Neutral Citation Number: [2022] EWHC 2927 (Comm)

Case No: CL-2022-000402

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

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

Date: 18/11/2022

**Before** :

**MR JUSTICE JACOBS**

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**Between :**

**EBURY PARTNERS BELGIUM SA/NV** — **Claimant**

**- and -**

**(1) TECHNICAL TOUCH BV**
**(2) JAN BERTHELS** — **Defendants**

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**Anton Dudnikov** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimant**
**Lisa Lacob** (instructed by **Crowell & Moring LLP**) for the **Defendants**

Hearing date: Thursday 3rd November 2022

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# Approved Judgment

This judgment was handed down remotely at 11.30am on Friday 18th November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives
(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE JACOBS

**Mr Justice Jacobs :**

## A: Introduction

1. In e-commerce, it is now commonplace for a person to agree to another person's terms and conditions by ticking the appropriate box when completing an on-line application form. Equally commonplace, at least speaking personally, is for a person to fail to do so and then to receive a reminder that the box must be ticked in order for the transaction to proceed.

2. In the present case, the First Defendant ("TT") was interested in receiving foreign exchange currency services from the Claimant company ("Ebury"). Its director, the Second Defendant ("Mr Berthels"), ticked the appropriate box on Ebury's application form for "Currency Services" on 15 January 2021. The application form was in Dutch, and the relevant ticked box was against the following text (in translation):

> "I agree to the Ebury Terms and Conditions."

3. Just above the ticked box was text which enabled an applicant to download those terms and conditions, with the text:

> "Download Terms and Conditions"

Just below the ticked box was a link to a webpage containing a pdf of those terms and conditions.

4. If Mr Berthels, on behalf of TT, had used either of the links so provided, he would have seen the detailed terms and conditions which Ebury wished to apply to its business dealings with those who completed the application form. These were headed "Relationship Agreement – Corporate Customers (v.5.0 09/2020)". Version 5.0 09/2020 was also the reference in the link below the ticked box. TT's evidence is, however, that Mr Berthels did not use either of the links, and therefore did not (at least at that time) look at or consider any of the detailed terms to which, by ticking the relevant box, he was indicating TT's assent. Had he looked, he would have seen terms which occupied some 15 pages and 27 clauses. Clause 27 listed a number of terms under the heading: "Other important terms". They included governing law and exclusive jurisdiction clauses in the following terms:

> "[27.11] This Agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation, interpretation, performance and/or termination (including non-contractual disputes or claims) shall be exclusively governed by and construed in accordance with the laws of England and Wales.
>
> [27.12] Each party irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this Agreement or its subject matter or formation, interpretation, performance and/or termination (including non-contractual disputes or claims). For such purposes each party irrevocably submits to the jurisdiction

> of the English courts and waives any objection to the exercise of such jurisdiction. Each party also irrevocably waives any objection to the recognition or enforcement in the courts of any other country of a judgment delivered by an English court exercising jurisdiction pursuant to this Clause 27.12."

5. On the basis of the above facts, there would appear (at least at first sight) to be no real scope under English law for TT to argue that it was not bound by Ebury's terms and conditions, including the jurisdiction clause, to which it had assented when it ticked the relevant box.

6. Under English law, as explained in *Chitty on Contracts* 34th edition, paragraph 15-007, where a contract has not been signed, a party can nevertheless be bound by terms contained or referred to in a notice or similar document, including a standard form document. Frequently the document is simply made available to a party before or at the time of making the contract, and the question will then arise whether the printed conditions which it contains, or to which it refers, have become terms of the contract. A party can be bound even if it does not take the trouble to read the terms. Whether or not the terms are binding will depend upon the form of the document which gives notice of the terms, the time at which it is brought to the attention of the receiving party, and whether reasonable steps have been taken to draw the terms to the attention of that party.

7. Paragraph 15-010 of *Chitty* discusses the concept of notice in greater detail. There was no dispute that this was an accurate statement of English law:

> "**Meaning of notice** It is not necessary that the conditions contained in the standard form document should have been read by the person receiving it, or that they should have been made subjectively aware of their import or effect. The rules which have been laid down by the courts regarding notice in such circumstances are three in number:
>
> (1) if the person receiving the document did not know that there was writing or printing on it, they are not bound (although the likelihood that a person will not know of the existence of writing or printing on the document is now probably very low);
>
> (2) if they knew that the writing or printing contained or referred to conditions, they are bound;
>
> (3) if the party tendering the document did what was reasonably sufficient to give the other party notice of the conditions, and if the other party knew that there was writing or printing on the document, but did not know it contained conditions, then the conditions will become the terms of the contract between them."

8. Applying these principles, there would appear to be no doubt that, applying principles of English law, Ebury did what was reasonably sufficient to give TT notice of its

standard conditions. Indeed, by ticking the box TT positively indicated its agreement to those terms and conditions. English courts have held in the past that sufficient notice of terms and conditions has been provided, even without a box being ticked, when a party has been given a document which refers to terms found on the other party's website. As Teare J said in *Impala Warehousing and Logistics (Shanghai) Co Ltd v Wanxiang Resources (Singapore Ltd)* [2015] EWHC 25 (Comm) para [16]:

> "In this day and age when standard terms are frequently to be found on web-sites I consider that reference to the web-site is a sufficient incorporation of the warehousing terms to be found on the website".

Teare J expressed a similar sentiment in *Cockett Marine Oil DMCC v ING Bank NV* [2019] EWHC 1533 (Comm) para [23], where he referred to a party's ability to access terms by clicking a hyperlink.

9. Furthermore, the box that was ticked was – objectively construed – an agreement to <u>all</u> of the relevant terms and conditions. There is nothing to suggest that any of the terms were somehow excluded from the notice being given by Ebury, or the assent which was being given by TT.

10. It is against this background that Ebury, the claimant in the present proceedings, applies for an interim anti-suit injunction (or "ASI") in respect of Belgian proceedings which have brought by the Defendants. Ebury contends that the Belgian proceedings are in breach of exclusive jurisdiction agreements in favour of the English court. Those jurisdiction agreements are, on Ebury's case, contained in two agreements concluded in early 2021.

11. The first agreement relied upon is the Relationship Agreement (or "RA") between Ebury and TT described in outline above. The second agreement is a personal guarantee and indemnity ("the Guarantee") given by Mr Berthels in respect of TT's obligations to Ebury. That agreement was signed by Mr Berthels, and therefore there can be no argument, at least under English law, that its terms are not binding upon him. The Guarantee contained English governing law and jurisdiction agreements in the following terms:

> "[15] This guarantee and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by, and construed in accordance with, the law of England and Wales. If any provision hereof or part thereof shall be held invalid or unenforceable no other provisions hereof shall be affected and all such other provisions shall remain in full force and effect.
>
> [16] Each party irrevocably agrees that, subject as provided below, the courts of England and Wales shall have exclusive jurisdiction over any dispute or claim arising out of or in connection with this guarantee or its subject matter or formation (including non-contractual disputes or claims). Nothing in this clause shall limit the right of Ebury to take proceedings against the Guarantor in any other court of competent jurisdiction, nor

> shall the taking of proceedings in any one or more jurisdictions preclude the taking of proceedings in any other jurisdictions, whether concurrently or not, to the extent permitted by the law of such other jurisdiction."

12. A dispute arose in April 2021, when TT failed to pay a margin call made by Ebury under the terms of the RA, and also failed to pay further sums that subsequently (on Ebury's case) became due after Ebury closed out the trades placed by TT. As soon as it became clear that the parties would not achieve an amicable settlement, the Defendants initiated the Belgian proceedings, by which they seek negative declaratory relief and challenge the validity of the RA and the Guarantee under Belgian law (notwithstanding the express choice of English law) in those agreements.

13. Ebury responded to the Belgian proceedings by issuing proceedings in what it contends to be the contractually agreed jurisdiction, England. The Claim Form, issued on 29 July 2022, claims various forms of relief, including the payment of monies alleged to be owed and damages. Particulars of Claim were attached to the Claim Form. On the same day, Ebury issued an application notice for an anti-suit injunction. The claim for an anti-suit injunction was supported by the evidence of Mr Parham Kouchikali, a partner in Reynolds Porter Chamberlain.

14. The Claim Form was served out of the jurisdiction, without obtaining the permission of the court, pursuant to CPR 6.33 paragraph 2B. This rule was amended with effect from 1 October 2022, although the amendments make no material difference in the context of the present issues. At the time of service, however, paragraph 2B was as follows:

> "The claimant may serve the claim form on the defendant outside of the United Kingdom where, for each claim made against the defendant to be served and included in the claim form –
>
> (a) the court has power to determine that claim under the 2005 Hague Convention and the defendant is a party to an exclusive choice of court agreement conferring jurisdiction on that court within the meaning of Article 3 of the 2005 Hague Convention; or
>
> (b) a contract contains a term to the effect that the court shall have jurisdiction to determine that claim."

