emerge from the authorities referred to in *QBE* can be summarised as follows:

    i) ASI relief on the quasi-contractual basis can be asserted where "the right which the respondent is purporting to assert in the non-contractual forum arises from an obligation under a contract to which the arbitration or jurisdiction agreement is ancillary, such that the obligation sued upon is 'conditioned' by the arbitration or jurisdiction agreement."

    ii) In cases in which the right which the respondent seeks to assert in the non-contractual forum is regarded by the English court as contractual in nature, and arises under a contract which is subject to the arbitration or jurisdiction agreement, the applicant is regarded by English law as having an equitable right not to be sued in respect of a particular claim otherwise than in accordance with any forum agreement conditioning that claim.

    iii) The basis of the equitable right is that it is unconscionable for the ASI respondent to enjoy the benefit of the derived right without complying with the associated obligation to pursue the right only in the contractual forum, or without complying with the choice of forum provision which is a legal incident of the right asserted. As Cockerill J put it in *Times Trading Corp v National Bank of Fujairah* [2020] EWHC 1078 (Comm), [73], the jurisdiction to grant ASI relief depends on the fact "that it would be invidious to permit someone who is invoking a contract as the basis of its claim to do so otherwise than in accordance with the jurisdictional regime of that contract."

    iv) In determining whether the right asserted by the ASI respondent is one conditioned by the obligation to assert it in a particular forum, it is necessary to classify the right being asserted in the non-contractual forum by reference to English conflict of law principles. That enquiry is to be undertaken "as a matter of substance."

71. The "direct action" statute cases have generally been concerned with the question of whether the victim of the insured wrong, or the state standing in the victim's shoes, is, as a matter of substance, enforcing the contract of insurance to which the wrongdoer is a party, or an independent statutory right. For that reason, many of the authorities

(including *QBE*) address themselves to the question of whether the claim advanced in the non-contractual forum is contractual in nature, and the type of injunction in question is often referred to, to the dismay of some, as a "quasi-contractual" injunction. However, I accept that ASI relief of this kind is not limited to cases in which the right asserted in a non-contractual forum is a claim in contract.

72. That point is well made in the decision of Mr Simon Salzedo KC, sitting as a Deputy High Court Judge, in *Aon UK Limited v LaMia Corporation Srl* [2022] EWHC 3323 (Comm). A "Terms of Business Agreement" between LaMia and Aon contained an EJC in favour of the courts of England and Wales. Proceedings were brought against Aon in tort in Florida by victims of an air crash to whom LaMia had assigned its rights. Mr Salzedo KC held that the claims brought in Florida engaged the quasi-contractual basis for ASI relief:

    i) At [125], he held that "the clear overall effect of the Florida law expert evidence is that the Individuals' claim against Aon is a claim to take the benefit of Aon's obligations to LaMia (if any)" and that "(as a result of the derivative nature of the claim) Florida law would recognise that any claim that the Individuals may have against Aon would be subject to the TOBA's terms as to choice of forum and choice of law."

    ii) However, even if the claim was treated as a free-standing claim in tort, the EJC in the TOBA conditioned LaMia's (and hence the Florida plaintiffs')" right to bring proceedings against Aon in tort ([129]-[131]).

    iii) At [131], Mr Salzedo KC said:

> "Therefore, the obligation owed in tort by Aon to LaMia of which the Individuals claim the benefit is one which is conditioned or restricted by LaMia's contractual agreement not to bring such claims other than in the courts of England and Wales. It may be said that this does not make the obligation a contractual one … Nevertheless, it seems to me that if, as I have held, the underlying obligation in the present case is conditioned by the jurisdiction agreement, then a claim to enforce that obligation should be treated as one that is subject to an obligation in equity not to sue in a non-contractual forum, which is the basis of the 'quasi-contractual' anti-suit cases."

73. Respectfully, I agree with that analysis. The Florida plaintiffs were seeking to exercise rights derived from LaMia. Whether those rights were contractual or tortious claims against Aon, they were in each case conditioned by the EJC in the TOBA, and it was unconscionable for the Florida plaintiffs to assert those rights against Aon without complying with the dispute resolution requirements which conditioned them.

74. However, this does not assist the Directors. JPM is not asserting derived rights against the Directors at all, but rights which (if they have any merit) are originally JPM's. Nor do the claims brought by JPM against the Directors assert contractual rights arising under the SHA. Rather they assert tortious obligations arising under the GCC which do not depend on establishing a breach of a contractual or conventional tortious obligation, still less one conditioned by the EJC.

75. While WRL and the Directors rightly make the point that the availability of the quasi-contractual anti-suit jurisdiction depends on the classification of the right asserted as a matter of substance and its characterisation as a matter of English rather than foreign law (see e.g. *London Steam-ship Owners' Mutual Insurance Association Ltd v Spain (The Prestige)* [2015] EWCA Civ 333, [12], [14] and [29]-[30]), it is the nature of *the right* asserted, rather than the facts said to give rise to it, which matters. The mere fact that it was open to JPM to bring claims against WRL with a similar subject matter to those brought against the Directors, which claims would have been subject to clause 42 of the SHA, is not sufficient to bring the derived rights principle into play. The same set of facts will frequently give one party claims against alternative defendants, some subject to a dispute resolution clause, and others not so subject. For ASI relief to be available in the latter case, it is necessary to satisfy the "more onerous and more nuanced" test of showing the foreign proceedings are vexatious and oppressive (cf. *QBE*, [13], [16]).

ASI RELIEF ON THE THIRD PARTY CLAIM OBLIGATION BASIS

76. If the Directors themselves have no contractual or quasi-contractual right not to be sued in the Greek Proceedings, then WRL asserts that it is the beneficiary of a contractual promise from JPM not to sue WRL's or Viva's Representatives otherwise than in this jurisdiction. In *JP Morgan Securities Plc and ors v VTB Bank PJSC* [2025] EWHC 1368 (Comm), I referred to an obligation owed by one party to its contractual counterparty not to bring certain types of claim against a non-party as a "Third Party Claim Obligation".

77. A "Third Party Claim Obligation" must arise either on the construction of the relevant contract or by implication. In *JP Morgan*, when considering the admittedly more challenging argument that an arbitration agreement gave rise to a Third Party Claim Obligation, I reviewed a number of authorities which have considered this issue at [101]-[134]. Those authorities were supplemented in this case by four further first instance authorities which I did not consider in *JP Morgan*.

78. The first is the decision of Mr Justice Morison in *Horn Linie GmbH & Co v Panamericana Formas e Impresos SA (The Hornbay)* [2006] EWHC 373 (Comm). In that case, cargo was carried under a bill of lading which contained an English EJC. Proceedings were commenced by cargo interests in Chile to enforce the bill of lading contract, but against Maritrans, the shipowner's Chilean agents, rather than against the shipowner. The shipowner obtained ASI relief to restrain those proceedings:

    i) At [28], Morison J noted that the claim against Maritrans derived from the contract of carriage made by the Claimants ("**Horn**"). He held it was "commercially unreal" to suppose that Maritrans would not be able to obtain an indemnity from Horn, with the result "that an action against the agent is, effectively, an action against Horn Linie."

    ii) At [29]-[30], he held that Horn had a "good arguable case" that the "Himalaya" clause in the bill of lading gave the agent the benefit of the EJC.

    iii) The precise basis on which ASI relief was granted is not clear. There are elements of the decision consistent with the granting of a quasi-contractual ASI, albeit that

would have been a basis of relief open to Maritrans, who were only joined to the proceedings after the court had already decided to grant the injunction to Horn.

iv) The Himalaya clause, which is not quoted in full, may have involved a promise to Horn not to bring proceedings against its agents either at all or otherwise than in accordance with the Hague Rules, but there is no statement to this effect in the judgment, and the Himalaya clause was only an alternative basis for the ASI in any event.

v) While at [32], Morison J stated that "there is no good reason not to hold the parties to the bargain they have made", there is no explanation of why the bringing of proceedings against the agent amounted to a breach of the defendants' bargain with Horn.

vi) With respect, I am unable to derive any clear statement of principle from *The Hornbay*.

79. However, *The Hornbay* was relied upon by Blair J and Burton J in the second and third decisions cited, delivered within a month of each other in 2009.

80. In *Vitol SA v Arcturus Merchant Trust Limited* [2009] EWHC 800 (Comm), there was (arguably) an English EJC in the contract between Vitol and the defendant. The defendant had sued Vitol and its wholly owned subsidiary and agent, Mansel, in Nigeria, seeking a declaration that the contract was null and void, and the return of the deposit paid. Granting ASI relief on Vitol's application in respect of both Vitol and Mansel in an ex tempore judgment, Blair J at [36] held:

> "I shall now consider the position of Mansel which is also a party to the Lagos proceedings. Mansel is a wholly owned subsidiary of the claimant. It acted at all times solely as the claimant's agent. In Nigeria to all intents and purposes it stands in the shoes of the claimant. In my view, *Horn Linie v Pan Americana* … is authority for the proposition that an exclusive jurisdiction clause can cover the claims made against an agent in such circumstances so as to bring such a claim properly within the ambit of the anti-suit injunction. In my view the claimant has made out a good case including both principal and agent in the terms of the injunction in the present case."

81. I accept that this case appears to treat *The Hornbay* as authority for the proposition that an EJC can involve a promise by one party only to sue the other's agent in the contractual forum in cases where the agent "to all intents and purposes stands in the shoes of the [principal]". The issue was dealt with very briefly, and Blair J only appears to have been concerned with whether the claim was arguable. It is not clear whether Blair J's conclusion was reached by way of construction or implication. The attempt to obtain a declaration of non-liability against Mansel might be said to have been premised on Mansel being the putative party to the disputed contract, but Mansel was not party to the English proceedings, and the decision was not premised on "quasi-contractual" ASI reasoning.

82. Less than one month later, on 3 April 2009, Burton J delivered judgment in *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2009] EWHC 730 (Comm), after hearing argument the day before. There were English non-exclusive jurisdiction clauses

("**NEJC**"s) in various contracts referred to as the GMRAs between DBAG and various companies in the Highland group. Highland sued DBAG and an associated company called DBSI (which acted in an agency role under certain of the transactions on behalf of both DBAG and Highland) in Texas seeking declarations of non-liability under the GMRAs. In due course, the Texas proceedings were expanded to include damages for negligent and fraudulent misstatement against DBAG and DBSI which were alleged to have induced the GMRAs, and "other tortious claims relating to the GMRAs, a breach of the contract in relation to the alleged inadequacies of the Default Valuation Notices and a claim by Highland for unjust enrichment and promissory estoppel". An employee of DBAG said to have made some of the misrepresentations was later joined to the Texas proceedings.

83. The GMRAs contained a promise by Highland not to sue DBSI to recover amounts owed or enforce rights in connection with or as a result of the transaction effected within the framework of the GMRAs (referred to in the case as the "no action clause"). DBSI had signed the GMRAs and Burton J found that it was arguable that DBSI was party to the NEJC. DBSI was made party to the English proceedings and supported the application for ASI relief.

