Neutral Citation Number: [2023] EWCA Civ 688

Case No: CA-2023-000478

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURTS OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
Mr Justice Henshaw
CL-2022-000420

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 June 2023

Before :

LORD JUSTICE LEWISON
LADY JUSTICE CARR
and
LORD JUSTICE NUGEE

- -

Between :

LLC EUROCHEM NORTH-WEST-2	**Claimant/ Respondent**
- and –	
(1) TECNIMONT S.P.A **(2) LLC MT RUSSIA**	**Defendants/ Appellants**

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Alan Maclean KC and Tom Leary (instructed by **Curtis, Mallet-Prevost, Colt & Mosle LLP**) for the **Appellants**
Justin Fenwick KC and George McDonald (instructed by **Vinson & Elkins LLP**) for the **Respondent**

Hearing date : 23 May 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 21 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Carr :

Introduction

1. Anti-suit injunctions are a discretionary remedy granted under s. 37 of the Senior Courts Act 1981 to restrain a party over whom the court has jurisdiction from commencing (or continuing) foreign proceedings, where it is necessary in the interests of justice to do so. They carry penal notices confirming, amongst other things, that a respondent who fails to comply may be held to be in contempt of court. They are a powerful tool in the court's armoury and have long been sought and granted in order to protect and uphold English jurisdiction and arbitration agreements.

2. This appeal relates to an anti-suit injunction obtained by the Respondent, LLC EuroChem North-West-2 ("EuroChem NW") against the Appellants, Tecnimont SPA ("Tecnimont") and LLC MT Russia ("MT Russia"), by order of Bryan J on 23 August 2022 (continued by order of HHJ Pelling KC on 6 October 2022) ("the ASI"). In broad terms, the ASI prohibited the Appellants from commencing or pursuing any foreign claims or proceedings for the purpose of restraining, delaying or otherwise impairing payment of certain bonds (other than with the written consent of EuroChem NW or further order).

3. Following a hearing on 2 March 2023, Henshaw J ("the Judge") ruled on 6 March 2023 that Tecnimont had acted in breach of the ASI by applying to intervene in proceedings in the Regional Administrative Court of Lazio between EuroChem Agro SpA ("EuroChem Agro") and the Italian Ministry of Economy, Treasury Department, Financial Security Committee (and others) ("the Italian Proceedings"). He also declined to vary the ASI so as to permit Tecnimont to pursue such intervention.

4. On this appeal, Tecnimont challenges both the Judge's finding of breach and the refusal to vary.

Background facts

5. EuroChem NW, a Russian company, and EuroChem Agro, an Italian company, are subsidiaries of EuroChem Group AG ("Eurochem AG"), a Swiss fertilizer producer. Tecnimont, an Italian company, and MT Russia, a Russian company, are subsidiaries of Maire Tecnimont SPA, another Italian company.

6. In June 2020 EuroChem NW engaged the Appellants as offshore and onshore engineering, procurement and construction contractors on the development of the "North-West 2" ammonia and urea production plant in Kingisepp, Russia ("the Project"). The relevant (three) contracts were as follows: a Coordination and Interface Agreement between EuroChem NW and Tecnimont and MT Russia; an Offshore Engineering and Procurement Contract between EuroChem NW and Tecnimont; and an Onshore Engineering, Local Procurement and Construction Contract between EuroChem NW and MT Russia ("the Contracts"). All were subject to materially identical London (ICC) arbitration clauses ("the London arbitration clauses"). (The arbitration clause in the Coordination and Interface Agreement was at Clause 7.5; in the other two contracts it was at Clause 21.3.)

7. Taking it as the exemplar, Clause 7.5 provided:

> "**7.5 Arbitration**
>
> 7.5.1. Any Dispute arising between Owner and one or more Contractor, or between EP Contractor and EPC Contractor, in relation to this Agreement or in any way connected therewith, which is not settled amicably in accordance with clause 7.1 within forty five (45) Days from the date written notice of such Dispute is issued by one Party to the other Party may be submitted by either Party for binding resolution by arbitration under the Rules of Arbitration of the International Chamber of Commerce such as are then in force (the "Rules") by three (3) arbitrators…
>
> 7.5.2 The place of the arbitration shall be London, England and the language of the arbitration shall be the English language. The seat of the arbitration shall be London, England..."

8. "Dispute" was defined as:

> "…any question, dispute or difference arising out of or in connection with this Agreement including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity (each a "**Dispute**")…"

9. Pursuant to the Contracts, the Appellants caused various banks to advance on-demand payment, performance and retention bonds to EuroChem NW. The bonds each contained an exclusive English jurisdiction clause ("the English jurisdiction clauses") as follows:

> "11. Governing Law
>
> This bond, and any non-contractual obligations arising out of or in connection with this bond, shall be governed by and construed in accordance with the laws of England and Wales. Each party irrevocably submits to the exclusive jurisdiction of the courts of England with regard to all matters arising from or in connection with this bond and agrees that a judgment on any proceedings brought in the courts of England shall be conclusive and binding upon them and may be enforced in the courts of any other jurisdiction."

(With the exception of the Onshore Advance Payment Bond, where Clause 11 did not include the additional phrase "and any non-contractual obligations arising out of or in connection with this bond".)

10. On 4 August 2022 EuroChem NW gave notice to terminate the Contracts following the suspension of work by Tecnimont and MT Russia on the Project, and between 4 and 11 August 2022 it attempted to draw down on the bonds. Payments out on two of the bonds (issued by Russian banks) were made; but, on the remaining six Bonds ("the

Bonds"), the relevant (French and Italian) Banks ("the Banks") refused payment, with the following explanation:

> "…we are unable to honour the claim due to the presence of international sanctions directly impacting the transaction. Payment under the above-mentioned claim will indeed constitute a breach of these international sanctions."

11. The Banks' position was that satisfaction of the demands would be contrary to the asset-freezing sanctions regime introduced as a response to Russia's invasion of Ukraine and earlier annexation of Crimea under EU Council Regulation 269/2014 (as amended by EU Council Regulations 2022/396 and 2022/878) ("Regulation 269") and EU Regulation 833/2014 (together "the Regulations"). It was said that EuroChem NW was owned and/or controlled by Mr and/or Mrs Melnichenko, who are "Designated Persons" for the purpose of the Regulations. The total sum unpaid under the Bonds is approximately EUR 212,000,000.

The Arbitration Proceedings

12. On 15 August 2022 the Appellants commenced arbitration proceedings under the Contracts against EuroChem NW ("the Arbitration Proceedings"). They sought declaratory relief to the effect, amongst other things, that EuroChem NW's calls on the Bonds were unlawful, in reliance (like the Banks) on the alleged involvement of Mr and/or Mrs Melnichenko in EuroChem NW. At the same time they applied for the appointment of an Emergency Arbitrator to restrain payment under the Bonds, contending that EuroChem NW's calls on the Bonds were "tantamount to fraud". It was said that the representation to the Banks that the Appellants had defaulted was false, and wilfully so.

13. The Emergency Arbitrator dismissed that application on 20 August 2022, on the basis that the Appellants had failed to establish a good arguable case that it was unlawful for EuroChem NW to demand payment. There was nothing to suggest that the demands on the Banks were made dishonestly.

14. Also in the Arbitration Proceedings, EuroChem NW claimed that Tecnimont had acted in breach of obligations said to have arisen following termination of the Contracts. Tecnimont denied breach on the basis that it cannot lawfully perform any such obligations because of the alleged involvement of Mr and/or Mrs Melnichenko in EuroChem NW. Performance would be tantamount to providing economic resources to EuroChem NW, in breach of the sanctions regime.

15. In its Reply to Counterclaims Tecnimont referred to and relied on a Decree of the Italian Treasury Ministry of Economy and Finance dated 27 September 2022 ("the Decree"), whereby the Italian authorities concluded that EuroChem Agro was ultimately owned or controlled by Mrs Melnichenko through EuroChem AG (and other companies). As a result, EuroChem Agro was subject to an asset freeze. The Decree noted that:

> "a.…the Italian company [EuroChem Agro] and controlled through foreign corporate vehicles ([EuroChem AG], based in Switzerland, as well as AIM CAPITAL PLC, LINEA (CY) LTD

> and LINETRUST PTC LTD based in Cyprus) by the FIRSTLINE Trust, established in Bermuda;
>
> b. effective owner of FIRSTLINE Trust, starting March 9, 2022, and Ms Aleksandra Melnichenko who succeeded, in the same capacity, Mr Andrey Igorevich Melnichenko resigned from quality on 8 March 2022…"

and considered that EuroChem Agro fell within the freezing measures under Regulation 269 "as indirectly attributable to Ms Aleksandra Melnichenko". It went on to declare the freezing of EuroChem Agro's assets on that basis.

16. Tecnimont has applied to join EuroChem AG to the Arbitration Proceedings, which are ongoing.

The Bank Proceedings

17. On 19 August 2022 EuroChem NW commenced Commercial Court proceedings in London against the Banks. On 30 August 2022 the Appellants applied for an order that they be joined to the proceedings under CPR 19.2(2)(b), given the common position adopted by them and the Banks as to ownership/control of EuroChem NW by Mr and/or Mrs Melnichenko. EuroChem NW and the Banks consented to that intervention.

