Neutral Citation Number: [2014] EWHC 3704 (Comm)

Case No: 2014 Folio 432

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2014

Before :

THE HONOURABLE MR JUSTICE MALES

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Between :

CRUZ CITY 1 MAURITIUS HOLDINGS **Claimant**

- and -

(1) UNITECH LIMITED
(2) BURLEY HOLDINGS LIMITED
(3) ARSANOVIA LIMITED
(4) UNITECH RESIDENTIAL RESORTS LIMITED
(5) NECTRUS LIMITED
(6) NUWELL LIMITED
TECHNOSOLID LIMITED
(8) UNITECH OVERSEAS LIMITED **Defendants**

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Mr Alain Choo Choy QC & Miss Nehali Shah (instructed by **White & Case LLP**) for the **Claimant**
Mr Graham Dunning QC & Mr James Willan (instructed by **Taylor Wessing LLP**) for the **4th, 6th, 7th & 8th Defendants**
Mr James Collins QC & Professor Dan Sarooshi (instructed by **Hugh Cartwright & Amin**) for the **5th Defendant**

Hearing dates: 29th & 30th October 2014

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Judgment

Mr Justice Males :

Introduction

1. The issue raised by this application is whether the English court has jurisdiction to make a freezing order in aid of enforcement of a London arbitration award against

subsidiaries of the award debtor against whom no substantive claim is asserted and who have no presence or assets within the jurisdiction.

2. In summary, the claimant is seeking to enforce an award which it has obtained against the first defendant ("Unitech"), an Indian company. The sum due now exceeds US $350 million, but so far nothing has been paid. Unitech is the parent of a group of companies incorporated in a variety of jurisdictions including not only India, but also Cyprus and the Isle of Man. It appears that substantial assets of the group are held by subsidiaries outside India. The claimant has obtained various orders against Unitech, including a worldwide freezing order, a disclosure order and an order for the appointment of receivers over Unitech's shareholdings in four subsidiary companies. These subsidiaries are now the fourth, sixth, seventh and eighth defendants (respectively "URRL", "Nuwell", "Technosolid" and "UOL", referred to in this judgment together with the fifth defendant "Nectrus" as the "*Chabra* defendants"). The claimant seeks now to reinforce those orders by obtaining a freezing order against the *Chabra* defendants in accordance with the jurisdiction first established in *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231 and since developed in other cases such as *Revenue & Customs Commissioners v Egleton* [2006] EWHC 2313 (Ch), [2007] 1 All ER 606 and *The Mahakam* [2011] EWHC 3143 (Comm), [2012] 2 All ER Comm 513.

3. However, the *Chabra* defendants are all incorporated outside England and Wales, have no assets, directors, officers or other presence within the jurisdiction and conduct no business here. In order to obtain relief against them, the claimant must first establish that the court has jurisdiction over them. On 26 August 2014 the claimant obtained permission on paper from Blair J to join the *Chabra* defendants to the existing proceedings against Unitech and to serve an amended claim form seeking a worldwide freezing order against them out of the jurisdiction. Jurisdiction was founded on three "gateways", namely:

   a. CPR 62.5(1)(c) (service of "an arbitration claim form" seeking a "remedy … affecting an arbitration (whether started or not), an arbitration agreement or an arbitration award");

   b. CPR PD 6B, para 3.1(3) ("necessary or proper party"); and

   c. CPR PD 6B, para 3.10 ("claim ... to enforce any judgment or arbitral award").

4. The claimant has since abandoned any reliance on CPR PD 6B, para 3.10, at any rate before me, although it seeks to reserve the right to rely on this paragraph in the event of an appeal.

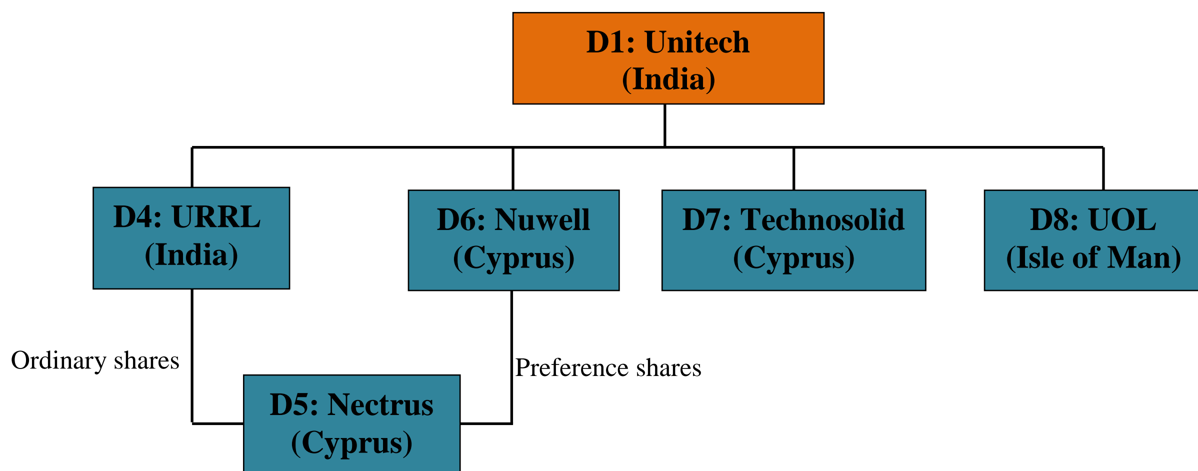
5. The *Chabra* defendants now apply to set aside the order for service upon them. They have not served evidence dealing with the merits of the claim for *Chabra* relief because they accept that the claim against them raises a serious issue to be tried, that is to say a claim which would not be dismissed on an application for summary judgment. However, they contend that the claim does not fall within either of the two remaining gateways for service on which the claimant relies; that this court is not "the proper place in which to bring the claim" within the meaning of CPR 6.37(3) or equivalent discretionary principles applicable to CPR 62.5; and that in the case of the three Cypriot defendants there is no "real connecting link between the subject matter

of the measures sought and the territorial jurisdiction" of the English court, as required by European case law concerning Article 31 of the Brussels Regulation.

Facts and procedural background

6. I set out in some detail the nature of the dispute and the procedural background leading to the making of the receivership order at [8] to [32] of my judgment dated 2 October 2014 ("the receivership judgment") and need not repeat that here. I should note, however, that as at 26 August 2014 when Blair J made the order for joinder of the *Chabra* defendants, it was known that the application for appointment of receivers would be heard, as it was, at the beginning of September. Thus it was not expected or thought to be necessary that the *Chabra* defendants would play any part in that application and they did not do so. In the event it was agreed that no argument would be addressed on the receivership application as to the availability of *Chabra* relief and that for the purpose of deciding that application I should ignore the possibility of such relief: see [27] of the receivership judgment.

7. It may also be useful to reproduce the following table which shows, in simplified form, the corporate structure of the Unitech group so far as relevant to the present application:



The *Chabra* jurisdiction

8. Although I am not concerned with the merits of the claim for *Chabra* relief, I summarise briefly, by way of background to the present jurisdiction challenge, the circumstances in which such relief is available. The principles are not disputed. *Chabra* itself was a case where there was a good arguable case that assets apparently owned by a third party were in fact beneficially owned by the defendant against whom there was a cause of action. If the assets were indeed beneficially owned by that defendant, they would in due course be available to satisfy any judgment against him, just as trust property would be available to satisfy a judgment against the beneficiary under a bare trust. On that basis a freezing order was made against the legal owner of the assets, even though there was no cause of action against it for any substantive relief, so as to preserve the assets pending any judgment. That left for later determination the question whether the assets held by the third party were in fact beneficially owned by the defendant against whom there was a cause of action.

9. However, the *Chabra* jurisdiction has since been extended to cases which are not limited to beneficial ownership of assets. Applying Australian authority (*Cardile v LED Builders Pty Ltd* [1999] HCA 18 at [57]), it has been held that a freezing order may be granted to preserve assets which are or may be available to the judgment creditor, if necessary by the appointment of a liquidator or receiver, by exercising the rights of the judgment debtor to compel the third party to disgorge property or otherwise contribute to the funds or property of the judgment debtor.

10. This is, nevertheless, an unusual jurisdiction, involving as it does the exercise of the court's compulsive powers, backed by the sanction of contempt proceedings, against a party against whom no cause of action is asserted. In a case where the exercise of the jurisdiction is not based on beneficial ownership but on the possibility of the judgment creditor being able to exercise rights of the judgment debtor, its effect is to restrain a *Chabra* defendant from dealing with assets over which it has both legal and beneficial ownership. It is not surprising, therefore, that the cases emphasise the need for caution in the exercise of this jurisdiction: *ETI Euro Telecom International NV v Republic of Bolivia* [2008] EWCA Civ 880 at [124]-[126].

