Neutral Citation Number: [2018] EWHC 1500 (Comm)

Case No: CL-2018-000293

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

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

Date: 08/06/2018

Before:

MR. JUSTICE BRYAN

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Between:

PERKINS ENGINES COMPANY LIMITED	**Applicant/ Claimant**
- and -	
(1) MOHAMMED SAMIH HUSEEIN GHADDAR **(2) GHADDAR MACHINERY CO. S.A.L.**	**Respondents/ Defendants**

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MR. JASBIR DHILLON QC and MR. EDWARD HO (instructed by **Mayer Brown International LLP**) for the **Applicant/Claimant**
MR. STEPHEN HOUSEMAN QC (instructed by **Allen & Overy LLP**) for the **Respondents/Defendants**

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JUDGMENT APPROVED

MR. JUSTICE BRYAN :

1. The parties appear before me today on the hearing of an application made by the Claimant Perkins Engines Company Limited ("PECL") dated 2 May 2018 seeking an interim negative anti-suit injunction against the First and Second Defendants, that is Mohammed Ghaddar and Ghaddar Machinery Co. S.A.L ("D1 and D2") in respect of proceedings commenced by them (as Plaintiffs) against PECL (as Defendant) in Lebanon on 12 April 2018 (the "Lebanese Proceedings"), which PECL say were commenced in breach of an arbitration

agreement contained within a Distributor Agreement to which PECL and the Defendants are party.

2. The application for an interim anti-suit injunction is made within arbitration proceedings commenced by an arbitration claim form issued on 1 May 2018 and served upon the First and Second Defendants pursuant to the Order of Phillips J made on 3 May 2018.

3. It is supported by a witness statement of a Miles Robinson dated 1 May 2018 and of a Katherine Wren dated 27 April 2018 and opposed in a witness statement of Katie Davies dated 29 May 2018, to which Mr. Robinson has replied in his second statement which was made on 5 June 2018. I confirm that I have read and had careful regard to such statements and the documentation exhibited thereto. Ultimately however, as shall be seen, the issues that arise largely turn on the proper construction of the wording of the arbitration agreement contained within the Distributor Agreement which is a matter of contractual construction of the provision concerned and, as such, a matter for the Court, although I also have before me some evidence of Lebanese law, the potential relevance of which will become apparent in due course.

4. The interim anti-suit injunction sought is in these terms, namely an injunction to restrain the First and Second Defendants from:-

   (1) Pursuing, or taking any further steps in, or procuring or assisting the pursuit of, the proceedings before the Court of First Instance in Sidon (Chamber of Commercial Lawsuits), Lebanon commenced by the Defendants on 12 April 2018 (the Lebanese Proceedings) by themselves,

their directors, officers, employees or agents.

(2) Commencing or pursuing, or procuring or assisting the commencement or pursuit of, any further proceedings concerning any dispute arising between them and the Claimant which arises from or relates to the Distributor Agreement dated 1 October 1990, as subsequently amended and novated (the "Distributor Agreement") in any Court or Tribunal other than a Tribunal constituted in accordance with Clause 23.6 of the Distributor Agreement, alternatively before the English Courts.

5. PECL is a UK registered company and is a wholly owned, indirect subsidiary of Caterpillar Inc., and one of the world's leading suppliers of gas and diesel engines in the 4-2000 kW range. The Second Defendant is a family-owned Lebanese company which is managed by the First Defendant Mr. Ghaddar. The Defendants were, until recently, distributors of the Claimant's products in Lebanon under the Distributor Agreement.

6. The Distributor Agreement was concluded on 1 October 1990 and the original parties to it were Perkins Power Sales & Service Limited ("PPSSL") and Ghaddar Machinery Est. There is a somewhat convoluted history, by reference to which it is said that, as at present and at all material times, PECL is party to the Distributor Agreement as principal and the Defendants are party to the Distributor Agreement as the Distributor. It is unnecessary to investigate that or make any findings in the context of this application, as little or nothing turns on it in circumstances where it is accepted, on behalf of the Defendants, that no issues arise as to title to sue or privity to the Distributor

Agreement and the arbitration clause contained within the Distributor Agreement.

7. Suffice it to say that PECL's case is that, as a matter of Lebanese law, an "Est." (like Ghaddar Machinery Est.) is not a juridical person with legal capacity to conclude contracts, and as a result the original party to the Distributor Agreement was not Ghaddar Machinery Est. but the individual who stood behind it (i.e., Mr. Ghaddar), whilst in or around October 2005, it is said by PECL that it was agreed that Ghaddar Machinery Co. SAL should be added as a party to the Distributor Agreement, and the agreement it is said was novated so as to include Ghaddar Machinery Co. SAL.

8. Similarly on 6 October 2010, PECL notified Mr. Ghaddar (both personally and in effect in his capacity as a director of Ghaddar Machinery Co. S.A.L.) that PECL was proposing to "*hold and manage*" the Agreement, which PECL says meant that PECL was to take over all obligations, as well as rights, originally held by PPSSL under the Agreement, and the Defendants accepted that proposal by their conduct with the result (says PECL) that in around October 2010 the Distributor Agreement was novated so as to replace PPSSL with PECL.

9. Whatever the precise circumstances and mechanism by which it was achieved, and I make not findings in relation to that, it is common ground between PECL and the Defendants for the purpose of this hearing that at all material times the parties to the Distributor Agreement are to be regarded as PECL and the Defendants.

10. The relationship between PECL and the Defendants is a long-standing one under the Distributor Agreement, and the Defendants have bought very many engines from PECL over the years pursuant to the terms of that Agreement.

11. The evidence relied upon by PECL is to the effect that in January 2017 the Defendants admitted selling 30 engines supplied under the Distributor Agreement into Syria, but that following investigations and dialogue with the Defendants over the course of 2017, it says (per the evidence of PECL at least) that the Defendants had sold in the order of 1,200 engines and at least 200 parts (and possibly more than 600 parts) into Syria, which PECL alleges was in breach of the Distributor Agreement.

12. The parties disagree about whether the Defendants' sales into Syria amounted to breaches of the Distributor Agreement. PECL says they did and, having served a notice of breach in respect of them on the Defendants (in accordance with Clause 20.2 of the Distributor Agreement) on 9 January 2018, and alleging therein that the Defendants had failed to remedy the breaches complained of within 45 days, subsequently on 2 March they alleged and stated that PECL was entitled to and did terminate the Distributor Agreement on that date. For their part, the Defendants deny that termination of the Distributor Agreement was lawful.

The Lebanese Proceedings

13. On 12 April 2018 the Defendants commenced the Lebanese Proceedings. In those proceedings the Defendants seek damages under Article 4(2) of the Decree-Law No. 34/67, a Lebanese decree which the Defendants say entitles a

commercial representative to damages where their principal has unlawfully terminated the representation agreement. The evidence is that Decree 34/67 is a mandatory provision of Lebanese law containing mandatory rules of Lebanese public policy which had been in force for over 20 years when the Distributor Agreement was concluded in October 1990. The Defendants say that such mandatory rules of Lebanese public policy must be applied in disputes of the kind currently between the parties which are heard by the Lebanese Court and which would give the Lebanese court exclusive jurisdiction over such disputes.

14. Two weeks after making the present application by arbitration claim form, PECL sent a Notice of Arbitration dated 16 May 2018 to the Defendants purporting to refer the dispute between them to arbitration in England. The Defendants have not taken part in the arbitration and seek to reserve their rights.

15. The primary basis for the (interim and final) anti-suit injunction sought by PECL in respect of the Lebanese Proceedings is an alleged breach by both the First and Second Defendants of an arbitration agreement contained in the second paragraph of Clause 23.6 of the Distributor Agreement (the "Arbitration Agreement").

The Arbitration Agreement

16. Clause 23.6 of the Distributor Agreement provides:

> *"This Agreement shall be deemed to be an agreement made in England and shall be read and construed and take effect in all respects in accordance with the Laws of England and the Parties hereby submit to the jurisdiction of the English Courts.*

> *To the extent there is no reciprocal enforcement procedures between the United Kingdom and the country in which the Distributor is located, the Parties agree to submit any dispute arising between them that cannot amicably be settled to arbitration. The arbitration shall be held in London, England …"*

I should add that the arbitration clause goes on to provide for the number of arbitrators (i.e. a sole arbitrator) and for the procedure which is under UNCITRAL Rules.

17. It is common ground that the Arbitration Agreement in Clause 23.6 is engaged if, and I quote:

> "There is no reciprocal enforcement procedures between the United Kingdom and the country in which the Distributor is located" (i.e. in this case the Lebanon).

