Neutral Citation Number: [2025] EWHC 3202 (Comm)

Case No: CL-2025-000041

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

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

Date: 08/12/2025

Before :

Peter MacDonald Eggers KC
(sitting as a Deputy Judge of the High Court)

- -

Between :

INVESTEC BANK PLC	**Claimant**
- and -	
(1) PAVLO PROTOPAPA	
(2) ABDALLAH CHATILA	**Defendants**

- -
- -

Mr James MacDonald KC (instructed by **Sidley Austin LLP**) for the **Claimant**
Mr Timothy Frith (instructed by **360 Law Services**) for the **First Defendant**
Mr Elliott Cook (instructed by **Knights Professional Services Limited**) for the **Second Defendant**

Hearing date: 13 October 2025

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Approved Judgment

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This judgment was handed down remotely at 10:30am on 08 December 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Peter MacDonald Eggers KC :

Introduction

1. The Claimant is a bank incorporated in England and Wales with its registered office in London.

2. The First Defendant and the Second Defendant are high-net worth businessmen, are resident in Switzerland and are business associates. The Second Defendant is the founder, President and sole owner of m3 Groupe Holding SH ("**m3GH**"), a Swiss company which is said to be the ultimate parent company of approximately 140 companies engaged in the business of real estate and finance.

3. The Claimant advanced substantial credit facilities to the Defendants. There are two relevant facilities:

   (1) The Personal Facility dated 29th April 2022 agreed between the Claimant and the First Defendant ("**the Personal Facility**").

   (2) The Joint Facility dated 26th July 2022 agreed between the Claimant and both Defendants ("**the Joint Facility**").

4. The Claimant's claim against each Defendant is in respect of alleged defaults under each of the Facilities to which they were a party.

5. Each of the Facilities contains a provision which expressly provides that any dispute shall be referred to the exclusive jurisdiction of the English Courts, although the relevant provisions are asymmetric in the sense that the exclusive nature of the English Court's agreed jurisdiction is for the benefit of the Claimant such that the Claimant, but not the Defendants, are free to pursue legal proceedings elsewhere. By contrast, if the Claimant commences legal proceedings in England, the relevant provisions require the Defendants to submit to the English Court's jurisdiction (subject to any residual discretion the Court might have).

6. The Defendants do not contest that the Facilities contain such jurisdiction agreements. Further, the Defendants accept that the Claim Form issued by the Claimant instituting these proceedings was validly served on the Service Agent designated in the Facilities. However, they contend the Court should not exercise its jurisdiction in respect of the Claimant's claim because there is another available forum, namely Switzerland, where the case may be tried more suitably (England is therefore the *forum non conveniens*).

7. The Defendants therefore apply pursuant to CPR rule 11 for an order that the Court will not exercise jurisdiction in respect of the Claimant's claims against the Defendants and that the Claim Form issued by the Claimant be set aside.

8. The Claimant resists the application on the grounds that:

   (1) England, not Switzerland, is the more suitable forum for the resolution of the Claimant's claims.

   (2) The Defendants are contractually estopped from contending otherwise.

(3) In any event, the Second Defendant has submitted to the jurisdiction.

9. For the purposes of this application, the parties were agreed that the English Court had jurisdiction, but the issue for determination was whether the Court should or should not exercise that jurisdiction. The parties were also agreed, for the purposes of this hearing (although the Claimant reserved its position beyond the hearing), that the Hague Convention on Choice of Court Agreements 2005 (implemented as a part of English law by section 3D of the Civil Jurisdiction and Judgments Act 1982) is not applicable to the jurisdiction agreements in the Facilities, because they were asymmetric. Although I was prepared to approach the Defendants' application on the basis that the Hague Convention was not applicable (and I was mindful of the discussion by the Court of Appeal in *Etihad Airways PJSC v Flöther* [2020] EWCA Civ 1707; [2022] QB 303, para. 82-86 and in *Hipgnosis SFH1 Limited v Manilow* [2025] EWCA Civ 486, para. 72), it should not be thought that I expressed a view either way on this question. I note that if the Hague Convention was held to be applicable, the Court would have had no discretion to decline jurisdiction (article 5(2) of the Hague Convention).

10. It was also common ground that asymmetric jurisdiction agreements are legally valid (*Mauritius Commercial Bank Ltd v Hestia Holdings Ltd* [2013] EWHC 1328 (Comm); [2013] 2 All ER (Comm) 898, para. 43).

11. Before addressing the parties' submissions, I will consider the terms of the Facilities and the factual background to the dispute.

The Personal Facility

12. The Personal Facility was extended by the Claimant to the First Defendant on 29th April 2022 in an amount of up to CHF 12.75 million for the purposes of financing substantial investments by the First Defendant, including in Swiss property developments. The Personal Facility was documented by way of a facility letter dated 29th April 2022 which incorporated the Claimant's Standard Terms and Conditions for Lending - Private Capital (January 2022) ("**the Standard Terms**").

13. The Personal Facility matured on the earlier of 36 months from the date of the facility (April 2025) or the date on which the First Defendant was permitted to sell shares he owned in a Delaware company, Socure Inc, a Delaware company ("**Socure"**).

14. The First Defendant drew down CHF 12 million on 3rd May 2022 under the Personal Facility. On 3rd November 2022, the Claimant advanced a further sum of CHF 750,000 to the First Defendant in accordance with certain interest roll up provisions.

15. The First Defendant e-signed the Personal Facility Letter via DocuSign, confirming his agreement to the terms contained in it and in the Standard Terms.

16. The First Defendant provided security to the Claimant for the sums lent under the Personal Facility. This comprised: (i) a deed of charge over deposits held in the First Defendant's CHF account with the Claimant; (ii) a deed of negative pledge relating to the shares the First Defendant owned in Socure; and (iii) a profit-sharing deed in respect of the First Defendant's shares in Socure, each dated 29th April 2022. Each of these security agreements was governed by English law and contained an asymmetric English jurisdiction agreement.

The Joint Facility

17. The Joint Facility is a loan facility dated 26th July 2022 for CHF 20 million advanced to the First and Second Defendants jointly and severally. Under its original terms, the Joint Facility matured in July 2023.

18. The purpose of the Joint Facility was to facilitate a transaction in which the First Defendant would subscribe to CHF 20m of 15% Notes (Notes) issued by m3GH (a company of which the Second Defendant was President and sole owner). This in turn would put m3GH in funds to acquire a Swiss bank now known as TradeXBank AG ("**TXB**"), formerly Sberbank (Switzerland) SA. According to the Second Defendant, m3GH's acquisition of TXB was intended to facilitate m3GH's expansion into the finance sector in Switzerland. The former owners wanted to sell TXB because Swiss sanctions imposed in 2022 on TXB prevented it from trading. The First Defendant's case is that he had no financial interest in the transaction.

19. The Joint Facility was contained in or evidenced by a Facility Letter dated 26th July 2022, which incorporated the Claimant's Standard Terms. The introductory paragraphs of the letter stated, amongst other things, that "*This Facility Letter, its Schedules and the [Standard Terms] shall be read and construed together as one document*".

20. On 26th July 2022, m3GH issued a Corporate Guarantee in favour of the Claimant in respect of the Defendants' obligations under the Joint Facility. The guarantee contained a provision (clause 19) that it was governed by Swiss law and subject to the exclusive jurisdiction of the Geneva Courts.

21. The Defendants drew down the full CHF 20 million under the facility on 27th July 2022. On the same date, the First Defendant subscribed to the Notes by way of a Notes Purchase Agreement dated 27th July 2022. The Notes Purchase Agreement contained a provision (clause 17) that it was governed by Swiss law and subject to the exclusive jurisdiction of the Geneva Courts. m3GH's acquisition of TXB subsequently went ahead in September 2022.

22. On 6th September 2022, the First Defendant entered into an Assignment Agreement with the Claimant assigning its claims against the issuer of the Notes under the Notes Purchase Agreement as security under the Joint Facility. The Assignment Agreement contained a provision (clause 13) that it was governed by Swiss law and subject to the exclusive jurisdiction of the Geneva Courts.

The Choice of Law and Jurisdiction Clauses in the Facilities

23. The Personal Facility and the Joint Facility contained the following provision in respect of choice of law and jurisdiction:

> "*GOVERNING LAW*
>
> *This Facility Letter and any non-contractual obligations arising out of or in connection with it are governed by English law and the courts of England have exclusive jurisdiction to settle any Dispute, in each case in accordance with Clause 29 (Governing Law and Enforcement) of the Standard Terms and Conditions unless the Borrower is domiciled in the UK outside of England, in*

which case the courts of the location of the Borrower's domicile shall have exclusive jurisdiction to settle any Dispute, in each case in accordance with Clause 29 (Governing Law and Enforcement) of the Standard Terms and Conditions."

24. The Governing Law Clause referred to Clause 29 of the Standard Terms, which provided that:

> "*29. Governing Law and Enforcement*
>
> *29.1 The Facility Letter, these [Standard Terms] and any non-contractual obligations arising out of or in connection with it are governed by English law.*
>
> *29.2 The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with the Facility Letter and/or these [Standard Terms] (including a dispute relating to the existence, validity or termination of the Facility Letter and/or these [Standard Terms] or any non-contractual obligation arising out of or in connection with the Facility Letter and/or these [Standard Terms]) (a "Dispute").*
>
> *29.3 The Bank and the Borrower agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly neither of them will argue to the contrary.*
>
> *29.4 This Clause 29 (Governing Law and Enforcement) is for the benefit of the Bank only. As a result, the Bank shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Bank may take concurrent proceedings in any number of jurisdictions*."

25. Clause 26.1 of the Standard Terms further confirmed that the respective Facility Letters, the Standard Terms and security documentation "*contain the entire agreement between the Bank and the Borrower in relation to the matters contemplated therein and supersede any previous agreements, representations or discussions between the Bank and the Borrower*".

26. Clause 27.1 of the Standard Terms provided that the "*Service Agent*" was "*irrevocably*" appointed as the borrower's "*agent for service of process in relation to any proceedings before the English courts in connection with the [AC/PP] Facility Letter or any Finance Document*".

27. Paragraph 30 of each of the Personal Facility and the Joint Facility was headed "*Service Agent*" and provided that each Defendant appointed Dr Richard Cook of Flat 4, 61 Inverness Terrace, Bayswater, London W2 3JT as their "*Service Agent*".