11. That need for caution applies with even greater force when the *Chabra* defendant is a foreigner with no presence or assets within the jurisdiction of this court, who has not agreed to come here. In view of the unusual nature of the *Chabra* jurisdiction and the need for caution which the cases emphasise, it would not necessarily be surprising to find that there is no applicable gateway permitting service out of the jurisdiction on a *Chabra* defendant against whom no substantive relief is sought.

12. In the present case, although the claimant's evidence (as yet unanswered on the merits) presents an apparently compelling case that the *Chabra* defendants are for all practical purposes controlled by Unitech and used to move value, investments and debt around the group at will, either for tax or other purposes, they remain separate corporate persons. So far as the law is concerned, there is nothing inherently wrong in such a group structure and no question of piercing the corporate veil. (Indeed the claimant is itself a special purpose vehicle established for the purpose of the transaction which gave rise to the parties' dispute). While Unitech has agreed to arbitrate in England and must therefore be taken to have submitted to the supervisory jurisdiction of the English court, there is no basis in English law for suggesting that its subsidiaries who are not parties to any arbitration agreement have done likewise. They cannot be treated as having done so merely by virtue of their status as subsidiaries, regardless of the degree of control exercised over them by Unitech as their parent company: cf. *Peterson Farms Inc v C&M Farming Ltd* [2004] EWHC 121 (Comm), [2004] 1 Lloyd's Rep 603.

13. It is important to bear in mind also the limitations of the *Chabra* jurisdiction. The most that the claimant can obtain from this court is a freezing order, coupled with an order for disclosure, restraining the *Chabra* defendants from dealing with their assets. However, that is only an interim measure. Ultimately what the claimant seeks is an order requiring the *Chabra* defendants to disgorge their assets to receivers exercising the rights of Unitech, the award debtor. If the *Chabra* defendants are not prepared to do this voluntarily, and if the directors and officers of Unitech are prepared to take the risk that their conduct may be found to be in breach of the receivership order, such an order can only be obtained from the courts where the *Chabra* defendants or their assets are located. That is not the English court.

Final decision or good arguable case?

14. The issue whether the claimant can pass through one or other of the gateways on which it relies involves no disputed questions of fact, but depends on the true construction of the relevant rules. Although it is generally necessary for a claimant seeking to establish jurisdiction to show no more than that it has a good arguable case that it can pass through one or more of the relevant gateways, when a question of law goes to the existence of the court's jurisdiction, the court will normally decide that question: *Altimo Holdings & Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 at [81]. It is common ground that this is such a case. I must therefore decide whether the claimant can pass through the gateways and not merely whether the claimant has a good arguable case that it can. It is important, however, in considering previous authorities concerned with these gateways, to be clear about whether they are final decisions or merely decisions as to the existence of a good arguable case.

A cardinal principle

15. In this context, a principle of construction established for over a century is that any doubt as to the correct construction of the jurisdictional gateways ought to be resolved in favour of the foreign defendant: *The Hagen* [1908] P 189 at 201. This has been often affirmed (see *Arab Monetary Fund v Hashim (No 4)* [1992] 1 WLR 553 at 557H) and is included in the leading text books: see e.g. *Dicey, Morris & Collins, The Conflict of Laws* (15th Edn), para 11-142 where it is described as one of four "cardinal points" applicable to service out of the jurisdiction.

16. Mr Alain Choo-Choy QC for the claimant submits that this is no longer the law following the decision of the Supreme Court in *Abela v Baadarani* [2013] UKSC 44, [2013] 1 WLR 2043. In that case Lord Sumption at [53] deprecated the traditional description of service out of the jurisdiction as "exorbitant". He pointed out that in the modern world, where such service is generally permitted either because the defendant has agreed to proceedings here or because there is a substantial connection between the dispute and this country, and where service is regulated in many cases by international convention, it is no longer realistic to view service out of the jurisdiction as an interference with the sovereignty of the state in which process is served. However, as Lord Clarke noted at [45], by the time the case reached the Supreme Court there was no issue about service out of the jurisdiction, the only issue being whether an order for alternative service was appropriate. It is in my view most unlikely that the Supreme Court intended to abolish the principle of construction established by *The Hagen* in a case where the issue did not arise for decision and without even referring to that or other cases in which the principle has been applied. I consider that the principle is still good law.

The policy that awards should be satisfied

17. I referred at [20] and [21] of the receivership judgment to the well established policy of the English court that arbitration awards should be satisfied, citing also what Gloster LJ had said about this in the Court of Appeal. However, that policy, important as it is, does not mean that the jurisdictional gateways should be approached with a predisposition to find that service out of the jurisdiction is permitted against a *Chabra* defendant. Mr Choo-Choy submits that if such service is not permitted in aid of

enforcement of an English arbitration award even in a case where the merits are strong, that would drastically reduce the scope and utility of the *Chabra* jurisdiction and would undermine the policy of upholding the effectiveness of arbitration awards. In my judgment, however, to say that the scope of the jurisdiction would be reduced begs the question whether the jurisdiction should be available against a foreign defendant with no presence or assets here who has not agreed to submit to the jurisdiction of this court. The policy of supporting arbitration cannot justify construing the jurisdictional gateways in a way which extends their scope beyond their proper bounds.

18. Accordingly while I stand by what I said in the receivership judgment, in particular that the English court should do what it properly can to assist in the enforcement of arbitration awards, I approach the questions of construction of the jurisdictional gateways at issue in this case applying the "cardinal principle" referred to above but with no predisposition one way or the other as to what their construction ought to be.

CPR 62.5(1)(c)

19. The gateway on which the claimant primarily relies is CPR 62.5(1)(c). CPR 62.5 provides:

> “(1) The court may give permission to serve an arbitration claim form out of the jurisdiction if—
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> (a) the claimant seeks to—
>
> (i) challenge; or
>
> (ii) appeal on a question of law arising out of,
>
> an arbitration award made within the jurisdiction;
>
> (The place where an award is treated as made is determined by section 53 of the 1996 Act).
>
> (b) the claim is for an order under section 44 of the 1996 Act; or
>
> (c) the claimant—
>
> (i) seeks some other remedy or requires a question to be decided by the court affecting an arbitration (whether started or not), an arbitration agreement or an arbitration award; and
>
> (ii) the seat of the arbitration is or will be within the jurisdiction or the conditions in section 2(4) of the 1996 Act are satisfied.

20. The claimant relies only on paragraph (c). Its case is that the freezing order which it seeks by way of *Chabra* relief is a "remedy … affecting … an arbitration award”.

21. Four main issues arise:

    a. Does CPR 62.5(1)(c) have any application to defendants who are not parties to any arbitration agreement or arbitral proceedings?

    b. Does the rule apply to proceedings which form part of the process of enforcing an award?

    c. Is the claim for *Chabra* relief within the definition of an "arbitration claim" in CPR 62.2(1)(d)?

    d. Would the grant of a freezing order against the *Chabra* defendants "affect" the award?

The scheme of CPR 62

22. Before addressing these issues I should say something about the scheme and history of CPR 62.5, which is part of a special rule applicable to arbitration claims. The rule (or "Part" in the language of the CPR) is in three sections. The first section, headed "Claims under the 1996 Act", is not in fact limited to claims under the provisions of the Arbitration Act 1996 as some of the claims for which it provides specifically arise in other ways, but in effect it regulates arbitration claims under the current law which are not dealt with in the third section of the rule. This first section includes CPR 62.5 dealing with service out of the jurisdiction in arbitration claims, whereas service out of the jurisdiction generally is dealt with by either CPR 6.33 or CPR 6.36 according to whether or not the Brussels/Lugano regime applies.

23. The second section of the rule, headed "Other Arbitration Claims", applies to arbitration claims to which "the old law" applies. As "the old law" only applies to arbitrations commenced before 31 January 1997, it is to be hoped that this section is more or less obsolete. The scope of the third section, headed "Enforcement", is dealt with by CPR 62.17 which provides that it "applies to all arbitration enforcement proceedings other than by a claim on the award". CPR 62.2(2) provides that the three sections of the rule are mutually exclusive. Thus Section I does not apply to an arbitration claim to which Section III applies.

24. The predecessor to CPR 62.5 (which was introduced in March 2002) was CPR PD 49G and, before that, RSC Order 73, rule 8. Although there have been minor linguistic changes, these provisions have been materially to the same effect since 31 January 1997 when the Arbitration Act 1996 came into force. Previously the applicable rule was RSC Order 73, rule 7, which referred to any application under the 1950 or 1979 Acts. It follows that the Rules Committee has considered the question of service out of the jurisdiction in arbitration cases, not only when making significant amendments to take account of the coming into force of the 1996 Act, but also from time to time on other occasions.

