THE HIGH COURT

COMMERCIAL

[2023] IEHC 324

Record No. 2022/5277P

BETWEEN

COMPAGNIE DE BAUXITE ET D'ALUMINE DE DIAN-DIAN S.A.

PLAINTIFFS

AND

GTLK EUROPE DESIGNATED ACTIVITY COMPANY

DEFENDANTS

JUDGMENT OF Mr. Justice Twomey delivered on the 15th day of June, 2023

INTRODUCTION

1. This case concerns a dispute with a Russian-State controlled company ("**GTLK**"), which is incorporated in Ireland and has had its assets in Ireland frozen on 8th April, 2022 as a result of the sanctions imposed after the invasion of Ukraine pursuant to Council Regulation EU No. 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine ("**Council Regulation EU No. 269/2014**").

2. GTLK is being sued for $20 million by the plaintiff ("**Compagnie**"), a company based in Guinea, under the terms of a guarantee dated 18th May, 2021 ("**Guarantee**"). The Guarantee relates to the delivery of bauxite from Guinea to an industrial site in Limerick.

3. Even though under the terms of the Guarantee all disputes between the parties are subject to the '*exclusive jurisdiction'* of the English courts, Compagnie has issued proceedings for this payment in the Irish courts.

4. Compagnie is doing so because it claims that, in light of the sanctions on GTLK, for it to get the $20 million dollars, to which it says it is entitled, it will have to obtain, not just a court order for its payment, but also a mandatory injunction which obliges GTLK to seek a derogation from the Central Bank of Ireland to allow the payment of the $20 million out of GTLK's frozen assets.

5. On this basis, Compagnie claims that it would amount to a manifest injustice if it were obliged to issue these proceedings in the English courts. This is because it would be seeking in the *English* courts a mandatory injunction against an *Irish* company obliging it to seek a derogation from an *Irish* regulatory authority (the Central Bank). Furthermore, it would then have to enforce that *English* court order in an *Irish court*. Compagnie argues that this Court should instead bypass these requirements by permitting these proceedings to be taken in the Irish courts, notwithstanding the existence of the terms in the Guarantee that the English courts should have exclusive jurisdiction of disputes between the parties.

6. This matter has come before this Court because GTLK has brought a motion (pursuant to Order 12, Rule 26 of the Rules of the Superior Courts) to have these proceedings struck out on the grounds that they should have been brought in the English courts.

7. Prior to Brexit, the treatment of a clause granting exclusive jurisdiction to the English courts would have been determined under Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("**Brussels Recast Regulation**"). However, the United Kingdom is no longer a member state of the EU and so the Brussels Recast Regulation no longer applies to this case. Instead, the resolution of this issue

now falls to be determined by the Hague Convention on Choice of Court Agreements 2005 ("**Hague Convention**").

8. For the reasons set out below, this Court does not think that it would amount to a '*manifest injustice*', as that term is used in the Hague Convention, to oblige Compagnie to honour the terms of its Guarantee with GTLK and have its disputes heard in the English courts.

9. However, this judgment also considers whether there is a duty on all litigants, whether a Russian State controlled company or an Irish company, to avoid using scarce court resources unnecessarily. In this instance, it means considering whether GTLK, even though it has been '*entirely successful'* in the litigation, should be entitled to 100% of its legal costs, where it is arguable the case might have settled if it had taken a more '*responsible and efficient approach to litigation'*. This is because of the Supreme Court's direction in *Permanent TSB & ors v. Skoczylas & ors* [2021] IESC 10 at para. 12, that the **courts should use the award of costs** to '*encourage a responsible and efficient approach to litigation*'. In particular, consideration is given to whether it would have been more '*responsible and efficient'* of GTLK to have given an undertaking which it *was not legally obliged* to give, but which *would not have prejudiced its position*, and which might have obviated the need for a court hearing and saved considerable court resources for the benefit of other litigants waiting for their cases to be heard.

BACKGROUND

10. Compagnie entered into a barging and transhipping agreement dated 15th December, 2017 (the "**BAT Agreement**") with a company based in Cyprus called POLA Logistics Limited ("**POLA**"). This provided for the transfer of bauxite by POLA from Guinea onto oceangoing vessels. This bauxite is primarily delivered to Limerick to Aughnish Alumina Limited for the production of alumina.

11. Under the terms of the BAT Agreement (as varied by a Deed of Variation dated 21st June, 2019), POLA was obliged to procure a guarantee of $20 million as security for its obligations to Compagnie under the BAT Agreement. In discharge of this obligation, POLA procured GTLK to enter the Guarantee in favour of Compagnie.

