Neutral Citation Number: [2023] EWHC 3060 (Comm)

Case No: CL-2023-000051
Case No: CL-2023-000780

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, WC4A 1NL

Date: 4 December 2023

Before :

MR JUSTICE BRIGHT

- -

Between :

PT SERVICES MALTA LIMITED

Claimant

- and -

TECNOLOGIA EN ENTRETENIMIENTO CALIPLAY, S.A.P.I DE C.V.

And between:

PT SERVICES MALTA LIMITED

Claimant

- and -

(1) TECNOLOGIA EN ENTRETENIMIENTO CALIPLAY, S.A.P.I DE C.V.
(2) CORPORACION CALIENTE, S.A. DE C.V.
(3) HIPODROMO DE AGUA CALIENTE, S.A. DE C.V.
(4) IMPULSORA GEMINIS, S.A. DE C.V.
(5) ADMINISTRADORA REGION DEL NOROESTE, S.A. DE C.V.
(6) SEPTEMBER HOLDINGS B.V.
(7) GREEN TURTLE GLOBAL II LLC
(8) HAMCO EXPEDITIONS II LLC
(9) VIENA FOREVER HOLDINGS, INC.

Defendants

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Orlando Gledhill KC and Mehdi Baiou (instructed by Bryan Cave Leighton Paisner LLP) for the Claimant in both actions

Roger Masefield KC and Ryan James Turner (instructed by Quinn Emanuel Urquhart & Sullivan LLP) for the Defendant in CL-2023-000051 and the First Defendant in CL-2023-00780
Nathan Pillow KC and Stuart Cribb (instructed by Signature Litigation LLP) for the Ninth Defendant in CL-2023-000780

Hearing date: 27 November 2023

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Approved Judgment

This judgment was handed down remotely at 4:30pm on 04/12/2023 by circulation to the parties' representatives by e-mail and by release to the National Archives.

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Mr Justice Bright:

Introduction

1. This judgment follows a Return Date hearing, which was concerned with interim injunctive relief sought by the Claimant ("PTSM") from the Defendants in two different actions – CL-2023-000051 ("the SLS action") and CL-2023-000780 ("the FWA action").

2. The only Defendants which took an active part in the hearing were the Defendant in the SLS action/First Defendant in the FWA action ("Caliplay") and the Ninth Defendant in the FWA action ("Viena").

3. Shortly before the hearing, I received a letter from solicitors for the Second to Fifth and Seventh and Eighth Defendants in the FWA action, indicating that they did not wish to take part in the hearing, but might be willing to offer undertakings. By a further letter subsequent to the hearing, dated 28 November 2023, they have confirmed their willingness to undertake not to take steps to prevent PTSM from exercising its right to arbitrate under clause 27 of the FWA or to seek relief from any arbitral tribunal. They have also stated that they may be prepared to give further undertakings, depending on this judgment.

4. The Sixth Defendant appears to have no interest in the dispute.

Background

5. PTSM is part of a corporate group owned by Playtech plc ("PT plc") that provides software and related services that support online gaming activities. Caliplay is incorporated in Mexico. It already had an established presence in sports betting in that country, but in about 2014 wished to establish a presence in online gaming. PT plc and Caliplay started doing business together at about that time. Since then, Caliplay's online gaming activities have been very successful, and very profitable.

6. The Second Defendant in the FWA action ("Caliente") owns 99.9999998% of the shares in Caliplay. Viena owns 0.0000001% of the shares in Caliplay. With the exception of the Sixth Defendant (which no longer has any relevant role), the other Defendants in the FWA action are other members of the Caliente group or are connected to Caliente via shareholdings in group companies.

7. The overall contractual background is complicated and can be traced back to a Memorandum of Understanding dated 20 October 2013, between PT plc and Caliente ("the MOU"). The MOU noted the intention of the parties to enter into a definitive agreement, which (with any ancillary agreements) was to be subject to English law. The MOU stated that its own provisions were not intended to be legally binding, with the exception of provisions relating to confidentiality, costs, exclusivity and governing law and jurisdiction. By clause 17 (which was legally binding), the MOU itself and all negotiations and disputes arising out of or in connection with it or its formation were governed by the law of Mexico and subject to the exclusive jurisdiction of the courts of Mexico.

8. Thereafter, various successive substantive commercial agreements were entered into. The two that are the focus of the actions before me were the following:

   i) The first is a Framework Agreement dated 4 June 2021 ("the FWA"), entered into by PTSM with all the Defendants in the FWA action. This agreement contained provisions regarding the corporate structure and governance of Caliplay. These provisions largely protect the interests of PTSM in relation to Caliplay. Clause 27 of the FWA provides for Mexican law and for all disputes to be settled by arbitration in London under the rules of the ICC, with PTSM designating one arbitrator and Caliente designating a further arbitrator on behalf of all the Caliente parties (and those two designating a third arbitrator).

   ii) The second is a Software License and Services Agreement dated 4 June 2021 ("the SLS"), entered into between PTSM and Caliplay (among others). It provides for PTSM to provide software and related services to Caliplay, and for Caliplay to pay various fees that give PTSM a substantial share in Caliplay's profits. Clause 14 of the SLS provides for English law and the exclusive jurisdiction of the courts of London.