18. In their pleaded Defence, the Appellants again referred to and relied on the Decree in support of their case. Again, the Bank Proceedings are ongoing.

The ASI

19. On 8 August 2022, without notice, EuroChem NW sought and on 9 August 2022 obtained an anti-suit injunction against the Appellants by order of Butcher J (to which minor corrections were made on 10 August 2022) with a return date of 23 August 2022. EuroChem NW's application was premised on a concern that the Appellants would commence proceedings abroad in order to restrain payment of the Bonds (in breach of the London arbitration clauses and/or English jurisdiction clauses). Amongst other things, it relied on the fact that the Appellants had sought and obtained temporary restraining orders from the Italian courts in similar circumstances in 2019.

20. The injunction (by paragraph 2) prevented the Appellants from commencing or pursuing any claims and/or proceedings in the courts of any jurisdiction for the purpose of restraining, delaying or otherwise impairing payment under the Bonds (without written consent from EuroChem NW or further order). There was provision (in paragraph 4) for the Appellants to apply for permission to bring such proceedings.

21. On 10 August 2022 the Appellants notified EuroChem NW of their intention to apply for permission to commence proceedings abroad, and on 19 August 2022 they proceeded to apply for permission (under paragraph 4 of the order of Butcher J) to issue proceedings in France and/or Italy against EuroChem NW and/or the Banks seeking interim relief restraining calls on or payments under the Bonds, and also permission to rely on expert evidence of Italian law.

22. At the return date of 23 August 2022 Bryan J made the ASI, which was to supersede its predecessor. In the normal way, the ASI carried a penal notice and expressly confirmed

the Appellants' right to seek variation or discharge. Paragraph 2 of the ASI ("Paragraph 2") read as follows:

> "2. Until further order the Defendant must not commence or pursue any claims and/or proceedings in the court(s) of any jurisdiction for the purpose of restraining, delaying or otherwise impairing payment under the bonds listed in Schedule 3 Part B to this Order, save:
>
> a. By proceedings brought by the Defendant in the courts of England;
>
> b. By arbitration in London in accordance with the arbitration agreements in the contracts listed in Schedule 3 Part A of this Order; or
>
> c. With the written consent of the Claimant."

23. Bryan J made detailed directions for a further hearing on a further return date of 29 September 2022. That hearing was intended to address i) whether or not the ASI should continue and, if so, on what terms, ii) the Appellants' application to discharge the ASI for alleged failure by EuroChem NW to make full and frank disclosure, and iii) the Appellants' application to vary the ASI to permit them to commence proceedings in France and/or Italy.

24. The hearing on 29 September 2022 came before HHJ Pelling KC. There were three issues before him:

i) Whether the ASI should continue and, if so, on what terms;

ii) Whether the ASI should be discharged because of an alleged failure by EuroChem NW to make full and frank disclosure at the without notice hearing before Butcher J;

iii) Assuming that the ASI should continue on its existing terms, or be re-granted on those terms, whether the Appellants should nevertheless be permitted to commence proceedings in France or Italy to restrain banks in those jurisdictions from honouring calls on the Bonds or requiring EuroChem NW to suspend its calls on the Bonds and refraining from making more calls on them, or both. This was described as the "Derogation Issue".

25. HHJ Pelling KC delivered his judgment on 6 October 2022 ([2022] EWHC 2444 (Comm)). He concluded that the ASI had been properly granted, and should continue on the same terms as ordered by Bryan J; he rejected the submission that EuroChem NW had been guilty of a failure of full and frank disclosure; he found against the Appellants on the Derogation Issue. Only the first and third issues are of potential relevance to the present appeal.

26. With regard to the first question, he confirmed that, subject to the availability of a quasi-contractual basis, there was no basis for an ASI against the Appellants on the basis of the English jurisdiction clauses, since the Appellants were not parties to the Bonds. However, it was common ground that any dispute between EuroChem NW and the

Appellants concerning the enforceability of the Bonds came with the scope of the London arbitration clauses. He rejected the Appellants' contention that it was nevertheless open to them to apply for relief in aid of the Arbitration Proceedings to state courts other than the courts of England and Wales. The Appellants had not established an entitlement to rely on the exception to the general rule requiring applications in aid of arbitration seated in England to be made to the English courts. The dispute between the parties, as to whether (as a matter of English law) it was open to a bank to resist payment on the basis that to pay would be unlawful, was capable of resolution by the English courts applying the relevant English law principles with expert evidence as necessary. It was wrong in principle to approach the question by reference to balance of convenience considerations. The Appellants' argument that, for practical reasons, they should be permitted to apply to courts in Italy or France because the remedy sought would not be granted either by the English courts applying English law or by an arbitral tribunal applying English law, was "entirely fallacious": that would permit the Appellants to apply to the courts in Italy or France for relief that they could not obtain from the courts in England (and which they would not be entitled to as a matter of English law). That would be to "outflank the arbitration agreement" that the parties had entered into, namely that there should be an arbitration seated in London, subject to English law and which by agreement must apply English law to resolve the disputes referred to the arbitration tribunal.

27. In these circumstances, it was unnecessary for HHJ Pelling KC to reach any conclusion as to whether the ASI could have been granted on a quasi-contractual basis. It also followed from these conclusions that, on the third question, he should not permit proceedings to be commenced in France or Italy under the Derogation Issue. Having referred back to his earlier reasoning, he stated (at [35]):

> "In summary however, any question concerning the enforceability of the Bonds is one of English law to be determined by the Arbitral tribunal or the courts of England and Wales as the courts of the seat…If and to the extent that compliance by the Banks with their obligations under the Bonds would be unlawful at the place of performance, that is an issue that by agreement of the parties can and should be resolved by the tribunal or the courts of England applying English law. If and to the extent that performance is not unlawful, then no legitimate benefit could arise from proceedings in either France or Italy because the courts in each of those countries would be obliged to apply English law so the outcome would be no different. That being so, permitting the [Appellants] to commence proceedings in Italy or France would be vexatious because it would generate extra layers of cost, might result in delay and would distract attention from the conduct of the arbitration."

Tecnimont's application to intervene in the Italian Proceedings

28. On or around 28 October 2022 EuroChem Agro commenced the Italian Proceedings seeking, amongst other things, annulment of the Decree. It filed claim submissions on 11 November 2022. The Italian authorities filed their defence on 18 November 2022.

29. On 14 February 2023 Tecnimont applied to intervene, arguing that it had an interest in the proceedings ("the Intervention Application"). In its "Deed of Participation *Ad Opponendum*" ("the Deed of Participation"), Tecnimont explained that it was involved in an international dispute with EuroChem NW and EuroChem AG. That dispute was being heard in the Arbitration Proceedings "just commenced" and in the Bank Proceedings "still pending before the English Court". It related "inter alia to the assumption made in [the Decree] which recognized…that EuroChem AG and the companies controlled by it are attributable to the Melnichenko couple…". The companies controlled by EuroChem AG (including EuroChem NW and EuroChem Agro) were said to be "directly and indirectly sanctioned", with the result that the provision of contractual services by Tecnimont was impossible. Tecnimont invited the Italian court to uphold the Decree.

30. On 24 February 2023 EuroChem Agro submitted pleadings asserting that (as a matter of Italian law) Tecnimont had insufficient standing to intervene. In the course of doing so, it stated that "the only interest prompting Tecnimont's intervention is abusive and emulative [*è di tipo abusivo ed emulativo*]. It seeks to oppose the appeal and to support the measure for the sole purpose of substantiating its position in the international commercial arbitration and in the proceedings before the English Court. Tecnimont's main purpose is in the substance to use the freezing order as an excuse to evade its contractual obligations…The intervention must therefore be rejected and the documents submitted by it are to be rejected as well."

31. In a Reply brief dated 8 March 2023 EuroChem Agro described the ownership or control of EuroChem Agro as the "decisive point" in the proceedings. Amongst other things, it sought a reference to the Court of Justice of the European Union ("CJEU") (on the basis that the EU law issues arising from the interpretation of the Regulations, to which the Decree gives effect, are key to the Decree).

The Contempt Proceedings and Judgment

32. In the meantime, on 17 February 2023 EuroChem NW had accused Tecnimont of breaching the ASI by the Intervention Application. Tecnimont "strongly reject[ed]" that allegation on 19 February 2023.

33. Undeterred, on 20 February 2023 EuroChem NW issued proceedings against Tecnimont for contempt of court ("the Contempt Application"). It sought an order that, unless Tecnimont withdrew the Intervention Application, its defence in the Bank Proceedings should be struck out. Tecnimont opposed the Contempt Application and, in the alternative, (by application dated 24 February 2023) sought a variation of the ASI such that Tecnimont and MT Russia would be permitted to participate in any proceedings commenced by EuroChem NW, EuroChem AG or any of its subsidiaries ("the Variation Application"). But it agreed not to make submissions in the Italian Proceedings pending the outcome of the Contempt Application.