18. The parties, however, disagree about what the words "*reciprocal enforcement procedures between the [UK] and [Lebanon]*" mean and whether such reciprocal procedures exist in this case. PECL's primary case is that the words "*reciprocal enforcement procedures between the [UK] and [Lebanon]*" mean that there must be a binding bilateral or multilateral treaty between the UK and Lebanon which provides the rules or procedures subject to which judgments of one state will be enforced in the other. It is common ground that no such treaty exists, with the result that there are (says PECL) no "*reciprocal enforcement procedures*" and the Arbitration Agreement is engaged.

19. If that is right, then PECL submits that it is or ought to be common ground that: (i) the disputes in the Lebanese Proceedings fall within the Arbitration Agreement and must be referred to English arbitration; and (ii) in those circumstances there is no reason why the interim anti-suit injunction sought by PECL should be refused.

20. If PECL's primary case on construction was rejected, and the Court (contrary to PECL's submissions) accepted the Defendants' interpretation of Clause 23.6, that there need only be substantial reciprocity between the UK and Lebanese rules of enforcement, PECL says that a further question of construction arises as to whether the words "*reciprocal enforcement procedures*" require that the actual dispute which has arisen between the parties is subject to substantially reciprocal enforcement procedures or whether it suffices if such procedures exist in general. PECL submits the former is the right construction, and that there are no substantially reciprocal enforcement procedures available to enforce any judgment in the actual dispute between the parties. PECL submits in the yet further alternative, that even if Clause 23.6 only requires that in general there is substantial reciprocity between the UK and Lebanese rules of enforcement, even that requirement is not satisfied on the facts.

21. PECL also foreshadowed a further case which is not based on its Arbitration Claim Form or the relief sought therein, which was that if, contrary to PECL's primary case, there are "*reciprocal enforcement procedures*" between the UK and Lebanon, then PECL identifies that there is a jurisdiction agreement in Clause 23.6, which it says would be engaged. PECL's submission would be in that scenario, that the Jurisdiction Agreement prohibits either party from continuing to litigate abroad if the other party invokes the jurisdiction of the English Courts. It was foreshadowed that if that interpretation was the correct one, then PECL would undertake to commence English proceedings immediately, with the submission from PECL that the Defendants would be (if they were right about that construction on Clause 23.6) contractually obliged

to discontinue the Lebanese Proceedings and PECL would be otherwise entitled to an interim injunction. For its part, the Defendants deny that would be the effect of the first paragraph of Clause 23.6. However, the position before me today is that no such claim has been brought, there has been no amendment to the claim form and the nature of the relief sought would not itself be that sought in the arbitration claim form.

22. Against that background, I have not heard full argument in relation to the issues that will arise in relation to that. I will mention the point again at the end of my judgment. Accordingly, this judgment is concerned with the first two points that I have identified before that point. Accordingly, against that background, it will be seen that the issues which arise in relation to the Arbitration Agreement are:

(1) What do the words "*to the extent that there is no reciprocal enforcement procedures between the [UK] and [Lebanon]*" in Clause 23.6 of the Distribution Agreement mean?

(2) Are there "*reciprocal enforcement procedures*" between the UK and Lebanon applicable in this case?

Applicable principles

23. Turning first to the applicable principles in relation to the granting of an anti-suit injunction, the parties were in agreement as to what those principles were. In that regard the court has jurisdiction to grant an interim anti-suit injunction to restrain a breach of an English Arbitration Agreement under section 37 of the Senior Courts Act 1981 (see ***Ust-Kamenogorsk Hydropower Plant JSC v***

AES Ust-Kamenogorsk Hydropower Plant LLP [2013] 1 WLR 1889 at paragraph 48 per Lord Mance). Reference was made to what was said by the Master of the Rolls, Sir Terence Etherton in ***Michael Wilson & Partners v Emmott*** [2018] EWCA Civ 51 at paragraph 39 and I quote:

> "Bearing in mind ... the caution that must be exercised in respect of injunctions against foreign proceedings, the court requires a high degree of probability that there is an arbitration agreement which governs the dispute in question where ... an anti-suit injunction is sought in respect of foreign proceedings."

24. In that regard from the same case reference is also made to the preceding paragraph 38, and I quote:

> "...if contracting parties agree to give a particular ... tribunal exclusive jurisdiction to rule on claims between them, and a claim falling within the scope of the agreement is made in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion to grant an anti-suit injunction in order to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum can show strong reasons for suing in that forum."

25. PECL accordingly bears the burden of demonstrating that there is no reciprocal enforcement procedures between the United Kingdom and the Lebanon. If it does so, then it will have demonstrated to a high degree of probability that there is an arbitration agreement which governs the dispute in question between the parties, with the result that the Defendants will be in breach of that arbitration agreement in commencing and continuing the Lebanon Proceedings.

26. However, it is a matter of construction as to what Clause 23.6 means as a matter of English law, and in that context it only has one meaning as a matter of English law. As such, the reality is that matters are unlikely to turn on the

burden of proof, at least if PECL are correct on their primary interpretation; i.e. based on the proper construction of Clause 23.6 and PECL's submission that that requires the existence of a bilateral or multilateral treaty, that question being itself a matter for the Court.

27. In this regard it is common ground between the parties that the meaning and effect of the Arbitration Agreement (including its conditionality or applicability) is a matter of English law, in accordance with the express choice of the parties in the opening paragraph of Clause 23.6 and their implicit choice of England as the seat of any arbitration in the second sentence of the second paragraph of Clause 23.6.

28. In that regard the arbitration agreement is a contract between the parties thereto and as such is to be construed in accordance with the English principles of contractual construction which are well-established and, as one would expect, common ground between the parties, although there was a difference of emphasis between the parties. For PECL's part, Jasbir Dhillon QC on behalf of PECL, referred to the authoritative summaries by the Supreme Court in ***Arnold v. Britton*** [2015] A.C. 1619 and ***Wood v. Capita Insurance Services Ltd*** [2017] A.C. 1173, specifically that interpretation is a unitary exercise in which the Court must consider the language used and ascertain what a reasonable person, who has all the relevant background knowledge, would have understood the parties to have meant. Where there are rival meanings, the Court can give weight to the implications of the rival constructions, by reaching a view as to which construction is more consistent with business common sense: ***Wood v. Capita***, *(supra)*, at [11].

29. Whilst for his part, Stephen Houseman QC, on behalf of the Defendants, relies on the fact that an Arbitration Agreement and, indeed, Clause 23.6 as a whole, is a dispute resolution clause in a commercial agreement, and as such the proper approach is that stated by the House of Lords in the ***Fiona Trust*** case [2008] 1 Lloyd's Rep 254, with reference being made in particular to paragraphs [5], [7]-[8], [13] & [20] of the speech of Lord Hoffmann to which I have had careful regard. In this regard, the exercise involves ascertaining the "*rational commercial purpose*" or "*reasonable commercial expectations*" of "*rational businessmen*". The commercial purpose of the wording may be affected by the "*commercial background*" and the court is ultimately looking for the "*fair construction*" to give effect to commercial purpose. I will return to those points when I address the issue of construction.

The Construction of Clause 23.6 and the parties' submissions in relation thereto

30. The parties address the questions of construction that arise at some length in the witness statements and in the respective skeleton arguments and the Defendants' supplemental note. Whilst the former would not normally be an appropriate vehicle for submission, it was necessary to address the merits of the application in the context of the application for permission to serve out of the jurisdiction. It would unduly lengthen this extempore judgment to set out all the arguments raised by the parties verbatim. I summarise below particular arguments advanced on behalf of each party. I confirm, however, that I have considered, and had regard to, all arguments advanced on behalf of the parties in reaching the conclusions I have.

31. It is common ground that the starting point is to identify the ordinary and natural meaning of the words. PECL submits that these words support PECL's, not the Defendants', construction:

(1) PECL submits that "*reciprocal*" means, when used as an adjective as in Clause 23.6 of the Distributor Agreement, "*Existing on both sides; mutual; (of two or more things) done, made, etc., in exchange*" referring in that regard to ***The Shorter Oxford English Dictionary*** (6th ed.) Vol. 2 p.2486. Reliance is also placed on the reference in Google.com that when the adjective "*reciprocal*" is used "*(of an agreement or obligation)*" it means "*…bearing on or binding each of the two parties equally…*".

(2) Accordingly, submits PECL "*…reciprocal enforcement procedures between the United Kingdom and [Lebanon]…*" are procedures for the enforcement of a judgment which "*exist on both sides*" or are mutual, and bind equally the United Kingdom and Lebanon.

