



Neutral Citation Number: [2021] EWHC 1344 (Ch)

Case No: IL-2020-000048

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

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

Date: 19 May 2021

Before :

MR JUSTICE SNOWDEN

Between :

(1) TRAPPIT S.A.
(2) TRAPPIT TECNOLOGIAS S.L.
(3) 2MC GESTION Y CONSULTORIA S.A.

Claimants

- and -

(1) AMERICAN EXPRESS EUROPE LLC
(2) GBT TRAVEL SERVICES UK LIMITED

Defendants

Sara Masters QC and Josephine Davies
(instructed by **Hausfeld & Co LLP**) for the **Claimants**
Stephen Houseman QC and George Spalton
(instructed by **Eversheds Sutherland (International) LLP**) for the **Defendants**

Hearing dates: 19-20 January 2021

Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10 a.m. on 19 May 2021.

MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN:

1. This is an application to strike out or stay proceedings claiming infringement of intellectual property rights in a computer programme and breach of non-contractual obligations of confidence that are said to have arisen when that programme was made available to the First Defendant for assessment. The application is made by the Defendants on the basis that the Claimants are contractually bound to litigate the claims in Spain rather than England, or that in light of proceedings that have already been brought and provisionally determined against the Second Claimant in Spain, this Court should decline jurisdiction or strike out the English proceedings as an abuse of process.

BACKGROUND

The parties and the computer programmes

2. The Claimants are three companies: (a) Trappit S.A. (“Trappit SA”) a Panamanian company, (b) Trappit Tecnologias S.L. (“Trappit Tec”) a Spanish company, and (c) 2MC Gestion Y Consultoria SA (“2MC”) a Spanish company. The relationship and distinctions between the Claimants is a matter of some dispute in this Application. The Defendants allege that each of the Claimants is under the direction and control of two individuals, Mr Luis Martín Lazaro (“Mr Martín Lazaro”) and Mr Daniel de Carvajal Aguilar (“Mr de Carvajal”). The Claimants dispute this and contend that each of the Claimant entities are distinct and act separately. Mr Martín Lazaro and Mr de Carvajal are both directors of Trappit Tec. However, only Mr de Carvajal is (or has been) a director of Trappit SA. By contrast, Mr de Carvajal has never had any role in 2MC, while Mr Martín Lazaro is an authorised representative of 2MC.
3. Mr Martín Lazaro and Mr de Carvajal are the creators of a computer programme known as “ARPO”. ARPO lies at the root of the substantive dispute between the parties. ARPO is a tool designed to allow customers to save money on their flight bookings, by using a system of computer ‘bots’ to monitor fluctuations in the price of booked flights and automatically cancel and re-book if the price drops. The development and commercialisation of ARPO was the principal activity of Trappit SA; later Trappit Tec fulfilled similar functions. 2MC’s involvement in ARPO was limited to employing the Spanish individuals who had been identified by Trappit SA to write the code for ARPO. As described below, 2MC (and its employees) have transferred their rights to ARPO to Trappit SA. Accordingly, it is only Trappit SA and Trappit Tec who advance substantive claims in the English Proceedings.
4. The Defendants in the English Proceedings are: (a) American Express Europe LLC (“AmEx Europe”) a Delaware corporation with a registered branch in England, and (b) GBT Travel Services UK Limited (“GBT UK”) an English company. AmEx Europe is a part of the international American Express Group; prior to 30 June 2014 it operated travel management services under the ‘American Express Global Business Travel’ brand. GBT UK was created in 2014 as a joint venture between the American Express Group and certain private equity investors. From 30 June 2014 GBT UK acquired AmEx Europe’s travel management services business in the UK.

5. The substantive claims brought in the English Proceedings relate to the development and/or use by the Defendants of two computer programmes, LastFare and Air Re-shop Expert (“ARE”). Like ARPO, these computer programmes also perform the function of fare re-booking at lower prices. The Claimants’ case is that LastFare and/or ARE were produced by copying from ARPO’s source code and misusing confidential information. The Defendants’ case is that LastFare was independently developed by GBT Spain from February 2015 onwards based on source code provided by a company which is now known as Global Business Travel France SAS. ARE is said to be based on technology licenced to GBT UK by Yapta Inc. and is simply a branded version of Yapta’s FareIQ programme. For the purposes of dealing with this Application it is not necessary to go any further into this dispute between the parties.

Discussions over ARPO and the NDA

6. In late 2013, Trappit SA was introduced to AmEx Europe. Trappit SA was interested in licensing ARPO to AmEx Europe for use in its Global Business Travel division. The first meeting between representatives of AmEx Europe and Trappit SA took place on 3 February 2014. After this, on 22 February 2014, Mr de Carvajal emailed Katrina Cliffe (“Ms Cliffe”) (General Manager, American Express Global Business Travel) asking AmEx Europe to sign a mutual non-disclosure agreement (NDA) prior to a meeting on 3 March 2014. Mr de Carvajal attached a draft NDA for consideration, which stated that it was governed by Spanish law but did not contain a jurisdiction clause.
7. It appears that Ms Cliffe responded by sending Mr de Carvajal an AmEx Europe standard draft NDA, because on 27 February 2014 Mr de Carvajal sent Ms Cliffe’s assistant an email outlining a number of issues with the draft. It was agreed that the meeting on 3 March 2014 would go ahead without an NDA in place and be followed up with a discussion on the terms of the NDA. After the meeting of 3 March 2014, Mr de Carvajal emailed Ms Cliffe looking to push negotiations on by providing more detail on the economic potential and technical scope of ARPO. For this purpose, Mr de Carvajal again proposed that AmEx Europe and Trappit SA enter into an NDA and attached a draft. In her response to Mr de Carvajal on 5 March 2014, Ms Cliffe noted that:

“... In terms of a single contact at Amex this should really sit with our product team who are in fact already looking at similar systems to yours (fare iq etc). Next steps would be to set up some time with our VP products so she can compare the various tools she is looking at with yours. It would be interesting if you could also share why yours is different.

This is certainly a capability we want and the potential to have it exclusively with you seems a good one. The challenge for many of us is that for the next two months our focus will be on securing and transitioning the business to the new Joint venture so I personally will have very little time which is why I think this is best to sit with our global product team.”

8. Between 3 March 2014 and 7 March 2014 there were a series of emails between Ms Cliffe’s assistant and Mr de Carvajal regarding the NDA. In particular, the draft produced by AmEx Europe had provided that:

“This Agreement (including any non-contractual obligations arising out of or in connection with the same) shall be governed in all respects by the laws of England without regard to conflict of laws principles, and any cause of action shall only be brought in a court of competent jurisdiction in England. Each party hereby expressly consents to, submits to, and acknowledges the jurisdiction of the courts of England in connection with this Agreement.”

9. However, in an email on 7 March 2014 Mr de Carvajal sent a number of suggested amendments to the draft NDA. These included amending the governing law and jurisdiction clause, including replacing the reference to English law with a reference to Spanish law and replacing the jurisdiction clause in favour of the courts of England to the courts of Madrid.
10. On 18 March 2014, Ms Cliffe emailed Mr de Carvajal to introduce him to Kevin Yeh (“Mr Yeh”) (Director of New Product Development at American Express Global Business Travel). Ms Cliffe noted that: “everyone [at AmEx Europe] has been very focussed on getting to the deal signing stage for our potential joint venture. That was announced last night which is great news and very exciting.” Later that day, there was an internal Trappit email from David Marcus to Mr de Carvajal discussing the effect of Spanish governing law and jurisdiction on the validity of a penalty clause in the draft NDA.
11. AmEx Europe and Trappit SA signed an NDA on 18 March 2014 (the “NDA”). As a result of the use of AmEx Europe’s template and Trappit SA’s amendment to change the governing law, the NDA is written in English and in a familiar form to an English lawyer but is governed by Spanish law.
12. After a paragraph giving the date of the agreement and another defining AmEx Europe and Trappit SA as “Amexco” and “Company” respectively, the third unnumbered paragraph of the NDA (“Recital 3”) provided that:

“Amexco and [Trappit SA] would like to exchange certain information regarding a potential business collaboration which may be considered trade secret, proprietary, confidential and/or sensitive information of each party and/or their respective subsidiaries and affiliates (collectively, “Confidential Information” and further defined below in clause 4). To ensure the protection of such Confidential Information and in consideration of the agreement to exchange information, the parties agree as follows...”
13. The NDA then set out and contained the following material numbered clauses:
 - “2. Permitted Use. Each party agrees to use the Confidential Information only for the purpose of evaluating a potential transaction between them.
 3. Obligations of Confidentiality. Each party agrees to regard and preserve as confidential, all Confidential Information of the

other party... Each party agrees to use the same degree of care that it uses to protect its own Confidential Information from unauthorized disclosure, but in no event less than a reasonable degree of care...In maintaining confidentiality hereunder, each party agrees it shall not, without first obtaining the written consent of the other party, disclose or make available to any person, firm or enterprise, reproduce or transmit, or use (directly or indirectly) for its own benefit or the benefit of others, and Confidential Information of such other party...

4. Confidential Information Definition. “Confidential Information” shall include, but is not limited to, specific information relating to a project or work effort contemplated by the parties, as well as all other information related to either party’s past, present and future plans, businesses, activities, products, services. customers and suppliers...

...

11. Intellectual Property and Announcements. Neither party shall acquire a right to use, and may not use without the other party’s prior written consent in each instance, the names, characters, artwork, designs, trade names, trademarks or service marks of the other party in any advertising, publicity, public announcement, marketing, press release, promotion, and/or client list.

...

14. Assignment. Neither party may assign or otherwise transfer this Agreement, or any of its rights and obligations hereunder, to any third party without the consent of the other party.

...

18. Governing law and jurisdiction. This Agreement (including any non-contractual obligations arising out of or in connection with the same) shall be governed in all respects by the laws of Spain without regard to conflict of law principles. Any dispute or controversy arising in connection with this Agreement shall be submitted before the courts of the city of Madrid, Spain.

...

21. Termination. This Agreement will terminate In the earlier of: (a) the execution of a definitive agreement regarding the “potential transaction” referred to in clause 2 which includes confidentiality provisions substantially similar to those contained in this Agreement (a “Definitive Agreement”); (b)

written notice given by either party terminating evaluation of the “potential transaction” referred to in clause 2; or (c) the date that is 1 year from the date of this Agreement. Except to the extent superseded by the Definitive Agreement, the rights and obligations of the parties: (i) with respect to Confidential Information that constitutes a “trade secret” (as defined by applicable law) will survive the termination of this Agreement for so long as such Confidential Information remains a trade secret under applicable law; and (ii) with respect to all other Confidential Information will survive the termination of this Agreement for a period of 2 years from termination. The obligations of clause 14 will remain in effect until satisfied.

22. Survival. Any provision of this Agreement, which contemplates performance or observance subsequent to termination or expiration of this Agreement (including, without limitation, confidentiality and limitation of liability provisions) shall survive termination or expiration of this Agreement and continue in full force and effect.”

14. After the signing of the NDA, there followed a series of discussions between Mr de Carvajal and Mr Yeh concerning ARPO. A demonstration portal (“the Demo Portal”) was provided to allow the AmEx Europe team to see ARPO’s functionality. By an email dated 8 April 2014 Mr Yeh agreed to Mr de Carvajal’s condition that,

“[t]he use of the demo portal is subject to the terms of the Non-Disclosure Agreement previously signed between Amex and Trappit SA.”

15. On 11 April 2014, the Demo Portal was installed at AmEx Europe’s headquarters in London. There is a dispute between the parties about what the Demo Portal was and what access to the confidential information underpinning ARPO it gave to AmEx Europe. It is unnecessary for me to decide this point.

The AmEx Corporate Transfer

16. Discussions over the possible use by AmEx Europe of ARPO continued. Whilst they were ongoing, the American Express Group took the decision to transfer its worldwide Global Business Travel (GBT) business to a new joint venture structure (‘the AmEx Corporate Transfer’). The AmEx Corporate Transfer was formally announced on 17 March 2014. It was undertaken pursuant to a Master Reorganisation Agreement (the “MRA”) dated 14 March 2014 between American Express Related Services Company, Inc. and GBT III B.V.
17. GBT UK, alongside a number of other entities, is part of that new joint venture structure. A Local Reorganisation Agreement (the “LRA”) dated 1 May 2014 was entered into by AmEx Europe and GBT UK to implement the MRA in respect of AmEx Europe’s business and assets. Under clause 2.1 of the LRA:

“On the terms and subject to the conditions of the Master Reorganization Agreement... each Business Seller [including

AmEx Europe] agrees to sell and transfer to the Business Buyer [GBT UK], and the Business Buyer agrees to purchase and acquire from each Business Seller, all the rights, title, interests in and to the Transferred Assets which are owned or held by such Business Seller, and the Transferred Business shall be considered transferred as a going concern.”

18. The ‘Transferred Assets’ are defined by the MRA as including,

“all of the relevant GBT Company’s [AmEx Europe in this case] rights, title and interest in, to and under the following assets... (c) the Assumed Contracts on the terms set out in Schedule 1 (Contracts)”.

19. Schedule 1 of the MRA then provided that:

“1.5. To the extent that, at any relevant Completion or Contract Transfer Date (as applicable), any requisite Third Party Consent has not been obtained in relation to the transfer of an Assumed Contract (a “Non-Assignable Contract”), such Non-Assignable Contract will be considered a Delayed Transfer Asset and the provisions of clauses 2.13 to 2.16 of this Agreement shall apply to such Non-Assignable Contract.

1.6. As soon as practicable after the relevant Completion or Contract Transfer Date (as applicable), the Parties shall issue or cause to be issued a notice in a form to be agreed by the Parties to each counterparty to an Assumed Contract (unless the requisite Third Party Consent from such counterparty has previously been obtained) informing them of the transfer of the relevant Assumed Contract by the relevant Contract Transferor to the relevant Contract Transferee.”