28. By an email dated 26th April 2022, the First Defendant had confirmed to the Claimant that Dr Cook had agreed "*to be the process agent in the UK*".

29. Dr Cook's appointment was confirmed by a letter to him dated 25th July 2022, which each Defendant, and Dr Cook, signed in ink and returned to the Claimant. The first

paragraph of this letter stated that the Defendants appointed Dr Cook as "*process agent to receive on our behalf service of process in any proceedings before the courts of England and Wales in connection with [the Joint Facility]*".

Subsequent Events

30. TXB apparently suffered financial difficulties after its acquisition by m3GH. The Claimant agreed to extend the maturity date of the Joint Facility from July 2023 to 15th December 2023. This extension was documented by way of a letter from the Claimant to the Defendants dated 25th July 2023; and an amended and restated Joint Facility Letter dated 25th July 2023.

31. These documents provided that "*Clause 29 (Governing Law and Enforcement) of the Standard Terms and Conditions (as defined in the Amended Facility Letter) applies to this Letter as if set out in full herein and as if references therein to the Amended Facility Letter were to this Letter*". They also contained the same terms regarding service on Dr Cook as the Facilities.

32. In connection with the July 2023 extension, m3GH and the First Defendant also provided the Claimant with further Joint Facility Security in the form of (i) a deed of guarantee confirmation given by m3GH ("**m3GH July Guarantee Confirmation**"); and (ii) a deed of security confirmation agreement given by the First Defendant, each dated 25th July 2023, each of which deeds was governed by Swiss law and subject to a Geneva exclusive jurisdiction agreement.

33. The Claimant's case is that, between October and December 2023, Events of Default occurred under the Joint Facility entitling the Claimant to accelerate the lending under Clause 22.16 of the Standard Terms:

    (1) A repayment event occurred under the terms of the Joint Facility when a put option relating to TXB shares was exercised. This required the capital and interest owing under the Joint Facility to be prepaid, but they were not.

    (2) m3GH entered into an agreement to dispose of certain shares in TXB in breach of clause 3(b) of the m3GH July Guarantee Confirmation.

    (3) The Defendants failed to pay any part of the principal and interest owing under the Joint Facility on its (extended) termination date of 15th December 2023. This sum totalled over CHF 21 million.

34. The Claimant agreed to enter into a Standstill Agreement dated 29th December 2023 with m3GH and the Defendants ("**the Standstill Agreement**"). Under the terms of the Standstill Agreement, the Claimant reserved all of its rights and remedies regarding the extant Events of Default (Clause 2.1(a)), but agreed (subject to certain conditions) not to exercise its contractual rights in respect of those Events of Default until 29th February 2024 (Clause 2.2(a)). The Standstill Agreement imposed various mandatory prepayment and information provision requirements on the Defendants (Clauses 3.2 and 3.3).

35. Clause 8 of the Standstill Agreement provided under the heading "*GOVERNING LAW AND JURISDICTION*" that "*Clause 29 (Governing Law and Enforcement) of the*

Standard Terms and Conditions applies to this Agreement as if set out in full herein and as if references therein to the Facility Letter were to this Agreement".

36. In connection with the Standstill Agreement, m3GH, and the Defendants provided the Claimant with further Joint Facility Security, in the form of: (i) a further deed of guarantee confirmation given by m3GH to the Claimant ("**the m3GH December Guarantee Confirmation**"); (ii) a deed of share pledge granted by the Second Defendant to the Claimant in respect of all of the Second Defendant's shares in a m3GH group company, Fitness Holdings SA; and (iii) a further deed of security confirmation by the First Defendant, each dated 29th December 2023. These deeds were expressed to be governed by Swiss law and subject to Geneva jurisdiction.

37. The Claimant's case is that the Defendants did not remedy the existing Events of Default when the standstill period expired by 29th February 2024 or pay any of the sums owing. Numerous further Events of Default then arose, as a result of the Defendants' further breaches of the terms of the Joint Facility, their failures to comply with terms of the Standstill Agreement and further breaches of the Joint Facility Security. The Claimant issued further reservation of rights letters on 1st March 2024, 3rd April 2024, 20th December 2024 and 16th January 2025. Further, according to the Claimant, certain Events of Default under the Joint Facility comprised cross-defaults under the terms of the Personal Facility pursuant to Clause 22.4 of the Standard Terms. The Claimant accordingly issued reservation of rights letters under the Personal Facility on 11th October 2023, 12th July 2024, 23rd September 2023, 20th December 2024 and 17th January 2024.

38. Each reservation of rights letter incorporated Clause 29 of the Standard Terms.

39. According to the Claimant, in late December 2024, it became aware that the m3GH group intended to restructure itself by acquiring a company (Steiner Development SA, now m3 Steiner Development SA) and transferring shares in TXB to an unidentified third party, in breach of the terms of both the m3GH July Guarantee Confirmation and the m3GH December Guarantee Confirmation, which both contained a negative pledge (Clause 3(b)) that obliged m3GH not to sell, transfer or otherwise dispose of its shares in TXB.

40. On 7th January 2025, the Claimant obtained an interim injunction against m3GH before the first instance courts of Geneva restraining m3GH from selling or disposing of its TXB shares. In granting the injunction, the Geneva court held that it was "*clear… that [m3GH] is about to sell part of the shares in [TXB] in breach of its contractual obligation*". This order was made final on 18th February 2025, following m3GH giving a commitment not to transfer the TXB shares without the Claimant's consent at the return date hearing on 17th January 2025. These proceedings are now completed (Mr Matthew Shankland's witness statement dated 29th March 2025, para. 5.5, served on behalf of the Claimant). Neither Defendant was a party to these proceedings.

41. On 3rd February 2025, the Claimant served acceleration notices under both Facilities requiring the principal and interest to be repaid immediately. At that time, the sums due under the Joint Facility exceeded CHF24 million and the sums due under the Personal Facility exceeded CHF12.9 million.

42. On 5th February 2025, the Claimant commenced these proceedings in England, seeking payment of all the outstanding sums, by serving the Claim Form and Particulars of Claim on Dr Cook in accordance with the Service Agent provisions in the Facilities.

43. On 17th March 2025, the First Defendant and m3GH entered into a Hold Harmless Agreement whereby m3GH agreed to hold harmless and indemnify the First Defendant in respect of claims under the Joint Facility. The Hold Harmless Agreement contained a provision (clause 8) that it was governed by Swiss law and subject to the exclusive jurisdiction of the Geneva Courts.

The Defendants' application under CPR rule 11

44. On 18th and 19th March 2025, the Defendants respectively issued an application seeking an order that the Court should not exercise its jurisdiction (in effect, a stay) and that the Claim Form issued by the Claimant be set aside, on the grounds that it would be more suitable to have the Claimant's claims tried in Switzerland than in England (*forum non conveniens*).

45. CPR rule 11(1) provides that:

> "*(1) A defendant who wishes to -*
>
> *(a) dispute the court's jurisdiction to try the claim; or*
>
> *(b) argue that the court should not exercise its jurisdiction*
>
> *may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have*."

46. The Defendants' application was made under CPR rule 11(1)(b), not CPR rule 11(1)(a). Accordingly, the Defendants accept that the English Court has jurisdiction by reason of the jurisdiction agreements in the Facilities, but contend that the Court should not exercise that jurisdiction essentially on *forum non conveniens* grounds.

47. As mentioned above, in order to consider this application, three issues arise for consideration:

    (1) Whether the English Court or the Swiss Court is the more appropriate forum for the determination of this dispute and whether a stay should be ordered.

    (2) Whether the Defendants are contractually estopped from contending that the English Court should not exercise jurisdiction on *forum non conveniens* grounds.

    (3) Whether, in any event, the Second Defendant has submitted to the jurisdiction.

48. I will address each of these issues in turn.

Is England or Switzerland the more appropriate forum?

49. The Defendants' application is essentially for a stay of the current proceedings instituted by the Claimant before this Court on the ground that Switzerland is distinctly and clearly a more suitable forum for the resolution of the dispute between the parties.

50. The Claimant opposes the application on the ground that England remains the more suitable jurisdiction and there are no sufficiently strong reasons why the Court should grant a stay in circumstances where the parties have agreed in the Facilities to the jurisdiction of the English Courts.

The parties' submissions

51. Mr Timothy Frith on behalf of the First Defendant submitted that the Court should hold that there are strong reasons why it should not exercise any jurisdiction that it has to try the claim and should make a declaration to that effect for the following reasons:

    (1) The Court should grant a stay on *forum non conveniens* grounds where it is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, that is another forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice (*Spiliada Maritime Corporation Appellants v Cansulex Ltd* [1987] AC 460).

    (2) The Court has a discretion to grant such a stay, even if there is an applicable English jurisdiction agreement, whether or not that agreement confers exclusive jurisdiction. The Court will ordinarily exercise its discretion in order to secure compliance with the contractual bargain, unless the party contending for a non-contractual forum can discharge the burden of demonstrating "*strong reasons*" for suing in that forum depending on the facts (*Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 All ER 749, para. 24-25; *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd* [2013] EWHC 1328 (Comm); [2013] 2 All ER (Comm) 898, para. 46). The principles governing the Court's discretion were summarised by Gloster J in *Antec International Ltd v Biosafety USA Inc* [2006] EWHC 47 (Comm), para. 7).

    (3) In the current case, there are clearly strong reasons to displace the contractual agreement of the parties in the Facilities.

        (a) When set in the wider context of the transaction as a whole the Facilities agreement were a part of a framework of agreements enabling m3GH (a Swiss Company) to purchase a bank in Switzerland funded by the Claimant advancing funds in Swiss Francs to the Defendants (both Swiss nationals) which were used by the First Defendant to subscribe to a Notes purchase agreement governed by a Swiss Law and Jurisdiction Clause. The funds thus released to m3GH were used to purchase the bank.

        (b) The First Defendant used the funds to subscribe to m3GH Notes under an agreement with a Swiss law and jurisdiction clause.

        (c) The First Defendant assigned the benefit of the Notes to the Claimant under an Assignment Agreement which the First Defendant and the Claimant agreed to be subject to Swiss law and jurisdiction. It is for the First Defendant to consider whether as a matter of Swiss law he is afforded a defence on the basis that the assignment has already discharged his indebtedness to the Claimant rather than simply providing security. Any enforcement of the benefit of the Notes against m3GH should take place in Switzerland.

(d) The Corporate Guarantee of the Joint Facility between m3GH and the Claimant is subject to a Swiss law and jurisdiction clause.