(3) In order for there to be enforcement procedures which are mutual, and which bind the UK and Lebanon equally, PECL submits that there must be a bilateral or multilateral treaty providing for the enforcement of court judgments between the UK and Lebanon, which proscribes the mutual enforcement procedures which both countries will use to enforce the other's judgments. Such a treaty, it is said, is the only thing which ensures mutual enforcement procedures and bind both countries equally.

(4) PECL submits that interpreting the words "*reciprocal enforcement procedures"* as requiring a bilateral or multilateral treaty is consistent with the fact that the word "*reciprocal*" connotes enforcement procedures which are "*done, made, etc., in exchange*". A treaty, like all agreements, is the conclusion of a process of give and take, and the procedures it contains for the enforcement of a judgment are the result of that process of exchange.

(5) Reference is also made to the use of the word "between". Clause 23.6 provides that there must be "*…no reciprocal enforcement procedures <u>between</u> the <u>United Kingdom</u> and the country in which the Distributor is located…"* (emphasis added). PECL identifies two points which it says follow from those emphasised words:

(a) First, the use of language which focuses on what reciprocal enforcement procedures exist *between* the UK and Lebanon is indicative of a treaty or convention to which both states are a party and which, therefore, exists "*between*" them. PECL submits that the language of Clause 23.6 does not, as the Defendants suggest, invite an inquiry into whether there are enforcement procedures in the UK and Lebanon which are "*reciprocal*" in the sense of being substantially similar, not least because that interpretation fails to give full effect to the words "***<u>between</u>*** *the [UK] and [Lebanon]*".

(b) Second, the fact that the reciprocal enforcement procedures have to exist between *the UK*, rather than one of the three distinct legal jurisdictions (i.e. England & Wales, Scotland and Northern Ireland) within the UK, indicates that the focus of Clause 23.6 is upon a treaty which the UK is a party to (rather than the rules of one of the three legal jurisdictions within the UK). In this regard, it is pointed out that the parties were well aware of the difference between the UK and the countries it comprises, as the first paragraph of Clause 23.6 refers repeatedly to England rather than the UK.

32. PECL also submits that its construction best accords with the contractual context provided by the Arbitration Agreement in Clause 23.6 of the Distributor Agreement praying in aid the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitration Awards 1958 (the "New York Convention"). In this regard, the Arbitration Agreement provides for arbitration in England, and PECL submits that implicitly therefore it contemplates an award capable of enforcement abroad (including, it is said, in the Lebanon) under the New York Convention. It is said that the enforcement mechanism envisaged by the Arbitration Agreement therefore is itself enforcement under a multilateral international treaty. It is said that context supports interpreting the words "*reciprocal enforcement procedures between the United Kingdom and [Lebanon]"* as referring to the existence of a bilateral or multilateral international treaty, akin to the New York Convention, for the

enforcement of a court judgment rendered by virtue of the Jurisdiction Agreement in Clause 23.6.

33. In response to this argument on factual matrix, the Defendants point out that the Lebanon was not a signatory to the New York Convention when the Distributor Agreement was concluded in October 1990, albeit that the Defendants state that it is understood to have introduced procedures for enforcing foreign arbitral awards consistent with the New York Convention. The Defendants note that the Lebanon later acceded to the New York Convention on 11 August 1998. This debate as to the relevance, if any, of the New York Convention regime, in the context of the construction of Clause 23.6 is however also set against the backdrop, as expressly acknowledged by the Defendants, at paragraph 11 of their Skeleton Argument, that the contractual language in Clause 23.6 is no doubt the product of standard wording used by PECL's predecessors in similar agreements with counterparties in different jurisdictions. As at October 1990 the New York Convention might well have been acceded to, in many jurisdictions where counter-parties to such standard wording resided.

34. PECL also submits that its interpretation of Clause 23.6 is also the only one, it says, which is consistent with business common sense and reasonableness. On PECL's construction, the scheme in Clause 23.6 is that, if there is a bilateral or multilateral treaty between the UK and the relevant other country which provides for the enforcement of judgments, the Arbitration Agreement is not engaged, and a party can instead litigate in England, secure in the knowledge that any judgment will be enforceable in the place where the other is located.

Whereas, if there is no treaty, the parties are bound to arbitrate and enforcement of the resulting award is secured by the New York Convention. It is said that that construction accords with business common sense and reasonableness because it produces a scheme which means that the parties obtain the benefit of either a specific agreement between the UK and Lebanon dealing with the enforcement of court judgments, or, in the absence of such a treaty, the New York Convention to enforce any arbitral award. It is said that PECL's construction ensures the parties are provided with a certain and predictable enforcement procedure which does not depend on the intricacies or vagaries of a particular national system of law.

35. In this regard, PECL submits that the effect of PECL's interpretation is that it provides the parties with the means by which to determine whether they are obliged by Clause 23.6 to arbitrate or litigate any dispute in a way which is certain, speedy and simple. It is said that the Claimant need only check whether there is a treaty or convention between the UK and Lebanon for the enforcement of judgments, which is said is a matter which is readily ascertainable, in order to determine whether it must arbitrate or litigate. It is said that the need for such certainty, speed and simplicity is obvious: in a case where urgent interim relief was needed or a limitation might be soon to expire, a claimant would need to know quickly, simply and with high degree of assurance which forum it should proceed in. It is submitted that PECL's construction provides that. Whereas, it is said the Defendants' construction provides quite the opposite.

36. In summary therefore, PECL submits that its construction provides a scheme which: (1) enables the parties to determine quickly, easily and with certainty whether they should arbitrate or litigate; (2) guarantees them clear enforcement rights prescribed by an international treaty; and (3) is wholly consistent with the natural meaning of the words of Clause 23.6.

37. For their part, and as identified at paragraph 53 and following of the statement of Katie Davies, as developed in the Defendants' Skeleton Argument and Supplemental Note, and oral submissions of Mr. Houseman before me this morning, the Defendants submit that when construing Clause 23.6 as a whole, the first paragraph amounts to a non-exclusive jurisdiction clause in favour of the English court, and the arbitration agreement in the second paragraph is conditional and only applies where there are "*no reciprocal enforcement procedures between the United Kingdom and the country in which the Distributor is located*". In other words, so it is said, it is agreed between the parties that if there are "*reciprocal enforcement procedures*" between the UK and Lebanon the arbitration agreement does not apply.

38. The Defendants' position, and submission, is that in relation to the second paragraph of the Clause there are "*reciprocal enforcement procedures*" between the UK and the Lebanon, namely the English common law enforcement procedures for foreign judgments and the Lebanese *exequatur* enforcement procedures for foreign judgments (as discussed in paragraphs 64 to 76 of Ms Davies' witness statement) so that the Arbitration Agreement does not apply. In this regard, the evidence of Lebanese law before me is that when the Distributor Agreement was concluded and, as I have already

foreshadowed, Decree 34/67, which is mandatory law giving Lebanese exclusive commercial agents and distributors the right to bring compensation claims in the Lebanese court in relation to the wrongful non-renewal, or termination of a Distribution Agreement, was already in force.

39. In relation to a Lebanese judgment, reference is made to the common law enforcement procedure summarised in Dicey, Morris & Collins, at para 14R-020 onwards, which is noted by Dicey for "the speed and simplicity of this procedure" (Dicey Para 14.011), reference also being made to ***New Cap Reinsurance Corp v Grant*** [2012] Ch 538 at paragraphs [7]-[8]. Comparisons are also made, and relied upon, between the common law enforcement procedure and the provisions of the Administration of Justice Act 1920 (the "1920 Act") and the Foreign Judgments (Reciprocal Enforcement) Act 1933 (the "1933 Act"), neither of which apply to the Lebanon, though the Defendants point out that they are similar to the common law procedure, and that being the case, it is said that the common law procedures should also constitute English "enforcement procedures". The Defendants also pray in aid Mr Robinson's apparent acceptance that the 1920 Act and the 1933 Act, where applicable to a particular country, would amount to "reciprocal enforcement procedures" between the United Kingdom and that other country for the purpose of the second paragraph of Clause 23.6.

40. This led to lengthy submissions on the relevance, if any, of such Acts which are addressed, in particular, at length, in paragraph 25 and following of PECL's Skeleton Argument. I have borne in mind the parties' respective submissions on such Acts, but, ultimately, I am concerned not with a situation

where either Act applies, but where neither Act applies, and I have to construe the second paragraph of 23.6 in that context.