20. ‘Third Party Consent’ was defined in the MRA, insofar as is relevant, as:

“...such... consents... which are necessary... for the conveyance, transfer, assignment, novation, license or sub-letting in favour of the relevant transferee of any of the Assumed Contracts...”

Clause 2.13 of the MRA provided that:

“To the extent that, as at any relevant Completion, any requisite Third Party Consent has not been obtained in relation to any asset that is to be a Transferred Asset (a “Delayed Transfer Asset”), this Agreement and the applicable Local Agreement shall constitute a transfer, acceptance, assignment and assumption of such Delayed Transfer Asset only to the extent legal and permissible under Law and the terms or conditions applicable to the Delayed Transfer Asset.”

Clause 2.16 of the MRA further provided that,

“Unless and until such Third Party Consent has been obtained (and accordingly all remaining rights, title, interests, benefits and Liabilities (excluding any Excluded Liabilities) to, in and under the Delayed Transfer Asset have been transferred, assigned or novated to the relevant Buyer), or, to the extent such Delayed Transfer Asset is a Contract, lease or other agreement or arrangement, until it expires or is otherwise terminated (including pursuant to clause 2.15):

(a) the relevant Seller shall be deemed to hold the Delayed Transfer Asset in trust for the relevant Buyer (and shall pay any monies received in respect of such Delayed Transfer Asset to the relevant Buyer in accordance with clause 9.1 of this Agreement); and

(b) the relevant Buyer shall assume, carry out, perform and complete all of the Assumed Liabilities, and Liabilities arising following the Principal Closing, of the relevant Seller under or in relation to the Delayed Transfer Asset as the relevant Seller’s sub-contractor, agent or otherwise (to the extent permitted by Law), and such Liabilities shall be considered Assumed Liabilities for the purpose of this Agreement.”

21. The transfer of AmEx Europe’s Global Business Travel Division to GBT UK was effective on 30 June 2014. From that point most, if not all, of the employees of AmEx Europe who had been dealing with Trappit SA were employed by GBT UK. Accordingly, when those individuals dealt with Trappit SA after 30 June 2014 they did so as employees of GBT UK.
22. The extent of Trappit SA’s awareness of the AmEx Corporate Transfer is a matter of dispute on this Application. Trappit SA denies knowledge of the AmEx Corporate Transfer and contended that it had no knowledge of the MRA or LRA. The Defendants contend that the AmEx Corporate Transfer was a significant event in the travel industry and directed me to a number of press reports and corporate announcements relating to it.

GBT UK decides not to take a licence of ARPO

23. On 16 July 2014, Ms Lynsey Verrillo (“Ms Verrillo”) of GBT UK emailed Mr de Carvajal to inform him that GBT UK was not interested in taking a licence of ARPO. At the foot of this email was the following disclaimer:

“Notice: This e-mail message has been sent by an employee or contractor of American Express Global Business Travel (“GBT”), a joint venture that is not wholly-owned by American Express Company or any of its subsidiaries (“American Express”). E-mail from GBT employees and contractors may continue to utilize an American Express domain for some period;

however American Express is not responsible for the content of this email, which is controlled by GBT. “American Express Global Business Travel”, “American Express” and the American Express Logo are trademarks of American Express and are used by GBT under limited license.”

Transfer of Rights in ARPO

24. Until 6 October 2014, the intellectual property rights in ARPO were vested in 2MC, which employed the individuals who created the code. The Claimants allege that prior to 6 October 2014 Trappit SA had an implied licence from 2MC in respect of the intellectual property rights in ARPO. On that date, 2MC and Trappit SA entered into an assignment (the “SA Transfer”) which provided that:

“TWO. [2MC] transfers to [Trappit SA] all rights to the work called ARPO, that had previously been transferred to the former by Mr Roberto Martín Escribano and Mr Alvaro Javier Morgan Guadamuz, and the latter accepts the transfer. By way of example, the rights transferred are those of reproduction, distribution, public communication and transformation, together with any type of exploitation.

The abovementioned transfer of rights is on an exclusive basis with a worldwide territorial scope and for the maximum time allowed by law....”

25. The Claimants’ pleaded case is that the SA Transfer included all intellectual property and associated rights (including in relation to breach of confidence) and all rights of suit by virtue of Articles 1281 and /or 1282 of the Spanish Civil Code and Articles 43 and 48 of the Spanish Intellectual Property Act. Article 48 provides (in part) that in addition to an assignment of the right to exploit the work, an assignment of exclusive rights shall confer upon the assignee the rights, which shall be independent of that of the assigning rightholder, to institute proceedings for infringements that affect the rights that have been assigned to him.
26. On 8 March 2015, Trappit SA and Trappit Tec entered into a further assignment (“the Tec Transfer”). This was subsequently notarised on 24 March 2015. The Tec Transfer provided that:

“ONE. Transfer on an exclusive basis

[Trappit SA] transfers, on an exclusive basis, all the rights to exploit the work entitled “ARPO” to [Trappit Tec], which accepts the transfer on the terms laid down in this agreement...

TWO. Rights transferred and methods of exploitation

The rights to exploit the work that are transferred are those of reproduction, distribution, public communication and transformation, in any of the means of exploitation that exist and are known as at today’s date...

...

FOUR. Geographical scope of the transfer

The transfer of the exploitation rights is worldwide in scope...”

27. The Tec Transfer did not include an express choice of law. It did, however, contain a heading in the agreement entitled “Applicable Law” which in fact dealt with jurisdiction and provided that any issues regarding the interpretation or performance of the agreement would be resolved by the courts of Madrid.
28. The Claimants’ pleaded case is that the Tec Transfer included all rights of suit by virtue of Articles 1281 and /or 1282 of the Spanish Civil Code and Articles 43 and 48 of the Spanish Intellectual Property Act. For reasons that are not explained, although it relies on the same provisions of Spanish law, the relevant paragraph of the Particulars of Claim does not make the same allegation as in relation to the SA Transfer that the transfer to Trappit Tec included all intellectual property rights, including in relation to breach of confidence.

The Spanish Proceedings: Commencement

29. On 3 June 2015 Trappit Tec filed a criminal complaint before the Investigating Court No. 51 of Madrid with Criminal Preliminary Proceedings number 3026/2015 (the “Spanish Proceedings” and the “Investigating Court”). This resulted in what turned out to be a lengthy investigatory process by the prosecuting authorities.
30. The originating process in the Spanish Proceedings is known as the Querella (roughly translated as the complaint). In the Querella, Trappit Tec described itself as having “invented and developed” the ARPO tool and alleged that it was the registered owner of the intellectual property rights with exclusive use of the product. The term used throughout the Querella was simply “Trappit”.
31. The defendants in the Spanish Proceedings consisted of 9 individual defendants and 2 corporate defendants (the “Spanish Defendants”). They were as follows,

“- KENNETH I CHENAULT, legal representative of American Express worldwide...

- KATRINA CLIFFE, representative and in charge of the Global Business Travel Department...

- ESTEFANÍA RUIZ DE ESGUIDE, in charge of the department of new developments and travel of American Express España...

- JOSÉ LUIS GIRALDEZ: Head of the Customer Management Department of American Express Global Business Travel...

- KEVIN P. YEH, Senior manager for international premium products and new products of American Express Company...

- LUIS DUPUY, General Manager of American Express Global Business Travel...
- LINSEY VERILLO: Manager | Income and business development manager | Global relations with suppliers of American Express in Europe...
- WILLIAM GLENN: President of American Express Global Business Travel...
- JOANNA MACLEOD: Senior Vice President for Suppliers of American Express Global Business Travel...
- AMERICAN EXPRESS ESPAÑA...
- AMERICAN EXPRESS internationally, whose address for service of process is American Express Company, World Financial Center, 20 Vesey Street, 50th Floor, New York, New York 10281-1009.”

At least on the basis of the heading of the Querella, it is not obvious that either of the UK Defendants were named defendants to the Spanish Proceedings.

32. The Querella alleged that the Spanish Defendants had committed a number of crimes. These included offences relating to intellectual property contrary to Article 270.1 of the Spanish Criminal Code that provides,

“Whoever, for profit and to the detriment of a third party, reproduces, plagiarises, distributes or publicly discloses all or part of a literary, artistic or scientific work, or transforms, interprets or performs it in any kind of medium, or broadcast by any medium, without authorisation by the holders of the relevant intellectual property rights or their assignees, shall be punished with a sentence of imprisonment of six months to two years and a fine from twelve to twenty- four months.”

33. In addition, the Querella alleged that the Spanish Defendants had breached Article 278 of the Spanish Criminal Code, which provides,

“Whoever obtains data, written or electronic documents, computer media or other objects related thereto in order to discover a company secret, or who uses any of the means or instruments described in Section 1 of Article 197, shall be punished with a sentence of imprisonment of two to four years and a fine of twelve to twenty- four months.”

34. Article 197.1 of the Spanish Criminal Code provides,

“Whoever, in order to discover the secrets or to breach the privacy of another, without his consent, seizes his papers, letters, electronic mail messages or any other documents or personal belongings, or intercepts his telecommunications or uses

technical devices for listening, transmitting, recording or to play sound or image, or any other communication signal, shall be punished with imprisonment of one to four years and a fine of twelve to twenty- four months.”

35. The Spanish Proceedings also included a claim for civil liability and damages pursuant to Articles 109 and 110 of the Spanish Criminal Code. Those provisions are as follows,

“Article 109

1. Perpetration of an act defined as a felony or misdemeanour by Law shall entail, pursuant to the provisions contained in the laws, to repair the damages and losses caused thereby.

2. In all cases, the party damaged may opt to sue for civil liability before the Civil Jurisdiction.

Article 110

The liability established in the preceding Article includes:

1. Restitution;
2. Repairing the damage;
3. Compensation of material and moral damage.”

36. The damages claimed in the civil claim were €14,681,239.00. As part of precautionary relief, Trappit Tec sought a bond in that amount from the Spanish Defendants. Trappit Tec also sought letters rogatory for the taking of statements from Mr Chenault and Ms Cliffe.

37. The following extract from the Querella provides an indication of the nature of the allegations made in the Spanish Proceedings:

“...Furthermore, [Joanna MacLeod] was the person who in performing the deceit to which they were submitting the plaintiffs, signed a confidentiality agreement with them. All of this aiming at having them believe that American Express was going to respect the ownership rights of the ARPO system, which belonged to the plaintiffs...

TWO - Defendants Ms Cliffe and Mr Glenn, in agreement with the rest of the defendants listed below, devised the following plan. In order to fraudulently take possession of the ARPO tool, they would propose to the plaintiffs to enter into a collaboration agreement to use and develop the ARPO system for the purchase of plane tickets... As will be explained later what the defendants actually did was to appropriate the system for themselves...

FOUR - On the initiative AMERICAN EXPRESS and following several meetings in which, among other things, the plaintiffs

gave technical explanations on the ARPO program... Therefore, a way of working was established, for the future agreement, at three levels (AMEX, TRAPPIT, BANCO DE SANTANDER, which is a client of the first two) to make an actual pilot test, and a period of three weeks was agreed upon to analyze the results...

Trappit's representatives delivered to the people in charge of American Express everything pertaining to the ARPO system, and delivered to them all of the required data and elements whereby it was possible to learn in full what the ARPO system consisted of and how it worked. The people at Trappit delivered the program in good faith and with several confidentiality agreements signed, and assuming that American Express knew that it was a product that was legally registered. (Appended document No. 6: Copies of the NDAs signed by Trappit and AMEX and Appended document No. 7: Handing over and delivery of the full ARPO system to American Express)...

Even though the defendants were fully aware that the ARPO system belonged exclusively to Trappit and that it was duly registered, they took possession of it, studied it, analyzed it and without the plaintiffs' knowledge or consent started to exploit it, offering it with a different name to the clients of American Express...

All of it was a ruse of the defendants to prevent the plaintiffs from exploiting their system so that it would be them who, to the detriment of TRAPPIT, would be using TRAPPIT's program."

38. It will readily be appreciated that the Querella did not maintain a clear (or indeed any) distinction between the various different corporate entities involved – i.e. Trappit Tec, Trappit SA or 2MC (on the one hand) and the different American Express entities (on the other). So, for example, it appeared to be alleged that the NDA had been signed by Trappit Tec and "AMEX", and that Trappit Tec had provided the Demo Portal to "American Express".
39. Further, and importantly, I note that the Querella did not include a claim by Trappit Tec in contract based upon the NDA. Rather, Trappit Tec alleged that the NDA had been used as part of a fraudulent scheme by the Spanish Defendants to gain access to the ARPO system and that it had then been copied (reproduced or plagiarised). Trappit Tec also contended that "American Express" had illegitimately gained access to a company secret (ARPO).

Events in the Spanish Proceedings

40. The Spanish Proceedings were lengthy and, so far as I can discern from the papers before me, fiercely contested by the Spanish Defendants. For present purposes I shall highlight only a few of the most relevant events.
41. On 6 November 2015, the Investigating Court ordered the issuing of letters rogatory to obtain testimony from a number of individuals including Mr Chenault, Ms Cliffe, Ms

Verillo, and Mr Yeh. However, the Spanish Defendants appealed the issue of letters rogatory and on 6 May 2016, the Madrid Examining Court (the “Examining Court”) allowed the appeal and set aside the order of the Investigating Court. The Examining Court noted that,

“if there had been contrivance to unlawfully or deceitfully obtain the complainants’ software product, according to this examining magistrate, the acts would have taken place and been decided in London and, if outside Spain, would not be subject to the jurisdiction of Spanish courts.”

The Examining Court also granted relief in the form of a provisional stay of proceedings on the basis that no act had occurred in Spain which could be considered a crime and that any crime had occurred in London.

42. Trappit Tec appealed the decision of the Examining Court to the Provincial Court, also in Madrid, which gave judgment on 28 October 2016. The Provincial Court partially allowed the appeal, holding that since it was alleged that ARPO had been plagiarised in Madrid, there was jurisdiction to investigate:

“Nevertheless, it cannot be ignored that the defendants claimed that the "LASTFARE" program was developed by personnel belonging to [GBT Spain]...