34. In support of Tecnimont's opposition and alternative application, Tecnimont's lawyer provided a witness statement dated 24 February 2023 stating that EuroChem NW was "interested in seeing the Decree annulled because if EuroChem Agro is successful, the position of [EuroChem NW] in the Arbitration and Bank Proceedings will be improved. For the same reasons, Tecnimont has a legitimate commercial interest in seeing the Decree upheld."

35. The Contempt Application duly came on before the Judge. He considered and rejected Tecnimont's three arguments of construction as follows:

    i) The wording of Paragraph 2 did prohibit participation by Tecnimont in the Italian Proceedings;

    ii) The Italian Proceedings did fall within the mischief to which the ASI was directed;

    iii) It was doubtful that the question of whether or not Tecnimont's proposed participation in the Italian Proceedings involved a breach of the London arbitration or English jurisdiction clauses was relevant to the issue of contempt (as opposed to variation). But in any event, the proposed participation did involve such breach.

36. Beyond this, the Judge held that Tecnimont's evidence was insufficient to establish that it had proceeded on the basis of a "good faith" understanding of the ASI. But he declined to make the "unless order" sought by EuroChem NW. It was unnecessary to do more than declare that the Intervention Application amounted to a breach of the ASI. Other sanctions would be likely to follow in the event that any intervention persisted.

37. He dismissed the Variation Application, which at the hearing was limited to an application for permission for Tecnimont to participate in the Italian Proceedings. The proposed intervention by Tecnimont was inconsistent with the London arbitration and, if relevant, also the English jurisdiction clauses. There was nothing unfair, he reasoned, in EuroChem Agro being able to challenge the Decree without Tecnimont being able to intervene in the opposition of that challenge. Further, any prejudice to Tecnimont in not granting the variation was limited, in circumstances where the Italian authorities were contesting EuroChem Agro's public law challenge in any event.

38. Following this ruling, on 10 March 2023, Tecnimont formally withdrew from the Italian Proceedings. On 13 March 2023 it sought permission to appeal, which permission was granted by Males LJ on 23 March 2023. On 29 March 2023 the merits hearing in the Italian Proceedings was adjourned to 11 October 2023.

The parties' positions on appeal

39. In summary, the Appellants argue that the Judge was wrong to conclude that the ASI prohibited Tecnimont from participating as intervener in the Italian Proceedings. The words "commence or pursue any claims and/or proceedings" in Paragraph 2 did not prohibit Tecnimont in this regard. Tecnimont did not commence the Italian Proceedings, nor was it seeking to "pursue" them. Its proposed participation was as intervener only. The Judge was wrong to conclude that it made no difference that the Italian Proceedings would or might fall away if, for example, EuroChem Agro were to discontinue them. As a matter of the Italian Administrative Procedure Code, Tecnimont's involvement would not be as principal litigant, and the ultimate judgment would have no direct effect on Tecnimont or EuroChem NW.

40. In any event, the Italian Proceedings, and Tecnimont's participation in them, were not "for the purpose of restraining, delaying or otherwise impairing payment under the bonds" and so fell outside the scope of the prohibition in the ASI. The issues in the

Italian Proceedings are issues of public law falling within the mandatory jurisdiction of the Italian administrative court; there is no question of the Italian Proceedings, whatever their outcome, restraining, delaying or impairing payment to EuroChem NW under the Bonds. The correctness of the Decree is relevant only to issues unrelated to the Bonds. The effect of the Judge's order is to preclude Tecnimont from participating in any proceedings before the CJEU on the issue of the control of EuroChem Agro.

41. The central focus of the oral submissions advanced powerfully by Mr Maclean KC for Tecnimont was, however, a broader, overarching ground of challenge. This was to the effect that the ASI could not have the scope ascribed to it by the Judge because the London arbitration and English jurisdiction clauses on which it was based could not, as a matter of law, have justified an injunction prohibiting Tecnimont's participation in the Italian proceedings. Participation in the Italian Proceedings would not be "inimical" to the London arbitration and English jurisdiction clause, as the Judge found that they were. There would be no breach of the London arbitration clauses: there is no dispute between Tecnimont and EuroChem NW in the Italian Proceedings that could fall within those clauses. The Judge wrongly conflated the issue of whether EuroChem AG was controlled by a Designated Person with the separate issue between Tecnimont and EuroChem AG as to whether the Decree was lawful under Italian law and failed to recognise that no issues as to payment of the Bonds arises in the Arbitration Proceedings in any event. As for the English jurisdiction clauses, the Appellants are not parties to the Bonds and there is no quasi-contractual basis on which to restrain Tecnimont from participation in the Italian Proceedings (see *Qingdao Huigan Shipping Company v Shanghai Dong He Xin Industry Group Co Ltd* [2018] EWHC 3009 (Comm); [2019] 1 Lloyd's Rep 520 at [31] to [35] and *QBE Europe SA/NV v Generali Espana de Seguros y Reaseguros* [2022] EWHC 2062 (Comm) at [13] to [21]). Tecnimont is not making any claim in the Italian Proceedings, let alone one premised on contractual claims under the Bonds.

42. Thus, the Judge was wrong to find Tecnimont to be in contempt of court for breach of the ASI.

43. Further or alternatively, it is said that the Judge was wrong to refuse to vary the ASI to permit Tecnimont's participation in the Italian Proceedings. Otherwise the ASI would stretch well beyond the requirements of the London arbitration and English jurisdiction clauses underpinning it. There would no lawful basis for such a broad injunction. Further, EuroChem Agro has now claimed in the Italian Proceedings that Tecnimont's intervention was an act of nuisance ("*atto emulativo*"); the effect of the Judge's order is to preclude Tecnimont from properly defending itself against that charge.

44. EuroChem NW contends that the Judge was right, essentially for the reasons that he gave. To the extent necessary, it seeks to uphold the Judge's order on different or alternative grounds as set out in its Respondent's Notice, including in particular that:

    i) The Intervention Application was itself a claim and/or proceedings which Tecnimont commenced and/or pursued for the purpose of restraining, delaying or otherwise impairing payment of the Bonds;

    ii) That whether or not the Intervention Application breached the London arbitration and/or English jurisdiction clauses was irrelevant to the question of contempt;

iii) That the Variation Application should be dismissed for different or additional grounds, including unnecessary proliferation of proceedings, lateness, and the fact that the purpose of the Variation Application is to permit what was a contempt of court which should not be condoned.

Relevant principles of construction

45. As for the construction of the ASI, the relevant principles can be summarised as follows:

i) The terms of an injunction, given the penal consequences of breach, are to be construed strictly;

ii) The words of the order are to be given their natural and ordinary meaning in their context, including their historical context and with regard to the object of the order. The proper construction depends on what the language of the order would convey, in the circumstances in which the court made it, so far as those circumstances were before the court and apparent to the parties;

iii) Rather than looking for ambiguity, the real issue is whether the meaning of the language is open to question. There may be many reasons, not limited to cases of ambiguity, where that is the case;

iv) The judgment leading to the order is admissible as an aid to construction, but will not necessarily be of assistance. A court's reasons may be used to interpret language, but not to contradict it. However, the parties' submissions are not a reliable or useful contextual source;

v) The question is simply what the order means. If it is desirable to give it a broader or narrower meaning, the solution is to vary it for the future not to give it a different interpretation.

(See *Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd and others* [2017] EWCA Civ 1525 at [41]; *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6 ("*Sans Souci*") at [11] to [16]; *In Re A (A Child) (Judgment Corrections)* [2014] EWCA Civ 871; [2014] 1 WLR 4453 ("*Re A*") at [32]; *Banca Generali SPA v CFE (Suisse) SA* [2023] EWHC 323 (Ch) ("*Banca Generali*") at [18] to [22]).

46. As for the construction of the London arbitration clauses, a broad and purposive construction is to be adopted. It is generally to be assumed that parties to a single agreement, as rational businesspersons, do not intend that disputes under the same agreement be determined by different tribunals (see *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40; [2007] 4 All ER 951 at [13]; *Sebastian Holdings Inc v Deutsche Bank AG* [2010] EWCA Civ 998; [2011] 2 All ER (Comm) 245 at [39]).

Discussion: breach of the ASI

47. It is convenient to start with a consideration of what Tecnimont is seeking to achieve in the Italian Proceedings, and why.

48. The main issue in the (ongoing) Bank Proceedings is whether the Banks can avoid payment of the Bonds because EuroChem AG and its subsidiaries are owned and/or controlled by Mr and/or Mrs Melnichenko ("the ownership/control issue"). Likewise, in the (ongoing) Arbitration Proceedings the Appellants seek to justify the cessation of work on the Project and to assert that EuroChem NW's demands on the Bonds were unlawful for the same reason. The ownership/control issue also arises front and centre in the Italian Proceedings: it was the Italian authorities' view that EuroChem Agro was owned/controlled ultimately by Mrs Melnichenko through EuroChem AG (and other foreign corporate vehicles) that underpinned the Decree.

49. By the Intervention Application Tecnimont sought to persuade the Italian court to find in its favour on the ownership/control issue. As the Judge rightly identified (at [30]), it was asking the court to decide in its favour an issue that is central to the disputes in both the Bank and Arbitration Proceedings.