41. I would, however, note that the 1920 Act only applies to countries which formed part of the British Empire, and if the Government is satisfied that "*…reciprocal provisions have been made by the legislature of any part of His Majesty's dominions outside the United Kingdom for the enforcement within that part of His dominions of judgments obtained in the High Court in England…*" and has, in effect, so declared by issuing an Order in Council declaring that Part II of the 1920 Act applies to the relevant country: see section 14 of the 1920 Act. The 1920 Act therefore provides a scheme: [A] limited to Crown dominions; [B] which, while not dependent on a treaty between the UK and the dominion, required there to be specific reciprocal legislative provisions for enforcement; and [C] which does not involve the Court in the assessment of whether any provisions were "*reciprocal*" but made that a matter for the Government.

42. As for the 1933 Act, Part I of the 1933 Act provides a statutory scheme for the recognition and enforcement of judgments to which that Part applies. Section 1(1) of the 1933 Act explains that Part I of that Act only applies following an Order in Council directing that Part I should apply to a particular country, which should only be made if "*…Her Majesty is satisfied that, in the event of the benefits conferred by this Part of this Act being extended to, or to any particular class of judgments given in the courts of that country or in any particular class of those courts, substantial reciprocity of treatment will be*

assured as regards the enforcement in that country of similar judgments given in similar courts of the United Kingdom…".

43. The 1933 Act only ever applied to a limited number of countries, and, as addressed in PECL's Skeleton Argument, in addition, many of those now fall within the Brussels I Recast regime.

44. PECL draws attention to what is stated in CPR PD 75A and in Dicey & Morris in relation to these Acts. Specifically, CPR PD 75A para 5 states "*Foreign judgments are enforceable in England and Wales under the 1920 or 1933 Act where there is an agreement on the reciprocal enforcement of judgments between the United Kingdom and the country in which the judgment was given*" (emphasis added); see similarly ***Dicey, Morris & Collins*** at §14-184 **[B4b/13/p.395]**; Briggs, ***Private International Law in English Courts***, (OUP, 2014) at §6.128, "…[The 1933 Act] *is therefore motivated by a concern to achieve reciprocity of treatment; and the Act will only be extended to a foreign country when a bilateral treaty has been made to provide for substantial reciprocity of treatment*". (emphasis added).

45. At paragraph 69 and following of her statement Ms Davies addresses the rules of the Lebanese exequatur enforcement procedure as set out in Articles 1014 to 1016 of the Lebanese New Code of Civil Procedure (CCP) submitting that an English judgment will be enforceable if specified conditions are met and identified defences do not apply. One such defence is where a final judgment has already been rendered by the Lebanese courts concerning the same dispute and between the same parties, or where an action was commenced in the

Lebanese courts concerning the same subject and between the same parties prior to the foreign proceedings.

46. The Defendants' construction is premised on the proposition that the second paragraph of clause 23.6 does not contemplate and require the existence of a bilateral or multi-lateral treaty between the UK and the country in question, and it suffices that there are respective enforcement procedures in the UK and the Lebanon which amount to "reciprocal enforcement procedures between the United Kingdom and the Lebanon".

47. In this regard the Defendants assert at paragraph 71 of Ms Davies' witness statement that they "believe that there is sufficient reciprocity between the enforcement procedures in England and the Lebanon to constitute, 'reciprocal enforcement procedures.' "

48. In this regard Ms Davies refers to the definition of reciprocity in Dicey, Morris and Collins. In this regard, Dicey, Morris & Collins defines "reciprocity" as follows: "*Reciprocity is used in two distinct senses in connection with the recognition and enforcement of foreign judgments. Firstly, it is used to describe the view…that* ***a judgment rendered by the court of a foreign country will not be enforced unless that country would enforce a comparable judgment of the requested court****. That view of reciprocity forms part of the law of many civil law countries but has never been the law in England. Secondly, reciprocity is used to describe the view that the English court should recognise the jurisdiction of the foreign court if the situation is such that mutatis mutandis the English court might have exercised jurisdiction e.g. under CPR rule 6.33 and PD 6B.337.*" (emphasis added). See Dicey §14-

087. Given that reciprocity in the dispute resolution clause refers to enforcement rather than the recognition of jurisdiction, the Defendants submit that the first definition is the most apt (a judgment rendered by the court of a foreign country will not be enforced unless that country would enforce a comparable judgment of a requested country). Reference is also made to the words of central reciprocity of treatment in section 1(1) of the 1933 Act.

49. For its part PECL says that reliance on the term "reciprocity", which it is pointed out is not actually even the word used, which is "reciprocal", is misplaced not least in circumstances where it is not and cannot be suggested that the term "reciprocity" is an English legal term of art. To the contrary, ***Dicey, Morris & Collins***, *supra,* at §14-087 says that the concept of "*reciprocity*" in the sense relied on by the Defendants "*…has never been the law in England*". There is, therefore, no evidence that "*reciprocity*" in the sense relied on by the Defendants is an English legal term of art and no reason why the parties, having expressly agreed that the Distributor Agreement was subject to English law and having drafted it in English, can objectively have intended any reliance upon the foreign law meaning of "*reciprocity"*.

50. PECL also says that, even if foreign legal terms of art are in principle relevant, ***Dicey, Morris & Collins***, *supra,* at §14-087 makes clear that the meaning of "*reciprocity*" the Defendants rely upon is one which was "*…once espoused by the United States Supreme Court but which has been largely abandoned in the United States…*" **[B4b/13/p.350]**. That is not part of the quotation that is quoted by Ms Davies but appears in the relevant passage from Dicey. In Dicey, in fact, therefore, that is no longer used as a legal term of art in the

United States, which is the only other common law country besides England, although Dicey & Morris mentions it "*forms part of the law of many civil law countries*". However, says PECL, it is unexplained why parties to the English law governed Distributor Agreement, drafted in English, can objectively have intended any reliance upon legal terms of art which form no part of English law, do not emanate from other common law jurisdictions, but instead apparently come from a multitude of very different civil law jurisdictions and which are, says PECL, (presumably) not expressed in English.

51. PECL also says that, even if the fact that "*reciprocity*" is a legal term of art in some civil law jurisdictions is relevant, the Defendants have led no evidence as to what the meaning of that legal term is in any of those jurisdictions (nor have they even identified which specific civil law jurisdiction's meaning of "*reciprocity*" is said to be relevant). Therefore, in so far as the Defendants' point is pursued by Mr. Houseman (and I should say that I was not addressed orally in relation to these points in relation to Dicey & Morris), PECL say that the point goes nowhere because it has not been proved what the foreign law meaning of the legal term of art they rely upon is.

52. Finally and fundamentally, even if "*reciprocity*" was in principle a relevant legal term of art with some clear meaning, then PECL submits that it is in fact irrelevant in this case because Clause 23.6, as I have already foreshadowed, does not in fact use the term "*reciprocity*" at all; it uses the word "*reciprocal*". Since the legal term of art on which the Defendants rely was not even used in the Distributor Agreement, there is no reason, says PECL, why the word "*reciprocal*" should not be given its ordinary and natural meaning.

53. Ms Davies submits that by reference to Articles 1014(d) and 1015(d) of the CCP there are Lebanese laws in place to ensure substantial reciprocity of treatment in relation to a judgment of the English court, continuing that the Defendants, "considers that these laws suffice to demonstrate the reciprocity of enforcement procedures between England and the Lebanon".

54. However, should it be necessary to look beyond Articles 1014(d) and 1015(d) of the CCP, she also set out a table comparing the key conditions and defences of the Lebanese exequatur enforcement procedures to identified conditions and defences applicable under English common law, which the Defendants submit demonstrates that and I quote, "substantial reciprocity of treatment to English judgments." An enlarged version of that table, to which I have had regard, is attached to the Defendants' Skeleton Argument.

55. In the Defendants' Skeleton Argument the Defendants enlarge upon their submissions as set out in Ms Davies' statement.

56. It is submitted that the opening paragraph of Clause 23.6 contains a non-exclusive English jurisdiction clause. Without more, it is said that the parties' jurisdictional bargain contemplates litigation in England or elsewhere, especially (but not necessarily limited to) the courts of "the country where the Distributor is located", i.e. Lebanon. The opening sentence of the second paragraph of Clause 23.6, it is said, contains a conditional or contingent fall-back agreement to arbitrate disputes in London. The conditionality is expressed as a negative, i.e. "To the extent that there is [sic] no reciprocal enforcement procedures between…". The burden of establishing such (negative) condition rests upon the claimant. As to the standard of proof, the

Defendants point out that the Claimant accepts that for the purposes of obtaining an interim anti-suit injunction it must establish a "high degree of probability" that D1 & D2 have breached the arbitration agreement. This burden subsumes the negative condition to arbitration summarised in their submissions.

57. The Defendants accept that the meaning and effect of the arbitration agreement (including its conditionality or applicability) is a matter of English law, in accordance with the express choice of the parties in the opening paragraph of Clause 23.6 and their implicit choice of England as the seat of any arbitration in the second sentence of the second paragraph of Clause 23.6.