9. The success of Caliplay's online gaming activities means that the fees payable to PTSM are now very large. Caliplay wished to terminate part of the existing fee arrangement (by serving a redemption notice). This led to a dispute as to whether Caliplay was entitled to act in this manner, under the terms of the SLS.

10. PTSM commenced the SLS action on 5 February 2023, seeking declaratory relief to the effect that Caliplay was not entitled to serve a redemption notice. Caliplay served its Defence and Counterclaim on 31 March 2023, advancing a positive case under the terms of the SLS that it was entitled to serve a redemption notice and seeking its own declaratory relief as to its rights under the SLS. On 25 May 2023 it served a Reply to Defence to Counterclaim, against setting out a positive case as to the meaning and effect of the SLS and its rights under the SLS.

11. On 22 August 2023, Caliplay commenced proceedings in the 46th Civil Court of Mexico against PT plc and PTSM (and others), asserting that Caliplay had been deceived into entering the FWA and the SLS and both agreements therefore should be treated as ineffective under Mexican law. The final relief requested by Caliplay was intended to establish that the FWA and the SLS were ineffective (in whole or at least in part). Caliplay also sought and obtained interim measures from the Mexican court, notably (i) that PTSM must not suspend, interrupt, stop or slow down the system and software it provides under the SLS, (ii) that the fees under the SLS should not be paid by Caliplay to PTSM but into a trust account (in the event, an account set up with Intercam Banco SA – "Intercam") and (iii) disapplying a number of the rights and obligations under the FWA that protect the interests of PTSM and PT plc in Caliplay.

12. PTSM did not learn of this development until shortly before a CMC hearing in the SLS action, which took place on 6 October 2023. Its response was twofold.

13. First, on 27 October 2023, it commenced proceedings in the 63rd Civil Court in Mexico under the FWA, against the other parties to the FWA. These proceedings were expressly in support of the arbitration proceedings that PTSM said it intended to commence under the FWA. The 63rd Civil Court made an Order on 31 October 2023 granting provisional

relief requiring the other parties (i.e., the Defendants in the FWA action before this Court) to comply with the FWA terms and to refrain from any legal proceedings other than arbitration under clause 27 of the FWA.

14. Second, on 31 October 2023 it made without notice application to this Court in both actions for injunctive relief. Foxton J made an Order in each action that the Defendants must not take any steps to pursue its claims or seek any further measures in the 46th Civil Court proceedings or commence or pursue any other proceedings.

15. The Return Date was initially set as 10 November 2023, but in the meantime PTSM learned of further proceedings, which had been commenced in Mexico by Viena in the 23rd Civil Court in Mexico on 28 August 2023 (i.e., a few days after the separate proceedings commenced by Caliplay in the 46th Civil Court). Viena sought provisional injunctive relief in support of an intended arbitration under the FWA agreement, which Viena said it would file against PTSM. The Order sought from and granted by the 23rd Civil Court on 20 September 2023 suspended the FWA in its entirety, as well as suspending various specific provisions in the FWA and protections derived from it. It also ordered PTSM to refrain from initiating any judicial or arbitration proceedings that aimed to suspend, interrupt or stop online gaming, and to refrain from suspending, interrupting or paralysing the services provided to Caliplay; it thus had an effect on the SLS, as well as on the FWA.

16. On 10 November 2023, the Return Date was adjourned to the date of the hearing before me, against various undertakings that preserved the position pending this judgment.

Summary of PTSM's arguments

17. In the SLS action, PTSM sought an order against Caliplay in final terms, including the following provisions:

    i) An injunction restraining Caliplay from pursuing legal proceedings in Mexico and to bring to an end the 46th Civil Court proceedings. Further provisions of the order sought included:

    ii) An order that Caliplay should pay to PTSM a € sum equivalent to the monies already paid into the Intercam account.

    iii) An order that Caliplay should resume the payment of fees to PTSM.

    iv) An order that Caliplay be restrained from acting or failing to act in reliance on the measures in the 46th Civil Court Order of 28 August 2023 in so far as relevant to the SLS.

    v) An order that PTSM have permission to amend its Claim Form and Particulars of Claim so as to bring a claim for breach of clause 14 of the SLS and for failure to pay the fees due under the SLS, seeking injunctive relief and damages.