12. This Guarantee states, *inter alia*, that:

> "This Guarantee and any contractual obligations arising out of or in connection with it shall be governed and construed in accordance with English law and **the courts of England shall have exclusive jurisdiction** to settle any dispute arising out of or in connection with this Guarantee or such non-contractual obligations. The Guarantor [GTLK] also undertakes to instruct a process agent in England to accept service of any such process, within a reasonable time following a request to do so." (Emphasis added)

13. Compagnie claims that POLA has breached its obligations under the BAT Agreement and, on this basis, Compagnie claims to be entitled to enforce the Guarantee against GTLK. By letter dated 16th June, 2022, Compagnie demanded payment of the full amount of the $20 million guarantee from GTLK.

14. By letter dated 24th June, 2022, GTLK replied to Compagnie stating it '*is not clear to us why [Compagnie] demands payment of the full amount of the Guarantee'*. It also stated that:

> "[….] please be informed that on 8 April 2022 the European Union amended Annex 1 to Regulation (EU) No 269/2014 (the "EU Regulation") to include, *inter alia,* the Guarantor [GTLK] as an entity subject to EU asset freezing provisions implemented pursuant to the EU Regulation. Due to the imposed restrictions the Guarantor [**GTLK] is unable to perform any payments under the Guarantee until such restrictions are lifted**." (Emphasis added)

15. In these circumstances, and notwithstanding the existence of the exclusive jurisdiction clause, Compagnie issued a Plenary Summons in Ireland on 17th October, 2022, seeking the $20 million and a mandatory injunction compelling GTLK to seek the authorisation of the Central Bank under Council Regulation EU No. 269/2014 for the release of frozen funds in order to pay that sum.

16. By letter dated 27th October, 2022, POLA wrote to GTLK about the dispute over the Guarantee stating, *inter alia*, that Compagnie '*was not entitled to commence proceedings against you in the Irish courts'*. POLA also complained in this letter to GTLK that it failed to seek a derogation from the Central Bank for the payment of sums due under the Guarantee. Insofar as relevant, the letter stated that:

> "It is noted that you applied to the Central Bank of Ireland a few weeks ago and were granted nine derogations from EU sanctions in three months to allow you to pay millions of euro in wages, bond repayments, legal fees, rent and IT services. **It is not understood why you failed to do so in this matter**." (Emphasis added)

17. In support of Compagnie's entitlement to issue proceedings in Ireland, despite the exclusive jurisdiction clause, Mr. Hugh Kennedy, solicitor for Compagnie, has sworn an affidavit dated 24th April, 2023, in which he refers to this letter and he avers that:

> "However, it also appears from that [letter of 27th October, 2022] that [GTLK] had **not sought a derogation from the Central Bank of Ireland in order to be in a position to deal with the within proceedings**." (Emphasis added)

18. After the proceedings were issued by Compagnie against GTLK on 17th October, 2022, no appearance was initially entered by GTLK within seven days of it being served with the Plenary Summons.

19. By letter dated 27th October, 2022 to GTLK, solicitors for Compagnie requested the filing of an appearance within 28 days of that letter, failing which it stated it would seek judgment in default of appearance.

20. By letter dated 4th November, 2022 to Compagnie, GTLK replied by stating, *inter alia*, that:

> "Please be advised that to date **we have been unable to obtain legal representation** to adequately defend the within proceedings despite continued efforts to do so.
>
> We hope to be in a position to enter an Appearance in advance of the expiry of 28 days from the date of your letter of the 27 October 2022." (Emphasis added)

21. On the 29th November, 2022 POLA issued a Notice of Motion seeking to be joined as a defendant to the proceedings. (This application was subsequently denied by Quinn J. on 21st December, 2022.)

22. After the expiry of the 28 days without any appearance on the part of GTLK, Compagnie issued a motion on 5th December, 2022 seeking judgment in default of appearance against GTLK.

23. On the 9th December, 2022, GTLK entered a conditional appearance (i.e. solely to contest the jurisdiction of the Irish courts to deal with the proceedings). However, this appearance was not entered by solicitors on behalf of GTLK, rather it was entered by GTLK on its own behalf.

24. The reason why Compagnie entered a conditional appearance in this manner, rather than having solicitors do so on its behalf, is explained by GTLK in its letter dated 8th December, 2022 to solicitors for POLA, where it states, *inter alia*, that:

> "Unfortunately, **despite desperate attempts, we have been unable to obtain Counsel to defend the proceedings on our behalf. This is mainly due to the fact that all our**

funds are frozen and any payment to legal advisers would have to be approved by the Central Bank of Ireland (post the work being carried out) and paid after the fact, which in reality would not be for another three months – too much risk and uncertainty exists given the volume of work involved.