(e) It is an implied term of all the framework documents including the Joint Facility that rational businessmen would want all potential disputes heard in the same jurisdiction if possible.

(f) The First Defendant's witness statement dated 18th March 2025, para. 30-31, and the Second Defendant's witness statement dated 19th March 2025, para. 6-10, state that the majority of their assets are located in Switzerland. There is no connection between the Defendants and the United Kingdom and any enforcement proceedings will take place in Switzerland.

(g) The Claimant has already instituted proceedings against m3GH as a guarantor and primary obligor in Switzerland.

(h) Prior to the issue of proceedings in the United Kingdom, the parties were invited by the Claimant to instruct Swiss attorneys and enter into "without prejudice" discussions in connection with the dispute in Switzerland.

(i) Given that the First Defendant has derived no financial benefit from the transaction, it is inevitable that he will wish to serve a notice of contribution or indemnity on the Second Defendant and/or m3GH. The Hold Harmless Agreement between m3GH and the First Defendant is governed by Swiss law and subject to the jurisdiction of the Geneva Courts.

(j) The Claimant may wish to join m3GH as a primary obligor if they are actually concerned as to the liquidity of the First and Second Defendants. The Corporate Guarantee issued by m3GH in favour of the Claimant is subject to a Swiss law and jurisdiction clause.

52. Mr Elliott Cook on behalf of the Second Defendant submitted that the Courts of Switzerland are clearly and distinctly a more appropriate forum for the determination of this dispute for the following reasons:

(1) The underlying facts of the transaction at the heart of these proceedings involve a loan by the Claimant to two Swiss nationals/residents (the Defendants) in Swiss Francs for the purposes of financing the purchase of shares in one Swiss company by another Swiss company. The Joint Facility forms part of a suite of other contractual agreements each of which guarantee/secure the debt and grant exclusive jurisdiction to the Courts of Switzerland.

(2) Whether the Court should exercise its discretion to grant a stay falls to be decided in part in accordance with the well-known principles from *Spiliada Maritime Corp v Cansulex* [1987] AC 460. In summary:

(a) The court must identify in which forum the case could most suitably be tried for the interests of all parties and for the ends of justice.

(b) Since the question is whether there is some other forum that is available and which is clearly more appropriate for the trial of the action, the Court will look first to see what factors there are which point in the direction of another

forum. The natural forum is the one in which the action has the most real and substantial connection.

(c) Factors include not just those affecting convenience and expense, but also other factors such as the governing law and the places where the parties carry on business.

(d) If the Court determines that there is an available forum which is *prima facie* more appropriate, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that the stay should be refused (such as an inability for the claimant to obtain justice in the other forum).

(3) In the premises, there is an available and competent alternative forum in this case: the Courts of Switzerland, where both Defendants are domiciled and where they carry on business. It is and has always been open to the Claimant to pursue a claim against the Defendants in that jurisdiction. There is nothing in the Joint Facility that prevents the Claimant from doing so.

(4) Where there is an English jurisdiction clause (including a non-exclusive one), the applicant for a stay must satisfy the Court that there are "*strong reasons*" for declining to exercise the Court's jurisdiction (*Zephyrus Capital Aviation Partners 1D Ltd v Fidelis Underwriting Ltd* [2024] EWHC 734 (Comm); [2024] 4 WLR 47, para. 113, 114(ii) & 123).

(5) Switzerland is a clearly and distinctly more appropriate forum than England and there are very strong grounds for declining to exercise the English Court's jurisdiction. There can be no question that the Claimant can obtain justice in Switzerland if it makes out its case:

(a) There is an inherent interrelationship between the Joint Facility (with its non-exclusive English jurisdiction clause) and the m3GH Guarantee, the Guarantee Confirmations, the Assignment Agreement (and related m3GH Notes), and the share pledge (which contain exclusive jurisdiction clauses in favour of Switzerland).

(b) Each of these agreements (together with the Standstill Agreement, which also has a non-exclusive English jurisdiction clause), relate to and impact upon the alleged debt the subject of the Claimant's claim against the Defendants. Rights which may be exercised (or purportedly exercised) under those agreements have the potential to impact on the existence and/or quantum of the alleged debt owed to the Claimant.

(c) There is therefore a real risk of a multiplicity of proceedings/disputes each taking up the parties' time and costs. This is not a purely hypothetical risk: the Claimant has previously launched proceedings in Switzerland under the Guarantee Confirmations. Furthermore, there is an ongoing dispute between the Claimant and m3GH in Switzerland about the ownership of the First Defendant's m3GH Notes and the Assignment Agreement.

(d) The parties have engaged Swiss lawyers to deal with the overall dispute and they did so months prior to the Claimant commencing these proceedings. In

fact, it was the Claimant who specifically demanded that m3GH retain Swiss counsel to deal with the overall dispute. It was the Claimant's Swiss lawyers who expressly told the Second Defendant that they were acting for the Claimant against the Second Defendant personally in relation to the alleged debt under the Joint Facility.

(e) There is an inevitability (or, at least, a high possibility) of further related litigation. The Defendant does not have any assets in the United Kingdom (and neither does the First Defendant). Even if the Claimant was to obtain judgment in these English proceedings, it will either need to enforce the judgment in Switzerland or will need to pursue its rights (or purported rights) under the various agreements governed by Swiss law which have exclusive jurisdiction clauses in favour of Switzerland. All of the contractual securities in play are based in Switzerland (save for the First Defendant's shares in Socure).

(f) The First Defendant has already noted his intention to pursue claims for contribution/indemnity against the Second Defendant and/or m3GH, or against m3GH for (alleged) breaches of the m3GH Notes purchase agreement (the First Defendant's witness statement, para. 38-39). Any such claims will have to be brought in Switzerland.

(g) This dispute, together with any related or satellite disputes, can be effectively dealt with in a single jurisdiction, that is Switzerland.

53. Mr James MacDonald KC on behalf of the Claimant submitted that:

(1) The Court has jurisdiction over the Defendants in connection with the Claimant's claims. The Claimant established jurisdiction as of right over the Defendants by serving the Claim Form on Dr Cook, their contractually designated Service Agent, in England under CPR rule 6.11. That is sufficient to establish jurisdiction (*Mauritius Commercial Bank Ltd v Hestia Holdings Ltd* [2013] EWHC 1328 (Comm); [2013] 2 All ER (Comm) 898, para. 46). The Defendants accept as much.

(2) It follows that the English Court has jurisdiction over the claims, and the only issue is whether it should exercise it. Given the parties' unequivocal agreement to English jurisdiction in the contractual documentation (and in any case), it plainly should. The Defendants' application for a *forum non conveniens* stay therefore should not be granted.

(3) In the present case, there is no dispute that the Governing Law Clause and Clause 29 of the Standard Terms are incorporated into the parties' agreement and that they apply to the claims made by the Claimant.

(4) The parties' contractual choice of English jurisdiction should generally be upheld. The editors of *Dicey* states that such a clause will "*almost invariably be upheld and enforced*" (*Dicey, Morris & Collins on the Conflict of Laws* (16th ed., 2021), at para. 12-106) and the Court of Appeal has observed that it is "*most unusual for an English court to stay proceedings brought in England pursuant to an English jurisdiction clause*" (*UBS AG v HSH Nordbank AG* [2009] EWCA Civ 585; [2010] 1 All ER (Comm) 727, para. 100).

(5) The test for overriding an English jurisdiction clause is therefore a high one. As appears to be common ground, "*strong reasons*" are required before the Court will decline to enforce an exclusive jurisdiction agreement (*Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 All ER 749, para. 24). The requirement of "*strong reasons*" give rise to the following considerations:

(a) This reflects "*the strong policy reasons - relating to party autonomy, the enforcement of bargains and commercial certainty - in favour of upholding agreements as to the forum in which disputes are resolved*" (*AerCap Ireland Capital Designated Activity Co v PJSC Insurance Co Universalna* [2024] EWHC 1365 (Comm); [2024] 2 CLC 1, para. 259; *cf. UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30; [2024] 3 WLR 659, para. 66-68).

(b) The test requires "*much more than the type of evaluation involved in a forum non conveniens assessment, particularly where the jurisdiction clause is exclusive*" (*Zephyrus Capital Aviation Partners 1D Ltd v Fidelis Underwriting Ltd* [2024] EWHC 734 (Comm); [2024] 4 WLR 47, para. 111; *AerCap Ireland Capital Designated Activity Co v PJSC Insurance Co Universalna* [2024] EWHC 1365 (Comm); [2024] 2 CLC 1, para. 265). For this reason, matters that were foreseeable at the time the agreement was made, such as the location of parties, documents, timing of trial, etc, are not strong reasons for departing from the clause: (*Zephyrus v Fidelis*, para. 114, *AerCap v PJSC Insurance*, para. 265). These are "*aspects*" of the litigation which the parties are simply "*precluded from raising*" (*Zephyrus v Fidelis*, para. 114(i), citing *British Aerospace plc v Dee Howard Co* [1993] 1 Lloyd's Rep 368).

(c) The foreseeable prospect of concurrent proceedings in a different jurisdiction is not a strong reason for departing from a jurisdiction clause (*Clifford Chance LLP v Societe Generale SA* [2023] EWHC 2682 (Comm); [2024] ILPr 6, para. 81; *Zephyrus v Fidelis*, para. 114).

(d) The burden of proving "*strong reasons*" lies on the parties seeking to persuade the Court to depart from the clause, in this case, the Defendants (*Donohue v Armco*, para. 24; *Zephyrus v Fidelis*, para. 125(v); *AerCap v PJSC Insurance*, para. 268(v)).

(6) The requirement for "*strong reasons*" applies whether the jurisdiction agreement is exclusive or non-exclusive. There is "*generally little fundamental difference, as regards the question of whether or not a stay of proceedings should be granted, between the approach of the English courts in cases involving an exclusive and a non-exclusive jurisdiction agreement*" (*Dexia Crédit Local SA v Patrimonio del Trentino SpA* [2024] EWHC 2717 (KB), para. 140), citing Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (3rd ed., 2015), para. 10.35) and the principle that matters foreseeable at the time of contracting (including the prospect of related proceedings abroad) are not strong reasons also applies in the context of non-exclusive clauses (*Deutsche Bank AG v Highland Crusader Offshore Partners LLP* [2009] EWCA Civ 725; [2010] 1 WLR 1023, para. 50(7) and 107; *Zephyrus v Fidelis*, para 114(ii) and (iii)).