Does CPR 62.5(1)(c) apply to non-parties?

The parties' submissions

25. Mr Graham Dunning QC on behalf of the *Chabra* defendants submits that CPR 62.5(1)(c) has no application to persons who are not parties to any arbitration agreement or arbitral proceedings. In outline the *Chabra* defendants' case is that:

    a. The rationale for the special regime of CPR 62.5 for permitting service out in arbitration cases is that the parties to an arbitration agreement providing for an English arbitration seat have consented to the supervisory jurisdiction of the English court, whereas non-parties have given no such consent.

    b. A consistent line of cases and text book writings shows that CPR 62.5 and its predecessors are limited to parties to an arbitration agreement.

    c. Despite several opportunities to do so, the Rules Committee has not intervened to make clear that the rule is intended to extend to non-parties.

    d. The requirement in paragraph (c) that the remedy should be one "affecting" an arbitration, an arbitration agreement or an award represents a deliberate choice of a word with narrow scope.

    e. Paragraph (b) of the rule, dealing with service of claims for an order under section 44 of the 1996 Act, is likewise limited to applications against parties to an arbitration agreement, but even if that is not the case and paragraph (b) extends to non-parties, that is not a reason why paragraph (c) should be construed in the same way.

26. Mr Choo-Choy for the claimant submits, again in outline:

    a. There is nothing in the general language of CPR 62.5 to suggest that it is intended to be limited to parties to an arbitration agreement.

    b. To the extent that older authority holds that CPR 62.5 is limited to parties to an arbitration agreement, those authorities are either wrongly decided or have been overtaken by more recent cases.

    c. Paragraph (b) of the rule is available against non-parties, as shown by several recent cases, in which case there is no good reason to limit the construction of paragraph (c).

    d. To deny *Chabra* relief against foreign parties on jurisdictional grounds even when all the relevant requirements on the merits are satisfied would be contrary to the policy of supporting the enforcement of arbitration awards.

    e. While applications against non-parties will be the exception, any issues arising out of the fact that a defendant is not a party to any arbitration agreement should be dealt with as a matter of discretion rather than jurisdiction.

The authorities

27. The relevant authorities begin with the decision of Clarke J in *The Cienvik* [1996] CLC 434, a case under the pre-1996 Act version of RSC Order 73, rule 7, in which an application was made under section 12(6) of the Arbitration Act 1950 (the predecessor of section 44 of the 1996 Act, although in materially different terms) against a non-party shipowner for an order for inspection of a ship. Clarke J began at 446D by considering the scope of section 12(6):

> "The argument is that if, as the plaintiffs say the court has power to make orders under RS and, O.29, r. 7A, or RSC, O. 75, r. 28 against non-parties to an action, s. 12(6) of the Act should be construed as giving similar powers against non-parties to the reference but for the purpose of and in relation to the reference. Some parts of s.12 expressly give the courts such powers against a non-party: see e.g. s. 12(2) and (3) and (6)(d). In my judgment, if the court has power to order or permit the inspection of the property of a non-party, C, in an action between A and B, it has the same power under s.12(6)(g) so to order for the purpose of and in relation to an arbitration between A and B."

28. Thus, Clarke J accepted that section 12(6) did give the court power to make an order against a non-party. It should be noted, however, that the court's powers under section 44 of the 1996 Act are materially narrower. In particular, the power to issue a witness summons against a non-party (which was contained in section 12(6)(d), one of the provisions to which Clarke J expressly referred) is now to be found in a separate section of the 1996 Act, namely section 43, while other powers of the court which were contained in section 12(6), such as the power to order security for costs, have been abolished. Further, the restrictions on making applications to the court which are included in section 44 in order to ensure the primacy of the arbitral tribunal did not exist in section 12(6) of the 1950 Act. Accordingly no inference as to the scope of section 44 of the 1996 Act can be drawn from the fact that section 12(6) of the 1950 Act permitted orders against non-parties.

29. However, the conclusion that section 12(6) of the 1950 Act permitted orders against non-parties was only the starting point in *The Cienvik*. It remained to consider whether RSC Order 73, rule 7 permitted service of such applications out of the jurisdiction on non-parties. Clarke J held that it did not. He did so for three reasons: first, because the natural meaning of the rule was that it was limited to applications against parties to the arbitration; second, because the rationale for permitting service out under RSC Order 73, rule 7 was that parties to an arbitration agreement had consented to determination of their disputes in England; and third, that there was no equivalent in the special regime of RSC Order 73, rule 7 to the express "necessary or proper party" head of jurisdiction applicable in the general rules for service out:

> "In my judgment that [i.e. that the rule only applies to applications between the parties to an arbitration] is the natural construction. I accept Mr Bailey's [i.e. counsel for the non-party defendant's] submission that the rationale of O. 73, r. 7 is that the parties to an arbitration agreement have consented to

> the determination of their disputes by arbitration in England. It makes sense for the rules to permit service out of the jurisdiction of applications by one party against the other relating to the arbitration between them. There is, however, no similar rational basis for saying that the English court should have power to allow service out of the jurisdiction of proceedings relating to an arbitration to which the proposed defendant is not a party.
>
> It follows, in my judgment, that when O. 73, r. 7 is viewed in its context and having regard to its purpose, it is properly to be regarded as being concerned only with applications by and against parties to an arbitration which relate to the arbitration to which they are parties. Thus, the natural meaning of the rule is that the application must be against the other party to the reference.
>
> RSC, O. 11 contains in r. 1(1)(c) an express provision which deals with the position of necessary or proper parties. In my judgment, if the draftsman of O. 73, r. 7 had intended to give the court jurisdiction to give leave to serve an application on non-parties out of the jurisdiction, he would have done so expressly. For these reasons I have reached the conclusion that the court did not have jurisdiction to give leave to serve the originating summons upon the second defendants out of the jurisdiction under RSC O. 73, r. 7. It is perhaps a matter for consideration in the future whether, if the conclusion is correct, it would be desirable to frame the rule in wider terms."

30. As already pointed out, the language of the relevant rule has changed, so that Clarke J's first reason cannot be directly applied to the current rule, but his second and third reasons continue to apply with equal force. Moreover it is significant that in the final sentence of the passage cited above Clarke J expressly drew attention to the possibility of a rule change to make clear that service out of the jurisdiction is permitted against a non-party in any case where the court has power to make such an order under section 12(6), but no such change has been made.

31. In *Tate & Lyle Industries Ltd v Cia Usina Bulhoes* [1997] 1 Lloyd's Rep 355, Hobhouse LJ described Clarke J's reasoning as "persuasive", while recognising that the point was arguable. I would not with respect have regarded this case, which was only a decision on permission to appeal, as taking the matter much further, although Hobhouse LJ's comment was referred to by Thomas J in the next case, *Vale do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] 2 Lloyd's Rep 1. That was a case in which it was sought to invoke the equivalent in CPR PD 49G of what is now CPR 62.5(1)(c) in order to sue a broker who was not a party to the arbitration agreement. The first ground of decision was that service on the broker was governed, not by the provisions of CPR PD 49G, but by the Lugano Convention, and that jurisdiction could not be established under that Convention. However, Thomas J went on to consider the position under CPR PD 49G, holding at [31] to [42] that it referred solely to an application by one party to an arbitration agreement against another.

32. There were seven reasons for this conclusion. First, this was the clear meaning of the language of the rule, construed in the light of the 1996 Act and the essentially consensual nature of arbitration. Second, the rationale for service out of the jurisdiction in arbitration cases identified by Clarke J in *The Cienvik* was equally applicable to the new post-1996 Act rule. Third, when amending the rules to take account of the 1996 Act, the draftsman must have considered adding a provision enabling necessary and proper parties to be joined in arbitration cases and decided not to do so. Fourth, there was good reason for that decision arising from the nature of arbitration and the potentially far reaching consequences of allowing the English court to exercise jurisdiction over third parties. Fifth, the words "affecting … an arbitration agreement" were in this context recognised as being words of narrow scope. Sixth, an argument that the provision of CPR PD 49G which is equivalent to CPR 62.5(1)(b) (an application for an order under section 44 of the 1996 Act) permitted service on non-parties, and that the equivalent of paragraph (c) should therefore be construed in the same way, was unsound: the equivalent of paragraph (b) did not permit service out on non-parties, but even if it did, that could not be read over into the equivalent of paragraph (c) as different considerations may apply to the two paragraphs. Seventh, even if there had been any doubt as to the true construction of the rule, such doubt would have to be resolved in favour of the foreign defendant, and clear words would be required to confer jurisdiction over a foreigner who was not a party to the arbitration agreement or arbitration.

