Neutral Citation Number: **[2023] EWHC 1015 (Comm)**

Case No: CL-2016-000041

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

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

Date: 2 May 2023

Before :

Mr Stephen Houseman KC
Sitting as a Deputy Judge of the High Court

- -

Between :

MERRILL LYNCH INTERNATIONAL

Claimant

- and -

CITTÀ METROPOLITANO DI MILANO

Defendant

- -
- -

Matthew Hoyle (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimant**
Craig Ulyatt (instructed by **Osborne Clarke LLP**) for the **Defendant**

Hearing date: 28 April 2023

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR STEPHEN HOUSEMAN KC

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Tuesday 2 May 2023 at 11.30am.

STEPHEN HOUSEMAN KC:

Introduction

1. This is my judgment upon an application heard last Friday afternoon. I indicated my decision on both grounds at the end of the hearing, made directions as required and promised fuller reasons to follow after the bank holiday weekend.

2. By its application notice dated 17 March 2023, the Defendant ("**Milano**") seeks production of a specific document in the control of the Claimant ("**MLI**") in the context of a pending jurisdiction challenge listed to be heard on 16 and 17 May 2023 ("**May Hearing**"). I refer to this application as the "**Disclosure Application**".

3. The document in question is an unexecuted but avowedly final version of a joint venture or temporary consortium agreement - known to Italian lawyers as an *Associazione Temporanea d'Impresa* or 'ATI' for short - entered into between MLI and an Italian bank ("**Dexia**") on 15 May 2001. This unexecuted version of the ATI ("**Unexecuted ATI**") was attached to an email sent from Dexia to MLI on 14 May 2001. Neither document was shown to the Court.

4. There is a dispute between the parties, not for resolution here or necessarily so at the May Hearing, as to whether the ATI as executed was in precisely the same terms as the Unexecuted ATI. I distinguish the two versions by referring to the former as the "**Executed ATI**". The Disclosure Application concerns the Unexecuted ATI. No version of the Executed ATI has yet been located - a position unlikely to change before the May Hearing.

5. These proceedings were commenced by MLI in January 2016 seeking negative declaratory relief in the context of apprehended or threatened proceedings by Milano in its home court. The proceedings were automatically stayed under CPR 15.11 between 16 October 2016 and 4 June 2022. The Order of Mr Justice Foxton which lifted the stay last summer also granted Milano an extension of time to acknowledge service and make an application under CPR Part 11, together with permission to the parties to adduce expert evidence as to issues of Italian law. Milano issued its jurisdiction challenge on 4 November 2022 ("**Part 11 Application**"). Detailed factual and expert evidence has been served by both sides.

6. The Disclosure Application arises out of a reference made in MLI's factual witness evidence, namely the Fourth Witness Statement of Thomas Clark dated 27 January 2023 ("**Clark-4**"), to the fact that no version of the Executed ATI had been located. The existence of the Unexecuted ATI was revealed by MLI's solicitors in correspondence. In support of the Disclosure Application, Milano sought and I granted permission to adduce a further short expert report from Professor Antonella Sciarrone Alibrandi ("**Alibrandi-3**") dealing with the approach of Italian law to so-called 'connected contracts'.

Relevant Background

7. This action concerns events that occurred over 20 years ago. The dispute, now also the subject of proceedings commenced by Milano before the Civil Court of Milan in April 2021, relates to alleged mis-selling of two interest rate swaps in November 2002 ("**2002 Swaps**").

8. Both swaps were concluded on ISDA terms, including English law and exclusive jurisdiction. MLI was not a party to either transaction. It was, however, involved in their design and the process by which each was concluded with Milano. By this action, MLI seeks wide declarations of non-liability under any applicable system of law relating to the circumstances in which Milano entered into both swap transactions.