15. Following service, the Defendants issued an Application Notice dated 7 September 2022. In the draft order accompanying the application, the Defendants sought the refusal of the claim for an anti-suit injunction. They also sought an order that the English court had no jurisdiction to try the claim brought against either of the Defendants, or in the alternative that the English court should not exercise any jurisdiction which it may have. The Defendants also sought a stay or dismissal of the present proceedings until the conclusion of the Belgian proceedings.

16. The Defendants' application was supported by the evidence of Cathryn Williams, a partner in the London office of Crowell & Moring. Shortly afterwards, the Defendants also served evidence from two Belgian lawyers, Mr Bruno Vandermeulen and Professor Regine Feltkamp, dealing with certain aspects of Belgian law and procedure. In

response, the Claimants relied upon a further witness statement of Mr Kouchikali and evidence of Belgian law and procedure from Mr Thomas Derval. It was accepted that this Belgian law was admissible in relation to the issues raised by the respective applications, albeit that the Claimant submitted that there was very little evidence of Belgian law or procedure that was of any real relevance to the court's decision.

## B: Legal framework for the applications and the shape of the parties' arguments

*Introduction*

17. This section introduces the legal framework for the various applications, and the shape of the arguments advanced.

18. Ebury's application for an ASI, and the Defendants' applications disputing the court's jurisdiction or inviting the court not to exercise it, are to a large extent different sides of the same coin. The central issues raised by the competing applications are essentially the same.

19. In this judgment I propose to consider, first, the Claimants' application for an ASI. If that application succeeds, then (as explained below) it effectively sweeps away all of the Defendants' jurisdictional arguments.

## B1: Principles governing ASI applications

20. The bundle of authorities prepared for the hearing reveals the frequency with which the Commercial Court deals with applications for anti-suit injunctions. The principles are now well settled. They were summarised by Foxton J (referring to prior authority) in *QBE Europe SA/NV v Generali España de Seguros Y Reaseguros* [2022] EWHC 2062 (Comm) at para [10] as follows:

    i) The court's power to grant an ASI to restrain foreign proceedings, when brought or threatened to be brought in breach of a binding agreement to refer disputes to arbitration, is derived from section 37(1) of the Senior Courts Act 1981, and it will do so when it is "just and convenient".

    ii) The touchstone is what the ends of justice require.

    iii) The jurisdiction to grant an ASI should be exercised with caution.

    iv) The injunction applicant must establish with a "high degree of probability" that there is an arbitration or jurisdiction agreement which governs the dispute in question.

    v) The court will ordinarily exercise its discretion to restrain the pursuit of proceedings brought in breach of a forum clause unless the defendant can show strong reasons to refuse the relief (relying on *Aggeliki Charis CompaniaMaritima SA v Pagnan SpA* (*The Angelic Grace*) [1995] 1 Lloyd's Rep 87).

    vi) The defendant bears the burden of proving there are strong reasons.

21. Prior to Brexit, it would not have been possible for anti-suit relief to be granted in a case such as the present, where a claimant seeks to enjoin proceedings in the court of

an EU member state. It was common ground, however, that such relief is now potentially available, as shown by the decision in *QBE Europe* where ASI relief was granted in respect of proceedings in Spain.

*"High degree of probability"*

22. A critical question is whether Ebury can show, with a high degree of probability, that there is a jurisdiction agreement governing the dispute in question. No point arose, in that context, on the width of the English jurisdiction clause, as a matter of its true construction, either in the RA standard terms or the Guarantee. Accordingly, if there were an effective jurisdiction clause in each of the agreements, it would be applicable to the claims which the Defendants seek to bring in Belgium.

23. The important issue which did arise, however, was whether the jurisdiction clause contained in Ebury's RA standard terms was incorporated into the agreement between Ebury and TT.

24. The question of whether a jurisdiction agreement was incorporated in the RA was addressed in the context of both English law and Belgian law. Ebury's case advanced by Mr Dudnikov was that English law was the only law to be applied in that context, and that a jurisdiction agreement had been clearly and sufficiently established for the purposes of an anti-suit injunction. On behalf of the Defendants, Ms Lacob's submission was that the application of English law principles did not lead to the conclusion that Ebury's case on incorporation had been established with a high degree of probability. Furthermore, relying upon Article 10 (2) of the regulation known as Rome I, the Defendants submitted that Belgian law was the relevant applicable law governing that issue. Further details of the parties' arguments are set out in Section C below.

25. This issue of incorporation of the jurisdiction agreement arose in the context of the RA. There was no similar point which could be advanced in relation to the jurisdiction agreement in the Guarantee, which had been signed by Mr Berthels. Accordingly, I did not understand Ms Lacob to submit that Ebury had failed to establish, to a high degree of probability, that there was an exclusive jurisdiction agreement in the Guarantee. Her argument was, in essence, that the more important and primary agreement was that between Ebury and TT rather than the Guarantee signed by Mr Berthels. Accordingly, if Ebury could not establish, to a high degree of probability, a jurisdiction agreement incorporated into that primary agreement, there should be no anti-suit injunction at all. In other words, the tail of the Guarantee should not be allowed to wag the RA dog.

*"Strong reasons"*

26. The Defendants submitted that there were strong reasons for declining to grant anti-suit relief. They relied upon various factors, but with a particular focus on the nature of the defence which is likely to be advanced in the English proceedings. That defence would be based upon various mandatory provisions of Belgian law which had the effect of rendering the RA void. That argument depended upon largely untested Belgian financial laws, as to which experts in Belgian law would have to give evidence. Even if the applicable law of the RA was English, Belgian law would nevertheless be important and indeed critical because of Article 3 (3) of Rome I. It was appropriate to

allow the Belgian court to determine these issues in the context of the proceedings which were commenced there first and which are far more advanced.

27. Ebury submitted that, if they could meet the requisite standard of high degree of probability, the court should give effect to the parties' contractual bargain by granting an ASI. There were no strong reasons to allow the matter to proceed in Belgium, and the burden of establishing such reasons was on the Defendants. Ebury submitted that most of the reasons advanced by the Defendants were arguments about the relative merits of fighting an action in Belgium as compared with fighting an action in London, where the factors relied on would have been foreseeable at the time that the contract was concluded. They relied in particular on the judgment of the Court of Appeal (Lawrence Collins LJ) in *UBS AG v HSH Nordbank AG* [2009] EWCA Civ 585 paras [100] and [101]:

> "[100] …it is most unusual for an English court to stay proceedings brought in England pursuant to an English jurisdiction agreement. In *British Aerospace plc v Dee Howard* [1993] 1Lloyd's Rep 368, at page 376, Waller J said (in the context of an exclusive English jurisdiction clause) that it should not be open to a party to start arguing about the relative merits of fighting an action in the foreign jurisdiction as compared with fighting an action in London, where the factors relied on would have been foreseeable at the time that they entered into the contract. That case involved an application to set aside service out of the jurisdiction. It has been approved in this court in the context of an application to stay English proceedings (*Ace Insurance SA-NV v Zurich Insurance Co* [2001] 1 Lloyd's Rep 618, at para 62, per Rix LJ) and of an application to restrain foreign proceedings in which the foreign court was asked to prevent a party suing in England pursuant to an English jurisdiction clause (*Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2003] 2 Lloyd's Rep 571, at para 36, per Waller LJ) and it has been applied in many decisions in the Commercial Court.
>
> [101] The next difficulty is that there is an express agreement in the jurisdiction clause the effect of which is that HSH irrevocably waived any claim that proceedings had been brought in an inconvenient forum. In *National Westminster Bank plc v Utrecht-America Finance Co* [2001] Lloyd's Rep Bank 285; [2001] 2 All ER (Comm) 7, at para 23, Clarke LJ thought it was "fatal" to any *forum non conveniens* case, whereas in *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan*, *ante*, at para 36 Waller LJ did not treat such an agreement as decisive, but thought that it underlined the point that the jurisdiction agreement would be overridden only in exceptional circumstances."

28. They also submitted that this was not a case where Article 3 (3) of Rome I would be applicable; because it was not a case where all other elements relevant to the situation at the time of the choice are located in a country other than England. Even if Article 3

(3) and Belgian law did come into play, any relevant issues could be decided by the English court. Ebury also contended that the Defendants would be arguing in Belgium for the more general application of Belgian law to the contracts in circumstances where English law was the chosen law. This was a strong reason for granting, rather than refusing, anti-suit relief. They referred in that context to my decision in *Catlin Syndicate Ltd and others v Amec Foster Wheeler Corporation* [2020] EWHC 2530 (Comm) paras [36] and [67].

