Neutral Citation Number: [2012] EWHC 1331 (COMM)

Case No: 2011-1175

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 May 2012

Before :

MR JUSTICE ANDREW SMITH

- -

Between :

Citigroup Global Markets Ltd	**Claimant**
- and -	
Amatra Leveraged Feeder Holdings Ltd and ors	**Defendants**

- -
- -

Antony Zacaroli QC and David Allison
(instructed by **Allen & Overy LLP**) for the **Claimants/Respondents**

Simon Picken QC and Sushma Ananda
(instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**)
for the **Defendants/Applicants**

Hearing date: 27 April 2012

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ANDREW SMITH

Mr Justice Andrew Smith:

Introduction

1. The fourth and third defendants ("AA" and "GA"), residents of Saudi Arabia, are a businessman who has or had great wealth and his son. The first defendant ("Amatra"), which is incorporated in Jersey, and the second defendant ("Ajial"), which is incorporated in the Cayman Islands, are corporate vehicles of family trusts, the settlor of Amatra's trusts being AA and the settlor of Ajial's trusts being GA. The defendants are all represented by Mr Simon Picken QC and Ms Sushma Ananda.

2. The claimant, incorporated in England and Wales, is in the Citicorgroup of companies. I shall refer to them as "CGML". Citigroup Global Markets Inc ("CGMI"), which is incorporated in the United States of America, is also in the group, as are Citibank NA and Citibank (Switzerland) SA: I shall refer to Citibank (Switzerland) SA together with Citibank NA (Geneva Branch) as "Citibank Switzerland". According to CGML's evidence, in or around early 2006 GA moved the family's banking from Deutsche Bank to Citigroups Private Bank in Geneva, Citibank (Switzerland) SA. CGML are represented by Mr Antony Zacaroli QC and Mr David Allison.

3. On 5 October 2011 CGML issued their claim form in these proceedings for declarations against the defendants. On 24 November 2011 Flaux J gave them permission to serve it out of the jurisdiction on the four defendants. The grounds upon which CGML sought and were granted permission so to serve it on Amatra and Ajial (to whom together I shall refer as the "corporate defendants") were that their claims are in respect of contracts governed by English law (CPR 6BPD para 3.1(6)(c)) and containing a term that the English court shall have jurisdiction (CPR 6BPD para 3.1(6)(d)). The basis on which they sought and obtained permission to serve it on GA and AA was that there is an issue between them and other defendants which it is reasonable for the court to try, and GA and AA are necessary or proper parties to the claims (CPR 6BPD para 3.1(3)).

4. The claim form was served on the corporate defendants on 3 and 13 January 2012 respectively, and on 30 January 2012 they made an application challenging the jurisdiction of the court over some claims in the proceedings (the so-called affiliate claims, an expression that I explain below at para 22) and for a stay of the whole proceedings. GA and AA agreed that their solicitors, Quinn Emanuel Urquhart & Sullivan UK LLP ("Quinn Emanuel"), should accept service of the proceedings on the basis that they were deemed to have been served on them in Saudi Arabia and that any applications that they made challenging jurisdiction or to have the proceedings stayed should be heard at the same time as those of the corporate defendants. On 23 March 2012 they made such applications.

The agreements made by CGML

5. This litigation arises from agreements into which CGML entered in May 2006. On 9 May 2006 they made two Option Transaction agreements (to adopt the terminology used by the parties), one with each of the corporate defendants. They provided the corporate defendants with synthetic leveraged exposures to the performance of underlying funds that comprised investments previously owned by the family of AA

and GA and transferred to CGML. The Option Transaction agreements comprised a confirmation, which stated that CGML entered the transaction "as principal and not as agent for any other party", and incorporated the ISDA Master Agreement (2002 form). It also recorded the parties' election of English law as the governing law.

6. The Option Transaction agreements, through the incorporation of the ISDA Master Agreement, contained jurisdiction agreements in these terms:

> "*Jurisdiction.* With respect to any suit, action or proceedings relating to any dispute arising out of or in connection with this Agreement ("Proceedings"), each party irrevocably:-
>
> (i) submits:-
>
> (1) if this Agreement is expressed to be governed by English law, to (A) the non-exclusive jurisdiction of the English courts if the Proceedings do not involve a Convention Court and (B) the exclusive jurisdiction of the English courts if the Proceedings do involve a Convention Court; or ...
>
> (ii) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object, with respect to such Proceedings, that such court does not have any jurisdiction over such party; and
>
> (iii) agrees, to the extent permitted by applicable law, that the bringing of Proceedings in any one or more jurisdictions will not preclude the bringing of Proceedings in any other jurisdiction."

Thus, the parties agreed to the non-exclusive jurisdiction of the English courts.

7. The corporate defendants entered into further agreements with CGML in so-called "Structuring Services" letters, which were dated 11 May 2006 and by which they acknowledged that CGML had assisted with the structuring of the Option Transactions. The agreements recorded in these letters were also stated to be governed by English law, and contained the following jurisdiction agreements (in which Amatra and Ajial are referred to as "Counterparty"), providing for the exclusive jurisdiction of the English courts:

> "... Counterparty and CGML each irrevocably agrees that the courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this letter agreement and accordingly submit to the exclusive jurisdiction of the English courts. Counterparty and CGML each waives any objection to the courts of England on the grounds that they are an inconvenient or inappropriate forum. Counterparty hereby appoints Law Debenture Corporate Services Limited as its agent for service of process in England

> in respect of any suit, action or proceeding arising out of or relating to this letter agreement and agrees that, in the event that such entity ceases so to act or ceases to be registered in England, Counterparty will appoint another person as its agent for service of process in any such suit, action or proceeding. Nothing in this paragraph shall affect the right to serve process in any other manner permitted by law."