(7) The burden on the Defendants is even steeper where, in addition to an English exclusive jurisdiction agreement, the contract also contains a term (clause 29.3 of the Standard Terms) in which the parties agree that England is the appropriate forum and promised not to argue to the contrary. In such a case, there must be "*very strong or exceptional grounds*" for the stay (*Standard Chartered Bank (Hong Kong) Limited v Independent Power Tanzania Limited* [2015] EWHC 1640 (Comm); [2016] 1 All ER (Comm) 233, para. 83-113) and *Berytus Insurance & Reinsurance Company SAL v Golden Adventure Shipping SA* [2025] EWHC 664 (Comm), para. 8, 24-25).

(8) The Defendants' *forum non conveniens* arguments are entirely without merit.

(a) The matters now relied on by the Defendants in support of their *forum non conveniens* challenges are the linkages to Switzerland and the possibility there might be further proceedings in Switzerland in connection with the enforcement of the Joint Facility Security. None of these factors comprise "*strong reasons*" or "*very strong or exceptional*" grounds for overriding the contractual terms as to jurisdiction.

(b) Each matter relied on by the Defendants is one that was foreseeable at the time of contracting and so it cannot constitute a strong or very strong reason. That alone is fatal to the Defendants' case.

(c) In any case, these arguments are not open to the Defendants, as the English jurisdiction agreement precludes the Defendants from arguing England is not the appropriate forum.

(d) The issue in this case is whether two individual borrowers (who have identified no viable defence to date) are liable to an English bank under the Facilities each subject to English law and jurisdiction. England is obviously the appropriate jurisdiction for the resolution of that dispute.

(e) Neither Defendant does nor plausibly could suggest that he would be prejudiced by participating in English proceedings. Both plainly speak good English and have filed witness statements in English. In any case, convenience factors of this nature are irrelevant.

(f) The facts that m3GH and TBX are Swiss, and that the Joint Facility funded the First Defendant's purchase from m3GH of Notes, governed by Swiss law, are wholly irrelevant. So too is the fact that the First Defendant assigned the benefit of the Notes to the Claimant under the Assignment Agreement governed by Swiss law. The present dispute does not concern that transaction. It concerns the Defendants' failure to repay the Facilities, governed by English law, that were extended to them personally.

(g) The fact that there have been interim proceedings against m3GH in Switzerland under the terms of the Joint Facility Security is equally irrelevant. Those proceedings were against a different party (m3GH) and for a different purpose. In any case, they are now complete.

(h) Should any future proceedings be issued in Switzerland for the purposes of preserving the Claimant's security, they would likely be against a different party (m3GH) and for a different purpose. Such proceedings would not bind the parties to the present claim and would not resolve all (or potentially any) of the issues in the current claim, which is simply concerned with the question of whether the Defendants are liable under the Facilities. In any event, the potential need for such proceedings should m3GH continue to fail to comply with the terms of its security was wholly foreseeable, and therefore this cannot constitute a strong or very strong or any reason for a stay.

(i) In any case, despite the engagement of Swiss lawyers many months ago, no further proceedings have commenced in the seven months since the jurisdiction applications were issued.

(j) Whilst the Claimant may in due course wish to enforce an English judgment against either or both of the Defendants in Switzerland, it is entitled as creditor to obtain that judgment here before enforcing it abroad. It is under no obligation to have recourse to its security first (*White v Davenham Trust Ltd* [2011] EWCA Civ 747; [2011] Bus LR 1443, para. 38).

(9) The First Defendant's intention to seek contributions from the Second Defendant and/or m3GH, or to sue m3GH for breach of the Notes Purchase Agreement is also irrelevant. The First Defendant could likely bring any such proceedings in this jurisdiction by serving a contribution notice on the Second Defendant under CPR rule 20.6 and CPR rule 6.38 (*Knauf UK GmbH v British Gypsum Ltd* [2002] EWHC 739 (Comm); [2002] 2 Lloyd's Rep 416, para. 22) and/or seeking to join m3GH pursuant to CPR PD 6B, para 3.1(3) and/or (4). If the First Defendant wishes to seek indemnities or pursue claims against m3GH in Switzerland, he is welcome to seek to do so, but that is no reason to decline jurisdiction over the conceptually anterior question of whether the First Defendant is liable to the Claimant in the first place.

(10) The First Defendant's argument that there is an implied term that rational businessmen would want all potential disputes heard in the same jurisdiction is somewhat desperate. The implied term alleged would be directly contradictory to the express terms on jurisdiction and so could not be implied.

(11) Finally, neither Defendant has put forward any evidence that the Swiss Court would actually accept jurisdiction over the Claimant's claims.

Decision

54. On the assumption (on which the parties are content I should rely) that the Court has a residual discretion to grant a stay in circumstances where the parties have agreed that the English Court has jurisdiction in respect of the claim brought by the Claimant against the Defendant, it seems reasonably clear that the Court should have regard to the fact that the parties contractually selected the chosen forum and should permit proceedings in another jurisdiction only if there are strong or very strong reasons for so doing. I am not certain that there is much difference between labelling the reasons as "*strong*" or "*very strong*", other than perhaps the latter reflecting the exceptional nature of any decision not to exercise jurisdiction. If there are reasons which commend the order of a stay, they

should be reasonably clear and compelling, but to the extent that there is a difference, I will have regard to both formulations.

55. In this respect, although it might be thought that the Court approaches the issue as if it were a simple question of whether there is a more suitable forum other than England (being the approach adopted in *Spiliada Maritime Corporation Appellants v Cansulex Ltd* [1987] AC 460), the fact that the parties have contractually bound themselves to the jurisdiction of the English Court transforms this into a more rigorous hurdle for the applicant for a stay to negotiate. This explains why there is a requirement of strong reasons or very strong reasons in support of a stay. Moreover, at least insofar as they concern matters of convenience, the reasons must be such that they were not foreseeable by the parties when they entered into their contract with the English jurisdiction agreement.

56. There are a number of decisions which support this approach.

57. In *Antec International Ltd v Biosafety USA Inc* [2006] EWHC 47 (Comm), Gloster J said, at para. 7, in dealing with a non-exclusive English jurisdiction agreement, that the Court should exercise its discretion in deciding whether to grant a stay subject to the following principles:

> "*In coming to my conclusion, I applied the following legal principles that can be derived from the authorities:*
>
> *i) The fact that the parties have freely negotiated a contract providing for the non-exclusive jurisdiction of the English courts and English law, creates a strong prima facie case that the English jurisdiction is the correct one. In such circumstances it is appropriate to approach the matter as though the claimant has founded jurisdiction here as of right, even though the clause is non-exclusive; see e.g. per Hobhouse J in S & W Berisford Plc v New Hampshire Insurance Co. [1990] 1 Lloyd's Rep. 454, at 463; per Waller J in British Aerospace Plc v Dee Howard Co [1993] 1 Lloyd's Rep. 368; per Moore-Bick J in Mercury Communications Ltd v Communication Telesystems International [1999] 2 AER 33 at page 41.*
>
> *ii) Although, in the exercise of its discretion, the court is entitled to have regard to all the circumstances of the case, the general rule is that the parties will be held to their contractual choice of English jurisdiction unless there are overwhelming, or at least very strong, reasons for departing from this rule; see e.g. British Aerospace Plc supra Mercury Communications supra at page 41; per Aikens J in Marubeni Hong Kong & South China Ltd v Mongolian Government [2002] 2 AER (Comm) 873 at 891(b)-(f); per Lawrence Collins J in Bas Capital Funding Corporation and others v Medfinco Ltd and Others [2004] 1 Lloyd's Rep. 652, at paragraphs 192–195; per Gross J in Import Export Metro Ltd v Compania Sud Americana de Vapores SA [2003] 1 Lloyd's Rep. 405.*
>
> *iii) Such overwhelming or very strong reasons do not include factors of convenience that were foreseeable at the time that the contract was entered into (save in exceptional circumstances involving the interests of justice); and it is not appropriate to embark upon a standard Spiliada*

> *balancing exercise. The defendant has to point to some factor which it could not have foreseen at the time the contract was concluded. Even if there is an unforeseeable factor or a party can point to some other reason which, in the interests of justice, points to another forum, this does not automatically lead to the conclusion that the court should exercise its discretion to release a party from its contractual bargain ... In particular, the fact that the defendant has, or is about, to institute proceedings in another jurisdiction, not contemplated by the non-exclusive jurisdiction clause, is not a strong or compelling reason to relieve a party from his bargain, notwithstanding the undesirability of parallel proceedings. Otherwise a party to a non-exclusive jurisdiction clause could avoid its agreement at will by commencing proceedings in another jurisdiction; see cases cited supra and The El Amria [1981] 2 Lloyd's Rep. 119; Breams Trustees Ltd v Upstream Downstream Simulation Services [2004] EWHC 211 (Ch) per Patten J at paragraphs 27 and 28*."

58. In *Deutsche Bank AG v Sebastian Holdings AG* [2009] EWHC 3069 (Comm); [2010] 1 All ER (Comm) 808, Burton J accepted Gloster J's analysis and considered in the context of both exclusive and non-exclusive jurisdiction agreements (where the latter is or is not accompanied by a *forum non conveniens* (FNC) clause, considered below), at para. 24:

> "*… It seems to me plain that, if there is to be an exceptional case, where forum non conveniens arguments are to prevail, a fortiori in an exclusive jurisdiction or FNC waiver case, but even in the case of non-exclusive jurisdiction, the burden on the applicant to establish such a case must be a heavier, perhaps, in exclusive jurisdiction cases, a much heavier, one than if there were no jurisdiction clause at all. If the matters were unforeseeable at the time of the contract, then the burden may be the more easily satisfied. If however the matters were foreseeable, for example if, as here, the parties entered into a series of interlinked agreements with different jurisdiction clauses, then it would not be possible to suggest - nor is it suggested here - that it was not foreseeable that a clash or contest of jurisdictions might not arise. In the absence of unforeseeability, and in this case in the absence of any impact on the parties, or on the issue of jurisdiction, of any third parties (such as featured considerably in Donohue), then the strong or very strong or exceptional grounds, said to engage the interests of justice and satisfy the necessary burden, must be all the more compelling.*"

59. In *Standard Chartered Bank (Hong Kong) Limited v Independent Power Tanzania Limited* [2015] EWHC 1640 (Comm); [2016] 1 All ER (Comm) 233, at para.109-110, Flaux J adopted Burton J's analysis.