18. Counsel for PTSM, Mr Orlando Gledhill KC, said that Caliplay's proceedings in Mexico were a clear and obvious breach of clause 14 of the SLS – so much so that it was appropriate to grant final relief.

19. I was concerned that it was anomalous, at an interlocutory hearing in an action where the trial is currently fixed to take place in October 2024, to ask the Court for final injunctive relief, but simultaneously to amend the claim so that the relief sought at trial will (on the face of things) include precisely the same injunctive relief as well as damages for the breach of clause 14. I suggested to Mr Gledhill KC that it seemed more appropriate that any injunctive relief granted at this hearing in the SLS action should be made until judgment or further order. He indicated that this was PTSM's alternative position.

20. In the FWA action, PTSM sought an order that included the following provisions:

    i) An interim injunction to restrain Caliplay from pursuing legal proceedings in Mexico concerning the FWA, except to bring to an end the 46th Civil Court proceedings.

    ii) An interim injunction against Viena, in similar terms, from pursuing legal proceedings in Mexico concerning the FWA, except to bring to an end the 23rd Civil Court Proceedings.

    iii) An interim injunction against the other Defendants, restraining them from commencing or pursuing legal proceedings in Mexico concerning the FWA.

    iv) An order that all the Defendants in the FWA action be restrained from acting or failing to act in reliance on the measures in the 46th Civil Court Order of 28 August 2023 or the measures in the 23rd Civil Court Order of 20 September 2023.

21. Mr Gledhill KC made it clear that he regarded all the relief he sought as part and parcel of anti-suit injunctive relief. In the context of the SLS action, whether it is right to regard all the relief sought as ancillary to an anti-suit injunction may not matter greatly. In the context of the FWA action, where there is an arbitration agreement, it does matter.

22. In the arbitration context, it is necessary to keep in mind the distinction between (i) an injunction in support of the negative promise not to bring foreign proceedings – where the Court's jurisdiction is under section 37 of the Senior Courts Act 1981, see *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, at [48] per Lord Mance JSC; and (ii) an injunction for the purposes of and in relation to arbitral proceedings – where the jurisdiction is under section 44 of the Arbitration Act 1996.

23. Where an application is properly brought under section 37 of the Senior Courts Act 1981, it is relevant for the Court to consider the urgency of the application and whether the arbitral tribunal or institution is unable to act effectively. However, in such a case, these are not statutory criteria. They are simply some of the factors that the Court will take into account in the overall exercise of its discretion, conscious that the section 37 power must be exercised with sensitivity to the role of the arbitrators (and, for that matter, with sensitivity to the foreign Court). I note the similar view of Phillips J in *Southport Success SA v Tsingshan Holding Group Co. Ltd* [2015] EWHC 1974 (Comm), at [25].

24. By contrast, where an application is or should be brought under section 44 of the Arbitration Act 1996, the Court's jurisdiction only exists (i) if the case is one of urgency (or with the agreement of the tribunal or of both parties) and (ii) if the arbitral tribunal or institution is unable to act effectively: see section 44 (3), (4) and (5).

25. Mr Gledhill KC said that the circumstances of this case include urgency, because of the far-reaching nature of the interim relief obtained by Caliplay and Viena in Mexico and its adverse consequences for PTSM. He also said that the arbitral tribunal has not yet been constituted, and that this was likely to take until (probably) January 2024. However, he accepted that PTSM could in principle have applied to the ICC under its emergency procedures (which he said would take 17 days) but had not done so.

26. Mr Gledhill KC said that, in so far as Caliplay's proceedings in the 46th Civil Court affected the FWA and sought final relief in relation to it, they were again a clear and obvious breach of clause 27 of the FWA.

27. As regards to Viena's proceedings in the 23rd Civil Court, Mr Gledhill KC said that they were a breach of clause 27, but, even if not, they still justified the granting of injunctive relief because they were vexatious and oppressive. He pointed to the fact that Viena is effectively controlled by Caliente and said that it was significant that Viena's application to the 23rd Court was made a few days after Caliplay had obtained the Order made by the 46th Civil Court on 25 August 2023. Moreover, after obtaining its own Order, Viena did not commence arbitration proceedings, and the Order itself was never served on PTSM (PTSM discovered the existence of the Order only via the diligence of its Mexican lawyers).

28. Finally, Mr Gledhill KC confirmed that it is not PTSM's present intention to stop supplying services under the SLS. It wants to continue to perform the SLS, in return for the fees payable under the SLS. I asked whether PTSM would be prepared to provide an undertaking to this effect. Subsequent to the hearing, PTSM's solicitors confirmed this (subject to suitable wording being finalised).

