HCCT 73/2023
HCCT 16/2024
(heard together)
[2024] HKCFI 2529

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS

NO 73 OF 2023

IN THE MATTER of Section 21L of the High Court Ordinance (Cap. 4) and Order 73 of the Rules of High Court (Cap. 4A)

and

IN THE MATTER of Section 45 of the Arbitration Ordinance (Cap. 609)

BETWEEN

Bank A Plaintiff

and

Bank B Defendant

AND

CONSTRUCTION AND ARBITRATION PROCEEDINGS

NO 16 OF 2024

IN THE MATTER of Section 21L of the High Court Ordinance (Cap. 4) and Order 73 of the Rules of High Court (Cap. 4A)

and

IN THE MATTER of Section 45 of the Arbitration Ordinance (Cap. 609)

BETWEEN

Bank A Plaintiff

and

Bank B Defendant

Before: Hon Mimmie Chan J in Chambers

Date of Hearing: 29 May 2024

Date of Judgment: 24 September 2024

J U D G M E N T

Background

1. Before this Court are the following applications for determination:

(1) the Originating Summons ("**1st OS**") issued by the Plaintiff on 19 October 2023 (as amended on 22 March 2024) for (*inter*

alia) an anti-suit injunction to restrain the Defendant from pursuing proceedings instituted by the Defendant before the Arbitrazh Court of Saint Petersburg and the Leningrad Region in Russia ("**Russian Court**") under Case No [redacted] ("**Russian Proceedings**"); a stay of the Russian Proceedings; an injunction to restrain the Defendant from taking steps to enforce any judgment in the Russian Proceedings; and a declaration that the Russian Proceedings were instituted in breach of an arbitration agreement between the Plaintiff and the Defendant;

(2) the Plaintiff's summons issued on 19 October 2023 for continuation of the interim injunction granted by the Hong Kong Court on 27 October 2023 pending the final determination of the 1st OS;

(3) a summons issued by the Defendant on 20 November 2023, for a declaration that the Hong Kong Court has no jurisdiction over the Defendant in respect of the subject matter of the present proceedings, in the absence of a certificate required by Article 19 of the Basic Law, such that the leave granted to the Plaintiff to issue and serve the proceedings out of the jurisdiction should be discharged ("**Jurisdiction Summons**"); and

(4) a further originating summons issued by the Plaintiff on 13 March 2024 ("**2nd OS**"), for essentially the same relief as that sought by the 1st OS, but in relation to another set of proceedings instituted by the Defendant before the Russian

Court under Case No [redacted] ("**2nd Russian Proceedings**").

2. The Defendant has abandoned its case, that leave to serve the proceedings out of the jurisdiction should be set aside on the ground of material nondisclosure.

3. The background facts are relatively simple.

4. The Plaintiff, [redacted], [redacted] is a licensed bank which is headquartered in Germany, and is now under voluntary and solvent liquidation. It is subject to the supervision of the German Federal Financial Supervisory Authority (Bundesanstalt fur Finanzdienstleistungsaufsicht) ("**BaFin**").

5. The Defendant, [redacted] is a bank established in Russia. The Government of the Russian Federation is its majority shareholder.

6. The Defendant holds 99.39% of the shares of the Plaintiff, and another Russian company is the minority shareholder.

7. On 23 July 2003, an ISDA Master Agreement ("**ISDA Agreement**") was made between the predecessor of the Plaintiff [redacted] and the Defendant [redacted] in respect of various foreign exchange and derivatives transactions.

8. On 17 March 2014, the European Union implemented Council Regulation No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine ("**EU Sanction**"). Under Article 2 of the EU Sanction:

> "1. All funds and economic resources belonging to, owned, held or controlled by any natural persons or natural or legal persons, entities or bodies associated with them as listed in Annex I shall be frozen.
>
> 2. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural persons or natural or legal persons, entities or bodies associated with them listed in Annex I."

9. As a result of the war between Russia and Ukraine in February 2022, BaFin issued an order on 24 February 2022 which prohibited the Plaintiff from making payments or other transfers of assets to companies belonging to the [redacted] Group including the Defendant, and from granting loans to Russian borrowers including the Russian State.

10. By a further order dated 28 February 2022, BaFin prohibited the Plaintiff from accepting new deposits, granting new loans, or making payments to Russian banks, with a view to winding down the Plaintiff's banking business, and eventually implementing a solvent winding-up of the Plaintiff.

11. On 8 April 2022, the Defendant was named as a sanctioned entity and added to Annex I of the EU Sanction.

12. On the same day, the Plaintiff and the Defendant entered into a Termination and Settlement Agreement ("**TSA**"), for the termination of their respective rights and obligations under all the outstanding transactions covered by the ISDA Agreement ("**Relevant Transactions**"). Under the TSA, the Plaintiff and the Defendant agreed that the Relevant Transactions would be terminated, and their respective rights, obligations and liabilities with respect to the Relevant Transactions would be terminated and discharged by the Plaintiff paying to the Defendant the sum of Euros 112,634,610 ("**Settlement Amount**") on or before 8 April 2022.

13. The TSA was expressed to be governed by English law, and contains a dispute resolution clause for arbitration in Hong Kong ("**Arbitration Clause**"), as follows:

> "Any dispute, controversy, difference or claim arising out of or relating to this letter, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Center ("**HKIAC**") under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted. The law of this arbitration clause shall be English law. The seat of arbitration shall be Hong Kong. The number of arbitrators shall be 3. The arbitration proceedings shall be conducted in the English language."

14. On 9 April 2022, BaFin prohibited the Defendant from exercising its voting rights as shareholder of the Plaintiff, followed by a prohibition against the Plaintiff following the instructions of the Defendant. Then on 19 April 2022, BaFin appointed a special representative of the Plaintiff, with executive powers, and on 10 June 2022 appointed another special representative to take over the function of the supervisory board of the Plaintiff. On 8 June 2022 and 18 August 2022 respectively, the

German Court appointed a trustee to exercise the voting rights of the Defendant and of the minority shareholder in the Plaintiff. On 24 March 2023, the trustee appointed by the German Court passed a resolution at an EGM for the Plaintiff to enter into voluntary and solvent liquidation with effect from 1 April 2023, and liquidators of the Plaintiff were appointed.

15. The Plaintiff explained that the above were steps to ringfence the Plaintiff from the influence of its Russian shareholders, including the Defendant.

16. On 22 June 2023, and in reliance on the TSA, the Defendant demanded payment of the Settlement Amount. In response, the Plaintiff claimed in its letter of 9 August 2023 that the EU Sanction prohibited it from making any funds or economic resources available, directly or indirectly, to the Defendant. The Plaintiff pointed out that the Settlement Amount requested by the Defendant can only be credited to the Defendant's account with the Plaintiff "which is subject to an asset freeze", and subject to the prior approval by BaFin. The Plaintiff reminded the Defendant in its letter that any dispute or claim arising out of or relating to the TSA should be referred to and finally resolved by HKIAC arbitration, and that no claims aimed at the recovery of any funds from the Plaintiff may be submitted to the Russian courts.

The relevant proceedings

17. Various proceedings followed the Defendant's demand for payment and the Plaintiff's failure to comply with it.

18. On 4 September 2023, the Defendant commenced the Russian Proceedings for recovery of the Settlement Amount. According to the Statement of Claim, the Defendant's claim against the Plaintiff in the Russian Proceedings is in relation to the Plaintiff's breach of its obligations under the TSA and its default in payment of the Settlement Amount by reason of the EU Sanction.

