



Neutral Citation Number: [2024] EWHC 1084 (Comm)

Case No: CL-2022-000456

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

Wednesday 8 May 2024

Rolls Building  
Fetter Lane  
London  
EC4A 1NL

**Before:**

**MRS JUSTICE COCKERILL DBE**

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**Between:**

**LLC EUROCHEM NORTH-WEST 2**

**Claimant**

**- and -**

**(1) SOCIETE GENERALE S.A**  
**(2) SOCIETE GENERALE PARIS**  
**(3) SOCIETE GENERALE MILANO**  
**(4) ING BANK N.V.**  
**(5) ING BANK N.V. – MILAN BRANCH**

**Defendants**

**(6) TECNIMONT S.P.A**

**No Cause of Action Defendant**

**AND BETWEEN:**

**(1) ING BANK N.V.**  
**(2) ING BANK N.V. – MILAN BRANCH**

**Part 20 Claimants**

**- and -**

**TECNIMONT S.P.A.**

**Part 20 Defendant**

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**The Claimant was present but did not participate at the hearing  
The Second to Third Defendants were not present at the hearing  
Camilla Bingham KC and James Weale (instructed by Clifford Chance LLP) for the Fourth  
and Fifth Defendants/Part 20 Claimants  
Alan Maclean KC and Tom Leary (instructed by Curtis, Mallet-Prevost, Colt & Mosle  
LLP) for the Sixth Defendant/Non Cause of Action Defendant**

Hearing dates: 17 April 2024

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## **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.  
This judgment was handed down remotely by the judge and circulated to the parties'  
representatives by email and release to The National Archives. The date and time for  
hand-down is deemed to be Wednesday 8 May 2024 at 10:00**

**Mrs Justice Cockerill:**

**INTRODUCTION**

1. Tecnimont S.p.A. (“Tecnimont”) has brought a Part 11 Jurisdiction application in respect of a Part 20 Claim issued by the Part 20 Claimants against Tecnimont on 22 September 2023 (the “Part 20 Claim”).
2. Tecnimont seeks an order declaring that the Court should not exercise any jurisdiction that it may have to hear the Part 20 Claim, together with ancillary orders setting aside the Part 20 Claim and the Service Order.
3. The Part 20 Claim against Tecnimont asserts a contractual claim by the Part 20 Claimants to an indemnity under an Italian law facility agreement between (i) the Second Part 20 Claimant (“ING Milan”), which is the Milan Branch of the First Part 20 Claimant, (“ING NV”, the “Bank”) and (ii) Tecnimont, Maire Tecnimont S.p.A. and KT - Kinetics Technology S.p.A. (the “Companies”). That agreement was dated 5 August 2015 (as amended on 27 October 2020 and 25 February 2022) (the “Facility Agreement”). The Part 20 Claimants are referred to compendiously as “ING”.
4. ING’s Facility Agreement with Tecnimont requires Tecnimont to indemnify ING on demand in respect of any sums ING has been required to pay out under bonds issued at Tecnimont’s request, and this gives rise to the Part 20 Claim, because ING is being sued in these courts in relation to such bonds.
5. Tecnimont points to Article 19 of the Facility Agreement, which provides as follows (in translation):
  - “1. This agreement is governed by Italian law. The Court of Milan shall have exclusive competence for any dispute arising out of or in connection with this agreement;
  2. Furthermore, the Bank alone shall be entitled to bring proceedings against the Companies before any other competent Court”.
6. Tecnimont says that as a matter of the true construction of the Facility Agreement, in particular as a matter of Italian law, Article 19 confers exclusive jurisdiction on the Italian courts; and that, this being the case, it is only in exceptional circumstances that the Court should hear this claim. The Part 20 Claimants (“ING”) in contrast assert that Article 19 is an asymmetrical jurisdiction clause, with Article 19.2 permitting the Bank to sue Tecnimont in any court around the world that is prepared to hear the claim; on that basis there is no need to prove exceptional circumstances. Further they point to the circumstances of the claim overall and in particular the circumstances in which Tecnimont entered the litigation as providing ample grounds for permitting the Part 20 Claim to proceed.

**FACTUAL BACKGROUND**

7. Tecnimont is an Italian company which carries on a construction business with particular experience in complex projects in the oil, chemical and energy sectors. For

many years ING and various Société Générale S.A. entities (together, the “Banks”) have extended credit facilities to Tecnimont.

8. Thus on 5 August 2015, ING Milan and the Companies entered into the Facility Agreement, which was subsequently amended on 27 October 2020 and 25 February 2022. Under its terms Tecnimont was given a credit line of up to €76 million.
9. The key terms of the Facility Agreement for present purposes are (i) Article 6(1) which sets out Tecnimont’s obligation to indemnify ING (including in respect of legal costs) in circumstances where ING has been required to pay out under its performance bonds; (ii) Article 19(1) which provides for Italian governing law and (iii) Article 19(2): the bone of contention in this application.
10. On 1 June 2020, Tecnimont and LLC MT Russia (“MTR”, a Russian subsidiary of Tecnimont) entered into an Offshore Contract, Onshore Contract, and Coordination Agreement with LLC EuroChem North-West 2 (“EuroChem”) for the engineering, procurement and construction of an ammonia plant in Russia (the “Construction Contracts” and the “Project”). Two of the Construction Contracts were governed by English law; one was governed by Russian law.
11. All of the Construction Contracts contained ICC arbitration clauses providing for the place and seat of the arbitration to be in London. The clauses in question were in very broad terms, embracing *“any question, dispute or difference arising out of”* or *“in relation to ... or in any way connected”* to the Construction Contracts.
12. EuroChem is a company incorporated in Russia. Interests in EuroChem are held within a complex offshore holding structure and its beneficial ownership is in dispute. What matters for present purposes is that ING and Tecnimont both contend that it is ultimately owned and/or controlled by Mr and/or Mrs Andrey Melnichenko. On 9 March 2022, Mr Melnichenko was designated by the European Union under EU Regulation 2022/396. Over the next few months, Mrs Melnichenko was also so designated and Mr Melnichenko was designated by the UK and US authorities.
13. On 2 November 2020, pursuant to the terms of the Construction Contracts, Tecnimont asked ING Milan to issue a performance bond pursuant to the Facility Agreement in favour of EuroChem in the amount of EUR 64,552,030.05. This bond was issued on 3 November 2021 and the amount was increased to EUR 75,285,299.85 on 8 February 2021 (the “ING Bond”). The ING Bond was governed by English law.
14. All of the Bonds (including the ING Bond) were subject to a materially identical English choice of law and jurisdiction clause in the following terms:

“11. Governing Law

This Bond, and any non-contractual obligations arising out of or in connection with this Bond, shall be governed by and construed in accordance with the laws of England and Wales. Each party irrevocably submits to the exclusive jurisdiction of the courts of England with regard to all matters arising from or in connection with this Bond and agrees that a judgment on any proceedings brought in

the courts of England shall be conclusive and binding upon them and may be enforced in the courts of any other jurisdiction.”