84. The Texas proceedings were found not to involve a breach of the NEJC ([22]), but Burton J held that they were vexatious and oppressive so far as DBAG was concerned on the basis that DBAG had already commenced English proceedings, and that where there was a contractual non-exclusive jurisdiction clause, a party would ordinarily act vexatiously and oppressively in pursuing proceedings in the non-contractual jurisdiction in parallel with proceedings in the contractual jurisdiction, unless there were exceptional reasons, not foreseeable at the time when the contractual jurisdiction was agreed ([27]). That conclusion was overturned on appeal ([2009] EWCA Civ 725).

85. Before Burton J, there was no challenge to the correctness of *The Hornbay* "and the conclusions to be drawn from that decision in relation to the appropriateness of an anti-suit injunction where a claim is made, in a non-contractual jurisdiction, against an agent of the contracting party" (see [15(iii)]). There was some debate as to whether the claims against DBSI and Mr Newell involved a breach of the "no action clause" ([30(ii)]) which Burton J did not find it necessary to resolve:

> "Whether or not the pursuit of DBSI amounts to a breach of clause 5, it does seem at the very least arguable that the principles of *The Hornbay*, to which I referred above, and whose applicability, as I have indicated, Mr Allen QC did not challenge, apply. In that case an anti-suit injunction was granted by Morison J, in circumstances in which the defendants unsuccessfully resisted a claim by shipowners in London, the contractual forum, for an anti-suit injunction, when, in order to seek to avoid the consequences of a jurisdiction clause, their claim in Colombia, which related to the contract, was brought in proceedings, not against the shipowners, but against the shipowners' agents."

86. At [34] he continued:

> "I conclude it to be at least strongly arguable, as set out above, that DBSI are engaged by the non-exclusive jurisdiction clause and became a party to it. However, quite apart from that, I am satisfied that the principles in *The Hornbay* entitle me to conclude that, in practice, the action in Texas, so far as it concerns

> joinder of agents or servants of the Claimant for the purpose of enforcing relief in connection with the contract, all of which would be justiciable in the United Kingdom, that the injunction should relate also to suit against DBSI. The same principle would apply to Mr Newell as a servant or agent. No substantive ground has been put forward as to why or whether there is any claim against him which is not in reality one made against his principals/employers and in connection with the Agreements and Transactions, and in the light of *The Hornbay* I grant an injunction in favour of the Claimant and DBSI in relation to pursuit of Mr Newell also."

87. There were a number of bases on which ASI relief extending to the pursuit of the Texas proceedings against DBSI could have been granted, including on the basis that it was a party to the NEJC in the GMRA, or benefited from an express agreement not to pursue it in the "no claims clause". The decision was, moreover, one founded on the vexatious and oppressive jurisdiction, there being no argument (save by reference to the "no claims" clause) that the bringing of the Texas proceedings was a breach of contract. It is not, with respect, entirely clear to me what principle Burton J regarded *The Hornbay* as establishing, and which factors of the case before him engaged that principle.

88. In *Royal Bank of Scotland plc v Highland Financial Partners LP* [2012] EWHC 1278 (Comm), Burton J addressed similar issues to those which arose in the *DBAG v Highland* case. RBS and Highland had entered into a loan in the form of a CDO transaction. The transaction was constituted by various contracts. RBS obtained summary judgment on its claim for repayment, the amount of Highland's liability being determined at a subsequent quantum hearing. After the quantum hearing, Highland commenced proceedings in Texas against RBS and two of its officers (Hall and Griffiths) in relation to the same transactions, alleging that RBS employees had given dishonest evidence. RBS applied for ASI relief on the basis that:

    i) the Texas proceedings breached English EJCs in the contracts; and

    ii) were in any event vexatious and oppressive.

89. A major issue in the case was whether injunctive relief should be refused on the basis that RBS had come to court with unclean hands and whether the liability judgment should be set aside on the basis that it had been procured by fraud. However, an issue also arose as to whether RBS could rely on the EJCs to restrain the Texas proceedings against Hall and Griffiths (which alleged that, when acting on behalf of RBS, Hall and Griffiths had repeatedly made untruthful statements and been guilty of culpable non-disclosures).

90. At [150], Burton J referred to the decision of Teare J in *Morgan Stanley & Co International plc v China Haisheng Juice Holdings Co Ltd* [2009] EWHC 2409 (Comm), [27] which had rejected the argument that the EJC before him extended to claims against non-parties (a case I referred to in *JP Morgan* at [117]), and also to *The Hornbay*, his own earlier decision in the *Deutsche Bank v Highland* case, Lord Scott's judgment in *Donohue v Armco Inc* [2001] UKHL 64 (which I discussed in *JP Morgan* at [114]-[115]), Mr Justice Norris' judgment in *Winnetka Trading Corporation v Julius Baer International Ltd* [2008] EWHC 3146 (Ch) (*JP Morgan*, [116]) and a decision of Flaux J in *Whitesea Shipping & Trading Corp v El Paso Rio Clara Ltda (The Marielle Bolten)* [2009] EWHC 2552 (Comm). That last decision involved an express promise

in a Himalaya clause in a bill of lading not to sue the servants or agents of the carrier, and does not appear to take the present debate further.

91. At [153], Burton J concluded:

> "Quite apart from any desire or obligation to pay an indemnity or a contribution to Messrs Hall and Griffiths, I am satisfied that what Mr Nicholls describes as the obvious reputational damage for RBS resulting from the making of a claim as to what Messrs Hall and Griffiths have allegedly done during their employment, in itself gives RBS a sufficient interest. I would accordingly conclude that to restrain the Texas Proceedings, not only against RBS, but also against Messrs Hall and Griffiths, falls within the ambit of the exclusive jurisdiction clause and/or is a proper consequence of it."

92. Finally in this regard, I was referred to *Bannai v Erez* [2013] EWHC 3689 (Comm), another decision of Burton J. In that case, there was an arbitration agreement between Mr Bannai and Mr Reifman. Israeli court proceedings were commenced by Mr Reifman's trustee in bankruptcy against Mr Bannai, his son and ten companies, which Mr Bannai sought to restrain by ASI relief. At [32], Burton J upheld the granting of ASI relief in relation to the companies as follows:

> "I am satisfied, as was Hamblen J, that there is jurisdiction to make such an order in order to avoid the arbitration clause being frustrated and circumvented. It is obvious, not least from the fact that the Trustee wished to continue with the very same Request for Instruction proceedings, to which the Companies and David Bannai had been joined, against them, even after the grant of the injunction by Walker J, that if no such order is made and the arbitration proceedings commenced between the Trustee and the Claimant, the Israeli proceedings would continue against the Companies in parallel, for the relief which the Trustee seeks in relation to transfers of ownership and declarations of interest in the assets, leading to oppressive litigation on two fronts and to no purpose. There is an analogy that can be drawn with the case of *The Hornbay* [2006] 2 Lloyd's Law Rep 44 (where there was not an arbitration clause but an exclusive jurisdiction clause), where the Claimants were entitled to restrain proceedings not only against them but against their agents."

It is not entirely clear whether this based *The Hornbay* injunction on vexatious and oppressive or contractual grounds.

93. It will be apparent from these authorities, and the other cases to which I referred in *JP Morgan*, that English law does not currently offer a clear and consistent answer to the question of when proceedings against a non-party in some other forum will be found to be a breach of an EJC or arbitration agreement, with the vast preponderance of authority being at first instance. In particular, it is unclear whether such an outcome depends purely on the construction of the EJC or arbitration agreement on conventional principles of contractual construction, or whether there is some more general legal doctrine or policy at play which prioritises maximising the efficacy of the forum selection agreement over any more conventional exercise of contractual construction and implication.

94. It will also be apparent from the *JP Morgan* case that I have difficulty with the latter suggestion. An obligation of the relevant kind would appear to engage the *Gilbert Ash* principle of construction and require sufficiently clear words to constrain a contracting party's right to sue third parties (*JP Morgan,* [103]). There is a formidable body of first instance authority which support the view that clear language is required to achieve such an outcome, much of which I referred to in *JP Morgan*: by way of brief summary, *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 All ER (Comm) 237, 252; *Team Y&R Holdings Hong Kong Ltd v Ghossoub* [2017] EWHC 2401 (Comm), [82(3)], [82(7)]; *Clearlake Shipping Pte Ltd v Xiang Da Marine Pte Ltd* [2019] EWHC 2284 (Comm), [23]-[24]; *Topalsson GmbH v Rolls-Royce Motor Cars Ltd* [2023] EWHC 2092 (TCC); and *Renaissance Securities (Cyprus) Ltd v ILLC Chlodwig Enterprises* [2024] EWHC 2843 (Comm), [28].

95. It would also involve a considerable asymmetry, with the third party's ability to sue the contracting party in a court of its choosing unconstrained (an issue which concerned Teare J in *Morgan Stanley & Co International plc v China Haisheng Juice Holdings Co Ltd* [2009] EWHC 2409 (Comm), [24] and [27] and Mr Rabinowitz KC in *Ghossoub*, [82(5)]), an asymmetry which might become particularly pronounced if the contracting party wished to counterclaim in proceedings brought by a third party. Finally, it is not as if an agreement between two parties that one of them will not sue servants, agents or contractors of the other is not well-travelled contractual ground, being a staple of the Himalaya clause.

96. I have identified various issues with what might be termed the *Hornbay* line of cases in the preceding paragraphs. It may be that they reflect a principle of law that if an agent is sued effectively as principal in respect of the contract entered into by the principal and which contains an EJC, the EJC will extend to those proceedings against the agent as well, although the quasi-contractual ASI jurisdiction which has more clearly developed since those cases were decided may provide a surer foundation for relief. For present purposes, it is sufficient to note that if *The Hornbay* and the associated cases do establish a principle of law of this kind, it is not one which is engaged here. The Directors are not being sued under the SHA, nor as agents of WRL. Under the applicable law, WRL has no legal responsibility for the Directors' conduct in the management of Viva (see [16] above), a legal position which WRL has not been slow in pointing out (see e.g. paragraph 17.1 of WRL's Amended Counterclaim).

97. If clause 42 is to create a Third Party Claim Obligation, it must do so through the conventional processes of construction or implication.

98. For the reasons explained at [44]-[49] above, I am satisfied that, far from containing clear language establishing a Third Party Claim Obligation, clause 42 is inconsistent with its application to disputes between anyone other than WRL, JPM and those who adhere to the SHA by Deeds of Adherence. It has been noted that express language addressing third party rights without reference to the EJC tells against the suggestion that the EJC in a contract protects third parties by a promise as to where they can and cannot be sued (*Ghossoub*, [82(3) and (4)]; *Topalsson*, [113]-[114] and *Renaissance Securities* in the Commercial Court, [38]-[39]). That consideration applies even more strongly here, because clauses 33.3 and 38.5 both address what entitlements the Representatives can derive from the SHA, without referencing the EJC.