58. In so far as it may be relevant to context, the Defendants rely on the fact that at the time of concluding the Distribution Agreement, as I have already foreshadowed, and so far as may be relevant as context, Lebanon was not a signatory to the New York Convention (NYC), although, again, as I have foreshadowed, it is understood to have introduced procedures for enforcing foreign arbitral awards consistent with the NYC, and English law provided no additional legal protections for commercial agents or distributors beyond common law remedies for breach or repudiation, in contrast to the established and mandatory protections under Lebanese law. The Defendants accept that the time for examining whether there "is no reciprocal enforcement procedures" should be the commencement of litigation or arbitration (whichever occurs first in time) in respect of the relevant dispute.

59. On construction itself, it is submitted that the key contractual language in Clause 23.6 is conspicuously wide and informal. Although no doubt the

product of standard wording used by the Claimant's predecessor(s) in similar agreements with counterparties in different jurisdictions, it is said that these English and Lebanese contracting parties agreed such wording for themselves in the DA and did so in a legal context applicable to their specific jurisdictional situation. Mr. Houseman in his oral submissions also took me to certain side letters in relation which the agreements were "Lebanonised", if such a word existed, as he put it. However, those modifications do not relate to the clause we are concerned with, which is Clause 23.6.

60. In particular, it is submitted by Mr. Houseman on behalf of the Defendants that a Lebanese distributor ("D" for short) would in October 1990 have a legitimate interest in preserving his right to sue for compensation in his local courts under Decree 34/67, especially given the lack of similar protections for distributors under English law at that time. It is submitted that any derogation from or ouster of what is characterised as an important juridical right would need to be clear and justified. That, of course, assumes that such a right exists.

61. It is said that a distributor D would be unwilling to give up what is described as a valuable right in exchange for arbitration, in which a tribunal sitting in London under English law may ignore Decree 34/67 or at any rate not apply it with the accrued expertise of the Lebanese courts, and especially at a time when Lebanon was not a signatory to the NYC. As to that latter point, it might well be said that the Claimant (when contracting with a distributor located in a country which was not a signatory to the NYC) would much prefer to litigate any dispute in his home court (England) so long as there was some form of "reciprocal enforcement procedures" in place to ensure practical

or commercial value in litigation. The submission continues better that, it is said, than an arbitration without the benefit of the NYC enforcement regime.

62. I bear in mind such submissions. However, the Defendants themselves acknowledge, as is no doubt the case, that this Clause is the product of standard wording used by PECL's predecessors in similar agreements with counterparties in different jurisdictions. It is accordingly somewhat artificial to submit that, as part of the objective common intention of the parties, the English and Lebanese counterparties agreed such wording for themselves in a legal context applicable to their specific jurisdictional situation. Certainly there is no evidence to suggest that both parties knew about specific features of Lebanese law, including the mandatory provisions of the Decree.

63. At first blush, in the context of a Clause which by the first paragraph provides that the applicable law is English law, an English counterparty might be somewhat surprised to learn that, on the Defendants' construction, their bargain with the counterparty would be subject to the possibility of the Defendants not only suing in their local court, but that court disapplying English law by reference to a mandatory provision such as the Decree, with the effect also being that a Lebanese court would refuse enforcement of an English judgment because that judgment would be contrary to Lebanese public policy. However it is not necessary for me to have regard to such potential consequence when construing Clause 23.6 in due course below, and I have not done so.

64. The general thrust of the Defendants' submission is that the commercial and legal context informs the contractual language. The parties used wide and

informal language to caveat the arbitration exception. It is said that they agreed primarily to litigate their disputes - in England or Lebanon, if not elsewhere - so long as any judgment would carry practical effect in the counterparty's jurisdiction (hence "enforcement") on a level playing field (hence "reciprocal"). Arbitration, it is said, was included as a "back stop" or "safety net" in this context. It is said that the parties did not interest themselves in how such "reciprocal enforcement" might take effect, nor indeed what might constitute "procedures" for such purposes, still less the need for a single underlying legal source for such procedures. Their interest in "reciprocal" enforcement was commercial, i.e. practical effect, rather than a legalistic one based on the originating source or foundation of applicable enforcement procedures (plural). They kept it flexible and informal and practical, it is said, for good reason.

65. It is certainly true that the first paragraph of Clause 23.6 contained not only an agreement that it was deemed to be made in England, and read and construed in all respects in accordance with English law, but also that the parties submitted to the jurisdiction of the English courts. This potentially raises an issue in relation to whether there could be litigation in other courts and whether or not it was an exclusive or non-exclusive jurisdiction clause. I will return to that at the end of my judgment.

66. On any view, I do not consider that arbitration is a "back stop" or safety net. The effect of the second paragraph is itself a choice of arbitration and an agreement to arbitrate where there is no reciprocal enforcement procedure between the United Kingdom and the country in which the distributor is

located. The parties therefore consciously chose that if there was no such reciprocal enforcement procedure their choice was arbitration, and arbitration in England. It will also be noted therefore that both the first and second paragraphs contemplate proceedings be they litigation or arbitration in England, with arbitration in England being the default if there were no reciprocal enforcement procedures.

67. Another way that the Defendants put their case is that all that mattered to the parties in agreeing the operative language of Clause 23.6 was that an English judgment obtained (presumably) by the Claimant against the Defendant would be enforceable against the Defendant in Lebanon to substantially (if not identically) the same "extent" that a Lebanese judgment obtained (presumably) by the Defendant against the Claimant would be enforceable against the Claimant in England. It is said that this is the essence of the reciprocity they contemplated to preserve their respective litigation rights. It is said that the focus is on pragmatics. So long as some form of "procedures" (plural) exist "between" the two countries' respective legal systems and organs to achieve such "reciprocal enforcement", that is sufficient. There is then no need for arbitration in London.

68. The potential difficulty with such submissions is that they do not track the ordinary and natural meaning of the words used – the word used is "reciprocal", not "reciprocity", and the submission that is made is that all that mattered to the parties in agreeing the operative language of Clause 23.6 was that an English judgment obtained (presumably) by the Claimant against the Defendant would be enforceable against the Defendant in Lebanon to

substantially (if not identically) the same "extent" that a Lebanese judgment obtained (presumably) by the Defendant against the Claimant would be enforceable against the Claimant in England (my emphasis). The difficulty with that submission is that that is not what the clause says (at least not on its face) and the word "substantially" does not appear, and is a gloss on what is said. It by no means follows in my view that that gloss represents the objective common intention of the parties. What they agreed was that there would be arbitration if there were "no reciprocal enforcement procedures between the UK and the country in which the Defendant is located" – they did not agree that this would be the position if an English judgment obtained (presumably) by the Claimant against the Defendant would be enforceable against the Defendant in Lebanon to substantially (if not identically) the same "extent" that a Lebanese judgment obtained (presumably) by the Defendant against the Claimant would be enforceable against the Claimant in England. Nowhere in that paragraph does the word "substantially" appear.

69. The Defendants characterise PECL's construction of the phrase "reciprocal enforcement procedures" as a narrow formal meaning if it means "international conventions or treaties" (whether bilateral or multilateral) between the UK and the Lebanon. It is said that this is a gloss on the contractual language and there is no warrant for such a gloss on that language.

70. Developing that submission, the Defendants submit that the clause could easily have used such narrow and formal language. It is said it did not. If anything, it did the opposite by focusing on "procedures".

71. However, it could be said that it is the Defendants' construction that is the gloss in the context of the fact that the clause expressly refers to reciprocal enforcement procedures between the UK (a country) and the country in which the Distributor is located – the express language, it could be said, is looking to reciprocal enforcement procedures between countries, and countries reach agreement on such procedures through treaties.

72. The Defendants also seek to pray in aid what they characterise as a concession by PECL that, if Lebanon was a country whose judgments benefited from certain statutory enforcement provisions, then that would suffice as "reciprocal enforcement procedures between" the two countries. It is said that this concession undermined PECL's position as to the narrow meaning of "procedures between", because countries are included (e.g. India and Pakistan) with whom the UK has/had no legally binding reciprocal enforcement relationship. However, ultimately it is not a matter of any concession by a party – I have to construe what the clause means.

73. As for PECL's emphasis on the word "between", i.e. to presuppose or posit the existence of a "binding" legal relationship between the governments of the two countries in question, it is said by the Defendants that this is pedantic and formalistic – especially in a sentence which uses "is" to describe "procedures". However, once again, on ordinary principles of contractual construction, meaning and effect is to be given, if at all possible, to the language used by the parties. In the present case, the word used is "between", and that word is used in relation to reciprocal enforcement procedures between two countries. That

is the language of a binding legal relationship between two countries giving rise to "reciprocal enforcement procedures".