8. On 11 May 2006 CGML and GA entered into what has been referred to as a non-reliance letter, which recorded GA's understanding of the Option Transactions. It stated that it contained only a summary of certain features of the arrangements and that it should be read in conjunction with other transaction documents. It did not include an express statement of the governing law or a jurisdiction agreement. GA countersigned it, and, while reserving GA's position as to whether it was of contractual effect, Mr Picken accepted that this is sufficiently arguable for present purposes.

9. CGML say that the Option Transaction agreements, the Structuring Services letters and the non-reliance letter include provisions, which they called the "Relevant Provisions", that are relevant to the legal relationship that they and their "affiliates" have with the defendants. It was not disputed on these applications that the affiliates include CGMI. Mr Zacaroli summarised the effect of the Relevant Provisions (which are fully set out in the annex to this judgment) as being (among other things) that the corporate defendants acknowledged and agreed that "(a) they have not relied on any representations of CGML or its affiliates (saving the express representations in the ISDA Master Agreement), (b) they have not relied on any advice of CGML or its affiliates, in entering into the Option Transactions, and (c) neither CGML nor its affiliates provide any advice to [Amatra] and [Ajial], nor acts as fiduciary for [Amatra] or [Ajial]".

10. According to the evidence of Mr Matthew Bunting, a partner in Quinn Emanuel, the defendants invested $343 million under the Option Transactions, including $198 million of the personal wealth of the family of AA and GA, and by 2009 the whole of the investment of $198 million had been lost.

11. The family also entered into a Private Equity Transaction with Citibank Switzerland and made an initial investment of $147 million under it. In particular, in March 2007 Citibank Switzerland entered into a multi-currency loan and overdraft credit agreement with investment vehicles of the family and with GA and AA as guarantors. According to Mr Bunting, the $147 million investment and further injections into the arrangements with Citibank (Switzerland) were also lost.

The FINRA reference

12. On 2 October 2009 Quinn Emanuel wrote to CGML, Citi Global Wealth Management in London and Citigroup in New York that they had been instructed on behalf of Amatra, Ajial, GA and AA (together with two personal investments companies, Amavest Holdings Ltd ("Amavest") and Gama Investment Holding Ltd ("Gama")) to investigate various matters, including the basis on which they participated in the Option Transactions. Quinn Emanuel said that they had identified "matters of real

concern in relation to the advice by entities including Citibank (Switzerland) and CGML".

13. CGMI are members of the Financial Industry Regulatory Authority ("FINRA"), the American regulator. The rules of FINRA provide that members such as CGMI "must arbitrate a dispute under the Code if ... [t]he dispute is between a customer and a member or associated person of a member"; and "The dispute arises in connection with the business activities of the member or the associated person" (subject to an irrelevant exception).

14. In August 2011 (before these proceedings were brought) the defendants (together with Amavest and Gama) brought arbitration proceedings against CGMI under the FINRA scheme. Their allegations include claims about both the Option Transactions and the Private Equity Transaction. CGML are not party to the reference. In their pleading the defendants make allegations against CGMI "and its affiliates", amongst whom they include CGML. By way of example, they allege (at p.2) that "Due to a pattern of gross misconduct by CGMI and its employees and affiliates, from late 2005 to present, the considerable family wealth which the Abbars entrusted to Citigroup has been virtually wiped out"; that "CGMI and its affiliates engaged in reckless and deceitful conduct by engineering financial structures" that were unsuitable; and that "CGMI and its affiliates mismanaged [the financial structures] to the detriment of the Abbars and for the benefit of CGMI and its affiliates".

15. The defendants claim relief in the following terms:

> "All of the actions and omissions of CGMI as set forth above constitute and give rise to the following claims: breach of fiduciary obligations; misrepresentations and material omissions; common law fraud and fraudulent inducement; unsuitability; failure to supervise; breach of the implied covenant of good faith and fair dealing; negligence, gross negligence and negligent misrepresentation; unjust enrichment; unlawful tying; breach of contract and warranty; promissory estoppel; prima facie tort; respondeat superior; breach of applicable U.S. securities laws, statutes, rules, regulations and standards of conduct; violations of English law, including but not limited to the Financial Services and Markets Act of 2000; and violations of applicable Saudi Arabian and Swiss law. Claimants also request a complete and full accounting.
>
> Throughout the entire period described herein, CGMI and members of the Citi team as various Citi affiliates were agents of one another in dealing with the Abbar Family's investments. In addition, CGMI FINRA–registered representatives had ultimate authority with respect to both the Hedge Fund and Private Equity Transaction. As such, CGMI should be held responsible for the misconduct of all these agents and employees."

16. Thus, the defendants include in the reference an English law claim based on contravention of the Financial Services and Markets Act, 2000. They also include a claim for breach of contract, and CGML submit that only they and not CGMI are party to any relevant contract with any of the defendants. With regard to the contractual position, the defendants plead this:

> "Although CGMI conducted the negotiations and other work to structure and implement the deal, and was originally intended to be the counterparty to the swap transaction, at the eleventh hour, CGMI and the Citi Entities proposed that CGML, their London-based Citi affiliate, instead be the counterparty to the transaction, rather than CGMI. Upon information and belief, this was contractual "window dressing" since CGML in London was essentially a sales organization, while the substantive work involved in evaluating and operating the structure had been and was to be done by CGMI in New York. Moreover, upon information and belief, Citi substituted counterparties to attempt to avoid regulatory and other legal obligations under U.S. law. Given no disclosure as to this motivation by Citi, Ghazi Abbar knew of no reason to object to this proposed change because the structure of the deal and the transaction documents would remain the same, so he consented to the change to CGML. ... ."