29. This was a very helpful concession, for which I am grateful. It is apparent from the repeated references to this in the proceedings in Mexico that one of Caliplay's and Viena's main concerns is that there should be no disruption to the services provided by PTSM, which I understand to be essential to Caliplay's online gaming business. If I had thought that there was a serious risk that PTSM might disrupt the services under the SLS, I also would have been concerned. The fact that Counsel for PTSM has stated, in public and on the record, that PTSM intends to continue to provide those services, and that PTSM gives a formal undertaking to this Court to that effect, is therefore a great comfort – to me, but also (logically) to the Courts in Mexico and, ultimately, to Caliplay. It makes my decision much easier. I am sure that it will also assist my fellow judges in Mexico.

Summary of Caliplay's arguments

30. Caliplay's case before me began with the positive case advanced by Caliplay in its Statement of Claim in the 46th Civil Court. This case is that, from the MOU onwards, Caliente and then Caliplay have acted under a mistake as to the redemption rights that ultimately exist under the SLS, to the knowledge of PT plc and/or PTSM. This renders

ineffective the negotiations that followed the MOU and all the agreements that have flowed from those negotiations, including the FWA and the SLS.

31. On this basis, the final relief that Caliplay seeks in Mexico includes declaratory relief against PT plc that the MOU is ineffective, and rather more extensive relief against PTSM that includes several declarations regarding the FWA and SLS. Caliplay also seeks financial relief to determine the market value that Caliplay should have paid in respect of PTSM's services and to recover some of the fees already paid by Caliplay under the SLS. It further seeks reforms to Caliplay's articles of association and board resolutions and other alterations to the corporate governance presently covered by the FWA.

32. The interim measures granted by the 46th Civil Court on 25 August 2023 were in support of that substantive claim.

33. Counsel for Caliplay, Mr Roger Masefield KC, said that, because the issues arising originally stem from the MOU and the negotiations under it, they are caught by the Mexican Court jurisdiction clause in the MOU. Furthermore, it is significant that the arbitration agreement in the FWA is, itself, subject to Mexican law. Under Mexican law, arbitration agreements are read narrowly, rather than it being presumed that the arbitrators were intended to have broad powers to decide all the parties' disputes.

34. Mr Masefield KC said that these Mexican law issues, relating to the construction, meaning and effect of clause 27 of the FWA, were sufficiently complex that they could not be resolved at this hearing, but should be reserved to an expedited trial of preliminary issues, to take place after the exchange of detailed expert evidence on Mexican law. I indicated that the Court could make four days available from 29 January 2024. Mr Masefield KC said that this would be convenient.

35. In any event, Mr Masefield KC said that it would not be appropriate to grant injunctive relief that would in effect remove PTSM from the proceedings before the 46th Civil Court, because this would necessarily mean that the balance of the claim (against PT plc) would also fail.

36. He next said that PTSM had submitted to the jurisdiction of the Mexican Courts.

37. He also said that PTSM had not made full and frank disclosure when it obtained the Orders made by Foxton J on 31 October 2023. However, he made it clear that he did not suggest that this was relied on as a ground justifying the discharge or refusal of injunctive relief (if otherwise appropriate), it was merely relied on in relation to costs. I therefore say no more about full and frank disclosure in this judgment.

Summary of Viena's arguments

38. While Caliplay disputed the effectiveness and applicability of clause 27 of the FWA (along with clause 14 of the SLS), Viena accepted that its disputes with PTSM were caught by that clause and must be resolved by arbitration in London under the ICC rules.

39. Counsel for Viena, Mr Nathan Pillow KC, said that it had been perfectly proper for Viena to seek interim measures from the 23rd Civil Court in support of an intended

arbitration, this being expressly permitted under Article 28.2 of the ICC Rules. He also said that there is now no urgency, so far as Viena is concerned, because it will comply with the Order made by the 63rd Civil Court on 31 October 2023 (subject to its right to challenge that Order on appeal in Mexico). There is, therefore, no immediate danger that Viena will use either the proceedings before the 46th Civil Court or its own proceedings before the 23rd Civil Court to circumvent the protections that the FWA puts in place for PTSM in relation to Caliplay's corporate governance.

The position as between PTSM and Caliplay, under the SLS

40. By agreeing that the SLS is subject to English law and English exclusive jurisdiction, the parties have expressly agreed that the effectiveness of the SLS must be determined by the Courts of this country, applying English contract law. On the face of things, it is difficult to see how that is consistent with Caliplay asking the 46th Civil Court in Mexico to rule on the effectiveness of the SLS, and invoking principles of Mexican law.

41. Mr Masefield KC submitted that the MOU, the FWA and the SLS should all be regarded as a suite of contracts, so that they and their respective dispute-resolution provisions should be considered together. He referred to *AmTrust Europe Ltd v Trust Risk Group SpA* [2014] EWCA Civ 437, at [44] to [48] per Beatson LJ, and *BNP Paribas SA v Trattamento Rifiuti Metropolitani SpA* [2019] EWCA Civ 768, in a passage from the judgment of Hamblen LJ beginning at [63] and culminating with a six-point approach at [68]. These authorities cover the situation where the overall contractual arrangements overlap, as do the dispute-resolution provisions that they contain, so that it may be difficult to work out under which provision a particular dispute should be treated as falling.