19. On 14 September 2023, the Defendant applied to and obtained from the Russian Court interim measures which froze the securities held in the Plaintiff's account with the Defendant, and prohibited the Defendant from transferring the title of such securities to any party other than the Defendant (referred to as the "**Freezing Order**"). The Freezing Order relates to securities with a total nominal value of US$ 2,221,625, CHF 61,150,000 and Eur 14,720,000.

20. The Plaintiff's appeal against the Freezing Order was dismissed. The Plaintiff claimed that the Russian Court did not have jurisdiction to determine the Defendant's claim by reason of the Arbitration Clause, but that was also dismissed by the Russian Court, in December 2023.

21. The Plaintiff then issued the 1st OS in Hong Kong on 19 October 2023. On 27 October 2023, it obtained an interim anti-suit injunction ("**HK ASI Order**"), whereby the Defendant was ordered to take all necessary steps to seek a stay of, and otherwise not to take any further steps in the Russian Proceedings, **and** not to commence or pursue any proceedings relating to the parties' underlying dispute save as in accordance with the parties' arbitration agreement.

22. By 26 October 2023, the Defendant had commenced the 2nd Russian Proceedings, and notwithstanding the HK ASI Order, the Defendant proceeded to obtain from the Russian Court further orders to prohibit the Plaintiff from initiating or continuing proceedings in Hong Kong in relation to the TSA. On 30 October 2023, the Russian Court granted an interim injunction, which prohibited the Plaintiff from initiating proceedings in the High Court of Hong Kong, and from maintaining petitions and claims in the High Court of Hong Kong for the prohibition of the commencement of legal proceedings in the Russian courts on the basis of the TSA, and from commencing or continuing the proceedings outside Russia ("**1st Russian ASI Ruling**").

23. On 2 November 2023, the Defendant applied for and obtained a further ruling from the Russian Court, prohibiting the Plaintiff from initiating *arbitration* proceedings in HKIAC and in any of the arbitration courts and arbitrations outside the Russian Federation on the basis of the TSA, until judgment in the 2nd Russian Proceedings ("**2nd Russian ASI Ruling**"). The Plaintiff claims that it has not been made aware of the details of the claims made in the 2nd Russian Proceedings.

24. The Plaintiff appealed against the 1st and 2nd Russian ASI Rulings, which were eventually dismissed by the Russian Court of Appeal on 12 January 2024.

25. On 1 December 2023, the Russian Court gave judgment in favor of the Defendant in the Russian Proceedings, for recovery of the Settlement Amount in full. The Russian Court further dismissed the Plaintiff's jurisdiction challenge, on the ground that the Russian Court had exclusive

jurisdiction in respect of the Defendant's claim for the Settlement Amount and in relation to the EU Sanction, under Article 248 of the Arbitrazh Procedural Code ("**Article 248**").

26. On 11 December 2023, the Russian Court also granted judgment in favor of the Defendant in the 2nd Russian Proceedings, which included final injunctions to restrain the Plaintiff from commencing or continuing any arbitration relating to the TSA, and from commencing proceedings in Hong Kong to prohibit the Defendant from claiming in Russia.

27. The Plaintiff's application to cancel the Freezing Order was also dismissed by the Russian Court of Appeal on 9 February 2024. Its appeal against the judgment in the Russian Proceedings was dismissed on 26 March 2024.

28. Against the foregoing background, this Court is asked to grant in favor of the Plaintiff:

(1) a final injunction to restrain the Defendant from commencing or pursuing, either within Russia or elsewhere, any proceedings relating to the disputes, differences or claims arising out of or relating to the TSA otherwise than by way of arbitration in accordance with the Arbitration Clause, pending the final determination of the arbitration proceedings already commenced by the Plaintiff against the Defendant in HKIAC/A[redacted] ("**HK Arbitration**");

(2) an order that the Defendant take all necessary steps to discontinue or seek a stay of, and should take no further steps in, the Russian Proceedings and the 2nd Russian Proceedings;

(3) declarations that the Defendant's claim to recover the Settlement Amount from the Plaintiff in the Russian Proceedings and the 2nd Russian Proceedings, in respect of disputes arising out of or relating to the TSA, and any consequential proceedings resulting therefrom, constitute breach of the arbitration agreement in the TSA;

(4) an injunction to restrain the Defendant from taking steps to enforce or rely on any order, decision, judgment or ruling by the courts in the Russian Proceedings and the 2nd Russian Proceedings which would interfere with or require the withdrawal of the HK Arbitration or the proceedings before the Hong Kong Court; and

(5) a declaration that the Defendant is obliged to bring any challenge to the substantive jurisdiction of the tribunal, or to the validity of the Arbitration Clause, before the tribunal in the HK Arbitration or the Hong Kong Court in the exercise of its supervisory jurisdiction.

29. On the part of the Defendant, it claims (pursuant to its Jurisdiction Summons) that firstly, by virtue of Article 19 of the Basic Law, the Hong Kong Court does not have jurisdiction over acts of state such as foreign affairs, and that the courts of Hong Kong must obtain a certificate from the Chief Executive on questions of fact concerning acts of state ("**Art 19 Certificate**"), whenever such questions arise in the adjudication of

cases, which certificate is binding on the courts. Before issuing the Art 19 Certificate, the Chief Executive is required under Article 19 to obtain a certifying document from the Central People's Government. On behalf of the Defendant, Article 13 of the Basic Law was highlighted, as that states that the Central People's Government shall be responsible for foreign affairs relating to the Hong Kong Special Administrative Region.

30. Praying in aid Articles 13 and 19 of the Basic Law, and the decision of the Court of Final Appeal in *Democratic Republic of Congo v FG Hemisphere Associates LLC (No 1)* (2011) 14 HKCFAR 95, the Defendant sought to argue that an Art 19 Certificate is required in this case in respect of the questions of facts raised in the dispute, and that in the absence of such a certificate, the Court has no jurisdiction to deal with the Plaintiff's claims in the action at all. The Defendant argued that the disputes before the Russian courts are not arbitrable issues, as the Defendant is seeking relief against the acts of the German state of implementing and enforcing EU sanctions, and that the Russian Court has exclusive jurisdiction in respect of such disputes. The two sets of Russian proceedings therefore do not constitute breaches of the parties' arbitration agreement.

31. In the alternative to its claim that the Hong Kong Court has no jurisdiction, it was argued for the Defendant that there are strong reasons against the grant of the anti-suit injunction and the related relief sought by the Plaintiff.

Anti-suit injunctions and applicable principles

32. At the heart of the dispute now before the Court is whether an anti-suit injunction should be granted on the Plaintiff's application in these proceedings.

33. The applicable legal principles in this respect are now well established, as reflected in the case of *Ever Judge Holding Co Ltd v Kroman Celik Sanayii Anonim Sirketi* [2015] 2 HKLRD 866, and applied in *Giorgio Armani SpA v Elan Clothes Co Ltd* [2019] 2 HKLRD 313, and *Linde GMBH v Ruschemalliance LLC* [2023] HKCFI 2409.

34. Foreign proceedings instituted in breach of an arbitration agreement will ordinarily be restrained by the grant of an injunction, unless there are strong reasons shown to the contrary. The applicant for an interim injunction must show to a high probability that its case is right given the impact of the injunction on proceedings before the foreign court. For contractual anti-suit injunctions, the courts have emphasized that there is no need to prove that the arbitral tribunal is the more convenient forum, since it is not a case of forum *non conveniens*. Nor is there need for the Court to feel diffidence in granting the injunction, or to exercise the jurisdiction sparingly and with great caution, for fear of giving an appearance of undue interference with proceedings of a foreign court. The restraint is directed against the party which has promised not to bring the proceedings otherwise than in accordance with the arbitration agreement, and effect should ordinarily be given to the agreement in the absence of strong reasons for departing from it. The strong reasons must be sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain and all the facts and circumstances of the particular case are to be

considered by the Court (per Lord Bingham of Cornhill in *Donahue v Armco Inc* [2002] CLC 440).