50. It did so in order:

    i) To seek to uphold the Decree and obtain evidence to support its case on the ownership/control issue in the Arbitration and Bank Proceedings;

    ii) To seek to secure a potential outright defence so far as non-payment of the (Italian) Bonds was concerned, on the basis that payment out in Italy would be unlawful.

51. The question is whether or not, by acting in this way, Tecnimont acted in breach of Paragraph 2.

52. As set out above, Tecnimont contends first that, on a proper construction of Paragraph 2, it was prohibited only from commencing or pursuing proceedings that would be in breach of (or, as Mr Maclean put it for the Appellants, "inconsistent with") the London arbitration clauses. On that basis it is said, secondly, that there was no breach of the ASI, because the Intervention Application fell outwith the scope of the London arbitration clauses. Tecnimont needs to succeed on both limbs of the debate in order to overturn the finding of breach.

Proper construction and scope of the ASI

53. On their face, the words of Paragraph 2 are clear and certain. Tecnimont has not argued for any ambiguity or suggested, for example, that the word "impair" is lacking in specificity or difficult to interpret. (Mr Maclean submitted without hesitation that it meant "inhibit".) Further, the scope of the prohibition imposed by the words is wide. Paragraph 2 prohibits the commencement or pursuit of "[a]ny claims and/or proceedings" in "any courts" of "any jurisdiction" for the purpose of not only restraining or delaying payment under the Bonds but also otherwise impairing such payment.

54. As the authorities set out above demonstrate, the question is not to search for ambiguity, but rather to ask whether the real meaning of the language in Paragraph 2 is open to question. Does the relevant context as known to the court and the parties at the time that the ASI was made require the prohibition in Paragraph 2 to be read down so as to

be limited by reference only to claims or proceedings falling within the London arbitration clauses?

55. That context includes the fact that, as would be expected, the ASI was granted (and continued) by reference to the London arbitration clauses. But that does not mean that the ASI was necessarily limited accordingly. The terms of Paragraph 2 went beyond the scope of those clauses - and obviously so. There is nothing to suggest that the judicial decisions to grant or continue relief in these (wider) terms were anything other than conscious and deliberate.

56. On the contrary, the terms were directly before three different Commercial Court Judges on three separate occasions. On each occasion, each judge would have considered the terms of Paragraph 2 with care, conscious of the injunctive nature of the relief in question; on each occasion the scope of Paragraph 2 was directly before the court for consideration. Thus, the direct first issue for HHJ Pelling KC was whether the ASI should be continued "and, if so, in what terms". It is to be remembered that Paragraph 2 was not a consequential add-on or the tail end of an order: it was the central operative clause granting the (only) relief sought. There was never any suggestion that Paragraph 2 did not state exactly what the court intended it to, without further limitation or gloss. Tecnimont at no stage sought to appeal the decision of Bryan J to grant, or of HHJ Pelling KC to continue, an order in the terms set out in Paragraph 2. Whether Paragraph 2 went further than it should have done, or whether Tecnimont now considers that its terms should be narrower, is not the question.

57. In these circumstances, there is no proper basis for going behind or beyond the simple words of the ASI in the manner contended for by Tecnimont. Nor is there a safe one. All parties to an injunction are entitled to know where they stand; the same can be said of interested third parties, such as a bank served with a freezing order relating to one of its customers. If there is to be interference with what is otherwise clear wording, there needs to be a clear and obvious basis for doing so. There is no evidence of any statement at any stage by Bryan J or HHJ Pelling KC (or Butcher J) that the injunction should be limited by reference to the London arbitration clauses. (In fact, no notes of Bryan J's ruling when he granted the ASI have been produced at all.)

58. Putting it another way, I do not consider that the meaning of the ASI is open to question, taking into account the background (to the extent that it is known) alongside the (very clear) wording. This is not, for example, a situation as in *Sans Souci*, where the words of the order begged the question of what "issue" of damages was being remitted to the lower court (see [15]). Nor is it a case where the meaning of the order is "absurd" without resort to the earlier judgment, as was the case in *In re A* (see [32]).

Breach of the London arbitration clauses

59. In any event, I consider, like the Judge, that Tecnimont's participation in the Italian Proceedings involved a breach of the London arbitration clauses. It is not necessary for present purposes to engage with the English jurisdiction clauses, to which Tecnimont was not a party, or the related quasi-contractual debate (and HHJ Pelling KC did not rely on them for the purpose of his decision).

60. As set out above, EuroChem NW and Tecnimont agreed to refer to arbitration "[a]ny Dispute arising between [EuroChem NW] and [Tecnimont] in relation to this Contract

or in any way connected therewith". "Dispute" was defined as "any question, dispute or difference arising out of or in connection with this Contract including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity (each a "Dispute")". The clauses are thus drafted very broadly, and in any event are to be construed widely.

61. It is common ground that any cause of action between EuroChem NW and the Appellants concerning the enforceability of the Bonds falls within the scope of the London arbitration clauses (to which EuroChem NW and Tecnimont were bound). It appeared during the course of the appeal hearing also to be common ground that the ownership/control issue (centrally) in dispute between Tecnimont and EuroChem NW in the Arbitration and Bank Proceedings was also (centrally) in dispute between Tecnimont and EuroChem Agro in the Italian Proceedings.

62. The definition of "Dispute" makes it clear that a "Dispute" is not limited to separate formal proceedings or claims, but extends to mere questions or differences between the parties. The ownership/control issue is such a question or difference. Its outcome concerns, amongst other things, whether the Banks are liable to pay under the Bonds. Put simply, the "Dispute" arises between EuroChem NW and Tecnimont in relation to or in connection with the Contracts. The fact that EuroChem NW was not party to the Italian Proceedings does not mean that EuroChem NW and Tecnimont are not to be taken as having agreed that the ownership/control issue (which relates to EuroChem AG and its subsidiaries) was to be litigated only in accordance with the London arbitration clauses, and not otherwise.

63. This analysis does not involve an impermissible conflation of issues, as suggested by Tecnimont. The fact that there is a separate issue between Tecnimont and EuroChem Agro as to the lawfulness of the Decree under Italian law cannot mask the existence of the underlying ownership/control issue. Nor does the fact that the Italian proceedings are public law proceedings within the province of the Italian courts, or that they involve an independent question of European law, for example, alter this analysis. The ownership/control issue arises as part of the dispute in the Italian Proceedings and it is on that issue that Tecnimont seeks a ruling in its favour.

64. The conclusion sits entirely comfortably with the notion that these commercial parties would not have intended the same issue to be litigated here and abroad in different tribunals. As the Judge put it at [43], such proliferation of proceedings would be inimical to Tecnimont's agreement to resolve its disputes with EuroChem NW solely by means of London arbitration. It is to be remembered 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.

65. Thus, subject to Tecnimont's additional challenges to the findings i) that it "commenced or pursued" proceedings within the meaning of the ASI and ii) that it did so for the purpose of "impair[ing]" the payment of the Bonds within the meaning of the ASI, the Judge was right to make the finding of breach that he did for the reasons that he gave.

Commencement or pursuit of a claim or proceedings

66. I have no hesitation in rejecting Tecnimont's submission that by making the Intervention Application it did not commence or pursue a claim and/or proceedings.

67. The Intervention Application was a deed of participation "*Ad Opponendum*" (i.e. with an objection). It concluded in the following terms:

> "**ON THESE GROUNDS**
>
> Tecnimont…requests that, following admission of this participation, rejecting any petition to the contrary, you reject the appeal lodged by EuroChem Agro…
>
> With the award of legal expenses and fees."

68. Thus, Tecnimont positively sought a particular outcome in the proceedings, namely rejection of EuroChem Agro's appeal against the Decree, together with an award of costs against EuroChem Agro. Applying the natural and ordinary meaning of the language, this amounted to the commencement of a claim by Tecnimont, albeit within already existing proceedings between EuroChem Agro and the Italian authorities.

69. Further or alternatively, Tecnimont pursued the Italian proceedings as intervener with the stated goal of defeating the appeal (for the purpose of the Arbitration and Bank Proceedings). At the outset it served substantial evidence arising from or already deployed in the Arbitration and/or Bank Proceedings (by way of Annex to the Intervention Application). It sought to participate actively thereafter on an ongoing basis, including by making further submissions.

70. There is nothing in Paragraph 2 to suggest that only an original claimant/a principal litigant can commence a claim or pursue proceedings for the purpose of Paragraph 2. Such a construction would defeat the object of the ASI: it would allow Tecnimont to seek to impair payment under the Bonds by supporting foreign claims or proceedings brought or pursued by others (even by its own affiliates or subsidiaries). Nor does it matter that, were EuroChem Agro to abandon its appeal, there might not be any ongoing proceedings. The fact would remain that Tecnimont had commenced a claim and/or pursued proceedings; and, in any event, there are no signs of EuroChem Agro withdrawing.

Tecnimont's purpose

71. Tecnimont contends that, in any event, the Intervention Application was not brought "for the purpose of restraining delaying or otherwise impairing payment under the Bonds" within the meaning of Paragraph 2. This takes me back to where I started the discussion.