FIVE. The Plenary ruling relating to jurisdiction... applies the principle of ubiquity to determine territorial jurisdiction, according to which: "A crime is considered to have been committed in all the jurisdictions in which any element thereof has taken place. Accordingly, the court in any of said jurisdictions that firstly initiates proceedings shall be the competent court to judge the case".

SIX. As a result, given that the plagiarism of the program allegedly took place in Madrid, the Madrid court has jurisdiction to determine whether a crime against intellectual property was committed and, as the declaration of a lack of jurisdiction was the reason why the interlocutory orders of November 6 and 12, 2015 were not sent, they must be confirmed...”

43. On 1 December 2016, the Examining Court made a further order taking into account the decision of the Provincial Court:

“In accordance with the order handed down by Madrid Provincial Appellate Court, it is appropriate for the letters rogatory to be issued. However, in the light of the appeal that was partly upheld, as is clearly apparent from the operative part of the decision, it is necessary to limit the subject-matter of this investigation to the events which took place in Spain, namely the development of the Last Fare application ...

As regards the taking of statements from Jaime de Carvajal Escalada, there are no grounds for acceding to the petition since the events which occurred in the UK and the US are not covered by the present proceedings ... which are confined, in contrast, to the question whether, in Spain, the intellectual property rights of the complainant were infringed by the creation in Spain of the Last Fare application.”

44. After further investigations, on 19 September 2018, the Provincial Court held that the letters rogatory should be suspended on the basis that,

"should the expert report establish that the computer programs ARPO and LASTFARE are not copies of each other, it is likely that no offence has been committed and it would be pointless to issue the mentioned letters rogatory"

45. Following that ruling, on 22 May 2019, the Provincial Court issued an order appointing an independent expert in computer forensics, Francisco Javier Folgado de la Rosa (“Mr Folgado”). Mr Folgado was asked to consider two points: (a) whether LastFare plagiarised ARPO, and (b) to compare the two source codes.

46. Mr Folgado delivered his expert report (the “Expert Report”) on 22 October 2019. The nature of the conclusions in the Expert Report remain in dispute between the parties, and I am not in a position on this application to adjudicate or form a view on the rights and wrongs of that dispute.

47. On 22 November 2019, the Expert Report was incorporated into the Spanish Proceedings and on 14 January 2020, in view of the Expert Report, the Spanish Defendants requested the dismissal of the Spanish Proceedings. However, on 19 February 2020, Trappit Tec filed a request for oral ratification of the Expert Report (a process of oral questioning of the expert). On 26 February 2020, the Investigating Court ordered oral ratification of the Expert Report and this duly took place on 26 May 2020.

48. After the oral ratification, a renewed request was then made by the Spanish Defendants for dismissal of the Spanish Proceedings on 5 June 2020. The Examining Court made an order provisionally dismissing the Spanish Proceedings on 14 August 2020. A “provisional dismissal” under Spanish law means that there is not enough evidence to suggest that a crime has been committed, and hence the complaint cannot go forwards to the next (Intermediate) stage before a full trial. As Mr Gabriel Castro, the Defendants’ Spanish lawyer explained in evidence,

“In deciding whether to progress from the Investigation Phase to the Intermediate Phase” (i.e. the point at which the Spanish Proceedings were dismissed) the judge merely considers whether a crime could have been committed. This is a significantly lower threshold than the criminal standard and does not even require the complainant to show that it is more likely than not that such an offence has been committed.”

49. In giving its decision, the Examining Court referred to some of the conclusions of the Expert Report, including that,

“LASTFARE and ARPO operate differently, LASTFARE is, at most, 10% of ARPO and LASTFARE does not have the capacity for Global Business Travel Spain (formerly American Express) to use it to search for the best ticket prices.”

50. The Examining Court also refused to widen the scope of the allegations in the Spanish Proceedings to include the ARE programme, concluding:

“In the opinion of this examining magistrate, according to the court-appointed expert report carried out in the terms required by the Provincial Court of Madrid, it can be clearly concluded that the LASTFARE program is not a plagiary of ARPO...”

Therefore, in light of the results of the expert report, pursuant to the reasoning explained in this ruling, the proceedings are declared as provisionally filed pursuant to article 641.1 LECrim [the Spanish Criminal Procedure Code] and, therefore, the case closed and the letters rogatory claimed by the criminal complainant [are] denied.”

51. As I shall explain, it was common ground between the parties that the effect of a provisional dismissal pursuant to Article 641.1 is that the relevant proceedings are closed, but that they may be re-opened by the parties, the court or the Public Prosecutor should additional evidence come to light which warrants such re-opening.

52. Trappit Tec appealed the provisional dismissal of the Spanish Proceedings to the Provincial Court on 21 August 2020. The Provincial Court dismissed Trappit Tec’s appeal on 22 October 2020 (the “Spanish Appeal Judgment”). In its judgment, the court held,

“Having examined the proceedings for the sole purpose of this appeal, the Chamber, sharing the criterion of the Examining Court and of the Public Prosecutor, considers that the perpetration of the crime that led to the formation of the case is not justified. There are not enough indications of the existence of facts with criminal relevance.

The judicial investigation is aimed at proving the plausibility of the commission of the allegedly criminal act that is the purpose of the complaint and, when it is deduced from the investigation carried out that said commission is not duly proven, the Investigating Judge has the option of opting for the provisional dismissal of the proceedings (Articles 641.1 and 779.1,1st of the Criminal Procedure Act).”

53. The Provincial Court then explained the effect of a provisional dismissal under Article 641,

“Article 641 sets out the provisional dismissal, which, as its name suggests, is temporary, provisional and, therefore, reversible at any time, provided that the statutes of limitation have not lapsed.”

54. The Provincial Court then held that the Investigating Judge had adequately justified “the reasons why the existence of criminally relevant evidence can be ruled out” and expressed its agreement with that conclusion. The court continued,

“The complainant essentially alleges the defendant's commission of a crime against intellectual property due to alleged plagiarism of its ARPO program in the development of the defendant's LASTFARE program, all of which is reported in the appeal to which we refer...

We consider that the object of the trial has been resolved through the expert evidence given in the agreed terms, both by the Court and by this Chamber, as the judicial expert concludes that the operations of ARPO and LASTFARE differ...LASTFARE and ARPO are different programs.

The determination of this point was decisive for the continuation of the proceedings, given that, if there is no plagiarism, it is unnecessary to speak of a crime against intellectual property.”

55. The Provincial Court then criticised Trappit Tec for attempting to raise new arguments:

“...it is not acceptable that, now, the complainant states that this information is irrelevant and attempts to modify the object of the investigation, alleging the existence of alleged crimes of discovery and disclosure of secrets and fraud, by the defendants allegedly appropriating the ARPO program, with the defendants using certain tricks and subterfuges that the appellant relates in its brief and which lack the slightest evidential support as said assertions are based on mere assumptions and conjectures. There is no indication whatsoever that GBT SPAIN had access to the ARPO program, nor that it was issued with it at any time.

There are no indications that the crime under investigation has been committed by the defendants..”

56. Finally, but importantly, the Provincial Court added the following,

“Added to the above considerations, which governs, in this matter, the principle of minimal intervention of Criminal Law, by virtue of which this jurisdictional order must only act when, in the civil, commercial or administrative law, there are no remedies to correct the alleged breach denounced ...

.....

In proof of the foregoing is the claim made by the complainant before an English Court specialising in Commercial and Intellectual Property, relating to these facts, as the defendants show in their objection brief.”

57. I shall return to consider the consequences of this provisional dismissal of the Spanish Proceedings later in this judgment.

THE ENGLISH PROCEEDINGS

58. The English Proceedings were issued on 9 April 2020; therefore, prior to the provisional dismissal of the Spanish Proceedings but after the delivery of the Expert Report. The initial Claim Form included the following causes of action:

“(1) The First and/or Second Defendant’s misuse and/or unauthorised disclosure of the Confidential Information in breach of the equitable duty of confidence owed to the First and/or Second Claimant;

(2) Further or alternatively, the Second Defendant’s knowing participation in the misuse and/or unauthorised disclosure of the Confidential Information by the First Defendant and/or others;

(3) The First and/or Second Defendant infringed and continue to infringe the Claimants’ copyright by: without the Claimants’ permission, storing and/or copying the software; and/or knowing or having reason to believe that it was an infringing copy possessing and dealing with an infringing copy of the software;

(4) Further or alternatively, the Second Defendant’s unlawful interference in the Claimants’ business and/or its procurement or inducement of a breach by the First Defendant of its obligations under a Mutual Non-Disclosure Agreement dated 18 March 2014 (and executed on 28 March 2014) (“the Agreement”);

(5) Further or alternatively, the tort of unlawful means conspiracy arising from the First and/or Second Defendant’s actions in combining together and/or with others to bring about the aforementioned breach(es) of the Agreement and/or of the equitable duty of confidence and/or the aforementioned torts of unlawful interference or inducing or procuring a breach of contract and/or infringement of copyright.”

(Underlining added)

59. However, the Claim Form was amended, prior to service, on 30 July 2020 by the removal of the underlined section in the quote above i.e. the removal of a claim against GBT UK for procuring or inducing a breach of the NDA by AmEx Europe. The amended Claim Form was then served together with a Letter of Claim on 5 August 2020.
60. The claims made in the English Proceedings are thus (i) breach of confidence, (ii) copyright infringement and (iii) unlawful means conspiracy.
61. An extract from the Particulars of Claim gives an indication of the factual allegations made in the English Proceedings:

“20. From about 3 March to about 10 June 2014, Trappit SA acting primarily through Mr de Carvajal and Mr Martín communicated the Confidential Information to individuals purporting to act on behalf of Amex Europe (the “GBT Employees”) on at least the following occasions...

21. On about 11 April 2014, Trappit SA provided Amex Europe and/or GBT UK with copyright material, namely the Demo Portal (by installing it on a virtual machine on a stand-alone computer at Amex Europe’s London office)...

23. The GBT Employees received the Confidential Information and copyright material in circumstances importing an obligation of confidence...

...

(6) Trappit SA and Amex Europe agreed ... the NDA on about 28 March 2014 which provided, inter alia, that each party agreed to use the other’s confidential information only for the purpose of evaluating a potential transaction between them...

(7) For the avoidance of doubt this claim is not brought for breach of the NDA because that contract contains a jurisdiction clause in favour of Spain. However...as a matter of Spanish law...the claims set out herein are not subject to that jurisdiction clause...

24. By reason of the transfer of the American Express Global Business Travel division... from about 1 May 2014, the GBT Employees must have been acting for and on behalf of GBT UK (whether in addition to or instead of Amex Europe). From that date, all the Confidential Information and copyright material that had been imparted to Amex Europe became known to GBT UK. Ongoing disclosure of confidential information by Trappit SA was (without Trappit SA’s knowledge) disclosure to

GBT UK and ongoing use of the Demo Portal was by GBT UK and unauthorised.

25. In all the circumstances, given that the GBT Employees knew the limited purposes for which the Confidential Information was communicated to them, Amex Europe and GBT UK were both under a duty of confidence towards Trappit SA at all material times.

....

28. The precise means and circumstances of the production of LastFare and ARE are necessarily outside the Claimant's knowledge. However, pending disclosure it is to be inferred from the facts and matters set out in the sub-paragraphs which follow, that both pieces of software were produced by: (1) copying at least a substantial part of the code for ARPO; and/or (2) using the Confidential Information..."

62. In relation to the breach of confidence claim, it is contended (a) that AmEx Europe made use of the Confidential Information other than for the permitted purpose of evaluating ARPO and (b) that GBT UK did the same or knowingly participated in the breaches of confidence by Amex Europe. The breach of copyright claims are made in essentially the same terms against both Defendants, alleging copying of the Demo Portal and at least a substantial part of the code for ARPO, and possessing in the course of business an infringing copy of ARPO, knowing or having reason to believe that it was infringing. The claim in unlawful means conspiracy alleges a combination between AmEx Europe and GBT UK with intent to injure Trappit SA and/or Trappit Tec and involving breach of confidence and copyright infringement.
63. The Defendants acknowledged service on 19 August 2020 indicating that they intended to contest the jurisdiction of the English courts. The Defendants made the present application by Application Notice dated 30 September 2020. Their Application Notice was amended on 13 November 2020 following the Spanish Appeal Judgment of 22 October 2020. The amendments added additional detail on the applications pursuant to the court's inherent jurisdiction and removed reliance on Article 30 of the Brussels I Recast Regulation.

THE ISSUES

64. The parties agreed that there are three principal questions which I need to consider:
- i) Whether the English Proceedings come within the scope of the jurisdiction clause in the NDA and thus within Article 25 of Brussels I Recast? I shall refer to this as the "Jurisdiction Agreement Issue". This question raises two issues as to: (a) which entities are or must be taken to have agreed to the jurisdiction clause in the NDA, and (b) which disputes fall within the scope of the jurisdiction clause in the NDA.

- ii) If and to the extent any claims have survived the Jurisdiction Agreement Issue, whether the English Proceedings are, by reason of the Spanish Proceedings, within the *lis pendens* provisions of Article 29 of Brussels I Recast? This is the “Lis Pendens Issue”. This question raises issues as to whether: (a) the Spanish Proceedings are pending, (b) the Spanish and English Proceedings involve the same parties, and (c) the Spanish and English Proceedings involve the same cause of action.
 - iii) If and to the extent that any claims have survived the Jurisdiction Agreement and Lis Pendens Issue, whether the English Proceedings should be struck out or stayed as an abuse of process? This is the “Abuse of Process Issue”. At this stage, the Defendants contend that the claims in the English Proceedings are (a) barred by issue estoppel, (b) vexatious or oppressive, and/or (c) a *Henderson v Henderson* (1843) 3 Hare 100 abuse of process.
65. For completeness I should add that the provisions of Brussels I Recast remain applicable to this dispute by reasons of the transitional provisions in the Civil Jurisdictions and Judgments (Amendment) (EU Exit) Regulations 2019.