99. WRL has also relied on the obiter dicta of Lord Scott in *Donohue v Armco Inc* [2001] UKHL 64, [60] that an EJC with one joint tortfeasor may as a matter of contract preclude claims in another forum against another joint tortfeasor. I, respectfully, have difficulty with that suggestion for the reasons given in *JP Morgan*, [115] and [124], although the particular issues it would raise in the context of an arbitration agreement are not present in this case as they were in *J.P. Morgan*. I detect a similar lack of enthusiasm for the proposition from Teare J in *Morgan Stanley*, [30] and from Mr Rabinowitz KC in *Ghossoub*, [75]. There was no attempt to argue that WRL was a tortfeasor under Greek law for the Article 919 claim, and, on its face, that suggestion is inconsistent with the agreed position as to Greek law at [16]. The possibility of the Directors having a legal right to an indemnity from WRL (a consideration which troubled Lord Scott) would appear to be remote given the premise of any Article 919 liability and the terms of Article 332 of the GCC. Even if these issues had been overcome, I would have concluded that there is no principle of construction of EJCs to the effect suggested by Lord Scott.

100. WRL also advances its case on the basis that the dispute being litigated in the Greek Proceedings is "in substance" a dispute between WRL and JPM, with the claim against the Directors being, in effect, a "proxy war" between JPM and WRL. In this connection, WRL understandably placed considerable reliance on the decision in the Court of Appeal in *LLC EuroChem North-West-2 v Tecnimont SPA* [2023] EWCA Civ 688, which I discussed in *JP Morgan* at [126]-[129]. This was a case in which Tecnimont had relied in an arbitration with EuroChem on an Italian government decree finding that EuroChem's Italian subsidiary was controlled by a sanctioned entity. The Italian subsidiary brought public law proceedings in Italy to challenge that decision, and Tecnimont sought to intervene in those proceedings to resist that attempt (for the purpose of improving its position in the arbitration and associated court proceedings).

101. By a majority, the Court of Appeal held that this involved a breach by Tecnimont of the arbitration agreement:

    i) At [60]-[64], Carr LJ held that the issue in the Italian public law proceedings and in the arbitration was the same – was EuroChem controlled by sanctioned persons – and one which Tecnimont had agreed to have determined in its arbitration with EuroChem.

    ii) She also noted (at [64]) that "the sole reason provided for Tecnimont's participation in the Italian Proceedings was its involvement in the Arbitration and Bank Proceedings. At the fundamental core, Tecnimont was seeking to litigate in Italy the very issue that it had agreed with EuroChem NW to address exclusively in London arbitration proceedings."

    iii) Lewison LJ expressed some doubt as regards the first question, noting that "although the ownership/control issue is the same in the Italian proceedings as in the Arbitration Proceedings, it could be said that in the Arbitration Proceedings the issue arises as between Tecnimont and EuroChem NW, whereas in the Italian Proceedings it arises as between Tecnimont and EuroChem Agro. Tecnimont agreed to arbitrate its disputes with EuroChem NW. It made no such agreement in respect of its disputes with EuroChem Agro". However, he described that as a "very strict interpretation of the arbitration agreement [which] ignores the underlying reality."

iv) He also noted that there was "no evidence that Tecnimont has any real dispute with EuroChem Agro. Its position in the Italian proceedings is no more than a cover or façade for the real dispute which is between it and EuroChem NW. The Italian Proceedings are no more than a vehicle by which it hopes to engage in a proxy war with EuroChem NW."

v) The decision, therefore, is based on two lines of reasoning: the "same issue" reason, and the "proxy war" reason.

102. Taking the "same issue" reasoning first:

i) The same issue or enquiry may often arise between Party A and Party B who have entered into an EJC or arbitration agreement, and between Party A and Party C, who may be parties to a different forum selection agreement or no agreement at all. However, the fact that the same (or a substantially similar) factual enquiry is involved does not mean that the issue arising between Party A and Party C is one which Party A has agreed is only to be determined in the dispute resolution process in its contract with Party B, such that the raising of the dispute with Party C is a breach of the EJC between Party A and Party B. That is because part of the process of identifying a dispute for the purposes of determining whether it engages a dispute resolution agreement is the legal context in which it arises. The same factual enquiry can be part of one dispute as between Party A and Party B, and part of a separate dispute as between Party A and Party C.

ii) As I noted in *J.P. Morgan*, [106], a good example of this is where a contract with the principal debtor is subject to arbitration, but not the associated guarantee, and where it is necessary to prove the liability of the principal debtor as between the creditor/ beneficiary and the guarantor, with the guarantor having a claim against the debtor for the amount of its liability if called upon to pay. This was the position in *ACP v Sacyr SA* [2017] EWHC 2228 (Comm), in which Blair J held that the issue of whether the debtor was liable to the creditor was a different issue in the context of the arbitration under the principal contract than in the context of the court claim by the guarantor. The importance of the legal context when determining whether a particular matter was subject to arbitration was a major feature of the Supreme Court's decision in *Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] UKSC 32, [78]-[80]:

> "When turning to the second stage of the analysis .., namely whether the matter falls within the scope of the arbitration agreement on its true construction, the court must have regard not only to the true nature of the matter but also to the context in which the matter arises in the legal proceedings.
>
> In *Autoridad del Canal de Panama* context played a central role in the decision. Blair J dealt with an application for a stay under section 9 of the 1996 Act in relation to legal proceedings in England to enforce guarantees which contained clauses that made English law their governing law and gave the English courts exclusive jurisdiction. The English law guarantees were given in the context of major contracts to expand the Panama Canal after the contractor experienced cash flow problems and obtained several advance payments to allow the works to continue. The canal authority

("ACP") had previously obtained guarantees subject to Panamanian law with arbitration clauses governed by "US law" in which the seat of the arbitration was Miami, to secure the contractor's obligations under the construction contract and both the earlier and future advance payments. ACP obtained the English law guarantees when it agreed to make further advance payments and extend the repayment date of the existing advance payments. Blair J (paras 131–138) rejected the application for a stay on the ground that the matter whether the contractor was bound to repay the advance payments ("the repayment issue") in the context of ACP's claim did not fall within the scope of the arbitration clauses. He accepted that the repayment issue was a substantial matter in the English legal proceedings but held that the substance of the controversy in the English proceedings was whether the defendants were liable under the English law guarantees. This was a matter referred to the exclusive jurisdiction of the English courts. ACP was entitled to choose which of its securities (i e guarantees) to enforce. It made no demand under the guarantees which had arbitration clauses or under the main contract. In that context, the claim to enforce the English law guarantees with their exclusive jurisdiction clauses, and the repayment issue did not fall within the scope of the arbitration clauses in the guarantees which ACP did not choose to enforce.

Blair J decided the case by stating (para 137(6)) that the "matter" in respect of which the legal proceedings had been brought was whether the defendants were liable under the English law guarantees and that, in that context, the repayment issue was not a matter which the parties had agreed to refer to arbitration. He saw this as an answer to the first stage question, although he had stated (in para 137(1) of his judgment) that the repayment issue was the most substantial issue arising under the English law guarantees. I would be inclined to answer the question in that case at the second stage of the analysis: even if it were a substantial matter in the legal proceedings, the context in which the matter arose in the legal proceedings could exclude the matter from the scope of the arbitration agreement. ACP had elected to advance a claim under the English law guarantees and that claim was reserved to the exclusive jurisdiction of the English courts. Subject to that qualification, I agree with Blair J's approach which recognises the significance of the context in which a matter arises in legal proceedings and a party's autonomy to choose which of several claims it wishes to advance."

iii) Approached with the benefit of that judgment, it is arguable that the issue between Tecnimont, the relevant Italian public authority and the EuroChem Italian subsidiary was not the same issue as that in the arbitration. The former did not involve a decision as to the position between EuroChem (who was not party to the Italian proceedings) and Tecnimont. It is far from clear how a decision refusing to set aside the Italian public authority decree as to the control of the Italian subsidiary could have generated an issue estoppel (and thus decided the same issue) on the question of whether EuroChem was controlled by a sanctioned entity in the arbitration (in which the original decision of the Italian public authority appears to have had an evidentiary rather than legally determinative status). Indeed it seems likely it would not: not least because it

seems inconceivable that a finding in the EuroChem-Tecnimont arbitration could have had any preclusive effect in the Italian public law proceedings.

iv) In this case, the factual issues raised between JPM and the Directors in the Greek Proceedings arise in the context of JPM's Article 919 claim, in proceedings to which WRL was not a party, and in respect of conduct for which WRL was not legally responsible under Greek law.

103. Turning to the "proxy war" aspect:

i) It is important not to allow what is probably an accurate metaphor within the overall commercial battle between JPM and WRL to obscure the legal analysis.

ii) In *Tecnimont*, Tecnimont had gone fishing in the Italian court proceedings for a decision whose sole value to it was to advance its position evidentially in its arbitration with EuroChem. The majority of the Court of Appeal regarded this as a proxy war between Tecnimont and EuroChem (although of course EuroChem also stood to benefit evidentially in the arbitration if its Italian subsidiary succeeded in challenging the public law decree).

iii) That involves a very different fact pattern from the present case. Success by JPM in the Greek Proceedings will realise a benefit to JPM wholly independently from any dispute between JPM and WRL, in the form of an award of compensation. WRL is not, in law, liable to pay that compensation.

iv) I am not persuaded that this fact pattern can be said to amount to JPM bringing a claim in substance against WRL, such that the claim falls within the EJC in the SHA, even though brought against non-parties to the SHA, for a cause of action in tort rather than for breach of the SHA, and in respect of conduct for which WRL is not legally responsible.

104. Finally, there is WRL's case on implication. This involved implying the terms in bold into the SHA:

i) In the definition of a "Dispute", so that it means a "dispute arising between the parties **and/or their Representatives** out of or in connection with this Agreement".

ii) In clause 42.5, that "each party **and/or their Representatives** irrevocably submits to the jurisdiction of the English courts and waives any objection to the exercise of that jurisdiction. Each party **and/or their Representatives** also irrevocably waives any objection to the recognition or enforcement in the courts of any other country of a judgement delivered by an English court exercising jurisdiction pursuant to this Clause."

105. I am satisfied that no such implication is possible:

i) This was a carefully drafted and heavily lawyered agreement, where it should not lightly be concluded that key definitions in the SHA and the EJC itself did not, in their express terms, reflect the parties' intentions. For the reasons given in [44]-

[49] above, those drafting the SHA were clearly alive to the difference between a Party and a Party's Representative.

ii) Clauses 33.3, 38.5 and 38.6 are inconsistent with any suggestion that the Representatives were, implicitly, included within clause 42, because those terms reflect a decision to give the Representatives limited rights which do not refer to clause 42.

iii) The attempted implications leave other parts of the integrated SHA dealing only with the Parties, including the first and second tiers of the dispute resolution process, the provision for the appointment of agents of service and the agreement that damages are not an adequate remedy for a breach of clause 42.

iv) The width of the proposed implication – having regard to the width of the definition of "Representative" as set out at [25(i)] above – is striking. Consultants, advisers, investment advisers and managers and valuers "from time to time" are all included. In the original formulation of the implied term Mr Weekes KC understandably sought to confine its operation to directors, but as Ms Phelps KC submitted, there was no drafting logic behind this formulation, which was a creature of forensic convenience.