15. Tecnimont and MTR have been unable to perform the Construction Contracts. They say that this is due to export control restrictions imposed in Europe against Russia, and the imposition of asset-freeze sanctions on Mr and/or Mrs Melnichenko.
16. Tecnimont and MTR have exercised their contractual rights to suspend performance of the Construction Contracts, but EuroChem has objected and purported to terminate the Construction Contracts for Tecnimont and MTR’s failure to perform. That dispute is currently subject to a London arbitration between, *inter alia*, Tecnimont, MTR and EuroChem.
17. On 4 and 10 August 2022, EuroChem made written demands to ING Milan for payment under the ING Bond, in light of what it terms Tecnimont’s failure to perform the Contracts. ING Milan rejected EuroChem’s demands on the basis, *inter alia*, that payment under the ING Bond to EuroChem was precluded by sanctions imposed across Europe on the Melnichenkos.
18. Following a without notice application, on 9 August 2022 Butcher J granted EuroChem an anti-suit injunction against Tecnimont to restrain Tecnimont from bringing proceedings to restrain payment of the Bonds elsewhere than in England and Wales (the “ASI”). A first return date was set for 23 August 2022.
19. On 15 August 2022, Tecnimont and MTR commenced an arbitration against EuroChem seeking, among other things, declarations (a) they had not breached the Construction Contracts, (b) that EuroChem had repudiated them, and (c) that EuroChem’s calls on the Bonds were unlawful. Tecnimont and MTR sought to justify their cessation of work on the projects by reference to EuroChem’s ownership/control by Mr and/or Mrs Melnichenko.
20. As already noted, the ING Bond is subject to English law and jurisdiction and EuroChem therefore issued proceedings against ING on 19 August 2022, seeking payment under the ING Bond (the “Main Proceedings”). ING are defending the Main Proceedings on the basis that payment would be illegal under EU sanctions because EuroChem is owned and/or controlled by Mr and/or Mrs Melnichenko who are designated persons.
21. The Main Proceedings have not yet been heard or determined. In short summary: pleadings were *prima facie* closed at the end of 2022, but amended pleadings were served in the course of 2023. A first CMC took place last September. There is another CMC listed for July 2024. The trial is listed for June 2025.
22. On 23 August 2022 (the first return date) Tecnimont sought to oppose the continuation of the ASI. In seeking to resist the ASI it was no part of Tecnimont’s case that Tecnimont and ING were contractually bound to resolve any relevant disputes between them before the courts of Italy or that the ASI was irreconcilable with the jurisdictional provisions of the Facility Agreement.
23. Bryan J continued the ASI. In its amended form the operative provision was as follows:

“2. Until further order the Defendant must not commence or pursue any claims and/or proceedings in the court(s) of any jurisdiction for the purpose of restraining, delaying or otherwise impairing payment under the bonds listed in Schedule 3 Part B to this Order, save:

- a. By proceedings brought by the Defendant in the courts of England;
- b. By arbitration in London in accordance with the arbitration agreements in the contracts listed in Schedule 3 Part A of this Order;  
or
- c. With the written consent of the Claimant.”

- 24. He also indicated that any application to join parties to the Main Proceedings should be made by 30 August 2022.
- 25. Tecnimont then made a successful application to join the Main Proceedings as an interested party (a no cause of action defendant or NCAD) on 30 August 2022, to support ING NV and ING Milan’s position. Tecnimont is not a party to the ING Bond but it has an interest in the outcome of the Main Proceedings because if ING Milan is found liable to pay EuroChem under the English law ING Bond, ING Milan has intimated that it will pursue an Italian law indemnity claim against Tecnimont under the Facility Agreement (which is what the Part 20 Claimants have now sought to do before the English court by way of the Part 20 Claim). Since its joinder by order of Foxton J dated 5 October 2022 (sealed on 7 October 2022), Tecnimont has participated in the Main Proceedings, echoing the Banks’ position that payment under the Bonds would contravene EU sanctions and making its own submissions on issues arising.
- 26. An attempt by Tecnimont to set aside and/or to vary the terms of the ASI was dismissed by HHJ Pelling KC at a second return date on 6 October 2022 ([2022] EWHC 2444 (Comm)).
- 27. In October 2022, an affiliate of EuroChem (EuroChem Agro SpA (“EuroChem Agro”)) commenced proceedings in Italy seeking to annul a decree of the Italian Treasury Ministry of Economy and Finance dated 27 September 2022 which concluded that EuroChem Agro was owned/controlled by Mrs Melnichenko. On 14 February 2023 Tecnimont applied to intervene in those proceedings. EuroChem promptly issued contempt proceedings by reference to the ASI. By his ruling dated 6 March 2023, Henshaw J concluded that Tecnimont had acted in breach of the ASI by its attempted intervention. That decision was upheld by the Court of Appeal, Carr LJ observing that (by design) the ASI had been cast in terms broader than the arbitration clause in the Construction Contracts, but that in any event “the ownership/control issue” was a question or difference falling within the clause and as such “*was to be litigated only in accordance with the London arbitration clauses and not otherwise*”.
- 28. In September 2023, ING made an application without notice for permission to bring a Part 20 Claim against Tecnimont in the Main Proceedings pursuant to the CPR r 20.6 (the “Part 20 Application”). Joinder often does not require permission. Here it did because ING’s notice was not being served alongside ING’s Defence (which had been served on 1 November 2022) or within 28 days of Tecnimont’s defence (dated 7 November 2022). A permission requirement exists under Rule 20.6(2)(b) after the expiry of those deadlines. The reasoning behind that requirement is not clear, but it is

likely to be to enable the Court to satisfy itself that introduction of the additional claim will not prove disruptive to the subsisting main proceedings from a case management perspective.