60. In *Clifford Chance LLP v Societe Generale SA* [2023] EWHC 2682 (Comm); [2024] ILPr 6, Henshaw J stated at para. 81:

> "*The fact that a court was contractually chosen by the parties will be taken as clear evidence that it is an available forum (Dicey § 12-109). It is in principle not open to a party to object to the exercise of the chosen jurisdiction on grounds that should have been foreseeable when the agreement was made, including inconvenience as a result of witnesses and documents being in another country,*

> *inconsistent findings as a result of concurrent proceedings, or that the chosen forum has no rule that costs follow the event (ibid.).*"

61. In *Zephyrus Capital Aviation Partners 1D Ltd v Fidelis Underwriting Ltd* [2024] EWHC 734 (Comm); [2024] 4 WLR 47, Henshaw J considered the nature of the Court's discretion in circumstances where the defendants applied for a stay of the English proceedings instituted by the claimants on the grounds that the relevant contracts contained a Russian exclusive jurisdiction agreement. Accordingly, the judge was not considering the stay of English proceedings instituted in accordance with an English jurisdiction agreement; instead, he was considering whether the English proceedings should be stayed to give effect to the parties' agreement that disputes should be resolved in a foreign jurisdiction. Nevertheless, the principles governing the exercise of the Court's discretion are, or at least should be, the same. Like Gloster J in *Antec International Ltd v Biosafety USA Inc*, Henshaw J drew a distinction between cases which involved the question whether another jurisdiction was more suitable having regard to considerations of convenience and cases which involved the question whether there could not be a fair trial in another jurisdiction, for example by reason of state intervention (described as "*interests of justice*" cases). The learned judge said at para. 106-125:

> "*106. The court will grant a stay in such circumstances unless the counterparty to the jurisdiction clause can point to strong reasons for the court not to do so. That reflects the strong policy reasons - relating to party autonomy, the enforcement of bargains and commercial certainty - in favour of upholding agreements as to the forum in which disputes are to be resolved …*
>
> *111. It is well established that to satisfy the "strong reasons" test requires much more than the type of evaluation involved in a forum non conveniens assessment, particularly where the jurisdiction clause is exclusive: see, eg, JP Morgan Securities Asia Private Ltd v Malaysian Newsprint Industries Sdn Bhd [2001] 2 Lloyd's Rep 41, para 51, Bas Capital Funding Corpn v Medfinco Ltd [2003] EWHC 1798 (Ch); [2004] 1 Lloyd's Rep 652, para 192, Antec International Ltd v Biosafety USA Inc [2006] EWHC 47 (Comm) at [7(iii)]. See also Skype Technologies SA v Joltid Ltd [2009] EWHC 2783 (Ch) at [33], per Lewison J:*
>
> > *"It follows, in my judgment, that what one might call the standard considerations that arise in arguments about forum non conveniens should be given little weight in the face of an exclusive jurisdiction clause where the parties have chosen the courts of a neutral territory in the context of an agreement with world-wide application. Otherwise the exclusive jurisdiction clause would be deprived of its intended effect. Indeed, the more 'neutral' the chosen forum was the less the importance the parties must have placed on the convenience of the forum for any particular dispute. If the standard considerations that arise in arguments about forum non conveniens were to be given full weight, they would almost always trump the parties' deliberate selection of a neutral forum …"*
>
> *114. It has been held in a series of cases that foreseeable factors of convenience, including the location of documents or witnesses and the likely speed of*

litigation, should not be regarded as strong reasons for declining to grant a stay …

125. The authorities summarised in paras 106-124 above, taken as a whole, support the following propositions relevant to whether the prospect of an unfair trial in the court chosen in an exclusive jurisdiction clause is a strong reason to decline a stay of English proceedings (or, mutatis mutandis, to decline to restrain proceedings abroad in breach of an exclusive jurisdiction agreement):

(i) The court is not bound to grant a stay but has discretion to do so (The Eleftheria factor (1), Donohue, para 24).

(ii) There can be no absolute or inflexible rule governing the exercise of the discretion (Donohue, para 24).

(iii) However, the English court will ordinarily exercise its discretion by granting a stay of proceedings unless the claimant can show strong reasons for suing in England (Donohue, para 24).

(iv) What constitutes a strong reason "will depend on all the facts and circumstances of the particular case" (Donohue, para 24; see also The Eleftheria factor (4)).

(v) The burden of showing strong reason is on the claimant (The Eleftheria factor (4), Donohue, para 24).

(vi) Strong reasons are not shown merely by establishing factors that would make England the appropriate forum on a forum non conveniens analysis.

(vii) Foreseeable factors of (mere) convenience should not be regarded as strong reasons to decline a stay (see the cases referred to in paras 114-115 above).

(viii) Regard can properly be had to whether the claimant would be prejudiced by having to sue in the foreign court because they would, for political, racial, religious or other reasons, be unlikely to get a fair trial (The Eleftheria factor (5)(e)(iv), approved in Donohue, para 24).

(ix) There are some judicial statements suggesting that even a matter pertaining to the interests of justice might not amount to a "strong reason" if it was foreseeable and could be regarded as encompassed within the parties' bargain in agreeing to the jurisdiction clause. However, the preponderance of the cases treat the interests of justice differently in that regard from factors of mere convenience."

62. Henshaw J went on to consider questions of foreseeability in different kinds of "*interests of justice*" cases, which discussion is not relevant to the present application.

63. It is very difficult to better Henshaw J's summary of the applicable principles in the case of exclusive jurisdiction agreements in favour of foreign jurisdictions. The principles apply equally to cases where the question before the Court is whether to stay English

proceedings commenced in accordance with an English jurisdiction agreement. This is so whether or not the agreement confers exclusive or non-exclusive jurisdiction on the English Court (*Dicey, Morris & Collins on the Conflict of Laws* (16th ed., 2021), at para. 12-106).

64. Thus, in *Dexia Crédit Local SA v Patrimonio del Trentino SpA* [2024] EWHC 2717 (KB), Bryan J said at para. 135-141:

> "*135. For the reasons set out in Section E above, the Jurisdiction Clause is an exclusive jurisdiction clause, and accordingly (as Trentino acknowledges) its application for a stay must fail in those circumstances.*
>
> *136. I address in the remainder of Section F what the position would have been if the Jurisdiction Clause had not been an exclusive English jurisdiction clause. In fact, as will appear, there would be no merit in the Stay Application in that scenario either, and it would stand to be dismissed if the Jurisdiction Clause was only a non-exclusive jurisdiction clause.*
>
> *137. If the Jurisdiction Clause is non-exclusive, to commence proceedings in another jurisdiction is not, without more, a breach of contract (Joseph, at paragraph 4.04). The implication of a non-exclusive jurisdiction agreement is that the parties are precluded "from later arguing that the forum identified is not an appropriate forum on grounds foreseeable at the time of the agreement, for the parties must be taken to have been aware of such matters at the time of the agreement", per Lord Justice Toulson, Highland Crusader Offshore Partners LLP v Deutsche Bank AG [2009] EWCA Civ 725 ("Highland Crusader"), at [50(7)].*
>
> *138. It has been said that, "overwhelming" reasons are required for a Court to grant a stay of proceedings in England where there is a jurisdiction clause (even a non-exclusive one) conferring jurisdiction on the English court, see Dicey, at paragraph 12-106, citing, among others, UCP Plc v Nectrus Ltd [2018] EWHC 380 (Comm) (a case of a non-exclusive jurisdiction clause).*
>
> *139. Where the English court is the "neutral forum" (as in the present case) it has been said that it is "most unlikely that the English court will override the choice", see Dicey, at paragraph 12-106, citing Akai Pty Ltd v People's Insurance Co Ltd [1998] 1 Lloyd's Rep. 90, 105 (only for "exceptional reasons" per Thomas J.); BAS Capital Funding Corp v Medfinco Ltd [2003] EWHC 1798 (Ch), at [192] (requiring "very strong grounds to override a choice of English jurisdiction"). It was also said by Staughton LJ in Attock Cement Co Ltd v Romanian Bank for Foreign Trade [1989] 1 W.L.R. 1147 (CA), at p. 1161 that "we ought to look with favour on the choice of our own jurisdiction".*
>
> *140. It has been said that, in practice, "there is generally little fundamental difference, as regards the question of whether or not a stay of proceedings should be granted, between the approach of the English courts in cases involving an exclusive and a non-exclusive jurisdiction agreement" - Joseph, at paragraph 10.35.*

> *141. Since the implication of a non-exclusive jurisdiction agreement is that the parties are precluded from later making forum non conveniens arguments, "an application to stay on forum non conveniens grounds an action brought in England pursuant to an English non-exclusive jurisdiction clause will ordinarily fail unless the factors relied upon were unforeseeable at the time of the agreement", per Toulson LJ in Highland Crusader, at [50(7)].*"

65. The fact that the parties have agreed to confer exclusive jurisdiction on the English Courts presupposes that the parties have contractually bound themselves to this jurisdiction and not to commence proceedings in another jurisdiction. By comparison, a non-exclusive English jurisdiction agreement permits the commencement of proceedings elsewhere, but of course once proceedings are commenced in England, jurisdiction is established in accordance with the parties' agreement. In either case, there would have to be, at the least, strong reasons for staying those proceedings on *forum non conveniens* grounds. That said, as there is a dispute between the parties as to whether the English jurisdiction agreement in the Facilities is exclusive or non-exclusive, and as this is not a dispute which I have been asked to resolve, I will proceed on the assumption that although the English jurisdiction agreement is described as "*exclusive*", it is to be treated as equivalent to a non-exclusive agreement because of its asymmetric nature. That is not to say that I agree or do not agree with this assumption.

66. In the present case, I have no hesitation in holding that the Defendants have been unable to discharge the burden of establishing an entitlement to a stay of these proceedings on *forum non conveniens* grounds, because the reasons offered in support of the stay are not, in my judgment, strong, or sufficiently strong, to permit the parties to resile from their contractual agreement as to jurisdiction.