42. I accept that it is often useful to consider a single contract in the context of the other contracts (if any) to which it relates, just as it is almost invariably useful to consider a single clause in the context of the other clauses to which it relates. However, this is not a case where there is any difficulty seeing where the scope of clause 14 of the SLS begins and where the scope of clause 27 of the FWA ends; or, indeed, where the scope of clause 17 of the MOU begins and ends. Each of these provisions is concerned with a distinct subject-matter, reflecting the subject-matter of the individual contract in which it sits. The fact that Caliplay has chosen to commence proceedings in Mexico which addresses not only issues arising under the SLS but also issues arising under the FWA (and, to a limited degree, issues arising out of the MOU) does not affect this.

43. It seems clear to me that the parties intended that a dispute as to the effectiveness of the SLS should be resolved in accordance with clause 14 of the SLS, and a dispute as to the effectiveness of the FWA should be resolved in accordance with clause 27 of the FWA. The fact that these agreements were concluded eight years after the MOU, and not between the same parties, makes it especially unlikely that disputes as to their effectiveness were intended to be resolved in accordance with clause 17 of the MOU, rather than under their own dispute-resolution provisions.

44. As to the submission that the effective removal of PTSM from the 46th Civil Court proceedings would mean the end of those proceedings, this is a smokescreen. It is obvious that the real goal of those proceedings has always been to obtain interim and then final relief in relation to the SLS and the FWA, as against PTSM. Those 46th Civil Court proceedings are really driven by the (as Caliplay sees matters) high fees payable

under the SLS and the correspondingly high redemption cost. The object of the proceedings has never been to get mere declaratory relief against PT plc, in respect of an MOU which no longer has any live function.

45. Turning finally to the submission that PTSM had submitted to Mexican jurisdiction, although Mr Masefield KC initially suggested that this stemmed from PTSM's own proceedings before the 63rd Civil Court, all the points that he advanced before me under this heading related to PTSM's response to the proceedings commenced by Caliplay, in the proceedings before the 46th Civil Court. However, all the documents shown to me as served on behalf of PTSM in those proceedings contained expressed reservations as to jurisdiction, as Mr Gledhill KC carefully demonstrated.

46. I therefore accept that PTSM is entitled to an antisuit injunction against Caliplay in the SLS action. This injunction will be an order made on an interim basis, until judgment, and will restrain Caliplay from pursuing the proceedings before the 46th Civil Court (or any proceedings in Mexico relating to the SLS) and will require Caliplay to bring them to an immediate end, as against PTSM.

47. The effect of such an injunction should be to set aside all the interim relief granted to Caliplay to date in relation to the SLS. Among other things, this will remove the justification currently relied on by Caliplay for paying monies in respect of fees to the Intercam account, rather than to PTSM. I therefore expect future fee payments to be made by Caliplay to PTSM, in accordance with the terms of the SLS, until the issues between the parties are resolved at trial. What those issues may comprise – notably, whether Caliplay will want to amend its case so as to run the points foreshadowed before me, to the effect that the SLS is wholly or partially ineffective and that the fees and/or the cost of redemption fall to be reduced – is a matter for Caliplay to consider, when it comes to plead back to PTSM's Amended Particulars of Claim.

48. None of this will have any bearing on the monies that Caliplay has paid over the last few months into the account with Intercam. If the trial judge accepts that it was a breach of contract for Caliplay to make those payments, rather than paying fees as provided under the SLS, the judgment after trial will presumably include an award in debt or in damages. However, the applications before me have not included an application for summary judgment on this part of the claim and no proper basis has been advanced for injunctive relief requiring payment of the default amounts, whether on a final basis or an interim basis. There was some evidence that if uncertainty about PTSM's fees were to continue for a substantial period in the future, this might adversely affect the perceived financial strength of PTSM and/or PT plc, but this was not really developed. It was not suggested before me that it is critical for PTSM to receive a sum equivalent to the sums held by Intercam now, rather than after trial. My order therefore will not require Caliplay to make such a payment. That will be for the trial judge.

49. Nor am I convinced that it is either necessary or practical for my order to restrain Caliplay from acting or failing to act in reliance on the measures in the 46th Civil Court Order of 28 August 2023, in so far as relevant to the SLS. This is partly because the terms of the draft Order proposed by PTSM on this point are vague. However, it is mainly because such a provision will no longer be material, if the 46th Civil Court proceedings are brought to an immediate end as against PTSM, and if the interim relief granted thereunder is set aside.