29. Consistently with CPR Part 20.6 (which provides that “*a defendant who has filed an acknowledgment of service or a defence may make an additional claim for contribution or indemnity against a person who is already a party to the proceedings by filing and serving on that party a notice containing a statement of the nature and grounds of the additional claim*”), the papers served on Tecnimont did not include a Part 20 claim form, or an acknowledgement of service pack. Under Rule 20.12, it is only where a claim form is served on a person who is not already a party that it must be accompanied by a form for acknowledging service. No High Court Form provides for acknowledgement of a notice under CPR 20.6.
30. ING says that the Part 20 Claim was brought because although throughout 2022 Tecnimont complied with its obligations to ING under the relevant provision of the Facility Agreement by indemnifying ING in respect of its legal costs in defending EuroChem’s claim it has refused to confirm that it will fulfil its indemnity obligations more widely insofar as EuroChem’s substantive claim succeeds, although the only defence that Tecnimont has intimated to ING’s claim concerns the sanctioned status of Mr and Mrs Melnichenko, which is said to have the result that “*any payment by Tecnimont to ING ... under the Facility Agreement would be illegal*”.
31. The application notice stated that Tecnimont was already a party to the Main Proceedings and ING had an additional claim for an indemnity against Tecnimont pursuant to the Facility Agreement that was closely connected with EuroChem’s claim in the Main Proceedings under the ING Bond. ING suggested that the English court had jurisdiction over Tecnimont in respect of the proposed Part 20 Claim by virtue of: (i) Article 19.2 of the Facility Agreement; and (ii) what it characterised as Tecnimont’s voluntary submission to the English court’s jurisdiction, relying on Tecnimont’s non-cause of action defendant application.
32. On 21 September 2023, Calver J granted the Part 20 Application. ING served Tecnimont, which (although there is no provision for filing an Acknowledgement of Service in response to such an order) filed an Acknowledgement of Service dated 6 October 2023 indicating that it intended to contest jurisdiction.
33. This Application was then made, on the basis that it was pursuant to the CPR Part 11, on 3 November 2023. The application seeks to stay or set aside the Part 20 Claim and the Service Order on *forum conveniens* grounds; on the dual/alternative bases (a) that the dispute advanced by the Part 20 Claim falls within the exclusive jurisdiction of the Italian courts and/or (b) that England is not the natural forum.
34. Against this background the argument proceeds essentially in two layers. ING says that the *forum conveniens* analysis never arises because Tecnimont has submitted to the jurisdiction. Tecnimont in writing largely ignored this argument and focused its fire on the traditional jurisdictional analysis by reference to the expert evidence. Submission logically arises first and I therefore take it first.

## **SUBMISSION TO THE JURISDICTION**

### **The Law**

35. The starting point is that there is a good deal of authority that a “*person who would not otherwise be subject to the jurisdiction of the court may be precluded by its own conduct from objecting to the jurisdiction, and thus give the court an authority over him which, but for that submission, it would not possess*”. Dicey (16<sup>th</sup> ed) at 11-063. The principle holds good both for defendants and for claimants; but to different extents because of the difference in their positions.
36. By instituting proceedings claimants are treated as having conferred on the Court jurisdiction to entertain counterclaims against them, even where permission to serve out might not be obtainable under CPR Part 6 were separate proceedings to be brought in respect of those cross claims: Dicey 11-064. In *Balkanbank v Taher (No 2)* [1995] 1 WLR 1067, CA Saville LJ said at 1072:
- “it would also seem in general terms to be only fair and just that those who choose to bring proceedings in this country should be open to suit in return, so that any submission which involves the proposition that a party can seek relief in our courts without running the risk of being sued in return necessarily requires, in the interests of justice, to be very closely examined.”
37. This is consistent with the reality that a party instituting process in England and Wales must be taken to understand the incidents of litigating under the CPR, including that the Court’s practice is to hear claims, cross claims and additional claims together where the nexus between them is such that the ends of finality, efficiency and fairness are likely to be served by that procedural course.
38. As to the position of defendants, it was common ground that:
- a) “*A useful test is whether a disinterested bystander with knowledge of the case, would regard the acts of the defendant (or his solicitor) as inconsistent with the making and maintaining of a challenge to the validity of the writ or to the jurisdiction*”: *Deutsche Bank AG v. Petromena ASA* [2015] 1 WLR 4225 at [27-32];
  - b) An “appearance” by a defendant confers jurisdiction notwithstanding the existence of a jurisdiction clause in favour of another jurisdiction. The position can be rationalised on the basis that such an appearance constitutes a tacit variation of such an agreement: Briggs *Civil Jurisdiction and Judgments* (7th ed) at paragraph 8.01;
  - c) However a defendant who submits to the jurisdiction does not necessarily submit to the jurisdiction in respect of claims other than those to which he originally submitted: *Maple Leaf Macro Volatility Fund v Rouvroy* [2009] EWHC 257 (Comm) [2009] 1 Lloyd’s Rep 475.



## Discussion

39. This all forms background to the highly unusual situation where we confront a party who has previously applied to intervene in or be joined to proceedings as a defendant – albeit an NCAD. The parties are agreed that there is no direct authority on this point but are at odds as to the result.
40. ING submits that an intervener should, like a claimant, be fixed with an appreciation of the Court's procedures and practices, and in particular the Court's willingness to entertain so-called "additional claims" against defendants, including – paradigmatically – claims for contributions and indemnities within the framework of Part 20.
41. As already noted, Tecnimont's written submission on this point was skeletal almost to the point of invisibility. Orally it submitted that the references to Briggs were to some extent misplaced because the passages cited relate to the Lugano convention and are to do with entering appearance not submission. Substantively it did not take serious issue with the tests set out above, but laid emphasis on the *Maple Leaf* analogy, arguing that its position was more akin to that of a defendant than a claimant and that it did not submit regarding the claim when it entered an appearance as an interested party. It emphasised that it did not invoke the court's jurisdiction. As Mr Maclean KC put it: "*it was not our choice to be involved in proceedings in England ... our commercial interests demanded that we show up.*" In essence Tecnimont's position was that it was not willing in the relevant sense.
42. On this issue I am quite persuaded that ING is correct. The authorities seem clear that for the willing participant submission cannot be done by halves. A good example can be seen in the case of *Glencore International A.G. v Exter Shipping Ltd* [2002] EWCA Civ 528. That was a case where there were proceedings in England and an anti-suit was sought on the basis that US proceedings were vexatious in that they duplicated issues in the English proceedings in which all of the respondents were involved and were claiming or counterclaiming against the applicant. The respondents argued that the court had no jurisdiction to grant such an injunction since, as a result of various settlements and discontinuances, the issues raised in the US proceedings no longer formed any part of the English proceedings. At [45] Rix LJ said:

"In my judgment a distinction has to be made between the case of a foreign party who invokes the jurisdiction of the English court by claiming here, and the case of a foreign party who is brought to this jurisdiction by answering a claim within England's long-arm statute (formerly RSC Order 11 and now CPR 6.20). In the first case the foreign claimant submits himself willingly to the jurisdiction. He does so, and in my judgment must do so, without reservation, and is subject, so far as territorial jurisdiction is concerned, to all the incidents of litigation in this country, including, for instance, his amenability to a counterclaim. He cannot say: 'I came here only for the purpose of my claim. I am not willing to accept this jurisdiction for the purpose of my defendant's counterclaim.' ... In the second case, however, the foreign defendant is brought here against his will and ... can limit his submission to the jurisdiction and prima facie is regarded as doing so on a claim by claim basis. I believe that the

authorities to which the court has been expressly or implicitly referred in this appeal are consistent with this distinction.”