9. Some 17 months or so prior to the 2002 Swaps, Milano had entered into a written mandate agreement, entitled "*Contratto di Mandatto*" and dated 15 May 2001, with both MLI and Dexia - themselves acting by or through or as an ATI as a matter of Italian law for such purposes - pursuant to which MLI and Dexia agreed to provide credit rating advice to Milano ("**2001 Mandate**"). MLI and Dexia subsequently acted as arrangers, joint book runners and joint lead managers for Milano's note programme. The 2001 Mandate is three pages long and provides (article 13) for Italian governing law and Milan court jurisdiction. Its meaning and effect is the focus of Italian law evidence. The relationship, if any, between the 2001 Mandate and the 2002 Swaps will be addressed at the May Hearing.

10. The Part 11 Application falls to be determined in accordance with Parliament and Council Regulation (EU) No.1215/2022 ("**Regulation**"). There are two main issues:

    (i) The first main issue concerns Articles 25 and 31(2) of the Regulation, i.e. the alleged applicability of the Milanese jurisdiction clause ('MJC' for short) in the 2001 Mandate to each distinct basis of MLI's contested liability. The parties differ as to whether MLI provided any services in relation to the 2002 Swaps pursuant to or in connection with such mandate. A separate issue arises as to the proper scope and effect of the MJC. I refer to this set of jurisdictional disputes as the "**Article 25 Issue**".

    (ii) The second main issue concerns Article 7(2) of the Regulation. MLI no longer seeks negative declaratory relief on a contractual basis; the focus is on its non-contractual position. This issue therefore concerns the place where any "*harmful event occurred*" within the meaning of Article 7(2). The factual witness evidence is largely directed at a geographical inquiry as to the location(s) of the event(s) giving rise to relevant harm, i.e. alleged harm to Milano. In an exercise familiar to practitioners in common law jurisdictions, the rival witness evidence is populated with references to events or conversations in London or Milan, as the case may be. I refer to this evaluative nexus inquiry as the "**Article 7(2) Issue**".

11. It is common ground as a matter of Italian law analysis that MLI and Dexia both entered into the 2001 Mandate with Milano pursuant to or through or as a joint venture/consortium governed by the Executed ATI. (I refer to this situation or status simply as 'the ATI'.) Although no copy of the Executed ATI has yet been located by MLI or its solicitors, it is presupposed by the terms of and specifically identified in the recitals to the 2001 Mandate as having been signed on the same day, i.e. 15 May 2001.

12. Broadly speaking, the ATI constituted the relationship between MLI and Dexia for the purposes of their participation in and performance of the 2001 Mandate. There is a dispute between the parties as to the legal relevance of Dexia and its role; such dispute straddles both limbs of the Part 11 Application outlined above. The Executed ATI is the foundational or constitutional instrument governing the relationship between MLI and Dexia for the purposes of providing services to and establishing privity with Milano in May 2001. It is not yet explained whether or to what extent such instrument might have identified who is to do what and where in performance of the 2001 Mandate.

13. Clark-4 was served on behalf of MLI in opposition to the Part 11 Application. It responds with commendable discipline to Milano's supporting evidence ("**Frapwell-2**"). Clark-4 comprises 55 paragraphs arranged in three sections. The first section (paragraphs 7 to 42) deals with factual background. Under three sub-headings this covers circumstances said to be relevant to the Article 7(2) Issue with emphasis on the location(s) of the event(s) giving rise to harm allegedly suffered by Milano. Amongst other things, Mr Clark explains (paragraph 16) that none of the individuals involved in relevant events in 2001-2002 are employed by MLI any longer. He also explains (paragraphs 34 and 35) that MLI has been unable to locate documents which identify the author(s) of key contemporary documentation, i.e. two technical reports alleged to relate to (what became) the 2002 Swaps.