THE JURISDICTION AGREEMENT ISSUE

Article 25 of Brussels I Recast

66. Article 25 of Brussels I Recast provides in material part:

“(1) If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise...”

Application to the parties and scope

67. The CJEU considered the approach to Article 25 in C-352/13 Hydrogen Peroxide [2015] QB 906, 960. In that case several companies, who were allegedly the victims of a cartel, assigned their claims against cartel members to the applicant. Some of the victims had entered into contracts of sale with cartel members which included arbitration and jurisdiction clauses. The CJEU had to determine whether the predecessor to Article 25 applied to jurisdiction clauses contained in contracts for the sale of goods where the claim was for breach of competition law.
68. The CJEU set out the relevant principles at [64] – [68]:
- “64. In a case such as that in the main proceedings, the court before which the action is brought must, nevertheless, ensure that the clauses at issue actually bind the applicant before

examining the requirements of form laid down in article 23 of Regulation No 44/2001. As the court has already made clear, a jurisdiction clause incorporated in a contract may, in principle, produce effects only in the relations between the parties who have given their agreement to the conclusion of that contract. In order for a third party to rely on such a clause it is, in principle, necessary that the third party has given his consent to that effect: the Refcomp SpA case, para 29.

65. Only where a party not privy to the original contract had succeeded to an original contracting party's rights and obligations in accordance with national substantive law as established by the application of the rules of private international law of the court seized of the matter could that third party nevertheless be bound by a jurisdiction clause to which it had not agreed: Coreck Maritime GmbH v Handelsveem BV (Case C-387/98) [2000] ECR I-9337, paras 24, 25, 30.

...

67. In that regard, it is for the national court to interpret the clause conferring jurisdiction invoked before it in order to determine which disputes fall within its scope: Powell Duffryn plc v Petereit (Case C-214/89 [1992] ECR I-1745, para 37, and in Benincasa v Dentalkit Srl (Case C-269/95) [1997] ECR I-3767; [1998] All ER (EC) 135, para 31.

68. A jurisdiction clause can concern only disputes which have arisen or which may arise in connection with a particular legal relationship, which limits the scope of an agreement conferring jurisdiction solely to disputes which arise from the legal relationship in connection with which the agreement was entered into. The purpose of that requirement is to avoid a party being taken by surprise by the assignment of jurisdiction to a given forum as regards all disputes which may arise out of its relationship with the other party to the contract and stem from a relationship other than that in connection with which the agreement conferring jurisdiction was made: the Powell Duffryn case, para 31.”

69. From that statement, it is clear that there are two questions to be considered. The court must first ensure that the jurisdiction clause in issue actually binds the parties to the proceedings, and secondly it must interpret the jurisdiction clause to determine whether the disputes in question fall within its scope.

70. It is also apparent that the operation of Article 25 can result in different parts of a dispute being determined in different jurisdictions (for example claims in contract and tort, or claims against a particular party). However, as the Supreme Court noted in AMT Futures v Marzillier GmbH [2017] UKSC 13, [2018] AC 439, [35]

“such inconvenience is the price of achieving the legal certainty and foreseeability which are among the principal aims of the Judgments Regulation, as the CJEU has recognised and endorsed.”

The burden and standard of proof

71. The Defendants, as the parties seeking to rely on Article 25, bear the burden of proving that its requirements have been satisfied: Bols Distilleries BV v Superior Yacht Services Ltd [2006] UKPC 45, [2007] 1 WLR 12, [28].
72. The Supreme Court clarified the requirements of this standard in Brownlie v Four Seasons Holdings Inc [2017] UKSC 80, [2018] 1 WLR 192, which was subsequently approved in Goldman Sachs International v Novo Banco SA [2018] UKSC 34, [2018] 1 WLR 3683, [9]. Lord Sumption confirmed in Brownlie at [7] that “good arguable case” was the test and in practice this meant:

“(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.”
73. Green LJ gave a detailed consideration to these three limbs in Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV [2019] EWCA Civ 10, [2019] 1 WLR 3514, [72]-[80]:
 - i) “The reference to ‘a plausible evidential basis’ in limb (i) is... a reference to an evidential basis showing that the claimant has the better argument”: [73].
 - ii) “Limb (ii) is an instruction to use judicial common sense and pragmatism, not least because the exercise is intended to be one conducted with ‘due despatch and without hearing oral evidence’”: [78].
 - iii) Limb (iii) “moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence”, which is “a more flexible test which is not necessarily conditional upon relative merits”: [80].
74. The parties were therefore agreed that the standard for the Defendants to satisfy was that of showing a good arguable case, and that if both parties had a good arguable case, the Defendants should show that their case was to be preferred (the “better argument”).
75. In this respect it will be appreciated that the parties in the instant case have adopted positions that are to some extent counter-intuitive and the opposite of those more frequently encountered and discussed in the authorities in which the principles have been developed. In the authorities above, it was the claimant who contended that the

clause applies to the dispute in question and entitled him to sue the defendants in his chosen forum.

76. In the instant case, it is the parties related to Trappit SA who are the claimants, who sought the NDA before making ARPO available to AmEx Europe, and who asked for a Spanish law and jurisdiction clause. However, it is those parties who now contend that the jurisdiction clause does not bind them and that they are free to issue proceedings in England for breach of confidence and copyright infringement arising (so they say) from the unauthorised copying of the source code to ARPO. In contrast, it was the parties related to AmEx Europe who would most naturally be the defendants to any claim under the NDA and who originally proposed an English law and jurisdiction clause. But it is those parties who are now contending that the jurisdiction clause in the NDA binds all parties and requires all of the claims made in the English Proceedings to be litigated in Spain.

The Spanish Law Evidence

77. It was common ground that the interpretation of Clause 18 to ascertain its scope and the circumstances in which persons other than Trappit SA and AmEx Europe might become a party to the NDA are matters to be determined in accordance with Spanish law as the governing law of the NDA.
78. In that regard I was referred to four lengthy expert reports on Spanish law: two each from Professor Ignacio Díez-Picazo (for the Claimants) and Dr Alfonso González Gozalo (for the Defendants). The expert reports addressed issues falling under two broad headings: (i) the proper approach to contractual construction, and (ii) the circumstances in which third parties can be bound by contracts.
79. The proper function of an expert witness on foreign law was discussed by Evans LJ in MCC Proceeds Inc v Bishopsgate Investment Trust plc (No 4) [1999] CLC 417, [23]-[24]. In the context of contractual construction it was considered by the Court of Appeal in BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA [2019] EWCA Civ 768, [2019] 1 CLC 822, [45]-[54]:

“45. The role of foreign law experts in relation to issues of contractual interpretation is a limited one. It is confined to identifying what the rules of interpretation are.

46. It is not the role of such experts to express opinions as to what the contract means. That is the task of the English court, having regard to the foreign law rules of interpretation.

47. This is well established law and is clearly set out and summarised by Lord Collins in Vizcaya Partners Ltd v Picard [2016] UKPC 5; [2016] 1 CLC 806 at [60]:

'60. ... Where the applicable law of the contract is foreign law, questions of interpretation are governed by the applicable law. In such a case the role of the expert is not to give evidence as to what the contract means. The role is "to prove the rules of construction of the

foreign law, and it is then for the court to interpret the contract in accordance with those rules": King v Brandywine [2005] EWCA Civ 235, [2005] 1 CLC 283, para 68; Dicey, paras 9-019 and 32-144 ("the expert proves the foreign rules of construction, and the court, in the light of these rules, determines the meaning of the contract").

48. To similar effect is the judgment of Longmore LJ in Deutsche Bank AG v Savona [2018] EWCA Civ 1740; [2018] 2 CLC 483] at [15]:

'15. ... In a case in which the main, let alone the only, issue is as to the construction of a foreign jurisdiction clause as opposed to an English jurisdiction clause, the only relevance of evidence of foreign law is to inform the court of any difference of law in relation to the principles of construction, see King v Brandywine [2005] 1 CLC 283, para 68 per Waller LJ and Vizcaya Partners Ltd v Picard [2016] 1 CLC 806 para 60 per Lord Collins. It is not to have competing arguments as to how the highest court in the foreign jurisdiction would decide the question whether a claim brought in England would (or would not or would also) fall within the foreign jurisdiction clause. The task of the English court is merely to inform itself of any relevant different principles of construction there might be in the foreign law and, armed with such information, look at both jurisdiction clauses and decide whether the English claim falls within the English clause. That should be a comparatively straightforward exercise."

Construction of contracts under Spanish law

80. Both experts considered that the relevant articles of the Spanish Civil Code were found in Book IV (on obligations and contracts), Title II (on contracts), Chapter IV (on construction of contracts). Those articles include the following:

"Article 1281

If the terms of a contract are clear and do not leave any doubt as to the intention of the contracting parties, they shall abide by the literal meaning of its clauses.

If the words seem contrary to the evident intention of the contracting parties, the latter shall prevail over the former.

Article 1282

In order to judge the intention of the contracting parties, their acts at the time of and subsequent to the contract shall be mainly taken into account.

Article 1283

However general the terms of the contract are, they shall not be deemed to comprise objects and cases different from those in respect of which the interested parties proposed to contract.

Article 1284

If any clause of the contract admits several meanings, it shall be construed to have the meaning most suitable for it to be effective.

Article 1285

Clauses in contracts shall be construed in connection with each other, attributing to any doubtful clauses the meaning resulting from the whole.

Article 1286

Words which may have different meanings shall be construed in the meaning which is most in accordance with the nature and subject matter of the contract.

Article 1287

Uses or customs of the country shall be taken into account to construe any ambiguities in contracts, standing in for the omission of clauses which are usually set forth therein.

Article 1288

The construction of obscure clauses in the contract shall not favour the party who caused the obscurity.”

81. The following points are clear from, and were common ground in, the reports of Dr González and Professor Díez-Picazo:
- i) The scope of a jurisdiction clause is entirely dependent on the parties’ freedom of will. There are no special rules for the construction of jurisdiction agreements, in other words there is no reason in Spanish law why a jurisdiction agreement should be interpreted in an extensive or a restrictive way.
 - ii) The starting point in construing a clause is the literal interpretation under Article 1281. If the words are clear then this is assumed to be exactly the same as the common intention of the parties.

- iii) The literal interpretation of the clause can be displaced if a common intention is proved which is contrary to the literal interpretation. The burden of proving a contrary common intention rests on the party disputing the literal interpretation.
 - iv) The relevant common intention is at the time of the execution of the contract, however, (with appropriate caution) the parties' behaviour before, during and after the signing of the contract is relevant to determining what that common intention was.
82. The experts disagreed, however, on the approach to application of Articles 1281-1288. Dr González's view was that there is no logical flow or hierarchy between Articles 1281-1288, and the Spanish court would resort to all of them concurrently in order to construe the agreement with regard to the whole of the contract and its overall objective and purpose. On the other hand, Professor Díez-Picazo's opinion was that if Articles 1281-1282 supply an answer to the construction question, then there is no need to have recourse to the principles in Articles 1283-1288. In his view, where the terms of the contract are clear, the literal meaning is not only the starting point but also the end point of the process of interpretation. For the reasons that follow I do not need to resolve that difference of opinion.
83. Both experts gave detailed consideration to how, in their view, the principles of construction in Spanish law applied to the facts of this case. In light of the decision of the Court of Appeal in BNP Paribas, I do not derive any assistance from these observations. It is for me to determine what the NDA means, having regard to the foreign law rules of interpretation.

The scope of Clause 18

84. Clause 18 provides,
- “18. Governing law and jurisdiction. This Agreement (including any non-contractual obligations arising out of or in connection with the same) shall be governed in all respects by the laws of Spain without regard to conflict of law principles. Any dispute or controversy arising in connection with this Agreement shall be submitted before the courts of the city of Madrid, Spain.”
85. The Claimants contend that the literal meaning of the words in the second sentence of Clause 18 has the result that it only provides for contractual disputes or controversies to be submitted to the courts of Madrid. The basis for that contention is said to be the fact that the second sentence does not contain similar words to those in parentheses in the first sentence containing a reference to non-contractual obligations.
86. Ms Masters QC submitted that I had to approach matters by asking whether the words of expansion in parentheses in the first sentence could be read into the second sentence notwithstanding the fact that they were not there. I do not accept that submission.
87. The first sentence of Clause 18 deals with the applicable law. As a drafting technique it was clearly appropriate first to specify the governing law of the agreement itself, and then to use the words in parentheses to expand the scope of the governing law clause to

include any non-contractual obligations (e.g. in tort) arising out of or in connection with the agreement. In that regard, as a simple matter of language, the words “arising out of or in connection with” are of very wide scope.