74. The Defendants submit that the contractual language is not apt to describe the source of each or either state's obligation to introduce and maintain the "reciprocal enforcement procedures". It is said it speaks bluntly and non-technically of such "procedures" existing "between" the respective jurisdictions. It is said by the Defendants that the emphasis is on substance not form.

75. The Defendants submit that the better approach is to regard "between" as descriptive shorthand for the functional correspondence or equivalence of the respective enforcement procedures, consistent with the meaning of "reciprocal" in this particular context. However, such an approach gives little, if any, meaning to the word "between", and that word is not normally used as descriptive shorthand, still less the descriptive shorthand alleged. Ultimately, meaning and effect is to be given to the ordinary and natural meaning of the words used.

76. Bringing their submissions together, the Defendants submit that the original contracting parties clearly wished to preserve their litigation rights to the fullest extent practicable. This shared imperative, coupled with conspicuously broad and functional language, it is said, tells against an artificially narrow construction of "reciprocal enforcement procedures" in the condition to the fall-back option of arbitration. It is said that the parties' real interest was in the pragmatic realities of foreign enforcement, ensuring that their preference for litigation made practical sense and had practical value for each of them.

This, it is said, is what "reciprocal" means here. It is a bye-word for "fair" or "equivalent" in this context. However, set against that, "fair" is some way from the word "reciprocal" as normally understood, and "equivalent" begs the question as to what the word equivalent means.

77. If the court rejects PECL's primary construction, the Defendants then submit that the next question is whether there exist no "reciprocal enforcement procedures" (i.e. plural) between the UK and Lebanon. It is submitted that PECL has failed to demonstrate a high degree of probability that there are no such procedures, and they submit there is no alternative to the "all or nothing" position advanced by PECL in this context. The Defendants repeat what is set out in Ms Davies' statement in that regard in relation to the enforcement of a Lebanese judgment in England by reference to the common law rules, and the enforcement of an English judgment in the Lebanon by reference to the exequatur enforcement procedure.

78. For its part PECL on this scenario submits that the words "reciprocal enforcement procedures" require that the actual dispute which has arisen between the parties is subject to the reciprocal enforcement procedures between the UK and Lebanon. It says that follows from the words of Clause 23.6, which provide, "To the extent there is no reciprocal enforcement procedures between the United Kingdom and [Lebanon], the Parties agree to submit any dispute arising between them that cannot amicably be settled to arbitration." (emphasis added). They say the Clause specifically refers to the actual dispute which has arisen between the parties being submitted to arbitration if there are no "reciprocal enforcement procedures" and as such

contemplates that the particular dispute must produce a judgment capable of benefiting from the "reciprocal enforcement procedures". It is submitted that there is no principled justification for failing to consider how in practice the law in a particular country is applied, and if there is to be an inquiry into "substantial reciprocity of treatment" it makes obvious sense for that to be a substantive inquiry.

79. PECL also submits that there are no "reciprocal enforcement procedures" between the United Kingdom and the Lebanon because:-

(1) Looking at whether any Lebanese Judgment rendered in the Lebanese Proceedings could be enforced in England, the answer is "no". That is because the English Court will only enforce a foreign judgment if in the eyes of the English court the Lebanese court had jurisdiction. In practice this means: [A] PECL must have been present in Lebanon when proceedings were instituted; [B] PECL was a claimant or counterclaimant in Lebanon; [C] PECL voluntarily submitted to Lebanese jurisdiction; or [D] PECL had agreed to submit to Lebanese jurisdiction: see ***Dicey, Morris & Collins*** §14R-054 **[B4b/13/p.334]**. PECL say that none of those requirements are satisfied in this case.

(2) Looking at whether any English Court judgment resolving the parties' dispute would be enforced in Lebanon, again the answer would be "no" because, as Mr Baroudi (PECL's Lebanese lawyer) has explained:

(a) As a matter of Lebanese Law, Decree 34/67, which is the foundation of the Defendants' claim in the Lebanese

proceedings, contains mandatory rules of Lebanese public policy which must be applied in disputes of the kind currently between the parties which are heard by the Lebanese Court and which give the Lebanese court exclusive jurisdiction over such disputes.

(b) However, if the parties' dispute was heard before the English court, the English court would, in accordance with the parties' express choice of English law in Clause 23.6, apply English law (and would not apply Lebanese Law including the provisions of Decree 34/67): ***Shell International Petroleum v Coral Oil*** [1999] 1 Lloyd's Rep. 72 at p.78; ***Dell Emerging Markets (EMEA) Ltd v. Systems Equipment Telecommunications Services SAL*** [2018] EWHC 702 (Comm) at [41].

(c) In consequence, when enforcement of any English judgment ultimately was sought in Lebanon, enforcement would be refused because the judgment would be contrary to Lebanese public policy.

80. Lastly PECL submits that even if the Defendants' construction was otherwise correct, then there are still no reciprocal enforcement procedures between the UK and Lebanon:

(1) An English Court will only enforce a foreign judgment if, in the eyes of the English court, the Lebanese court had appropriate jurisdiction.

(2) By contrast the Lebanese Court will enforce a judgment if it was rendered by a competent judge according to the law of the country where judgment was given (provided this was not based only on the nationality of the claimant) – see paragraphs 70(a)(ii) and 77(ii) of Ms Davies' first statement. A Lebanese Court therefore assesses jurisdiction not by application of its own principles of jurisdiction, but by reviewing those of the foreign court.

(3) That distinction means the enforcement procedures are not substantially similar: the English Court will only recognise the jurisdiction of the Lebanese court at common law in certain fairly narrow situations, it is said, whereas the Lebanese court will enforce an English judgment so long as the English Court itself would accept it had jurisdiction. That creates a substantial mismatch – for instance an English Court could itself accept jurisdiction under any of the gateways in CPR PD 6B Para 3.1 and a Lebanese court would accept its jurisdiction, but if the Lebanese court used the majority of those gateways, the English Court would not enforce its judgment for want of jurisdiction.

(4) Furthermore, having a judgment declared enforceable in Lebanon could in practice take years to achieve and there is not therefore a substantial reciprocity with English procedures where registration and enforcement would occur under CPR Pt 74 much more quickly.

Discussion

81. As already noted, the meaning and effect of the Arbitration Agreement (including its conditionality or applicability) is a matter of English law, in accordance with the express choice of the parties in the opening paragraph of Clause 23.6 and their implicit choice of England as the seat of any arbitration in the second sentence of the second paragraph of Clause 23.6.

82. In that regard the Arbitration Agreement is a contract between the parties thereto and as such is to be construed in accordance with the English principles of contractual construction which are well-established. Those include both (1) the general principles of contractual construction by reference to the authoritative summaries by the Supreme Court in ***Arnold v. Britton,*** *supra* and ***Wood v. Capita Insurance Services Limited*** *supra*, specifically that interpretation is a unitary exercise in which the Court must consider the language used and ascertain what a reasonable person, who has all the relevant background knowledge, would have understood the parties to have meant and that where there are rival meanings, the Court can give weight to the implications of the rival constructions by reaching a view as to which construction is more consistent with business common sense: ***Wood v. Capita***, *supra*, at [11], and (2), in the context of the fact that an Arbitration Agreement and Clause 23.6 as a whole is a dispute resolution clause in a commercial contract, the approach stated by the House of Lords in the *Fiona Trust* case [2008] 1 Lloyd's Rep 254 in particular in paragraphs [5], [7]-[8], [13] & [20] of the speech of Lord Hoffman, namely, the exercise involves ascertaining the "*rational commercial purpose*" or "*reasonable commercial expectations*" of "*rational businessmen*". The commercial purpose of the wording may be affected by the "*commercial background*" and the court is ultimately looking

for the "*fair construction*" to give effect to commercial purpose, what Mr. Houseman described as the "Fiona Trust lens".

83. To the extent that there is any difference in approach from more general principles of contractual construction, I have proceeded on the basis that Clause 23.6 is to be construed in accordance with the principles identified by Lord Hoffmann in *Fiona Trust,* in the context of what is a dispute resolution clause.