67. My reasons for this conclusion are as follows.

68. First, the Facilities are each governed by English law and subject to an English jurisdiction agreement. There are a number of related contracts, namely the m3GH Guarantee, the Guarantee Confirmations, the Assignment Agreement, the Notes Purchase Agreement and the Hold Harmless Agreement, all of which are governed by Swiss law and contain exclusive jurisdiction clauses in favour of the Swiss Courts. However, other than the Assignment Agreement, each of those agreements are not between the Claimant and either or both of the Defendants. I note also that the Security Documents relating to the Personal Facility are subject to English law and jurisdiction, but the Security Documents relating to the Joint Facility are subject to Swiss law and jurisdiction. In any case, each of these related agreements serve purposes and functions distinct from the purpose and function of the Facilities. The related contracts may provide support for the Facilities, but they are not the same. Accordingly, it is difficult to understand why there should be an objection to the Claimant commencing proceedings in England in respect of its claims under the Facilities on this ground.

69. Second, in entering into these contracts on the terms they did, the parties must be taken to have been aware of where they were free to litigate any disputes relating to each of these contracts and where they were not permitted to litigate, depending on the contract to which the dispute related. If there were a breach of the Facilities, it must have been obvious that this would or could well give rise to claims under the other related contracts. Accordingly, any factors which might otherwise contribute to an assessment of whether

England or Switzerland is the more appropriate forum were reasonably foreseeable. The fact that there might be a multiplicity of proceedings under the various contracts does not militate against the parties' contractual choice of England as the forum for the resolution of disputes under the Facilities, when this was plainly a possible or likely consequence of a claim made under the Facilities.

70. Third, the Claimant's claims under the Facilities are straightforward and are based on an alleged default by the Defendants. The claims do not depend on the establishment of any relief obtainable under the related contracts. The fact that the purpose of the Facilities was to finance the purchase of Notes under the Notes Purchase Agreement does not alter this analysis.

71. Fourth, although it might well be desirable for the parties to wish to have all of their disputes resolved in one jurisdiction, I do not consider that any term could be implied along those lines, where the parties knowingly entered into the various contracts with the jurisdiction agreements they contained. Moreover, the argument that there should be an implied term in favour of the parties resolving all disputes in one jurisdiction does not necessarily speak in favour of Switzerland being the one jurisdiction; it is equally possible that England should be that one jurisdiction. In any case, the implied term would be inconsistent with the parties' jurisdiction agreements in the Facilities.

72. Fifth, even if it were convenient if proceedings were conducted in Switzerland, having regard to the location of the Defendants' domicile or residence or their assets, that is not sufficient to overcoming the objections to granting a stay discussed above. Of course, the facts that the Claimant is a United Kingdom company and that the Facilities, the Facilities extensions and the Standstill Agreement incorporated clause 29 of the Standard Terms are not to be ignored if this application were to be resolved only by reference to issues of convenience.

73. Sixth, the prospect of the First Defendant commencing proceedings for an indemnity or contribution against the Second Defendant or m3GH or anyone else should not deprive the Claimant of its contractual entitlement under the jurisdiction agreement. Each of those potential claims will give rise to distinct issues, even if they might overlap with the issues arising from the Claimant's claims under the Facilities.

74. Seventh, the parties to the Facilities agreed, by clause 29.3 of the Standard Terms, that "*the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly neither of them will argue to the contrary*". This reinforces the fact that the parties entered into the Facilities in full recognition, by way of a contractual commitment, that the exercise of this Court's jurisdiction should not be refused on grounds of convenience, especially where any issues of convenience were foreseeable at the time of the contract. I return to this provision below.

75. Eighth, the Facilities are each expressed to be governed by English law. The English Court is better placed to deal with issues of English law than the Swiss Court.

76. Accordingly, for these reasons, I refuse the Defendants' application for a stay. However, I will proceed to consider the additional issues raised by the parties, given that they were the subject of argument.

Contractual estoppel

77. As explained above, the Facilities incorporated clause 29 of the Standard Terms. Clause 29.3 provides that:

> "*The Bank and the Borrower agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly neither of them will argue to the contrary.*"

78. The question to be considered is whether this provision precludes the Defendants from challenging the exercise of the Court's jurisdiction on grounds of *forum non conveniens*. This provision, as a part of clause 29 as a whole, was a consideration taken into account in the exercise of the Court's discretion in refusing the Defendants' application for stay.

79. However, the issue now is whether the terms of clause 29.3 prevent the Defendants from seeking or applying for a stay in the first place on the grounds that Switzerland, or any other jurisdiction, was more suitable for determination of the Claimant's claim under the Facilities than England.

The parties' submissions

80. Mr MacDonald KC submitted on behalf of the Claimant that the effect of clause 29.3 is to create a contractual estoppel preventing the Defendants from denying that England is the most appropriate forum (*Barclays Bank Plc v PJSC Sovcombank* [2024] EWHC 834 (Comm), para. 6, 24, 33). Contractual estoppel arises where the parties have concluded a binding contract containing an acknowledgment of a state of affairs from which they then cannot then resile (*Al Saud v Gibbs* [2024] EWHC 356 (Comm), para. 117). In the present case, the parties have explicitly agreed by clause 29.3 to a state of affairs, namely, that England is the most appropriate jurisdiction. In addition, the Defendants have agreed not to contend otherwise. The contract therefore precludes the Defendants from asserting *forum non conveniens*.

81. In his written submissions, Mr MacDonald KC appeared to contend that there was a limited exception to this contractual estoppel, namely where there are "*very strong or exceptional grounds*" in support of a stay. However, during his oral submissions, Mr MacDonald KC clarified his primary submission by contending that the Defendants are estopped from contending that England is not "*the most appropriate and convenient courts to settle Disputes*". The Court of Appeal has established that there is a very limited exception, not to such an estoppel, but instead to a promise by a contracting party not to contend that England is not the most appropriate forum (a *forum non conveniens* or FNC waiver clause). If, however, there is an applicable exception to contractual estoppel, it applies where the party seeking the stay makes out "*very strong or exceptional grounds*" for a stay, which were "*unforeseen and unforeseeable at the time the [contract] was made*" (*Standard Chartered Bank (Hong Kong) Limited v Independent Power Tanzania Limited* [2015] EWHC 1640 (Comm); [2016] 1 All ER (Comm) 233, para. 109; *Berytus Insurance & Reinsurance Company SAL v Golden Adventure Shipping SA* [2025] EWHC 664 (Comm), para. 8, 24-25; *Dicey, Morris & Collins on the Conflict of Laws* (16th ed., 2021), at para. 12-114). The "*very strong or exceptional grounds*" test is an even stricter test than the "*strong reasons*" test that is applicable where there is only a jurisdiction clause. For the purposes of this test, the foreseeable prospect of related foreign

proceedings again does not constitute very strong or exceptional grounds (*Dexia Crédit Local SA v Patrimonio del Trentino SpA* [2024] EWHC 2717 (KB), para. 144-145).

82. Mr Cook on behalf of the Second Defendant submitted that a defendant is not debarred from raising a *forum non conveniens* argument simply because they have agreed not to do so in their contract, albeit there must be very strong grounds for the Court declining to exercise its jurisdiction (*Standard Chartered Bank (Hong Kong) Limited v Independent Power Tanzania Limited* [2015] EWHC 1640 (Comm), para. 109).

Decision

83. Contractual estoppel, as it is often called, refers to a principle which holds the parties to their agreement that a state of affairs exists, even if such a state of affairs does not exist. I note that it has been suggested that this principle is not really a species of estoppel at all (*Chitty on Contracts*, (36th ed., 2025), para. 7-030). Nonetheless, as this is how the principle has been labelled, I will continue to refer to it as such.

84. In *Al Saud v Gibbs* [2024] EWHC 356 (Comm), at para. 117, Calver J summarised the operation of contractual estoppel as follows:

> "*Contractual estoppel arises when parties have concluded a binding contract containing an acknowledgment of a state of affairs. The maker of the statement is estopped from asserting in litigation that the opposite was true. The basic principle is that "[t]here is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis of the transaction, whether it be the case or not". In such a case, a party cannot "subsequently deny the existence of the facts and matters upon which they have agreed, at least as far as concerns those aspects of their relationship to which the agreement was directed". Contractual estoppel is a "separate doctrine" to other forms of estoppel; it contains no requirement of reliance or detrimental reliance, and the party relying on the estoppel does not have to show that it would be unconscionable for the other party to resile from the agreed state of affairs. The representation of fact is enforceable because it forms part of the contract between the parties*."

85. The question is how this principle of contractual estoppel applies to a provision such as clause 29.3 of the Standard Terms. There are two components in this provision, namely:

    (1) An agreement between the Claimant and the Defendants that "*the courts of England are the most appropriate and convenient courts to settle Disputes*".

    (2) A promise by the parties that "*neither of them will argue to the contrary*".

86. The term "*Disputes*" is defined in clause 29.2 to mean "*any dispute arising out of or in connection with the Facility Letter and/or these [Standard Terms] (including a dispute relating to the existence, validity or termination of the Facility Letter and/or these [Standard Terms] or any non-contractual obligation arising out of or in connection with the Facility Letter and/or these [Standard Terms])*".

87. In *Deutsche Bank AG v Sebastian Holdings AG* [2009] EWHC 3069 (Comm); [2010] 1 All ER (Comm) 808, the relevant agreements contained either an exclusive or non-

exclusive English jurisdiction agreement and, in addition, a provision to the effect that the parties will not object to proceedings in the English courts on the basis that such court is an inconvenient forum. Burton J referred to such a provision as an "*FNC waiver clause*" and then considered, at para. 15-17, a hierarchy of jurisdiction clauses, with an exclusive jurisdiction agreement at the top of the ladder, followed by a non-exclusive jurisdiction agreement with an FNC waiver clause, and at the lower end a non-exclusive jurisdiction agreement without an FNC waiver clause.