35. As this Court observed in *GM1 v KC* [2020] 1 HKLRD 132:

> "An injunction to enforce the positive promise of a party to arbitrate disputes and the negative right not to be vexed by foreign proceedings can be viewed as an interim order which maintains the status quo of parties which have already commenced their arbitration, as in this case, in accordance with the rights conferred under their arbitration agreement. The anti-suit injunction restrains a party from commencing proceedings instituted in breach of the arbitration agreement, the continuation of which must inevitably prejudice the arbitral process, the tribunal's conduct of the arbitration, and the orders to be made by the tribunal in the process. In my judgment, the Injunction sought is within the scope of the interim measures covered by s.45 of the Arbitration Ordinance, and the Court has jurisdiction to make such an order under the section. There is in any event a serious question to be tried on the plaintiffs' claim in the OS."

36. As for the relief of anti-anti-suit injunction, Counsel for the Plaintiff has referred to the case of *Ecom Agroindustrial Corp Ltd v Mosharaf Composite Textile Mill Ltd* [2013] 2 All ER (Comm) 983, and the observation made by Hamblen J therein (at para 21 of the judgment):

> "Where, as in the present case, the foreign defendant is itself seeking (or has obtained) an anti-suit injunction, and thus the Court is asked to grant an antianti-suit injunction, caution is called for (see *Raphael*, para 5.49; see also *General Star International Indemnity v Stirling Brown* [2003] Lloyd's Rep IR 719, para 16). However, where the foreign proceedings are brought in breach of an exclusive jurisdiction or arbitration clause, anti-anti-suit injunctions are frequently granted – see, for example, *Sabah Shipyard v Government of Pakistan* [2004] 1 CLC 149, paras 40-42; *Goshawk v ROP* [2006] EWHC 1730 (Comm))."

37. At paragraph 36 of the judgment in *Ecom*, the court further explained:

> "In circumstances where the defendant is bound by an arbitration clause, it is an egregious breach of contract for the defendant not only to commence proceedings in a non-contractual jurisdiction but to obtain an injunction from that non-contractual forum to prevent the claimant from itself vindicating the rights granted to it under the arbitration clause. Whilst the Bangladeshi court order is a relevant factor, where, as here, 'the obtaining of the injunction can be seen to have abused the contractual rights of the litigant with the contractual right to come to England' to arbitrate, it is not a factor of any great weight."

38. In circumstances such as those in *Ecom*, a mandatory injunction requiring the defendant to discontinue the foreign proceedings may be granted. The explanation given by Hamblen J was as follows:

> "The claimant submits that this is an appropriate case [for a mandatory injunction] because (1) this case concerns a final order and therefore an established breach of contract; (2) it involves an exclusive forum clause; (3) the breach is particularly egregious in that it involves seeking to prevent the Claimant from exercising its contractual rights, and (4) it is necessary for such an order to made because of the interim injunction which is in place. I accept that these reasons justify the making of a mandatory order. In particular, given that the Defendant has already obtained an interim injunction from the Bangladeshi court, for the order to be practically effective it is important that the injunction granted by this Court be in mandatory form."

39. With these principles in mind, I turn to the matters in dispute in these proceedings.

The jurisdiction challenge

40. In the submissions made for the Defendant, Mr Georgiou argued that the Defendant is seeking relief against the effects of international sanctions including the EU Sanction, which by their nature are matters of state. It is also claimed that the Defendant is seeking relief against the acts of the German state (acting through the liquidators appointed to the Plaintiff) of

implementing and enforcing the EU Sanction against the Defendant, which acts have "culminated in the expropriation of the Plaintiff". It was argued that the tribunal in the HK Arbitration does not have jurisdiction to determine disputes on the implementation and enforcement of sanctions "*vis-à-vis* the German state and the Defendant", and that the issue before the Russian Court is for relief against the effects of the EU sanction, rather than the enforcement of contractual terms under the TSA.

41. On the Defendant's case, there is a clear conflict between (1) the foreign affairs policies of the People's Republic of China ("**PRC**") (including the Hong Kong SAR) and (2) the EU Sanction which has caused the prohibition of payment of the Settlement Amount under the TSA as well as the liquidation of the Plaintiff. According to the Defendant, this conflict concerns questions of fact in relation to acts of state as contemplated by Articles 13 and 19 of the Basic Law, and the relief sought in the Originating Summonses before this Court constitute a direct interference in, and is inconsistent with the foreign affairs policies of the PRC. Accordingly, the Court does not have jurisdiction to grant or continue any relief sought by the Plaintiff.

42. Mr Georgiou highlighted the fact that PRC does not recognize any sanctions against the Russian Federation, and Mr Georgiou claims that PRC demonstrates support for Russia in the face of international sanctions. According to Mr Georgiou, governmental policy concerning the implementation and recognition of sanctions and countermeasures to sanctions is an obvious area of foreign affairs which is within the jurisdiction of the Central People's Government. It was submitted on behalf of the Defendant that decisions, determinations or actions of any

governmental or judicial body of the PRC, including this Court, concerning sanctions and countermeasures, give rise to questions of facts regarding acts of state, as contemplated by the Basic Law.

43. The Defendant's submission is that the only ground relied upon by the Plaintiff to avoid payment of the Settlement Amount is the effect of the EU Sanction. According to the Defendant, the tribunal in the HK Arbitration will most likely determine, as a matter of English law, that payment of the Settlement Amount by the Plaintiff is unenforceable due to the imposition of the EU Sanction. The submissions of Mr Georgiou continue to the effect that the relief sought by the Plaintiff require this Court to:

(1) recognize the EU Sanction as having force in this jurisdiction, despite this being contrary to the foreign policy of the PRC;

(2) facilitate the enforcement of the EU Sanction by constraining the parties to arbitration, which will most likely result in an outcome whereby the Settlement Amount is not paid to the Defendant solely because of the prohibitions imposed by the EU Sanction; and

(3) actively prohibit the Defendant from availing itself of sanctions countermeasures provided by the Russian Federation, despite the Russian Court being the only forum available to the Defendant to obtain relief from the effects of the EU Sanction imposed by the German state.

44. On the Defendant's case, as each of the above matters concerns the foreign affairs of the PRC with regard to the EU Sanction and the

countermeasures put into effect by the Russian Federation, determination of these issues give rise to a question of fact concerning acts of state, to require the Art 19 Certificate, which is absent.

45. I cannot accept the submissions made for the Defendant, that the Court has no jurisdiction over the Plaintiff's claims in the absence of an Art 19 Certificate. Articles 13 and 19 of the Basic Law are not relevant at all to the issues raised for determination in this case, as there is no "state", and no act of state involved at all.

46. As Mr Law for the Plaintiff emphasized, the present dispute is between the Plaintiff and the Defendant, two banks.

47. As for the nature of the dispute, the Notice of Arbitration dated 1 December 2023 served by the Plaintiff in respect of its claims against the Defendant relies on the rights and liabilities of the parties under the TSA, and seeks by way of relief declarations in relation to the TSA, its validity, the jurisdiction of the tribunal to decide disputes arising out of and in connection with the TSA, and as to the jurisdiction of the Russian Court in respect of such claims. There is no claim made by or against any state, or any party other than the Plaintiff bank and the Defendant bank.