**B2: The Defendants' jurisdiction and other applications**

29. If Ebury's ASI application is successful, this will in practical terms dispose of the Defendants' jurisdictional challenge and related applications. There are essentially two reasons for this.

30. First, if Ebury can show (for the purposes of the ASI), to a high degree of probability, that there is a jurisdiction agreement which binds the parties, then that will be sufficient to establish a "good arguable case" that the English court has jurisdiction under CPR 6.33 (2B) (b) ("a contract contains a term to the effect that the court shall have jurisdiction to determine that claim"). The standard of "good arguable case" is lower than "high degree of probability", and the greater includes the lesser.

31. Secondly, once jurisdiction has been established on the basis of an English jurisdiction clause, then it is well established that effect should ordinarily be given to that obligation in the absence of "strong reasons" for departing from it: see *Donohue v Armco* [2001] UKHL 425, para [24] *per* Lord Bingham. It is "most unusual" for an English court to stay proceedings brought in England pursuant to an English jurisdiction agreement: *UBS AG v HSH Nordbank AG* at [100] (set out above). The question of whether there are "strong reasons" not to give effect to the jurisdiction clause therefore arises in both the ASI and the jurisdictional contexts. If the Defendants cannot show strong reasons for the court to refuse ASI relief, then it necessarily follows that there cannot be strong reasons for the court to decline jurisdiction notwithstanding the English jurisdiction agreement. Indeed, Ms Lacob did not submit that she could fail on "strong reasons" in the context of the ASI, but nevertheless succeed in the context of her jurisdictional challenge based upon the same (alleged) strong reasons.

32. It is for these reasons that I will first consider the application for an ASI, and then address any other issues if they arise.

**Section C: The incorporation issue**

33. This section addresses the question of whether Ebury has established a sufficiently strong case ("high degree of probability") that an English jurisdiction clause was incorporated into the relevant agreements between the parties.

34. I start by addressing the factual position, as it emerges from the documentary and other uncontroversial evidence. In so far as I address factual issues, I do so in the context of deciding, on the basis of the evidence hitherto filed by both parties, whether Ebury has established its case to a high degree of probability. I am not here finally deciding any factual issue, and recognise that some of the matters described below may be subject to evidence and argument at trial. I note, however, that there at present appears to be no substantial factual dispute, on the evidence hitherto served, as to what transpired

between the parties: this is very largely documented in the correspondence and also recorded in transcripts of telephone calls.

## C1: Factual background

*The parties and the initial discussions*

35. Ebury is a provider of financial services incorporated in Belgium, and is part of an international group of companies headquartered in London. The shares in Ebury are owned by Ebury Partners Ltd and Ebury Partners UK Ltd (EPUK), both incorporated in England.

36. TT is a Belgian company, and its business comprised importing and distributing components and lubricants, principally from Japan, for high-performance and racing motorcycles. Mr Berthels is a director of TT, and is its CEO and founder. He resides in Belgium.

37. Since TT is purchasing from Japan in Yen, and selling in other currencies – principally Euro – it was exposed to currency fluctuations between in particular Yen and Euro. Mr Berthels' evidence (via Ms Williams' witness statement) was that since TT imported a considerable number of motorcycle parts from Japan, it was crucial for the business to protect itself against currency fluctuations between the Euro and Yen in order to provide a degree of certainty at a time when the exchange rate was particularly volatile. In order to do so, TT had previously entered into agreements with a company called Monex in relation to hedging any differentials arising on the exchange rate.

38. There was some contact between Mr Jonathan Seys of Ebury and TT in late 2020: discussions took place initially with Mr Diego Claessens, the then Project and Sales manager at TT, and then subsequently with Mr Berthels. Transcripts of the calls between them were exhibited to Mr Kouchikali's 2nd witness statement. In the initial call, which appears to have been a "cold call", Mr Claessens described a global business: "from our London office we do Europe, Africa, Asia and from our California office we do the US, North America South America, Canada and part Australia". Mr Seys described Ebury as having a "fairly international presence". He referred to branches in other countries that could handle international transactions. The purpose of this initial call was to see if TT was interested in doing business with Ebury, in particular in relation to forward contracts.

39. The discussions then continued between Mr Seys and Mr Berthels. According to the latter, he spoke to Mr Seys in the week commencing 30 November 2022. The discussion concerned whether Ebury could offer TT the financial services that TT had previously obtained from Monex. TT's disclosed documents in this case include two agreements, entered into in early 2021, with Monex companies: a Credit Facility Agreement governed by English law and subject to English jurisdiction, and a Margin Agreement governed by the law of Luxembourg, with a choice of the Luxembourg court. The Defendants accept that, prior to 2021, TT had previously entered into spot agreements with Monex containing "foreign" (i.e. non-Belgian) forum clauses.

40. According to Mr Berthels, Mr Seys said that Ebury could offer the services TT required and proposed that TT enter into a contract with Ebury for the provision of foreign exchange, account and payment services. In a later call, Mr Berthels indicated that he

was satisfied with the arrangements that he currently had in place, but that at the beginning of next year he would be "back in cover for the next three to five years and then I will certainly contact you".

41. Mr Berthels was indeed interested in taking matters forward. These discussions then led to a meeting between Mr Berthels and Mr Seys on 14 January 2021. The discussions, according to the evidence of Mr Kouchikali, concerned the possibility of Ebury providing a credit line. Mr Berthels initially proposed a credit line of € 80 million over a 5 year period. As described below, the discussions about a credit line, and the amount and terms thereof, continued thereafter.

*The 14 January meeting and completion of the application form*

42. Following this meeting, Mr Seys wrote to Mr Berthels by email on 14 January 2021. As with other correspondence between the parties, the e-mail was in Dutch. In translation, it included the following:

> "Dear Jan and Herman,
>
> I have passed on your projections to my dealer colleague who is now discussing with our risk department which conditions for the guarantor we can offer you so that I can come up with the **best proposal.** I estimate that I will not be able to provide this until next week, because one of the colleagues was on sick leave today.
>
> I'll put a little bit of a **link here to our registration form:**
>
> https://apply.ebury.com/sfdc/servlet/SmartForm.html?formCode=currency-services&locale=nl_BE
>
> You do not yet need to include proof of identity and residence here as we will do this later together through a digital tool. You can already **fill in the data about the company and the manager(s).** This **does not commit you to anything**, but it is simply to speed up the procedure should you accept our proposal.
>
> I will give you the information you wanted to know in the **context of the deposit.** There are therefore two sureties, namely the initial deposit and the variable surety:" (Bold in original)

43. The e-mail attached various documents about Ebury, including a document which explained forward contracts and margin calls.

44. On the following day, 15 January 2021, Mr Berthels on behalf of TT submitted the online application form described in Section A above. The form was headed:

> "Currency Services
>
> Welcome to our application form"

45. The form required the applicant to provide various details, such as the key controlling directors. Mr Berthels described himself as the CEO/ Owner. He also uploaded certain documents, such as TT's 2019 Annual report and proof of his address. In relation to the "Purpose" of the application, Mr Berthels said that the origin of funds was Belgium, and the destinations were Japan and the USA. The currencies were Euro, Yen and US Dollars. The total annual volume was € 12 million, with the frequency of payments being 51 to 100.

46. The final section of the form was headed "Terms and Conditions". It contained the box, which Mr Berthels ticked, against the text "I agree to Ebury Terms and Conditions". As previously described, it contained a link to the RA standard terms, and a button which enabled those terms to be downloaded.

47. The evidence submitted on behalf of the Defendants, in Ms Williams' witness statement, was that Mr Berthels did not see a copy of the RA at the time. He only saw it much later, after trades between Ebury and TT had commenced. It therefore appears, and I proceed on the basis, that Mr Berthels did not look at the RA at the time. However, this can only be because he decided not to do so, notwithstanding that it would involve a simple click of one of the links, which were prominently displayed. Mr Berthels (through Ms Williams) makes the point that the RA was not attached to the Application Form. Whilst it may not have been an attachment, it was nevertheless easily accessible.

48. In her witness statement, Ms Williams then explains that Mr Berthels:

> "…was not aware of the clauses in the Relationship Agreement that stipulate English law is the governing law and grant the English courts jurisdiction in relation to any disputes arising thereunder. These provisions were not included on the face of the Application Form itself, they were instead included in the Relationship Agreement that was only referenced by a tick box within the Application Form. It was, I am told, Mr Berthels' natural assumption, when submitting the Application Form, that the contractual relationship between TT and Ebury would be governed by Belgian law and that the Belgian courts would have jurisdiction, given that both Ebury and TT are Belgian companies, the Application Form was in Dutch and his communications with Ebury were in Dutch. Mr Berthels had no reason to expect that English law might be applicable as the contractual arrangement between TT and Ebury had nothing to do with England or questions of English law, nor was it suggested to him at any time that English law might apply."