However, we believe it is highly appropriate for your client to be joined to the Proceedings in the interests of justice. **With a view to being extra prudent, we have attempted to file a Conditional Appearance in our own capacity**. We attach a copy of same for your attention. The Appearance is conditional due to the jurisdictional point which we say is quite clear. Additionally**, in the interests of justice and in an exception to the rule in Battle** (*Allied Irish Banks v. Aquafresh Fresh Fish Limited*; *2018*), **it is clearly appropriate that the company can enter an appearance on its own behalf**. The entering on an Appearance is being carried out to avoid judgment in default – unfortunately, due to our inability to obtain Counsel, we will be reliant upon your client to articulate any legal arguments." (Emphasis added)

25. On the 5th January, 2023 Compagnie filed a motion in the Central Office to set aside the conditional appearance which had been entered by GTLK, on the basis that it had been entered not by a solicitors' firm, but by GTLK on its own behalf.

26. However, by the 10th January, 2023, it was clear that GTLK had engaged solicitors. This is because on that date a conditional appearance was filed by solicitors on behalf of GTLK in the Central Office.

27. This is the background to GTLK's application to have the service of the proceedings, seeking to enforce the Guarantee, set aside.

THE APPLICABLE LAW REGARDING EXCLUSIVE JURISDICTION CLAUSES

28. There was no dispute between the parties regarding the law which determines whether the exclusive jurisdiction clause in the Guarantee prevents Compagnie issuing these proceedings in Ireland. That law is the Hague Convention and in particular the Choice of Court (Hague Convention) Act, 2015 ("**2015 Act**"), which gave effect to the Hague Convention in Ireland. It is not disputed by the parties that the United Kingdom and Ireland are Contracting States to the Hague Convention. The relevant sections of the 2015 Act are set out hereunder.

29. Section 3 of the 2015 Act states:

> "**Convention to have force of law**
>
> (1) The Convention has the force of law in the State and judicial notice shall be taken of it.
>
> (2) For convenience of reference, the text in the English language of the Convention referred to in Article 34 thereof is set out in the Schedule."

30. Section 9 states:

> "**Protective measures**
>
> (1) An application to the **Master of the High Court for an enforcement order respecting a judgment may include an application for any protective measures the High Court has power to grant** in proceedings that, apart from this Act, are within its jurisdiction.
>
> (2) Where an enforcement order is made, the Master of the High Court shall grant any protective measures referred to in subsection (1) that are sought in the application for an enforcement order." (Emphasis added)

31. The Hague Convention is set out in the Schedule to the Act and, insofar as relevant, it states:

Article 1(1):

"Scope

This Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters."

Article 3 states:

"Exclusive choice of court agreements

For the purposes of this Convention—

a) "exclusive choice of court agreement" means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts;

b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;

c) an exclusive choice of court agreement must be concluded or documented—

i) in writing; or

ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference;

d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the

exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid."

Article 5(1) states:

"Jurisdiction of the chosen court

The court or **courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies**, unless the agreement is null and void under the law of that State." (Emphasis added)

Article 6 states:

"Obligations of a court not chosen

A court of a Contracting State other than that of the chosen court **shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies** unless –

(a) the agreement is null and void under the law of the State of the chosen court;

(b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;

(c) g**iving effect to the agreement would lead to a manifest injustice** or would be manifestly contrary to the public policy of the State of the court seised;

(d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or

(e) the chosen court has decided not to hear the case." (Emphasis added)

32. It was not disputed by the parties that they had a valid exclusive jurisdiction clause. Accordingly, the key issue in this case was whether, pursuant to Article 6 of the Hague

Convention, an Irish court (as the '*court of a Contracting State other than that of the chosen [English] court*') was obliged to dismiss the proceedings instituted by Compagnie, or whether, as claimed by Compagnie, this would amount to a '*manifest injustice'* under Article 6(c), such that the Irish court is not required to enforce the exclusive jurisdiction clause.

33. In relation to what is meant by '*manifest injustice'*, it is relevant to refer, in particular, to s. 4(2) of the 2015 Act which states:

> "**Interpretation of Convention**
>
> […]
>
> (2) **Judicial notice shall be taken of the explanatory report by Trevor Hartley and Masato Dogauchi on the Convention** and that **report may be considered by any court when interpreting** any of the provisions of the Convention and shall be given such weight as is appropriate in the circumstances." (Emphasis added)

Paragraphs 151 to 153 of the *Hartley and Dogauchi Report* state:

> "**The third exception (first limb): manifest injustice**. The third exception is where giving effect to the agreement would lead to a "manifest injustice" or would be "manifestly contrary to the public policy of the State of the court seised". In some legal systems, the first phrase would be regarded as covered by the second. Lawyers from those systems would consider it axiomatic that an agreement leading to a manifest injustice would necessarily be contrary to public policy. In the case of such legal systems, the first phrase might be redundant. In other legal systems however, the concept of public policy refers to general interests – the interest of the public at large – rather than the interest of any particular individual, including a party. It is for this reason that both phrases are necessary.
>
> The phrase "**manifest injustice" could cover the exceptional case** where one of the parties **would not get a fair trial in the foreign State**, perhaps because of bias or

corruption, or where there were other reasons specific to that party that would preclude hm or her from bringing or defending proceedings in the chosen court. It might also relate to the particular circumstances in which the agreement was concluded – for example, if it was the result of fraud. **The standard is intended to be high**; the provision does not permit a court to disregard a choice of court agreement simply because it would not be binding under domestic law.