14. In a sub-section entitled "*Milano's factual chronology*" which starts at paragraph 24, Mr Clark deals with a series of matters covered in the factual background section (paragraphs 10 to 50) of Frapwell-2. Paragraph 27 of Clark-4 responds to paragraphs 13 to 16 of Frapwell-2 concerning events in March-April 2001. This paragraph is important. It reads in material part as follows:

> "*Similarly (subject to the points in paragraphs 27.a. 27.c. below) MLI does not dispute Milano's summary of the invitation process and the Joint Offer at Frapwell-2/13-16, although it notes that it has no knowledge of whether invitations were sent to other banks and, if so, in what form. Nor has it presently located an executed copy of the ATI.*
>
> *[…]*
>
> *b. Second, I am instructed that, contrary to Frapwell/15, MLI did not enter into an ATI with Dexia until 15 May 2001…*"
>
> (emphasis added)

15. Paragraph 27.b. corrects what Mr Frapwell said in his first witness statement, relating to the lifting of the automatic stay, which suggested (paragraph 15) that MLI and Dexia had entered into their ATI by early April 2001. Mr Clark confirmed on behalf of MLI that the ATI was concluded on 15 May 2001, as recorded in the recitals to the 2001 Mandate. The basis for this understanding is not separately identified in Clark-4 itself.

16. Clark-4 does not define "*ATI*" or "*the ATI*". By paragraph 2, subject to the usual caveat, it adopts the definitions used by Mr Clark in his three prior witness statements or in Frapwell-2. For its part, Frapwell-2 (paragraph 8) defines "*ATI*" in a generic legal sense in the context of describing the basis of MLI's and Dexia's participation in the 2001 Mandate. All that said, there is a clear reference by Mr Clark to "*an executed copy of the ATI*" which, he confirms, was concluded between MLI and Dexia on 15 May 2001. I am satisfied that this constitutes a direct reference to the Executed ATI, albeit a negative reference.

17. This reference forms the primary basis of the Disclosure Application. No mention is made of the Unexecuted ATI. The existence of this distinct document was revealed in correspondence when Milano's solicitors challenged paragraph 27 of Clark-4. As to this:

    (i) MLI's solicitors have explained as follows: (a) the Unexecuted ATI was attached to an email sent (at an unspecified time) on 14 May 2001 from someone at Dexia to one or more people at MLI ("**14.5.01 Covering Email**"); (b) this email described the attached document as the "*final version*" of the ATI, but invited comments on it; (c) no document has been found which contains comments on such version or reflects changes (to be) made to it prior to execution the following day.

    (ii) This explanation has been provided through correspondence so as to avoid mentioning the Unexecuted ATI in a witness statement prompted by the Disclosure Application. Quite fairly and sensibly, no point is taken against MLI for adopting this policy.

18. Mr Ulyatt, counsel for Milano, contended forcefully that the Court can and should infer at this stage or in the context of the Part 11 Application that the Executed ATI was in identical terms, i.e. contractual terms, as the Unexecuted ATI. I assume this to be the case for present purposes, but will leave the point for the judge at the May Hearing if he or she thinks it matters to their determination of the Part 11 Application.

19. Alibrandi-3 contains two substantive paragraphs. Professor Alibrandi further opines (paragraph 3) that Italian law may treat two contracts as connected and, where this is so, one contract may influence the proper interpretation of the other. One decision is identified to support this proposition, namely Court of Cassation No.14320/2022 which involved a lease and sale contract both of which were bilateral contracts. Prof. Alibrandi observes (paragraph 4) that a connected contract may be used to influence interpretation "*even if the contents of the second contract were not known to the counterparty of the first contract*". I gave permission to MLI to adduce Alibrandi-3 for the purposes of the Disclosure Application and

the Part 11 Application; and made directions for prompt filing of short responsive expert evidence on this issue ahead of the May Hearing. The judge at that hearing will have an opportunity to evaluate both side's evidence, and resolve any objections to admissibility, within the applicable evidential rubric.

Disclosure Application: Grounds & Analysis

20. Although the basis for seeking production of the Unexecuted ATI has evolved since the first request was made by Milano's solicitors on 3 March 2023, the Disclosure Application is framed and pursued on two distinct and alternative grounds:

    (i) First, it is said that the Unexecuted ATI should be produced pursuant to paragraph 21 of PD57AD. In short, this is because: (a) the Executed ATI is a "*document*" as widely defined in PD57AD; (ii) such document was "*mentioned*" in paragraph 27 of Clark-4 (as quoted and highlighted above) in accordance with paragraph 21.3 of PD57AD; (c) the Unexecuted ATI is a "*copy*" of such mentioned document, having (it is to be inferred) "*identical content*" within the meaning of paragraph 1.1 of Appendix 1 to PD57AD; and (d) such production is both reasonable and proportionate in accordance with paragraph 21.4 of PD57AD.