88. The second sentence of Clause 18 does not deal with applicable law, but the different point of the appropriate jurisdiction for resolution of disputes. It was not necessary to employ the same drafting technique in that sentence as in the first sentence. Instead, the words used in the second sentence are, linguistically, of the widest possible scope and contain no limitation: the jurisdiction clause simply refers to “any dispute or controversy arising in connection with” the agreement. The second sentence was not, for example, limited to disputes “under” the agreement, but used the much wider words “in connection with” that had been used to encompass non-contractual disputes in the first sentence. There was no express limitation to contractual disputes, and nor do I consider that the words used needed any parenthetical expansion or express addition to make them any wider.
89. In paragraph [68] of Hydrogen Peroxide, the CJEU gave some indication of the type of restriction that might exist in relation to jurisdiction clauses under Article 25. It indicated that a jurisdiction clause should only be given effect in relation to disputes arising in connection with the legal relationship created by the agreement containing the clause. The CJEU indicated that the purpose of that requirement is to avoid a party being taken by surprise by the assignment of jurisdiction to a given forum of disputes arising from a relationship other than that in connection with which the agreement conferring jurisdiction was made. In the Hydrogen Peroxide case the jurisdiction clauses were contained in contracts for sale of goods and the CJEU indicated (at [69]-[70]) that such clauses could not govern claims in tort arising from one party participating in an unlawful cartel which was unknown to the other contracting party: such tortious claims did not stem from the contractual relationship.
90. Seeking to apply this principle, the Claimants (and Professor Díez-Picazo) contended that the formulation of the definition of “Confidential Information” did not expressly refer to intellectual property rights. They also argued that the NDA did not include a licence to use intellectual property rights or expressly prohibit infringement of them, and only imposed obligations of confidence. Hence, the Claimants contended, the jurisdiction provisions in the second sentence of Clause 18 ought not to be read so as to apply to claims of copyright infringement which would exist independently of the terms of the NDA and could not be said to stem from it. Nor, so the Claimants contended, were claims for breach of confidence in equity (rather than for breach of the NDA’s contractual obligations of confidence) caught by the jurisdiction provisions in Clause 18.
91. I do not agree. The relevant relationship between Trappit SA and AmEx Europe envisaged by the NDA was that set out in Recital 3 as follows,

“[AmEx Europe] and [Trappit SA] would like to exchange certain information regarding a potential business collaboration which may be considered trade secret, proprietary, confidential and/or sensitive information of each party and/or their respective subsidiaries and affiliates (collectively, “Confidential Information” and further defined below in clause 4). To ensure the protection of such Confidential Information and in

consideration of the agreement to exchange information, the parties agree as follows...”

92. That provision made clear that Trappit SA was making ARPO available to AmEx Europe for assessment with a view to a business collaboration, and the NDA created a relationship under which that access would be provided. It was plainly envisaged that ARPO would fall within the definition of “Confidential Information” amounting to “[a] trade secret, proprietary, confidential and/or sensitive information”, and also that such information should receive “protection”.
93. To that end, Clause 2 permitted the parties to use the Confidential Information (including ARPO) only for the purpose of evaluating a potential transaction between them. In addition, albeit under the heading of “Obligations of Confidentiality”, Clause 3 expressly prohibited reproduction (i.e. copying) of the Confidential Information for the benefit of the recipient of the information or others.
94. In those circumstances I consider that it is entirely within the principle outlined in Hydrogen Peroxide that the jurisdiction provisions in Clause 18 could apply to all types of claims arising from misuse of the information which the NDA envisaged would be provided by one party to the other. This would include claims based upon unauthorised copying and infringement of intellectual property rights as well as claims for breach of confidence, whether under the NDA or in equity. All those types of wrongdoing would only be possible because of the access to the Confidential Information given by one party to the other on the terms of the NDA. Hence they could all fairly be said to stem from the relationship created by the NDA. Neither party could, in my judgment, sensibly claim that it was taken by surprise to find such claims being governed by the very document that they had to agree before the information was made available.
95. To illustrate the point, I do not understand how it can sensibly be contended by the Claimants that by the simple expedient of couching their claims for breach of confidence against AmEx Europe as a generalised claim in equity rather than under the contractual provisions of the NDA, they would escape the jurisdiction provisions of Clause 18. Even assuming that English law would apply at all, one would ordinarily assume that any equitable duties of confidence would be subsumed by, or would be modified so as to be consistent with the express agreement between the parties covering the same activity. The idea that the parties to the NDA should be taken to have intended an identical or materially similar claim for breach of confidence to be capable of being litigated in two places depending on whether it was framed as a claim in equity rather than under the terms of the NDA is absurd. A similar point can be made in relation to the claim for conspiracy in which one of the essential elements said to amount to the “unlawful means” is the breach of confidence.
96. I would make the further point that the parties had clearly thought to provide in the first sentence of Clause 18 for an applicable law to govern both contractual and non-contractual claims arising in connection with the NDA. Having made provision for the governing law for both types of claims, it would make no commercial sense for the second sentence to apply to contractual claims only, so that the parties would have failed to make any provision at all for the venue for litigation of any non-contractual claims.

97. I also do not consider that this analysis is cast into doubt by the point made by Ms Masters QC that, as a matter of law, Article 8 of Regulation (EC) No 864/2007 (“Rome II”) makes specific provision for the applicable law in relation to non-contractual obligations arising from an infringement of an intellectual property right (Articles 8(1) and (2)), and further provides in Article 8(3) that the applicable law cannot be derogated from by an agreement between the parties under Article 14.
98. Article 8 of Rome II is a provision dealing with applicable law, not jurisdiction, and there is no indication in the wording of the NDA that the parties had this point in mind at all. The fact that the agreement as to the applicable law in the first sentence of Clause 18 might have been legally ineffective as regards the choice of law for a potential sub-set of non-contractual claims (intellectual property right infringements) does not mean that the parties must also be taken implicitly to have intended to qualify the second sentence so as to exclude the same sub-set of claims from the jurisdiction clause. Still less is there any reason why the parties should be taken to have intended to exclude all non-contractual claims from the scope of the jurisdiction clause in the second sentence.

Which companies were parties to Clause 18 for the purposes of Article 25?

99. There is no dispute that AmEx Europe and Trappit SA, as signing parties to the NDA, are both bound by Clause 18. That much is clear from the terms of the NDA.
100. The question is whether Trappit Tec and/or GBT UK have become parties to Clause 18 of the NDA for the purposes of Article 25. That question falls to be determined by reference to Spanish law insofar as it concerns the interpretation of the NDA and the method by which third parties can become parties to contracts under Spanish law.

Parties to Contracts under Spanish law

101. Dr González and Professor Díez-Picazo were agreed that the starting point is that in Spanish law, a contract does not have legal consequences except between those who have agreed to it. The experts were also agreed, however, that under Spanish law contracts may produce effects vis-à-vis third parties if:
- i) the relevant clause, or the contract of which it forms part, establishes rights for third parties;
 - ii) the contracting parties and the third party expressly agree that the relevant clause or contract shall apply to the third party (i.e. novation of the contract);
 - iii) the third party validly takes the place of either of the contracting parties (a process referred to in the evidence as “subrogation”), e.g. as a result of a statutory assignment or a bilateral assignment by one of the contracting parties with the consent of the other contracting party; or
 - iv) the third party succeeds to the place of a contracting party as a result of a process of universal succession to the rights and obligations of that contracting party.
102. However, the experts disagreed on several points. The first was whether the NDA established rights for Trappit Tec as an affiliate of Trappit SA. Dr González was of the view that because the definition of “Confidential Information” in the NDA referred to confidential information belonging to subsidiaries and affiliates of the parties, this

would enable Trappit Tec, as an affiliate of Trappit SA, to claim rights to protect its Confidential Information under the NDA, and had the result (he contended) that Trappit Tec would also be bound by the jurisdiction clause. Professor Díez-Picazo disagreed, contending that the definition was simply defining the information that might be handed over by Trappit SA and qualify for protection, but not which entities would be parties to the NDA. In this regard I should also record that neither party contended that GBT UK was an affiliate of AmEx Europe; but there was a dispute on the facts as to whether Trappit Tec was (or became) an affiliate of Trappit SA.

103. Secondly, neither expert suggested that clause 14 of the NDA amounted to an absolute prohibition on an assignment of the rights and liabilities of any of the parties under the NDA, and they both appeared to accept that clause 14 reflected Spanish law to the extent that it permitted assignment with the express, implied or tacit consent of the other party to the NDA.

104. However, the experts disagreed on what might constitute tacit consent for the purposes of particular succession. Dr González considered that tacit consent can be inferred from silence,

“when good faith, trade uses or the existence of a prior commercial relationship between the parties required such silent party to express its opposition to the conduct or proposal from the other party.”

105. Professor Díez-Picazo’s view was that in the context of a contractual assignment, silence would very rarely give rise to a finding of consent. He considered that there would have to be some previous active conduct of the party demonstrating a willingness to consent; and that “merely having knowledge of another party’s conduct and remaining silent in spite of that knowledge is not sufficient to give rise to tacit consent.” He also expressed the opinion that constructive knowledge (i.e. that the person “should have known”) of an assignment is not enough to constitute tacit consent.

106. Thirdly, in Professor González’s opinion, universal succession under Spanish Act 3/2009 on structural modifications for business companies could apply in this case. He expressed the view that,

“Universal succession involves a block transfer of the estate (in whole or in part) of one company (assets and liabilities) to another one. In these cases, the company that acquires this estate subrogates to the position that was occupied by the transferring company in all its agreements with third parties. No consent is required for the subrogation to happen, because it is an automatic legal consequence derived from the structural modification of the company.”

107. However, Professor Díez-Picazo’s view was that the universal succession to which Dr González refers applies only to Spanish registered companies, and thus cannot apply to the effect of the AmEx Corporate Transfer between AmEx Europe (a US corporation) and GBT UK (an English company). In his view, the effect of the AmEx Corporate Transfer would therefore depend on the terms of the MRA and LRA, which are governed by New York law.

108. In addition, Dr González expressed the view that because Trappit Tec relied upon the NDA in the Spanish Proceedings in seeking to protect its interests in ARPO, a Spanish Court would apply a doctrine of estoppel to prevent Trappit Tec from seeking to argue that it was not bound by the NDA, including Clause 18.
109. Professor Díez-Picazo disagreed. He was of the opinion that estoppel is a different doctrine under Spanish law to the concept of tacit consent. He set out a statement of the doctrine of estoppel taken from a decision of the Spanish Supreme Court,

"The doctrine of estoppel imposes a future coherent behaviour on a person whom in a certain moment has observed a conduct that objectively produces in other party a confidence in this coherence. In order to be applicable, it is necessary that contradiction exists between the previous conduct and the later behaviour, but also that the first one is objectively evaluated as a definitive position with regard to a certain legal situation, because the justification of this doctrine is found in the protection of the confidence that -with grounds- the previous behaviour generated."

Professor Díez-Picazo expressed the view that this doctrine would have no relevance on the facts of the instant case.

Analysis: the parties to the NDA

110. The definition of "Confidential Information" The first issue is whether Trappit Tec and GBT UK were intended to benefit from (and be bound by) the NDA by reason of the definition of "Confidential Information" in Recital 3 to the NDA which included relevant types of information "of each party and/or their respective subsidiaries and affiliates".
111. As a simple matter of interpretation in accordance with the principles of Spanish law outlined above, I do not consider that this wording was sufficient to make each subsidiary and affiliate of Trappit SA and AmEx Europe a party to the NDA or otherwise entitle them to enforce or be bound by its terms.
112. Recital 3 appears after an introductory paragraph which identifies and defines the two contracting parties as AmEx Europe and Trappit SA. The remainder of the NDA variously refers to "both parties" (clause 1); "each party" (most of the rest of the clauses); and "neither party" (clause 11). Clause 12, dealing with breach, requires the breaching party to provide notice immediately to "the other party" at an address that is specified for each of AmEx Europe and Trappit SA, and Clause 14 provides that "neither party may assign or transfer" the rights and obligations of the parties without consent. There is thus no indication whatever in the recitals or wording of the remainder of the document that any other entity might be a party to the NDA or entitled to enforce it.
113. Recital 3 also simply sets out the background and purpose of the agreement, and defines the information protected by the agreement. The wording which includes the reference to subsidiaries and affiliates is included only in the definition of Confidential Information and is cross-referenced only to an expansion of that definition in Clause 4.

In my judgment, that wording is commercially quite explicable on the basis that the two contracting parties might wish to exchange information belonging to other corporate entities in their respective groups, and would therefore wish to ensure that they obtained contractual rights under the NDA that would enable them to take action to protect such information on behalf of such other companies.

114. But it does not follow that there was any intention for such other entities also to be parties entitled to enforce the agreement and there was no indication in the document that any other company was thereby intended to acquire rights (or be bound) under the NDA. There was, for example, no cross-reference in Recital 3 to Clause 14 of the NDA which dealt with assignment of rights. That is also where one might have expected to find some carve-out or reference to be made to other subsidiaries and affiliates if the same were already intended to be parties to, or affected by the NDA.
115. In his reports, Dr González referred to a case in Valencia (RJ/ 2015/4994) to the effect that an arbitration clause affected a company in the same group as the contracting party where there had been “effective participation” of the group company in the contractual relationship. The court relied upon a theory of the economic unity of a group, notions of piercing the corporate veil and estoppel. The case clearly turned on its facts, and in the absence of closer consideration in the reports, I cannot give it any real weight in my assessment of the merits of the rival arguments on the scope of Recital 3 in the NDA.
116. Assignment with consent The second issue is whether there has been an assignment of the rights and obligations under the NDA either to Trappit Tec (by Trappit SA) or GBT UK (by AmEx Europe), to which the respective other contracting party has consented in accordance with Clause 14 of the NDA and Spanish law on subrogation.
117. The Defendants submitted that the Tec Transfer operated to transfer all rights, including rights of suit in relation to ARPO from Trappit SA to Trappit Tec; that Trappit SA was bound by Clause 18 in respect of its rights of suit; and that this must mean that in so far as Trappit Tec sues in the English proceedings as assignee of such rights of suit, it is also bound by Clause 18.
118. The Claimants did not directly dispute that proposition, but responded that it did not apply in so far as Trappit Tec is bringing claims for copyright infringement based upon acts of the Defendants after it acquired the rights to ARPO under the Tec Transfer. The Claimants contended that Trappit Tec brings such claims not as assignee, but in its own right as owner of the intellectual property rights, and hence it is not bound in that regard by the restrictions in Clause 18.
119. I agree that the Tec Transfer could, by its terms and in accordance with Spanish law, only operate to transfer causes of action which had already accrued to Trappit SA by 8 March 2015. Those rights of suit would be subject to the jurisdiction clause in Clause 18 for the reasons that I have explained. But the transfer of the intellectual property rights to ARPO under the Tec Transfer would not mean that the rights and obligations of Trappit SA under the NDA also transferred, not least because there is no suggestion that the consent of AmEx Europe was sought or obtained to such assignment under Clause 14 of the NDA. As such, any new cause of action for infringement of intellectual property rights in ARPO arising from events after the date of the Tec Transfer would not, without more, be subject to the jurisdiction provisions of Clause 18.