72. It is common ground that the relevant purpose is that of Tecnimont. Further, Tecnimont rightly did not renew the submission made before the Judge that the ASI was only intended to catch "direct" restraint, delay or impairment of payment under the Bonds. As the Judge identified at [39], there was no support for such a construction to be found, including in the judgment of HHJ Pelling KC. The issues before HHJ Pelling KC included whether Tecnimont should be allowed to start proceedings in France or Italy to restrain the Banks there from paying under the Bonds; but, as set out in [2] of his

judgment, the broader and primary issues included whether the ASI should be continued and, if so, on what terms. HHJ Pelling KC's statements that "any question" about the enforceability of the Bonds was to be determined in England, and that to allow Tecnimont to start proceedings elsewhere might result in delay and distract attention from the conduct of the Arbitration Proceedings, are consistent with the ASI having effect, as the Judge put it at [40], "according to its express terms, which plainly extend beyond proceedings to restrain payment". Direct or indirect interference is sufficient: see for example *Kallang Shipping SA v AXA Assurances Senegal (The Kallang)* [2006] EWHC 2825; [2007] 1 Lloyd's Rep 160 at [39].

73. The terms of the Intervention Application speak for themselves. The only reason given for Tecnimont's interest in participation in the Italian Proceedings was its involvement in English proceedings involving EuroChem NW and EuroChem AG, that is to say the Bank and Arbitration Proceedings (to which express reference was made). The Bank and Arbitration proceedings were said to relate, amongst other things, to:

> "the assumption made in [the Decree] which recognized…that EuroChem AG and the companies controlled by it are attributable to the Melnichenko couple, both designated pursuant to Council Implementing Regulation (EU) 2022/396…and Council Implementing Regulation (EU) 2022/878…
>
> EuroChem AG and the companies controlled by it, as they are attributable to the Melnichenko couple, are therefore directly and indirectly sanctioned with, inter alia, the resulting impossibility of providing the contractual services…"

74. Tecnimont thus sought to uphold "the assumption made in [the Decree]" in relation to the ownership/control issue because of its involvement in the Arbitration and Bank Proceedings. As Tecnimont's lawyer confirmed in his witness statement of 24 February 2023, it was thereby seeking to improve its position in the Arbitration and Bank Proceedings. It wanted to strengthen its position on the ownership/control issue, which was central to both the Arbitration and Bank Proceedings, making it less likely that the Banks would be required to pay EuroChem NW under the Bonds. It was seeking obviously to impair payment under the Bonds.

75. Tecnimont's submission on appeal that it was seeking simply to assist the English tribunals by gathering relevant material to provide a full and accurate overall picture is factually (and commercially) unreal. As indicated, Tecnimont was not a neutral party in the Italian Proceedings; by the Intervention Application it was positively seeking to secure both an evidential and a substantive legal advantage in the Bank and Arbitration Proceedings through a finding of the Italian court in the Italian Proceedings in its favour on the ownership/control issue. Success in Italy would add to the body of evidence suggestive of Mr and Mrs Melnichenko's ownership/control of EuroChem AG and its subsidiaries, and potentially provide an outright defence (on the basis that payment under the Bonds would be unlawful in Italy).

76. The fact that EuroChem Agro's claim in the Italian Proceedings is for different relief or serves a different purpose is neither here nor there. Nor does it matter that the outcome of the Italian proceedings may not be binding in the Bank or Arbitration Proceedings. What matters is Tecnimont's purpose in bringing the Intervention

Application. Tecnimont's purpose was to inhibit payment under the Bonds. Equally, Tecnimont's reliance (for the first time on appeal) on a potential reference by the Italian court to the CJEU, the scope of which has in any event not been made clear, does not advance Tecnimont's position on this basic question. The answer to that question is that Tecnimont made the Intervention application in order to impair payment under the Bonds by improving the merits of its denial of the lawfulness of such payment in the Arbitration and Bank Proceedings.

77. I would therefore dismiss the first ground of appeal: Tecnimont commenced and/or pursued the Intervention Application for the purpose of impairing payment of the Bonds; the ASI means what it says, and in any event the Intervention Application falls within the scope of the London arbitration clauses.

Discussion: application to vary in the alternative

78. The precise terms of variation sought by the Appellants have been inconsistent. Mr Maclean confirmed, however, that the Appellants' position on appeal remained that ultimately adopted before the Judge, namely limited to the seeking of an order permitting participation in the Italian Proceedings.

79. The challenge to the Judge's refusal to vary the ASI is ambitious on many levels. And, realistically, in the light of my conclusion that the Intervention Application fell foul of the London arbitration clauses, it effectively falls away in any event.

80. I nevertheless deal with it, albeit shortly. The Judge considered that it would not be appropriate or just to grant the proposed variation. This was an exercise of discretion on his part. It fell well within the scope of decisions reasonably open to him.

81. First, he was entitled to conclude that it would not be unfair to allow EuroChem Agro to challenge the Decree but not for Tecnimont to be able to intervene on the other side.

82. In this context, it is necessary to comment on a point of detail. When granting permission to bring this appeal, Males LJ was struck by Tecnimont's submission that in the Italian Proceedings EuroChem Agro had "now claimed…that Tecnimont's intervention was an act of nuisance…as a matter of Italian law". It was said to be wrong for Tecnimont to be precluded from properly defending itself against that charge (in breach of its due process rights).

83. However, this is a red herring. EuroChem Agro makes no substantive claim of any sort against Tecnimont in the Italian Proceedings. As set out above, its reference to Tecnimont having committed an "*atto emulativo*" was in a submission that was purely responsive to the Intervention Application. EuroChem Agro was arguing that Tecnimont did not have the necessary interest to intervene as a matter of Italian law. Understood in this way, there can be no question of procedural unfairness arising out of an inability on Tecnimont's part to appear in the Italian Proceedings. Once the Intervention Application is withdrawn, as it now has been, EuroChem Agro's suggestion of unwarranted interference on the part of Tecnimont in response is irrelevant.

84. Secondly, the Judge was entitled to take into account the fact that any prejudice to Tecnimont in not granting a variation would be limited, in circumstances where the Italian authorities were contesting EuroChem Agro's challenge in any event.

85. In these circumstances, it is not necessary to decide whether there were further additional reasons why the variation should not be granted, as EuroChem NW submits there were. I would simply observe that there appears to be force in a number of the matters identified by EuroChem NW, including as to the lateness of the Variation Application (which should have been made before the Intervention Application was made).

86. I would therefore dismiss the second ground of appeal as well.

Conclusion

87. For these reasons, I would dismiss the appeal on all grounds.

88. Anti-suit injunctions, like all court orders, are there to be obeyed (see *R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46; [2022] AC 461 at [44]). Tecnimont breached both the spirit and the letter of the ASI. There has (rightly) been no challenge to the Judge's further conclusion that Tecnimont had not established that it had acted on the basis of a "good faith understanding" of the ASI when proceeding as it did. In those circumstances, Tecnimont could consider itself fortunate that the Judge declined to grant more than declaratory relief. It remains able fully to argue its position on the key issue of ownership and/or control of EuroChem AG and its subsidiaries in the Arbitration (and Bank) Proceedings in accordance with the jurisdictional agreements freely entered into by the parties.

Lord Justice Nugee :

89. I am very grateful to Carr LJ for her account of the factual background and the issues which arise in this appeal and I will adopt the same abbreviations as she does. But I have the misfortune to disagree with her (and with Lewison LJ whose judgment I have also had the advantage of reading in draft). I would myself have allowed Tecnimont's appeal, and I will try and explain my reasons.

90. There is no dispute as to what Tecnimont did. On 27 September 2022 the Department of the Treasury of the Italian Ministry of Economy and Finance issued the Decree (see per Carr LJ at paragraph 15 above). This concluded that EuroChem Agro (an Italian company) constituted an economic resource indirectly attributable to Mrs Melnichenko and on that basis seized all of EuroChem Agro's shares held by its Swiss parent EuroChem AG. On or about 28 October 2022 EuroChem Agro commenced proceedings before the Administrative Regional Tribunal of Lazio against the Department of the Treasury and other Italian authorities seeking annulment of the Decree (see paragraph 28 above). On 14 February 2023 Tecnimont applied to intervene in the annulment proceedings by filing a Deed of Participation *ad opponendum* (see paragraph 29 above). It appears from the evidence that this is a particular procedure under Italian law under which an interested party can apply to intervene in existing proceedings either to support the claim being brought (*ad adjuvandum*) or to join in opposing the claim (*ad opponendum*). The way it was described in the witness statement of Mr Molfa (Tecnimont's solicitor and also an Italian *avvocato*) was that:

> "By intervening in the Administrative Proceedings, Tecnimont has therefore sided with the Italian Authorities' position in seeking a dismissal of EuroChem Agro's application for the annulment of the Decree"

91. There is also no dispute why Tecnimont did this. Tecnimont had relied on the Decree in both the Arbitration Proceedings and the Bank Proceedings (see paragraphs 15 and 18 above). That is because a central issue in those proceedings is whether EuroChem NW is ultimately owned or controlled by Mr and/or Mrs Melnichenko. The Decree unsurprisingly decides nothing in terms about EuroChem NW (which is not an Italian entity but a Russian one) but the basis for the Decree against EuroChem Agro is the conclusion of the Italian authorities that Mrs Melnichenko owns or controls the ultimate holding company of the EuroChem Group, and hence owns or controls EuroChem AG (a Swiss company) which is the parent of EuroChem Agro. If that is right, then the same would equally apply to EuroChem NW which is also a subsidiary of EuroChem AG. The way it was put by Mr Molfa in his witness statement was that EuroChem NW is interested in seeing the Decree annulled because if EuroChem Agro is successful, the position of EuroChem NW in the Bank and Arbitration Proceedings will be improved; and conversely Tecnimont has an interest in seeing the Decree upheld (see paragraph 34 above). Or to put it more succinctly, Tecnimont applied to intervene in the Italian proceedings in the hope that seeing off the challenge to the Decree would strengthen its position in the Bank and Arbitration proceedings.