48. The Statement of Claim filed in the Russian Proceedings likewise refers to the rights of the Defendant under the TSA, although it asserts that it is the Russian Court which has jurisdiction over the claims made by the Defendant against the Plaintiff for payment under the TSA, by virtue of Article 248. Mr Law highlighted that the relief sought in the

Statement of Claim filed in the Russian Proceedings is for recovery of the Settlement Amount simpliciter.

49. Mr Law pointed out that it was only in the Skeleton Submissions served for the Defendant on 27 May 2024 that claims were made by the Defendant, for the first time, that the German state was somehow involved, with the claim that the German state had "expropriated" the Plaintiff through sanctions, and that "the Plaintiff is merely a pawn in the dispute". Upon review of the evidence and the authorities, I agree that there is no substance in the attempts made by the Defendant to allege that there is any state, or act of state, involved in the issues for determination in this case.

50. The Defendant bank has the majority of its shares owned by the Russian Federation, but there is no claim or evidence that it is a state entity. The Defendant owned the majority of the shares in the Plaintiff, but it is a separate legal entity from either the Plaintiff, or the Russian Federation. The Plaintiff has its headquarters in Germany, and is subject to the supervision of BaFin, which has applied to the German Court and secured the appointment of a trustee to exercise the Defendant's voting rights in the Plaintiff since August 2022. The acts of BaFin, as a regulatory authority, cannot be equated with the acts of the German state. The Plaintiff denies that there is any "expropriation" of the Defendant's assets, emphasising that the Defendant continues to be and remains the Plaintiff's 99.39% shareholder.

51. The TSA was made between the Plaintiff and the Defendant, and set out the rights and obligations of the parties, including the obligation to make and accept payment of the Settlement Amount, ***AND*** to refer

disputes arising out of or relating to the existence, validity, performance or breach of the TSA to arbitration in Hong Kong.

52. In the context of the relevance of the Art 19 Certificate, such certificate is required only if questions of fact concerning "acts of state" arise in the court's adjudication of cases.

53. As explained in *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 1)* (2011) 14 HKCFAR 95 ("***Congo***"), the ambit of Article 19(3) of the Basic Law is narrow. The Court has general jurisdiction over all cases under Article 19(2), excepting only "over acts of state such as defence and foreign affairs". The Court is only bound by facts concerning such acts of state as are declared in the Chief Executive's certificate, and it is for the courts to determine the legal consequences and to decide the case on such basis (paragraph 344 of the judgment in *Congo*).

54. The Court of Final Appeal explained, at paragraphs 360 of the judgment in *Congo*, the application of Article 19(3), as follows:

> "The application of art 19(3) therefore requires the Court first to identify what, if any, questions of fact there may be which concern the relevant act of state. Secondly, it requires the court to consider whether such questions as arise need to be resolved in the adjudication of the case by using the certificate procedure."

55. Pertinently, at paragraph 362 of the judgment, the Court in *Congo* pointed out that an Art 19 Certificate is required only when there is controversy or doubt about questions of fact concerning acts of state, and not when "the relevant facts have been authoritatively established and are not in dispute".

56. On the facts of the present case, is there a question of fact concerning an act of state, and is the resolution of this question of fact which may concern the act of state ***necessary*** for the adjudication of the dispute between the Plaintiff and the Defendant in this case? In my judgment, the answer should be a clear "No" to each of these questions.

57. The common law doctrine of act of state was considered by the UK Supreme Court in *Belhaj v Straw* [2017] AC 964, and the observations of Lord Neuberger are set out at paragraphs 118 to 124:

> "118. In summary terms, the Doctrine amounts to this, that the courts of the United Kingdom will not readily adjudicate upon the lawfulness or validity of sovereign acts of foreign states, and it applies to claims which, while not made against the foreign state concerned, involve an allegation that a foreign state has acted unlawfully. In so far as it is relied on in these proceedings, the Doctrine is purely one of domestic common law, and it has all the advantages and disadvantages of a principle that has been developed on a case by case basis by judges over the centuries. Thus, while it is pragmatic and adaptable to changing norms (as Lord Wilberforce pointed out in *Blathwayt v Baron Cawley* [1976] AC 397, 426), it is a principle whose precise scope is not always easy to identify...
>
> 120. It appears to me that the domestic cases, to which we have been referred, suggest that there may be four possible rules which have been treated as aspects of the Doctrine, although there is a strong argument for saying that the first rule is not part of the Doctrine at all, or at least is a free-standing aspect of the Doctrine effectively franked by international law.
>
> 121. The first rule is that the courts of this country will recognise, and will not question, the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state.
>
> 122. The second rule is that the courts of this country will recognise, and will not question, the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that state.
>
> 123. The third rule has more than one component, but each component involves issues which are inappropriate for the courts

> of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not rule on it. Thus, the courts of this country will not interpret or question dealings between sovereign states; 'Obvious examples are making war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory' – per Lord Pearson in *Nissan v Attorney General* [1970] AC 179, 237. *Nissan* was a case concerned with Crown act of state, which is, of course, a different doctrine and is considered in *Mohammed (Serdar) v Ministry of Defence; Rahmatullah v Ministry of Defence* [2017] AC 649, 787, but the remark is none the less equally apposite to the foreign act of state doctrine. Similarly, the courts of this country will not, as a matter of judicial policy, determine the legality of acts of a foreign government in the conduct of foreign affairs. It is also part of this third rule that international treaties and conventions, which have not become incorporated into domestic law by the legislature, cannot be the source of domestic rights or duties and will not be interpreted by our courts. This third rule is justified on the ground that domestic courts should not normally determine issues which are only really appropriate for diplomatic or similar channels (see *Shergill v Khaira* [2015] AC 359, paras 40, 42).
>
> 124. A possible fourth rule was described by Rix LJ in a judgment on behalf of the Court of Appeal in *Yukos Capital SARL v OJSC Rosneft Oil Co (No 2)* [2014] QB 458, para 65, as being that
>
> > 'the courts will not investigate acts of a foreign state where such an investigation would embarrass the government of our own country: but that this doctrine only arises as a result of a communication from our own Foreign Office'."

58. Mr Law pointed out that the Defendant has been vague as to what constitutes the act of state in this case, other than the suggestion that some foreign legislation is involved. There have only been ambiguous expressions to the effect that the grant of anti-suit injunction amounts to indirect enforcement of the EU Sanction in Hong Kong, or that the case involves foreign affairs between the PRC and the Russian Federation generally. According to Mr Law, none of the 4 rules identified in the judgment of Lord Neuberger in *Belhaj v Straw* has relevance to the

EU Sanction or Article 258, as neither act involves the executive of any foreign state, or dealings between sovereign states.

59. In my judgment, what is pertinent is that the question for determination by the Court in this case is simply whether there is a valid and binding arbitration agreement between the Plaintiff and the Defendant, which covers the scope of the dispute between the two parties and the claims made by them in these proceedings and in the two sets of Russian Proceedings, and whether to grant the injunctions on the Plaintiff's application. It is trite, that the arbitration agreement contained in the Arbitration Clause is severable from and separate to the underlying TSA between the parties. Any illegality of the TSA, and any alleged impossibility to perform the TSA, cannot affect the validity and operation of the arbitration agreement. Nor does the impossibility of performance of any award obtained in the HK Arbitration affect the validity and enforceability of either the arbitration agreement, the HK Arbitration itself, or the award obtained.