120. The position of GBT UK depends upon the effect of the AmEx Corporate Transfer (and in particular the MRA and LRA) upon the NDA. The Defendants accept that consent for the assignment contemplated by the MRA and LRA was required by Clause 14 of the NDA under Spanish law. Under the MRA and LRA, the NDA was a “Transferred Asset” which required “Third Party Consent” to be obtained before it could be transferred to GBT UK. However, neither AmEx Europe nor GBT UK ever asked Trappit SA to consent to the assignment of the NDA as envisaged by clause 1.6 of Schedule 1 to the MRA.
121. That analysis has the consequence that unless Trappit SA could be said to have given its tacit consent to the assignment of the NDA to GBT UK so as to satisfy Clause 14 and Spanish law, the NDA became a “Delayed Transfer Asset” and clauses 2.13 and 2.16 of the MRA would have the effect that the rights and obligations under the NDA would not be transferred and AmEx Europe would hold it on trust for GBT UK. GBT UK would therefore not be entitled to rely on the jurisdiction provisions of Clause 18.
122. As regards Spanish law on tacit consent I prefer the evidence of Professor Díez-Picazo that silence very rarely gives rise to a finding of consent; that there would have to be some previous active conduct of the party demonstrating a willingness to consent; and the fact that a person should have known of an assignment is not enough to constitute tacit consent. There was no such active conduct of Trappit SA that might have indicated any such willingness to consent, and the terms of Clause 14 plainly put the onus upon AmEx Europe to seek consent for the assignment of the NDA.
123. Dr González suggested that tacit consent might be found to have been given when good faith, trade uses or the existence of a prior commercial relationship between the parties required such silent party to express its opposition to the conduct or proposal from the other party. However, there was no suggestion that any identified trade usage applied in this case, and I cannot see on what basis it might be suggested that the contractual relationship between the parties required Trappit SA to speak up in opposition to the transfer of the NDA in circumstances in which the onus to seek such consent under Clause 14 plainly rested with AmEx Europe.
124. Nor, indeed, is there any clear or credible evidence to support a conclusion on the facts that anyone at Trappit SA knew enough about the detail of AmEx Corporate Transfer, its potential effect upon the NDA and the timing of the transaction, so that good faith in commercial dealings required Trappit SA to speak out. Quite apart from the fact that there was no explanation in the evidence of how the obligation of good faith would operate in such circumstances, none of the emails or press coverage are sufficiently clear as to the precise structure of the AmEx Corporate Transfer or its timing that it could reasonably have been apparent to anyone at Trappit that they were required to speak up.
125. By way of example, one of the more significant emails was that sent by Ms Cliffe to Mr de Carvajal on the very day of signature of the NDA. That email stated that
- “Apologies for the delay in getting back to you. I explained to Manuel that everyone has been very focussed on getting to the deal signing stage for our potential joint venture. That was announced last night which is great news and very exciting as it

will give us \$900M of investment capital directly in to the business once we have closed the transaction around end Q2.”

The email simply spoke in generic terms of a joint venture and a capital injection into the business rather than clearly indicating that the assets of the GBT business were to be transferred by AmEx Europe to a new entity or otherwise indicating what effect the “potential joint venture” would have upon the NDA.

126. A similarly imprecise message was also given in the press announcements and coverage at the same time. They variously reported the agreement to create the joint venture with the investor group led by Certares International Bank and Qatar’s sovereign wealth fund and focussed on the size of the new investment. The press coverage also described the agreement as a sale by AmEx of half of the business travel division – which suggested a possible transfer of ownership interests in AmEx Europe rather than an asset sale by the company.
127. Further, both Ms Cliffe’s email and the company’s announcement and press coverage also indicated that the proposed joint venture deal was expected to be completed in the second quarter of 2014. That would not have indicated any urgent need for Trappit SA to raise the issue of the potential effect upon the NDA which it had just signed. Indeed, if anything, the very coincidence of the signing of the NDA and the announcement of the agreement with the new investor group should have caused the relevant individuals *at AmEx Europe* to reflect upon the effect the transaction might have upon the NDA which they had just negotiated and to ensure that consent to assignment of the NDA to GBT UK was sought.
128. Universal succession I am entirely satisfied that the principles of universal succession under Spanish law have no application to the AmEx Corporate Transfer in the instant case. I accept Professor Díez-Picazo’s evidence that the relevant provisions of the Spanish Act 3/2009 on structural changes in corporations only regulate changes to the legal structure of Spanish registered trading companies by conversion, merger, division or global disposal of assets and liabilities as part of a process of universal succession. That opinion is entirely understandable and obviously correct: since companies are creations of the legal systems of a particular country, their legal structure can only be altered, and a true process of universal succession can only occur, in accordance with the law of the state of incorporation: see e.g. *Dicey & Morris on the Conflict of Laws*, Rules 174 and 175 and the commentary thereto at paragraphs 3-011 and 3-028.
129. Professor Díez-Picazo’s evidence also clearly demonstrates that the relevant provisions of Spanish law have no application to commercial transactions for sale of assets between non-Spanish companies which leave the legal structure of the corporate entities involved unchanged. I reject Dr González’s suggestions to the contrary. In particular, Title IV of the Spanish Act 3/2009 is the relevant provision that makes provision for the global disposal of assets and liabilities by universal succession. This provides, in Articles 81 and 84,

“Article 81. *Global disposal of assets and liabilities.*

1. A registered company may transfer all its assets en bloc by universal succession to one or several partners or third parties in

exchange for a compensation other than partners' shares, stakes or securities of the transferee.

2. The transferring company shall disappear if the partners receive the compensation fully and directly. At any rate, the compensation received by each partner must comply with the rules applicable to the liquidation preference.

...

Article 84. *International global disposal.*

Where the transferring company and the transferee or transferees may have different nationalities, the global disposal of assets and liabilities shall be governed by the provisions in their corresponding personal laws....

130. Neither AmEx Europe nor GBT UK are Spanish registered companies, and the MRA and LRA are commercial agreements for the transfer of some, but not all, of the assets of AmEx Europe. Those agreements are governed by New York law and do not make provision for the transfer by AmEx Europe of all its assets *en bloc*, or for the disappearance of AmEx Europe on completion of the transaction.

131. Estoppel under Spanish law As indicated above, Dr González asserted that Trappit Tec had relied on the NDA in the Spanish Proceedings,

“where it claimed that the defendants, who were individuals and companies of the American Express Group, had breached the confidentiality obligations imposed on them by the NDA. It follows that Trappit Tec relied on the NDA to protect its confidential information against AMEX EU affiliates.

In fact, in cases similar to the one we are dealing with here, the Spanish courts allow the extension of the scope of the arbitration and jurisdiction clauses to third parties, based on the doctrine of estoppel, when the third parties exercise rights based on the contracts containing such jurisdiction clauses, since it is not fair to benefit from the rights that the contract recognises and to claim not to be subject to the arbitration or jurisdiction clause contained in the same contract.”

132. I do not accept the factual premise for Dr González's opinion. I have set out the basis for the Spanish Proceedings above. Trappit Tec did not make a claim for breach of the NDA in the Querella. Rather, it alleged that the NDA had been used as a device as part of a fraudulent plan to induce “Trappit” to make the ARPO product available to AmEx Europe, ostensibly for evaluation, but in reality with the aim of copying its source code. The complaint was for infringement of intellectual property rights contrary to Article 270.1 and for obtaining wrongful access to a company secret contrary to Article 278 of the Spanish Criminal Code.

133. The cases cited by Dr González for this opinion are also clearly distinguishable. The first was the case from Valencia (RJ/ 2015/4994) to which I have already referred. In the decision, the court placed some reliance on the doctrine of estoppel to hold that a group company was bound by an arbitration clause in a contract executed by another group company. The court explained the doctrine as follows,

“Among those mentioned, the figure which underpins the subjective extension of the arbitration clause is "estoppel", a general principle of law whereby neither party is entitled to invoke a position opposed to the positions adopted, expressly or implicitly, previously. That figure is based on the need to protect the party that has relied on a given situation. That legal concept, in any of its manifestations, is therefore based on the principle of good faith, which is well established in arbitration practice.”

134. That explanation of estoppel is similar to the opinion expressed by Professor Díez-Picazo by reference to a decision of the Spanish Supreme Court,

"The doctrine of estoppel imposes a future coherent behaviour on a person whom in a certain moment has observed a conduct that objectively produces in other party a confidence in this coherence. In order to be applicable, it is necessary that contradiction exists between the previous conduct and the later behaviour, but also that the first one is objectively evaluated as a definitive position with regard to a certain legal situation, because the justification of this doctrine is found in the protection of the confidence that -with grounds- the previous behaviour generated.”

135. The essence of the doctrine therefore appears to reside in a definitive position being taken by a person, upon which the other party “relies” or “places confidence”, and the protection of that reliance or confidence. Applying that concept it seems highly unlikely that a Spanish court would find that Trappit Tec was estopped from denying that it was a party to the NDA because of the statements which it made in relation to the NDA in the Spanish Proceedings. Although Trappit Tec alleged in the Querella that Ms MacLeod had induced “the plaintiffs” to sign the NDA as part of a fraudulent plan to “instil trust in the plaintiffs and unlawfully obtain the ARPO program”, in contrast to the situation that might well arise in a commercial relationship, I cannot see how any of the Spanish Defendants could sensibly be said to have relied upon or placed any confidence in that allegation. The Spanish Defendants were (by all accounts) vigorously denying the allegations by Trappit Tec and defending the Spanish Proceedings. There is no evidence that they placed any reliance or confidence in what Trappit Tec alleged, and indeed it must have been perfectly obvious to everyone connected with AmEx Europe involved in the Spanish Proceedings (and from the face of the NDA) that it was Trappit SA that had signed the NDA and not Trappit Tec.

136. The second case relied upon by Dr González (HCJ of Madrid judgment 20/2018) is also clearly distinguishable. It concerned a company which was held by an arbitrator to be estopped from denying that it had given its tacit consent to be subrogated to a franchise contract signed by one of its founder members with a third party. The company had been invoiced by the third party for services rendered over a significant period and had

paid the invoices. The arbitrator thus held that the company was bound by the arbitration clause in the contract when a dispute arose over whether it could terminate the contract. That decision was upheld by the Court, which stated,

“Consequently, the arbitrator applies the theory of estoppel in order to conclude that [the defendant] was tacitly subrogated in the contract of 18 March 2005, and therefore also in the arbitration clause, in a correct manner, since that implies, in the context in question, that a company cannot rely on its legal independence in order not to be bound by an arbitration clause contained in a contract which has become contentious, when it has taken advantage of its consequences and/or benefits, since that claim is objectively contrary to its previous conduct.”

137. The key distinguishing feature was that the company in question had acted pursuant to the franchise contract and could then not seek to deny that it was bound by the arbitration clause in it. As I have indicated above, the case concerned a commercial relationship in which it could well be thought that the counterparty had relied upon the position taken by the company when supplying services and invoicing it according to the terms of the contract.

Conclusion on the Jurisdiction Agreement Issue

138. I therefore conclude (and the better argument is) that the jurisdiction clause in the NDA applied to all the claims in the English Proceedings, but that it only binds AmEx Europe and Trappit SA as the original signatories to the NDA. The effect of Article 25 is that the English courts therefore have no jurisdiction over the claims brought by Trappit SA against AmEx Europe in the English Proceedings.

THE LIS PENDENS ISSUE

Article 29 of Brussels I Recast

139. Article 29 of Brussels I Recast is in Chapter II Section 9, which is entitled “Lis pendens – related actions”. Article 29 provides that:

“1. Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32.

3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.”

140. The purposes of Article 29 are clear. In WMS Gaming Inc v B Plus Giocolgale [2011] EWHC 2620 (Comm), referring to Article 27 of the original Brussels Regulation (which was in materially the same form as Article 29) Simon J made two observations, at [21],

“First, the approach to the question whether the cause of action in proceedings in the two jurisdictions is the same reflects the general underlying policy of avoiding at the outset the possibility of irreconcilable judgments. It is for this reason that Article 27 should be interpreted ‘broadly so as to cover, in principle, all situations of *lis pendens* before the courts of Member States, see Underwriting Members of Lloyd’s Syndicate 980 and others v Sinco SA [2008] EWHC 1842 (Comm), Beatson J at [22], citing Case C-351/89 Overseas Union Insurance Ltd etc v New Hampshire Insurance Co [1991] ECR I-3317, [16]. Secondly, Article 27 also has a secondary aim, namely to minimise the possibility of concurrent proceedings i.e. to discourage a multiplicity of proceedings: Recital (15) of the Brussels Regulation; see also Evalis SA v SIAT and others [2003] EWHC 863 (Comm), Andrew Smith J at [127], citing the dictum of Saville LJ in ‘The Happy Fellow’ [1998] 1 Lloyd’s Rep 13 at 17-18.”

Concurrent Proceedings

141. The Claimants raise a threshold objection to the application of Article 29 in this case, namely that after the provisional dismissal of the Spanish Proceedings by the Examining Court on 14 August 2020, and the dismissal by the Provincial Court of the appeal against that decision in October 2020, the Spanish courts are no longer seised of the Spanish Proceedings within the meaning of Article 29, with the consequence that Article 29 cannot apply.
142. That argument itself raises a preliminary question on the facts of this case. The point is that on the chronology, it is undoubtedly the case that the Spanish Proceedings were commenced before the English Proceedings, and that they were still on foot when the Claim Form in the English Proceedings was issued on 9 April 2020 and then served on 5 August 2020. On any basis, therefore, there was a period of time after the commencement of the English Proceedings but before the provisional dismissal of the Spanish Proceedings on 14 August 2020 when the Spanish Court was first seised of the Spanish Proceedings and the English Court was second seised of the English Proceedings. The question is whether it matters for Article 29 purposes that events have now moved on in Spain?
143. As is apparent from the title and structure of the Article itself, the purpose of Article 29 is to deal with cases where there are concurrent proceedings. Hence, as I see it, the question of whether the Article applies so as to require the court second seised to stay its proceedings should logically be determined with regard to the state of the foreign proceedings at the time when the application is heard.