ASI RELIEF PURSUANT TO THE VEXATIOUS AND OPPRESSIVE JURISDICTION

The legal principles

106. I gave a summary of the applicable principles for granting ASI relief on this basis in *JP Morgan*, which I repeat here, but supplement by reference to additional authorities referred to in this case.

107. The principles for the granting of anti-suit relief on the vexation and oppression basis are summarised by Males LJ in *SAS Institute Inc v World Programming Ltd* [2020] EWCA Civ 599 at [90]-[91], [103] and [108] and in *JP Morgan* I précised that summary and principles derived from other authorities cited in that case as follows:

i) The basic principle is that the jurisdiction is to be exercised "when the ends of justice require it".

ii) Established categories of case where an injunction may be appropriate (which may overlap) include cases where an injunction is necessary to protect the jurisdiction of the English court and cases where the pursuit of foreign proceedings is regarded as vexatious or oppressive, but the jurisdiction is not confined to these categories and must be applied flexibly.

iii) Great caution must be exercised before such an injunction is granted, at any rate in cases where the injunction is not sought in order to enforce an arbitration or exclusive jurisdiction clause, because of the requirements of comity.

iv) When an anti-suit injunction is sought on grounds which do not involve a breach of contract, comity, telling against interference with the process of a foreign court, will always require careful consideration.

v) Comity requires that in order for an anti-suit injunction to be granted, the English court must have "a sufficient interest" in the matter in question. Often that sufficient interest will exist by reason of the fact that the English court is the natural forum for the determination of the parties' dispute. In a case where the injunction is sought in order to protect the jurisdiction or process of the English courts, the existence of a sufficient interest will generally be self-evident.

vi) The categories of factors which may amount to vexation and oppression are not closed (*Elektrim SA v Vivendi Holdings 1 Corp* [2008]EWCA Civ 1178, [83]).

vii) At [146], I added my own observation that even in cases in which injunctive relief is not sought on a contractual or quasi-contractual basis, the fact that the foreign proceedings involve the circumvention of an agreement for arbitration with an English seat, or an English EJC, can itself be relevant in determining whether the commencement and pursuit of the foreign proceedings is vexatious and oppressive, as well as establishing the necessary "sufficient interest" of the English court to act.

108. Relying on a passage in *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2009] EWCA Civ 725, [50], JPM submitted that it must be the fact that the proceedings are being pursued in the foreign court, rather than the fact of the allegations advanced in the proceedings, which is vexatious and oppressive. In my view, the distinction between the place of the proceedings and the claims brought is not an easy one to draw, and I doubt its general application: for example, when foreign proceedings are said to be vexatious and oppressive because they seek to re-litigate matters determined in the English proceedings, it is surely the fact of re-litigation rather than where the proceedings are taking place which is the true vice.

109. JPM also referred to the following factors highlighted by Toulson LJ in that same paragraph in *Deutsche Bank*:

i) The principle of comity requires the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for an English court to arrogate to itself the decision how a foreign court should determine the matter.

ii) The stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention.

110. They also relied on the enhanced burden of showing that proceedings in a foreign court are vexatious and oppressive in a so-called “single forum” case. That principle is summarised by Trower J in *Bourlakova v Bourlakov* [2024] EWHC 929 (Ch), [46]-[47] in the following terms:

i) “Single forum cases” are cases "when the cause of action relied on in the foreign court cannot be advanced in England, and there is no cause of action available

(as a matter of English domestic law or the law applicable under its choice of law rules) to the claimant to allow him to win before the English courts …".

ii) Particular caution is required before granting ASI relief in this context. As the only possible forum is the foreign forum, the risk of injustice is very real, because the issue for the court is not in which forum the claims should proceed, but rather whether they should proceed at all.

iii) The availability of relief in the foreign court on a basis which it is easier to satisfy than analogous relief in this jurisdiction will (at least in some cases) be analogous to a "single forum" case, requiring a similar level of caution.

iv) There are two further paragraphs I should refer to. At [49], Trower J said that "commencing proceedings abroad which raise issues that are already subject to proceedings in England is also capable of amounting to vexatious or oppressive conduct, but that is not necessarily the case" and that "there is no presumption that a multiplicity of proceedings is vexatious, and that proceedings are not to be regarded as vexatious merely because they are brought in an inconvenient place".

v) At [50], he referred to the need "to strike an appropriate balance between the possible injustice to the parties depending on whether the anti-suit injunction is granted or refused", and stated that "in carrying out that exercise, only credible and legitimate advantages are to be given weight, because it is not unjust to deprive a party to foreign proceedings of illegitimate or theoretical advantages or ones which are hopelessly or cynically invoked."

111. Where, as here, the reason why Greece is said to be the "only" forum is because it will not give effect to the parties' agreement, freely entered into by JPM and enforceable in this jurisdiction and under the applicable law of the SHA, that the Directors should not be liable, I rather doubt that the party seeking to assert the liability it has agreed should not exist can avail themselves of the higher threshold for granting a "single forum" injunction. In any event, I have assumed that WRL and the Directors only need to meet the lower test.

The matters relied upon

112. The factors relied upon by WRL and the Directors to contend that the Greek Proceedings are vexatious and oppressive so far as both of them are concerned are set out at some length in the Directors' Part 8 Claim Form but I have taken the following summary from WRL and the Directors' skeleton:

i) It is alleged that the Greek Proceedings are subjectively vexatious, being pursued for purposes wholly collateral to the subject of the proceedings (this being said to be vexatious as regards both WRL and the Directors). In this connection, reliance is placed on the impact of the Greek Proceedings on WRL and the Directors.

ii) It is said that the Greek Proceedings are an attempt to manipulate the EJC (which I take to be a case of vexation and oppression so far as WRL is concerned).

iii) It is said that the Greek Proceedings are bound to fail, having regard both to clause 33.1 and issues of causation and loss (which I take to be a case of vexation and oppression as regards the Directors).

iv) It is said that the Greek Proceedings are an attempt to circumvent clause 33.1 (which I take to be a case of vexation and oppression as regards both WRL and the Directors, both of whom are parties to clause 33.1).

v) Two further points are made: that the Greek Proceedings seek to relitigate matters raised in the proceedings before Dame Clare Moulder DBE and that the Greek Proceedings deploy material which is subject to "without prejudice" privilege.

Subjective vexation and oppression

113. In *Bourlakova*, [48], Trower J accepted that foreign proceedings brought in bad faith or with the intention and effect of harassing the person seeking an anti-suit injunction can justify ASI relief, not least because it will normally be appropriate to stigmatise such conduct as unconscionable.

114. I accept the evidence of Mr Christopher Robinson of JPM's solicitors that the Greek Proceedings have not been brought for the purpose of vexing the Directors or WRL, nor for the collateral purpose of preventing WRL from raising the funding necessary to exercise the call option and buy JPM out at a fair market value. Mr Lissack KC very properly accepted Mr Robinson's evidence as to his own state of mind. Further, the point made by Mr Robinson that, far from wanting to make it difficult for WRL to raise cash, JPM wanted to exit what had become a toxic business relationship at a fair market price and was happy for WRL to raise the cash necessary to make this happen, makes good commercial sense. This is a type of party for whom "the bottom line" is likely to be far more of an animating consideration than alleged personal animosities.

115. It may be that the Greek Proceedings are making it more difficult or expensive for WRL to raise the funds to buy JPM out (although the evidence of the existence and extent of any such difficulty is thin, essentially consisting of unevidenced assertions, and the explanations offered for the difficulty have not been entirely consistent). Regardless of the Greek Proceedings, it is clear from the two sets of English proceedings, the Greek defamation proceedings and the criminal complaint that the relationship between WRL and JPM, and between their respective appointed directors, is a dire one, and identifying any additional difficulties said to have followed from the attempt to open a yet further front in this commercial war is extremely difficult. That is equally true of the alleged difficulty in retaining or replacing director appointees.

116. Nor am I persuaded that I can infer that the Greek Proceedings are subjectively vexatious because a damages claim against the Directors cannot realistically be met. I have already expressed a provisional, but relatively uninformed view, that it would be very surprising if JPM's shareholding turned out to have no value, but I am unable to rule out that possibility, still less that some lesser, but still highly significant, sum might be recovered ([18]). Further one of the Directors, Mr Karonis, has an 81.95% interest in WRL, which in turn has a majority stake in Viva. That is clearly an asset which may well have significant value, and acquiring ownership of it pursuant to the execution of any damages judgment obtained against Mr Karonis a significant commercial benefit

for JPM. The fact that the position of others of the Directors may be different does not make proceeding against them in respect of the same acts subjectively vexatious.

117. It is said that a bad motive can be inferred from the fact that no proceedings were brought against the Viva directors nominated by JPM, but the essence of the Greek Proceedings is that the Directors, acting collectively, used their majority control to disenfranchise the JPM appointed directors and frustrate their attempts to protect JPM's interests. It is scarcely surprising that the JPM nominated directors were not made defendants to such a claim.

118. It is also said an improper motive can be inferred from the fact that the Greek Proceedings were initiated shortly after the Court of Appeal hearing referred to at [9(iii)] above (albeit just over three weeks before a draft judgment was distributed), it being suggested that JPM had read the runes at the hearing itself, and launched the Greek Proceedings as a result. That may well be so – without having been present at the hearing, I am unable to form a reliable assessment. However, even assuming that it is, I do not see why a conclusion that one strategy for dealing with JPM's perceived problems in relation to its minority interest in Viva (buying WRL out and becoming sole owner) might no longer be open could not perfectly properly lead to an attempt to pursue another strategy to the same end, namely to sue for damages for acts alleged to have reduced the value of its minority shareholding and associated rights. Complaints about the timing of the claim – the collapse of negotiations in December 2024, a letter before action on Christmas Eve and no sufficient time to reply before proceedings were commenced – were, with respect, a little unworldly in litigation of this type, and may have reflected the very real anti-suit risk which has, in the event, materialised.

119. Finally, the objective effect of the Greek Proceedings on the Directors and WRL is relied upon. It is said that the Directors feel intimidated by the size of the claim. That may well be the case, albeit the position taken by WRL and the Directors that the claim is hopeless and the quantum overstated may bring some solace in this respect. Clearly, being on the receiving end of any (and a fortiori a large) claim is an unpleasant experience (as it was no doubt unpleasant for the JPM-nominated directors to be on the receiving end of defamation claims and a criminal complaint). However, the size of the claim reflects the high value nature of the transactions, and its subjective effects on those on the receiving end do not assist me in determining that the Greek Proceedings are vexatious and oppressive.

120. It would be naïve to suppose that the Greek Proceedings do not form part of JPM's strategy for dealing with what, to date at least, appears to have been an unhappy joint venture experience for both parties, and that they are not a new front in a wider commercial battle. That is a regular feature of the major cross-border litigation which features in this court, and is a litigation strategy which I am sure WRL and the Directors, and those who advise them are fully familiar with. That does not, however, suffice to make them subjectively vexatious and oppressive. I accept that even in litigation of this scale and intensity, there can come a point when matters move beyond "strongly fought" and "no holds barred" litigation and one party engages in abusive conduct: this was the position in the "Metro" litigation, when it came before Rix LJ in *Glencore International AG v Exter Shipping Ltd* [2002] EWCA Civ 528, [69] to which Mr Lissack KC referred me. However, while this is undoubtedly commercial litigation which, for both parties, is "red in tooth and claw", I do not think it can fairly be said that the Greek Proceedings are subjectively vexatious and oppressive.