60. It is also clear, that the Court's decision on the questions identified in the preceding paragraph does not require its adjudication of the validity, lawfulness or fairness of the EU Sanction, nor its operation within the territory of the EU. There is no attempt by the Plaintiff to seek enforcement of the EU Sanction in Hong Kong, as it has no recognition or application here. It is simply not necessary for the Court to decide whether the issue and application of the EU Sanction in the EU, or in Hong Kong, is right, or wrong, or valid. Whether the EU Sanction confers a good answer to the Defendant's claim for payment under the TSA, whether the Plaintiff can be excused from payment, and the effect of the EU Sanction on the TSA are

all matters which go to the merits of the claims in the HK Arbitration, and it should not be forgotten that the Court does ***not*** consider the merits of the underlying dispute when it decides the Plaintiff's claim for the injunctions – which are made solely on the basis of a valid arbitration agreement. This is also a reason to reject the Defendant's assertion that by granting the injunctions to the Plaintiff, the Court is implementing or facilitating the EU Sanction. Any injunction which the Court grants in this case is to facilitate the arbitration agreement between the parties, and nothing else.

61. Even if it can be said that the issue or pronunciation of the EU Sanction by the EU and the inclusion of the Defendant in the list of sanctioned entities is an act of state, the issue of the EU and the inclusion of the Defendant as a sanctioned entity are clearly established and have never been in dispute. Nor is the effect of the EU Sanction, at least with regard to assets and entities within the EU, in dispute between the parties. As explained by the Court of Final Appeal in *Congo*, the Art 19 Certificate is not called for in such circumstances when there is no controversy or doubt.

62. In this regard, Mr Georgiou referred repeatedly to the need of the Hong Kong Court to "speak with one voice" and to work in harmony with the executive of the government (citing Lord Hope in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 883) in matters of foreign policy as well as matters of public policy. When questioned by the Court, the only "one voice" which he was able to identify as being relevant was Order No 1 of 2021 on Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures issued by the Ministry of Commerce of PRC ("**MOFCOM Order**"). Articles 1 to 3 of MOFCOM Order state as follows:

> "Article 1 These Rules are formulated in accordance with the National Security Law of the People's Republic of China and other relevant laws, for the purpose of counteracting the impact on China caused by unjustified extra-territorial application of foreign legislation and other measures, safeguarding national sovereignty, security and development interests, and protecting the legitimate rights and interests of citizens, legal persons and other organizations of China.
>
> Article 2 These Rules apply to situations where the extra-territorial application of foreign legislation and other measures, in violation of international law and the basic principles of international relations, unjustifiably prohibits or restricts the citizens, legal persons or other organizations of China from engaging in normal economic, trade and related activities with a third State (or region) or its citizens, legal persons or other organizations.
>
> Article 3 The Chinese Government pursues an independent foreign policy, adheres to the basic principles of international relations, including mutual respect for sovereignty, non-interference in each other's internal affairs, and equality and mutual benefit, abides by the international treaties and agreements to which China is a party, and fulfills its international obligations."

63. The Plaintiff is a bank licensed and headquartered in Germany, subject to the supervision of BaFin in Germany. The Defendant is a bank established in Russia. Neither is an organization or legal person of China. I fail to see how the Court's determination of the rights and liabilities of the Plaintiff and the Defendant under the TSA and the arbitration agreement made between them can be affected by or be concerned with the foreign affairs or policy of PRC as reflected in the MOFCOM Order. The MOFCOM Order does not require this Court to support or reflect its policy, or to speak in any voice consistent therewith in this case.

64. As to whether the grant of the anti-suit injunction will interfere with the jurisdiction of the Russian Court and the protection conferred upon

the Defendant under Article 248, and whether this can in any way constitute interference with the rule that the Court will not question the effect of the legislation or other laws of a foreign state, in relation to any acts which take place or take effect within the territory of that state (ie rule 1 as identified by Lord Neuberger in *Balhaj v Straw*), I accept the submissions made by Mr Law for the Plaintiff. As the Court explained in *Ever Judger Holding Co Ltd v Kroman* [2015] 2 HKLRD 866, an anti-suit injunction is an order *in personam*, and is not addressed to or binding upon a foreign court. Its effectiveness depends simply on the defendant being amenable to the jurisdiction of the Hong Kong Court.

65. In *Turner v Grovit* [2001] UKHL 65, Lord Hobhouse already pointed out that the making of a restraining order does not depend upon denying, or preempting, the jurisdiction of the foreign court. At paragraph 26 of his judgment, His Lordship explained in the following clear terms:

> "The making of a restraining order does not depend upon denying, or preempting, the jurisdiction of the foreign court. One of the errors made by the deputy judge in the present case was to treat the case as if it were about the jurisdiction of the Madrid court. Jurisdiction is a different concept. For the foreign court, its jurisdiction and whether to exercise that jurisdiction falls to be decided by the foreign court itself in accordance with its own laws (including conventions to which the foreign country may be a party). The jurisdiction which the foreign court chooses to assume may thus include an extraterritorial (or exorbitant) jurisdiction which is not internationally recognised. International recognition of the jurisdiction assumed by the foreign court only becomes critical at the stage of the enforcement of the judgments and decisions of the foreign court by the courts of another country. Restraining orders come into the picture at an earlier stage and involve not a decision upon the jurisdiction of the foreign court but an assessment of the conduct of the relevant party in invoking that jurisdiction. English law makes these distinctions. Indeed, the typical situation in which a restraining order is made is one where the foreign court has or is willing to assume jurisdiction; if this were not so, no restraining order would be necessary and none should be granted."

66. In *Giorgio Armani SpA v Elan Clothes* [2019] 2 HKLRD 313, the Court explained that such an injunction does not call into question the jurisdiction of the foreign court; and further, that if the arbitration clause is valid and applicable under its proper law, the fact that the foreign tribunal will not recognize the clause as valid or give effect to it will not normally prevent the English or Hong Kong Court from enforcing it through an anti-suit injunction.

67. The fact that the foreign court has jurisdiction in the matter has little weight, when the entire purpose and expressed intent of each contracting party to either an exclusive jurisdiction clause, or an arbitration agreement, is for the party **NOT** to invoke that undisputed jurisdiction. This disposes of the argument that the Russian Court has exclusive jurisdiction under Article 248.

68. In conclusion, I find that Article 19 of the Basic Law has no application to the facts of this case, and no certificate from the Chief Executive is required. The Court has jurisdiction to decide the matters raised in these proceedings, which are arbitrable.

Whether relief should be refused on the basis of there being no dispute

69. In the alternative to claiming that the Court has no jurisdiction, the Defendant made various submissions as to why the Court should not exercise its discretion to grant the anti-suit injunction and other related relief to the Plaintiff.

70. The first is that there is no dispute between the parties for submission to arbitration, because it is common ground that payment of the Settlement Amount cannot be made by the Plaintiff to the Defendant by virtue of the EU Sanction.

71. The above is denied by the Plaintiff, which claims that the only common ground between the parties is that there is an arbitration agreement which is enforceable under Hong Kong law being the law of the seat of the HK Arbitration.

72. In the case of *Tommy CP Tze & Co v Li & Fung (Trading) Ltd*, [2003] 1 HKC 418, the Court held that a dispute will exist "unless there is a clear and unequivocal admission not only of liability but also of quantum".

73. The Notice of Arbitration refers to the Defendant's breach of the arbitration agreement under the TSA, by pursuing its claim for the Settlement Amount before the Russian Court. Clearly, this has not been admitted by the Defendant, and it constitutes a dispute between the parties, which has been included in the Notice of Arbitration as the basis of the Plaintiff's claim in the HK Arbitration for declarations: that the arbitral tribunal has jurisdiction to decide the dispute between the parties arising out of and in connection with the TSA, that the Russian Court has no jurisdiction in respect of such dispute, that the institution of the Russian Proceedings and the 2nd Russian Proceedings constitute breaches of the arbitration agreement contained in the TSA, and that the Defendant is not entitled to claim the Settlement Amount from the Plaintiff.