33. This is a well known decision that CPR PD49G was applicable only as between parties to the arbitration agreement or arbitration in question. When CPR PD49G was replaced by CPR 62.5(1)(c), the language of the rule was not changed materially. In those circumstances, where one judge has suggested that a rule change might be considered and another has pointed out that there was a good reason why that opportunity for change was not taken, the obvious inference from the fact that, with only minor linguistic changes, the rule has then been continued in the same terms is that the draftsman of the current rule regards the position as settled by these decisions, accepts the rationale for them and, moreover, does not regard any change to permit service on non-parties as appropriate.

34. Some aspects of the decision of Thomas J in the *Vale do Rio Doce* case have been criticised (see *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 WLR 1889 at [50]), but those criticisms do not affect the reasoning and decision on this point.

35. It might be said, perhaps, that the decision of Thomas J on this point was *obiter*, but even if that were so, his reasoning and decision were applied as a matter of *ratio* to the current rules by Cooke J in *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2008] 1 Lloyd's Rep 230:

> "The decision of Thomas J is authority for the proposition that the width of the wording in section 62.5(1)(c) does not enable a remedy to be given against someone who is not a party to the arbitration, even if the question raised relates to an arbitration or arbitration agreement. The remedy or question must 'affect' an arbitration or an arbitration agreement and this can only be the case if the claimant and defendant are both parties to the arbitration."

36. I accept Mr Dunning's submission that this is a clear and consistent line of authority which holds, as a matter of decision and not merely of good arguable case, that service out of the jurisdiction pursuant to CPR 62.5(1)(c) is permissible only against a party to the arbitration agreement or arbitration in question. That is also the view of *Dicey, Morris & Collins* (15th Edn), which states at paragraph 16-045 that the provisions of the rule apply only to applications by and against parties to an arbitration agreement. Other text books adopt the same position (e.g. *Russell on Arbitration* (23rd Edn), paragraph 8-191).

37. Mr Choo-Choy submits that this is no longer the law in the light of more recent authorities. He relies on four cases.

38. The first such case is *Tedcom Finance Ltd v Vetabet Holdings Ltd* [2011] EWCA Civ 191, in which the Court of Appeal held, on an urgent *ex parte* appeal and after hearing only brief oral argument, that "there is at least an argument that jurisdiction does exist" for service on a non-party under CPR 62.5(1)(b). However, this was a decision on paragraph (b) of the rule, not paragraph (c), and Longmore LJ made clear that nothing more than the existence of an argument was being decided, and that the decision would not bind the commercial judge at the *inter partes* hearing. Since *Tedcom* has been referred to in subsequent cases, I would not criticise counsel for having cited it. However, I would respectfully suggest that it is a case which decides nothing more than that there is an argument to be had, that nobody would ever have heard of the case if it were not for the fact that by reason of the internet everything nowadays is reported, and that it could usefully be forgotten.

39. *BNP Paribas SA v OJSC Russian Machines* [2011] EWHC 308, [2011] 2 CLC 942 was a claim for an anti-suit injunction against two Russian companies to restrain the pursuit of proceedings in Russia. The claim against the first defendant was based upon a guarantee containing a London arbitration clause, with an option for the claimant to bring proceedings in this court instead of arbitrating. The second defendant was a company connected to the first defendant, with whom it was alleged to have conspired to assist the latter to evade responsibility under its guarantee, but was not a party to any arbitration agreement with the claimant bank. Blair J held that jurisdiction could be established over the second defendant under CPR 62.5(1)(b) as the relief was sought under section 44 of the 1996 Act, even though it was not a party to the arbitration agreement. It is important to note, however, that (1) this was merely a decision that there was a good arguable case to that effect (see the definition of the issues at [28] and [37]), and (2) Blair J expressly based his decision so far as the second defendant was concerned on paragraph (b) and not paragraph (c) of CPR 62.5(1) (see [49]).

40. The claim against the first defendant in *Russian Machines* was more straightforward, but I should note that an argument by the first defendant that the claimant's concerns about the proceedings in Russia were that they would render enforcement of any arbitration difficult and that enforcement issues were outside CPR 62.5, was rejected. Blair J said at [48]:

> "In my view these contentions are incorrect. The fact that the claimant's concerns relate to enforcement, on the basis that an adverse decision in Russia may make an award in their favour much harder to enforce, does not imply that the question is not

> one 'affecting an arbitration … an arbitration agreement or an arbitration award'. It plainly is, in my view, because enforcement is an integral part of the process."

41. This case went to the Court of Appeal, which held that jurisdiction could be established against the second defendant under CPR PD6B 3.1(3) as a necessary or proper party to the claim against the first defendant. That being so, the Court decided not to address the issues relating to CPR 62.5, which it described as "not straightforward" (see [79] and [88]).

42. In *Western Bulk Shipowning III A/S v Carbofer Maritime Trading ApS* [2012] EWHC 1224, [2012] 1 CLC 954, shipowners seeking to exercise a lien on sub-freights applied for a worldwide freezing order against the sub-sub-charterers, a Marshall Islands company called Sea Task with an office in Greece. The sub-sub-charterparty provided for arbitration in Greece under Greek law. Christopher Clarke J refused to grant a freezing order as a matter of discretion, so that the question whether jurisdiction could be established over Sea Task did not arise. After referring to the *Tedcom* and *Russian Machines* cases, Christopher Clarke J said at [114] that he did not propose to resolve the controversy whether service out could be ordered against a defendant who was not a party to an arbitration agreement under CPR 62.5(b), although he inclined to the view that it could.

43. Finally, *PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov* [2013] EWHC 3203 (Comm) was an application for a freezing order against a non-party whose assets were alleged to be, in truth, the assets of the arbitration defendant so as to be amenable to enforcement in the event that the claimant obtained an award against that defendant. It was, therefore, an application for *Chabra* relief at the pre-award stage. After referring to the cases cited above, Blair J held that there was power to order service out of the jurisdiction on the defendant who was not a party to the arbitration agreement under CPR 62.5(b) as the claim was for an order, an interim injunction, under section 44 of the 1996 Act. It is clear, however, that this too was merely a decision that the case was sufficiently arguable to amount to a good arguable case.

44. From this review of the authorities I would conclude as follows:

    a. As already mentioned, the *Cienvik*, *Vale do Rio Doce* and *Starlight Shipping* cases constitute a line of authority which holds, as a matter of decision and not merely of good arguable case, that service out of the jurisdiction pursuant to CPR 62.5(1)(c) is permissible only against a party to the arbitration agreement or arbitration in question.

    b. None of the later cases is concerned with CPR 62.5(1)(c) and, no doubt for that reason, they do not grapple with the powerful reasoning which led Clarke, Thomas and Cooke JJ to that conclusion.

    c. The later cases decide at most that there is a good arguable case that jurisdiction against a non-party can be established under CPR 62.5(1)(b) – but the claimant in the present case does not rely on that paragraph.

    d. The only case to consider expressly whether the fact that jurisdiction against a non-party can be established under CPR 62.5(1)(b) ought also to mean that

such jurisdiction can be established under paragraph (c) is the *Vale do Rio Doce* case, where Thomas J held that it did not.

45. It follows, in my judgment, that the cases support Mr Dunning's submissions summarised at [27] above and contradict Mr Choo-Choy's submissions (a) to (c) summarised at [28] above (I have already dealt with his submission (d) at [17] above).

Section 44 of the 1996 Act and paragraph (b) of CPR 62.5(1)

46. However, as the claimant relies heavily on (a) the availability of relief against a non-party under section 44 of the Arbitration Act 1996 so that jurisdiction in such a case can be established under CPR 62.5(1)(b), with the consequence (b) that jurisdiction should therefore be equally available under CPR 62.5(1)(c), I should say something more about this topic. Mr Dunning for the *Chabra* defendants challenges both stages of this argument.

47. The first question is whether section 44 of the 1996 Act enables an order to be made against a person who is not a party to an arbitration agreement or arbitration. As appears from the cases discussed above, some judges have expressed the view that it does, albeit not (as I read the cases) as a matter of final decision, although the question has also been described as "not straightforward". For my part, for three reasons I consider that the better view is that section 44 does not include any power to grant an injunction against a non-party.