    (ii) Alternatively, it said that the Court should exercise its acknowledged residual power as enshrined in CPR 3.1(2)(m) to order production of the Unexecuted ATI in the interests of justice for the determination of the Part 11 Application. This is said to be necessary for the fair disposal of the jurisdiction challenge given the potential impact of the Unexecuted ATI upon aspects of the Court's inquiry on both the Article 25 Issue and the Article 7(2) Issue, including the role of Dexia in relevant events surrounding the 2002 Swaps. The exceptional circumstances of the present case are said to justify disclosure of this single document given the paucity of contemporary material or direct witness evidence to explain what happened so long ago.

21. The Disclosure Application was not amended to include the 14.5.01 Covering Email. I deal with this at the end of my analysis of ground (ii) below.

22. I do not know and should not speculate whether or how the Unexecuted ATI may be helpful or unhelpful to MLI or Milano in the context of the Part 11 Application. I do not infer from MLI's stance on the Disclosure Application that it is (perceived, rightly or wrongly, as) likely to be more unhelpful to it than not at the May Hearing. MLI takes what it describes as a "*principled*" position in refusing to produce the document.

(i) PD57AD paragraph 21

23. No issue is taken about timing. Paragraph 21.1 of PD57AD operates "*at any time*". Whether it is "*reasonable and proportionate*" to make an order (paragraph 21.4) may depend on timing in some circumstances, but not here.

24. I accept the first two stages of analysis within this ground. The Executed ATI is obviously a "*document*" as widely defined in paragraph 2 of PD57AD; further, such document was "*mentioned*" in paragraph 27 of Clark-4: see paragraph 16 above.

25. It is not necessary to review authorities dealing with the concept of "*mentioned*" in this or any precursor regime. Paragraph 21.3 of PD57AD summarises the test. It is not intended to create difficulties in practice: see *Hoegh v. Taylor Wessing LLP* [2022] EWHC 856 (Ch) at [14]-[28]; *FCA v. Papadimitrakopoulos & another* [2022] EWHC 2061 (Ch) at [14]-[20]; *Expandable Ltd. v. Rubin* [2008] 1 WLR 1099; [2008] EWCA Civ 59 at [23]-[24].

26. There was some debate as to the role of inference in the concept of mentioning a document. This is academic in the present case. There was no reference to - or mention of - the Unexecuted ATI by Mr Clark. There was an express reference to the Executed ATI. Inference has no role to play here. Further, the fact that a document is mentioned which no longer exists or cannot be or has not yet been located - including where the purpose of mentioning it is to make this very point in witness evidence - does not preclude the applicability of paragraph 21.1 of PD57AD. A mention is a mention. The procedural consequences (if any) of mentioning such a document are another matter, of course. It could not be "*reasonable*" to order a party to produce (a copy of) a document which it does not have. A counterparty who requests a copy of such a document would be wasting everyone's time and money. It follows from this, as occurred in the present case, that a document can be mentioned without it being deployed or relied upon in a positive or substantive way.

27. The real difficulty for Milano stems from the elemental position that the Unexecuted ATI was <u>not</u> mentioned in Clark-4. Hence the third stage of Milano's analysis, summarised in paragraph 20(i) above. This requires the conclusion that the Unexecuted ATI is a "*copy*" of the Executed ATI, such that MLI should be ordered to comply with Milano's "*request [for] a copy of*" the Executed ATI by producing the Unexecuted ATI. I reject this analysis.

28. Paragraph 21.4 of PD57AD empowers the Court to order production of a "*document*" if satisfied that this is reasonable and proportionate. It does not say "*copy*". References to "*copy*" in paragraph 21.1 and "*[c]opies*" in paragraph 21.2 suggest that there is no taxonomical distinction drawn within paragraph 21 between a "*document*" and a "*copy*" of such document, save as to make clear that a party ordered to produce a document need not (unless so ordered) provide an original or the only version within its control.