Circumvention of the EJC

121. This is the most significant aspect of WRL and the Directors' contention that the Greek Proceedings are vexatious and oppressive. It is one which centres on the suggestion that the Greek Proceedings are somehow a device, intended in substance to bring claims against WRL but without complying with the EJC. I accept that there will be conduct of this broad character which will satisfy the requirement of vexation, oppression and unconscionability – that was after all the essential basis for the injunction I granted under the vexatious and oppressive ground in *JP Morgan*. However, as I noted in that case, the concept of "circumventing" an EJC or arbitration agreement is a very uncertain one, capable of embracing conduct which would not be considered vexatious and oppressive by any sensible description ([141]).

122. It is helpful to look briefly at the authorities in which "circumvention" of a dispute resolution clause in a contract between Party A and Party B has been held to make a claim by Party A against Party C vexatious and oppressive, and the reasons given for the court's conclusion.

123. In *Clearlake Shipping Pte Ltd v Xiang Da Marine Pte Ltd* [2019] EWHC 2284 (Comm), Party A (Xiang Da) had contracted with Party B (Clearlake) who entered into a sub-contract with Party C (Gunvor), both contracts including a hybrid arbitration agreement / EJC depending on the value of the claim. The purchaser of the cargo from Gunvor sued Xiang Da in Singapore on the basis of allegedly false statements as to the origin of the cargo which had led to its condemnation in China. Xiang Da sought to pass on those claims in third party proceedings in Singapore, initially suing Clearlake under the charterparty and a separate LOI (which arguably did not contain an EJC), and Gunvor in tort. By the time of the hearing before Andrew Burrows QC, the claim under the charterparty had been dropped, given the EJC it contained.

124. In relation to the LOI claim against Clearlake, the dispute in question also fell within the EJC in the Clearlake charter, and the Judge held that this provided the basis for a wholly contractual ASI against Clearlake. It was in relation to the tort claim against Gunvor that the Judge granted an ASI on the vexatious and oppressive ground for the reasons given at [34]:

    i) First, because England was the natural forum for the claim, given the EJCs in the two charterparties (although I would note that the court of the place where a party is being sued is an unsurprising forum in which to seek to bring indemnity claims in respect of any liability established in those proceedings, not least to avoid inconsistent findings of fact).

    ii) Xiang Da "has manipulated its third party claims to try to avoid being caught by the exclusive jurisdiction clause in the Clearlake charter" (a reference to the fact that it had abandoned claims caught by the EJC between it and Clearlake after Bryan J granted ASIs to enforce the EJC).

    iii) Clearlake had passed on the email recording the false origin of the cargo to Xiang Da (having, it would seem, itself received that email from Gunvor which, as the seller of the cargo, would have been closer to the origins of the sold goods).

iv) "The most obvious tortious misrepresentation claim, open to Xiang Da, would be against Clearlake not Gunvor; and it appears that the claim against Gunvor rests on the misrepresentations being passed on by Clearlake to Xiang Da".

v) If Gunvor were to be held liable to Xiang Da for tortious misrepresentation, it is hard to see why Clearlake would not also be so liable; and certainly one would normally expect Clearlake to be sued for tortious misrepresentation if Xiang Da were suing Gunvor for such misrepresentations.

vi) Had the misrepresentation claim been brought against Clearlake in England (as required by the exclusive jurisdiction clause in the Clearlake charter) it would have constituted unacceptable forum-fragmentation for the misrepresentation claim against Gunvor raising the same issues to have been heard in Singapore.

vii) The bringing of the tortious misrepresentation claim solely against Gunvor and not against Clearlake was a procedural manoeuvre designed to evade the exclusive jurisdiction clause.

viii) In the light of what had been decided in relation to the LOI claims by Xiang Da against Clearlake – which would be heard in England and not Singapore – there was very good reason to avoid forum-fragmentation on the same issues, to have all third party proceedings (by Xiang Da against Clearlake and Gunvor) heard in the same jurisdiction (i.e. England).

ix) There was no obvious prejudice to Xiang Da in having all the third party proceedings heard in England rather than Singapore; and, while it may be that there would have been some overlap between the issues in the third party proceedings and the issues in the main claim by China-Base against Xiang Da, they would have been insignificant compared to the overlap of issues that would occur if the third party proceedings were split as between England and Singapore.

125. Respectfully, I find the conclusion that pursuing a party (from whom an allegedly false statement passed onto the claimant had originated) in tort for an indemnity, when there was no EJC between Xiang Da and Gunvor, amounted to vexatious and oppressive conduct challenging. It is not immediately clear why Xiang Da's decision not to try and continue proceedings originally brought against Clearlake in breach of the EJC in the Xiang Da-Clearlake charters supports such a conclusion. Nor am I persuaded that not suing the most "obvious" defendant in the agreed forum makes the pursuit of what the Judge found to be an arguable claim for the same complaint against a stranger to that forum clause in another court necessarily vexatious and oppressive. That is the case even leaving aside reasons which made the attempt to sue Gunvor in Singapore a commercially understandable decision (viz that that was where Xiang Da was being sued and the alleged misrepresentation originated more closely to Gunvor as seller than to Clearlake, who simply received the email and passed it on). It follows that I do not feel able to derive significant assistance from *Clearlake* as to the circumstances in which circumvention of an EJC will amount to vexation and oppression.

126. The second example is the obiter comment of Singh LJ in *Renaissance Securities (Cyprus) Ltd v ILLC Chlodwig Enterprises* [2025] EWCA Civ 369, [55] that the Russian proceedings in that case might well be vexatious and oppressive because they

"appear to be designed to circumvent and undermine the effect of those agreements." In that case, assets were held under contracts which were subject to arbitration. The contracts were terminated, but the assets were not returned because of UK sanctions. The Russian parties to those contracts then sued the claimant in Russia for the return of the assets or for damages. When those claims were made subject of ASIs granted by the Commercial Court, the Russian parties sued three Russian affiliates of the claimant for delictual claims, the wrong alleged being breach of the contracts between the claimant and the defendants. It is apparent from the first instance judgment ([2024] EWHC 2843 (Comm), [19]-[21]) that the legal basis of the Russian law claims was essentially the same as those before me in *JP Morgan*, which I discuss below. In those circumstances, I do not find Singh LJ's comment at all surprising, and they are consistent with my own conclusion in *JP Morgan*. At [56] Singh LJ identified three reasons why the court should be prepared to contemplate granting an anti-suit injunction in that case: i) to protect the integrity of the arbitral process; ii) to protect the integrity of the orders made by courts of this jurisdiction, in particular the anti-suit injunctions made by Dias J and Henshaw J; and iii) to protect the public policy of the United Kingdom in having the sanctions regime which it does. None of those considerations are in play in this case.

127. Finally, there is *JP Morgan*. My reasons for concluding that the Russian proceedings in that case were vexatious and oppressive are set out at [151]. Key findings were (a) that the claims asserted were, in substance, for the recovery of debts due under contracts which were subject to arbitration agreements, and thus "an attempt to enforce inherently contractual obligations in an inherently contractual way"; (b) that the legal theory relied upon in the Russian proceedings did not "accord with generally recognised principles of civil law", effectively being a claim in tort for failure to pay a debt and a tortious obligation imposed on all companies in the same corporate group regardless of any involvement in the transaction to take steps to require a debtor to pay; and (c) the claims had been brought by reference to special legal principles of Russian law developed in response to international sanctions. Once again, none of those factors are present here.

128. The Greek Proceedings involve claims on a legal basis long recognised under Greek law. The Greek Civil Code was adopted in 1948, drawn largely from the German Civil Code. An equivalent to Article 919 has formed part of German law since 1900 and is currently to be found in Article 826 of BGB:

> "Deliberate infliction of loss *contra bonos mores*
>
> A person who deliberately causes loss to another in a manner which contravenes good morals is obliged to compensate the other for the loss."

129. Not only is the form of claim well known, but its application in claims against directors of a company by minority shareholders is far from novel. Further, the claims against the Directors are brought in respect of their own conduct (rather than an artificial attempt to fix one group company with liability for another's debt). Both the type of claim (a claim for loss intentionally caused by actions contrary to good morals) and the loss claimed (the damages to the value of shares allegedly so caused) are inherently tortious. I am not persuaded that the extensive overlap between the facts and circumstances pleaded to support the liability in tort, and possible or threatened claims against WRL, means the pursuit of the former can be characterised as "circumvention" of the EJC in the SHA in a vexatious and oppressive sense. Indeed, I cannot see why it

would not be open to JPM, in the absence of some other legal bar, to pursue both sets of claims, provided there was no double recovery.

130. It is far from uncommon for a minority shareholder who feels its interests have been harmed by the majority shareholder and the directors it has appointed to bring proceedings against both in the context of a claim for minority shareholder relief. This was the case in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57, a decision which has considerably influenced the law of England and Wales in this area, not least in *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corpn* [2023] UKPC 33. Where there is an arbitration agreement between the minority and majority shareholders in an SHA, the factual complaints relied on will be determined in arbitration. That will not make the continuation of the claims against the strangers to the arbitration agreement such as the directors vexatious and oppressive, although they may well be subject to case management stays pending the conclusion of the arbitration, possibly on terms.

131. Finally, I should refer in this regard to complaints that proceedings had been brought in a jurisdiction which, if it applied Greek law to the claim, would not give the same effect to clause 33 as an English court applying English law, and which did not offer similar opportunities for summary determination of claims. However:

    i) This is not an instance of the Greek courts being chosen by reason of their alleged procedural disadvantages as compared with England (i.e. as some form of "Greek torpedo"). If there is no obligation not to bring proceedings against the Directors at all, or to bring them in England, then Greece was the obvious place to bring such claims, which are brought against the Directors in their country of domicile, in respect of matters occurring in their role as directors of a Greek company, which are alleged to have reduced the value of JPM's shareholding in that company.

    ii) This is a case in which JPM has a well arguable case that Greek law is the applicable law of the tort, wherever proceedings are brought (see [171]-[182] below), which, on the basis of Professor Dickinson's analysis at [28] above, would involve the English court applying Article 332 of the GCC and holding that clause 33.1(c) did not give a defence to the Article 919 claim.

    iii) The court deprecates arguments in a jurisdictional context based on the alleged procedural disadvantages of one legal system as against another (*Dicey, Morris & Collins on the Conflicts of Law* (16th), [12-042]).

The alleged lack of merit in the Greek Proceedings

132. The bar for establishing vexation and oppression by reference to the lack of merit in the proceedings to be injuncted is a high one: Mr Lissack KC accepted it involved a "heavy, heavy burden". In *Vitol Bahrain EC v Nasdec General Trading LLC* [2013] EWHC 3359 (Comm), [50]-[59], Males J reviewed the relevant authorities and summarised the applicable legal principles as follows:

    i) It is not the function of the English court to determine which cases proceeding in foreign courts have sufficient merit to be allowed to proceed.

ii) Cases where the weakness of the foreign proceedings has been a factor, including in rare cases a decisive factor, in the grant of an injunction have all been cases where the English court has intervened to protect an interest of its own and which have involved something akin to bad faith on the part of the foreign claimant, with the hopeless nature of the claim providing evidence of such bad faith or similarly vexatious conduct, as distinct from being a reason in itself to grant an injunction.

iii) It is only in an exceptional case that the English court should conclude that a claim advanced in proceedings abroad is hopeless.