48. First, there are several indications in section 44 itself that it is intended to be limited to orders made against a party to the arbitration "for the purposes of and in relation to" which the court's powers are to be exercised:

    a. The section is expressed by the opening words of subsection (1) to be subject to contrary agreement between the parties, which must mean the parties to the arbitration agreement. While it would theoretically be possible that the availability of remedies against non-parties should depend on the parties' agreement, it seems much more likely that Parliament contemplated an agreement between the parties to the arbitration as to the powers which one party could invite the court to exercise against the other.

    b. Subsection (4) provides that, except in cases of urgency, the court can only act on an application made with the permission of the arbitral tribunal or the agreement in writing of "the other parties" -- which clearly means the other parties to the arbitration. It is possible, I suppose, that Parliament intended to empower arbitrators to give permission for an application to be made against a non-party, but that seems surprising in view of the consensual nature of arbitration and the fact that arbitrators generally have no jurisdiction over non-parties. It would be surprising too if the arbitrators were empowered to give such permission without hearing from the non-party, although to allow a non-party even this limited standing to make submissions to the arbitrators (for which purpose it would generally need to know something about the arbitral proceedings) seems hard to reconcile with the private and confidential nature of arbitration.

c. Subsection (5) provides that the court shall act only if the arbitrators have no power or are unable for the time being to act effectively. But that will always be the case where an order is sought against a non-party.

d. Similarly, subsection (6), which allows the court to hand back to the arbitral tribunal the "power to act in relation to the subject matter of the order", can have no application to an order made against a non-party.

e. The effect of subsection (7) is that there can be no appeal from any order under section 44 unless the first instance court gives permission. It would be surprising if in the exceptional case of an order against a non-party, backed up by the sanction of contempt proceedings, the non-party's right of appeal was limited in this way. A non-party has not agreed to the finality and promptness of decision making which are meant to be the hallmarks of arbitration and which provide the rationale for curtailing a party's rights of appeal.

f. None of these indications is conclusive, but together they suggest, to my mind, that the section is simply not concerned with applications against non-parties.

49. Second, section 44 is one of only a few sections of the 1996 Act which applies even if the seat of arbitration is outside England and Wales or Northern Ireland: see section 2(3). While such an order could always be refused as a matter of discretion in the absence of any connection with this country, it seems unlikely that Parliament intended to give the English court jurisdiction to make orders against non-parties in support of arbitrations happening anywhere in the world.

50. Third, paragraphs 214 to 216 of the report of the Departmental Advisory Committee on Arbitration Law, which explain the background to and purpose of section 44, contain nothing to suggest that it was intended to confer jurisdiction on the court to make orders against non-parties. This is something which, if it was intended, could be expected to be stated with clear words. Instead, the report merely recognises that orders under section 44 may affect third parties, but that is rather different from saying that orders may be made against third parties.

51. If this is wrong and section 44 does permit an order to be made against a non-party, I would accept that CPR 62.5(1)(b) permits service out of the jurisdiction against a non-party in support of an application for such an order. But this would still leave the second stage of the claimant's argument. I would not accept that this more extended scope of paragraph (b) provides any justification for extending the well established meaning of paragraph (c) to such a case.

Conclusion on application to non-parties

52. Drawing the threads together, it is clearly a possible meaning of CPR 62.5(1)(c) that it is limited to a remedy sought against a party to the arbitration or arbitration agreement in question. Thomas J and Cooke J have held that it is so limited, and the cases give compelling reasons why it should be. If there were any doubt about this, which in my judgment there is not, the "cardinal principle" that any doubt as to the correct construction of any jurisdictional gateway should be resolved in favour of the foreign defendant would provide the answer. This conclusion is sufficient to defeat the

claimant's reliance on CPR 62.5(1)(c), but as the other issues arising under the rule were argued I go on to deal with them.

Does CPR 62.5(1)(c) apply to proceedings in aid of enforcement?

53. The purpose of the freezing order sought by the claimant is to assist it in enforcing the award which it has obtained. Although strictly speaking the award is a partial final award, which means that the arbitral proceedings have not finally concluded, the liability which the claimant seeks to enforce has been finally determined. In those circumstances the *Chabra* defendants say that the present application is outside the scope of CPR 62.5 as the application is ancillary to enforcement of the award, which is dealt with in Section III of CPR 62 and not Section I. The claimant, in contrast, submits that enforcement of an award is an integral part of arbitration proceedings, and that an application in aid of such enforcement falls within CPR 62.5, relying for this purpose on the passage from Blair J's judgment in *Russian Machines* quoted at [40] above.

54. The issue here is whether the claimant's application for *Chabra* relief falls within the apparently broad expression "all arbitration enforcement proceedings other than by a claim on the award" in CPR 62.17. If it does, Section III of Part 62 applies to the application and Section I which includes CPR 62.5 does not. Looking at CPR 62.17 in isolation there is considerable force in the submission that, as a matter of language, the claimant's current application is part of the process of enforcing its award and therefore constitutes "arbitration enforcement proceedings". However, when Section III of Part 62 is viewed as a whole, it is apparent that the proceedings with which it deals are proceedings for the recognition or enforcement of arbitral awards under specific sections of the 1996 Act or its predecessors or under equivalent provisions of other legislation. Those are the only applications dealt with in the succeeding paragraphs of Section III. In my judgment that colours the meaning of "all arbitration enforcement proceedings other than by a claim on the award" in CPR 62.17 which are not, therefore, to be given their full literal width. Rather they are enforcement proceedings of the type with which Section III goes on to deal.

55. I would therefore hold that the mere fact that the order sought by the claimant is to assist it in enforcing an award is not a reason for concluding that CPR 62.5 cannot apply to the present application. It remains to consider, however, whether the application falls within the language of the rule.

Is the claim for a freezing order an "arbitration claim"?

56. Section I of CPR 62.5 only applies if there is an "arbitration claim" as defined in CPR 62.2(1). This provides:

> "(1) In this Section of this Part 'arbitration claim' means –
>
> (a) any application to the court under the 1996 Act;
>
> (b) a claim to determine –
>
> (i) whether there is a valid arbitration agreement;

(ii) whether an arbitration tribunal is properly constituted; or what matters have been submitted to arbitration in accordance with an arbitration agreement;

(c) a claim to declare that an award by an arbitral tribunal is not binding on a party; and

(d) any other application affecting –

(i) arbitration proceedings (whether started or not); or

(ii) an arbitration agreement."

57. It is common ground that none of paragraphs (a) to (c) applies in this case. The only paragraph on which the claimant seeks to rely is paragraph (d). The question, therefore, is whether this is an "application affecting … arbitration proceedings … or an arbitration agreement".

58. Mr James Collins QC dealt with this issue for the *Chabra* defendants. He submits, in outline, that:

a. The word "affecting", in this context, means "having an effect" or "having an influence" on, so as to bring about some change or alteration to, the "arbitration proceedings" or the "arbitration agreement". This is to be contrasted with the looser or broader connecting language used elsewhere in the CPR, such as PD 6B, paragraph 3.1(6) ("claims in relation to contracts") which permits service where a claim is made "in respect of a contract".

b. The definition of arbitration claim shows that what must be affected is the "arbitration proceedings" or the "arbitration agreement", which may be contrasted with applications affecting an "arbitration award". Applications which affect or determine the effect of awards qualify as "arbitration claims" only if they fall within CPR 62.2(1)(a) ("any application to the court under the 1996 Act") or CPR 62.2(1)(c) ("a claim to declare that an award by an arbitral tribunal is not binding on a party"), but in order to fall within the definition in CPR 62.2(1)(d), the application must affect the agreement or the proceedings.

59. Mr Choo-Choy for the claimant submits that claims made in aid of enforcement of awards do "affect … arbitration proceedings" because an award is part of arbitration proceedings. He relies on the decision of Field J in this case that a claim "whose purpose is to enforce two arbitral awards … is an 'application affecting arbitration proceedings'" within the meaning of CPR 62.2 (see [2013] EWHC 1323 (Comm) at [23]) and on the statement by Blair J in *Russian Machines* that "enforcement is an integral part of the process" (see [40] above).

60. The meaning of the word "affects" must depend on its context. In some contexts it has been held that "affects" is synonymous with words such as "influenced," "altered," or "shaped", while in other contexts it has been held to be equivalent to "touching, or relating to, or concerning": *In re Bluston* [1967] Ch 615; and the Australian case of

Shanks v. Shanks (1942) 65 CLR 334. In neither of these cases, however, was the context similar to the present case. These cases, therefore, do little more for present purposes than demonstrate that the word is capable of having either a wider or a narrower meaning.