49. It is apparent from that passage, as would have been obvious from the box that Mr Berthels ticked, that he understood that he was being asked to agree to terms and conditions that would govern TT's contractual relationship with Ebury. Indeed, the above paragraph refers to an assumption made by Mr Berthels "when submitting the Application Form" as to what the terms of the relationship would be.

50. In the course of her submissions, Ms Lacob placed emphasis on the text of the e-mail dated 14 January, and in particular the statement, in the context of completing the application form, and the provision of information by Mr Berthels, that this "does not

commit you to anything, but it is simply to speed up the procedure should you accept our proposal". She said that this statement, objectively interpreted, negatived any possible contractual effect of the terms and conditions to which Mr Berthels signified his assent when he ticked the box when completing the application form on the following day.

51. I disagree. There was nothing in Mr Berthels' evidence, given via Ms Williams, which suggested that he approached the application form, and the ticking of the box, on the basis that it was contractually irrelevant. Indeed, Ms Williams did not even refer to this e-mail in her witness statement: the e-mail was only later introduced by Ebury, in Mr Kouchikali's second statement, in response to different points which Ms Williams had made. There was, therefore, as Mr Dudnikov submitted, a considerable degree of opportunism in the reliance later placed on the 14 January e-mail. In fact, the evidence of Ms Williams, quoted above, shows that Mr Berthels did appreciate – as one would expect when such a box was ticked – the contractual relevance of his assent to Ebury's terms and conditions. Thus, he referred to the parties' "contractual relationship" in the context of his submission of the Application Form – albeit that he said that his assumption was that the contractual relationship would be governed by Belgian law and the Belgian courts.

52. In any event, it is clear from the context of the 14 January e-mail as a whole, and in the context of the prior discussions described above, that the reference to TT not being "committed to anything" meant no more than that there was no commitment on the part of TT actually to do any business with Ebury. The parties were at that stage still discussing the commercial aspects of their relationship, including in particular the provision of a credit line. As described below, those commercial discussions continued for a short time thereafter, until the parties reached a mutual agreement. But there is nothing in the documents which suggests that there was any discussion thereafter, still less any disagreement, about the applicability of Ebury's standard terms to which Mr Berthels had signified his assent on 15 January 2021.

53. Indeed the e-mail of 14 January also referred to the procedure being "speeded up" if Ebury's proposal was accepted. It is difficult to see how the procedure could be speeded up unless TT was agreeable to Ebury's terms and conditions, and indicated its assent to those terms by ticking the box. Agreement to TT's terms was therefore the gateway to an agreement between the parties covering the commercial aspects of the relationship which were under discussion.

*The terms and conditions*

54. The RA contained 27 clauses (and many sub-clauses). It is not necessary to describe them fully, since the parties' arguments focused upon the question of whether they were incorporated rather than the particular effect of any particular clause. Accordingly, it is sufficient for present purposes to highlight a number of features.

55. Clause 1 of the RA provided that its terms would govern the relationship of the parties as follows:

> "1.1 This agreement (the "Agreement") sets out the terms and conditions governing the relationship between the person (acting in the course of business or a profession which it carries on)

> referenced in the Application Form or on our Online System (the "Customer", "you", "your") and Ebury ("us", "we", "our") in respect to certain of our products and services. The Agreement allows you (subject to the terms set out in this Agreement) to:
>
> (a) load funds onto a General Client Account;
>
> (b) make payments using such funds; and
>
> (c) enter into Trades, each a "Service" and collectively, the "Services".
>
> 1.2 This Agreement and the documents referenced herein may be updated and/or amended by us from time to time and at any time. Subject to Clause 9 below, you understand, acknowledge and agree that you will be bound by the latest version of this Agreement (and any documents referred to herein) as is published on our website from time to time (http://www.ebury.com). You may request a copy of the latest version of this Agreement by contacting an Ebury Representative."

56. Clause 1 of the RA thus identified the "Application Form". This was defined in clause 2.1 as follows:

> ""**Application Form**" means the application form completed by you for the purposes of entering into this Agreement."

57. Clause 1 also provided for the parties to enter into "Trades". These were defined as meaning a "Spot Contract, Forward Contract or any other transaction we enter into with you under or in connection with this Agreement". The terms Spot Contract and Forward Contract were themselves defined. The definitions made clear that what was contemplated were foreign exchange contracts:

> ""**Forward Contract**" means a foreign exchange contract under which we agree, on a specific date or specified range of dates in the future (and which may, if agreed, be contingent on a specific event or circumstances occurring) to physically exchange money with you at an agreed exchange rate and at an agreed time to facilitate payments for a commercial purpose for identifiable goods, services or direct investments.
>
> "**Spot Contract**" means a foreign exchange contract under which we agree to exchange money at an agreed exchange rate within two Business Days of the contract being entered into"

58. Clause 3.1 contained a further reference to the Application Form, making it clear that completion of the Application Form online, or by other methods, was necessary in order for a party to use "one or more Services" (as defined in Clause 1.1).

> "3.1 To use one or more Services, you must register to create a General Client Account by either:
>
> (a) using our Online System, clicking on "Open Account" and following the instructions (including by signing the online Application Form); or
>
> (b) completing and signing an Application Form and returning it to us (by email or post)."

59. Clause 4 also contained a reference to the Application Form, and provided for the time when the Agreement (again as defined in Clause 1.1) came into effect:

> "4.1 This Agreement shall take effect between you and us on the earlier to occur of:
>
> (a) you opening a General Client Account on our Online System and signing an online Application Form; or
>
> (b) signing and returning to us a copy of the Application Form (by email or post),
>
> (the "**Effective Date**")."

60. Clause 5 contained various representations and warranties by Ebury's counterparty, including specifically in relation to foreign exchange transactions:

> "5.1
>
> …
>
> (e) you have the necessary experience and knowledge (a) to understand the risks involved in relation to any Trade entered into under or in connection with this Agreement and (b) in relation to foreign exchange markets, products and services;
>
> (f) that any Forward Contract entered into by you is only (a) for non-speculative reasons and (b) to facilitate the payment by you of goods, services and/ or direct investments; …"

61. The terms relating to Forward Contracts, set out in Clause 22, reiterated that the purpose of the parties' trades was not speculative, but rather to facilitate the payment for identifiable goods and services:

> "22.1 From time to time we may agree to enter into a Forward Contract with you. You understand and agree that:
>
> (a) we buy and sell currency for non-speculative purposes only and will not trade with you if you are seeking to enter into Forward Contract(s) as an investment or to profit by pure speculation on foreign exchange rate movements;

> (b) we will only enter a Forward Contract with you if we are satisfied that you are entering such Trade (i) for non-speculative reasons and (ii) to facilitate the payment by you of goods, services and/or direct investments; and
>
> (c) you will immediately notify us if the purpose of your Forward Contract (i) has ceased to become one to facilitate payment of identifiable goods, services and/or direct investment or (ii) could be considered as being for speculative reasons."

62. There were other detailed terms contained in the RA, and unsurprisingly in the context of a contract which contemplated forward foreign exchange transactions, there were provisions relating to the provision of margin, close-out and termination. There were also various provisions which, as Ms Lacob pointed out, sought in substance to disapply aspects of Belgian domestic law. Clause 27.11 and Clause 27.12, previously set out, provided for English law and jurisdiction.

*15 January/ February 2021*

63. Between TT's submission of the application form on 15 January and 11 February 2021, there were various email exchanges between Ebury and TT. Ebury requested, and Mr Berthels provided, further financial/shareholder information. A principal focus of the correspondence was the question of a credit line being provided to TT.

64. On 22 January 2021, Mr Seys e-mailed indicating that he was working on a competitive proposal. He referred to the fact that his colleagues had "normally forwarded you a link that you must access within 24 hours to confirm your email and the terms and conditions". There is no evidence, however, that TT did access that link within the 24 hours or at any other time. In his submissions, Mr Dudnikov did not place any significant reliance on that e-mail. His case focused on the earlier acceptance of Ebury's terms and conditions.

65. On 27 January 2021, Mr Seys wrote to say that he had been able to "pass your story on to our risk team". The risk team had asked for documents to support the story. Mr Seys had been very convincing about TT's success story, but "since we do not yet have a commercial relationship with you, there are a few things they [i.e the risk team] need". The e-mail concluded by referring to the fact that "this is of course a big line with a company with which we do not yet have a commercial relationship".

66. On 3 February 2021, Mr De Beir of Ebury told Mr Berthels that he wanted to inform him about the current state of affairs regarding a possible proposal from Ebury. He was "still negotiating with the various departments regarding the possible conditions". He indicated, however, that they could provide TT with "the following conditions". The e-mail set out the terms for two possible credit lines, one of € 80 million and the other of € 30 million, with different time periods and deposits.