The position between PTSM and Caliplay, under the FWA

50. The position here is essentially the same as under the SLS. There are two differences that I should mention, being points that did not arise as between PTSM and Caliplay, under the SLS.

51. The first is Mr Masefield KC's argument that Mexican law requires arbitration agreements to be construed strictly, because they are a derogation of the rights of access to the Court. Accordingly (he said), they are presumed not to extend to the determination of a dispute as to the validity of the relevant contract or to declare its nullity. This requires clear and precise terms; if there is any doubt as to the scope of the arbitration clause, it must be construed narrowly.

52. Caliplay's Mexican law evidence on this point was not entirely accepted by PTSM. However, it is not necessary for me to enter into that debate. Here, the arbitration agreement in clause 27 contains two features that, in my view, contain exactly the clear and precise terms that Mexican law is said to consider necessary:

    i) First, the arbitration in question is to take place in London. That means that it is subject to the English Arbitration Act 1996. Section 30 of the Arbitration Act 1996 provides that the tribunal can rule on its own substantive jurisdiction, unless otherwise agreed by the parties. Such a ruling generally necessitates deciding whether the contract containing the arbitration agreement is valid, and it will do in this case. Pursuant to section 2 of the Arbitration Act 1996, section 30 applies irrespective of the governing law of the arbitration agreement.

    ii) Second, the arbitration is subject to the ICC Rules. Article 6 of the ICC Rules expressly provides that the tribunal can determine any question of jurisdiction, and that the tribunal's jurisdiction is not affected by any allegation that the contract is non-existent or null and void (as long as the tribunal upholds the validity of the arbitration agreement).

53. It follows that, even taking into account the strict approach of Mexican law, clause 27 of the FWA gives the ICC tribunal jurisdiction to determine a dispute as to the validity of the FWA.

54. The second point that did not arise under the SLS, but is relevant under the FWA, relates to the distinction between (i) the jurisdiction to grant an antisuit injunction under section 37 of the Senior Courts Act 1981, and (ii) the jurisdiction to grant relief in aid of arbitral proceedings under section 44 of the Arbitration Act 1996.

55. I have no qualms about granting an order under section 37 of the Senior Courts Act 1981 that restrains Caliplay from pursuing the proceedings before the 46th Civil Court (or any other proceedings in Mexico relating to the FWA) and will require Caliplay to bring those proceedings to an immediate end, as against PTSM.

56. As explained above, I would expect this to mean that it is not necessary also to order that Caliplay should be restrained from acting or failing to act in reliance on any of the measures in the Order of 28 August 2023. However, here, there is the further problem that such an Order would be one aimed not at enforcing compliance with clause 27 of the FWA, i.e., the arbitration agreement, but with the substantive contractual clauses of

the FWA. To make such an order would stray into the territory of section 44 of the Arbitration Act 1996. I am not persuaded that I have jurisdiction to make such an order – in particular, because of section 44(5).

The position as between PTSM and Viena, under the FWA

57. I accept, in principle, that, on 28 August 2023, Viena was entitled to apply to the 23rd Civil Court in Mexico for interim relief in aid of an intended arbitration. However, I agree with Mr Gledhill KC about the following:

    i) It is striking that Viena's application was made while the outcome of the application made a few days earlier by Caliplay, before the 46th Court, was still pending. I have seen no positive evidence that Viena knew about Caliplay's application, but nor have I seen any evidence to the contrary. Given the corporate connections between the two companies (via Caliente), it seems unlikely that Viena did not know.

    ii) It is also striking that, having obtained the Order of 20 September 2023, Viena did not seek to rely on it in any way.

    iii) Finally, it is striking that Viena's application included the positive statement that Viena would initiate arbitration proceedings under the FWA, yet Viena did not do so. There has been no real explanation for Viena's failure to commence arbitration proceedings.

58. These striking features lay behind Mr Gledhill KC's submissions that Viena's proceedings before the 23rd Civil Court were vexatious and oppressive – essentially because they were a covert effort to outflank PTSM, and/or an attempt to overwhelm PTSM by requiring it to put out many simultaneous fires, deliberately started in different locations.

59. While I agree with Mr Gledhill KC that Viena's conduct to date involves some curious and unexplained features, I do not accept that Viena has been vexatious or oppressive. Fundamentally, this is because the very fact that the Order of 20 September 2023 was never served, and the further fact that it has been largely overtaken by the Order of the 63rd Civil Court of 31 October 2023 (which Mr Pillow KC has told me Viena will respect), mean that Viena's proceedings before the 23rd Civil Court had not, in fact, vexed or oppressed PTSM.