61. That might suggest, in accordance with the "cardinal principle" already referred to that doubts as to the correct construction of jurisdictional gateways should be resolved in favour of the foreign defendant, that the narrower meaning should be adopted in this case. Two considerations, however, persuade me that the term should not be construed as narrowly as Mr Collins suggests. The first is that any construction must be consistent with the decision of the Supreme Court in the *AES* case. That was a claim for an anti-suit injunction to enforce the negative obligation not to commence foreign court proceedings which is implicit in an arbitration agreement. The Supreme Court held that such an application, made under section 37 of the Senior Courts Act 1981 and not section 44 of the Arbitration Act 1996, fell within CPR 62.2 and CPR 62.5(1)(c). Lord Mance described Section I of CPR 62 at [49] as covering "matters relating to an arbitration agreement, independently of any arbitral proceedings". This language alone suggests that "affects" is broadly equivalent to "related to" in this context. So too does the result of the case. An application for an anti-suit injunction cannot change or alter an arbitration agreement, which remains a valid and binding contract whether or not the injunction is granted. The purpose of the application in the *AES* case was partly to determine the effect of the arbitration clause (i.e. to determine that the foreign proceedings were brought in breach of the clause) but also and more importantly to enforce that clause by means of an injunction (see [18] of Lord Mance's judgment).

62. The second consideration is this. An application under section 44 of the 1996 Act for a freezing order in order to preserve assets is undoubtedly an "arbitration claim" if it is made before the arbitration is concluded. It falls within CPR 62.2(1)(a) as "an application to the court under the 1996 Act". However, an application for a freezing order made post-award does not fall within paragraph (a). The arbitration is concluded and section 44 no longer has any part to play: see *AES* at [43] where Lord Mance observed that the exercise of the court's powers under section 44 depends on an arbitration being on foot or proposed. It seems most unlikely to have been intended that a post-award application for a freezing order even against the award debtor falls outside the scope of CPR 62, but such an application can only constitute an "arbitration claim" if it falls within paragraph (d) as "any other application affecting arbitration proceedings". In my judgment "affecting" must be construed accordingly.

63. So too must "arbitration proceedings". For much the same reason, I consider that an application for a freezing order must be regarded as affecting not merely the award but the arbitration proceedings. This is in a sense counter intuitive as in general the 1996 Act draws a clear distinction between the arbitration proceedings (i.e. the proceedings conducted by and before the arbitral tribunal) and enforcement of the award, while it is not obvious how a freezing order has any effect on the proceedings before the arbitrators. However, a freezing order under section 44 is regarded as being made "for the purposes of and in relation to arbitral proceedings" (the opening words of subsection (1) of section 44) even though it will generally have no impact at all on the conduct of the arbitration. Nor will any disclosure of assets made pursuant to such an order. The freezing order only becomes important if the claimant is successful in

obtaining an award, which it then seeks to enforce against the assets which have been frozen, using the information which has been disclosed. Indeed a pre-award freezing order which is not extended to take effect beyond publication of the award may not be much use. To assist in eventual enforcement is the purpose for which such an order is made. If (as the statute clearly contemplates) an application for a freezing order made under section 44 before the arbitration is concluded is made "for the purposes of and in relation to arbitral proceedings", I see no reason why an application made post-award should not also be regarded as "affecting arbitration proceedings". In both cases the application and any order made have little or no effect on what happens before the arbitrators and are made for the purpose of assisting in enforcement after the proceedings before the arbitrators are concluded by the issue of an award.

64. Accordingly, I agree with the decision of Field J in this action that the claimant's application for a worldwide disclosure order against the award debtor was an "arbitration claim" ([2013] EWHC 1323 (Comm) at [23]).

Would a freezing order affect the award?

65. The final question under the heading of CPR 62.5 is whether an application for a freezing order is an application for a remedy "affecting … an award" within the meaning of CPR 62.5(1)(c). For the reasons already given when dealing with the definition of "arbitration claim", a post-award application against the award debtor must fall within this paragraph unless the conclusion is to be accepted that such an application is not within the scope of Part 62 at all.

Conclusion on CPR 62.5(1)(c)

66. For the reasons given above I hold that CPR 62.5(1)(c) does not permit service out of the jurisdiction on a defendant who is not a party to the arbitration or arbitration agreement in question. For that reason the claimant's reliance on this paragraph is ill founded.

67. However, I would conclude if necessary that an application for a post-award freezing order against the award debtor falls within the scope of Section I of CPR 62 and is within the definition of "arbitration claim", and that the court has jurisdiction to permit service out of the jurisdiction of such an application under CPR 62.5(1)(c). If that is so, it must follow that if I am wrong to conclude that CPR 62.5(1)(c) is limited to claims against a party to the arbitration or arbitration agreement, the court also has jurisdiction to permit service out of the jurisdiction of an application for a freezing order against a non-party in accordance with the *Chabra* principles. I reach this conclusion with some hesitation, as to some extent it appears to require a somewhat strained construction of the rules, but it is a conclusion which appears to be necessary in order to be loyal to the reasoning of the Supreme Court in the *AES* case and to avoid what would be a very surprising conclusion, namely that an application for a post-award freezing order falls outside the terms of CPR 62.

CPR PD 6, para 3.1(3) – "necessary or proper party"

68. PD 6B, para 3.1(3) provides a jurisdictional gateway where:

> "A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
>
> (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
>
> (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

69. Whether the claimant can establish jurisdiction under this paragraph depends on three issues. The first is whether there is any "claim made" against Unitech as the "anchor defendant". The *Chabra* defendants say that such a claim must be a substantive claim, whereas the only claims made against Unitech in the English court have been the applications for the freezing orders, disclosure orders and the appointment of receivers, all of which are merely ancillary to the claimant's attempts to enforce its award. The claimant submits that this is sufficient for the purpose of paragraph 3.1(3). The second issue is whether there is "a real issue which it is reasonable for the court to try" as between the claimant and Unitech. For the purpose of this issue it must be assumed that an application for ancillary relief of the type described above is sufficient to constitute a "claim". Even so, the *Chabra* defendants say that there is nothing left for the court to try. The claimant has already obtained the orders which it has sought against Unitech. The third issue is whether the *Chabra* defendants are necessary or proper parties to any trial of the issue whether the claimant is entitled to the relief which it seeks against Unitech.

The nature of the "claim" against the anchor defendant

70. The nature of the claim which must exist against the anchor defendant has been considered by Flaux J in two recent cases. In *Belletti v Morici* [2009] EWHC 2316, [2010] 1 All ER 412 the proposed anchor defendant was an Italian businessman against whom a judgment had been given in Italy. The claimants obtained a worldwide freezing order against him in England pursuant to section 25 of the Civil Jurisdiction and Judgements Act 1982. They then discovered that the defendant's parents had assisted him, either wittingly or unwittingly, in breaching the terms of the order. The claimants sought to join the parents to the English proceedings in order to obtain a freezing order and related relief against them. They relied on PD 6B, para 3.1(3) in order to found jurisdiction against the parents, contending that they were necessary or proper parties to the claim for interim relief against their son. Flaux J held that this paragraph did not apply as it was limited to cases where the substantive dispute was before the English court. Only in such a case was any claim going to be tried between the claimant and the anchor defendant. The alternative gateway, para 3.5 (a claim for an interim remedy under section 25 of the 1982 Act), did not assist the claimants because it was "inexpedient" to make an order under section 25 in view of the parents' lack of connection with this country.

71. *Belletti* was not a case of an application for *Chabra* relief but the next case was. That was *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2011] EWHC 2339, [2011] 2 Lloyd's Rep 663, in which the claimant companies had obtained arbitration

awards against the first defendant, the time charterer of a series of vessels. They then obtained summary judgment in England against the second defendant, a company in the same group as the first defendant which had guaranteed the first defendant's obligations. Neither the award nor the judgment was honoured and the claimants then applied for freezing orders against the third to thirteenth defendants, other companies in the same group, all of which were outside the jurisdiction. They did so, first by suggesting that this was a case for piercing the corporate veil so as to render the third to thirteenth defendants liable on the underlying claims and second in reliance on the *Chabra* principles. In order to establish jurisdiction over the third to thirteenth defendants they relied on PD 6, para 3.1(3), contending that they were necessary or proper parties to the claim against the first and second defendants. Flaux J held that there was no arguable case for piercing the corporate veil against any of the defendants, but that there was a sufficiently arguable case on the merits for *Chabra* relief against the third defendant (but not the other defendants). So far as the third defendant was concerned, therefore, the case was materially identical to the present case. Following his previous decision in *Belletti*, Flaux J held that the "necessary or proper party" jurisdiction was not available unless the substantive dispute between the claimant and the anchor defendant was before the English court:

> "161. However, the difficulty which the claimants face in relying on this 'necessary or proper party' provision is that (in so far as they are seeking to found the *Chabra* jurisdiction against the third to thirteenth defendants in relation to assets held by them, which are arguably the first defendant's assets or in which the first defendant is arguably beneficially interested), the application of para 3.1(3) of the Practice Direction is limited to cases where the substantive dispute is before the English courts, because only in such a case will any 'claim' ever be tried between the claimant and the defendant who has been or will be served with the proceedings. In the present case, the claims of the claimant against the first defendant for breach of the charterparties will all be determined in London arbitration rather than by the English court."