17. In their submissions CGML characterised the claims in the reference as being brought under the Option Transaction agreements and Structured Services letters, but CGMI's duties and the claims against them are pleaded on a much wider basis than that. By way of illustration only, the "gross misconduct" of "CGMI and its employees and affiliates" is alleged to have started in "late 2005", some months before these agreements.

The proceedings against the defendants

18. CGMI have brought proceedings in the US District Court of the Southern District of New York (the "New York court") in which they seek a declaration that the claims brought in the FINRA arbitration are "not arbitrable", and an order restraining the defendants from pursuing the reference, their argument being that the defendants are not customers of CGMI and no dispute arises from CGMI's business activities. The New York court proceedings are to be tried in June 2012, and, according to a letter dated 23 April 2012 from Messrs Allen & Overy, CGML's solicitors, "the Court could render judgment in July, but it could also take the Court substantially longer". Counsel told me that the judgment might be appealed.

19. As well as the proceedings before the New York court and these proceedings, the defendants face claims in Swiss proceedings brought on 5 October 2011 in which Citibank Switzerland seek declarations that they are not liable in relation to the Private Equity Transaction, and also orders that GA and AA repay a loan of $10 million (plus interest). They have not yet pleaded particulars of claim fully setting out the basis of their claim.

20. By an application notice dated 23 April 2012 CGML sought permission to amend their claim form. During the hearing, Mr Zacaroli indicated that CGML recognised that they should make further changes to the draft amended declarations, and after the hearing they provided a revised draft of them. I set out below the relief that they seek in the revised draft. In the proposed declarations the "Transactions" are the Option Transactions:

> "1. A declaration, that by reason of the Relevant Provisions and/or in any event in all the circumstances, the Claimant owed no duty to advise or fiduciary obligations to the Defendants or any of them in connection with the Transactions.
>
> 2. A declaration that, by reason of the Relevant Provisions, the Claimant's Affiliates (excluding Citibank (Switzerland)) owed no duty to advise or fiduciary obligations to the First to Third Defendants or any of them in connection with the Transactions.
>
> 3. Without prejudice to (1) and (2) above, a declaration that by reason of the Relevant Provisions the First Defendant to Third Defendants and/or each of them are estopped from contending that the Claimant or its Affiliates (excluding Citibank (Switzerland)) owed such duty to advise or fiduciary obligations.
>
> 4. Alternatively, a declaration that the Claimant is not liable to the Defendants or any of them for breach of any duty of care (including, without limitation, a duty to advise), breach of contract (including, without limitation, in connection with monitoring and/or valuation) or fiduciary obligations arising out of or in connection with the Transactions.
>
> 5. A declaration that, by reason of the Relevant Provisions, and/or in any event in all the circumstances the Claimant is not liable to the Defendants or any of them in misrepresentation (whether by positive statement or omission) or non-disclosure, whether innocent, negligent or fraudulent, in connection with the Transactions and/or the decision of the Defendants or any of them to enter into the Transaction.
>
> 6. A declaration that, by reason of the Relevant Provisions, the Claimant's Affiliates (excluding Citibank (Switzerland)) are not liable to the First and/or Second Defendants in misrepresentation (whether by positive statement or omission) or non-disclosure, whether innocent or negligent, in connection with the Transactions and/or the decision of the First and Second Defendants to enter into the Transactions.
>
> 7 Without prejudice to (5) and (6) above, a declaration that the First and/or Second Defendants are estopped from contending (a) that the Claimant or its Affiliates (excluding Citibank (Switzerland)) made any misrepresentations, omissions or non-

> disclosure in connection with the Transactions and/or (b) that the First and/or Second Defendants were induced to enter into the Transactions in reliance on any misrepresentation or omission or failure to disclose by the Claimant or its Affiliates (excluding Citibank (Switzerland)).
>
> 8. A declaration that the Claimant is not in breach of obligations owed to the Defendants or any of them under the Financial Services and Markets Act 2000 that would give rise to a cause of action by the Defendants or any of them under section 150 of that Act.
>
> 9. In respect of each Transaction and the structuring services provided by the Claimant under the Structuring Services Letters (Structuring Services) a declaration that all disputes between the Claimant and the First and/or Second Defendants in relation to Structuring Services are subject to the exclusive jurisdiction of the English courts."

21. Although the defendants do not consent to the proposed amendments because they are challenging the court's jurisdiction, they advanced no argument against them and do not require that CGML obtain permission to serve out of the jurisdiction an amended claim form. Therefore, as invited by both parties, I shall consider the defendants' application on the basis that CGML's claim is for the relief in the proposed amendment.

22. The second, third, sixth and seventh declarations refer to the "affiliates" of CGML other than Citibank (Switzerland), and I shall use the label the "affiliate declarations" and "affiliate claims" to refer to them and the claims for them, and use the labels "non-affiliate declarations" and "non-affiliate claims" correspondingly. (It is not clear whether the term "affiliates" is intended to include Citibank NA (Geneva Branch), but that is not important.) Mr Zacaroli confirmed that the declarations that CGML and their affiliates are not liable to defendants are not intended to be only about whether they would be so liable under English domestic law but about whether they would be liable under whatever law governs the relevant relationship or potential claim under English private international law.