67. The discussions, internal and external, then resulted in an offer of a credit line which was sent by e-mail on 11 February 2021. The offer was for an open position of € 40 million. It began by outlining the basic terms for that position, including the maximum contract length, the purchase currencies (Yen and US Dollars), and the sale currency. This section then concluded with the following:

> "By acknowledging receipt of this email, you agree that the terms set forth herein will apply to all of your further foreign exchange forward contracts with Ebury
>
> Please accept the terms of this email by replying to this email and confirming your authority to act on behalf of Technical Touch BVBA."

68. There was then a heading: "Your Obligations". This explained that once Ebury had received instructions to agree a forward contract, TT had obligations to transfer margin within a specific time period. At the conclusion of that section were the words:

> "Our Terms and Conditions that you received from us on 10-2-2021 apply to this e-mail"

69. In fact, there is no evidence that any Terms and Conditions were in fact received on 10 February 2021, and accordingly Mr Dudnikov on behalf of Ebury again did not place any significant reliance on that provision of the email.

70. The e-mail then went on to give further detail of the "credit terms", under the heading "Your credit terms are". It included a worked example of the margin requirements.

71. On 18 February 2021, Mr Berthels e-mailed to confirm his acceptance of the "terms and conditions in this e-mail" and provided his confirmation that he could act on behalf of TT.

72. By the end of February 2021, TT had placed a number of forward contracts with Ebury.

*April/May 2021: increased credit line and the Guarantee*

73. By April 2021, the parties were in discussion as to a possible increase in the credit line. In an email of 21 April 2021, Mr Berthels explained that the reason for the additional hedges was that his company was growing very fast with the support of a Japanese publicly traded company. On the previous day, Mr Veerman of Ebury had told Mr Berthels that Ebury's risk department had indicated that a personal guarantee would be necessary in order to be able to offer additional forward contracts.

74. On 18 May 2021, Mr Berthels signed the Guarantee. Although it was not properly executed as a deed, Ms Lacob accepted that it was nevertheless contractually binding. As previously described, it contained an English law and English jurisdiction clause. The Guarantee was accompanied by a signed Declaration. This stated, amongst other things, that the guarantor's obligations under the Guarantee were "subject to any general principles of law limiting obligations, legal, valid, binding and enforceable".

75. On 19 May 2021, which was the day that Mr Berthels returned the signed copy of the Guarantee, Ebury offered to increase the credit line to € 75 million. The e-mail offer was in a similar format to that sent, and accepted, in February 2021, except that it had an open position limit of € 75 million. It again referred to terms and conditions sent on 10 February 2021. On 19 May 2021, Mr Berthels on behalf of TT e-mailed to confirm his agreement to the "credit terms and conditions". There was later, in February 2022, a further increase to € 90 million.

*April 2022*

76. Following the increased credit limits, TT's open position had reached around € 86 million by April 2022. On 12 April 2022, Ebury made a margin call of € 2.169 million. This was not paid, and Ebury then closed out several of TT's trades. In consequence, a sum of around € 2.5 million is alleged by Ebury to have become due as a debt pursuant to clause 24.2 (d) of the RA.

77. Subsequently, in early May 2022, TT's remaining trades were closed out, resulting in a claim for a "Termination Amount" (as defined in clause 11.2 of the RA) of € 4.8 million. A formal letter of demand was sent to TT on 15 July 2022, and a letter of demand under the Guarantee was sent to Mr Berthels on 18 July 2022. No payments were made in response. In the meantime, the Defendants had commenced proceedings in Belgium.

*The Belgian proceedings*

78. On 4 May 2022, the Defendants commenced proceedings against Ebury in the Dutch-language Business Court in Brussels under case reference A/22/01432. They sought declarations of non-liability and that the RA and Guarantee were void (as well as alleging that Ebury was in breach and seeking provisional damages of €1). The Defendants did not give Ebury any prior notice of the intended proceedings.

79. Ebury has disputed the Belgian court's jurisdiction on the basis of the jurisdiction agreements in the RA and the Guarantee. However, on 27 May 2022, the Belgian court declined Ebury's request for bifurcation, and directed the question of jurisdiction to be determined at the same time as the merits.

80. Ebury served its first round of written submissions, confined to a jurisdiction challenge, on 27 July 2022. The Defendants served their submissions on 7 October 2022. Further written submissions are due on 7 December 2022 (Ebury); on 30 January 2023 (Defendants); and on 30 March 2023 (Ebury). The combined hearing on jurisdiction and merits is scheduled for 3 May 2023. In theory, a judgment must be rendered within one month after the hearing. However, according to the evidence of Mr Derval, in practice the Brussels courts often take longer, and therefore Ebury "could have to wait until the autumn of 2023" for the court's decision on jurisdiction and the merits. If, for some reason, the hearing date is postponed (which is not unusual in the Brussels courts), the judgment would be further delayed. The Brussels courts are generally known for their backlog of cases and proceedings may take years to be concluded, because of the possibility of appeal and a potential challenge before the Court of Cassation.

*English proceedings*

81. As described above, Ebury issued the present proceedings, together with the ASI application, on 29 July 2022. This was 2 days after filing its first written submissions in Belgium, disputing jurisdiction. There was no argument by the Defendants that ASI relief should be refused on the grounds of any delay by Ebury.

## C2: The law governing the incorporation issue

82. The question of "incorporation" arose in the context of the jurisdiction clause in the RA. Ms Lacob did not, and could not sensibly, suggest that there was any incorporation issue which arose in relation to the Guarantee. This is because the Guarantee was signed by Mr Berthels, and there could be no serious argument concerning his consent to all of the terms set out therein. The Guarantee was, as described above, a necessary pre-condition for Ebury offering an increased credit line to TT in April 2021, and TT thereafter took full advantage of that increase.

83. The incorporation issue, which arose in relation to the jurisdiction agreement in the RA, gave rise to the question: what law determines whether the jurisdiction agreement, contained in Ebury's standard terms, was incorporated into the parties' agreement? A number of provisions of Rome I, in particular Articles 3 (5) and 10, are relevant to that question. It was common ground that Rome I, which is set out in Regulation (EC) No 593/2008, is "retained" EU law. It therefore remains – notwithstanding Brexit – applicable to issues concerning applicable law when they fall for consideration by an English court.

84. Article 3 (5) of Rome I provides:

> "The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13".

85. Article 10 provides:

> "1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.
>
> 2. Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1."

86. There was a considerable degree of common ground, in the parties' arguments, as to how these provisions applied in the present context. Subject to the important question of whether Article 10 (2) applied – so as to make Belgian law applicable to the question of whether there was consent – it was common ground that the question of incorporation was to be considered by reference to English law. Accordingly, both parties' submissions addressed the question of English law in some detail. The Defendants' primary submission was that Belgian law applied to the issue of consent because of Article 10(2), but Ms Lacob's written submission first analysed the issue of consent by reference to English law as the putative law applicable to the contract. Similarly, I address (in Section C3 below) the issue of incorporation under English law, before considering the relevance and impact of Belgian law in Section C4 below.

87. In view of the common ground between the parties, it is not necessary to analyse in detail why English law is – unless Article 10 (2) applies – the relevant law which applies

to the incorporation issue. In summary, the reason is that the question of whether a jurisdiction clause has been incorporated is governed by the putative law applicable to the contract (sometimes known as the "matrix contract") which contains that clause: see *Dicey, Morris and Collins: The Conflict of Laws 16th edition*, paragraph 12-081 and *Seniority Shipping Corpn SA v City Seed Crushing Industries Ltd* [2019] EWHC 3541 (Comm) para [12] (Andrew Baker J). In the present case, the putative proper law of the matrix contract is – again subject to the possible application of Article 10 (2) – English law, by virtue of the express choice of English law in that contract.

88. Against this background, I turn first to the question of whether, applying English law, Ebury has demonstrated, to the requisite "high degree of probability" standard, that the jurisdiction clause was incorporated into the RA.

### C3: Incorporation under English law

89. Mr Dudnikov submitted that the RA was concluded when Mr Berthels, acting for TT, ticked the box on the application form expressly confirming TT's agreement to Ebury's RA terms and conditions. He says that the relevant test, as set out in the passages in *Chitty* summarised and quoted in Section A above, was whether reasonable notice of the terms relied upon was given. That test was met. The application form contained a hyperlink to the terms and conditions. They were available in Dutch, which Mr Berthels was able to access, read and understand. Any diligent director would have done so, before binding their company.

90. I largely accept this straightforward submission, and conclude that – applying English law – Ebury has demonstrated the existence of an English jurisdiction agreement to the requisite standard. Ms Lacob on behalf of the Defendants advanced a number of arguments as to why, applying English law, consent was not established in this case to the requisite standard.