133. In this case, it is said that the Greek Proceedings are hopeless in two respects.

134. The first is that the Greek court will find that the applicable law of the tort is the law of England and Wales, and on that basis will uphold clause 33.1(c). The issue of the applicable law of the tort in this case is not straightforward. I deal with the issue of whether the Directors have a sufficiently arguable case for jurisdiction purposes that the applicable law is the law of England and Wales at [171]-[182] below. For present purposes, it is sufficient to observe:

i) The case for the application of Greek law under Article 4 of Rome II is far from hopeless. I am satisfied that the general rule in Article 4(1) points to Greek law. There are arguments as to whether English law applies by virtue of the Article 4(3) exception, albeit I regard JPM as having the better of that argument on the basis of the submissions I have heard. The Greek law experts, with their experience of the Greek courts, offer different views of how the point is likely to be decided there.

ii) There are credible arguments available to both sides on the issue of whether there has been a choice of English law as the law of tort claims against the Directors for the purposes of Article 14(1) of Rome II, which I do not feel able to decide.

iii) There is an issue of whether JPM's Delaware domicile is sufficient to oust the application of Article 14(2), which Professor Gortsos, at least, suggests may not be the conclusion of a Greek court.

iv) Further, it is common ground that Articles 919 and 332 are mandatory provisions of Greek law which cannot be derogated from by agreement. That raises the possibility of English law being disapplied under Articles 16 and 26 of Rome II (with the experts offering different predictions as to how the Greek courts will decide this latter issue).

135. It will be apparent that this is very far from the exceptional type of case envisaged by Males J, in which the claim run is so weak that it is capable of supporting an inference of bad faith for that reason.

136. The second is that the case as to causation and loss is wholly inadequate, or at least inadequately pleaded. On the evidence before me, the document used by JPM to initiate the Greek Proceedings complies with Greek pleading requirements, and will be significantly supplemented by the next round of pleadings in September this year. In addition further explanation of the basis of the claim has been provided by Mr

Robinson. I have made some observations on the loss claimed at [18]. I am far from persuaded that I can conclude that there is no arguable claim for significant loss at this stage, albeit (as is frequently the case at the start of major litigation), the realistic horizons of the loss claim are currently difficult to discern.

The alleged attempt to circumvent clause 33.1

137. I accept that there will be circumstances in which the bringing of proceedings in another forum for the purposes of circumventing rules of English law may support a conclusion that those proceedings are vexatious and oppressive: for example the English sanctions legislation considered in *Barclays Bank Plc v PJSC Sovcombank* [2024] EWHC 834 (Comm), [25], *Renaissance Securities*, [56], [59]-[60] and *JP Morgan*, [151].

138. However, the fact that a foreign court may apply a different law to a claim than the law which the English court would apply, or would, applying its law, not enforce a term which the English court would enforce in proceedings here, will not of itself usually support the conclusion that the claim is vexatious and oppressive.

139. In *Navig8 Pte Ltd v Al-Riyadh Co for Vegetable Oil Industry* [2013] EWHC 328 (Comm), proceedings were commenced in Jordan in respect of cargo carried under a bill of lading which the Jordanian courts were likely to interpret as a contract with Navig8 as carrier, which would not be the position under English law. Further, the Jordanian courts would not give effect to certain provisions of the bill which would be given effect in English proceedings (Jordan being a Hamburg Rules jurisdiction). Andrew Smith J rejected the contention that the pursuit of the Jordanian proceedings was vexatious and oppressive in those circumstances:

    i) It was not enough that the proceedings in Jordan would (on the conventional application of Jordanian private international law principles) be governed by Jordanian law, whereas English proceedings would, through the application of English principles of private international law, be governed by English law ([15(i)]) nor that those two legal systems would reach different conclusions as to who the contractual carrier was ([15(ii)]).

    ii) Nor was it sufficient that exemptions which Navig8 would enjoy under English law had the proceedings been brought here (due to the contractual incorporation of the Hague Rules), would not be available, or available to the same extent, in a jurisdiction applying the Hamburg Rules ([15(iii)]).

    iii) The Judge noted at [22] that "Navig8's argument asserts a right, deriving apparently from the choice of English law, not to be sued in any jurisdiction that does not give effect to a choice of English law that is recognised by English private international law, at least unless the foreign jurisdiction recognises rights similar to those recognised by English law" and held that "there is no proper basis for so wide a proposition".

140. Similar views were expressed by Burton J in *Golden Endurance Shipping SA v RMA Watanya SA (The Golden Endurance)* [2014] EWHC 3917 (Comm), [45]-[46].

141. In this case, the arguments as to which law applies are not straightforward, and the case for the application of Greek law very far from hopeless. That provides a further reason why this particular head of vexation and oppression is not made out.

142. Further, if the SHA did not, as a matter of contract, give the Directors a right not to be sued in any jurisdiction which would not give effect to clause 33.1(c), then this argument would essentially give them under the court's vexation and oppression jurisdiction a protection that they had failed to obtain as a matter of contract.

143. Finally, I should also note that while it is the case that Greek law does not permit contracting out of liability under Article 919, there are many respects in which Greece might be said to be the natural forum for the complaints advanced in the Greek Proceedings. The proceedings are brought against Greek nationals in respect of their conduct as directors of a Greek company by a shareholder in that company in respect of alleged damage to their rights as shareholders.

The remaining points

144. I can deal with the remaining points briefly:

i) The Greek Proceedings do not involve re-litigation of matters which were or ought to have been decided in the earlier English proceedings. The Directors were not party to the English proceedings, and it will be a very rare case in which it will be abusive to pursue claims against someone who was not a party to earlier litigation on the basis that they should have been joined to that litigation (*Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260, [5]-[6], [10], [26]). Further, the single paragraph complaint in the 2024 Commercial Court proceedings is addressed at [9] above. As WRL recognised at the time, the matters in this paragraph were not relevant, and they do not thereafter appear to have featured in the proceedings. The allegations against WRL in the second set of English proceedings are not being pursued and have not and will not be the subject of adjudication (see [11] above).

ii) The Greek Proceedings do not seek to impugn the Court of Appeal's conclusions regarding the construction of the call options, and while complaint is made about the Directors' refusal to look to negotiate an agreed exit for JPM from Viva, this does not come close to the vice of re-litigation.

iii) There was originally a short reference in the Greek Proceedings to material which WRL and the Directors say is subject to without prejudice privilege, but which JPM alleges has lost that status by reason of the deployment of part of that material by WRL. In any event, the reference was removed from the Greek Proceedings by agreement before the claims for ASI relief were made. This point goes nowhere.

Sufficient interest

145. Given my conclusion that WRL and the Directors have failed to establish conduct of a kind which amounts to vexation and oppression for ASI purposes, it is not necessary to consider whether a sufficient interest has been established for the English court to intervene. The answer to that question is likely to be influenced by the nature of the

oppressive conduct found, and it is unlikely to be helpful to consider it in the abstract or on a hypothetical basis.

THE JURISDICTION AND DECLARATION ISSUES

Service by the Directors on JPM

146. The Directors purported to serve their Part 8 Claim Form on the agent for service in England and Wales appointed by JPM under the SHA. In this connection, the Directors relied upon CPR 6.11(1), which permits service by a contractually agreed method of claims solely in respect of the relevant contract.

147. I accept JPM's submission that this method of service was invalid. I am satisfied that on its proper construction, clause 43 of the SHA provides for JPM to appoint an agent for service of claims brought by other parties to the SHA and that the Directors are not parties for this purpose. Clause 43 is clearly intended to reflect a mutual obligation (clause 42.6) and the Directors have not and are not required to appoint agents for service themselves. Nor are the Directors able to enforce clause 43 under the 1999 Act, given the terms of clause 38.6 of the SHA, and the fact that clause 43 neither provides that the Directors are entitled to enforce it, nor purports to confer a benefit on the Directors.

148. That clear language of clause 43 is consistent with the authorities which make it clear that a contractual agreement to appoint an agent for service will normally only extend to service by a contracting party, its successors and assigns (*Argo Capital Investors Fund SPC v Essar Steel Ltd* [2005] EWHC 2587 (Comm), [26] and see also *Morgan Stanley & Co International plc v China Haisheng Juice Holdings Co Ltd* [2009] EWHC 2409 (Comm), [23(ii)]).

149. The Directors also served JPM in Delaware on 11 March 2025, without leave under CPR 6.33(2B)(c), alternatively, by way of a retrospective application for permission to serve out of the jurisdiction in reliance upon various of the Practice Direction 6B gateways. Commendably, JPM has met these points on the merits rather than taking a stand on the technical service issue which could have been cured if necessary.

Service out of the claim to enforce the Clause 33 Contract

150. I have concluded that the Directors have a right under an agreement governed by English law (viz the Clause 33 Contract) not to be sued in a jurisdiction which would not give effect to clause 33.1(c). There is an undeniable gateway for such a claim in CPR PD 6B paragraph 3.1(6)(c) ("a claim is made in respect of a contract where the contract … is governed by the law of England and Wales"). I am satisfied that England and Wales is the appropriate forum for the pursuit of such a claim. Indeed it is the only forum, because of the agreed evidence that Greek law will not give effect to clause 33.1(c), and because the contractual promise which the Directors seek to enforce is a promise (in effect) not to be sued in Greece, the only other forum canvassed. Accordingly, I am satisfied that I should give permission to serve out on this ground, no point being taken as to the retrospective nature of such permission.

151. The jurisdiction analysis could end at this point, but given the inevitability of the case going further, I should cover at least some of the points raised.

152. Under the present heading, an issue arises as to whether the Directors were entitled to serve without permission under CPR 6.33(2B) which provides:

> "The claimant may serve the claim form on the defendant outside of the United Kingdom where, for each claim made against the defendant to be served and included in the claim form –
>
> …
>
> (b) a contract contains a term to the effect that the court shall have jurisdiction to determine that claim; or
>
> (c) the claim is in respect of a contract falling within sub-paragraph (b)."

153. It is fair to say that this provision has something of a convoluted history, and that I have contributed to its convolution. CPR 6.33(2B) was brought into force with effect from 1 October 2015 following the coming into force of the Hague Convention 2005. At that stage, it provided:

> "The claimant may serve the claim form on the defendant outside of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under the 2005 Hague Convention, and the defendant is a party to an exclusive choice of court agreement conferring jurisdiction on that court within the meaning of Article 3 of the Hague Convention."

154. At that point, Practice Direction 6B para. 3.1(6) still included, at (d), a discretionary service out gateway "where a claim is made in respect of a contract where the contract … contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of that contract."