23. The defendants submit that the claims involve many issues apart from the meaning and application of the Relevant Provisions, and the trial of them will cover many matters that are subject to the FINRA arbitration. Mr Bunting referred in this context to (among other things) the alleged breaches of duty of care, breaches of contract and fraudulent and other misrepresentations and the claims under the Financial Services and Markets Act, 2000. I shall not comment upon the individual claims because they were not examined in detailed submissions, and the issues raised are likely to be considered more fully in the FINRA arbitration or elsewhere. But I accept that the proposed declarations raise many issues as well as the meaning and application of the Relevant Provisions; and that there is a substantial overlap between the issues for determination in these proceedings and those in the FINRA reference.

24. I add that I have supposed that CGML and their "affiliates" referred to in the Relevant Provisions and in the declarations are the same entities as CGMI and their affiliates referred to in the FINRA pleading. There is no evidence of this, but it seems probable and was, I think, assumed at the hearing.

25. The essential difference between the parties is whether complaints made by the defendants should be decided in these proceedings or in the FINRA arbitration. Mr Bunting's evidence was that, in light of the outcome of the proceedings before the New York court, "Amatra and Ajial may be entitled to a stay, pursuant to section 9 of the Arbitration Act 1996, of the claims brought by CGML in respect of CGMI", and that, "In the event that it is determined ... that claims brought by the FINRA Claimants against CGMI are arbitrable under the FINRA Rules, Amatra and Ajial may be entitled to, and reserve their right to make an application pursuant to section 9 for, a stay of the claims brought by CGML in respect of CGMI ...". (I observe in passing that in order to make an application under section 9 the corporate defendants would need to identify a relevant arbitration agreement "in writing" within the meaning of section 5 of the Act, but the court has an inherent jurisdiction that might be available if that were their only problem.) They could make such an application only if they had not taken any step in the proceedings to answer the substantive claim (other than to acknowledge service of the claim form). In these circumstances, I asked the parties whether these applications should be determined after the proceedings before the New York court. Rather than having these applications delayed, CGML agreed that they would allow the defendants proper time, should they need it, after the delivery of this judgment to consider whether to apply for a stay.

CGML's contractual rights

26. In light of this, I shall not defer deciding these applications. What I have called the essential difference about where the complaints should be determined arises because on the one hand CGML's contracts, including the jurisdictional agreements, give them rights against the defendants, including rights about the forum for resolving disputes, and on the other hand CGMI are subject to the FINRA regulatory regime. Before I come to the specific issues that are raised upon the defendants' challenge to the jurisdiction and their application for a stay, I shall say something more about the contractual rights that CGML assert, particularly in the affiliate claims with regard to CGMI, and about the FINRA regime.

27. CGML say that the court has jurisdiction to determine the affiliate claims and should exercise it, and in support of this contention they argue that:

i) The only relevant contractual nexuses are in their agreements with Amatra, Ajial and GA, and that CGMI are not party to any relevant contract with any defendant.

ii) Their agreements with Amatra, Ajial and GA affect the defendants' legal relationship not only with themselves but also with CGMI (and, I suppose, with other affiliates).

iii) They are entitled to have their contractual rights arising from those agreements upheld, and in view of the jurisdiction agreements they are contractually

entitled to have their rights against the corporate defendants upheld in the English courts.

28. In response to my request that CGML formulate the contractual rights that they assert with regard to the defendants' claims and allegations against CGMI, Mr Zacaroli used as an example their rights concerning fiduciary obligations, and formulated them in the following terms:

> "1. [that] the Defendants are estopped from asserting claims against CGML or its affiliates that its affiliates are fiduciaries for it.
>
> 2. that the determination of the question whether its affiliate (CGMI) is a fiduciary for the defendants is made in light of the fact that the defendants have promised CGML that CGMI is not their fiduciary".

29. Mr Zacaroli called the former the "narrow right" and the latter the "wide right". He accepted that the "narrow right" is that the defendants are so estopped in proceedings against CGML (and not in proceedings against CGMI), and its legal nature is relatively straightforward. As Moore-Bick said in Peekay International Ltd v ANZ Banking Group, [2006] EWCA Civ 386 at para 56, "there is no reason in principle that parties should not agree that a certain state of affairs should form the basis for the transaction whether it be the case or not", this principle sometimes being expressed in terms of the parties being subject to "contractual estoppel" (per Moore-Bick LJ, loc cit, at para 58) or a form of estoppel by convention (per Chitty on Contracts (30th Ed) Vol 1 at para 6-135). Whatever the label, it is an estoppel that operates in CGML's favour against defendants with whom they had a contract containing provisions justifying it ("contracting defendants", as I shall call them).

30. I find the "wide right" more elusive, but Mr Zacaroli made it clear that CGML claim only a contractual right that could be asserted against contracting defendants in proceedings in which they (CGML) are a party. As I understand it, it encapsulates *CGML's* entitlement to have the contractual rights and duties determined *between them and contracting defendants* upon the agreed basis.

31. At one point in his oral submissions Mr Zacaroli suggested that the Relevant Provisions gave rise to more extensive rights: that CGML are entitled to prevent the contracting defendants asserting to any third party (including CGMI and other affiliates but also third parties) that CGMI or any affiliate was their fiduciary. CGML also suggested that, after they have obtained the declarations, CGMI might seek an injunction in America to prevent the defendants from asserting against them that they were the defendants' fiduciaries. (I set out at para 40 below evidence about this of Mr Arnondo Chakrabarti, a partner in Allen & Overy LLP, CGML's solicitors.) However, these arguments went beyond the formulation of the contractual rights that was eventually presented on behalf of CGML. In the end, CGML did not assert that CGMI have a right that the defendants should not claim against them (CGMI) that they (CGMI) owe fiduciary obligations.