91. The focus of her argument was upon the "ancillary" nature of jurisdiction clause in the terms and conditions. She contended that agreement between the parties was only reached, initially, on 18 February 2021, when Mr Berthels accepted the credit terms set out in Ebury's 11 February 2021 e-mail. She said that this exchange of correspondence did not contain a sufficient reference to Ebury's standard RA terms: it wrongly referred to terms having been sent on 10 February, when no such terms had been sent. She was inclined, at least at some stages in her argument, to accept that the agreement between Ebury and TT was subject to at least some of Ebury's RA standard terms. In her written argument, she drew a distinction between the "substantive commercial provisions" of the RA, and the jurisdiction clause which was only an "ancillary" provision. In her oral submissions, she said that there obviously had to be some terms and conditions which applied to the relationship and dealings between Ebury and TT, but she said that those were the commercial terms which were germane to the relationship. They did not therefore include the ancillary jurisdiction clause.

92. I do not accept this analysis – or at least it does nothing to persuade me against the conclusion that Ebury has crossed the "high degree of probability" threshold. It was indeed, as Ms Lacob submitted, obvious that there had to be some terms and conditions that would govern the parties' relationship. In my view, there was clear assent to Ebury's standard terms when Mr Berthels ticked the relevant box on 15 January 2021. It is because of the assent that was clearly given at that stage that the parties'

relationship, albeit supplemented by later agreements concerning the detail of the credit terms, was governed by the standard RA terms. It is not necessary to search beyond 15 January 2021 to find the reason why, as Ms Lacob was inclined to accept, the parties were bound by at least some of the terms in RA. In my view, however, they were bound by all of the terms, because the clear terms of TT's agreement, as reflected in the box that was ticked, was to all of the terms, not merely to some of them.

93. I accept that, at that stage, it can reasonably be argued (as Ms Lacob submitted) that there was no concluded contract between the parties for the opening of the account described in the RA standard terms. This is because it appears, from the documents, that Ebury had not completed, or indeed started, a due diligence exercise of considering the documents submitted by TT. Ebury did not at that stage communicate its acceptance of TT's application. It is also the case that the parties had only just begun their discussions about the size of a possible credit line, and the discussions on this issue went on for some weeks.

94. However, I do not consider that this alters the position under English law. As shown by the discussion in *Chitty*, incorporation of contractual terms under English law depends upon sufficient notice being given. Such notice can be given before or at the time when the contract is made: see *Chitty* para 15-009. Even if a binding contract between the parties was not concluded until a few weeks after 15 January 2021, that does not affect the question of whether sufficient notice was given at an earlier stage. There is no reason why such notice should not be given, as here, at the time when the discussions between the parties begin in earnest. Indeed, that would be a sensible and appropriate time to give such notice, with the terms then providing the framework – or "umbrella" as Mr Dudnikov described it – for their continuing discussions and any further consideration on both sides (including due diligence) as to whether they wished to consummate a commercial relationship.

95. It is equally sensible and appropriate for a party to seek, as here, express assent at an early stage to the relevant terms and conditions that are to govern the relationship. This avoids some of the difficulties that have arisen in past cases where issues have arisen as to whether a party has received sufficient notice. Here, the question of notice was put beyond doubt by the express assent that was sought and given.

96. Mr Dudnikov submitted that the assent meant that there was an "umbrella" contract between the parties at that stage. I do not think that this necessarily adds to the analysis. I am also inclined to think that neither party was, as at 15 January 2021, committed to any contract. For example, Ebury's due diligence may have identified difficulties with TT which meant that they did not want them as a counterparty. Equally, TT's willingness to deal with Ebury was dependent upon whether Ebury could offer sufficiently attractive credit terms. However, the parties were clearly in agreement on 15 January 2021 that if they did move forward together contractually, the RA standard terms (and all of them) would be applicable to their dealings. That is, on any view, the effect of the assent that was given when the box was ticked on 15 January.

97. Although Ms Lacob referred me to the correspondence subsequent to 15 January, there was nothing in that correspondence which suggested that the assent previously given to the RA standard terms was no longer relevant or applicable. There is no documentary evidence of any further discussion of those terms, let alone any disagreement as to their application.

98. Indeed Ms Williams' evidence, when dealing with the Guarantee signed in April 2022, was that Mr Berthels had informed her that:

> "… he was told by Ebury that the contents of the Application Form and the Guarantee were non-negotiable, that the terms could not be altered or negotiated and that TT's only option was to sign the documents as drafted if it wanted to enter into a commercial relationship with Ebury and receive Ebury's services".

99. This aspect of Mr Berthels' evidence was in dispute. However, it would, if accepted, further demonstrate the fact that Mr Berthels was willing to assent to Ebury's terms, if only because he had no other option if he wanted to deal with Ebury (as indeed he did). The same conclusion follows, in my view, from Mr Berthels' evidence that he did not read Ebury's terms at any relevant stage. There is much force in Mr Dudnikov's submission that a diligent director would have done so. But ultimately this does not matter from an English law perspective, which (as Ms Lacob accepted) requires an objective approach to the issue of contractual formation. If Mr Berthels chose to agree to Ebury's terms without reading them, then that was a matter for him. It does not affect the question of whether reasonable notice of those terms was given to him, or indeed, whether or not, considering the matter objectively, he did assent to them.

100. Ms Lacob placed reliance on a line of authority which concerned the incorporation of arbitration or jurisdiction clauses from one contract into another. The classic example is where a bill of lading incorporates charterparty terms, and the issue arises as to whether an arbitration or jurisdiction clause in the charterparty is applicable to the bill of lading contract. A similar issue can arise where a reinsurance contract incorporates the terms of an underlying insurance. This was the source of her argument based on the "ancillary" nature of the jurisdiction clause in the standard RA terms, and the contrast which she drew with other "commercial" terms in the RA which were "germane" to the parties' dealings.

101. In my view, the Defendants gain no assistance from that line of authority. The present case, based on the assent given on 15 January, does not seek to import the terms of one concluded (and different) contract into another. Rather, it is a straightforward case of assent to a set of contractual terms. As previously discussed, the assent was to all of the terms: there was nothing in the box ticked by TT which could be construed, looking at the matter objectively, as an assent to only some of the terms. The argument advanced by Ms Lacob is essentially the same argument that was rejected by Christopher Clarke J in *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2010] EWHC 29 (Comm) para [51]. There is also a similar, earlier, decision of Christopher Clarke J in the context of Article 23 of the Brussels Convention. In *Africa Express Line Limited v Socofi S.A.* [2009] EWHC 3223 (Comm), Christopher Clarke J said at paras [28] – [30]:

> "[28] Where the contract refers expressly to one party's standard terms it is not necessary for there to have been a specific reference to the jurisdiction clause for the purposes of establishing the real consent required by Article 23: *7E Communications Ltd v Vertex Antennentechnik GmbH* [2007] 1 W.L.R.2175, 2185, para [32] (CA) *Credit Suisse Financial Products v Société Générale d'Entreprises* [1997] CLC 168, 171

> – 172 (CA) (per Saville L.J., delivering the only reasoned judgment of the Court in a case involving the 1992 ISDA Master Agreement). In those circumstances it is irrelevant that the party against whom the jurisdiction clause is sought to be enforced does not have a copy of the terms and conditions. Further the parties' agreement may be contained in more than one document e.g. by an exchange of correspondence: 7E Communications para 33.
>
> [29] So there will be a valid agreement in writing where a quotation is made on one party's own standard terms and is accepted, even though the acceptor did not have a copy of those terms. In *7E Communications* a German company faxed a quotation to an English company offering to sell certain satellite equipment on its general terms and conditions. These contained an exclusive German jurisdiction clause. No copy of those terms was sent to the claimant, which faxed the defendant a purchase order for the goods in the quotation. It was held that there was an agreement in writing for the purpose of Article 23(1).
>
> [30] Where the terms of a wholly separate contract are incorporated, different considerations apply..."

102. I therefore reject the Defendants' arguments in so far as they are based on English law.

**C4: Belgian law and Article 10 (2)**

*The parties' arguments*

103. The Defendants submit that the effect of Articles 3 (5) and 10 (2) of Rome I is that the question of consent to the English governing law clause in the RA terms and conditions is to be decided under Belgian law if it would be unreasonable to apply English law. I did not understand this proposition to be in dispute.

104. I was referred by the parties to a number of authorities concerning Article 10 (2) (or its predecessor): *Oldendorff v Libera Corp* [1995] 2 Lloyd's Rep 64 (Mance J); *Welex AG v Rosa Maritime Ltd* (The 'Epsilon Rosa') (No 2) [2002] EWHC 2035 (Comm) at paras [8] – [11] (David Steel J); *Ulusoy Denizilik AS v Cofco Global Harvest Trading Co Ltd* [2020] EWHC 3645 (Comm) at [28]-[39] (Bryan J); and *Dicey, Morris & Collins* at para 32-142. All of the above English decisions concerned international shipping contracts of one kind or another, rather than the banking/foreign exchange arrangements which were made in the present case. In *Oldendorff*, Mance J said that the application of Article 10 (2) should not be approached by applying English law or "the attitude of English domestic law". Rather, it is necessary to adopt a "dispassionate, internationally minded approach".