29. In any event, the Unexecuted ATI could not be a "*copy*" of the Executed ATI. The definition of "*copy*" in paragraph 1.2 of Appendix 1 to PD57AD is as follows: "*a facsimile of a document either in the same format <u>as the document being copied</u> or in a similar format that is readable by the recipient and <u>in all cases having identical content</u>*" (emphasis added). The first set of highlighted words assumes, consistent with common sense and ordinary language, that a copy cannot pre-exist or pre-date the document of which it is said to be a copy. The verb 'to copy' and hence the passive rendition ("*being copied*") presupposes the current or

prior existence of something that has been, is being or will be copied. Philosophers and intellectual property lawyers can debate whether it is possible to copy something which does not yet exist. As a matter of formal definition in this procedural regime, it is beyond doubt that the Unexecuted ATI is not a copy of the Executed ATI.

30. Aside from this sequential imperative, I do not accept that the Unexecuted ATI and the Executed ATI would have "*identical content*" as one another. The absence of any signatures, and possibly a date if required to be filled in upon execution, mean that they do not have identical contents. I have sympathy with Mr Ulyatt's focus on inherent probabilities and substance over form - amounting, in effect, to a plea of 'get real'. I proceed on the assumption, so far as relevant or necessary for my purposes, that the Executed ATI was *on the same terms* as the Unexecuted ATI: see paragraph 18 above. I cannot, however, accept that the latter is a "*copy*" of the former within the meaning of PD57AD. To hold otherwise would require the elision of two distinct documents through a process akin to alchemy.

31. The Unexecuted ATI (which MLI has) and the Executed ATI (which MLI does not have) are different documents. A reference to the latter in Clark-4 does not engage a procedural responsibility to produce (a copy of) the former under paragraph 21 of PD57AD. This is the position even if, which I accept so far as it goes, Milano was technically entitled to request a copy of the Executed ATI in such circumstances.

32. I am satisfied that this outcome does not prioritise form over substance. There is no basis for Milano to interrogate paragraph 27 of Clark-4 pursuant to CPR Part 18 in order to 'flush out' any ambiguity or latent reference to the Unexecuted ATI. Save as indicated in paragraph 15 above, the basis of Mr Clark's understanding and belief is explained and, at any rate, not dependant upon the known existence of any other located document(s) such as the Unexecuted ATI. There was no untoward or avoidant drafting at play.

33. Further, I am satisfied that this conclusion upholds the integrity of PD57AD. Satellite disputes are to be discouraged, especially where they may arise within interlocutory or jurisdictional applications. If the mention by a party of its failure to locate 'document x' were to trigger a putative responsibility to produce any other document(s) said to be identical in content to it, the scope for interrogation could be open-ended and become oppressive or invidious. Judicial time would be wasted speculating about potential differences between pairs or groups of unseen documents. This might require hearings to be listed on an expedited basis at the expense of other court users so as to resolve disclosure disputes ahead of the listing of interlocutory or jurisdictional hearings, as here. Such approach is likely to generate legal costs and consume curial resources. The only document to be provided under this regime is a literal copy of the document mentioned in the first place.

34. I should add that if I had been persuaded otherwise, then I would have found no obstacle to making an order for production of the Unexecuted ATI pursuant to paragraph 21.4 of PD57AD. Leaving aside the 14.5.01 Covering Email at this stage, such order would concern

a single document already identified and considered by MLI's solicitors in London. It represents the best evidence available as to the terms of MLI's and Dexia's joint participation in the 2001 Mandate with Milano, the scope and effect of which is said (by Milano) to impact the jurisdictional analysis at the May Hearing. Its disclosure would be both reasonable and proportionate in the present circumstances.

35. In the event, and as indicated at the conclusion of submissions last Friday, I rejected the first and primary ground for production of the Unexecuted ATI.