92. Those being the facts, the question is whether Tecnimont's act of intervening in the Italian proceedings was a breach of Paragraph 2 of the Order of Bryan J dated 23 August 2022. Paragraph 2 is set out at paragraph 22 above, but I repeat the relevant words here for convenience:

> "the Defendant must not commence or pursue any claims and/or proceedings in the court(s) of any jurisdiction for the purpose of restraining, delaying or otherwise impairing payment under the bonds…"

That is subject to exceptions but none of them is relevant.

93. Two questions on this wording are raised by Tecnimont's grounds of appeal. The first is whether Tecnimont "commence[d] or pursue[d] any claims and/or proceedings". I do not think this gives rise to any difficulty and I agree with Carr LJ that the answer to this is Yes (see paragraphs 66 to 70 above). I do not find it necessary to consider whether by its intervention Tecnimont was commencing or pursuing a "claim", as I have no real doubt that it was commencing or pursuing "proceedings". "Proceedings" is a protean word which does not have a precise technical meaning but which takes its meaning from the context. There is indeed authority to that effect which it is not necessary to cite. It is certainly capable, depending on the context, of covering any formal steps which a litigant takes before a court for the purpose of pursuing or resisting a claim, and in the present context it would be unduly stultifying to hold that only the person initiating the main proceedings (here EuroChem Agro) was commencing or pursuing proceedings. If Mr Molfa had been asked after 14 February 2023 whether Tecnimont was pursuing proceedings in Italy, it would have been surprising if he had said that it was not because it was merely siding with the Italian authorities in opposing

someone else's proceedings. I agree therefore that this ground of appeal should be dismissed.

94. The other question however is one that I find much less straightforward. This is whether Tecnimont's act of intervention was "for the purpose of … impairing payment under the bonds". The difficulty, as so often with questions of construction, is not really with the *meaning* of these words. They are all ordinary English words. So far as "purpose" is concerned, it is common ground that the relevant purpose is that of Tecnimont (see paragraph 72 above), as Mr Maclean in terms accepted. So far as "impair" is concerned, he unhesitatingly said that it meant "inhibit" (see paragraph 53 above), and although it does not to my mind help much to replace "impair" with "inhibit", the difficulty is not really in what "impairing" means.

95. What I find less obvious on a simple reading of Paragraph 2 is quite how far it was intended to extend, what its reach or scope was intended to be.

96. Let me give an analogy. It is a commonplace that when asking in various legal contexts what the "cause" of something is, we have to select from the whole range of possible causes, immediate or more remote, those that are relevant for the purposes of the inquiry in hand, and that we do that by having regard to the particular legal context in which that inquiry arises. I think the same is true when asking what someone's "purpose" was in doing something. This is because when asking the question why someone did something, it is always possible to give a shorter or longer answer, depending on how extended the inquiry is.

97. Suppose for example I go to a hardware shop to buy a tin of paint. If the question is why I went to the shop, the simple answer would be "to buy a tin of paint". But I could give lengthier explanations such as that I wanted to buy a tin of paint so as to able to paint the railings in front of my house, or that I wanted to paint the railings so as to impress my wife. These are all explanations as to why I went into the shop, but I think in most contexts if the question was what my purpose was in going to the shop, the answer would be "to buy a tin of paint", not "to improve my standing with my wife", however true that might be at one level.

98. In the same way, if we ask why Tecnimont intervened in the Italian proceedings, the simple answer is that it did so to support the Italian authorities in upholding the Decree and defeating EuroChem Agro's application to annul it. That is what it sought to achieve by joining in the proceedings. It is also true that the reason it wished to uphold the Decree was because it was relying on the Decree in the Bank and Arbitration Proceedings, and hoped that if the Italian authorities successfully defeated the challenge to the Decree that would improve its own position in those proceedings, and hence ultimately help defeat EuroChem NW's claims for payment under the Bonds. The question is not whether these are all part of the explanation why Tecnimont intervened – as a matter of fact there is no dispute that they are – the question is whether Paragraph 2 was intended to prohibit actions of this type, which is a question of what the intended scope or reach of Paragraph 2 was. Was it intended to prevent Tecnimont taking any foreign proceedings which might improve its position in the Arbitration or the Bank Proceedings? Or was its intended scope narrower than that?

99. That as I have said I do not find immediately obvious on a reading of Paragraph 2 by itself. In those circumstances one can look for other tools to assist in an understanding

of what Paragraph 2 was directed at. And the first port of call is the judgment leading to the order; this is the obvious place to start when seeking to understand what an order is intended to do. On this Carr LJ has summarised the relevant principles at paragraph 45 above. I have no issue with that summary, which seems to me an admirable and most helpful distillation of the authorities, but I will just draw attention to two points. The first is that the words of an order are to be interpreted, as she says at paragraph 45 ii), "with regard to the object of the order". The other, as she says at paragraph 45 iv), is that the judgment leading to the order is admissible as an aid to construction. On this it is perhaps worth citing from one of the relevant cases, namely *Sans Souci* at [13] per Lord Sumption:

> "But implicit in the Proprietor's argument is the suggestion that the process of construing the order is to be carried out in two discrete stages, the first of which is concerned only with the meaning of the words, and the second with the resolution of any "ambiguities" which may emerge from the first. The Court's reasons, so it is said, are relevant only at the second stage, and then only if an "ambiguity" has been found. The Board is unable to accept these propositions, because the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve."

Indeed since the very purpose of giving a judgment is to explain why the Court has dealt with the case in the way it has, it is hardly surprising that the judgment is, as Lord Sumption is at pains to say, *always* admissible to construe the order: the judgment will, or at any rate should, explain what "the object of the order" is, and as stated above this is always a relevant consideration when seeking to construe it.

100. The chronology of the proceedings has been given by Carr LJ above but to recap:

i) On 9 August 2022 Butcher J granted an injunction in the form of the ASI on the without notice application of EuroChem NW. This was expressed to last "until further order" but provided for a return date of 23 August 2022. We have seen a full note of the hearing which includes Butcher J's reasons for making the order.

ii) On the return date of 23 August 2022 Bryan J continued the injunction after a hearing attended by both parties. His order was expressed to supersede that of Butcher J and again to be "until further order". It provided for a further return date of 29 September 2022 to address three issues, the first of which was:

> "whether the Injunction should continue (and if so on what terms) or be discharged on the merits"

We have not seen any judgment of Bryan J from that hearing, but that would not seem to matter given that it would appear from the terms of his order that Bryan J did not make any decision on the merits and was simply continuing the injunction until these could be fully argued.

iii) On the further return date of 29 September 2022, HHJ Pelling KC declined to discharge the injunction on its merits, which was therefore allowed to stand. He handed down a reserved judgment on 6 October 2022 at [2022] EWHC 2444 (Comm) giving his reasons.

101. In those circumstances, although the extant order (and the one which founded the application for contempt) is technically that of Bryan J, we can I think plainly look at the judgment of HHJ Pelling as this contains the substantive reasons why the Court considered that that injunction was justified on its merits. I also think we can technically look at the note of the reasons why Butcher J made the original order to see if it adds anything material, although it does not in fact take matters any further.

102. Three things are apparent from HHJ Pelling's judgment:

i) He nowhere addresses in the judgment the precise terms of the injunction which he is being asked to continue, and does not give any separate consideration to the "impairing payment" limb. Indeed apart from quoting the terms of the order sought by EuroChem NW, he does not use the word "impair" or "impairing" in his judgment at all. That is a clear indication that he did not receive any separate argument as to what was intended by this limb or quite what it was intended to cover.

ii) The justification for the application put forward by EuroChem NW was a fear that Tecnimont would otherwise bring proceedings in France or Italy to restrain payment. At [9] HHJ Pelling explained that the claim was an arbitration claim that EuroChem NW had commenced on the basis identified in the claim form, namely that:

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

There was no dispute that this was what Tecnimont wanted to be able to do. After setting out the terms of the injunction sought HHJ Pelling continued (also at [9]):

> "The Defendants oppose the making or continuation of an order in those terms because they wish to preserve their ability to apply to the courts in either Italy and/or France to restrain the Banks from honouring the Bonds…"

And indeed he identified the third issue he had to decide in the following terms (at [2]):

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

And it is apparent from his judgment that the argument, both on the first issue (whether the injunction should continue) and on the third issue (as set out above) was whether the Defendants should or should not be permitted to take such proceedings, that is proceedings in France or Italy to restrain payment.

iii) The basis for his decision on the first issue was that the injunction was a standard anti-suit injunction granted for conventional reasons to restrain action in breach of the arbitration agreement.