The third exception (second limb): public policy. The phrase "manifestly contrary to the public policy of the State of the court seised" is intended to set a high threshold. It refers to basic norms or principles of that State; it does not permit the court seised to hear the case simply because the chosen court might violate, in some technical way, a mandatory rule of the State of the court seised. As in the case of manifest injustice, the standard is intended to be high; the provision does not permit a court to disregard a choice of court agreement simply because it would not be binding under domestic law." (Emphasis added)

ANALYSIS

34. Against this legal and factual background, the focus of the hearing was on whether requiring the parties to comply with the terms of their Guarantee, to have their dispute heard in the English courts, would amount to a manifest injustice for the purposes of Article 6.

Onus is on the party that is alleging the exclusive jurisdiction clause should be ignored

35. The first point to note about Article 6 is its mandatory nature, i.e. a court of a Contracting State other than that of the chosen court (in this case, an Irish court) '*shall suspend or dismiss proceedings*' when the dispute in question is subject to the exclusive jurisdiction of the courts of another Contracting State.

36. In light of the mandatory nature of Article 6, it seems clear that if Compagnie wants this Court to depart from its obligation under Article 6 (and *not* dismiss the proceedings against GTLK), then the obligation is upon Compagnie to satisfy this Court that giving effect to the exclusive jurisdiction clause would give rise to a manifest injustice.

Meaning of '*manifest injustice*'

37. The Convention is set out in full as a schedule to the 2015 Act and s. 3(1) of the 2015 Act provides that the Convention is to have '*the force of law in the State'*. However, neither party was able to produce any case law on the interpretation of the expression '*manifest injustice*' in Article 6(c). On this basis it seems to this Court that the normal rules of statutory interpretation apply as to how this expression is to be interpreted in Ireland. Thus, it seems clear to this Court that this expression should be given its '*ordinary and natural meaning'* in accordance with this well-established principle of statutory interpretation, articulated recently in the Supreme Court case of *DPP v. Brown* [2019] 2 I.R. 1 per McKechnie J. at p. 46:

> "*The primary route by which the intention of the legislature is ascertained is by ascribing to the words used in the statute their ordinary and natural meaning.*"

38. The term *'manifest injustice'* should therefore be given its ordinary and natural meaning, which this Court takes to mean an injustice which is '*clear or obvious to the eye or mind'* (Oxford English Dictionary, 2001) and therefore an injustice which is open to little or no doubt.

39. On this basis, it seems clear that there is a high bar for a party to surmount in order to successfully argue that the contract that they made with another party (to grant exclusive jurisdiction of their dispute to the courts of a certain country) should, in effect, be ignored by operation of law.

40. To put it another way, the onus is on that party, not simply to show that it is possible that an injustice might arise, or that a considerable inconvenience or increased cost or delay

will arise. Instead, that party must show that there is little or no doubt that a very obvious injustice will arise, if the exclusive jurisdiction clause is applied.

41. Although, this Court is not obliged to rely on the *Hartley and Dogauchi Report*, it is clear from s. 4(2) of the 2015 Act, that this Court is entitled to do so. In this regard, this Court draws support, for its conclusion that *'manifest injustice'* is a high bar for an applicant to surmount, from the analysis in that Report, which refers to the fact that the '*standard [of manifest injustice] is intended to be high'*.

42. The first example is one of the most obvious cases of injustice, namely that a party would not get a fair trial in the foreign court in question, *e.g.* because of a biased or corrupt judiciary. It is to be observed that there is no suggestion in this case that Compagnie would not get a fair trial in the English courts or anything close to this level of manifest injustice.

43. The second example of '*manifest injustice*' is where there are reasons why a party could not bring or defend proceedings in the chosen court. Again, there is no suggestion of any impediment to Compagnie bringing proceedings in England, nor anything similar which might go to the ability of Compagnie to litigate in the English courts. The closest one comes to this type of injustice in this case is Compagnie's claim that it does not *believe* that it is *'clear'* that it will get the remedy it wants in the English courts (this claim is considered further below).

44. The third and final example given in the *Hartley and Dogauchi* Report is where the '*manifest injustice'* arises from the circumstances in which the agreement was concluded, with the example given of where the agreement was the result of fraud. Again, there is no suggestion that Compagnie was defrauded into agreeing an exclusive jurisdiction clause or anything of similar gravity. The closest one comes to this type of injustice is the suggestion by Compagnie, that GTLK is using the sanctions' regime for its own strategic benefit, i.e. to avoid meeting its alleged obligations under the Guarantee because its assets are frozen (which claim is also considered below).