43. There is force in ING’s argument that those who start or consent to join proceedings in England and Wales are willing participants, and it is that willingness which justifies a more expansive approach to “submission” than the claim by claim analysis applied to unwilling participants in proceedings.
44. Reference was made to sections of Briggs dealing with foreign judgments, where the author posits that while in general a claimant will be taken to have opened himself to a counterclaim, there may be limits to the principle, particularly in circumstances where it may be mere happenstance whether a party is claimant or defendant. Briggs in this context suggests a quasi “plums and duff” approach:

“It would be rational to limit the extent of this automatic or deemed submission to claims which are in some way related to the claim made ... to those matters to which a fair minded [person] would say that [it] had laid itself open.”

45. Standing back and viewing this case in the light of the principles, there is no reason why a litigant who applies to join as a defendant should be in a different position. Like a claimant that litigant has volunteered to be part of proceedings here. Like a claimant it thereby renders itself amenable in principle to such claims as the Court considers ought to be heard against it simultaneously. This approach of calibrating by willingness was urged by ING and was not really disputed as an approach by Tecnimont, its submission being that it was not willing in the right sense. But if willingness is indeed the right dividing line – as the authorities would seem to suggest, Tecnimont offered no principled division to calibrate between relevant and irrelevant willingness. This is not a promising start.
46. This would be the case even before one looks at the facts. When one does so it becomes particularly difficult for Tecnimont to evade the conclusion that it has submitted generally. The facts have been outlined above, but the following points emerge and are relevant here.
47. Tecnimont was already involved in proceedings in this jurisdiction: the arbitration with EuroChem (under the Construction Contracts). It seems likely that the reason EuroChem had not joined Tecnimont to the Main Proceedings against the Banks was because on the face of it any dispute between it and Tecnimont had to be resolved in the London-seated arbitration.
48. The potential claim by ING against Tecnimont was plainly present to Tecnimont’s mind. The stated basis for Tecnimont’s application was that: (i) “*it is desirable for [sc Tecnimont] to be joined so the court can resolve all the matters in dispute in the [sc Main Proceedings]*” and (ii) “*there is an issue involving [sc Tecnimont], the Claimant and the Defendants which is connected to the matters in dispute in the [sc Main Proceedings], and it is desirable for [sc Tecnimont] to be joined so that the court can resolve that issue*”. Tecnimont’s evidence in support of its joinder application expressly identified the connection between Tecnimont’s obligations under the Facility Agreement and ING’s potential liability in the Main Proceedings, as follows:

“The bonds issued by the Defendants are in turn secured by way of counter-guarantees issued by the Applicants through other banks. If the Defendants are found liable to pay the Claimant in response to a call on the Bonds, the counter-guarantees will be, or are more likely to be, called upon... the Applicants have (by reason of the counter-guarantees) a significant financial interest in the outcome of the Bank Proceedings”.

49. It is also quite clear from the submissions made that Tecnimont regarded entry into these proceedings as necessary. That was echoed before me by Mr Maclean: “ *our commercial interests demanded that we show up and lead the cheering for the banks in those proceedings.*”
50. Having taken that approach and joined the proceedings Tecnimont has not sat on the sidelines and simply cheered. It has played an active role:
  - 1) Tecnimont filed a detailed defence to the claim advancing affirmative factual and legal bases of opposition to EuroChem’s claim and asserting at paragraph 66 that “*The Claimant is not entitled to the relief sought or any relief.*”
  - 2) At the first CMC (on 26 September 2023) Tecnimont actively sought disclosure orders against EuroChem and made written submissions in relation to the order to be made in respect of expert evidence.
  - 3) At no stage prior to filing of this application did Tecnimont seek to qualify its participation or to reserve its position as to whether disputes relating to the Facility Agreement were justiciable alongside the Main Proceedings.
51. It follows from these facts that on any view Tecnimont must be seen as a “willing” participant and that its actions amply meet the “disinterested bystander” test, as well as that of willingness. It sought joinder. It indicated no hedge or limitation to its entry into proceedings which it itself said were proceedings which “*can resolve all the matters in dispute.*” It actively participated. The Facility Agreement was integral to the issues and was indeed invoked as a reason for entry.
52. Even if the willingness analysis were not to be accepted as the test, and even if Tecnimont were to be regarded as partaking more of the character of defendants than claimants, in my judgment they would still fall the side of the line which would indicate that the claim against them should proceed. This is a case where the claim advanced is not different to that which prompted entry into the proceedings. It is the very claim which motivated that entry. This is a million miles from the situation where a defendant enters an appearance to a claim in contract, which is later abandoned and a claim in (say) nuisance advanced in its place. It is a country mile from the interpleader cases where the nature of the proceedings puts substantive claims in a different basket to the interpleader claims. This is a case where it cannot sensibly be said that the claim is distinct. This is truly a “plums and duff” case. Tecnimont has entered the litigation for its commercial interest – to secure the plums of resisting the claim which would trigger the indemnity; it must therefore take the duff of the corresponding indemnity claim.
53. I note that, as ING submitted, the result accords not only with common sense but with the scheme established by Part 20.6 and Part 11. Jurisdiction challenges pursuant to

Part 11 are structured by reference to the service of claim forms and the filing of acknowledgements of service. Yet Part 20.6 read with CPR Rule 20.8(2) makes clear that no claim form is needed where an existing party is to be served with an additional claim, and there exists no High Court Form for the acknowledgement of service of a Part 20.6 claim. This would seem to reflect the fact that logically any existing foreign party to proceedings is already properly before the Court; either because permission to serve them out of the jurisdiction has been granted or because they have submitted to the jurisdiction by entry of appearance at common law, or made a statutory submission under Part 11. It is not suggested that ING was obliged to seek permission to serve the Part 20 Claim out of the jurisdiction.