The FINRA regime

32. Against the contractual rights that CGML assert, the defendants say that the court should not interfere with their entitlement to pursue the FINRA reference. CGMI are members of FINRA and have accepted the regulatory scheme. Mr Bunting's evidence, which is not challenged and I accept, is that "the FINRA arbitration is not a mere private, contractual arbitration, but is an arbitration brought pursuant to a regulatory regime instituted in the US to regulate the securities industry, and broker-dealers in particular". The regime is mandatory, and CGMI, as a broker-dealer operating in the United States, are obliged to abide by its rules. It would be contrary to those rules for CGMI to enter into any arrangement with a customer that would prevent the customer from bringing a FINRA reference in order to resolve a dispute between the customer and CGMI; and the rules also prevent financial institutions from entering into agreements that "purport to fetter contractually the scope of claims that can be advanced by the customer in arbitration".

33. Accordingly, in considering whether the court should exercise its exorbitant jurisdiction to entertain CGML's claims, and particularly their affiliate claims, I must consider whether this might compromise the FINRA regime, and if it might, I should recognise that the regime not only gives rise to private rights but is part of a regulatory framework for American financial businesses. CGMI being subject to the FINRA regime, their customers are entitled to have their disputes arbitrated. There is, of course, a question about whether the defendants are or were CGMI's customers (within the meaning of the FINRA regime), but that is to be determined by the New York court, and I am not in a position to do so.

The principles governing the exorbitant jurisdiction

34. If CGML are to justify the permission for them to serve the proceedings out of the jurisdiction, they need to satisfy the court:

    i) That the proceedings meet the requirement for a "jurisdictional gateway": that is to say, that they (CGML) have much the better of the argument that their claims against each defendant served outside the jurisdiction are within (at least) one of the gateways stated in CPR 6BPD para 3 for the court to exercise the exorbitant jurisdiction.

    ii) That they meet the "merits requirement"; that is, that there is a serious issue to be tried that CGML are entitled to relief sought against those defendants, or, as it has been put, that the defendants could not have the claims dismissed on an application for summary judgment.

    iii) That they meet the "forum conveniens requirement"; that is, that the English court is the proper forum in which to bring the claims.

    iv) That the Court should exercise its discretion to permit service out of the jurisdiction.

35. I take the labels for the first three requirements from the judgment of Beatson J in Faraday Reinsurance Company Limited v Howden North America Inc, [2011] EWHC 2837 at paras 45-48. (I have couched the first in terms of "much the better of the argument" rather than simply the better of the argument so as more fully to reflect the words of Lord Collins in AK Investment CJSC v Kyrgyz Mobil Tel Ltd and ors,

[2011] UKPC 7 at para 71. Mr Zacaroli accepted my formulation, but nothing turns upon the difference between Beatson J's statement of the test and mine.)

36. It was often said that the exorbitant jurisdiction should be exercised only if the claim falls within "the spirit" (as well as the letter) of one of the bases for exercising it, a test firmly stated by Visc Haldane in Johnson v Taylor Brothers, [1922] AC 144, 153 and cited in text books and the courts (for example, in George Munro Ltd v American Cyanamid Corp, [1944] KB 432, 442 per Du Parcq LJ and Mercedes Benz AG v Leiduck, [1996] AC 284, 299 per Lord Mustill). However in Sharab v Al-Saud, [2009] EWCA Civ 353 at para 35 the Court of Appeal rejected this view. As I understand that judgment, it suffices that the case is within the letter of one or more of the gateways (interpreted, presumably, in accordance with the overriding objective). But generally, I think, the court would not exercise the discretion to allow service out of the jurisdiction unless the claim was also within their spirit.

The principles governing negative declarations

37. There is another important consideration in this case that bears upon the question whether the court should exercise its discretion to permit service out of the jurisdiction. CGML's claim is largely, in substance if not in form, for negative declarations. I shall refer later (at para 51) to Mr Picken's submissions concerning the general principles about when declarations of any kind are granted. But with regard to negative declarations in particular, apart from any question whether the court should exercise the exorbitant jurisdiction and whether the litigation is transnational or purely domestic, the court scrutinises claims and rejects them if the declarations would serve no useful purpose. In Messier-Dowty Ltd and anor v Sabena SA and ors, [2000] 1 WLR 2040 at p.41, Lord Woolf MR said that, "The approach is pragmatic. It is not a matter of jurisdiction. It is a matter of discretion." However, I do not think that this means (as Mr Zacaroli appeared to suggest at one point in his submissions) that the court will defer consideration of whether the case is one appropriate for negative declarations until there is a hearing on the merits and not engage with it when deciding whether its jurisdiction is properly invoked. (In this context reference was made to the judgment of Lord Collins in A K Investment CJSC v Kyrzyg Mobil Tel Ltd and ors, [2011] UKPC 7. I refer to this at para 60 below.)

38. The power of the court to grant negative declarations in the exercise of the exorbitant jurisdiction has been beyond dispute at least since the decision of the Court of Appeal in New Hampshire Insurance Company v Philips Electronic North America Corp, [1998] CLC 1,062. The principles governing its exercise which Rix J identified in that case and which the Court of Appeal approved (at p.1,066) include these:

> "1. There is power to grant a negative declaration in an appropriate case, the fundamental test being whether it would be useful.
>
> 2. However, careful scrutiny will be exercised not only to test the utility, or on the other hand the futility, of seeking to determine the claim by means of a negative declaration in England, but also to ensure that inappropriate forum shopping is not allowed, let alone encouraged.