88. At para. 19-24, Burton J said that:

> "*19. If even an exclusive jurisdiction clause will not trump a stay application, then at least a similar approach must follow in respect of a stay application brought on forum non conveniens grounds in breach of an FNC waiver clause. Lord Collins of Mapesbury in UBS AG v HSH Nordbank AG [2009] EWCA Civ 585; [2009] 1 CLC 934 at paragraph 101 set out a brief history in this regard …*
>
> *21. It is obvious therefore that if stays can be granted even where there is an exclusive jurisdiction or an FNC waiver clause, then an application for a stay can be considered in a non-exclusive jurisdiction case, where there is no FNC waiver clause. The significant factor is that there is no breach of contract involved in the party seeking to persuade the chosen court to decline jurisdiction. However in two recent and regularly quoted judgments in the Commercial Court conclusions have been reached, severally by Gross J in Import Export (supra) and by Gloster J in Antec International Ltd v Biosafety USA Inc [2006] EWHC 47 (Comm) that, by reference to cited authority, the test is or ought to be the same, and in effect equally difficult and exceptional, in relation to a stay sought where there is a non-exclusive jurisdiction clause. Gross J so concludes at paragraph 14(ii) of his judgment, as does Gloster J, by reference to a number of earlier first instance judgments, in paragraph 7(ii) of her judgment.*
>
> *22. It is plain that weight must be given to the fact that the parties have chosen and/or not objected to the jurisdiction at the time of entering into the contract …*
>
> *23. The 'exceptional circumstances' to which Gloster J refers by way of an exception to this general rule appear to derive from the words of Rix LJ, giving the judgment of the Court of Appeal in Ace Insurance SA-NV v Zurich Insurance Co [2001] CLC 526 at paragraph 62 of his judgment where, having referred to the words of Waller J and the need for unforeseeability, he seems to have in mind that a party to a non-exclusive jurisdiction clause could escape its effect not only by showing some unforeseeable matter but also by showing 'some matter which lies beyond considerations of convenience and goes to a matter of justice' .*
>
> *24. … It seems to me plain that, if there is to be an exceptional case, where forum non conveniens arguments are to prevail, a fortiori in an exclusive jurisdiction or FNC waiver case, but even in the case of non-exclusive jurisdiction, the burden on the applicant to establish such a case must be a heavier, perhaps, in exclusive jurisdiction cases, a much heavier, one than if there were no*

> *jurisdiction clause at all. If the matters were unforeseeable at the time of the contract, then the burden may be the more easily satisfied. If however the matters were foreseeable, for example if, as here, the parties entered into a series of interlinked agreements with different jurisdiction clauses, then it would not be possible to suggest - nor is it suggested here - that it was not foreseeable that a clash or contest of jurisdictions might not arise. In the absence of unforeseeability, and in this case in the absence of any impact on the parties, or on the issue of jurisdiction, of any third parties (such as featured considerably in Donohue), then the strong or very strong or exceptional grounds, said to engage the interests of justice and satisfy the necessary burden, must be all the more compelling.*"

89. In *Standard Chartered Bank (Hong Kong) Limited v Independent Power Tanzania Limited* [2015] EWHC 1640 (Comm); [2016] 1 All ER (Comm) 233, Flaux J accepted Burton J's analysis and said at para. 109:

> "*… even where there is an FNC waiver with a non-exclusive jurisdiction clause, if very strong or exceptional grounds for granting a stay are demonstrated, the Court may in an appropriate case grant a stay, provided that the grounds in question can properly be described as unforeseen and unforeseeable at the time the agreement was made. In other words, the bargain which the defendant makes in entering a contract with an FNC waiver is that he will not seek to argue that England is not an appropriate forum in relation to forum non conveniens grounds which were foreseeable at the time that the relevant agreement was made*."

90. In *Berytus Insurance & Reinsurance Company SAL v Golden Adventure Shipping SA* [2025] EWHC 664 (Comm), a marine insurance policy contained a jurisdiction agreement which provided that:

> "*… [3] The underwriters and/or All Marine Insurance Brokers Limited reserve to themselves the right to bring proceedings in respect of any matter which arises out of or in connection with this cover note in the courts of any country which has or claims jurisdiction in relation to that matter.*
>
> *[4] The assured hereby submits to the non-exclusive jurisdiction of the courts of the Republic of Cyprus and waives any objection on the ground of inconvenient forum to any proceedings which arise out of or in connection with this cover note being brought in the courts of the Republic of Cyprus or any other courts by virtue of the above …*"

91. The underwriters commenced proceedings in England seeking a declaration of no liability under the policy in respect of a particular loss. The defendants applied for a stay of the proceedings on grounds of *forum non conveniens*. HH Judge Pelling KC refused the application and observed in respect of the FNC waiver clause at para. 24-25:

> "*24. In this case, the parties had agreed that the claimant could sue the defendant either in Cyprus or elsewhere as it chose, and the defendant had agreed not to contend that any forum chosen by the defendant was not convenient. There may be limited circumstances in which the defendant could*

> *avoid the effect of its FNC waiver by reference to convenience issues that were not foreseeable at the date the agreement was made, particularly relating to the interests of justice, but the circumstances in which such is available are highly circumscribed - see the judgment of Flaux J (as he then was) in Standard Chartered Bank v Independent Power Tanzania Ltd (ibid.) at [109].*
>
> *25. Whilst, of course, parallel proceedings are not satisfactory as a general proposition, that is not a reason for concluding that the claimant should be precluded from commencing proceedings other than in Cyprus, or that the defendant should be permitted to object to such proceedings on that ground notwithstanding its FNC waiver. As Toulson LJ acknowledged in Highland Crusader (ibid.) at [107], the possibility that there will be parallel proceedings is an inherent risk where the parties agree a non-exclusive jurisdiction provision. That risk is all the greater where the parties agree an asymmetrical provision that requires one party - here the defendant - to commence proceedings in Cyprus but permits the other - here the claimant - to commence proceedings elsewhere. The possibility of parallel proceedings was foreseeable at the time such an agreement is made and, in my judgment, is not a bar or basis for granting a stay on the application of a party who has agree a FNC waiver - see Dexia Credit Local SA v Patrimonio del Trentino SpA [2024] EWHC 2717 (KB) per Bryan J at [153]-[155] and [164].*"

92. Accordingly, following this line of authority, if the jurisdiction agreements in the Facilities were confined to the FNC waiver clause, the Court would retain a discretion to grant a stay on *forum non conveniens* grounds, even though the parties had agreed not to contend that England was not a convenient or suitable forum and even though the discretion could be exercised only on "*very strong or exceptional grounds*".

93. However, the jurisdiction agreements in the Facilities contain the additional provision recording the parties' agreement between the Claimant and the Defendants that "*the courts of England are the most appropriate and convenient courts to settle Disputes*" (as defined). Applying the principle of contractual estoppel, it seems to me that the Defendants are estopped from contending that England is not the more suitable forum for the resolution of the Claimant's claims under the Facilities.

94. Of course, it might be said that the additional agreement as to the suitability of England as the forum for the resolution of Disputes adds little or nothing to the FNC waiver clause, but I do not consider that is so. The promise not to argue that England is not the most appropriate forum is different from an agreement that England is the most appropriate forum. In those circumstances, I do not consider that the Defendants are contractually able to argue that England is not the most appropriate forum, having agreed that it is.

95. Accordingly, I would have refused the Defendants' application on this additional ground.

Did the Second Defendant submit to the jurisdiction?

96. There was a further issue, which no longer remains relevant, namely whether the Second Defendant has - as the Claimant contends - submitted to the jurisdiction. This issue would have had to be determined if I had accepted that there were sufficiently strong reasons to grant a stay and there was no applicable estoppel. As I have not come to that conclusion,

this issue of submission to the jurisdiction does not arise. Nevertheless, as it was argued, I shall deal with it briefly.

97. The chronology of events giving rise to this issue is as follows:

(1) On 5th February 2025, the Claimant issued the Claim Form instituting these proceedings two days after serving notice of acceleration of the debt due under the Joint Facility. The Second Defendant became aware of the Claim Form on 6th February 2025 (his first witness statement, para. 43).

(2) Initially, the First and Second Defendants jointly instructed a solicitor and a barrister. However, the Second Defendant was advised that he and the First Defendant should not be represented by the same solicitor and barrister (his first witness statement, para. 44-45; and para. 8 of the first witness statement dated 19th March 2025 of Mr Andrew Frake of Knights Professional Services Limited ("**Knights**")).

(3) On 19th February 2025, the First Defendant filed an acknowledgment of service ("**AOS**") indicating an intention to contest jurisdiction.

(4) On Friday 21st February 2025, the Second Defendant instructed Knights. The Second Defendant's AOS had to be filed on Monday 24th February 2025 (the next working day).

(5) On 24th February 2025, Knights filed an AOS on behalf of the Second Defendant, indicating an intention to defend the claim, and not indicating an intention to contest jurisdiction.

(6) On the same day, 24th February 2025, Knights wrote to the Claimant's solicitors, Sidley Austin LLP ("**Sidley Austin**"), serving the AOS and stating that "*Given our recent instruction and the complexity of the matter, we request that an extension of 28-days is agreed for our Client's Defence*".

(7) On 3rd March 2025, Sidley Austin responded to Knights' request by stating that the Claimant "*is prepared to consent to an extension until 4pm on 19 March 2025 for your client to file and serve his Defence (that being the same date by which the First Defendant is required to file his application to challenge the Court's jurisdiction)*".

(8) There followed a dispute between the Claimant's and the Second Defendant's solicitors as to whether an extension of time had been agreed.

(9) On 13th March 2025, Knights stated their client's position as to whether an extension of time for the filing of a defence had been agreed, and added that "*We have now had an opportunity to take our Client's instructions, and we have instructed leading Counsel who has advised on this matter. We have been in conference with Counsel this morning. As a result, we can now confirm that the Second Defendant also intends to challenge jurisdiction in this matter. As such, we will be issuing an application in the coming days … As a consequence of the above, the Second Defendant will not be filing a Defence by 19 March 2025 in any event*".

(10) On 14th March 2025, Sidley Austin informed Knights that the Second Defendant had submitted to the jurisdiction.

(11) On 19th March 2025, the Second Defendant applied for an order pursuant to CPR Part 11 that the Court should not exercise its jurisdiction in respect of the Claimant's claims.

The parties' submissions

98. Mr MacDonald KC submitted on behalf of the Claimant that the Second Defendant has submitted to the jurisdiction, because:

(1) The Second Defendant's instructed solicitors, Knights Professional Services Ltd ("**Knights**"), filed an AOS on 24th February 2025 which ticked the intention to defend box, not the intention to challenge jurisdiction box. Then, on the same day, Knights wrote to the Claimant's solicitors seeking a 28-day extension of time for the service of the Second Defendant's defence. Then, on 12th March 2025, Knights wrote to the Court stating (incorrectly) that an extension for the serving of the defence until 19th March 2025 had been agreed. All this was done without any reservation of the Second Defendant's rights as to jurisdiction or any indication that the Second Defendant intended to contest jurisdiction.