45. These three examples in the *Hartley and Dogauchi Report* of '*manifest injustice*' provide support therefore for this Court's view that establishing '*manifest injustice'* is a high bar for an applicant to surmount.

Is there a '*manifest injustice*' in keeping Compagnie to its bargain with GTLK

46. Bearing in mind the foregoing understanding of what is meant by '*manifest injustice'*, this Court will now consider in more detail the alleged '*manifest injustice*', which Compagnie says it will suffer if it has to bring its claim under the Guarantee in the English courts.

(i) GTLK did not seek derogation from Central Bank for its obligations under Guarantee

47. Compagnie points out that if it is successful in obtaining a court judgment for $20 million against GTLK, it will require a mandatory injunction against GTLK, obliging GTLK to seek a derogation from the Central Bank for the release of $20 million in frozen funds.

48. It notes that GTLK, although it sought a derogation for other matters, chose not to seek a derogation from the Central Bank for its alleged obligations under the Guarantee, despite the issue of these proceedings by Compagnie against it.

49. However, in considering whether this gives rise to a manifest injustice, it is important to bear in mind that GTLK disputes its obligations under the Guarantee. Accordingly, it is hard to see that there was *any* obligation upon GTLK to seek a derogation from the Central Bank in relation to obligations which it disputes that it has. For its part Compagnie points out that the Guarantee is a performance or demand guarantee and it claims that in light of the case law on such guarantees (*Fraser v. Great Gas Petroleum (Ireland) Limited* [2012] IEHC 523 and *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.* [1978] Q.B. 159), it is a very straight forward matter for it to obtain a judgment for $20 million from GTLK. On this basis, it claims that GTLK should have sought the derogation. However, even assuming that Compagnie is correct and that it will get its court order for $20 million against GTLK, almost for the asking, this Court does not see the failure, on the part of GTLK, to, in effect, prepare

the way for this judgment, gives rise to a manifest injustice for Compagnie. GTLK's failure to seek a derogation in advance from the Central Bank may lead to a delay in the payment of a claim on the Guarantee *if* Compagnie is correct that it will get a court order as a matter of course. However, such a delay does not, in this Court's view, give rise to a manifest injustice.

(ii) Difficult to get mandatory injunction from English court and to enforce in Ireland?

50. More significant perhaps is Compagnie's claim regarding alleged difficulties, which might arise in relation, firstly, to the grant of a mandatory injunction by an English court to compel GTLK to seek a derogation from the Central Bank in Ireland and, secondly, regarding the enforcement in Ireland of such an injunction granted by an English court.

51. On this basis, Compagnie claims that it will be denied an adequate remedy if the proceedings are not pursued in an Irish court and Compagnie is compelled to litigate in the English courts. This, it says, amounts to a manifest injustice.

52. In the affidavit dated 24th April, 2023 sworn by Mr. Hugh Kennedy, solicitor on behalf of Compagnie, he avers that

> "**It is not [Compagnie's] view** that an English court **would grant such an injunction** in respect of an Irish company, and if such an injunction was granted, whether an **Irish court would enforce it**." (Emphasis added)

However, no expert evidence has been put before this Court that an English court is unlikely to grant a mandatory injunction against GTLK requiring it to seek a derogation from a regulatory authority based outside the UK, namely the Central Bank of Ireland.

53. Similarly, no evidence was put before this Court in relation to the claim that it was unlikely that an Irish court would enforce the mandatory order of an English court, assuming one was granted. In fact, the only evidence opened to this Court regarding enforcement of orders from foreign courts was to the contrary effect, since it illustrated the willingness of the Irish courts to enforce the orders of foreign courts by appropriate enforcement orders. This is

because s. 9 of the 2015 Act references the entitlement to seek an enforcement order from the Master of the High Court in respect of a *'judgment'*, which may include any protective measures which the High Court has jurisdiction to grant. The term *'judgment'* is defined, in s. 1 of the 2015 Act as *'a judgment or order (by whatever name called) that is a judgment for the purposes of the Convention'.*

54. It is also notable that the strongest terms in which Compagnie could make this claim of manifest injustice in its legal submissions was as follows:

> "[…]**it is not clear** that an English court would grant a mandatory injunction to compel [GTLK] to bring an application to the Central Bank or even if it would, whether such an injunction could be enforced against [GTLK] in this jurisdiction." (Emphasis added)

Bearing in mind that the test for an exclusive jurisdiction clause to be ignored is that complying with it would amount to an injustice that is manifest, i.e. that is clear. This submission appears to this Court to make the contrary point, namely that the alleged injustice is not clear and so is not manifest.

(iii) <u>Delay by GTLK in challenging jurisdiction?</u>

55. Compagnie also claims that there would be a manifest injustice in obliging it to litigate in the English courts at this stage in the proceedings, in view of the delay by GTLK in seeking to challenge the jurisdiction of the Irish courts (including its entry of an inappropriate appearance on its own behalf, rather than by a firm of solicitors on its behalf).