74. I am satisfied that there is a dispute between the parties, which falls within the scope of the Arbitration Clause as covering any controversy, difference or claim arising out of or relating to the TSA, including the validity, interpretation, performance, breach or termination of the TSA, and can be submitted to arbitration in accordance with the Arbitration Clause.

Whether there is dispute on the effect of the EU Sanction, and whether the HK Arbitration would be futile

75. The Defendant further argued that whereas the tribunal may determine the contractual implications of the EU Sanction on the payment obligations under the TSA, the determination and disposal of such an issue would be moot, given the prohibitive effect of the EU Sanction in blocking payment of the Settlement Amount, regardless of the HK Arbitration and its outcome.

76. In this regard, the Defendant also argued that there is a real risk that it would not be able to obtain the intended benefit of arbitration by HKIAC in Hong Kong, because of the effect of the EU Sanction. Its rationale is that at the time when the parties entered into the TSA and the arbitration agreement, the Defendant's intended purpose was to have disputes over the parties' rights, obligations and liabilities to be resolved by arbitration. It was not its intention and purpose "to use the arbitration process to facilitate the draconian effects of Western sanctions" including the EU Sanction. The Defendant therefore has serious concerns as to the effectiveness of the arbitration process, and whether the tribunal can legally make a final award in favor of the Defendant by ordering the Plaintiff to pay the Settlement Amount in accordance with the terms of the TSA, without

placing any members of the tribunal and/or the HKIAC in breach of sanctions imposed by their respective home jurisdictions.

77. Whether this constitutes a strong cause or reason not to enforce the arbitration agreement depends on whether there is a sufficiently credible basis for the Defendant to assert that the tribunal would not be able to make an award in favor of the Defendant, for payment of the Settlement Amount. From the authorities (*Zephyrus Capital Aviation Partners ID Limited v Fidelis Underwriting Limited [2024] EWHC 734 (Comm)*, paras 106 and 110), it is clear that the burden is on the Defendant in this case to show that there are strong reasons for the Court not to stay the Russian proceedings. On the face of the evidence adduced by the Defendant, however, there are only bare assertions that members of the tribunal would not be able to make an award in favor of the Defendant by virtue only of the effect of the sanctions against the members. (Other claims of the Defendant being unable to pay legal fees and costs will be dealt with under the consideration of a fair trial and public policy below.)

78. With regard to the effect of the EU Sanction, I accept the submissions made for the Plaintiff that the parties in this case had by their own choice agreed to and provided for English law to govern the TSA. If, under English law, the EU Sanction has effect on the TSA, or on the HK Arbitration in any way, that is a consequence of the parties' choice. It is also pertinent that at the time of the TSA, sanctions had already been implemented by the EU (since March 2014) and the parties to the ISDA Agreement must have envisaged the risks of sanctions and their effect on the transactions under the ISDA Agreement. The Defendant was added to the list of sanctioned entities on the same day as the TSA and it is

inconceivable that this could not have been envisaged as a risk at the time when the TSA was negotiated and concluded.

79. There is nothing unjust for the tribunal to apply English law to the resolution of the disputes in the HK Arbitration in relation to the TSA, including any effect which English law may have on the parties' obligations and rights under the TSA.

80. It is undisputed that the EU Sanction, and the prohibitions thereunder, do not have effect in Hong Kong.

81. It is a matter for detailed submissions to be made before the tribunal, on concrete evidence to be filed, whether payment of the Settlement Amount can be made to the Defendant as a result of the EU Sanctions, and it is for the tribunal in the HK Arbitration to decide on such evidence whether an award can be made in favor of the Defendant. At this stage, there is no basis for this Court to conclude that the tribunal cannot resolve the dispute (as the parties had intended at the time of the TSA and their agreement to arbitrate). However the tribunal may decide, whether in favour of the Plaintiff, or in favour of the Defendant, that is resolution of the dispute by the agreed mode, and as the parties had intended when they entered into the TSA.

82. In the event that the tribunal ultimately makes an award in the HK Arbitration for the Plaintiff to make payment to the Defendant, such an award is valid and binding on the parties, even if performance of the award is impossible, by virtue of the EU Sanction or any other sanctions, or for any other reason. This is trite (*Eton Properties Limited* CACV 197/2008) and is

sufficient ground to dismiss the claim that the HK Arbitration will be futile by reason of the fact that an award for payment to the Defendant cannot be performed.

83. In the more recent case of *Barclays Bank Plc v VEB.RF* [2024] EWHC 225 (Comm), the question of the utility of an order was raised and rejected by the court as a reason against granting anti-suit and anti-enforcement injunctions. As the learned judge observed in the case:

> "The only other point I should consider is futility. Generally speaking, an English court will not grant an injunction or make a mandatory order if to do so would be futile, because they would go unenforced and unobeyed. That is always a concern in an application of this sort. However, I am persuaded that it is appropriate to make the orders sought in the circumstances of this case, because the making of such orders will or at least may provide the bank with protection in the event that judgment is entered in Moscow, contrary to what should be the result of the orders that I have made, and attempts are made then by the respondents to enforce any judgment obtained from the Russian courts in third country jurisdictions. The Russian proceedings should not have been started, and should not be continued with, and any judgment obtained in the Russian proceedings should not be enforced because by starting or continuing the proceedings and seeking to enforce any judgment in such proceedings, the respondent has acted deliberately in breach of contract. The making of the order sought by the claimant emphasise those points."

84. Counsel for the Plaintiff also referred to the decision of the English court in *Airbus Canada Limited Partnership v Joint Stock Company Illyushin Finance Co* [2024] EWHC 790 (Comm), a case in which the Court granted final anti-suit declaratory and injunctive relief, including a mandatory order requiring the defendant to discontinue foreign proceedings, and an anti-enforcement order. The Court found that there was practical utility in the anti-suit relief, explaining:

> "Aside however from such conduct being a contempt of this court which would expose the directors of the defendant to sanctions including unlimited fines and imprisonment of up to two years, there is practical utility in making of the orders sought by the claimant, essentially for two reasons. Firstly, it will be open to the claimants to commence arbitration proceedings and seek negative declaratory relief in those proceedings which would then be enforceable using the usual cross-border techniques available around the world for the enforcement of international arbitral awards using the New York convention process, and, secondly, and perhaps more importantly, an order in mandatory terms in these proceedings is likely to prove useful if, and to the extent the defendant obtains a judgment in the Russian proceedings and seeks to enforce those elsewhere."

85. I therefore disagree that there is any reason to decline the relief sought by the Plaintiff, simply because it would be futile to have the HK Arbitration.

Whether there is strong cause to refuse relief on the ground of public policy

86. Many of the arguments raised above are also used to support the Defendant's claim that it would be contrary to the public policy of Hong Kong to grant the relief sought by the Plaintiff by its Originating Summonses.

87. At the heart of the Defendant's complaint is that it would not get a fair hearing if the claim for payment under the TSA should be dealt with by the chosen mode of arbitration in Hong Kong. This is on the basis that the Plaintiff would be claiming in the HK Arbitration that the payment obligations under the TSA are not enforceable, and the EU Sanction would be at the centre of the inquiry before the tribunal.

88. The Defendant argued that it is likely that applying English law, the tribunal will "give positive regard to the EU Sanctions", including the Defendant's claim of expropriation of the Plaintiff by the German state, and ultimately find that the Plaintiff's payment obligation is unenforceable solely because of the EU Sanction. On the Defendant's case, this will not only be evidence of an unfair trial, but it will be against the foreign policy/affairs of the PRC, and hence should be against the public policy of Hong Kong, to give effect to the EU Sanction and to the acts of expropriation by the German state.