54. I should note that no specific reference was made to the cases of *Commonwealth of Australia v Peacekeeper International* [2008] EWHC 1220 (KB) and *Stephenson Harwood LLP v Medien AG* [2020] EWCA (Civ) 1743 [2021] 1 WLR 1775 (footnoted in Dicey). This absence might at first blush seem strange since they both concern interpleader/stakeholder proceedings, which are to some extent analogous. However, the first case concerns the position of a defendant in such proceedings and is analysed by reference to specific interpleader authorities. It therefore offers no assistance. As for the second case, the narrowness of the issue on the appeal and the facts of the case (where the claim explicitly submitted to unavoidably involved the merits) precludes it being of much assistance. It might however be said that the result (a conclusion that a party submitting had submitted for the purposes of the claim on the merits and could not accept the court's jurisdiction "*in two separate tranches*") aligns with the approach which I have adopted.
55. It follows that the *forum conveniens* arguments do not arise; but particularly in a case where this first issue is one on which there was no established law it is right to consider those issues fully.

## **FORUM CONVENIENS**

### **The Law**

56. It was common ground that the test applicable in a *forum non conveniens* application remains that outlined by Lord Goff in *Spiliada Maritime Corp v Cansulex* [1987] AC 460 whereby:
- a) First, the burden is on the defendant to show that another forum is "*clear or distinctly more appropriate than the English forum*";
  - b) Secondly, if the defendant satisfies that burden the burden shifts to the claimant to show, using cogent evidence, that there are nevertheless "*special circumstances by reason of which justice required that the trial should nevertheless take place in this country*".
57. It is also common ground that if it is established that the English proceedings have been commenced in breach of an exclusive jurisdiction clause, the Court will:

"ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of

proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum . . . Where the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A's claims fall within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause.”: *Donohue v Armco* [2002] 1 All ER 749 at [24-25].

58. The test for overriding an exclusive jurisdiction clause is often placed as being one of exceptionality or of “very strong reasons indeed” by reference to (inter alia) *Donohue* [75] and *UBS AG v HSH Nordbank AG* [2009] 1 CLC 934 at [101].
59. Factors relevant to whether a claimant can show those very strong reasons were considered in *The Eleftheria* [1970] P 94 at p. 99-100 and are listed in Dicey, Morris & Collins at paragraph 12-107 – 110. They include: (i) the country in which the factual evidence is likely to be situated; (ii) whether foreign law applies; (iii) which country the parties are connected to, and how closely; (iv) whether the claimant would be prejudiced in having to sue in a foreign court, e.g. being unable to enforce judgment, facing a time-bar not applicable in England, or otherwise unlikely to get a fair trial. Those factors of course have an overlap with standard *forum conveniens* factors.
60. Although ING points out that the distinction between exclusive and non-exclusive jurisdiction clauses is not necessarily a bright line one, citing *BNP Paribas S.A. v. Anchorage Capital Europe LLP* [2013] EWHC 3073 (Comm), Males J at [88], the true question being said to be whether the commencement and pursuit of the relevant proceedings are things which a party has promised not to do, some distinction remains and indeed absent an exclusive jurisdiction clause the Court may well only decline the exercise of its jurisdiction on *forum conveniens* grounds if there are exceptional or very strong reasons for doing so: see *Deutsche Bank AG v Sebastian Holding Inc* [2009] 2 CLC 949.

### The approach to foreign law

61. Here questions of Italian law arise on the question of whether Article 19 is an exclusive jurisdiction clause as a matter of Italian law.
62. There was no issue between the parties as to the correct approach to dealing with questions of foreign law.
  - a) Where the English court is called upon to interpret a contract governed by foreign law it will generally apply the relevant legal principles, identified by the experts, for itself: *BNP Paribas SA v Trattamento Rifiuti Metropolitani SpA* [2019] EWCA Civ 768; [2020] 1 All ER 762 at [45 – 49];
  - b) However, where particular contractual words are used as terms of art under the relevant foreign law, the views of the expert as to their special meaning (and any foreign case-law dealing with a similarly worded clause) will be

admissible and relevant expert evidence: *King v Brandywine Reinsurance Co (UK) Limited* [2005] EWCA Civ 235; [2005] 1 Lloyd's Rep 655 at §68.

63. The key question here is whether Article 19 imports a promise by ING not to sue elsewhere than in Italy (as Tecnimont contends) or whether (as ING maintains) ING has reserved to itself the right to bring proceedings before any other competent Court – inside or outside of Italy.

### Italian Legal Principles

64. The parties agree that the following interpretive rules are applicable as a matter of Italian law:
- 1) By Article 1362 of the Italian Civil Code (“ICC”), contracts must be interpreted in all the circumstances of the case, by reference to “*the common intention of the parties*”, taking into account “*their overall conduct even after the conclusion of the contract*”;
  - 2) By Article 1363 ICC, contractual clauses are to be “*interpreted by means of each other, each clause being given the meaning that results from the act as a whole*”;
  - 3) By Article 1367 ICC, “*in case of doubt, the contract or individual clauses must be interpreted in the sense in which they may have some effect rather than in the sense according to which they would have none*”;
  - 4) The subjective intentions of the parties may be taken into account, not just objective factors.
65. With one exception, the principles are broadly analogous to well-established principles of construction as a matter of English law. The exception (not relevant here) is that under Italian law, the courts are entitled to consider post-contractual conduct in order to determine the true meaning of an agreement.
66. The experts also agree that by Article 1341 ICC, contractual derogations from the competence of a particular Italian court (i.e. a derogation within Italy) contained in general terms and conditions must be specifically accepted by the parties, in addition to the general signing of the contract.

### Article 19 – Construction

67. Article 19 of the Facility Agreement states as follows;

“Art. 19 – LEGGE APPLICABILE E FORO COMPETENTE

1. Il presente contratto è soggetto alla legge italiana. Per qualunque controversia relativa al presente contratto sarà esclusivamente competente il Foro di Milano.

2. Sarà peraltro facoltà della sola Banca di chiamare a giudizio le Società avanti ad ogni altro Foro competente.

[Agreed translation]

## Article 19 – APPLICABLE LAW AND COMPETENT COURT

1.This agreement is governed by Italian law. The Court of Milan shall have exclusive competence for any dispute arising out of or in connection with this agreement.

2.[Furthermore] [However], the Bank alone shall be entitled to bring proceedings against the Companies before any other competent Court.”