> 3. A negative declaration will not be appropriate where it is premature or hypothetical, viz where no claim has been made or threatened against the plaintiff.
>
> 4. The existence of imminent or a fortiori current foreign proceedings is always a highly relevant consideration, not only for the purpose of testing the utility of the English claim, but also so as to having (sic) in mind the need to avoid the twin dangers of forum shopping and of the vices of concurrent proceedings."

I would also cite the statement of principle of Mustill LJ in Insurance Corp of Ireland v Strombus International Insurance Co, [1985] 2 Ll L R 138,144, "the Court should be careful not to bring a foreigner here, unless it can be shown that a solid practical benefit would ensue". These principles are still observed - Cheshire, North & Fawcett, Private International Law (14th Ed, 2008), states this (at p.408):

> "Careful scrutiny must be exercised not only to test utility but also to ensure that inappropriate forum shopping is not allowed. If the possibility exists that the claimant in the English proceedings will be sued by the defendant in an alternative forum abroad, the English court must be particularly careful to ensure that the negative declaration is sought for a valid and valuable purpose and not in an illegitimate attempt to pre-empt the jurisdiction in which the dispute between the parties is to be resolved."

Would the declarations be useful?

39. CGML submit that the affiliate declarations would, if granted, be useful, and, while maintaining that it is sufficient if they were of use to CGMI and in the American proceedings, they argue that the affiliate declarations would also be of use to themselves, CGML.

40. Mr Zacaroli submitted that these proceedings do not compromise the FINRA regime, but, on the contrary, the FINRA tribunal is likely to be assisted by an English judgment on issues that are before it. The evidence of Mr Chakrabarti is that "a declaration from the English court that CGMI was not liable to Amatra and Ajial could be utilised in the US in a number of ways. First, the FINRA Arbitral panel has a discretion either to find that the issues determined by the English court are res judicata and cannot be re-opened before it, or alternatively that the decision of the English court is persuasive as a matter of substance. Secondly, if the FINRA panel does neither, CGMI may be able to seek an injunction from a US court preventing the arbitration from proceeding in relation to the issues determined by the English court."

41. In support of this contention Mr Zacaroli cited the judgment of Thomas LJ in AWB Geneva SA v North America Steamships Ltd, [2007] EWCA Civ 739, in which the Court of Appeal, while refusing an injunction against the defendant pursuing insolvency proceedings in Canada, declined to stay proceedings for a declaration about issues that arose in the Canadian proceedings and specifically about whether

provisions in the ISDA Master Agreement, which were governed by English law, were effective. Thomas LJ said this (at paras 37 and 38):

> "... The challenge made by the Trustee to the meaning of these swaps involves a contention that certain clauses of the ISDA Master Agreement are ineffective. The ISDA Master Agreement is widely used in all types of derivative transaction on the international markets and thus plays an important role in the efficient functioning of the international financial markets and their financial stability. The Trustee's contentions could, if correct, therefore have ramifications for the financial markets. The sooner the issues raised are determined, the better.
>
> In my view, it would also be very helpful to the judge considering the proposal of the Trustee in the Canadian CCAA proceedings to have the decision on the interpretation of the ISDA Master Agreement by the Commercial Court which has the jurisdiction to adjudicate on these issues in accordance with English law. If the Trustee is correct that the Master Agreement has the effect for which it contends, then when considering the reasonableness of the plan under the CCAA, the judge will know that the clauses are ineffective by their proper law. If, on the other hand, the Trustee is wrong then the judge will know that the clauses are effective by the proper law of the contract and be in a better position to consider the proposal in paragraph 21 of the initial draft order as part of his assessment of the reasonableness of the plan. He will be able, in the knowledge that the clauses in issue are valid by their proper law, to have regard to the potential effect of a Canadian court approving para 21 of the draft initial order proposed by the Trustee in the wider context of derivative transactions made on the terms of the ISDA Master Agreement."

42. Mr Zacaroli acknowledged that the first reason given by Thomas LJ that the English proceedings should decide the claim for a declaration, sc. that the determination of a point of law was of general importance, does not arise in this case. However, he submitted that Thomas LJ's second reason is in point. I am not persuaded of that. Mr Zacaroli did not contend that the question whether CGMI are liable to any of the defendants is to be determined by English law either in these proceedings or in the FINRA reference. It is not clear that the FINRA reference would apply rules of private international law that are the same as the English rules or would lead to the same law (or laws) determining whether CGMI are liable to the defendants. But, even assuming that they would, nevertheless the declarations that CGML seek include questions about whether CGMI are liable to the defendants under whatever system of law governs (or systems of law govern) their relationship. The position is unlike that considered by Thomas LJ, who was concerned about whether the determination of the English court on questions of English law might help the Canadian court.

43. It might be, as Mr Zacaroli submitted, that the Relevant Provisions, or some of them, bear upon whether CGMI are liable to the defendants, but it does not follow that the

FINRA arbitrators would be helped if the English court interpreted them. It is not clear that there are any issues about the applicable English law principles of contractual construction, and, if there is any issue at all about what the Relevant Provisions mean, the arbitrators might consider it for them to interpret the contractual provisions in light of the English law principles (reflecting the English law limits upon expert evidence of foreign law in relation to construction issues: Rouyer Guillet & Cie v Rouyer Guillet & Co Ltd, [1949] 1 AER 244). Far from identifying any issue about the meaning of the contracts governed by English law, Mr Zacaroli submitted that the corporate defendants "must accept that in [their contracts] they promised that CGMI owed no duties to advise or fiduciary obligations towards them".