60. Furthermore, in one respect, much of this is now moot. Arbitration proceedings have been commenced against Viena by PTSM. The matters referred to arbitration by PTSM include the validity of the FWA and the effectiveness of the FWA provisions that protect PTSM and which Viena targeted in its application. Mr Pillow KC did not demur from Mr Gledhill KC's suggestion that the arbitral tribunal is likely to be constituted in early January 2024 – always assuming sensible co-operation by all parties (which, I have no doubt, the ICC will be astute to police). Thereafter (even if not earlier), there will not be any reason for any party to seek relief from any Court, rather than from the arbitral tribunal. Mr Pillow KC accepted that interim relief from the tribunal, or even emergency relief under Article 29 of the ICC Rules, would be enforceable in Mexico (just as it would be in the UK).

61. I do not expect Viena to appeal or otherwise challenge the Order of the 63rd Civil Court of 31 October 2023. It has no reason to do so, given that an arbitration tribunal will soon be fully constituted, and – as Viena has expressly acknowledged – it will be the right tribunal to decide all the points that Viena may wish to raise under the FWA. There will certainly no longer be any sensible justification for Viena to seek further interim relief from the 23rd Civil Court or any other court in Mexico. In future, it can and should apply to the arbitrators.

62. Indeed, if Viena or any other party were, in future, to apply to a court rather than to the arbitrators, this might well be regarded as vexatious and oppressive. If this were to happen, in circumstances amounting to vexation or oppression, I would expect the party or parties affected to apply to the arbitrators for interim relief to prevent such vexation or oppression.

63. If there were evidence before me showing a real prospect that Viena (or any other of the other Defendants) might take further steps in Mexico, it is conceivable that the circumstances would make this vexatious and oppressive. However, that is a conjecture. This conjectural risk is not sufficient for me now to restrain Viena from making any such application: that would be too gross an interference by the Courts of this country with proceedings before the Courts of Mexico. However, it does seem proportionate and reasonable to require Viena to give notice before acting in Mexico.

64. I will be content not to make any order against Viena, if Viena is content to give an undertaking not to take any further steps in Mexico in relation to the FWA or the SLS, without first giving 21 days' notice to PTSM. The significance of this notice period is that (i) it exceeds the 17 days necessary under the ICC emergency arbitrator procedure and (ii) it allows for the inevitability that some members of all the legal teams will be unavailable over Christmas/New Year. If Viena is not prepared to give such an undertaking, I will make an order to the same effect.

The position between PTSM and the other Defendants

65. In the light of the helpful letter received from the solicitors for the Second to Fifth and Seventh and Eighth Defendants, I do not intend to make any order against them, in the expectation that they will give undertakings (i) not to take steps to prevent PTSM from exercising its right to arbitrate under clause 27 of the FWA or to seek relief from any arbitral tribunal, and (ii) not to take any other steps in Mexico in relation to the FWA or the SLS, without first giving 21 days' notice to PTSM. I anticipate that they will have been able to confirm their willingness to give these undertakings before this judgment is handed down.

66. I do not see that any order is required as against the Sixth Defendant.

Costs

67. I will decide all costs issues after handing down this judgment. In the meantime, it may assist the parties if I give them my preliminary views on two points.

68. First, as between PTSM and Caliplay, I have mentioned that Mr Masefield KC made some points about full and frank disclosure, foreshadowing his position on costs. In the interests of saving time, I discouraged Mr Gledhill KC from addressing me on those

points in his reply. Subject to any further points from Mr Masefield KC on full and frank disclosure, I still do not need to hear from Mr Gledhill KC on full and frank disclosure.

69. Second, as between PTSM and the other Defendants, the normal costs disposal in interim relief applications like this is for costs to be reserved to the merits tribunal – here, the arbitrators. That is what I am likely to order, unless one or another party wishes to say that there is a compelling reason to do something different. For the avoidance of doubt, this does not apply as between PTSM and Caliplay.

Post script

70. The hearing of PTSM's applications took place on 27 November 2023. A draft judgment, reflected by the text set out in paragraphs 1 to 69 above, was circulated in the morning of 29 November 2023, with a request for typographical corrections and written submissions on consequential directions to be received by my clerk in the afternoon of 30 November 2023. The parties were told that my judgment would be handed down today, 1 December 2023.

71. At 22:51 on 29 November 2023, my clerk received an email from the solicitors for Viena, stating that a challenge to the decision of the 63rd Civil Court (the "Amparo") had been filed on behalf of Viena on 23 November 2023. This email stated that, on 29 November 2023, the Mexican Federal Court had confirmed acceptance of the Amparo; had suspended various provisions of the interim relief granted by the Order of the 63rd Civil Court; and that this suspension would remain in place until 5 December 2023, at which point the Mexican Federal Court would consider the reasons given to it by the 63rd Civil Court as to why the Order of that Court was granted, and would determine whether the suspension should continue until a substantive consideration of the Amparo at a hearing to take place at the earliest on 29 December 2023 or at some point in January 2024, at which all parties to the 63rd Civil Court proceedings would be invited to be represented.