68. The argument of Tecnimont is run at two levels – (i) special technical meaning, resulting in an exclusive jurisdiction clause and (ii) contractual construction resulting in a conclusion that the parties intended a Milan/domestic courts asymmetric clause. The arguments to a considerable extent overlap because some of the construction arguments are deployed to feed into the argument about technical meaning.
69. The key dispute between the experts on the exclusive jurisdiction clause argument is about whether, as Tecnimont maintains, the phrase “*Foro competente*” in Article 19.2 has a special “unambiguous technical meaning” as a matter of Italian law and refers exclusively to competent Italian courts, or whether, as ING suggest, the phrase “*Foro competente*” can comprehend “*any court having jurisdiction*” outside Italy; the word “competente” not having any relevant technical meaning but rather being capable of embracing international jurisdiction as well as local territorial competence.
70. The experts agree that linguistically the word “competente” used in both Article 19.1 and 19.2 of the Facility Agreement is best interpreted as referring to “competence” rather than “jurisdiction”. That does not however answer the question, and neither party suggests matters are so simple as this.
71. The dispute between the parties is therefore as to the scope of “any other competent Court” (or “*Foro competente*”), and how far Article 19.2 derogates from Article 19.1. Tecnimont maintains that it has a special meaning under Italian law that only permits ING Milan to bring proceedings against Tecnimont in other Italian courts insofar as they are competent under the Italian Code of Civil Procedure.
72. Professor Consolo's position in his report is that there is a fundamental distinction in Italian law between (i) the concepts of “competent court” and “competence” (respectively, “*foro competente*” and “*competenza*”) and (ii) the concept of “jurisdiction” (“*giurisdizione*”). Tecnimont therefore says that “*The words “Foro competente” in Article 19.2 therefore have a special, technical meaning in Italian law*”. However that is to assume the truth of what Professor Consolo argues. One must examine the reasons why he reaches this conclusion.
73. Professor Consolo's primary position is that this special meaning of “*Foro competente*” was explained by the Italian Supreme Court of Cassation, Sixth Division in *Banca Popolare dell’Emilia Romagna v Banca Leonardo S.p.A.* Tecnimont contends that the court there considered a materially similar clause which provided that “*for any disputes arising from this contract, the Court of Milan shall be exclusively competent, without prejudice to the Bank’s right to sue in any other competent Court*”. Professor Consolo's reading is that the Supreme Court stated that such a clause could not be interpreted as giving the Bank “*the right to choose the judge ad libitum*” because “*it is clear that the expression ‘any competent Court’ is intended to attribute the bank the sole right to*

*choose between one of the alternatively competent Courts on the basis of the ordinary criteria of the law (Articles 18, 19 and 20 of the Code of Civil Procedure)*". This reference to those articles, which deal with points which go to domestic factors only, is said to point the way to the conclusion.

74. Tecnimont says that on this basis the reasoning is clear and wholly inconsistent with ING's suggestion that Article 19.2 of the Facility Agreement permits ING Milan to bring proceedings in England. It contends that the Supreme Court of Cassation gave a "*clear definition of what the term 'any other competent Court'*" means in a choice-of-court clause under Italian law – namely, "*it clearly means only that Italian courts that are competent based on the ordinary criteria of the Code of Civil Procedure*". Consequently, Tecnimont says that the word "*competenza*" itself tells you that the clause is domestic. Competence, in essence, is a subset which is peculiar to Italian domestic jurisdiction.
75. However, the matter is not quite so simple or so clear. The parties are actually agreed that the *Banca Popolare* case is not on all fours with the present one, and given the weight put on the case by Tecnimont it is necessary to unpick it in some detail.
76. The Supreme Court was in that case determining a dispute as to whether the courts of Milan or Bergamo were the proper forum; in other words it was a competition between jurisdiction provisions which both related to which domestic court was appropriate, in a dispute that had been commenced by a special application to challenge "competence" (so called "*regolamento di competenza*"). As the case records: "*Banca Popolare dell'Emilia Romagna soc. coop. (formerly Meliorbanca S.p.A.) brought an action for a declaration of competence*".
77. The facts of the case are rather complex. The question before the court in that case was whether the court of Bergamo had been jurisdictionally competent to adjudicate a dispute arising between Banca Popolare on the one hand, an Italian bank, and two Bergamo domiciled guarantors of an account held at Banca Popolare in circumstances where a credit line had been extended to the holder of the account and that credit had not been repaid. Both of the guarantors were domiciled in Bergamo, so Bergamo was, on any view, a competent court.
78. There were four documents in play.
  - 1) A basic current account opening document which incorporated article 20 of the second document;
  - 2) The bank's general terms and conditions, which provided that wherever the account holder was not a consumer, the court of Milan will be exclusively competent without prejudice to the bank's right to sue in any other competent court;
  - 3) There was a credit line agreement pursuant to which the missing credit had been advanced. That agreement provided at article 15 for the exclusive jurisdiction of the courts of Milan, again subject to the bank's rights to sue in any other competent court;
  - 4) The credit line agreement annexed a self-styled summary document which recorded inconsistently with the asymmetric provision in the credit line agreement itself, that



the competent court should be Milan without prejudice to cases where mandatory law pointed to other courts.

79. Banca Popolare sued the guarantors in Bergamo and obtained an injunction freezing the guarantors' assets and registered a charge against those assets. The guarantors protested that the Bergamo court lacked jurisdiction on the basis that the proceedings should have been brought in Milan, as contemplated by the summary document annexed to the credit line agreement. They were supported by another bank which was a creditor of the guarantors and stood to be prejudiced by enforcement of the charge. The Supreme Court upheld the Bergamo court's competence, effectively saying that it was wrong to allow the tail of that summary document to wag the dog of the credit line agreement itself.
80. Thus there was no issue before the court as to whether or not proceedings could have been brought outside of Italy consistently with the clause at issue, nor did the Court state in any section of the judgment that the bank could not bring proceedings outside Italy. The reference to the domestic jurisdiction provisions in the Italian Civil Procedure code is logical and inevitable in the circumstances. That reference does not more than say *"in this context, this is where you can look for competent courts"*. Altogether I conclude that the case really provides no support for Tecnimont in relation to the issue in this case. Certainly, it does not provide a clear technical meaning as Professor Consolo would argue.
81. I therefore turn to the other arguments deployed by the experts. The second point on which Professor Consolo relies is the absence of the word *"giurisdizione"/"jurisdiction"*. In effect he says that that is the more natural word to use and that the absence of its use means that *competenza* should be understood as domestic competence. This is echoed in his second report where he says that competence cannot apply to both internal competence and jurisdiction.
82. In my judgment that is an argument which has certain attractions until one comprehends that there is no adjective in Italian which covers jurisdiction. Professor Briguglio notes that in terms of competence based words Italian offers *"competenza"* (the noun) and *"competente"* (the adjective). But there is no adjective which correlates to jurisdiction (*"giurisdizione"*). Professor Briguglio therefore contends that the adjective *"competente"* has a broader meaning than the noun *"competenza"* such that the former encompasses both the concepts of competence and jurisdiction.
83. Tecnimont does not dispute the semantic point as to the absence of a jurisdiction based adjective but contends that the point is artificial. Further given the fact that Professor Briguglio expressly accepts that *"from a legal standpoint"* the word *"giurisdizione"* denotes *"jurisdiction"* whereas *"competenza"* *"can be used to denote local jurisdiction or venue and thereby refers to the various Italian courts situated within the national (Italian) territory"* Tecnimont says that the argument is strained – or as Professor Consolo terms it, illogical.
84. However substantively, Professor Consolo's position is based firmly in his view that there is a technical meaning of *"foro competente"* which refers in the context of an Italian law jurisdiction clause, *"exclusively to the identification of the Italian courts that can hear a dispute based on internal competence rules, and not to foreign courts"*.