89. I have already rejected the claim that there is any evidence of expropriation of the Defendant's assets by the German state.

90. I have also rejected the claim that the Court's grant of relief to the Plaintiff in this case would in any way be contrary to any foreign policy of the PRC when there is no question of any sanction against any Chinese entity or assets involved.

91. Nor has the Defendant in this case adduced any evidence at all, that it has been or will be deprived of the opportunity of having a fair hearing in Hong Kong, or that it has been rendered unable to pay for legal representation of its choice for the HK Arbitration. All that the Defendant can assert is that Western sanctions have cut the Defendant from the SWIFT banking system which has made it "very difficult" for the Defendant to engage and pay for legal services to represent the Defendant in the HK Arbitration. It claims that it has been unable to pay any of the invoices issued by its legal representatives and it has had to seek extensions of time to file evidence in opposition.

92. As Counsel for the Plaintiff pointed out, the Defendant has not explained whether it has attempted to use alternative payment systems other than SWIFT, and if so, why these alternative means have failed. The Plaintiff submits that there are other methods of payment such as the Financial Messaging System of the Bank of Russia (SPFS) developed by Russia, and the Cross-Border Interbank Payment System (CIPS) set up by Mainland China under the supervision of the People's Bank of China. According to the Plaintiff, there is evidence to show that the Defendant, as a Russian bank, has since September 2022 been launching transfers in RMB without using SWIFT. It is also apparent from the English cases (such as *Barclays Bank* and *Airbus Canada*) that there have been established routes in the UK to enable a party to make payments to its legal representatives notwithstanding the sanctions imposed.

93. The Plaintiff highlighted the fact that the EU Sanction does not prohibit the Defendant's payment to its lawyers in Hong Kong, as the EU Sanction has no application in Hong Kong.

94. In any event and notwithstanding any "difficulties" alleged by the Defendant, it is clear that it has successfully procured the services from its legal advisers, and evidence has been filed in these proceedings to resist the Plaintiff's claims and to launch its challenge to the jurisdiction of the Court. As Counsel for the Plaintiff rightly submitted, the Defendant has not explained whether there are alternative means to make payment for legal fees incurred in Hong Kong, and it must have succeeded somehow in arranging for payment notwithstanding the alleged difficulties in utilizing the SWIFT system.

95. As for the Defendant's access to justice in Hong Kong, I would repeat the observations made at paragraph 55 of my judgment in *Linde GMBH & anor v Ruschemalliance LLC* [2023] HKCFI 2409. There is no evidence in this case which can lead me to accept that the Defendant cannot have a fair hearing before the tribunal or before the Hong Kong Courts simply because the dispute in the HK Arbitration turns on the existence and effect of the EU Sanction on the parties and their agreements.

96. Counsel for the Defendant relies on *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 to support his argument that when it would be contrary to public policy, a provision of foreign law (such as the EU Sanction) may be disregarded. According to Counsel, public policy considerations should outweigh the parties' contractual choice (of resolving the disputes by arbitration), citing the judgment of Sales LJ in *Petter v EMC Europe Limited* [2015] EWCA Civ 828 (which was quoted by Henshaw J in *Zephyrus*):

> "Where, as here, a party is seeking to sue in England there may be 'strong reasons' of public policy against simply respecting the parties' contractual choice which are based on the public policy of the foreign state (which the English court may be prepared to recognize and give weight to on grounds of comity) or <u>which are based on the public policy which is inherent or reflected in English law</u>." (Emphasis added)

97. As explained in the earlier parts of this judgment, I do not accept the Defendant's proposition that the Hong Kong Court, in exercising its discretion in this case, has to "work in harmony with the executive" with regard to the foreign policy and foreign affairs of the PRC with regard to sanctions. There is no question of this Court giving effect to the EU Sanction merely by granting the anti-suit injunction and anti-enforcement injunction

and associated relief on the basis of the Arbitration Clause in the TSA made between and agreed to by the Defendant, and no question of the Court acting against the public policy of Hong Kong as a result. The relevant public policy in play on the facts of the present case is that of upholding the parties' autonomy and their agreement to submit their disputes to arbitration in Hong Kong.

98. This is sufficient to dispose of the matter, but since the parties have spent time on arguing the relevance and details of public policy and *Kuwait Airways*, I will briefly deal with the points raised in *Kuwait Airways*, as follows.

99. Far from assisting the Defendant's case against the grant of the anti-suit and associated relief, the Plaintiff argued that the case of *Kuwait Airways* endorses public policy considerations in favor of the sanctions under consideration. The relevant legislative action and the legislation considered in *Kuwait Airways* is totally different to the relevant EU Sanction in this case, and the observations of the English Court should be read in the proper context, and in the particular and unique circumstances of the case.

100. The resolution considered by the court in *Kuwait Airways* is Resolution 369 of the Revolutionary Command Council of Iraq, which resolution vested title in aircraft belonging to Kuwait Airways Corp to Iraq, and which authorized the retention and use of the aircraft by Iraqi Airways Co ("**IAC**") as its own. The questions raised for the Court in *Kuwait Airways* included: (1) is the effectiveness of Resolution 369 as a legislative act vesting title in the aircraft in IAC justiciable in the English courts; and (2) if it is, and if Resolution 369 is held to offend against English public policy,

does it nevertheless have to be recognized as vesting title to the aircraft in IAC. The English Court also considered Resolution 660 adopted by the United Nations Security Council, which decided that Iraq's annexation of Kuwait under any form and whatever pretext had no legal validity and was considered null and void. Resolution 662 then called upon all states "not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation".

101. It was against the above background, that Lord Hope made his observations on justiciability and on public policy, at paragraphs 135 to 140 of his judgment:

> "135. Important questions of principle are raised by the highly unusual facts of this case. There is no doubt as to the general effect of the rule which is known as the act of state rule. It applies to the legislative or other governmental acts of a recognised foreign state or government within the limits of its own territory. The English courts will not adjudicate upon, or call into question, any such acts. They may be pleaded and relied upon by way of defence in this jurisdiction without being subjected to that kind of judicial scrutiny. The rule gives effect to a policy of 'judicial restraint or abstention': see *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888, 931F-934C per Lord Wilberforce. As the title to moveable property is determined by the lex situs, a transfer of property effected by or under foreign legislation in the country where the property is situated will, as a general rule, be treated as effective by English law for all relevant purposes.
>
> 136. It would clearly be possible for a 'blue pencil' approach to be taken to Resolution 369, by reading it down so that it applied only to the property of KAC that was situated at the time of the resolution within its own territory. The normal rule is that legislative action applied to property within the territorial jurisdiction will be internationally recognised, despite the fact that it has been combined with action which is unenforceable extraterritorially. If this approach is adopted, that part of Resolution 369 which vested title in the aircraft in IAC will provide IAC with a complete defence to this action. Its legality in international law will not be justiciable in these proceedings.

137. IAC accepts however that the normal rule is subject to an exception on grounds of public policy. The proposition which it accepts is that the exception applies if the foreign legislation constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise the legislation as a law at all: *Oppenheimer v Cattermole* [1976] AC 249, 278, per Lord Cross of Chelsea. The proposition which it disputes is that the public policy exception extends to breaches of international law. IAC's argument is presented as one of principle. Arguments directed to breaches of international law are non-justiciable. The public policy exception must be tightly restricted. The only exception that has been judicially recognised is the human rights exception. As that exception is not invoked in this case, it has a complete defence to these proceedings under the act of state rule.