(ii) Residual Power / CPR 3.1(2)(m)

36. It is common ground that such residual power exists even where disclosure cannot be ordered pursuant to PD57AD.

37. However, as is also common ground, such power should not be exercised in a way that cuts across or sidesteps this formal regime. Two features are important: first, there is no express provision for specific disclosure at this stage in proceedings - see paragraphs 17 and 18 of PD57AD; *Axnoller v. Brake* [2021] EWHC 2250 (Ch); *Balfour Beatty Regional Construction Ltd. v. Broadway Malyan Ltd.* [2022] EWHC 2022 (TCC); secondly, only supporting documents (i.e. those which are not "*adverse*") would need to be produced as part of Initial Disclosure (paragraph 5.4 of PD57AD) by reference to the substantive case, come what may.

38. It is and should be an unusual thing for the Court to order specific disclosure in the context of a jurisdiction challenge: see e.g. *The Owners of "Al Khattiya" v. The Owners and/or Demise Charters of "Jag Laadki"* [2017] EWHC 3271 (Admlty). Such applications are intended to be determined without extensive factual investigation. This is reflected in the relatively low gateway threshold, vis. a plausible evidential basis, as well as vocal discouragement of jurisdictional appeals. There are frequent observations as to the scale of material and number of authorities cited by parties on challenges of this kind. (As an aside, I note that 26 authorities, plus procedural and statutory provisions, were cited by counsel for this hearing listed for two hours, which estimate is required to include giving of judgment and dealing with consequential matters.)

39. A jurisdiction challenge is not an opportunity for a detailed or exhaustive factual investigation. It should, however, proceed on as equal a footing as achievable within the applicable procedural regime. This is especially so where a foreign defendant's default right to be sued in the courts of its domicile under Article 4 of the Regulation is sought to be displaced by a contextual nexus evaluation of events which occurred over 20 years earlier.

40. I take as the litmus test the need for an applicant to demonstrate "*exceptional circumstances*" to justify even "*limited specific disclosure*" within a pending jurisdiction challenge. This reflects the position summarised in *Lungowe v. Vedanta Resources plc* [2020] AC 1045; [2019] UKSC 20 at [43] by reference to *Rome v. Punjab National Bank* [1989] 2 All ER 136

and *Vava v. Anglo American South Africa Ltd.* [2012] 2 CLC 684; [2012] EWHC 969 (QB). This is not, however, confined to specific disclosure of a 'killer document' or 'smoking gun' as was suggested on behalf of MLI. It requires exceptional circumstances.

41. Milano does not say that it cannot continue with the Part 11 Application in the absence of seeing the Unexecuted ATI with or without the 14.5.01 Covering Email. It did not pitch this as a 'life or death' application; cf. *Al Khattiya* (above). On the contrary, it projects unswerving confidence in its jurisdiction challenge. Milano nevertheless says that there are exceptional circumstances which justify specific disclosure in the context of the issues requiring determination on such application by reference to events which took place in 2001-2002 and the paucity of direct or contemporaneous evidence. I agree, but only in the peculiar circumstances of the Part 11 Application.

42. Without in any way prejudging the relevance of the Unexecuted ATI or the 2001 Mandate or Dexia's role in/to the jurisdictional analysis at the May Hearing, I consider there to be exceptional circumstances justifying production of the Unexecuted ATI. As noted above, this document represents the best available evidence as to allocation of responsibilities of and as between MLI and Dexia for the purposes of their participation in and performance of the 2001 Mandate with Milano. I can foresee how the judge at the May Hearing may favour having sight of this missing piece of the jigsaw given the focus on historical events. It may be that they obtain no benefit from this document upon analysis; indeed, it is possible that it proves to be (net) adverse to Milano's jurisdictional contentions at the May Hearing.

43. My concern is analytical integrity. There is a real benefit in avoiding the need for the judge at the May Hearing to speculate about a document which could easily have been produced but was not. Much better that it is disclosed now and explained as appropriate (see below) than the judge next month being blindfolded as to this conspicuous piece of the admitted contractual matrix. Whilst I do not say that the judge would be hamstrung without this document, I do regard its disclosure now as something which should facilitate the fair and expedient determination of - at least and especially - the Article 7(2) Issue.