72. This was a great surprise to me. Paragraphs 39 and 59 above reflected assurances given to me by Mr Pillow KC, on behalf of Viena. I understand that, when he gave those assurances, Mr Pillow KC did not appreciate that the Amparo had already been lodged in Mexico.

73. Furthermore, as I observed to Mr Pillow KC in submissions, and as reflected in paragraph 60 and 61 above, Viena has no reason to seek relief in Mexico. Arbitration proceedings have now been commenced under the FWA. Whatever disputes there may be in respect of the FWA, they can and should be resolved by the ICC arbitration tribunal. Viena can and should be confident not only that its case will be decided fairly by the ICC arbitration tribunal, but also that it will be decided according to Mexican law.

74. Indeed, I have learnt today that Viena's solicitors are now on the record in the ICC arbitration, and that an arbitrator has been nominated on behalf of the Caliente parties (including Viena). If PTSM and the Caliente parties agree to their respective nominees selecting the third arbitrator promptly, and if they request the ICC to expedite the process of appointing the arbitral, it should be possible for the full arbitration tribunal to be in place within days. Viena has indicated its willingness to give an undertaking to

this effect, and I would be disappointed if the Caliente parties and PTSM were not to provide the same co-operation.

75. I also noted in paragraph 62 above that, if Viena were to apply to a court rather than to the arbitrators, this might well be vexatious or oppressive. I regret to say that the fact that Viena had already lodged its Amparo, but chose not to tell PTSM or this Court, with the result that Mr Pillow KC inadvertently made submissions on a misleading basis, is both vexatious and oppressive.

76. I should stress that what troubles me about this is not the mere fact that Viena chose to lodge its Amparo with the Mexican Federal Court. In itself, that was legitimate conduct. What troubles me is that this was withheld from this Court, albeit inadvertently, with the result that I was given an incorrect understanding. If I had been given proper information, I am sure that it would not have been difficult to deal with this without it affecting the kind of disposal I had in mind in paragraph 64 above. The position as between PTSM and Viena would have been resolved by each of them giving suitable undertakings. It would not have been necessary for me to make an Order against Viena. Wherever possible, this Court always prefers not to make Orders that impact the proceedings before the Courts of other countries.

77. As matters now stand, I need to be sure that Viena does not take an unfair advantage. Mr Gledhill KC on behalf of PTSM has suggested that this can be achieved if I order Viena to act as if the terms of the Order of the 63rd Civil Court had not been suspended. I agree and will do so. I should record that Viena does not agree that I should make such an Order, but Mr Pillow KC has not said that it would cause any unfairness, prejudice or inconvenience to Viena.

78. Mr Gledhill KC has also asked me to make a further Order as against Viena. He has impressed on me that PTSM is not merely concerned that Viena might take advantage of the present position; it is also concerned that other parties might do so – i.e., Caliplay, but also the other Defendants, including Caliente. He notes that they are Defendants to the proceedings in the 23rd Civil Court proceedings, and so potentially affected by the interim relief obtained by Viena in that Court. If they were to be served with the Order of the 23rd Civil Court, they could now act on it unconstrained by the (suspended) Order of the 63rd Civil Court, and could then ignore the protections given to PTSM under the substantive provisions of the FWA. He has suggested that I therefore should order Viena to bring its proceedings before the 23rd Civil Court to an end, in order to prevent other parties from making unfair use of the Order made by that Court on 20 September 2023.

79. This seems to me more difficult to justify, in two ways.

80. First, if other parties seek to take unfair advantage of the existence of the proceedings before the 23rd Civil Court in order to circumvent the FWA, that would not constitute a breach by Viena of its negative promise not to litigate outside clause 27 of the FWA. It might well constitute a breach of the FWA, but this takes me back to the distinction between an antisuit injunction under s. 37 of the Senior Courts Act 1981 and an injunction under s. 44 of the Arbitration Act 1996.

81. Second, while I do not discount the possibility that other parties might act in the way that Mr Gledhill KC fears, I am not satisfied that this risk is so imminent that I should

make an injunction today, especially since I can only do so if PTSM cannot obtain relief from the arbitration tribunal or the ICC. If the parties co-operate sensibly to ensure that the arbitration tribunal is appointed swiftly (as Viena has undertaken, and as I expect of all of them), that will close off this point.

82. However, if any party were to seek to take unfair advantage of the Order of the 23rd Civil Court, that would very swiftly come to the attention of this Court or (in due course) of the arbitration tribunal. I hope and expect that none of the parties will, in fact, be so foolish. It would be an expensive mistake, which would achieve nothing. Any party that seeks to act opportunistically must, by now, be aware that this Court and the arbitration tribunal will not be impressed, and will not hesitate to act.