It is therefore circular and relies on the argument which I have found not to be substantial.

85. A final point relied on by Tecnimont is the fact that ING “*demanded specific approval of Article 19 under Article 1341 of the Italian Civil Code*” and accordingly there “*are no grounds to validly believe that Italian parties (or their lawyers) would have added this additional signature if their intention had been to agree on a clause conferring jurisdiction on a foreign court*”. In other words because Article 1341 covers a derogation from domestic jurisdiction (ie jurisdiction of a particular Italian court) and Article 1341 approval is not required for international jurisdictional choices, the Article 1341 approval is evidence that the parties considered it to have a domestic, not international, ambit. This seems to be a considerable overreach in circumstances where Article 19(1) of the Facility Agreement did have international reach. As Ms Bingham KC put it “*on any and every reading ... that article does derogate from the competence of the Italian courts*”. Article 19(1) provided that Tecnimont should sue ING in Milan and hence deals with jurisdiction – and in doing so it uses the word *competente* not *giurisdizione*. Another reason for concluding that the argument is overambitious is the sheer variety of inapt clauses included in the derogation. This indicates a highly precautionary approach to the operation of Article 1341, which means that inclusion cannot really be said to correlate to a view as to the domestic nature of the clause.
86. Therefore simply looking at Tecnimont's arguments, I consider them to fall some way short of a compelling argument either for the exclusive jurisdiction clause or for construction more generally. Given the facts it might well be the case that *competenza* has to cover both competence and jurisdiction and that the meaning has to be judged by the context.
87. ING via Professor Briguglio relies on three examples to support its contention. These do not, individually or together, clearly resolve the point. He refers to the judgment of the Court of Milan in DeJure (17 April 2014), which referred in terms to the Court of the Federal Republic of Germany as being “*competent to hear the case*”. Although this is not completely clear because, as Tecnimont points out the case concerned a case under the 1956 Geneva Convention on the Carriage of Goods by Road (the official language of which is English), the point remains that the Italian court used the word competence in the context of a dispute about international jurisdiction – in exactly the way that Professor Briguglio suggests would happen.
88. ING's second example is the fact that “*competente*” is used interchangeably with “*giurisdizione*” in Italian legislation and case law. The primary example relied on is Article 669-ter of the Italian Code of Civil Procedure which uses the word “*competente*” in the context of conferring jurisdiction on the Italian courts to determine interlocutory injunctions (see the official translation and commentary). Tecnimont says that this concerns domestic territorial competence, and so takes matters no further. But the same point cannot be made for the second example of interchangeability given by Professor Briguglio: Article 66 of the Italian Act on Private International Law (Law No. 218/1995) dealing with the recognition of certain foreign court judgments. This refers to “*foreign court orders [...] issued by an authority which is competent pursuant to criteria corresponding to those applicable in Italy*” [Original Italian text: “*provvedimenti stranieri [...] pronunciati da un'autorità che sia competente in base a criteri corrispondenti a quelli propri dell'ordinamento italiano*”]. That is a genuine example of interchangeable use. ING also notes that the usage for which it contends is

consistent with Article 10 of model clauses provided by the Italian Chambers of Commerce where the word “*competente*” plainly embraces the competence of Italian Courts as well as all other Courts within the CEE. Although not strictly legislation, and not case law, that provides some limited further support.

89. The third example which ING gives is the fact that “*competente*” is used to refer to a court “having jurisdiction”, see for example the Italian text of article 26(1), sentence 2, EU Regulation 1215/2012, Brussels Regulation Recast. This point seems to me to have less force than the other two examples. As Tecnimont pointed out, that document is not an original Italian document, but an EU document, translated by the EU authorities.
90. So much for textual arguments, on which it is fair to say that ING has the better of the argument. Turning to contextual considerations, Tecnimont says that its understanding of Article 19.2 is entirely consistent with the general commercial purpose of such clauses, which is to enable the lender to enforce its security where the debtor has its assets. However, there is no evidence that this is the general commercial purpose of such clauses. Indeed, the position is rather the converse. As ING submits, this clause looks and reads very much like a fairly standard asymmetric jurisdiction clause such as are common currency in banking documentation, cf Dicey at paragraph 12-075.

“It has become common, especially in financial transactions, for one party to be bound to bring proceedings in one designated forum, while the other party is free to bring proceedings in any available forum. For example, a loan agreement may allow the lender to sue wherever it can, the better to be able to secure repayment from the debtor in any available form where the debtor has assets, while the borrower is required to bring any proceedings in a single forum.”

91. These points all push more compellingly in favour of ING's argument. That tentative conclusion for ING is reinforced by the background of this case. In particular I have in mind here the fact that this is not an unequivocally domestic contract; even if ING NV Milan Branch is capable of contracting on its own behalf (a question for future hot debate) it is on any analysis not a purely Italian entity but a branch of a major international bank based in the Netherlands. Such a situation would at least suggest a need or desire to cover off the international side of jurisdiction. Further as already noted, it would seem that Article 19(1) does exactly that (not least as it includes a choice of Italian law) and does it by using the wording “*competente*”. If Tecnimont were right on the point of construction there would apparently be an inconsistency between limbs 1 and 2 of Article 19. That would be a very surprising situation.
92. In short I conclude that “*Foro competente*” in Article 19.2 does not have a special meaning in Italian law and as a matter of construction is not an exclusive jurisdiction clause. It confers jurisdiction not only on Italian courts that are competent under the Code of Civil Procedure but on any court which is jurisdictionally apt – national or international. ING would, on this approach, break no contractual promise by making a claim in this jurisdiction.

### **Is Italy clearly or distinctly the more appropriate forum?**

93. On the basis that the correct analysis, absent submission, is that no contractual promise has been broken by ING in issuing the Part 20 Claim, the stay application requires a

conventional *forum conveniens* analysis (with the burden on Tecnimont).