84. It is common ground that the starting point is to look at the ordinary and natural meaning of the words used in Clause 23.6, which I will repeat for ease of reference:

> "This Agreement shall be deemed to be an agreement made in England and shall be read and construed and take effect in all respects in accordance with the Laws of England and the Parties hereby submit to the jurisdiction of the English Courts.
>
> To the extent there is no reciprocal enforcement procedures between the United Kingdom and the country in which the Distributor Agreement is located, the Parties agree to submit any dispute arising between them that cannot amicably be settled to arbitration. The arbitration shall be held in London, England …"

85. By the time of the completion of the parties' oral submissions, the two competing meanings advocated by PECL and by the Defendants were essentially as follows:-

(1) That of PECL that there must be a bilateral or multilateral treaty providing for the enforcement of court judgments between the UK and the Lebanon which proscribes the mutual enforcement procedures which both countries will use to enforce the other's judgments.

(2) That of the Defendants. The Defendants' interpretation in terms of what the words mean is less clear, as I have identified above when setting out their arguments. However ultimately, as developed orally before me by Mr. Houseman, the Defendants submitted that "reciprocal enforcement procedures" is a reference to the domestic laws of the jurisdictions which are substantially or functionally equivalent, and the Defendants submitted that those of England and the Lebanon were.

86. I am in no doubt whatsoever that PECL is correct in its construction of the second paragraph of 23.6, and for the following reasons.

87. First, that is, and is the only, ordinary and natural meaning of the words used and which gives meaning and effect to each of the words used.

88. The word used is "reciprocal". "Reciprocal" means, when used as an adjective as in Clause 23.6 of the Distributor Agreement, "Existing on both sides; mutual; (of two or more things) done, made, etc., in exchange" referring to The Shorter Oxford English Dictionary (6th ed.) Vol. 2 p.2486. I also note that a further meaning of the word "reciprocal" that is given in that dictionary is, "inversely correspondent, correlative, complementary". Those meanings, which may or may not have a mathematical context, are consistent with the first meaning that is given. In this regard, a similar meaning is given on Google.com that when the adjective "reciprocal" is used "(of an agreement or obligation)" it means "…bearing on or binding each of two parties equally…".

89. Whilst I am, of course, alive, to the fact that dictionary meanings in themselves do not give an answer to the meaning of words or phrases in a contract in the abstract divorced from their context (as has been repeatedly

stressed in cases such as *Arbuthnott v Fagan* [1996] L.R.L.R 135, 141), in the context of the present clause and its wording, such dictionary definitions accords with the ordinary and natural meaning of the words used, namely, that "…reciprocal enforcement procedures between the United Kingdom and [Lebanon]…" are procedures for the enforcement of a judgment which "exists on both sides" or are mutual, and bind equally the UK and Lebanon.

90. A bilateral or multilateral treaty providing for the enforcement of court judgments between the UK and Lebanon, which proscribes the mutual enforcement procedures which both countries will use to enforce the other's judgments, are enforcement procedures which are mutual and which bind the UK and Lebanon equally. Indeed, viewed in context, and coupled with the fact that such "reciprocal enforcement procedures" must be between the United Kingdom (a country) and the country in which the Distributor is located, such a treaty is the only thing which ensures mutual enforcement procedures that binds both countries equally and fits the language of the clause.

91. Such an interpretation is consistent with the fact that the word "reciprocal" connotes enforcement procedures which are "done, made, etc., in exchange", i.e. by reference to a dictionary definition. A treaty, like all agreements, is the conclusion of a process of give and take and the procedures it contains for the enforcement of a judgment are the result of that process of exchange.

92. The word "between" is also a key indicator of the objective common intention of the parties, and so far as possible, on ordinary principles of contractual interpretation, meaning and effect must be given to that and all words in a clause. Clause 23.6 provides that there must be "…no reciprocal enforcement

procedures between the United Kingdom and the country in which the Distributor is located…" (emphasis added).

93. As PECL has pointed out, and I agree, the use of language which focuses on what reciprocal enforcement procedures exist between the UK and Lebanon is indicative of a treaty or convention to which both states are a party and which, therefore, exists "between" them.

94. The language of Clause 23.6 does not, as the Defendants suggest, invite an inquiry into whether there are enforcement procedures in the UK and Lebanon which are "reciprocal" in the sense of being substantially similar, not least because that interpretation fails to give meaning and effect to the words "between the [UK] and [Lebanon]". The word is "between" – that is between countries – and it is not a reference to reciprocal enforcement procedures in the two countries i.e. to internal domestic laws of the jurisdictions, still less is it a reference to domestic law of the jurisdictions which are substantially or functionally equivalent.

95. It is also key that reference is to the United Kingdom (not England) and the United Kingdom encompasses England and Wales, Scotland and Northern Ireland with their separate laws. Mr Houseman candidly acknowledged in his oral submissions that the reference to the United Kingdom was "not helpful" to the Defendant's construction. He was right to so acknowledge. It is the United Kingdom that enters into treaties with other countries. The United Kingdom is not synonymous with England in this Clause. It is perfectly clear that the drafter of Clause 23.6 consciously distinguishes between England – that is referred to twice in the first paragraph, English law that is referred to in

the first paragraph and the United Kingdom which is referred to in the second paragraph.

96. The fact that the reciprocal enforcement procedures have to exist between the UK and the other country, rather than one of the three distinct legal jurisdictions (i.e. England and Wales, Scotland and Northern Ireland) within the UK, indicates that the focus of Clause 23.6 is upon a treaty which the UK is a party to, rather than the rules of one of the three legal jurisdictions within the UK.

97. The words "there is no reciprocal enforcement procedures between the United Kingdom and the country in which the Distributor is located" shows that what is being referred to is some form of treaty between those countries which further supports the conclusion that it is only a treaty that is being referred to.

98. There is no reason why "reciprocal enforcement procedures" cannot be a reference to the provisions of the Treaty concerned and that is the interpretation which is consistent with those reciprocal enforcement procedures being between the two countries. That is perfectly apt to describe provisions within a treaty. A treaty can contain reciprocal enforcement procedures.

99. I am satisfied, and find, that in the second paragraph of Clause 23.6, the ordinary and natural meaning of the words "reciprocal enforcement procedures between the UK and" (in this case the Lebanon) is that they are referring to a binding bilateral or multilateral treaty between the UK and Lebanon which provides the rules or procedures subject to which judgments of one state will be enforced in the other.

100. It is also the only construction that is consistent with business common-sense and reasonableness. On PECL's construction, the scheme in Clause 23.6 is that if there is a bilateral or multilateral treaty between the UK and the relevant other country which provides for the enforcement of judgments, the Arbitration Agreement is not engaged, and a party can instead litigate in England secure in the knowledge that any judgment will be enforceable in the place where the other is located whereas if there is no treaty, the parties are bound to arbitrate and enforcement of the resulting award is secured by the rules in whatever relevant countries are concerned.

101. This construction accords with business common-sense and reasonableness because it produces a scheme which means that the parties obtain the benefit of either a specific agreement between the UK and Lebanon dealing with the enforcement of court judgments or, in the absence of such a treaty, an arbitration award which can then be enforced in many jurisdictions of the world.

102. In this regard, it matters not in my view that the New York Convention was not in force in the Lebanon at the time of contracting. The New York Convention is no more than an added aid to enforcement. Clause 23.6 is, as the Defendants recognise, a product of standard wording used by PERC's predecessors in similar agreements with counterparties in different jurisdictions. By 1990, that Convention would have been acceded to in many countries, including countries where the First Defendant is believed to have assets.

103. The arbitration clause is not a safety net or an exception. There is real scope for its life and operation. It is carefully drafted and has its own circumstances in which it applies.

104. The ordinary and natural meaning of the words also provides the parties with the means by which to determine whether they are obliged by Clause 23.6 to arbitrate or litigate any dispute which means, therefore, that those provisions are certain, speedy and simple. The claimant need do no more than check whether there is a treaty or convention between the UK and the Lebanon for the enforcement of judgments (a matter which is readily ascertainable) in order to determine whether it must arbitrate or litigate.

105. The need for such certainty, speed and simplicity is obvious: in a case where urgent interim relief is needed or a limitation period is soon to expire, a claimant needs to know quickly, simply and with high degree of assurance which forum it should proceed in. PECL's construction provides that. This is a businesslike construction which meets the reasonable commercial expectations of rational businessmen having regard to the commercial background, applying a *Fiona Trust* lens.

106. It is not a narrow or formalistic interpretation. On the contrary, it gives meaning and effect to all the words of the second paragraph and provides the parties with contractual certainty. The opposite cannot be said of the Defendants' rival construction which, it is conceded, would require the parties to obtain legal advice as to the law in the two jurisdictions, and ultimately perform the sort of exercise that has been performed for this hearing. That is not a commercial or business-like interpretation that can reflect the objective

common intention of the parties. Nor is it an answer to say that, by the stage of a dispute, lawyers will be involved and costs incurred in any event on lawyers' fees. If, as in the present case, the ordinary and natural meaning of a clause is clear and makes perfect business sense, an alternative interpretation that makes no business sense stands to be rejected - see the well-known dicta of Lord Diplock in *The Antaios* [1985] A.C. 191, 201.