155. With effect from 6 April 2021, CPR 6.33(2B) was amended to provide:

> "The claimant may serve the claim form on the defendant outside of the United Kingdom where, for each claim made against the defendant to be served and included in the claim form:
>
> (a) the court has power to determine that claim under the 2005 Hague Convention, and the defendant is a party to an exclusive choice of court agreement conferring jurisdiction on that court within the meaning of Article 3 of the 2005 Hague Convention; or
>
> (b) a contract contains a term to the effect that the court shall have jurisdiction to determine that claim."

156. At this point, PD 6B para. 3.1(6) was amended to remove (d). The result was that there was the ability to serve out without permission where there was an applicable jurisdiction agreement (that agreement obviating the need for the discretionary and forum conveniens analysis for discretionary gateways). However, where this was not the case, the mere fact that a claim was "with respect to" a contract with an EJC, even though that EJC was not applicable to the claim, could no longer be the basis for an

application for discretionary service out (assuming that such a claim would otherwise have fallen within the relevant discretionary gateway).

157. The Civil Procedure (Amendment No. 2) Rules 2022 effected further amendments to CPR 6.33(2B), to give effect to the recommendations of a service sub-committee of the Civil Procedure Rules Committee of which I was a member, to add the new "(c)" quoted at [152] above. I explained the background to that change in *QBE Europe SA/NV v Generali Espana de Seguros y Reaseguros* [2022] EWHC 2062 (Comm), [22]:

> "Finally, it may be relevant to note that the fact that proceedings have been brought for ASI relief by reference to a contract to which either the applicant, the respondent, or both are said not to be parties also has the potential to raise issues as to the proper basis for serving applications for such relief out of the jurisdiction. In order to remove any scope for doubt on this issue so far as claims to enforce exclusive jurisdiction clauses are concerned, the Civil Procedure Rules Committee has approved an amendment to CPR 6.33(2B) to provide that a claimant may serve a claim form on a defendant outside the jurisdiction where 'for each claim made against the defendant to be served and included in the claim form … the claim is in respect of a contract' which 'contains a term to the effect that the court shall have jurisdiction to determine the claim' (on the basis that the width of the words 'in respect of' will address any issues which might otherwise arise from the quasi-contractual nature of such ASI applications)."

158. It is possible, however, that the rule change may (unintentionally) have done more than that, because the language "in respect of" might not simply have restored the effect of the deleted discretionary gateway para. 3.1(6)(d), but promoted it to a non-discretionary gateway. This is a point perceptively made by the editors of *Civil Procedure* (2025) who note at [6.33.4.1]:

> "The new r.6.33(2B)(c) also appears to have the effect that a claim form can be served out of the jurisdiction without the court's permission not merely where the claim falls within a jurisdiction clause in the contract (or, as appears to be intended, would do so if the claimant and defendant were both parties to that contract) but also where the claim is 'in respect of' a contract containing such a clause. This could be interpreted to apply more broadly than to claims seeking an anti-suit injunction given the breadth of the phrase 'in respect of' …."

159. The sub-committee of the Civil Procedure Rules Committee's report of 4 May 2022 placed the proposed amendment to CPR 6.33(2B) in the context of (and by way of a reversal of) the earlier deletion of PD 6B para. 3.1(6)(d), and to that extent provides some support for the expanded reading referred to by the editors of *Civil Procedure*. However, it is fair to say that in including the new paragraph (c) in CPR 6.33(2B), the sub-committee's focus was very much on claims which would be subject to the EJC, even if not on a contractual basis. That interpretation fits better with sub-paragraphs (a) and (b), and with the fact that the usual protections of the discretionary service out gateway are not available because an agreed forum clause is being given effect (even if on a quasi-contractual rather than contractual basis). If the amendment has gone further than that, the fact that it appears in a provision which permits service without leave and without the discretionary protections of PD 6B will be a relevant factor when testing the connection between the claim and the contract containing the EJC.

160. In this case, the Directors' position is that they are parties to a contract – the Clause 33 Contract – which on my findings does not contain an EJC, but which is constituted by a clause appearing in a wider contract to which the Directors are not parties and which does contain an EJC. I am not persuaded that this is a sufficient connection to meet the "in respect of" requirements of CPR 6.33(2B)(c), and accordingly I conclude that the Directors were not entitled to serve their Part 8 Claim Form without the leave of the court, albeit that such leave has now been given.

161. Had the Directors been entitled to contractual anti-suit injunctions as parties to clause 42, or as third parties able to enforce clause 42 under the 1999 Act, then I accept that the Directors would have been entitled to serve those proceedings out of the jurisdiction without permission under CPR 6.33(2B), as well as with permission under PD 6B para. 3.1(6)(c). That would also have been the case had I accepted the argument that the Directors were entitled to ASI relief on the quasi-contractual basis, on the ground that the Greek Proceedings were in substance asserting contractual claims under the SHA.

Vexatious and oppressive ASI relief

162. Had this been the sole basis on which ASI relief was available to the Directors (with the result that no issue as to the application of PD 6B para. 3.1(4B) needs to be considered), then a difficult question of jurisdiction would have arisen. Fitting injunction applications on this basis within the service out regime has been a long-standing problem.

163. In *Navig8 Pte Ltd v Al-Riyadh Co for Vegetable Oil Industry* [2013] EWHC 328 (Comm), as I noted at [139] above, it was argued that the Jordanian proceedings were vexatious and oppressive because they would circumvent the application of English law and the beneficial consequences to Navig8 (on its own case, a non-party to the bill of lading contract) of the application of English law. As well as rejecting the contention that the foreign proceedings were vexatious and oppressive, at [14] Andrew Smith J rejected the contention that this claim fell within PD 6B para. 3.1(6)(c):

> "There is no dispute that Navig8 have (at least) a sufficiently strong argument for present purposes that the contracts evidenced by the bills of lading are, under English private international law, governed by English law. The question is whether they have a good arguable case that the claim for an injunction is "in respect of" them. In my judgment they do not. In *Alliance Bank JSC v Aquanta* [2012] EWCA Civ 1588, where claims were brought in fraud by claimants who alleged that they were induced to make security contracts governed by English law, Tomlinson LJ, giving the judgment of the court, said (at para 71) that 'unless the claimant is suing in order to assert a contractual right or a right which has arisen as a result of non-performance of a contract, his claim is not in this context properly to be regarded as one made in respect of a contract'. When this test is applied, the claim for an injunctive relief on the grounds that foreign proceedings are vexatious or oppressive falls outside paragraph 3.1(6)(c): no contractual right is asserted and no right resulting from any (actual or threatened) non-performance of a contract is asserted."

164. Where proceedings by one party to an EJC against a third party are said to be vexatious and oppressive as regards the other party to the EJC, and the essential vice of the oppression is the circumvention of the EJC, then I see strong grounds for contending

that they are claims which meet the requirements of CPR 6.33(2B)(c). Both claimant and defendant are parties to the EJC, and the connection between the claim and the EJC (and the contract containing it) is a close one. Indeed, the fundamental premise of such a claim is that the claimant has been deprived of the effective benefit of its contractual rights, albeit not necessarily through a breach of contract (viz the implied term issue canvassed in *JP Morgan*).

165. What of the position where the claim is brought not by a party to the EJC, but an affiliate of such a party, albeit against someone who is party to the EJC? Undoubtedly the claim is more difficult. In *JP Morgan*, [172], without the benefit of argument, I made the following observation:

> "To the extent that any issue had arisen as to the availability of these arbitration specific gateways so far as applications under the vexation and oppression jurisdiction are concerned (and none was raised), where an EJC or arbitration agreement governed by English law is a central feature of the alleged vexation and oppression, which in essence involves a complaint of improper circumvention of that agreement, I would note that CPR Practice Direction 6B para 3.1(6)(c) applies where a claim is "in respect of" a contract governed by English law, words of obvious width on which I commented in the *QBE* case."

166. Where the essential vice of the foreign proceedings is the improper circumvention of an EJC, and the proceedings are brought against a party to the EJC who has, to that extent, voluntarily connected itself to this jurisdiction, I remain of the view that an application for ASI relief on the vexatious and oppressive basis would fall within this gateway, and arguably (cf the debate at [158] above) within CPR 6.33(2B)(c). I accept, however, that the multi-factorial analysis inherent in the identification of vexation and oppression may make line drawing difficult, and that even when the essential vice is circumvention, other factors are likely to be prayed in aid to establish that essential vice. For present purposes, I should note that if no gateway is available for service out in vexatious "forum circumvention" cases, that will make the issue of whether an appropriate term can be formulated and implied a vital one (cf. *JP Morgan,* [111(ii)]).

The claims for declarations

167. The Directors make various claims for declarations of non-liability:

i) A declaration that the Directors are not liable to JPM in respect of the subject matter of the SHA.

ii) A declaration that the Directors are not liable to JPM in respect of the claim made in the Greek Proceedings.

iii) A declaration that they are not liable to JPM in respect of any claim for damages for the alleged diminution in the value of JPM's shareholding in Viva.

168. There are a number of issues which might arise in relation to the appropriateness and terms of these Declarations. The answer to those questions will be heavily influenced by the issue of whether the Greek Proceedings continue. If they do not (on the basis of my conclusion as to the effect of clause 33.1(c)), then there may be no need for any Declarations. If they do continue, issues would arise as to the appropriateness of making

Declarations for the purpose of enabling the Directors to deploy them in the Greek Proceedings (and as to their effect there). Those questions are best left to a point when the final outcome of the ASI claims is known.

169. It follows that for present purposes, I propose to limit myself only to the issue of whether there is a gateway for the proposed Declarations, on which I did not hear extensive argument, and which, to some extent, overlaps with other issues in the case.

170. To the extent that:

i) a declaration is sought as to the absence of a liability on the Directors' part under the SHA (and the utility or appropriateness of such a declaration on the basis of my findings must be highly questionable, there being no apparent basis for a claim against the Directors under the SHA); or

ii) as to the meaning and effect of the Clause 33 Contract (if it were appropriate to grant such a declaration and it would serve any useful purpose);

then I accept that such claims fall within Practice Direction 6B para. 3.1(6)(c), both the SHA and the Clause 33 Contract being governed by English law (as is common ground).

171. To the extent that a declaration is sought as to the Directors' non-liability in tort, that would appear to require a "good arguable case" that the claim fell within PD 6B para. 3.1(16A), which in turn depends on showing (in this case) a good arguable case that the applicable law of the tort claim is English law (for the purpose of PD 6B para. 3.1(9)(c), this being the provision relied upon for the purposes of gateway (16A)). This raises a complex question on which I heard extensive argument, but also an issue of some potential sensitivity if, contrary to my ruling, the Greek Proceedings proceed, and this question is addressed by the Greek courts.

172. Identifying the applicable law of the tort claims in the Greek Proceedings involves the application of Rome II, and in particular (in this case), the following provisions of Rome II:

i) Article 4:

"General rule

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a

pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

ii) Article 14:

"Freedom of choice

1. The parties may agree to submit non-contractual obligations to the law of their choice:

…

(b) where all the partes are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occured.

The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.

2. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement."

iii) Article 16:

"Overriding mandatory provisions

Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation."