72. This reasoning and decision were followed by Gloster J in *The Mahakam* at [90].

73. To different effect is an earlier decision of Aikens J in *C Plc v L* [2001] 2 Lloyd's Rep 459. In that case the claimant had obtained a default judgment against Mrs L, the anchor defendant, as well as a freezing order over her assets. She claimed, however, to have no beneficial ownership of any assets, with most of the family assets being in her husband's name and such assets as she held in her own name being held on trust for her husband. The claimant applied for a freezing order against the husband who was resident out of the jurisdiction and also sought to set aside the default judgment and to amend the claim form in order to bring a substantive claim against both Mrs L and her husband. Aikens J held that the claimant had a substantive right against Mrs L by virtue of the default judgment, that the court had power to make a freezing order against Mr L in accordance with the *Chabra* principles, and that jurisdiction could be established against him as a necessary or proper party to the claim against Mrs L because there remained a dispute between the claimant and Mrs L as to enforcement of the judgment, in particular whether a receiver should be appointed over her assets,

an application to which Mr L was a necessary or proper party. He held also that he would if necessary have been prepared to set aside the default judgment so that a substantive claim could be pursued against both Mr and Mrs L.

74. In *Belletti* at [37] Flaux J distinguished *C Plc v L* on the ground that the substantive dispute in the earlier case was before the English court. With respect I am not sure that this is a valid ground of distinction as in *C Plc v L* the claim against Mrs L had already been determined by the default judgment and there was nothing of substance left for the court to try. Moreover, this was not the basis of Aikens J's reasoning. If it had been necessary to set aside the default judgment, there would have been a substantive claim against both defendants and therefore no difficulty in establishing jurisdiction over them. As it was, however, this was not necessary and jurisdiction was in fact established over Mr L on the basis that he was a necessary or proper party to the application for appointment of a receiver over his wife's assets. It seems to me, therefore, that the decision in *C Plc v L* is difficult to reconcile with the *Belletti* and *Linsen* cases.

75. Mr Choo-Choy submits that the two latter cases are wrongly decided and should not be followed. I do not agree. In my judgment the requirement of a substantive claim against the anchor defendant is in accordance with the language of PD 6B, para 3.1(3) and with principle.

76. As to the language, the references to a "claim", a "real issue" and a trial ("reasonable for the court to try") suggest that what is required is a substantive claim against the anchor defendant. Relief which is ancillary to the enforcement of a judgment or award does not fit naturally into this language, even if such an interpretation is possible. Again, therefore, the "cardinal principle" comes into play: unless there is good reason not to do so, any doubt in the construction of a jurisdictional gateway ought to be resolved in favour of the foreign defendant.

77. Further, in the *Altimo Holdings* case at [73] Lord Collins said that:

> "The necessary or proper party head of jurisdiction is anomalous, in that, by contrast with the other heads, it is not founded upon any territorial connection between the claim, the subject matter of the relevant action and the jurisdiction of the English courts."

78. He added that this jurisdiction must be exercised with caution. Although this reference to the need for caution was primarily concerned with the way in which the court's discretion ought to be exercised, this reasoning tends to confirm that in the construction of para 3.1(3) the "cardinal principle" ought to be applied and not departed from.

79. To interpret the paragraph as requiring a substantive claim against the anchor defendant is also consistent with the long-standing approach to construction of the rules for service out of the jurisdiction, namely that they are generally to be construed as relating to claims which involve the determination and enforcement of legal rights, and not to applications for interim relief which involve no process of adjudication upon substantive rights: see *Mercedez Benz AG v Leiduck* [1996] AC 284 at 301-302:

> "In their [Lordships'] opinion the purpose of Ord. 11, r. 1 is to authorise the service on a person who would not otherwise be compellable to appear before the English court of a document requiring him to submit to the adjudication by the court of a claim advanced in an action or matter commenced by that document. Such a claim will be for relief founded on a right asserted by the plaintiff in the action or matter, and enforced through the medium of a judgment given by the court in that action or matter. The document at the same time defines the relief claimed, institutes the proceedings in which it is claimed, and when properly served compels the defendant to enter upon the proceedings or suffer judgment and execution in default. Absent a claim based on a legal right which the defendant can be called upon to answer, of a kind falling within Ord. 11, r. 1(1), the court has no right to authorise the service of the document on the foreigner, or to invest it with any power to compel him to take part in proceedings against his will.
>
> Thus, at the centre of the powers conferred by Order 11 is a proposed action or matter which will decide upon and give effect to rights. An application for *Mareva* relief is not of this character. When ruled upon it decides no rights, and calls into existence no process by which the rights will be decided …
>
> This opinion, that Order 11 is confined to originating documents which set in motion proceedings designed to ascertain substantive rights, is borne out by its language …"

80. This general approach is of course subject to any contrary indication in the terms of particular gateways, but it nevertheless remains the default position.

81. I conclude, therefore, that because there is no substantive claim against Unitech in this court, that claim having been determined in arbitration, the "necessary or proper party" gateway is not available to the claimant.

A real issue which it is reasonable for the court to try

82. However, if a substantive claim against the anchor defendant is not required, it is necessary to identify the "real issue" as between the claimant and Unitech which the claimant contends that it is reasonable for the court to try. It is not the substantive claim as that has been determined by the arbitrators, whose award has been upheld in this court (see *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm)). It cannot be the application for a disclosure order or a freezing order as those orders have already been made by Field J and Flaux J before the claimant sought any remedy against the *Chabra* defendants. Nor can it be the application for appointment of receivers, which application was already scheduled to be heard (and was subsequently heard) without the involvement of the *Chabra* defendants.

83. Instead the claimant's case is that the existing freezing order needs to be extended to "prohibit … Unitech from exercising any of its rights or powers, whether (i) as a direct or indirect shareholder of shares in other companies or (ii) by virtue of any

contract or agreement, for the purpose of achieving" the disposal of assets held by the *Chabra* defendants. It seems to me, however, that this would add nothing of substance to the relief which the claimant has already obtained. In particular the receivership order already prohibits Unitech from doing anything in any way to impede or interfere with the performance of the receivers' functions and the exercise of their powers and requires Unitech to co-operate with the receivers.

84. If necessary, therefore, I would have concluded that there is no real issue requiring to be tried as between the claimant and Unitech. The mere possibility that such issues may arise in the future, for example if there is a dispute about any particular step which the receivers require Unitech to take, is not enough to establish jurisdiction now against the *Chabra* defendants. Since there is no such real issue requiring to be tried, the *Chabra* defendants cannot be necessary or proper parties to the trial of that claim.

Discretion

85. If I am wrong as to jurisdiction, the question of discretion arises. If the claimant can establish jurisdiction under the "necessary or proper party" gateway, it must demonstrate that "England and Wales is the proper place in which to bring the claim" (see CPR 6.37(3)). This rule does not apply in terms to an arbitration claim when the jurisdiction is established under CPR 62.5, although it is clear from the terms of that rule ("the court may give permission") that there too, there is a discretion to be exercised. Accordingly the claimant must show that England is clearly the most appropriate forum for the determination of the application for a freezing order against the *Chabra* defendants.

86. I find it difficult to say, on the hypothesis that I am wrong about jurisdiction, how the discretion should be exercised. It would have to depend on why I am wrong. For example, if I had held that the *Chabra* defendants are indeed necessary parties to a claim against Unitech involving a real issue as between the claimant and Unitech, there would appear on that basis to be a powerful case for saying that the *Chabra* defendants should be joined and jurisdiction should be exercised over them. Similarly if I had held that the draftsman of CPR 62.5 intended the court to have jurisdiction over defendants who were not parties to any arbitration or arbitration agreement, defendants such as the *Chabra* defendants would appear to be within the contemplation of the rule, in which case the policy of supporting the enforcement of arbitration awards would come into play.