44. I therefore cannot understand why or how the FINRA arbitrators would find helpful a decision of the English court in these proceedings. I can see that a question of English law *might* arise in the FINRA proceedings about whether CGMI can rely upon the Relevant Provisions. (This is unclear: CGMI have not pleaded their defence in the reference.) For example, there might be a question whether they can invoke the Contracts (Rights of Third Parties) Act, 1999. However, such a question would not be determined in these proceedings, which are not about whether CGMI can rely upon the contracts but whether the contracts entitle CGML to bring these claims.

45. The evidence of Mr Chakrabarti, which I have set out at para 40, should, I think, make me the more cautious about permitting service of the affiliate claims out of the jurisdiction. As I have explained (at para 31), Mr Zacaroli's formulation of CGML's contractual rights confined them (in my judgment properly) to rights that they were entitled to assert in proceedings to which they are a party. It was not said that either CGML or CGMI have any complaint by reason of the contracts that the defendants otherwise assert against CGMI that CGMI are their fiduciary (or owe them other duties). However, according to Mr Chakrabarti, if the English court reached a determination of CGML's claims in CGML's favour, this might be used in America to prevent the defendants from doing just that.

46. I do not consider that the decisions of the English court on CGML's claims could properly be useful to CGMI or in the American proceedings. If CGMI could use them at all, (and I am not persuaded that they could), they could only do so in order to have issues decided outside the mandatory regime that, unless the New York court otherwise rules, the defendants are entitled to invoke. That would not, to my mind, be a justification for the court to exercise the exorbitant jurisdiction.

47. It is said that the declarations would be useful to CGML because CGML and CGMI, as companies "in a group structure with common ownership", share "financial and reputational interests". More specifically, according to Mr Chakrabarti, "any finding against CGMI gives rise to the possibility of CGMI having a claim against CGML due to the role performed by CGML in structuring and entering into the Option Transactions", and that "any such claim may fall within the mutual indemnities granted between CGML and CGMI under the terms of the Citigroup Corporate and Investment Bank Global Master Service Contract ... (see clause 6)" (which I shall call the "Service Contract"). He also referred to an Intra-Citi Service Agreement (the "Service Agreement") entered into by CGML and CGMI with effect from 1 January

2008, and said that it incorporated the General Terms & Conditions for Intra-Citi Services.

48. Mr Picken argued that this evidence is not convincing because the Service Agreement was not in force at the relevant time, and CGML and CGMI are not listed as signatories of the Service Contract. Moreover, as he observed, nothing suggests that CGML provided services for a fee in connection with the transactions. More persuasively, in my judgment, clause 6 would require CGMI to give CGML prompt written notice of any indemnifiable event and to give CGML authority to defend the FINRA claims on their behalf. There is no evidence that CGMI have given CGML such notice or authority or that CGML had waived these requirements, and Mr Zacaroli did not answer this point. There seem to me reasons to view with scepticism the suggestion that CGML are at risk of an indemnity claim from CGMI.

The grounds of the defendants' challenge to the jurisdiction

49. The corporate defendants do not challenge the court's jurisdiction over non-affiliate claims, but only the affiliate claims. The grounds in their notice are:

i) That the requirement for a jurisdictional gateway is not met because CGML have no standing against the corporate defendants in respect of the affiliate claims.

ii) That the affiliate claims fall outside the jurisdictional agreements.

iii) That the merits requirement is not met because there is no serious issue to be tried in respect of the affiliate claims.

50. The grounds of GA's and AA's challenge to the jurisdiction in their notice are:

i) That the requirement for a jurisdictional gateway is not met, the court not having jurisdiction to hear any of the claims.

ii) Alternatively, that the requirement for a jurisdictional gateway is not met in respect of the affiliate claims, the court not having jurisdiction to hear those claims.

iii) That the forum conveniens requirement is not met.

Mr Picken submitted in the case of AA that the requirement for a jurisdictional gateway is not met because he is not a necessary or proper party to any of the claims against other defendants. However, in the case of GA his submission was only that CGML have not shown that England is the proper forum in respect of the claims brought against him, sc. that the forum conveniens requirement was not met, and he advanced no argument about the requirement for a jurisdictional gateway. The forum conveniens argument was also made on behalf of AA.

The corporate defendants' "standing"

51. Mr Picken argued in support of the jurisdictional challenge of the corporate defendants that CGML have no "standing" to seek relief by way of the affiliate

declarations because they do not satisfy the necessary requirements for declaratory relief. He cited the judgment of Aikens LJ in Rolls-Royce plc v Unite the Union, [2009] EWCA Civ 387 at para 120 (as well as Gouriet v Union of Post Office Workers, [1978] AC 435 esp. at p.501 per Lord Diplock, Ainsbury v Millington, [1987] 1 WLR 379 at p.381, and Re S (Hospital Patient: Court's Jurisdiction, [1996] Fam 1 at esp. pp.21-23) in support of his submission that these principles (among others) govern the exercise of the court's jurisdiction to grant declaratory relief:

i) That there should be a real and present dispute between the parties as to the existence of a legal right;

ii) That each of the parties would be affected by the determination of the issue;

iii) That the court can be satisfied that all sides of the argument have been fully and properly presented by ensuring that all those affected either appear or will have their arguments presented by someone else; and

iv) That a claim for declaratory relief is the most effective way of resolving the issues raised.