105. The Defendants submitted that the present case was very different to the international charterparty in issue in *Oldendorff*. Here, the parties' agreement had no connection with England other than by way of the disputed choice of law and jurisdiction clauses. The

present case is very far from an international shipping context. It is a contract by a Belgian regulated financial services entity to provide services in Belgium to a Belgian company who would pay for those services in Belgium in Euro. The position was akin to an English bank providing financial services to an English company: the natural expectation would be that English law applies.

106. Ebury submitted that the burden was on the party which sought to displace the effect of Article 10 (1) by reliance on Article 10 (2). The court should have regard to all the circumstances of the case, not solely those in which the party claiming that it has not consented to the contract has acted. Neither of those further propositions was disputed. Relying upon the approach of David Steel J in *The Epsilon Rosa* at paragraph [12], they submitted that the present transactions were entirely conventional. The Defendants in this case were willing counterparties: TT had initially sought a credit line, and this had been increased at the request of Mr Berthels who had willingly provided the Guarantee. Their conduct was inconsistent with a lack of consent. If Mr Berthels failed to read the terms that were offered, that was his own fault and was not relevant.

107. Ebury also submitted that the principles of Belgian law were in any event materially similar to English law. They do not require a counterparty to have actually read the terms sought to be incorporated so long as they had a reasonable opportunity to acquire knowledge. Ticking a box on an online application form, containing a hyperlink to the terms, is sufficient for the purposes of acceptance.

*Discussion*

108. Adopting a dispassionate, internationally minded approach, I do not consider it unreasonable to apply English law to the relevant questions of incorporation in this case. It is of course true that the RA was a transaction between two Belgian companies. It was, however, apparent from the very first conversation between Mr Seys and Mr Claessens that both companies had or were associated with international operations in different countries. The intended subject-matter of the parties' commercial relationship was foreign exchange and payments in connection with TT's international operations. The commercial arrangements under discussion involved a multi-million Euro credit line, for the purpose of forward foreign exchange transactions, to a company which presented itself as being involved in very substantial overseas business. Accordingly, when the circumstances are considered as a whole, the transaction had a significant international flavour and could not be regarded as a purely domestic.

109. It also seems to me that the Defendants' case, that it is unreasonable to apply English law, is based significantly on the evidence of Mr Berthels that he did not read the terms and conditions to which he assented. However, in my view it is self-evident that they should have been read by a director in Mr Berthels' position. He was negotiating for, and ultimately committing his company, to contractual obligations towards Ebury, in respect of transactions involving many millions of Euros. It is surprising, to say the least, that Mr Berthels should have shown (on his evidence) no interest at all in looking at the terms to which he was prepared to assent when he ticked the box, or indeed subsequently. It is in my view all the more surprising that his neglect to do so can then be prayed in aid in support of the proposition that it would be unreasonable to apply English law which (as set out in Section C3 above) would consider that sufficient notice of the contractual terms had been given so that TT was bound by the terms to which Mr Berthels had given consent.

110. In *Oldendorff*, one of the factors that influenced Mance J was that the relevant charterparty form had been produced to the defendant, and that it "was clearly produced in order to be studied". He inferred that, in that case, it had actually been studied. However, he went on to say:

> "To ignore the arbitration clause would appear contrary to ordinary commercial expectations, when everything suggests that the defendants must actually have considered and accepted the clause (and even if they did not, ordinary commercial practice and common sense would suggest that they should have done) …" (my emphasis)

111. Here too, in my view, ordinary commercial practice and common-sense dictates that TT should have considered the terms to which Mr Berthels was prepared to assent, and where his ticking of the box objectively indicated his assent to his counterparty. I would be surprised if this were to be regarded as a parochial, English view rather than a dispassionate international one. Indeed, it seemed to me that the same conclusion, as to incorporation of the relevant clauses, would be reached if I were considering the case in the context of Article 23 of the Lugano Convention or the equivalent provisions in the Brussels Recast Regulation: see *Public Institution for Social Security v Banque Pictet & Cie SA* [2022] EWCA Civ 29 at [71], [76]-[77].

112. It is also relevant (see *The Epsilon Rosa* paragraph 11 (c)) that it is not here suggested that there is anything unreasonable in holding TT bound by all of the "commercial" terms in the RA standard terms. As described above, Ms Lacob accepted at various points in her argument that there must be some terms applicable to the parties' relationship, other than those set out in the e-mails relating to the credit facility, and that these terms are the "commercial" terms forming part of the standard terms. When considering the question of consent in the context of Article 10 (2), however, I see no reason to draw a distinction between consent to the "commercial" terms in the document which Mr Berthels did not (on his case) take the trouble to read, and the jurisdiction and applicable law provision. The reality is that he was willing to agree, and signify his consent, to Ebury's standard terms, whatever they happened to say.

113. In that context, it is noteworthy too that there is nothing in the evidence which suggests that Mr Berthels would have been unwilling to agree to the jurisdiction and applicable law provisions, had he considered them. That is reinforced by the fact that some weeks after the parties' commercial dealings started, Mr Berthels signed the Guarantee which contained express choice of English law and English jurisdiction clauses. His signing of the Guarantee then resulted in substantially increased dealings between the parties, because he successfully negotiated a higher credit limit. Since English law and jurisdiction clauses were contained in the Guarantee, then Mr Berthels should have appreciated the likelihood, or at least strong possibility, that they were also contained in the RA itself. He was nevertheless content to continue trading, at higher volumes, with that knowledge (actual or constructive). Although these matters occurred after the initial dealings between the parties, they reinforce my conclusion that there is nothing unreasonable in applying English law to the questions of consent and incorporation in this case.

114. These conclusions mean that it is not necessary to discuss in any detail the disagreement between the Belgian law experts as to the effect of Belgian law and whether this is in fact materially different to English law.

Conclusion

115. Accordingly, Ebury has established the relevant jurisdiction clauses, both in the RA and the Guarantee, to the requisite standard: a high degree of probability.

## D: Are there strong reasons to refuse anti-suit relief?

*The parties' arguments*

116. The Defendants submitted that it would not be just or convenient to grant an anti-suit injunction. They made 9 points, which were to some extent interrelated, as follows.

(1) If there is any residual dispute about the proper incorporation of the jurisdiction or governing law clauses, these issues are best considered by the Belgian court which would be able to assess the objective meaning of the communications between the parties in their native language (Dutch). Whether the Belgian Court does so by reference to English law or Belgian law is somewhat academic; what the court will be looking to determine is whether there was real consensus on jurisdiction. It will do so by reference to the exchanges between the parties which all took place in Dutch. Beyond this issue:

(2) The reality is that this case is (or will be) all about the validity of the parties' agreements under mandatory provisions of Belgian law. That is what the Belgian proceedings are about and that is likely to be the substance of any defence which would be filed in these proceedings. The interests of justice are best served by the submission of the dispute to a single tribunal which is best fitted to make a comprehensive judgment on all the matters in issue and which will do so in relatively short order.

(3) The case as to whether the parties' agreements are void concerns the application of largely untested Belgian financial laws. This court would be bound under Rome I to consider the conflict between Belgian law experts on these points as disputed evidence of fact. The Belgian Court would consider those issues directly as matters of Belgian law.

(4) All the parties are closely connected with Belgium. All the witnesses in this case and all the documents and evidence on issues of fact are in Belgium. It is the very opposite of vexatious or oppressive for this case to be litigated in Belgium.

(5) The Belgian proceedings were commenced first and are far more advanced than the English proceedings. The dispute is due to be finally determined in May 2023 (with judgment likely to be handed down within a month of that). There is no prospect of the English proceedings (which would have to involve consideration of the Belgian mandatory financial laws) being determined by then.

(6) Ebury would not be prejudiced by having to sue in Belgium; indeed they would more easily be able to enforce any judgment obtained against the Defendants there. They have no assets or presence in the UK.

(7) An anti-suit injunction would have no impact on the Belgian proceedings. The Belgian procedural order, currently in place, will remain in place regardless and the Belgian court, which is likely to find that it has jurisdiction to determine the dispute, will not recognise an anti-suit injunction. There is therefore more than a risk of inconsistent decisions. That is almost an inevitable outcome.

(8) This would mean duplication in the time and expense of the proceedings for both parties. This would be particularly onerous for the Defendants who have no connection to the UK and had no expectation of ever litigating here.

(9) This is a €4 million dispute, with potential personal liability for Mr Berthels. The cost of litigating it in England will far outweigh the cost of litigating in Belgium. For the Defendants, that creates a very significant burden and will operate substantially to their disadvantage.