(2) It was only on 13th March 2025, apparently following a meeting with Leading Counsel, that the Second Defendant belatedly changed his position and communicated an intention to contest and to amend his AOS. By then, however, it was too late, as the Second Defendants' solicitors' prior actions unequivocally indicated an intention to fight the claim on the merits inconsistent with a jurisdiction challenge and thereby submitted to the Court's jurisdiction (*AELF MSN 242 LLC v De Surinaamse Luchtvaart Maatschappij NV* [2021] EWHC 3482 (Comm); [2022] 1 WLR 2181).

99. Mr Cook on behalf of the Second Defendant submitted that he had not submitted to the jurisdiction, as the Claimant contends, because:

(1) Any conduct on the part of a defendant prior to the deadline for filing a Part 11 application must be "*wholly unequivocal*" to amount to a submission to jurisdiction and a waiver of the right to challenge jurisdiction (*SMAY Investments Ltd v Sachdev* [2003] EWHC 474 (Ch); [2003] 1 WLR 1973, para. 41). The question of submission to jurisdiction is highly fact specific. A defendant who indicates an intention to defend the claim on an AOS does not, without more, submit to jurisdiction if the defendant then goes on to make a CPR Part 11 application in time, as is the case here (*AELF MSN 242 LLC v De Surinaamse Luchtvaart Maatschappij NV* [2021] EWHC 3482 (Comm); [2022] 1 WLR 2181, para. 63(6)).

(2) Although a request or application for an extension of time to serve a defence might constitute a submission to jurisdiction (*AELF MSN 242 LLC v De Surinaamse Luchtvaart Maatschappij NV* [2021] EWHC 3482 (Comm); [2022] 1 WLR 2181, para. 63(5)), whether or not it does so depends on the facts (*The Burns-Anderson Independent Network plc v Wheeler* [2005] EWHC 575 (QB); [2005] 1 Lloyd's Rep 580, para. 34). Both of these decisions are distinguishable on the facts. In *AELF*, the Court also relied on the fact that there had been no indication at all by

the defendant of its intention to contest the Court's jurisdiction (or reserving its right to do so) prior to its filing its CPR Part 11 application (para. 73). In *Burns-Anderson*, in addition to an extension of time for the defence, the defendant had also requested disclosure of documentation which was said to be required in order to enable him to prepare a defence.

(3) Similarly, in *Global Multimedia International Ltd v Ara Media Services* [2006] EWHC 3612 (Ch), the defendant had: (i) engaged with and recognised the Court's directions to trial, (ii) indicated an intention to defend the claim in its AOS, (iii) sought an extension of time for its defence, (iv) engaged in the merits of the claim by writing to the claimant threatening a strike out application, and (v) failed to give any indication of its intention to contest jurisdiction for a period of 5 weeks. The Court concluded that the defendant had submitted to the jurisdiction (para. 30-31).

(4) By contrast, in the present case, at no point did the Second Defendant or his solicitors engage with the merits of the Claimant's claim against the Second Defendant and did not make any requests for disclosure from the Claimant nor threaten any applications. The request by the Second Defendant for an extension of time to file his defence was made at the same time as serving the AOS and under circumstances, communicated to the Claimant's solicitors, that Knights had only just been instructed as the Second Defendant's solicitors (and, implicitly, were still considering the position). On its own case, the Claimant did not agree to the Second Defendant's request for an extension of time for the defence. It was made very clear by Knights on 13th March 2025 that the Second Defendant was intending to contest the Court's jurisdiction (11 days before the deadline of any CPR Part 11 application). None of this conduct amounted to a "*wholly unequivocal*" submission to jurisdiction or a waiver of the Second Defendant's right to challenge the exercise of the Court's jurisdiction.

(5) In any event, the Court has recognised that a defendant who has submitted to the jurisdiction is not by that reason alone debarred thereafter from making an application for a stay of the proceedings on the grounds of *forum non conveniens* (*Texan Management Ltd v Pacific Electric Wire & Cable Company Ltd* [2009] UKPC 46, para. 68; *Le Guevel-Mouly v AIG Europe Limited* [2016] EWHC 1794 (QB), para. 32; *Apollo Ventures Co Ltd v Manchanda* [2021] EWHC 3210 (Comm), para. 19). In this case, nothing has happened since the alleged submission to jurisdiction, save that the Second Defendant has informed the Claimant of its intention to challenge the exercise of the Court's jurisdiction some 10 days before the deadline for such an application and has made a timely CPR Part 11 application, in response to which the Claimant has filed evidence.

(6) Therefore, the Second Defendant has not submitted to the jurisdiction of the English courts and is (in any event) entitled to contest the exercise of that jurisdiction.

Decision

100. On the assumption that this issue remained relevant, I would have held that the Second Defendant had not submitted to the jurisdiction and was not thereby precluded from contending that England was not the more suitable forum.

101. I would have reached this conclusion for two reasons.

102. First, in deciding whether a defendant has submitted to the jurisdiction, one has to consider the entirety of the facts in order to undertake an objective appraisal of whether the defendant unequivocally recognised and submitted to the Court's jurisdiction; if the defendant's conduct cannot be explained other than on the basis that the defendant has submitted to the jurisdiction, the Court should so hold; any conduct which is more equivocal will not signal a submission to jurisdiction (*SMAY Investments Ltd v Sachdev* [2003] EWHC 474 (Ch); [2003] 1 WLR 1973, para. 41; *AELF MSN 242 LLC v De Surinaamse Luchtvaart Maatschappij NV* [2021] EWHC 3482 (Comm); [2022] 1 WLR 2181, para. 63(2)-(8)). I should note that I did not understand it to be alleged that there was a statutory submission to jurisdiction pursuant to CPR rule 11(5).

103. In the present case, there are two instances of the Second Defendant's conduct on 24th February 2025 which it is said amounted to a submission to jurisdiction, namely an indication of an intention to defend the claim in the AOS and the request for an extension of time for the service of a defence. The first of these, at least by itself, cannot amount to a submission to the jurisdiction (CPR rule 11(3); *AELF MSN 242 LLC v De Surinaamse Luchtvaart Maatschappij NV* [2021] EWHC 3482 (Comm); [2022] 1 WLR 2181, para. 63(6)). The second of these is, depending on the circumstances, capable of indicating a submission to jurisdiction, but equally it is capable of falling short of such a submission (*Burns-Anderson Independent Network plc v Wheeler* [2005] EWHC 575 (QB); [2005] 1 Lloyd's Rep 580, para. 34). Having regard to similar circumstances, in *AELF*, at para. 73-78, I decided that there was a submission to jurisdiction. However, as Mr Cook submitted, the present case is to be distinguished by reason of the fact that before the Second Defendant filed its application under CPR Part 11 on 19th March 2025, it had informed Sidley Austin of its intention to make such an application on 13th March 2025. This might have been because Sidley Austin had informed Knights on 3rd March 2025 that the Claimant was "*prepared to consent to an extension until 4pm on 19 March 2025 for your client to file and serve his Defence (that being the same date by which the First Defendant is required to file his application to challenge the Court's jurisdiction)*". In any event, taking the Second Defendant's conduct as a whole, I do not consider that there has been a submission to jurisdiction.

104. Second, and significantly, even if I had concluded that there had been a submission to jurisdiction by the Second Defendant, that by itself would not have prevented an application being made by the Second Defendant for an order that the Court should not exercise that jurisdiction on *forum non conveniens* grounds, because the power to grant a stay on such grounds presupposes that the Court has jurisdiction; the question instead is whether the Court should or should not exercise that jurisdiction.

105. In *Le Guevel-Mouly v AIG Europe Limited* [2016] EWHC 1794 (QB), at para. 31-32, Hickinbottom J made the point that the submission to jurisdiction whether pursuant to CPR rule 11(5) or on some other basis does not preclude a party from seeking a stay on *forum non conveniens* grounds:

> "*31. … Rule 11(5) can have no application to cases in which it is accepted that the English courts have jurisdiction but, it is contended, they should not exercise that discretion because another jurisdiction is more appropriate; because rule 11(5) can only have any substance in circumstances in which the jurisdiction of the English courts is or may be in issue, so that the defendant can, by tardiness,*

> *lose the opportunity of contending that it has no jurisdiction. There is no question of a defendant submitting or being treated as having submitted to the jurisdiction when the jurisdiction of the English courts is not in issue, but only whether the courts should be self-restrained in exercising that jurisdiction.*
>
> *32. Nor am I persuaded that, in this case, the Defendant voluntarily submitted to the jurisdiction in some other way. Ms Deal relied upon an agglomeration of elements to contend that it did. However, I do not consider that it voluntarily submitted to the jurisdiction as a result of steps it took prior to the issue of proceedings; and the simple fact that extensions of time for a Defence were sought and granted appears insufficient to amount to submission to the jurisdiction (see Texan Management at [85]). In my judgment, none of this amounted to an "unequivocal recognition that it was appropriate for the [English] court to exercise its jurisdiction" (at [86])*."

106. In reading this judgment, it is said that there has been neither a submission to jurisdiction nor a recognition that it was appropriate for the English Court to exercise its jurisdiction. As to the reference to there being no submission to jurisdiction, I think the point which Lord Collins sought to make in *Texan Management Ltd v Pacific Electric Wire & Cable Company Ltd* [2009] UKPC 46, at para. 85-86, was that there was no submission to jurisdiction of the Courts of the British Virgin Islands by the requests for extensions of time for the service of a defence, because the defendants "*were in any event subject to the jurisdiction as BVI companies*". That is, Lord Collins was stating that there had been no submission to jurisdiction where the Court already had jurisdiction against a defendant domiciled within the jurisdiction.

107. It is the latter reference to there being no recognition that it was appropriate for the English Court to exercise its jurisdiction, which is significant in this case. The mere fact that the Court has jurisdiction, whether as of right or by submission or otherwise, does not mean that the defendant cannot contend that the Court should not exercise that jurisdiction on *forum non conveniens* grounds.

108. Therefore, had it been relevant, I would have held that the Second Defendant was not precluded from applying for a stay on *forum non conveniens* grounds by reason of his having indicated an intention to defend in the AOS and having requested an extension of time for the service of a defence.

Conclusion

109. For the reasons explained above, I therefore dismiss the Defendants' applications for (a) a stay of these proceedings, (b) an order that the Court should not exercise its jurisdiction on *forum non conveniens* grounds, (c) any related declaratory relief, and (d) an order setting aside the Claim Form issued by the Claimant.

110. I am very grateful to all counsel for their helpful and thought-provoking submissions.