94. The relevant factors are set out in the skeleton for ING and although challenged to some extent by Tecnimont, they certainly retain considerable force – more than enough to make it clear that absent an exclusive jurisdiction clause, Tecnimont's challenge must fail.
95. A key factor is the centrality of the Main Proceedings and the undesirability of creating a fragmentation of proceedings with consequent risk of inconsistent judgments. On one possible outcome, the High Court could determine that ING is liable to pay EuroChem and the Italian court could determine that Tecnimont is not liable to indemnify ING. Such an outcome would be manifestly unjust and undesirable.
96. There is no inevitability of a multiplicity of proceedings because of the pending arbitration. Owing to the timetable for the arbitration, which has proceeded more slowly than the court proceedings, these proceedings will constitute the single forum in which all of the critical factual and legal disputes – arising out of the question of whether EU sanctions entitle any party to withhold a payment made to or for the benefit of EuroChem – will be resolved.
97. Then there is linkage of issues: the Main Proceedings are, as I have already noted, inextricably linked to ING's Part 20 Claim. Leaving aside the common factual and legal issues in respect of sanctions, the resolution of the Main Proceedings in favour of ING will render the Part 20 Claim academic: ING will be under no liability to EuroChem to be indemnified by Tecnimont.
98. It follows that all parties will stand to benefit from a single consistent determination on, among others, the question of whether: (i) EuroChem is owned or controlled by Mr and/or Mrs Melnichenko; (ii) such ownership or control makes any payment to or for the benefit of EuroChem illegal as a matter of EU law; and (iii) whether such illegality affords a contractual defence to an obligation to make such payment.
99. As to Italian links, while certainly the centre of gravity is in Italy in terms of parties and witnesses as well as performance, that is a less strong factor than is often the case. The scope for witness evidence on the Tecnimont issues (as opposed to the Main Proceedings, which Tecnimont on any analysis wants to participate in) is very limited. All other parties will be preparing for trial here.
100. The foreign governing law factor is not a material consideration. Contrary to what Tecnimont submits, it is unlikely that expert evidence on Italian law is likely to be needed. This application has established the essential similarity of the relevant principles of construction, and the relevant sections of the Civil Code have been agreed. As for expert evidence on sanctions, that point has essentially been determined against Tecnimont already. At the first CMC, Foxton J and the parties proceeded on the basis that no party was contending "*that the legal rules that determine whether it is lawful or unlawful to make these payments are different in France and Italy than they would be as a matter of EU law applying the relevant regulations*". The Court concluded that no expert evidence was required to resolve issues of EU law. Accordingly, Tecnimont's reliance on the fact that the Facility Agreement is governed by Italian law whilst the ING Bond is governed by English law is misplaced.

101. A stay of the Part 20 Claim will run contrary to the Court's general wish to promote efficiency, convenience or clarity where consistent with principle. In addition to the risk of inconsistent judgments there would be increases in costs consequent on the need to instruct Italian legal teams. The existence of Italian proceedings would seem likely (in the absence of a confirmation by Tecnimont that it would accept the decision in the Main Proceedings as binding) to lead to *res judicata* arguments which would not otherwise arise.
102. Finally, there is the risk of delay – the evidence suggests that Italian proceedings would be determined some years after the Main Proceedings here will (even allowing for appeals) be completed.
103. Accordingly, as indicated, there is really no sustainable argument that Italy is clearly and distinctly the *forum conveniens*. If (contrary to my primary finding) Tecnimont had not submitted to the jurisdiction this would in any event be the *forum conveniens*.

**Contingent issues: Very strong or overriding reasons**

104. This point only arises if (i) Tecnimont had not submitted to the jurisdiction and (ii) Article 19 is an exclusive jurisdiction clause. It arises therefore only on a double contingency and can accordingly be dealt with briefly.
105. The factors relevant to the exercise of the Court's discretion whether or not to order a stay are not dissimilar to those discussed above, but there are some distinctions, and the burden of proof shifts very considerably.
106. The law is summarised in Dicey at 12-108 by reference to the seminal judgment of Brandon J (as he then was) in *The Eleftheria* [1970] P. 94 (subsequently affirmed by Brandon LJ in *The El Amria* [1981] 2 Lloyd's Rep. 119):

“In exercising its discretion whether to grant a stay, the court considers all the circumstances of the case, and the following formulation of the particular factors to be taken into account has been much relied upon: (1) in which country the evidence is available, and the effect of that on the relative convenience and expense of a trial in England or abroad; (2) whether the contract is governed by the law of the foreign country in question, and if so, whether it differs from English law in any material respect; (3) with what country either party is connected, and how closely; (4) whether the defendants genuinely desire trial in a foreign country, or are only seeking procedural advantages; (5) whether the claimants would be prejudiced by having to sue in the foreign court because they would be deprived of security for their claim, or be unable to enforce the judgment in their favour, or be faced with a time-bar not applicable in England, or for political, racial, religious or other reasons be unlikely to get a fair trial.”

107. Although there is some overlap with the usual *forum conveniens* issues the range is narrower. In particular the otherwise important question of inconsistent judgments drops out of the equation. As Colman J held in *Konkola Copper Mines Plc v Coromin Ltd* [2006] EWHC 1093 (Comm); [2006] 2 Lloyd's Rep 446 at [32]:

“it should not be open to a party seeking to justify service outside the jurisdiction in contravention of a foreign jurisdiction to rely as grounds for strong cause or reasons the risk of inconsistent decision of different courts when he ought to have appreciated the existence of that risk at the time when he entered into the exclusive jurisdiction clause”.

108. Dealing solely with the *Eleftheria* factors:

- 1) There is no clear answer on relative convenience. Despite ties to Italy, because the legal and factual issues in the Main Proceedings and the Part 20 Claim will substantially overlap the material for those issues is or will be in this jurisdiction. The contractual issues in the Main Proceedings are distinct matters of English law but that has little impact on convenience. There may be some distinct issues of fact;
- 2) The contract is governed by Italian law. That pulls towards Italy but not as strongly as might be the case in other circumstances. The principles of Italian law construction are very akin to English law questions. There may be some discrete issues of law – for example whether a payment to the Part 20 Claimants (in circumstances where, on their own case, the Facility Agreement was to some extent for the benefit of third parties like EuroChem) would itself violate Italian sanctions law, notwithstanding that it would not amount to a direct payment or benefit to EuroChem itself. But that appears to be a relatively discrete issue;
- 3) The connections of the parties are closer with Italy than here;
- 4) There is no reason to believe that Tecnimont does not genuinely desire trial in Italy, thought doubtless the procedural advantages are not unwelcome either;
- 5) Italy is a jurisdiction where a fair trial could obviously be had. The delay in this context is not sufficient to affect that point, particularly where on this contingent hypothesis ING bargained for Italian jurisdiction.

109. Overall were the double contingency to arise I would not regard this as a case where very strong reasons meant that it was appropriate to disregard the exclusive jurisdiction clause. However, as already noted, the contingency does not arise.

## **CONCLUSION**

110. For the reasons given above, this application falls to be dismissed.