56. In its written legal submissions Compagnie says this delay has led to it having to incur significant costs:

> **"[GTLK] has permitted [Compagnie] to incur very significant costs** in prosecuting the proceedings and in dealing with a number of applications, **which costs otherwise would not have been incurred** had [GTLK] simply entered a conditional appearance

at the outset and contested the jurisdiction as it ought to have done at the commencement of the proceedings". (Emphasis added)

57. To consider whether the incurring of these costs amounts to a manifest injustice, the claim that there has been a considerable delay to Compagnie in dealing with the challenge to jurisdiction needs to be put in context. The starting point in this regard is that Compagnie issued the proceedings on the 17th October, 2022. On the 27th October, 2022, it issued its 28 day letter to GTLK threatening judgment in default of appearance. However, Compagnie knew within days of this 28-day letter, i.e. from the letter of 4th November, 2022 which it received from GTLK, that GTLK's funds were frozen and it knew of GTLK's claim that it was having difficulty obtaining legal representation.

58. In addition, by the 9th December, 2022, Compagnie knew that GTLK was contesting the jurisdiction, *albeit* that the conditional appearance to this effect, was filed by the company, rather than by solicitors on its behalf (as GTLK says that it was having difficulty engaging lawyers as its funds were frozen).

59. Since Compagnie's complaint of manifest injustice is that it incurred unnecessary legal costs, it is important to note that within approximately 7 weeks of issuing proceedings, Compagnie knew that GTLK was contesting jurisdiction. Accordingly, at that stage, Compagnie knew that any legal costs incurred by Compagnie on Irish legal advice, as distinct from English legal advice, might end up being an unnecessary expense (if an Irish court were to uphold the jurisdiction of the English courts).

60. Then a few days after Compagnie issued its motion, on 5th January, 2023, to set aside that conditional appearance, solicitors for GTLK filed a conditional appearance (on the 10th January, 2023).

61. When one considers the relatively short length of the delay in question, and Compagnie's knowledge that GTLK intended to contest jurisdiction, and the apparent reasons

for the delay, namely the freezing of funds and the alleged difficultly in arranging legal representation, this Court does not believe that this delay amounts to a '*manifest injustice'* , such as to justify this Court in permitting Compagnie to be released from the terms of the Guarantee it signed, whereby the English courts were to have jurisdiction.

62. This is particularly so, when one notes that there was also delay on Compagnie's part in progressing the hearing of this motion, which was issued on 23rd January, 2023. This is because there were uncontroverted submissions by GTLK that, to enable Compagnie to clarify whether their substantive proceedings seeking payment under the Guarantee fell within the sanctions' regime, Compagnie sought to adjourn this motion on more than one occasion. These adjournment applications were consented to by GTLK, before this motion was finally heard on the 18th May, 2023.

Conclusion regarding '*manifest injustice*'

63. When one considers Compagnie's complaints of '*manifest injustice'* in the round, it appears to this Court that they are primarily in the nature of the additional inconvenience which is caused to Compagnie as a result of it having to issue proceedings in the English courts (rather than in the Irish courts), in light of the freezing of GTLK's assets in Ireland on the 8th April 2022. This inconvenience arises as there is now a further step which must be undertaken by Compagnie in order to obtain the payment of $20 million, to which, it says, it is entitled.

64. This Court has considerable sympathy for the position in which Compagnie finds itself in dealing with a Russian State entity, as a result of sanctions imposed on Russian entities arising from the invasion of Ukraine.

65. However, it is to be noted that Compagnie accepted a Guarantee from a Russian State entity, *albeit* before that entity was subject to sanctions. Uncontroverted submissions were made however that, even at the time of the execution of the Guarantee, sanctions were in place

against other Russian entities, as result of the invasion of Crimea (which sanctions were simply extended to apply to GTLK after the invasion of Ukraine).

66. The extension of the sanctions to GTLK adds an inconvenience to Compagnie's task of enforcing the Guarantee. This is because, prior to the invasion of Ukraine, Compagnie would not have had to seek a mandatory injunction requiring GTLK to seek a derogation from the Central Bank, in addition to seeking a judgment for $20 million. However, because of the exclusive jurisdiction clause, it is from an *English* court that this mandatory order, against an *Irish* company to seek a derogation from an *Irish* regulatory authority, will have to be obtained. If such an order is obtained, then Compagnie will have the added inconvenience of having to issue separate proceedings in Ireland seeking to enforce in *Ireland* that mandatory injunction from *an English court*, assuming the English court grants such an order. Compagnie would not have had this inconvenience and cost, prior to these sanctions being imposed on GTLK.

67. On the other hand, if Compagnie was entitled to issue proceedings in Ireland, it would only have to deal with one set of proceedings and one jurisdiction, which would be a lot more convenient.