87. The *Chabra* defendants submit that in principle, the most appropriate place to make orders affecting assets abroad is the place where the assets are located, citing Millett LJ in *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 at 827:

> "It is a strong thing to restrain a defendant who is not resident within the jurisdiction from disposing of assets outside the jurisdiction … Where a defendant and his assets are located outside the jurisdiction of the court seised of the substantive proceedings it is in my opinion most appropriate that protective measures should be granted by those courts best able to make their orders effective. In relation to orders taking direct effect against the assets, this means the courts of the state where the

> assets are located; and in relation to orders *in personam*, including orders for disclosure, this means the courts of the State where a person enjoined resides."

88. The *Chabra* defendants rely also on what was said by the European Court of Justice in the context of the Brussels Convention in *Van Uden Maritime BV v KG in Firma Deco-Line* [1999] QB 1225 at [39]:

> "… the courts of the place—or, in any event, of the contracting state—where the assets subject to the measures sought are located are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures authorised."

89. I see the force of this, but one of the claimant's problems is that it does not know where the *Chabra* defendants have their assets: see [32] of the receivership judgment. They have not revealed where such assets are located, save to say that they have no assets within the jurisdiction of this court. In those circumstances their submission that the claimant should apply for interim relief in the places where the *Chabra* defendants' assets are to be found is difficult to accept. On the other hand, it would be possible for the claimant to apply in the jurisdictions where the *Chabra* defendants are incorporated, but that would require separate applications in India, Cyprus and the Isle of Man and would therefore result in, rather than avoid, duplicative proceedings. I recognise that the grant of a freezing order here might lead to further proceedings in the jurisdiction or jurisdictions where the *Chabra* defendants' assets are located once that information is known and that ultimately that is where any enforcement against those assets would have to take place, but it seems more efficient for the question whether the claimant is entitled to a freezing order and disclosure order in accordance with the *Chabra* principles to be determined in a single proceeding here rather than in separate proceedings in three different jurisdictions where the *Chabra* defendants are incorporated.

90. A final decision as to how the discretion should be exercised would have to await a decision as to the basis on which the court has jurisdiction in the event that I am wrong in the conclusions which I have reached as to the gateways relied upon. However, I would say provisionally, and giving appropriate weight to the need for caution, that if the *Chabra* defendants are necessary parties to a claim against Unitech involving a real issue as between the claimant and Unitech, or if CPR 62.5 is intended to give the English court jurisdiction over defendants who were not parties to any arbitration or arbitration agreement, I would probably have exercised the discretion in favour of permitting service out of the jurisdiction on the *Chabra* defendants. That would avoid the necessity for separate proceedings in the various jurisdictions where these defendants are incorporated and would promote the policy of assisting in the enforcement of arbitration awards, while the existence of jurisdiction over Unitech and the English court's supervisory role in relation to the London arbitration which resulted in the award would provide a connection with England. The fact that Unitech Corporate Parks Plc, an Isle of Man company in which despite its name Unitech has only a minority shareholding, is listed on the AIM in London provides a further link to the jurisdiction in view of the impending sale of its subsidiary company Candor

Investments Ltd (see [31] of the receivership judgment). In reality, however, the premise for any exercise of discretion (i.e. that the court does have jurisdiction because the gateways in question permit service on non-parties for the purpose of obtaining relief which is ancillary to the enforcement of an award) seems to me to be so doubtful that the question how the discretion should be exercised is somewhat artificial.

Real connecting link

91. Three of the *Chabra* defendants, Nectrus, Nuwell and Technosolid are Cypriot companies. It is common ground that, in their case, a further requirement exists in order to found jurisdiction here, namely that there is "a real connecting link between the subject matter of the measures sought and the territorial jurisdiction" of the English court. That requirement arises because, as Cyprus is a member of the European Union, jurisdiction in respect of civil and commercial matters is governed by the Brussels Regulation, it being common ground that the "arbitration" exception does not apply. Even if it did, however, an application for a freezing order is characterised as an application for provisional or protective measures to which Article 31 applies: *Van Uden*. In such a case, territorial jurisdiction over the intended defendant must be found in the national rules of the court to which an application is made, but European law imposes an additional requirement of a "real connecting link". Thus *Van Uden* at [38] to [40] states that:

> "38. The granting of this type of measure of requires particular care on the part of the court in question and detailed knowledge of the actual circumstances in which the measures sought are to take effect. Depending on each case and commercial practices in particular, the court must be able to place a time limit on its order or, as regards the nature of the assets or goods subject to the measures contemplated, require bank guarantees or nominate a sequestrator and generally make its authorisation subject to all conditions guaranteeing the provisional or protective character of the measure ordered: *Denilauler v S.n.c. Frères* (Case 125/79) [1980] ECR 1553,, 15700, para 15.
>
> 39. In that regard, the court held at paragraph 16 of *Denilauler* that the courts of the place - or, in any event, of the contracting state - where the assets subject to the measures sought are located are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures authorised.
>
> 40. It follows that the granting of provisional or protective measures on the basis of article 24 is conditional on, *inter alia*, the existence of a real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the contracting state of the court before which those measures are sought."

92. In *Belletti* Flaux J held at [46]-[47] that *Van Uden* established an additional jurisdictional hurdle:

> "46. Equally, in my judgment there is no basis for the suggestion that the *Van Uden* criterion of a 'real connecting link' should somehow not apply because the relief sought is ancillary to other interim relief. The criterion clearly applies to any case to which the Judgments Regulation applies in which interim relief is sought. This application is such a case, irrespective of the fact that interim relief had been previously sought and obtained against the first defendant.
>
> 47. It follows that in order to justify permission to serve the parents out of the jurisdiction, the claimants have to satisfy both the criteria as regards expediency established by the various Court of Appeal cases and the *Van Uden* criterion."

93. The claimant contends that the requirement of a "real connecting link" in an application for *Chabra* relief is satisfied by the fact that the principal defendant, Unitech, is subject to the territorial jurisdiction of the English court even though the assets which it is sought to freeze are outside the jurisdiction. It contends that the subject matter of the measures sought consists of the principal defendant's rights to and control of the relevant assets, which can therefore be made available to satisfy the judgment or award against that defendant. The *Chabra* defendants, however, say that the subject matter of the measures is either the *Chabra* defendants themselves or their assets and that in either case there is no connection with the territorial jurisdiction of the English court.

94. It is apparent from the passage from *Van Uden* cited above that the rationale for the requirement of a "real connecting link" is that the court considering whether to grant interim measures must be able to ensure the provisional character of those measures, by imposing any necessary conditions or safeguards on the grant of the measures in question. Accordingly, where the measures are concerned with assets which are to be available as security for a claim, it is to be expected that the court where the assets are located is the court which is in a position to exercise the necessary control over those assets, not only to ensure that they are indeed frozen, but also to ensure that the claimant does not obtain more than it is entitled to by way of provisional relief. This suggests, in my judgment, that for the purpose of the "real connecting link" requirement, the subject matter of an application for a freezing order over assets consists of the assets in question.

95. This appears also to have been the view of the Court of Appeal in *Banco Nacional de Comercio Exterior SNC v Empresa de Telecommunicationes de Cuba SA* [2007] EWCA Civ 662, [2008] 1 WLR 1936 at [29], and of Popplewell J in *ICICI Bank v Dimincio NV* [2014] EWHC 3124 (Comm) at [30]. *Sandisk Corporation v Koninklijke Electronics NV* [2007] EWHC 332 (Ch) at [52] and *Belletti* at [58] are to similar effect, although Pumfrey J and Flaux J in the two latter cases also recognised the alternative possibility that the subject matter of the measures sought might be the defendants whose control over the assets was to be restrained. None of these were *Chabra* cases, but I see no reason why a different principle should apply in such a

case. The rationale, namely, the local court's control over the assets in question, or possibly over the defendants, remains the same.

96. I conclude, therefore, that there is no "real connecting link between the subject matter of the measures sought and the territorial jurisdiction" of the English court and that for this additional reason in the case of the three Cypriot defendants, this court must decline jurisdiction. That being so, it is necessary to revisit the question of discretion in relation to URRL and UOL. Since it is now impossible for the question of *Chabra* relief to be determined against all the *Chabra* defendants in a single proceeding in this court, the strength of the case for exercising jurisdiction over the Indian and Isle of Man defendants is much reduced. Accordingly, because jurisdiction over the three Cypriot defendants must be declined for want of a “real connecting link” as a matter of European law, I would decline jurisdiction over URRL and UOL as a matter of discretion.

Non-disclosure

97. Finally, the *Chabra* defendants complain that the claimant failed to draw the attention of Blair J to authorities, or passages in authorities, which were adverse to its case. I accept, however, that this failure was inadvertent and would not have set aside the order for service out of the jurisdiction on this ground.

Overall conclusion

98. This court has no jurisdiction over the *Chabra* defendants and their application to set aside the order for service upon them out of the jurisdiction succeeds.