103. This last point is worth explaining in more detail. After an introduction at [1]-[3] which identified the three issues he had to decide, HHJ Pelling at [4]-[9] gave the factual background, which he said was not in dispute, at any rate for the purpose of the application before him. He referred at [4] to the three contracts between EuroChem NW and the Defendants, and then said:

> "The Contracts are expressly governed by English law and provide for disputes between Eurochem and the Defendants under the Contracts to be resolved by arbitration under the ICC Rules seated in London. This is not in dispute between the parties. It is also common ground that any dispute between Eurochem and the Defendants concerning the enforceability of the bonds comes within the scope of the parties' arbitration agreement."

(It may be noted that he was using "Eurochem" throughout the judgment to refer to the Claimant, that is EuroChem NW.)

104. He then considered the first of the three issues he had to decide, which he referred to as "the Merits Issue" at [10]-[24]. At [10] he summarised the Defendants' submission, which was that the ASI should be discharged because:

> "i) They are not contractually prohibited from bringing the proceedings they may wish to bring in Italy or France because:
>
> a) the exclusive jurisdiction clause in the bonds does not bind them because they are not parties to the contract contained in or evidenced by the Bonds; or
>
> b) the arbitration agreement in the Contracts permits the Defendants to seek conservatory relief in any court not merely the courts of the seat of the Reference; or
>
> ii) Even if the Defendants are confined to issuing claims for conservatory relief in courts of England and Wales as the court of the Reference's seat, any application for orders precluding enforcement of the Bonds comes within the exception identified in U&M Mining Zambia Ltd v Konkola Copper Mines plc [2013] 2 Lloyd's Rep. 218 and/or the courts of France and Italy are more appropriate than the English Court to resolve the issues that arise because of what is said to be the unavailability of certain arguments in England that would be available in proceedings in Italy or France."

105. At [11] he summarised the principles under which the Court may grant an ASI, namely where there is a jurisdiction agreement or arbitration agreement between claimant and defendant requiring disputes to be submitted for determination to the Courts in England and Wales or to arbitration in England and Wales. He also referred to a third basis for the exercise of the jurisdiction, namely where the respondent is founding a claim on rights arising from a contract which contains such a jurisdiction or arbitration agreement, which he referred to as the "quasi contractual" ground. It is not necessary to consider this quasi contractual ground further as HHJ Pelling did not in the event reach any conclusions on it, and it did not form the basis for his decision not to discharge the injunction [24].

106. At [12] he began his consideration of the contractual grounds by stating that a Court must be satisfied to a high degree of probability that there is a "binding and applicable jurisdiction or arbitration agreement" before considering making such an order, but subject to that:

> "the court will ordinarily exercise its discretion to restrain the pursuit of proceedings brought in breach of a forum clause unless the defendant can show strong reasons to refuse the relief."

He described that as the framework against which the issues in the case should be resolved.

107. At [13] he made the point that the Defendants were not parties to the contracts contained in or evidenced by the Bonds and so were not contractually bound by the jurisdiction agreements in them, so that in relation to those agreements the only basis for the ASI could be the quasi contractual one.

108. At [14] he continued:

> "However, it is common ground that the arbitration agreement is binding between Eurochem and the Defendants and that any cause of action between them concerning the enforceability of the Bonds comes within the scope of that agreement. However there is a dispute between the parties as to whether it nevertheless remains open to the Defendants to apply for relief in aid of the Reference to state courts other than the courts of its seat namely England and Wales. It is to that issue that I turn now."

109. At [15] he identified the parties' respective positions on that issue. EuroChem NW's position was that it was a general principle that any application for interim relief from a Court in support of the arbitration had to be made to the Courts of the seat of arbitration, whereas the Defendants' position was that there was no such requirement or alternatively that the case fell within one of the exceptions to it.

110. The remainder of his discussion of the Merits Issue at [16] to [23] is concerned with resolution of that issue, which he decided in favour of EuroChem NW, his conclusion at [20] being that the Defendants:

> "had not established an entitlement to rely on the exception to the general rule requiring applications for injunctions in aid of arbitration seated in England to be made to the Courts of England and Wales".

111. I have set this out at some length because it explains very clearly the nature of the issues HHJ Pelling had to resolve, the shape of the argument before him, and the basis on which he made the decision he did not to discharge Bryan J's order. It is important to appreciate what was *not* disputed in that hearing:

    i) It was not disputed that the Defendants were bound by the three contracts and the arbitration agreements contained in them [14].

    ii) It was not disputed that "any dispute between Eurochem and the Defendants concerning the enforceability of the bonds comes within the scope of the parties' arbitration agreement" [4], repeated almost verbatim in [14] as "any cause of action between them concerning the enforceability of the Bonds comes within the scope of that agreement." I draw attention to the fact that in both these formulations what was under active consideration was a dispute, or a cause of action, between the Defendants and "Eurochem" (that is, *EuroChem NW*) as to the enforceability of the Bonds.

    iii) It was not in dispute that what Tecnimont wished to be able to do was take proceedings in France or Italy "to restrain banks in those jurisdictions honouring

> calls made on various on-demand bonds issued by those banks in favour of Eurochem or requiring Eurochem to suspend its calls on the bonds and refrain from making more calls on them, or both" [2]. In other words what Tecnimont wished to do was take proceedings for an injunction either directly against EuroChem NW, or indirectly against EuroChem NW by restraining the Banks from paying.

iv) It was also not in dispute that it was open to Tecnimont to take court proceedings for injunctive relief in aid of the arbitration. The debate was whether that could only be done in the Courts of the seat of the arbitration (England and Wales) or also in Courts in other jurisdictions [14]-[15].

It follows from the above that the proceedings Tecnimont wished to take were based on a cause of action, or dispute, between itself and EuroChem NW as to the enforceability of the Bonds which admittedly fell squarely within the arbitration clause. The argument was all about which Courts such proceedings could be brought in.

112. It also follows from the above that the ASI was allowed to continue by HHJ Pelling on the entirely conventional and uncontroversial basis that the proceedings contemplated by Tecnimont would involve a breach of the arbitration clause. That indeed is the usual basis for the grant of an ASI, as stated by Foxton J in *QBE Europe SA/NV v Generali España de Seguros y Reaseguros* [2022] EWHC 2062 (Comm) at [9]:

> "Most ASI applications are made by a party who asserts that both it, and the respondent to the application, are parties to an arbitration or jurisdiction agreement, and that the respondent has brought or is intending to bring proceedings against the applicant in breach of the arbitration or jurisdiction agreement."

This is no more than an illustration of the familiar fact that the Court usually grants injunctions to prevent actual or threatened civil wrongs (torts, breaches of contract and the like). The Court undoubtedly does have a wider jurisdiction under s. 37 of the Senior Courts Act 1981 to grant injunctions whenever it is "just and convenient": see the comprehensive examination of the ambit of the s. 37 power by the Privy Council in *Convoy Collateral Ltd v Broad Idea International Ltd* [2021] UKPC 24 at [4]-[58] per Lord Leggatt JSC, adopted by this Court in *re G* [2022] EWCA Civ 1312. But there is no suggestion in the present case that the ASI was being granted other than to restrain a threatened breach of contract, and Mr Justin Fenwick KC, who appeared with Mr George McDonald for EuroChem NW, accepted in terms that the juridical basis for the ASI in the present case was to restrain a breach of the arbitration agreements.

113. It is also worth noting that, as Foxton J said in another case, *Riverrock Securities Ltd v JSC International Bank of St Petersburg* [2020] EWHC 2483 (Comm) at [33], it is well established that if the question is whether the Court should grant an ASI to restrain proceedings brought in breach of an arbitration agreement:

> "The applicant must show a 'high probability of success' that the pursuit of the foreign proceedings involves a breach of the arbitration agreement (*The Angelic Grace* [1995] 1 Ll Rep 87 and *Dell Emerging Markets (EMEA) Ltd v IB Maroc.com SA* [2017] EWHC 2397 (Comm); [2017] 2 CLC 417). This involves

> establishing to that standard both (i) the existence of an arbitration agreement binding between the applicant and the respondent, and (ii) that the subject-matter of the foreign proceedings falls within and is subject to that arbitration agreement."

114. It is now possible to return to the question of what Paragraph 2 of the ASI was intended to do. In the light of the analysis of HHJ Pelling's judgment that I have undertaken and the established principles, I would start with a strong predisposition to find that he left it in place on the understanding that what it was intended to do was restrain acts that would be, or at any rate where there was a high probability that they would be, breaches of the arbitration agreement, there being no suggestion in his judgment that he was intending to do, or asked to do, anything else.

115. Paragraph 2 has three limbs, namely proceedings taken for the purpose of (i) restraining payment of the bonds, (ii) delaying payment of the Bonds, or (iii) otherwise impairing payment of the Bonds. It is easy to see what the first two limbs are aimed at. That in (i) is directly aimed at what Tecnimont wished to do, which is to take proceedings for injunctive relief restraining payment of the Bonds. That in (ii) seems to me a variant of (i) to ensure that the ASI was effective not only to prevent proceedings for a permanent injunction but also proceedings for a temporary injunction. It will be recalled that the impetus for the application was EuroChem NW's concern that Tecnimont would attempt to repeat what it had done in 2019 in relation to another EuroChem company, which had resulted in a temporary restraining order which delayed payment of the Bonds there in question (see the endorsement on the claim form cited at paragraph 102 ii) above).