68. However, it seems to this Court that this inconvenience is a long way from constituting a manifest injustice such that this Court would make an order permitting, in effect, the breach of an agreement which had been reached at arm's length between two commercial entities (that any dispute between them would be dealt with by the English courts).

69. Although not directly applicable, it is nonetheless relevant to refer to how the Supreme Court has treated exclusive jurisdiction clauses in the past. In the case of *Kutchera v. Buckingham International Holdings* [1988] I.R. 61, the defendant, a company incorporated in Canada, had agreed under the terms of a loan agreement with the plaintiff, a resident of South Africa, that the Irish courts would have exclusive jurisdiction over any dispute relating to the agreement. However, when served with proceedings, the defendant sought to have them set

aside, despite the exclusive jurisdiction clause. The Supreme Court refused to do so. At p. 72, Walsh J. stated:

> "The application by the defendant to have that order set aside is in effect asking the court to act in aid of the defendant in its efforts to **act in breach of its own contract** by endeavouring to avoid the Irish jurisdiction which they had expressly chosen and agreed to. In general the court should act in a way calculated to **make people honour their contracts** save where there is shown to exist some very grave cause to do otherwise. No such cause has been shown in the present case." (Emphasis added)

70. It is important to note that *Kutchera* is not directly applicable to the current circumstances because it was dealing with the common law applicable to exclusive jurisdiction clauses, while this Court is dealing with a very separate matter, namely the interpretation of the 2015 Act and the Hague Convention.

71. Nonetheless, this Court does draw some support from this case, for this Court's view that to avoid the effects of an exclusive jurisdiction clause under the Hague Convention, there is a high bar to be surmounted. This is because a finding of *'manifest injustice'* under the Hague Convention amounts to a court permitting a party not to *'honour their contracts'*. This is not something which is undertaken lightly, since having people honour their contracts is a crucial part of everyday life and commerce and has been something to which the Irish courts have always attached importance, as evidenced by *Kutchera*.

Imminent liquidation of Compagnie?

72. Finally, Compagnie also pointed out that a winding up petition for GTLK was to be heard by the Irish courts within days of this hearing. On this basis, it claimed that it was premature for GTLK to bring this motion, since within a very short time, a liquidator might have carriage of these proceedings. In particular, Compagnie claims in its written submissions that it:

"*is difficult to see a liquidator wishing to defend these proceedings in another jurisdiction."*

Compagnie claims that the liquidator of GTLK would not wish to defend these proceedings in the English courts (as GTLK does) in view of the potential costs and so she was likely to admit the claim. On this basis, Compagnie claimed this motion should not have been brought by GTLK on the eve of a petition for its winding up.

73. However, first it is important to point out that there is no guarantee that a liquidator will be appointed to Compagnie. In this regard, counsel for GTLK submitted that the company is totally opposed to the petition and that the company is solvent. Secondly this Court has no way of knowing how a liquidator might approach a claim under the Guarantee (in the English courts or the Irish courts) since it will have to consider the value of the claim, its chances of success, its legal advice and the costs involved. Accordingly, this Court cannot reject GTLK's motion, as suggested by Compagnie, on the basis that a liquidator *might* be appointed and on the basis of what she *might* do in relation to this litigation.

CONCLUSION

74. For the foregoing reasons, this Court concludes that Compagnie has failed to discharge the onus upon it to establish that it would suffer '*manifest injustice'* if this Court was to require it to comply with the terms of its Guarantee with GTLK (that their disputes should be exclusively dealt with by the English courts). Accordingly, this Court will make the order sought by GTLK setting aside service of these proceedings on it.

75. This Court orders the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time, with the terms of any (draft) agreed court order to be provided to the Registrar. In case it is necessary for this

Court to deal with final orders or costs, this case will be provisionally put in for mention one week from the date of delivery of this judgment, at 10.30 am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).

Costs

76. As regards costs, the hearing in this case took a day. Because of the legal issues raised, it was necessary to reserve judgment, meaning that a considerable amount of additional court resources had to be expended on this matter. The Court of Appeal case of *Campbell v. County Sligo Golf Club & Ors* [2023] IECA 132 highlights the amount of court resources which are expended in preparing written judgments and the fact that settlements therefore lead to a considerable saving of court resources. At para. 7 *et seq*, Collins J. stated that:

> "No allegations of dishonesty or any form of deliberate wrongdoing were made in these proceedings and so that factor has no application here. Nevertheless, the fact is that **considerable judicial time – an expensive resource – has been expended in the preparation of judgment**. One of the **general benefits of settlement is that it saves judicial resources** (and the resources of the parties). That is of limited relevance in circumstances where the appeal has been heard and judgment prepared. It has to be said that **it is unfortunate that the parties were not in a position to agree a settlement at an earlier point**." (Emphasis added)

Regarding the amount of judicial time involved in judgment writing, it seems to this Court that, in very general terms, it can take between two to five times the length of a hearing to prepare a written judgment, depending on the length of the hearing and the complexity of the case.