144. That proposition is borne out by the decision of the Court of Appeal in Easygroup v Easy Rent a Car [2019] 1 WLR 4630. In that case, proceedings in England for passing off and trademark infringement had been commenced in England a month after the defendants had issued proceedings in Cyprus for declarations that they were entitled to use the disputed names and images. The judge at first instance in England refused an application to stay the proceedings under Article 29, and the defendants appealed. By the time that the appeal came to be heard, the Cypriot proceedings had been struck out, but the defendants to the English proceedings had appealed that decision.
145. At paragraph 16 et seq. of his judgment, David Richards LJ recorded that the issue before the first instance judge was whether the two sets of proceedings involved the same cause of action, but identified a logically anterior question of whether the Cypriot court was, at the time of the English appeal, seised of the Cypriot proceedings at all. He went on to hold that the Cypriot court was still seised of the proceedings because of the pending appeal against the striking out, and hence that it was still necessary for the Court of Appeal to answer the question which had faced the first instance judge. The clear inference is that if the Court of Appeal had found that the Cypriot court had ceased to be seised of the proceedings by the time of the appeal in England, Article 29 would no longer have applied.
146. That analysis is also entirely consistent with the decision of the Court of Appeal in Prudential Assurance Co Ltd v Prudential Insurance Co of America [2003] EWCA Civ 327, [2003] 1 WLR 2295. That case was decided under the Brussels Convention, and Chadwick LJ considered the relationship between the articles in the equivalent of Chapter II Section 9 of the Brussels I Recast and the equivalent of those in Chapter III which deal with recognition and enforcement of judgments. He stated, at [26]:
- “It is said that the object of the provisions in [the equivalent of Section 9 of Brussels I Recast] “is to prevent conflicting decisions on identical or almost identical issues arising between the same parties in different courts of the Contracting States”. For my part, I would accept that the object of those provisions is to avoid or reduce the possibility that courts in different Contracting States may reach conflicting decisions in concurrent pending actions between the same parties which raise the same or closely related issues. But I find nothing in article [29] to suggest that the article is required to stay its proceedings or decline jurisdiction unless there is a concurrent action involving the same cause of action and between the same parties pending in another contracting state ... where, at the time an action is commenced in state A, one of the parties has already obtained a judgment in state B, [the equivalent of Section 9] is not in point. In such a case the relevant provisions ... are those in section I (“Recognition”) of Title III (“Recognition and enforcement”).”
147. Article 29 thus only applies where there are concurrent proceedings before the courts of different member states at the time when the court second seised makes its determination. The question therefore arises whether, following their provisional dismissal, the Spanish courts are still seised of the Spanish Proceedings for the purposes of Article 29.

148. The evidence from the parties' respective Spanish lawyers on the effect of the provisional dismissal did not, to my mind, disclose any major relevant differences of opinion. As indicated above, in the Spanish Appeal Judgment, the Provincial Court had itself explained the legal effect of a provisional dismissal under Article 641,

“Article 641 sets out the provisional dismissal, which, as its name suggests, is temporary, provisional and, therefore, reversible at any time, provided that the statutes of limitation have not lapsed.”

That position was (unsurprisingly) agreed by the experts.

149. Mr Álvaro Martín Talavera, for the Claimants, expressed the view that notwithstanding the technical possibility that they could be reopened, the Spanish Proceedings could not be regarded as ongoing, because the case has been dismissed and archived. Mr Castro for the Defendants did not disagree with that proposition. He stated,

“The effect of a provisional dismissal is that the relevant proceedings are closed, but may be re-opened by the parties, the court or the Public Prosecutor should additional evidence come to light which warrants such re-opening.

The fact that the proceedings have been provisionally, rather than finally, dismissed is a result of the stage at which the proceedings have been dismissed, namely the investigative stage. However, in this case, it seems highly unlikely that further evidence could come to light following 5 years of proceedings.”

150. Mr Castro subsequently added some further insight to the effect that in practical terms the Spanish Proceedings would be extremely unlikely to be reopened. He stated,

“By passing a resolution confirming a provisional dismissal, the Investigating Court confirms that at the time it provides the provisional dismissal the criminal complainant has been unable to provide sufficient evidence to indicate that a crime has been committed.

Although it is technically possible to re-open proceedings following a provisional dismissal by the Investigating Court, it is extremely rare for this to happen (and I do not understand Mr Talavera to disagree with this). Pursuant to Spanish case law, proceedings provisionally dismissed can only be reopened if existing evidence available at the time of the proceedings (but not provided to the court) comes to light after the dismissal. If these circumstances arise, the party filing the evidence must justify why they were not able to provide it at the time the proceedings were ongoing. Only under these particular circumstances does Spanish case law admit the reopening of proceedings which have been provisionally dismissed.

The vast majority of cases are simply never re-opened. In my 22 years of experience, I have only seen a matter reopened once following a provisional dismissal already confirmed by the Provincial Court of Appeal. In practice, it is therefore not material that the dismissal has been ruled as provisional (as it is in reality akin to a final decision).”

151. Mr Castro also referred to the investigatory process that had taken place in Spain since 2015. He summarised it as follows,

“In the following 5½ years, the parties exchanged 105 submissions (70 from Trappit Tec and 35 from the Spanish Defendants); produced 175 documents (120 from Trappit Tec and 55 from the Spanish Defendants); 3 investigated persons have been summoned before the Court; 9 witnesses have provided testimony; the Public Prosecutor has intervened on 23 occasions; an expert appointed by the Court produced a report (and the expert ratified his report before the Court); and more than 110 resolutions have been passed by various divisions of the Spanish courts. The case has been appealed to the Audiencia Provincial nine times. The claims have also been dismissed not once, but twice, including the recent Appeal Judgment.

This level of evidence and argument is quite exceptional for a case in the Investigation Phase. On any view, the Spanish Proceedings have therefore involved a detailed consideration of the issues arising from the alleged unlawful use and copying of confidential information provided in relation to ARPO.”

152. Mr Castro concluded by stating that,

“As I have explained above, it is very rare that Preliminary Proceedings are fully dismissed. Therefore, the decision taken in relation to the Spanish Proceedings is not temporary. It would require further significant evidence, existing but for some reason not produced in the previous 5½ years, in order for the Spanish Proceedings to be reopened.”

153. The effect of a provisional dismissal of a Spanish criminal investigation has also been considered in a case in this country, namely Hutchinson v Mapfre [2020] EWHC 178 (QB). As in the instant case, Hutchinson involved Spanish criminal proceedings which had, by the time of the jurisdictional challenge in England, been provisionally dismissed by the Spanish court. In Hutchinson, a holidaymaker had suffered personal injuries in a nightclub in Spain and was taken to hospital. Unbeknownst to the holidaymaker, the Spanish court had commenced a criminal investigation in respect of the incident following a report from the hospital doctor. The holidaymaker had taken no part in the Spanish criminal proceedings and stated that he had no intention to do so.

154. On his return to England, the holidaymaker brought proceedings against the nightclub and its insurer in England in contract, tort and for breach of statutory duty. The defendants relied on the fact that the holidaymaker had failed to reserve his right to

bring separate civil proceedings in the Spanish criminal proceedings, such that the Public Prosecutor was obliged to bring civil proceedings on his behalf within the ambit of the criminal proceedings.

155. By the time the holidaymaker commenced proceedings in England, the Spanish court had ruled that there was insufficient information to proceed with a criminal prosecution and provisionally dismissed the proceedings. The question – as in the instant case – was thus whether the Spanish proceedings were still pending for the purposes of Article 29.

156. In addressing that issue, Andrews J noted at [48] that:

“Although the dismissal of the actions on 30 September 2016 was described as "provisional" rather than final, that word needs to be approached with some caution. The word may simply reflect the fact that a dissatisfied party had three days from the date of notification of the ruling in which to ask the court to reconsider the ruling, or five days in which to make a direct appeal against it. There is no evidence that anyone did either of those things. Alternatively, the dismissal might be "provisional" in the sense that it would be open to the investigating judge to re-open the case if fresh evidence subsequently came to light. That is consistent with the documents being archived.”

157. Andrews J then concluded that Article 29 was not engaged, stating at [59]:

“59. ... the resolution of the issue of *lis alibi pendens* does not depend on expert evidence so much as on my assessment of the factual situation in Spain. The documents upon which Ice Mountain seeks to rely indicate that the Spanish court concluded its preliminary investigations in September 2016 and decided that there is no basis for a prosecution. It dismissed the cause and archived the files. There is no evidence that the "provisional" dismissal has been reversed in substance, or that the judge has changed her mind about whether there is enough evidence to prosecute (let alone identified the defendant to prospective criminal charges). Therefore, there is no ongoing criminal action leading to trial, to which any civil action would attach.”

158. There are, I consider, a number of obvious similarities between the basis for the decision reached by Andrews J in Hutchinson, and the facts of the instant case. In particular, both criminal investigations had decided that there was no basis for a prosecution. There was also no indication of any change of circumstance in either case. In Hutchinson there was no indication that the judge had changed her mind after the provisional dismissal. That is also the situation in the instant case, in which, on the basis set out above, the experts are agreed that the case has been closed and archived, and that it is unlikely in the extreme that any new evidence would come to light so as to justify reopening the case after more than five years of extensive investigatory proceedings in Spain.

159. All these factors point in the same direction, and taking them together, I am satisfied that the Claimants are correct and that the Spanish courts are no longer seised of the Spanish Proceedings for the purpose of Article 29.
160. That conclusion is sufficient to dispose of the Lis Pendens Issue. I therefore do not need to consider the underlying questions of whether the two sets of proceedings involve the same cause of action (which includes the question of whether they have the same *objet* or end in view) and whether they also involve the same parties.

THE ABUSE OF PROCESS ISSUE

161. CPR rule 3.4 (2) (b) provides that the “court may strike out a statement of case if it appears to the court that the statement of case is an abuse of the court’s process”.
162. The Defendants put this aspect on the case on three bases: (a) issue estoppel, (b) vexatious or oppressive litigation, and (c) *Henderson v Henderson* abuse. As Cockerill J observed in SAS Institute Inc v World Programming Ltd [2018] EWHC 3452 (Comm), [2019] FSR 30, [36]:

“the different doctrines... have different requirements, but they shoot at the same target – that of ensuring that nobody should be vexed twice in respect of one and the same cause...”

Issue Estoppel

163. The Defendants contend that the English Proceedings involve a collateral attack on the Spanish Appeal Judgment of the Provincial Court which affirmed the decision provisionally to dismiss the Spanish Proceedings, inter alia, on the central basis that the Expert Report had found that there had been no plagiarism or copying of the ARPO source code by the Defendants. The Defendants contend that this gives rise to an issue estoppel.
164. The requirements of issue estoppel were summarised and discussed by Bryan J in MAD Atelier v Manes [2020] EWHC 1014 (Comm) at [47]:

“A foreign judgment can give rise to issue estoppel: Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No. 2) [1967] 1 A.C. 853, 918B, 927G, 967B (Lords Reid, Hodson and Wilberforce). The conditions which must be satisfied in such a case are: (1) the judgment relied on as creating the estoppel must be (a) by a court of competent jurisdiction; (b) final and conclusive; and (c) on the merits; (2) the parties (or their privies) must be the same in both sets of proceedings; (3) there must be a clear determination of the issue by the judgment – it must not be merely collateral or obiter comment; (4) the issue in the later action must be the same as the issue decided by the judgment in the earlier proceedings: see The Sennar (No. 2) [1985] 1 W.L.R. 490, 499 (H.L.).”

165. Dealing with the ‘final and binding’ criteria, Bryan J held at [61] that,

“the precise question which must be answered for the “final and binding” criterion is whether the foreign court would, as a matter of its own law and formally, treat the determination in the earlier judgment as precluding further consideration of the issues. The fact that the foreign court would as a matter of practice refuse to hear the second case on case management grounds does not suffice.”

Bryan J also observed at [57] that:

“... If it veers on absurd to recognise estoppel as arising from a foreign *judgment* if the foreign law would not regard such a judgment as being final, it must be equally absurd to estop an English court from hearing a particular *issue* where a foreign court would not consider that issue to be binding...”

166. Bryan J summarised the principles in relation to privity of interest at [63]. He then considered the clear determination requirement, Bryan J held at [72]:

“There must be a clear decision on the issue in question by the foreign court: Good Challenger Navegante SA v. Mineralexportimport SA [2004] 1 Lloyds Rep. 67, at [54] (C.A.). The English court must be cautious before deciding that the foreign court made a clear decision on the relevant issue because English courts are unfamiliar with modes of procedure in many foreign countries, and it may be difficult to see whether a particular issue has been decided or that a decision was a basis of a foreign judgment and not merely collateral or obiter: Carl Zeiss (No. 2), supra, at 918; Good Challenger, supra, at [54].”

167. In addition to recording the (admittedly remote) possibility of the Spanish Proceedings being reopened in practice, the parties’ Spanish lawyers also addressed the issue of the effect of the provisional dismissal of the Spanish Proceedings in terms of whether the Claimants would be able to bring new civil proceedings in Spain.

168. For the Claimants, Mr Martín Talavera was of the opinion that because there had only been a provisional dismissal of the Spanish Proceedings at the end of the investigatory phase, there could be no *res judicata* in Spain. He stated,

“If one considers Spanish Procedural law, it can also be easily seen that the decisions at the end of the investigatory phase do not produce any *res judicata*. In particular, Article 116 of the Spanish Criminal Procedure Law provides:

“Termination of the criminal proceedings does not carry the civil action with it, unless the termination arises from a final decision stating that the act from which the civil action may have arisen did not exist.