116. What then of the third limb, that of taking proceedings "for the purpose of … otherwise impairing payment" of the Bonds? Is this wide enough to include any proceedings which might be useful to Tecnimont in improving its position in the Bank or Arbitration Proceedings? In my view it is not.

117. This is for two related reasons. First it is noticeable that what is restrained under the first two limbs is a claim or proceedings which are (a) themselves concerned with stopping, permanently or temporarily, payment of the Bonds – where this is the very relief sought in the proceedings – and (b) which necessarily involve EuroChem NW as payee of the Bonds. Neither of these is true of the Italian annulment proceedings, or of Tecnimont's intervention in them. The annulment proceedings are not concerned with the Bonds at all; they are concerned with the validity, as a matter of Italian administrative law, of the Decree. Nor do the annulment proceedings involve EuroChem NW, which is not a party to them and not the subject of the Decree. The Decree, and the annulment proceedings, involve EuroChem Agro, which is a different legal entity established in a different country. The annulment proceedings may of course have consequences for EuroChem NW as payee of the Bonds, but that is a different matter: the proceedings themselves do not concern either EuroChem NW or the Bonds, and it seems self-evident that in considering the validity of the Decree the Italian court will simply not be interested in either the position of EuroChem NW, or the enforceability of the Bonds.

118. In those circumstances I think that there is a strong argument for interpreting limb (iii) of the ASI in Paragraph 2 as intended to do something similar to limbs (i) and (ii),

namely to restrain foreign proceedings in which the question raised in the proceedings is the enforceability of the Bonds, and the relief sought is relief that is itself directed at inhibiting payment of the Bonds to EuroChem NW. The form of the three limbs of Paragraph 2 is of the familiar "A, B or other C" type, and there is much to be said for the view that what is meant by the "other C" limb is something of the same type as the A or B limbs, namely here proceedings which are themselves concerned with whether the Bonds should be paid to EuroChem NW. This is admittedly an argument of the *eiusdem generis* type, and the modern approach to construction, as I am well aware, is to regard the traditional canons of construction such as this with a degree of caution: if allowed to harden into rules and applied uncritically they can be more of an obstruction than a help in interpreting a text. But that is not to say that they have no utility, and they often express what is no more than a common sense distillation of how we usually use words.

119. So here where the drafter of Paragraph 2 has referred to proceedings commenced or pursued "for the purpose of restraining, delaying or otherwise impairing payment under the bonds" I think it is relevant that proceedings "for the purpose of restraining" or "for the purpose of delaying" payment of the Bonds would naturally be understood as referring to proceedings where the relief sought was an injunction restraining payment, or an order delaying payment, of the Bonds; and that in those circumstances "proceedings … for the purpose of … otherwise impairing payment of the bonds" should equally be understood as referring to proceedings where the relief sought was something impairing or inhibiting payment of the Bonds (such as for example making payment conditional on some payment into court or the like), and not as extending to proceedings where the relief sought was something entirely different that neither referred to the bonds nor was directed at payment of them.

120. But I have said there are two reasons why I have reached the view I have. The second is that I am unconvinced that Tecnimont's intervention in the Italian annulment proceedings was, or would be, a breach of the arbitration agreements. I can take this quite shortly. The arbitration agreements require Disputes between the contracting parties ('Owner' and 'Contractor') to be referred to arbitration: see paragraph 7 above. The contracting parties are Tecnimont and EuroChem NW, and Disputes are questions, disputes or differences "arising [out] of or in connection with the contracts": see paragraph 8 above. The dispute that is being litigated in the Italian annulment proceedings is whether as a matter of Italian administrative law the Decree should have been made or should be annulled. That is not a dispute between Tecnimont and EuroChem NW; it is a dispute between the Italian state authorities and EuroChem Agro, neither of whom are parties to the arbitration agreement. Even if Tecnimont were to join in the proceedings, it would still not be a dispute between Tecnimont and EuroChem NW and would at most be a dispute between Tecnimont and EuroChem Agro. Nor on any view is the dispute as to the legality of the Decree as a matter of Italian administrative law something that arises out of or in connection with the contracts.

121. In those circumstances the view I take is that Tecnimont's intervention in the Italian annulment proceedings is not a breach of the arbitration agreement. The fundamental basis of an ASI where there is an arbitration agreement is that a person who has agreed to arbitrate a particular dispute will be in breach of contract if he litigates it instead because he has agreed that that dispute will be submitted to arbitration instead of

litigation. But if the dispute in question is not one that ever could have been submitted to arbitration then this reasoning does not apply. It seems to me self-evident that the question of whether the Decree is valid or not, a question of Italian administrative law arising between the Italian state authorities and EuroChem Agro, could never have been referred to arbitration by Tecnimont in an arbitration between Tecnimont and EuroChem NW. If Tecnimont could not have referred that question to arbitration, I do not see how it can be a breach of its arbitration agreement for it to seek to litigate that question in the only forum in which it could be determined, namely the Regional Administrative Tribunal in Lazio.

122. To my mind this conclusion is unaffected by the fact that the essential factual question in the Italian annulment proceedings – namely does Mrs Melnichenko own or control the EuroChem group – is the very same factual question that will arise in the Arbitration Proceedings. That I am willing to accept, and I will also assume that that factual question may very well prove to be not only relevant to, but determinative of, both the annulment proceedings in Italy and the Arbitration Proceedings (and indeed the Bank Proceedings). But I do not think that means that an arbitration agreement in a contract between Tecnimont and EuroChem NW precludes Tecnimont from litigating the same factual question against someone else in Italy. This is a simple question of contract. If A agrees in a contract with B to refer disputes between A and B to arbitration, does that prevent A litigating a dispute with C on the basis that the same factual issues arise? In my view the answer to that is No. It is to my mind a novel proposition that A, by agreeing with B to arbitrate disputes with B, is also to be taken as agreeing with B not to litigate a dispute with C if the same issue would arise in the litigation with C as in an arbitration with B. In my judgement Tecnimont was not in breach of the arbitration agreements in seeking to intervene in the annulment proceedings, even though the issue it wished to litigate (was the EuroChem group owned or controlled by Mrs Melnichenko?) was also relevant to the Arbitration Proceedings, and indeed, as I have no difficulty in accepting, that was the very reason it wished to intervene.

123. In my judgement therefore the position is a simple one. The ASI was allowed by HHJ Pelling to stand on the conventional basis that what was sought to be restrained was a claim or proceedings in breach of the arbitration agreements. The intervention by Tecnimont in the Italian annulment proceedings was not and would not be in breach of the arbitration agreements. It would be surprising in those circumstances if Paragraph 2 of the ASI was intended to restrain such intervention. When read in context with limbs (i) and (ii), limb (iii) of Paragraph 2 can, and should, be interpreted as intended only to restrain proceedings of a similar type to those in limbs (i) and (ii), namely proceedings concerned with the bonds in which the relief sought included something restraining, delaying or otherwise impairing payment of the Bonds. It should not be interpreted so widely as to be intended to restrain any proceedings, of whatever nature and involving whatever other parties, the outcome of which might prove helpful to Tecnimont in the Arbitration or Bank Proceedings.

124. In those circumstances I do not myself think that Tecnimont's action in seeking to intervene by way of Deed of Participation *ad opponendum* was a breach of Paragraph 2 of Bryan J's order, and I would allow the appeal accordingly.

Lord Justice Lewison :

125. There are, as I see it, three questions that arise on this appeal:

i) Was Tecnimont in breach of the ASI in intervening in the Italian proceedings?

ii) Did the terms of the ASI go beyond what was justified by the scope of the arbitration agreement?

iii) If so, should the ASI be varied?

126. On the first of these questions, I agree with Carr LJ, for the reasons that she gives that Tecnimont was in breach. First, like her, I consider that the words of the ASI are both wide and clear. Second, Tecnimont's intervention in the Italian Proceedings was itself the pursuit of proceedings, as was its support of the Italian public authorities in upholding the decree. Third, there is no real doubt that its purpose in so doing was to improve its position in the Arbitration Proceedings and thus to impair (i.e. make more difficult) payment under the bonds.

127. On the second of these questions there is, I accept, more room for doubt. 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. But that very strict interpretation of the arbitration agreement ignores the underlying reality. There is 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. In my judgment the scope of the ASI was justified.

128. HHJ Pelling KC considered the scope of the ASI at the hearing before him in September 2022 and gave judgment on 6 October 2022. If Tecnimont took the view that the ASI went too far, it should have appealed. The application to vary the terms of the ASI, which was not made until 24 February 2023, was no more than a disguised attempt to appeal out of time from one High Court judge to another. The appeal to this court is also, in substance, an application to appeal out of time against the decision of HHJ Pelling. For those reasons, as well as those given by Carr LJ, I consider that the judge was entitled to refuse to vary the ASI.

129. I too would dismiss the appeal.