107. The ordinary and natural meaning of the clause provides a scheme enabling the parties to determine quickly, easily and with certainty whether they should litigate or arbitrate. It guarantees them clear enforcement rights prescribed by an international treaty in the context of litigation and an arbitration regime where there is no such treaty.

108. In contrast, the Defendants' construction derives no support from the express language of the clause or the ordinary and natural meaning of the words used. Furthermore, the very articulation of the Defendants' construction is not consistent with, and fails to give meaning and effect to, the express words of the clause. I have already addressed at some length, as I went through the Defendants' submissions, the difficulties with those submissions as to construction in the course of identifying those submissions. I will not repeat such points here, but I bear those points well in mind and I take them into account. The overarching difficulty with such submissions is that they are simply not consistent with the express language of the clause and the fact that the reciprocal procedures are to be between the United Kingdom and the Lebanon – i.e. the two countries concerned. There is also the fact that the Defendants' formulation has changed over time, is inherently uncertain, and

requires words to be inserted that are simply not in the clause. The clause simply does not provide for a test of substantial or functional equivalence, still less by reference to internal domestic laws. Rather, it refers to reciprocal enforcement procedures between the United Kingdom and the country concerned, in this case, of course, the Lebanon.

109. Accordingly, and for the reasons I have given, I am satisfied and find that the words "*reciprocal enforcement procedures between the [UK] and [Lebanon]*" mean that there must be a binding bilateral or multilateral treaty between the UK and Lebanon which provides the rules or procedures subject to which judgments of one state will be enforced in the other.

110. It is common ground that no such treaty exists, with the result that there are no "reciprocal enforcement procedures" and the Arbitration Agreement is engaged, and I so find. On that basis, the disputes in the Lebanese proceedings fall within the Arbitration Agreement and must be referred to English arbitration and, in those circumstances, there is no reason why the interim anti-suit injunction sought by PECL should be refused. I accordingly grant the injunction in the terms sought. I will hear the parties on any points arising as to the precise terms of the injunction.

111. Having succeeded on the question of construction, PECL's alternative construction does not arise for consideration. I will, however, address briefly the points that would have arisen.

112. The question that would have arisen is whether there exist no "reciprocal enforcement procedures" (i.e. in the plural) between the UK and Lebanon.

113. I bear in mind what is set out in Ms Davies' statement in relation to the enforcement of a Lebanese judgment in England by reference to the common law rules, and the enforcement of an English judgment in the Lebanon by reference to the exequatur enforcement procedure, and the comparison table that has been produced.

114. Had the position arisen, I would, however, have preferred the construction advocated by PECL and for the reasons given by PECL, as also developed in oral argument by PECL, including in reply.

115. I consider that the words "reciprocal enforcement procedures" do require that the actual dispute which has arisen between the parties is subject to the reciprocal enforcement procedures between the UK and Lebanon. I agree that this follows from the words of Clause 23.6 which provide that, "To the extent there is no reciprocal enforcement procedures between the United Kingdom and [Lebanon], the Parties agree to submit any dispute arising between them that cannot amicably be settled to arbitration." This specifically contemplates a dispute which has arisen between the parties being submitted to arbitration if there are no "reciprocal enforcement procedures" and as such contemplates that the particular dispute must produce a judgment capable of benefiting from the "reciprocal enforcement procedures".

116. As a matter of principle, if the provision is to be given a meaningful and businesslike construction, it is necessary to consider how in practice the law in a particular country is applied.

117. It is apparent in this case that there are no "reciprocal enforcement procedures" between the United Kingdom and the Lebanon for a number of reasons.

118. First, and looking at whether any Lebanese judgment rendered in the Lebanese proceedings could be enforced in England the answer is "no". That is because the English court will only enforce a foreign judgment if, in the eyes of the English court, the Lebanese court had jurisdiction. In practice, that means: (a) PECL must have been present in Lebanon when proceedings were instituted; (b) PECL was a claimant or counterclaimant in Lebanon; (c) PECL voluntarily submitted to Lebanese jurisdiction; or (d) PECL had agreed to submit to Lebanese jurisdiction: see Dicey, Morris & Collins paragraph 14R-054. None of those requirements are satisfied in this case.

119. Secondly, and looking at whether any English Court judgment resolving the parties' dispute would be enforced in Lebanon, again the answer would be "no" because as Mr Baroudi (PECL's Lebanese lawyer), has explained, as a matter of Lebanese law, Decree 34/67, which is the foundation of the Defendants' claim in the Lebanese proceedings, contains mandatory rules of Lebanese public policy which must be applied in disputes of the kind currently between the parties which are heard by the Lebanese Court and which give the Lebanese court exclusive jurisdiction over such disputes.

120. However, if the parties' dispute was heard before the English court, the English court would, in accordance with the parties' express choice of English law in Clause 23.6, apply English law (and would not apply Lebanese law, including the provisions of Decree 34/67) - see *Shell International Petroleum*

v Coral Oil (supra) and *Dell Emerging Markets (EMEA) Ltd v. Systems Equipment Telecommunications Services SAL (supra).*

121. The consequence is that when enforcement of any English judgment ultimately was sought in Lebanon, enforcement would be refused because the judgment would be contrary to Lebanese public policy.

122. In any event, even had the Defendants' construction been otherwise correct, then there are still, in my view, no reciprocal enforcement procedures between the UK and Lebanon in the following circumstances: first, as an English court will only enforce a foreign judgment if, in the eyes of the English court, the Lebanese court had appropriate jurisdiction. By contrast, the Lebanese court will enforce a judgment if it was rendered by a competent judge, according to the law of the country where judgment was given (provided this was not based only on the nationality of the claimant)- see paragraphs70(a)(ii) and 77 (ii) of Ms Davies' first statement.

123. A Lebanese court therefore assesses jurisdiction not by application of its own principles of jurisdiction, but by reviewing those of the foreign court. That distinction means the enforcement procedures are not substantially similar: the English court will only recognise the jurisdiction of the Lebanese court at common law in certain fairly narrow situations, whereas the Lebanese court will enforce an English judgment so long as the English court itself would accept it had jurisdiction. As PECL points out, that creates a substantial mismatch – for instance, an English court could itself accept jurisdiction under any of the gateways in CPR PD 6B Para 3.1 and a Lebanese court would accept its jurisdiction, but if the Lebanese court used the majority of those

gateways the English Court would not enforce its judgment for want of jurisdiction.

124. Finally, although of lesser weight, having a judgment declared enforceable in Lebanon could in practice take years to achieve and there is not therefore a substantial reciprocity with English procedures where registration and enforcement would occur under CPR Pt 74 much more quickly.

125. In the above circumstances, had it been relevant, I would have found that there are no reciprocal enforcement procedures in relation to the actual dispute between PECL and the Defendants, so that once again, on that scenario, the parties would also have agreed to submit their dispute to arbitration and PECL would be entitled to the anti-suit injunction sought. However, for the avoidance of doubt, my finding on construction, and associated granting of relief, is on the basis of the first point of construction and I have expressed the views I have in relation to the second point as a matter of courtesy to the parties, having been addressed on the point.

126. I say nothing about PECL's unpleaded alternative claim. It has foreshadowed the possibility of an anti-suit injunction based on the commencement of an English action. No such claim has yet been made and no such action has yet been commenced. In such circumstances it would be premature for a judge to express any views on it.

127. Finally, I should mention that there was a dispute that arose between the parties in relation to whether the first paragraph of Clause 23.6, providing that the parties hereby submit to the jurisdiction of the English courts, was an exclusive or a non-exclusive jurisdiction clause. I have not found the need to

address that issue in relation to the issues that arise as to the proper construction of the second paragraph of Clause 23.6 given the clear, ordinary and natural meaning of that clause, as I have found. The point was not fully argued before me in any event. On the basis of such argument as I heard, and had the point arisen for determination, I would have been inclined to follow the reasoning in the decisions of Males J in *BNP Paribas SA v Anchorage Capital Europe LLP* [2013] EWHC 3073 (Comm) and Teare J in *Global Maritime Investments Cyprus Limited v O.W. Supply & Trading A/S* [2015 EWHC 2690 (Comm). In that regard, I consider the case of *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2010] 1 WLR 1023 not to be in point and to be distinguishable for the reasons given by Mr Dhillon in his oral submissions. However I did not hear full argument, the point did not arise for determination, and in such circumstances I make no determination in respect of it.

128. I accordingly grant the anti-suit injunction sought.