In all other cases, the person entitled to take civil action may do so, before the appropriate civil jurisdiction and via the civil route, against whoever is under the obligation to reinstate the thing, repair the damage or compensate for the damages suffered.”

Article 116’s reference to “a final decision” is a reference to a Judgment ...[but] ... the Spanish Proceedings were provisionally dismissed, not finally dismissed, meaning there has not been any “final decision”, i.e. a “Judgment”, for the purposes of Article 116.”

169. Importantly, Mr Martín Talavera also explained that,

“The effect of the above is that Trappit Tec could, if it wished, bring a civil claim making the same or similar allegations subject to matters such as jurisdiction and limitation.

. ...While the Spanish Proceedings were active, Trappit Tec could not have started a separate civil proceeding in Spain making the same claim advanced in the Querella, because it was precluded by the pending criminal proceeding that was before the Investigating Court. Following the Appellate Court’s decision, Trappit Tec could, in principle, and subject to matters such as jurisdiction and limitation, bring such civil claims in Spain.”

170. For the Defendants, Mr Castro took issue with a number of other points raised by Mr Martín Talavera, stressing the evidential significance of the findings made during the investigatory phase and the role of the Provincial Court. In effect he was seeking to point out that the Claimants had failed, on the evidence, to satisfy even the relatively low hurdle to be surmounted before a case could progress from the investigatory phase (“could a crime have been committed”). However, and importantly, I do not consider that Mr Castro challenged or raised any real doubt as to Mr Martín Talavera’s opinion or analysis on the issue of *res judicata* or the ability of the Claimants to commence new civil proceedings in Spain.

171. That position is also, in my judgment, supported by the comments at the end of Spanish Appeal Judgment of the Provincial Court, in which it referred to,

“the principle of minimal intervention of criminal law, by virtue of which the jurisdictional order must only act when, in the civil, commercial or administrative law, there are no remedies to correct the breach denounced.”

172. As I understand that observation, the Provincial Court was supporting its decision to dismiss the appeal on the basis that there were civil or commercial remedies open to Trappit Tec in respect of the allegations that it had made in the Spanish Proceedings. Moreover, the Provincial Court expressly referred to the existence of the English Proceedings as “proof” of its approach on the minimal intervention of Spanish criminal law in light of the availability of other remedies.

173. Accordingly, I consider it clear that the essential requirements of an issue estoppel of a final and binding Spanish decision on the merits of the Claimants' allegations have not been met. The decision was plainly not final and binding so as to prevent future civil claims, and if there is no *res judicata* in Spain arising out of the provisional dismissal of the Spanish Proceedings, no issue estoppel can arise in England.

Vexatious and Oppressive Litigation

174. The Claimants rely on the following observation in Civil Procedure (The White Book) vol 1 at 3.4.3.1:

“[I]t is an abuse to bring vexatious proceedings, i.e. two or more sets of proceedings in respect of the same subject matter which amount to harassment of the defendant in order to make them fight the same battle more than once with the attendant multiplication of costs, time and stress. In this context it is immaterial whether the proceedings are brought concurrently or serially.”

175. The classic statement of principle in relation to the power of the court to strike out a claim as an abuse of process if it replicates other proceedings is that of Simon LJ in Michael Wilson & Partners v Sinclair [2017] 1 WLR 2646 (Ch). At paragraph [48], Simon LJ stated,

“(1) In cases where there is no *res judicata* or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; see Lord Diplock in Hunter's Case [1982] AC 529, Lord Hoffmann in the Arthur S Hall case [2002] 1 AC 615 and Lord Bingham in Johnson v Gore Wood & Co [2002] 2 AC 1. These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in Hunter's Case. Both or either interest may be engaged.

(2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no *prima facie* assumption that such proceedings amount to an abuse: see Bragg v Oceanus [1982] 2 Lloyd's Rep 132; and the court's power is only used where justice and public policy demand it, see Lord Hoffmann in the Arthur J S Hall case.

(3) To determine whether proceedings are abusive the court must engage in a close ‘merits based’ analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process,

see Lord Bingham in Johnson v Gore Wood & Co and Buxton LJ in Laing v Taylor Walton [2008] PNLR 11.

(4) In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within ‘the spirit of the rules’, see Lord Hoffmann in the Arthur J S Hall case; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, see Sir Andrew Morritt V-C in the Bairstow case [2004] Ch 1; or, as Lord Hobhouse put it in the Arthur J S Hall case, if there is an element of vexation in the use of litigation for an improper purpose.

(5) It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process, see Lord Hobhouse in In re Norris [2001] 1 WLR 1388.”

176. These principles were recently affirmed by Flaux LJ in the Court of Appeal in PriceWaterhouseCoopers LLP v BTI 2014 LLC [2021] EWCA Civ 9, [82]-[86]:

“82. ... Where the parties to the second proceedings are not the same as those to the first proceedings, ... no question arises of the application of the doctrines of issue estoppel or res judicata, so that the parties are not bound in the second proceedings by the findings in the first. However, as the fourth theme or principle stated by Simon LJ in Michael Wilson & Partners at [48(4)] and the cases there cited recognise, there may still be an abuse of process where the parties to the second proceedings are not the same as those in the first.

83. The mere fact that the second proceedings involve the relitigation of issues decided in the first proceedings or a challenge to findings made by the judge in the first proceedings (and thus a collateral attack on the judgment in the first proceedings) does not without more amount to an abuse of process, as is made clear by the citation from the speech of Lord Hobhouse in the Arthur Hall case in [94] of the judgment of Simon LJ in Michael Wilson & Partners quoted ... above.

84. The circumstances in which such a collateral attack will be an abuse were clearly stated by Sir Andrew Morritt V-C in Secretary of State for Trade and Industry v Bairstow [2003] EWCA Civ 321; [2004] Ch 1 at [38(d)]:

"If the parties to the later civil proceedings were not parties to or privies of those who were parties to the

earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute."

...

86. Furthermore, where the parties to the second proceedings are not the same as the parties to the first proceedings, the authorities are clear that it will only be in a very rare or exceptional case that the court will find that the second proceedings are an abuse of process."

177. Proceedings may be oppressive where they have no purpose other than "pointlessly to duplicate proceedings previously brought in another jurisdiction": Ferrexpo AG v. Gilson Investments Ltd [2012] EWHC 721 (Comm), [198]. And in VTB Bank v Skurikhin [2020] EWCA Civ 1337, [51] Phillips LJ emphasised that in relation to abuse of process,

"the crucial question is whether, taking a broad merits-based approach, a party is misusing or abusing the process of the court."

178. Against this background, the Defendants point to a number of specific factors which they contend make the pursuit of the English Proceedings vexatious and oppressive. These are said to be as follows,

- i) a number of key points have been raised and addressed in the Spanish Proceedings which have a direct bearing on the claims advanced in the English Proceedings, including, in particular, the finding that LastFare was not a copy of ARPO and the conclusion that the Spanish Defendants never had access to the source code of ARPO;
- ii) more than £500,000 in legal costs has already been incurred in defending the Spanish Proceedings;
- iii) Trappit Tec persisted in a "fishing expedition" throughout the life of the Spanish Proceedings in attempting to procure evidence to support its claims, including in particular by attempting to persuade the Spanish court to issue letters rogatory against senior AmEx personnel; and
- iv) the events underlying the claims advanced in the English Proceedings took place back in early/mid-2014. The Spanish Proceedings were instituted in 2015, but no claim was commenced in England until April 2020, just days before the expiry of the limitation period referable to the provision of access to the Demo Portal. Trappit Tec and Trappit SA have not explained this substantial delay.

179. So far as purpose is concerned, the Defendants contend that the English Proceedings claims were commenced after five years of fruitless litigation in Spain, claiming substantial but unparticularised damages, and it can be inferred that they are designed to exert leverage upon American Express to reach some form of settlement contrary to the intrinsic merits or true value of the dispute.
180. Those are powerful points and well made. Trappit Tec has clearly pursued persons associated with the Defendants extensively in the Spanish Proceedings over a considerable period of time, but appears to have got nowhere in establishing the fundamental allegation of plagiarism of the ARPO program at the heart of its complaints.
181. The points made by the Defendants have given me substantial pause for thought. So too has the point that, for reasons that I have explained, the NDA prevents the claims by Trappit SA against AmEx Europe from being litigated in England. Although that factor is not relevant to the analysis under Article 25 for the reasons set out in paragraph 70 above, it does point to unified civil proceedings in Spain as being the most appropriate to resolve all the issues between the parties.
182. As such, I regard the English Proceedings as very close to the margins of an abuse or misuse of the process of the English courts. However, on balance I do not consider that they are sufficiently unfair to the Defendants or risk the administration of public justice in England being brought into disrepute so as to warrant striking them out as an abuse.
183. In essence, I have reached that conclusion for the following reasons.
184. First, and as indicated above, although abuse may occur where it is sought to bring new proceedings in relation to issues that have been raised in prior proceedings, there is no prima facie assumption that such proceedings amount to an abuse, and the court's power to strike out is only to be used where justice and public policy demand it. It is thus clear that the power to strike out proceedings as an abuse where there is no issue estoppel must be cautiously exercised.
185. Second, and in that regard, it is relevant that the Spanish Proceedings were in the nature of a criminal investigation, directed at the question of whether there had been breaches of the Criminal Code in Spain. They did not clearly name either of the two Defendants to the English proceedings or result in a final judgment in the Defendants' favour on the merits from any court which had itself conducted a trial on the basis of full disclosure and evidence. Instead, it appears that the provisional dismissal of the Spanish Proceedings was based largely or entirely upon the conclusions of a single court-appointed expert in the Expert Report, that there was insufficient evidence of plagiarism of ARPO in the LastFare program to proceed to a second stage of criminal proceedings.
186. Although I have recounted in paragraph 150 above the description given by Mr Castro of the extensive nature of the Spanish Proceedings, I have found it difficult to form any clear view of the realities of the extent of the investigation conducted by the Spanish authorities or, for example, the extent of any disclosure or evidence given by any of the relevant American Express parties or witnesses in those proceedings. I cannot clearly find that the Spanish criminal investigation included the same information or

procedures for compelling the production of documents or witnesses that would be available in civil proceedings in England.

187. Third, although the Defendants placed considerable weight on the Spanish Appeal Judgment of the Provincial Court upholding the dismissal of the Spanish Proceedings, and contended that it would be subverted by the English Proceedings, I do not think that is so. It is clear to me, for the reasons that I have explained, that the Provincial Court did not regard it as inappropriate for there to be subsequent civil proceedings relating to the matters alleged in the Spanish Proceedings. The Provincial Court expressly referred to and relied upon the possibility of there being civil or commercial remedies available to the Claimants rather than the processes of the criminal law, and even went so far as to derive support in that regard from the existence of the English Proceedings to which their attention had been drawn by the Spanish Defendants.
188. The Spanish Court would obviously have had a far better appreciation than I do of the extent of the investigation of the issues that had taken place in the Spanish Proceedings. If that court, best placed in such respect, did not regard it as unfair to the Defendants or otherwise inappropriate for there to be subsequent civil proceedings between the same or related parties in Spain or England, that must be a significant pointer to whether such proceedings should be characterised as an abuse of the process of the English courts.
189. Fourth, it appears from the overall tenor of the evidence and submissions that I have considered, that the underlying contention advanced by the Defendants in reliance on the events in Spain is that it can clearly be seen from the Expert Report that the claims against them are unsupported by any credible evidence. They say that this is demonstrated by the fact that the complainants could not even pass the relatively low threshold required to pass from the investigatory stage to the intermediate stage of criminal proceedings in Spain.
190. If that is right (and I express no view on it), then there are other mechanisms available under English law to invite the court to decide the case summarily and at an early stage in order to prevent the Defendants from being vexed by a hopeless case. The power to strike out repeat proceedings for vexation is conceptually different from the power to strike out a hopeless case.
191. Accordingly I decline to strike out any of the claims that remain after application of Article 25 as an abuse of process on the grounds of vexatious re-litigation.

Henderson v Henderson

192. The principles underpinning Henderson v Henderson abuse were considered by Cockerill J in SAS Institute Inc v World Programming Ltd [2018] EWHC 3452 (Comm), [47]-[49]:

“47. ... the Henderson principle is concerned with protecting the integrity of the cause of action and issue estoppel defences and preventing them from being deliberately or inadvertently circumvented by a party which did not advance an argument in England which would otherwise have created such an estoppel.

48. The base requirement is that the party in question ought to have advanced the relevant argument if it was one which "properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time". However, while there is an element of a "could and should" test about this (reflected also in the passage from Lord Bingham above and also in Virgin Atlantic at [17]), it is not a simple or a broad "could and should" test.

49. It was common ground that the burden is on the party relying on the principle to show that it is engaged. It is common ground, too, that it is necessary to approach the question of abuse of process with caution. As Lowry CJ emphasised in Sloan v Shaw [1982] NI 393 (CA) at p.397: "The entire corpus of authority on issue estoppel is based on the theory that it is not an abuse of process to relitigate a point where any of the... requirements of the doctrine is missing".

193. In the earlier case of Johnson v Gore Wood [2002] 2 AC 1, 31 Lord Bingham observed that the:

"bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all". However, there should be a "broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before".

194. For reasons that I have explained, I do not consider that an issue estoppel can arise in the instant case. However, that conclusion is not based on the question of whether the same issues were raised in the Spanish Proceedings as in the English Proceedings. I have also considered, on a "broad, merits-based" basis, whether the English Proceedings are an abuse of process for the reasons that I have just explained. I have concluded that they are not. In those circumstances, I do not think that recourse to Henderson v Henderson as a last resort adds anything new or can assist the Defendants.

CONCLUSION

195. For the reasons that I have given, I find that this Court does not have jurisdiction to entertain any of the claims made in the English proceedings between Trappit SA and AmEx Europe by reason of the application of Article 25. I will make orders accordingly, but I will otherwise dismiss the Defendants' application.