44. As observed above, the key feature which drives me to this conclusion is the fact that the jurisdictional analysis concerns factual events dating from 2001-2002 in circumstances where there is a paucity of direct witness or contemporary documentary evidence. To keep from the Court's analysis of such issues the foundational or constitutional instrument which defines the basis upon which professional financial services were to be provided to Milano pursuant to the 2001 Mandate is undesirable, and certainly much less desirable than requiring MLI to divulge such document now with any accompanying context it may wish to explain via supplemental witness evidence within a week.

45. Whether or not the judge conducting the May Hearing is ultimately persuaded by Alibrandi-3 as to the legal relevance or influence of the Unexecuted ATI as a matter of Italian law remains unknown. This goes to the Article 25 Issue, rather than the Article 7(2) Issue.

46. A finding of "*exceptional circumstances*" does not cut across or sidestep the regime prescribed in PD57AD. A residual contextual jurisdiction oils the cogs of the formal machinery. Specific disclosure which is reasonable and proportionate can, in exceptional situations, be ordered even where the document is not "*mentioned*" in a formal sense and even if it proves to be "*adverse*" to the disclosing party as a matter of jurisdictional analysis. This does not undermine the integrity of PD57AD. It just so happens that a reference to the unavailability of a related document led to specific disclosure in this context. With the bittersweet perspective of hindsight, MLI's solicitors may now see that, having given a candid response to Milano's initial speculative request, it would have been cheaper just to provide a copy of the Unexecuted ATI and the 14.5.01 Covering Email even though justified in refuting accusations of "*withholding*" evidence. The parties have incurred almost £120,000 in this process. A two hour listing was allocated on an expedited basis.

47. I do not expect my conclusion to create an unwanted precedent. There are unlikely to be jurisdictional challenges which resemble this one; and each case, even ones involving factual nexus evaluations in respect of events over two decades old, must and will turn on their own particular circumstances and evidential landscapes.

48. Mr Hoyle raised two further and related objections. He submitted that MLI will be prejudiced by the "*incomplete picture*" created through the isolated disclosure of the Unexecuted ATI and may become subject to "*piecemeal*" disclosure requests from Milano. As to the former, MLI should have an opportunity to meet such concern by filing a short supplemental witness statement which explains the context for and any probative limitations of the Unexecuted ATI (see paragraph 44 above). When discussing directions and form of order, Mr Hoyle sensibly indicated that MLI would not resist disclosure of the 14.5.01 Covering Email with the Unexecuted ATI. These two documents represent the sum total of any specific disclosure that may be ordered ahead of the May Hearing. MLI is not being and will not be subjected to piecemeal disclosure requests.

49. I discourage further interrogation or postulation by correspondence. The focus now should be on preparation for the May Hearing so as to provide optimum assistance to the judge allocated to deal with the Part 11 Application.

50. For these reasons, as summarised at the conclusion of submissions last Friday, I acceded to the alternative ground for production of the Unexecuted ATI. I also ordered production of the 14.5.01 Covering Email.

Disposition

51. Disclosure of the twinned documents was expected to be given a short time after the hearing ended at around 4pm. I gave directions as to filing by MLI of any focussed factual evidence and reply expert evidence on 4 and 5 May, respectively.

52. I reserved the costs of the Disclosure Application to the judge allocated for the May Hearing. As indicated above and observed at the conclusion of the hearing, if this proves to have been a *tempesta* in a teacup then Milano may find itself bearing some or all of the relevant costs, especially after having lost on its primary ground for disclosure. The judge who determines these costs may also wish to consider the degree of aggression exhibited in certain letters.

53. Both counsel curated their submissions by reference to the areas which I identified as most important to my decision. Business was concluded within the time allocated by the listing office. I regard that as a successful form of ATI between court and counsel, notwithstanding the citation of 26 authorities.