173. I am satisfied, applying Article 4(1), that JPM clearly has the better of the argument that the damage claimed here occurred in Greece. The tort claim concerns the alleged interference in JPM's rights as a shareholder in a Greek company and the resultant loss of value in those shares. The fact that JPM has legal rights relating to its share ownership which are governed by English law under the SHA (as well as rights arising under Greek law under the Articles of Association and Greek companies law) does not affect the place of damage, nor does the fact that it would possible (by virtue of clause 7.2 of the SHA) to hold meetings relating to the management of Viva outside Greece. The Directors' submission that because English law might be relevant to determine where particular obligations were to be performed, it follows that "the place of the relevant 'damage' … is England", is, with respect, a non sequitur.

174. The Directors then point to the Article 4(3) "escape clause". This has been described as an "exceptional" provision, and it has been observed that Article 4(3) sets a "high hurdle" for the party seeking to establish an applicable law under this provision: see *Dicey, Morris & Collins on the Conflict of Laws* (16th), [35-032]. As Linden J noted in *Owen v Galgey* [2020] EWHC 3546 (QB), [60], Article 4(3) requires that it be "'clear'

that there is a 'manifestly' or obviously closer connection with the country other than that which is indicated by articles 4(1) and (2)". Linden J continued at [61]:

> "Article 4(3) is an exception/exceptional in these senses but in my view, there is no additional test of exceptionality and it is therefore not necessary for the court to be satisfied, for example, that the facts of the case are also exceptional or unusual in nature before applying Article 4(3). What is required is the application of the words of Article 4 with an awareness of the aims of Rome II. The aim of Articles 4(1) and (2) in particular, is to achieve certainty. They will provide the answer in a given case unless they can be displaced. But [Rome II] also aims 'to bring a degree of flexibility, enabling the court to adapt the rigid rule to an individual case so as to apply the law that reflects the centre of gravity of the situation' through Article 4(3), albeit this provision will only operate in a clear and obvious case."

175. In this case, the Directors rely on the Clause 33 Contract to bring the claim in the Greek Proceedings within Article 4(3): a contract between JPM and the Directors, which it is common ground is subject to English law, and which determines when claims in tort can and cannot be brought by the Directors and JPM (inter alios) against each other. A similar issue was considered by Bright J in *Magomedov v TPG Group Holdings (SBS) LP* [2025] EWHC 59 (Comm). In that case, a clause in the so-called Omirico SPA was said to lead to the application of English law under Article 4(3). Omirico was a Cypriot company which acquired a majority share interest in NCSP, a commercial port central to one of the tortious conspiracies alleged in the case. Omirico was owned by two companies: Port Petrovsk owned by Mr Magomedov and his brother, and Fenti owned by Transneft. Mr Magomedov claimed that he was threatened for the purpose of forcing him to agree to a sale of Port Petrovsk's interest in Omirico for a below market price to Fenti. While Mr Magomedov said that he never agreed to the sale, a document purporting to be a sale of Port Petrovsk's interest to Fenti was entered into and proceeded to completion– the Omirico SPA.

176. The Omirico SPA was subject to a choice of English law (clause 22.1). Further:

i) Clause 15.1(d) of the Omirico SPA provided that "except for any liability in respect of a breach of this Agreement, no Party (or any of its Connected Persons) shall owe any duty of care or have any liability in tort or otherwise to the other Party (or its respective Connected Persons) in relation to the transaction."

ii) Clause 16 of the Omirico SPA provided "without prejudice to any provision of this Agreement and with effect from Closing, a Party, both for itself and on behalf of its respective Affiliates, hereby releases the other Party (including in relation to the Purchaser, Transneft) or its respective Affiliates from, and waives, any claims against, and liabilities of, such persons that may have potentially arisen during the period prior to the date of this Agreement (or may arise in future), whether in contract, tort or otherwise, in connect with, or relating to, such Party holding its respective shares in Omirico and/or the such Party or its Affiliates participating in management of Omirico, the Omirico Subsidiary and/or the NCSP Group…"

177. One of the conspiracies alleged by Mr Magomedov was the conspiracy to cause the sale of Port Petrovsk's interest in Omirico to Fenti for an undervalue, and an issue arose as

to the applicable law of that claim. Mr Magomedov sought to rely on the terms of the Omirico SPA to contend that English law applied to that conspiracy claim, through the gateway of Article 4(3) of Rome II. That conclusion was rejected (in circumstances in which neither Mr Magomedov nor the proposed defendants to the NCSP conspiracy were parties to the Omirico SPA), Bright J holding that the choice of law was not "significant".

178. For the reasons given in *Magomedov*, I would not regard the choice of English law *in the SHA* between JPM and WRL as a sufficient factor for Article 4(3) purposes. However, in this case, the Directors' position is in one sense stronger, in that they and JPM are both parties to the Clause 33 Contract, which is directly concerned with JPM's ability to bring tort claims against them.

179. Nonetheless, I have concluded that JPM has the better of the argument that the implied choice of English law in the Clause 33 Contract is not itself sufficient to lead to the application of English law under Article 4(3):

i) Article 4(3) requires that a particular tort, or "the tort *in question*" be "manifestly more closely connected with" another legal system. It envisages looking at the connections between the particular tort advanced, and a particular system of law.

ii) The Clause 33 Contract does not purport to define the obligations of the Directors to JPM nor to regulate how the Directors are to act towards JPM. To that extent, it does not inform or regulate the conduct which forms the basis of the proposed tort claim.

iii) Rather, the Clause 33 Contract is concerned only with exempting the Directors and JPM from liability to the other for certain types of legal wrong in relation to the subject matter of the SHA.

iv) If the question is asked "what relevance does Clause 33 have to any claim brought in tort against the Directors in relation to the subject matter of the SHA?", the only answer is (and will always be) that for tort claims falling outside clause 33.2, "it is an agreement that there shall be no such liability save in limited circumstances".

v) If an agreement of this kind is to determine the law applicable to a tort claim relating to the subject matter of the SHA, to my mind it can only be because it involves a choice of applicable law for Article 14 purposes. If it cannot achieve that objective by satisfying the strictures of Article 14, it would be contrary to the scheme of Rome II to find that it had been given the same practical effect by displacing the presumptive applicable law under Article 4(3).

vi) Treating clause 33 as sufficient to lead to the application of English law under Article 4(3) would also involve the application of English law to claims which clause 33 does not seek to regulate (i.e. those falling within clause 33.2).

vii) It would also involve a certain circularity in relation to the operation of Article 15 of Rome II, by which the law applicable to a non-contractual obligation will govern "the grounds for exemption from liability, any limitation of liability and any division of liability", yet the law of a contract governing the exemption of

limitation of liability would, by virtue of Article 4(3), become the applicable law (see [28(iii)] above).

180. Turning to Article 14(1), I have found this a more difficult issue, which required more "air time" than could be found for it in a packed hearing or in the limited time available to produce a judgment:

i) The Directors rely on clause 41 of the SHA which provides:

> "This Agreement and any non-contractual obligations arising out of, or in connection with, it shall be governed by, and interpreted in accordance, with English law."

ii) For this clause to avail the Directors for Article 14 purposes, it must form part of a contract to which they are parties with JPM (cf. Article 14(1), "the parties may agree …").

iii) For reasons I have given earlier, the Directors are not parties to clause 41 of the SHA as such, nor are they given rights under the 1999 Act in relation to that clause (cf. clause 38.6).

iv) Is it, however, a term of the Clause 33 Contract? There is no express incorporation of clause 41, and indeed no incorporating language of the kind present in *The Mahkutai* [1996] AC 650 ("all exceptions, limitations, provision, conditions and liberties herein benefiting the carrier"), in which case Lord Goff appears to have been of the view that the choice of law "already applies to the bill of lading contract itself and may for that reason apply to another contract which comes into existence pursuant to its terms." Further, the choice of law clause in that case applied to the contract only, and it might be said that incorporating a choice of law for non-contractual claims is more challenging. It is also significant that clause 38.5 does not identify clause 41 as a clause which Representatives are to obtain the benefit of. The Directors' submission, in a footnote in the skeleton argument, is that "the Directors must be entitled to rely upon this choice of law agreement, whether upon its proper construction, pursuant to clause 38.5, since clause 41 is ancillary and necessary to the enforcement of clause 33 … or pursuant to a term implied into the SHA."

v) There is the further issue that if clause 41 is transposed to the Clause 33 Contract, it would involve a selection of a governing law for tort claims "arising out of or in connection with" the Clause 33 Contract. The tort claims brought in the Greek Proceedings do not seem to "arise out of" the Clause 33 Contract (which is not the source of substantive obligations). The argument that they "arise … in connection with" that contract is more difficult, given the very limited content of the Clause 33 Contract, than the same argument in the context of the SHA.

vi) Further, Article 14 posits a relatively high threshold for such an agreement (viz the choice being demonstrated "with reasonable certainty"), and I note the observation in *Dicey, Morris & Collins*, [34-046] that this is a case in which an express choice is more likely than an implied choice.

181. In addition to that threshold question, further issues may arise as to whether clause 33 (if it did incorporate clause 41 or otherwise constitute a choice of law for Article 14(1) purposes) was "freely negotiated", which has been held to require "a genuine opportunity to influence its contents" (*Pan Atlantic Chartering Inc v UNIPEC UK Co Ltd* [2016] EWHC 2774 (Comm), [185]-[191]). This is not a case in which the Directors rely on rights acquired as transferees of a pre-concluded contract but one in which clause 33, at least, is negotiated (and I am sure freely negotiated – if it matters, WRL and JPM have agreed as much in clause 38.8) by JPM and WRL acting as the Representatives' agents. However, for later Representatives (given the "from time to time" element of the definition), the clause 33 package is pre-agreed. The application of this aspect of Article 14 in this case is not straightforward, and received limited attention in the course of argument. There is also the issue of whether any Article 14(1) choice would be displaced by Article 14(2).

182. In these circumstances, I have reluctantly concluded that I should not decide the Article 14 point at this stage. On my conclusions, it is not necessary to do so, and should that cease to be the case, it is a point which would benefit from more extended argument than could be accommodated within a packed and expedited hearing.

CONCLUSION

183. It follows that the Directors are entitled to ASI relief in respect of the Greek Proceedings on the basis that they breach an obligation to be implied into clause 33 not to bring proceedings in a jurisdiction in which the clause 33 "no liability" provision would not be effective. WRL's and the Directors' alternative claims for ASI relief fail.

184. This conclusion rests the restraint of JPM's claim against the Directors on that part of the SHA most directly and obviously concerned with claims by JPM against the Directors, which provisions the parties took care to ensure that the Directors would be able to enforce. Had those provisions not achieved the object for which WRL and the Directors contend in these proceedings, it is not, perhaps, particularly surprising that other provisions, less directly connected with these issues and in respect of which the Directors did not have first party rights, should not do so.

185. It only remains for me to thank both legal teams for an excellent example of very heavy and hard fought litigation, which has been brought on for argument under considerable pressure of time, and yet litigated in a constructive, professional and co-operative manner. It is to be hoped the parties can take inspiration from the approach adopted by their respective legal advisers.