138. It is clear that very narrow limits must be placed on any exception to the act of state rule. As Lord Cross recognised in *Oppenheimer v Cattermole* [1976] AC 249, 277-278, a judge should be slow to refuse to give effect to the legislation of a foreign state in any sphere in which, according to accepted principles of international law, the foreign state has jurisdiction. Among these accepted principles is that which is founded on the comity of nations. This principle normally requires our courts to recognise the jurisdiction of the foreign state over all assets situated within its own territories: see Lord Salmon, at p 282. A judge should be slow to depart from these principles. He may have an inadequate understanding of the circumstances in which the legislation was passed. His refusal to recognise it may be embarrassing to the executive, whose function is so far as possible to maintain friendly relations with foreign states.

139. But it does not follow, as Mr Donaldson QC for IAC has asserted, that the public policy exception can be applied only where there is a grave infringement of human rights. This was the conclusion that was reached on the facts which were before the House in the *Oppenheimer* case. But Lord Cross based that conclusion on a wider point of principle. This too is founded upon the public policy of this country. It is that our courts should give effect to clearly established principles of international law. He cited with approval Upjohn J's dictum to this effect in *In re Claim by Helbert Wagg & Co Ltd* [1956] Ch 323, 334. As Upjohn J put it, at p 349, the true limits of the principle are to be found in considerations of public policy as understood in the courts. I think that Mr Donaldson sought to achieve a rigidity which is absent from these observations when he said that, whatever norm one finds that has been abused, it cannot be applied in our law if it is a manifestation of international law and

does not fall within the recognised exception relating to human rights.

140. As I see it, the essence of the public policy exception is that it is not so constrained. The golden rule is that care must be taken not to expand its application beyond the true limits of the principle. These limits demand that, where there is any room for doubt, judicial restraint must be exercised. But restraint is what is needed, not abstention. And there is no need for restraint on grounds of public policy where it is plain beyond dispute that a clearly established norm of international law has been violated."

102. Paragraphs 144 to 149 make clear the findings made on public policy:

"144. It is not disputed that our courts are entitled on grounds of public policy to decline to give effect to clearly established breaches of international law when considering rights in or to property which is located in England. A state lacks international jurisdiction to take property outside its territory, so acts of that kind are necessarily ineffective: *Dr F A Mann, Further Studies in International Law* (1990), p 175. There could be no question of Resolution 369 being regarded as effective in the English courts as a transfer to IAC under the lex situs of any of KAC's rights in any property that happened to be situated in this country. IAC could not rely on the act of state doctrine if England was the country of the lex situs at the time when the breaches of international law were committed. But why should effect not also be given here to international law where to do so can be justified on grounds of public policy?

145. In my search for an answer this question I would take as my guide the observations of Lord Wilberforce in *Blathwayt v Baron Cawley* [1976] AC 397, 426. He said that conceptions of public policy should move with the times and that widely accepted treaties and statutes may point in the direction in which such conceptions, as applied by the courts, ought to move. It would seem therefore to be contrary to principle for our courts to give legal effect to legislative and other acts of foreign states which are in violation of international law as declared under the Charter of the United Nations: see *Dr F A Mann, Further Studies in International Law*, p 176; *Oppenheim's International Law, 9th ed* (1992), vol 1, p 376. ... It is now clear, if it was not before, that the judiciary cannot close their eyes to the need for a concerted, international response to these threats to the rule of law in a democratic society. Their primary role must always be to

> uphold human rights and civil liberties. But the maintenance of the rule of law is also an important social interest.
>
> 146. Security Council Resolution 662 called upon all states to refrain from any action which might be interpreted as an indirect recognition of the annexation. There is no doubt that the responsibility for answering this call lies in the first instance with the executive arm of government. But, in seeking which direction to take in such matters where decisions must be taken on grounds of public policy, the judges should try to work in harmony with the executive. Furthermore, as the Court of Appeal observed, ante, p 976, para 334, there is nothing precarious or delicate, and nothing subject to diplomacy, which judicial adjudication might threaten in this case. The taking of KAC's property in breach of Iraq's obligations under the Charter of the United Nations was a clear example of an international wrong to which legal effect should not be given.
>
> 147. There could be no embarrassment to diplomatic relations in our taking this view.
>
> ...
>
> 149. ... Respect for the act of state doctrine and the care that must be taken not to undermine it do not preclude this approach. The facts are clear, and the declarations by the Security Council were universal and unequivocal. If the court may have regard to grave infringements of human rights law on grounds of public policy, it ought not to decline to take account of the principles of international law when the act amounts - as I would hold that it clearly does in this case - to a flagrant breach of these principles. As Lord Upjohn indicated in *In re Claim by Helbert Wagg & Co Ltd* [1956] Ch 323, 334, public policy is determined by the conceptions of law, justice and morality as understood in the courts. I would hold that the effectiveness of Resolution 369 as vesting title in IAC to KAC's aircraft is justiciable in these proceedings, and that such a flagrant international wrong should be deemed to be so grave a matter that it would be contrary to the public policy of this country to give effect to it."

103. In my judgment, there is nothing in *Kuwait Airways* which supports the argument that this Court should decline to grant the anti-suit and associated relief as being contrary to the public policy of Hong Kong, simply because the EU Sanction is the focus of the dispute in the HK Arbitration. The EU Sanction should be respected in so far as it has effects

on rights in or property which is located within the EU, and the courts and tribunal here will not call into question the acts of the EU within the limits of the territory of the EU. As the EU Sanction does not affect the rights or property of any Chinese entity or entity in Hong Kong, there is no basis at all for the Court to conclude that it would be contrary to the public policy of Hong Kong to grant the relief sought by the Plaintiff and to uphold the arbitration agreement contained in the TSA. Nor is there any other basis for this Court to find that the EU Sanction violates any concepts of law, justice and morality as understood by the Hong Kong Court, such that it would be contrary to the public policy of Hong Kong to give effect to it.

Whether to grant the relief

104. Having considered all the facts and circumstances of this case, and being satisfied that the Plaintiff's claims in the Arbitration, and the Defendant's claims in the Russian Proceedings all relate to the validity, alleged breach and termination of the TSA, to fall within the scope of the Arbitration Clause in the TSA, I cannot find any "strong cause" or reason not to grant the injunctions and relief sought, to restrain the Defendant from acting in breach of the Arbitration Clause. The fact that the Russian Court has already assumed jurisdiction and issued an anti-suit injunction does not require this Court to refuse the relief. The Defendant had agreed, by the Arbitration Clause, **not** to invoke the jurisdiction of the Russian Court, and the injunctions are directed at the Defendant, and not against the Russian Court. Since the Defendant has ignored the HK ASI Order granted by the Court on 27 October 2023, the egregious breach by the Defendant of commencing the 2nd Russian Proceedings, and in obtaining the 1st and 2nd ASI Rulings and judgment in the Russian Proceedings (which should never

have been commenced) warrants mandatory injunctions as well as declaratory relief being granted by this Court, in the terms sought by the Plaintiff.

Disposition

105. For all the above reasons, I dismiss the Defendant's Jurisdiction Summons, and grant the relief sought in the 1st OS and the 2nd OS issued by the Plaintiff on 19 October 2023 (as amended on 22 March 2024) and 13 March 2024 respectively. The costs of the two sets of proceedings (including any costs reserved) are to be paid by the Defendant to the Plaintiff, on indemnity basis, with Certificate for Counsel.

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

Mr Law Man-chung SC and Mr Danny Tang, instructed by Deacons,
for the plaintiff in both HCCT 73/2023 & HCCT 16/2024

Mr Phillip Georgiou (Solicitor Advocate), of Georgiou Partnership LLP,
for the defendant in both HCCT 73/2023 & HCCT 16/2024