117. Ebury submitted that there were no strong reasons here. They argued, in particular, that:

(1) Many of the points relied upon were simply "forum conveniens" considerations. These are irrelevant to the exercise of the court's discretion as to whether or not to grant an injunction.

(2) Even if allegedly mandatory provisions of Belgian law were of any relevance as a matter of conflicts, they would still not amount to a strong reason to refuse an ASI.

(3) There were a number of answers to the argument that an English ASI may not be enforced by the Belgian court. In particular, it is not the habit of the English court, in considering whether or not it will make an order, to contemplate the possibility that it will not be obeyed. There was in any event no evidence that the Defendants would disobey an ASI, and they risked contempt proceedings or being debarred from defending Ebury's claim if they were to do so.

(4) In so far as the Defendants were submitting in Belgium that English law should not be applied to the relevant agreements at all, that was a strong reason to grant relief, in order to ensure that the correct applicable law was applied to the contracts.

*Discussion*

118. The authorities establish that the burden is on the Defendants to show strong reasons to refuse relief which restrains the pursuit of proceedings brought in breach of a forum clause. I do not consider that any sufficiently strong reasons have been shown here.

119. In *UBS v Nordbank* (quoted above), the Court of Appeal said that, in the present context of ASI relief and other similar contexts, it was not open to a party to start arguing about the relative merits of fighting an action in the foreign jurisdiction, as compared with fighting an action in London, where the factors relied on would have been foreseeable

at the time that they entered into the contract. That principle has recently been applied by Calver J in *Louis Dreyfus Company Suisse SA v International Bank of St Petersburg* [2021] EWHC 1039 (Comm) at [23] and *ZHD v SQO* [2021] EWHC 1262 (Comm) at [21]. In the former case, the judge said that *forum conveniens* considerations do not amount to strong reasons because the parties can be taken objectively to have foreseen considerations of relevant convenience or inconvenience of forums for dispute resolution at the time of contracting and are therefore encompassed by the parties' agreement. In that latter case, he added that it was not necessary for the applicant for an ASI to show that England is the natural forum.

120. Accordingly, a number of the factors relied upon by the Defendants can in my view be disregarded and are of no substantial weight, specifically: that the documents are in Dutch and can best be considered by a Belgian court, that the parties are closely connected with Belgium and that witnesses and evidence on issues of fact are there.

121. I also do not consider that the existence of the Belgian proceedings, or the fact that they are (slightly) more advanced than the English proceedings, is a factor of any weight, let alone a strong reason. Those proceedings have been commenced in breach of a jurisdiction agreement which, for present purposes, has been established to a high degree of probability. The Belgian proceedings are not far advanced. They were subject to a prompt jurisdictional challenge, which remains to be determined.

122. The principal focus of the Defendants' submissions was the desirability of litigating in Belgium the questions as to the effect of the mandatory provisions of Belgian law, coupled with the fact that there is likely to be a speedier determination (i.e. speedier than in London) of those issues (and indeed the case as a whole) if the timetable leading to a hearing in May 2023 is adhered to. It seems to me that this could fairly be regarded as an argument based on foreseeable *forum conveniens* factors which (as described above) are generally of no weight.

123. However, irrespective of that point, I do not consider that it provides a strong reason for refusing the ASI relief sought. For present purposes, even though the case in England is at a very early stage, I shall proceed on the basis that the Defendants are likely to raise an argument as to the validity of the agreements under mandatory provisions of Belgian law. The Defendants' argument in favour of the application of Belgian law, notwithstanding that English law is the applicable law of the agreements by express choice, will be based upon Article 3 (3) of Rome I. This provides:

> "Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement."

124. It is clear, however, that there will be a substantial issue as to whether Belgian law is relevant as a result of Article 3 (3). Mr Dudnikov referred me to a line of English authority on that issue, including *Banco Santander Totta SA v Cia Carris de Ferro de Lisboa SA* [2016] EWCA Civ 1267. These authorities establish that Article 3 (3) is a limited exception to the policy or principle or starting point of party autonomy, and is to be construed narrowly. In that case, as in some subsequent cases – most recently

*Banca Intesa Sanpaolo SpA v Comune di Venezia* [2022] EWHC 2586 (Comm) (Foxton J) – the attempt to invoke Article 3 (3) failed.

125. It is not necessary or appropriate to express even a preliminary view as to whether Belgian law will be applicable as a result of Article 3 (3). There will clearly be a substantial argument, on the part of Ebury, that the narrow exception to party autonomy does not apply on the facts of the present case. However, even assuming that it will indeed be an issue in the English proceedings, and that therefore Belgian law evidence will be required, I do not consider that that provides a strong reason for declining to protect the parties' jurisdiction agreement by granting anti-suit relief. This simply means that the Defendants have a Belgian law argument. But the relevance of that argument is yet to be determined, and it may turn out that Belgian law has no relevant application. In any event, as shown by the cases in which Article 3 (3) has been invoked, including the recent *Venezia* case, the Commercial Court is very well accustomed to hearing and deciding issues of foreign law in that context and indeed many others.

126. There is one further point on Belgian law which arises, and upon which Mr Dudnikov relied. The effect of the evidence of the Defendants' expert, Mr Vandermeulen, is that the Belgian courts are likely to, or at least may very well, find the English choice of law clause to be invalid. This issue is addressed in Section 2, paragraphs 35 – 48 of his report. In my view, this provides a positive reason why the English court should restrain the proceedings, essentially for the reasons given in *Catlin Syndicate Ltd and others v Amec Foster Wheeler Corporation* [2020] EWHC 2530 (Comm) paras [36] and [67]. In summary, it is prejudicial to a party if it is required to litigate in a jurisdiction which will or may apply a different applicable law from that which they parties have agreed. The fact that a party is or may be seeking the application of a law contrary to that agreed between the parties provides a strong reason why an injunction should be granted, in order to protect the integrity of the parties' bargain. In addition, if English law is indeed the applicable law, then it is more likely to be applied reliably by the English Commercial Court rather than the Belgian court, which would presumably need to receive expert evidence as to English law.

127. The Defendants rely upon the relative speed with which the cases may be decided in Belgium as compared to England. It seems to me that this is really a *forum conveniens* point and that it is not a significant factor. In any event, there is some uncertainty as to whether the case will actually be decided by the Belgian court in May 2023, since postponements of cases often happen. Furthermore, the final resolution of the case may in any event be quicker in England, the contractual forum, bearing in mind the availability of appeals in Belgium, and the restrictions on appeals which apply in England.

128. The only remaining point is the Defendants' argument based on the effectiveness of anti-suit relief. I proceed on the basis that it may not be possible for Ebury to invoke the assistance of the Belgian court in giving effect to an anti-suit injunction. However, I have no clear evidence from the Defendants that they would in fact disobey an anti-suit injunction granted by the English court. If the injunction were to be disobeyed, then there may be effective measures that Ebury could take. In the past at least, TT has had debtors in England, and any future debts may be liable to confiscation. There is also a potentially effective sanction whereby the Defendants, if they disobey the injunction may be debarred from defending the claim. Furthermore, as Mr Dudnikov submitted, it is not the habit of the English court in considering whether or not it will make an order

to contemplate the possibility that it will not be obeyed: *Stichting Shell v Krys* [2014] UKPC 41 at [37] per Lords Sumption and Toulson.

129. Accordingly, the Defendants have failed to show any strong reasons why the ASI should not be granted in order to protect the integrity of the parties' agreements.

## E: The Defendants' jurisdiction application

130. In the light of these conclusions on the ASI application, the Defendants' application challenging the jurisdiction of the court, or seeking a stay or similar relief, must fail. In summary this is because, in the light of my earlier conclusions:

131. First, there is a good arguable case for service out pursuant to CPR 6.33 (2B) (b), and accordingly the English court has jurisdiction in principle.

132. Secondly, there are no strong grounds for the court declining, whether by stay or otherwise, to exercise its jurisdiction in the light of the parties' contractual agreement.

133. It is therefore not necessary to express a view as to whether there is also a good arguable case that the claim falls within CPR 6.33 (2B) (a), which applies where the 2005 Hague Convention is applicable. The parties addressed that point in some detail, but its only relevance is that, if the 2005 Hague Convention applies, the English court would be bound to accept jurisdiction: it would have no discretion to stay the proceedings or set them aside on jurisdictional or *forum non conveniens* grounds. In view of the fact that I would not be prepared to do so in any event, even if the Hague Convention were inapplicable, it is not necessary further to consider the question of the applicability of the 2005 Hague Convention.

## F: Conclusion

134. I will grant an anti-suit injunction, and I will hear the parties as to the precise form of that order.

135. The Defendants' jurisdictional applications are dismissed, and again I will hear the parties as to the precise form of the order.