77. Accordingly, in the case of a hearing lasting a day, as in this instance, the failure of the parties to settle their dispute necessitated the expenditure of a number of days of court resources for the hearing and the preparation of a judgment. In this respect, this Court shares the sentiment

expressed by the Court of Appeal in *Campbell*, that it is a pity that the parties in this case could not have settled this matter themselves, as it would have saved significant court resources.

78. However, when it comes to costs, GTLK having won the case might well say that it is all Compagnie's fault that court resources were wasted, since Compagnie was in the wrong on the jurisdiction point (as evidenced by this judgment), yet it insisted on pursuing that point. Thus, shouldn't GTLK be entitled to 100% of its legal costs from Compagnie?

Is there an onus on parties to seek to resolve disputes without court involvement?

79. Is it as simple as that? Could it not be argued that there is an onus on parties (even parties who end up being '*entirely successful'* - per s. 169(1) of the Legal Services Regulation Act 2015) to try to resolve their disputes, without unnecessarily using court resources.

80. In particular, should a party, even one which is in the right, as established by the subsequent judgment, not seek to save court resources if this can be achieved by making a concession *without prejudicing itself*? After all, there is a public interest at stake here, as noted by MacMenamin J. in *Tracey t/a Engineering Design & Management v. Burton* [2016] IESC 16 at para. 45:

> "**Court time is not solely the concern of litigants**, or their legal representatives. There is a **strong public interest aspect** to these issues." (Emphasis added)

81. In this case, this Court raised with the parties that the hearing, and the expenditure of court resources in preparing a judgment, might have been avoided if GTLK had given an undertaking to Compagnie to seek a derogation from the Central Bank if judgment was obtained from the English courts. This is because it appeared to this Court that the giving of the undertaking would not have prejudiced GTLK's position. This was because GTLK's position appeared to be that it disputed Compagnie's claims that there would be any issue enforcing, in the Irish courts, a mandatory injunction from the English courts (requiring an Irish company to obtain a derogation from an Irish regulatory authority).

82. If an undertaking had been given by GTLK, this would have allowed Compagnie to take the case in the English court, knowing that if it won, GTLK would seek a derogation to release the funds due to Compagnie. When this Court raised the giving of an undertaking at the hearing, Compagnie indicated that if such an undertaking was given, it would find it extremely difficult to argue that there could be a manifest injustice in it having to litigate in the English courts. On this basis therefore, it seemed to this Court that an undertaking by GTLK in these terms might have obviated the need for a court hearing and a written judgment.

This Court must use costs orders to encourage 'responsible and efficient' litigation

83. The failure by GTLK to make such a concession, although not legally obliged to do so, has to be considered in the context of the Supreme Court direction that this Court is obliged to use costs orders to encourage responsible and efficient litigation. This is clear from *Permanent TSB & ors v. Skoczylas & ors* [2021] IESC 10, where in a joint judgment of O'Donnell, McKechnie and Charleton JJ. at para. 12, the Supreme Court stated that:

> "*Part of the function of the court's jurisdiction to award costs is to* ***encourage a responsible and efficient approach to litigation***." (Emphasis added)

Bearing in mind that the Supreme Court has also made it clear, in *Tracey v. Burton,* that how parties litigate is not an exclusively private interest matter, as there is a public interest in saving court resources, it seems to this Court that '*responsible'* litigation includes making a concession which would settle a dispute where that concession is not prejudicial to the position of the party making it.

84. Accordingly, one way for the courts to seek to encourage responsible and efficient litigation is to encourage a litigant, who is technically in the right, not to use court resources if her dispute could be resolved in a more practical manner, e.g. by making a concession that *does not prejudice her position*.

85. Yet, since such a litigant is not legally obliged to make a concession or give an undertaking, and as she may believe that she is 'in the right', she may choose not to do so, confident that if the matter is litigated, she will win and furthermore that she will obtain an order *for all her costs* against the other side.

86. However, if this is the mindset of a litigant, it means that taxpayer-funded court resources are being used unnecessarily, contrary to the public interest, adding to the backlogs of trials and so to the detriment of parties waiting for cases to be heard (whose cases may not be capable of resolution by the simple expedient of giving an undertaking or other concession that does not prejudice their position).

87. All of this raises the question of whether in this case, GTLK should be entitled to 100% of its costs, even though it appears to have been '*entirely successful'*, since it appears that court resources might have been saved, for the benefit of other litigants and the taxpayer, at no apparent prejudice to GTLK by the simple expedient of the giving of an undertaking.

88. It is important to emphasise that this Court has not reached any decision in this regard and wants to hear submissions from the parties on this point (unless as noted above, the parties reach an agreement on the costs).