I accept these statements of principles (although Aikens LJ qualified his statement in the Rolls-Royce case as being a summary for the purposes of the very different case before the Court of Appeal).

52. Mr Picken submitted that the court "lacks jurisdiction" in respect of the affiliate claims because:

i) There is no real and present dispute between CGML and the defendants (the parties to these proceedings) as to the existence of legal rights.

ii) CGML would not be affected by the determination whether their affiliates owed duties to or were liable to the defendants.

iii) CGMI are not claimants in these proceedings, nor is any other affiliate, and therefore there cannot be full and proper argument about the affiliates' position and about the context of the question whether they are liable to any of the defendants.

53. CGML respond that the first point ignores the basis of CGML's affiliate claims, that they, CGML, rely upon and only upon their own contractual rights. They do not seek a determination of what CGMI can properly assert in the FINRA proceedings (or indeed what CGMI could properly assert if they were party to these proceedings or had brought their own proceedings for declaratory relief). This case, therefore, is unlike the Gouriet case or the Re S case, in both of which there was an issue whether the claimant had an interest in a legal right or in the performance of a legal obligation so as to entitle him to invoke the court's jurisdiction. CGML's interest in the rights that they assert is clear because they claim as a party to the relevant contracts.

54. I accept CGML's argument about this. It does not seem to me that Amatra's and Ajial's challenge to the court's jurisdiction is (as their application notice indicates) on the basis that CGML have not met the requirement for a jurisdictional gateway. The

three limbs of Mr Picken's submission are all really to the effect that the merits requirement is not met: that CGML do not have a sufficiently arguable case for the declarations because the only real dispute is about the liability of CGMI, and CGML have no interest in a declarations about that.

55. However, before coming to the merits requirement, the corporate defendants have another challenge to the court's jurisdiction relating to the jurisdictional gateways: that the jurisdiction agreements cover only disputes between CGML on the one hand and the corporate defendants on the other hand – the parties to the agreements – and not disputes between CGMI and defendants. I accept this interpretation of the jurisdiction agreement (see Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd, [1999] 1 Ll R 767, 777-778 and Morgan Stanley & Co International Plc v China Haisheng Juice Holdings Co Ltd, [2010] 1 Ll R 265 at paras 23 and 29), but the submission misses the same point as the defendants' first argument: that CGML present claims for relief on the basis that the disputes are *between* the contracting parties, albeit they are *about* the duties and potential liability of CGMI.

The merits requirement for the affiliate claims against the corporate defendants

56. I must therefore consider whether CGML satisfy the merits requirement in respect of the affiliate claims against the corporate defendants. I reject two of the defendants' arguments. First, Mr Picken submitted that the court would not grant the affiliate declarations because the court could not be satisfied that all those affected by them are before the court, CGMI not being party to the proceedings. This submission was based upon the principle identified by Aikens LJ to which I referred at para 51(iii) above. I am not persuaded by Mr Zacaroli's first response to this point, that none of CGML's affiliates have any interest in objecting to the relief sought: this overlooks that the court might refuse the affiliate declarations and deliver a judgment adverse to CGML and CGMI and favourable to the defendants. However, given the court is likely to hear proper submissions in favour of the affiliate claims from CGML and from the corporate defendants against them, it seems improbable that the court would reject them out of concern that it has heard insufficient argument or that CGMI might be prejudiced because the court has not received submissions on their behalf. In reaching this conclusion, I recognise that there might be an issue about what law governs CGMI's (and other affiliates') relationships with the corporate defendants, but any necessary arguments about this are likely to be ventilated.

57. Secondly, Mr Picken argued that the affiliate claims are bound to fail because they attempt to "bypass" the Contracts (Rights of Third Parties) Act, 1999, and it "cannot conceivably be right" that the court should allow this. The 1999 Act does not prevent contracting parties from enforcing their contractual rights for the benefit of third parties if they so chose, but gives third parties their own rights (in certain circumstances).

58. Having rejected those arguments, is there any real prospect that the court will grant the affiliate declarations? These considerations seem to me important:

    i) That the defendants have not averred *as against CGML* that CGMI are liable to any of them, and CGML do not assert a belief that they will face such an averment (still less that they will face a claim in relation thereto). There is

therefore no purpose in determining whether CGML have rights of the kind that they assert concerning the position of CGMI: sc. by way of declarations that the defendants are estopped *as against CGML* from making averments about their relationship with CGMI; or declarations about the position of CGMI which are dependant upon an agreed basis for deciding questions *between CGML and the corporate defendants.*

ii) That the affiliate claims would apparently require the court to consider the position between CGMI and the different defendants in respect of numerous possible causes of action, which might well raise private international law issues and issues under different governing laws. (In the FINRA arbitration the defendants assert, for example, claims under the law of Saudi Arabia.)

iii) That the issues with which the affiliate claims would be concerned are, in large measure, likely to be before the FINRA arbitrators if the New York court allows that reference to proceed.

59. I conclude that the affiliate claims against the corporate defendants would be rejected under principles identified by Aikens LJ in the Rolls Royce case as generally applicable to declarations and by Rix J in the New Hampshire Insurance Company case as applicable to negative declarations when permission for service out of the jurisdiction is required; and I do not consider that they give rise to any serious issue to be tried. This is because:

i) The affiliate claims reflect no significant dispute (or real and present dispute) between CGML and the corporate defendants, and it is not realistic to think that CGML will be affected in any significant way by their determination.

ii) It is not the most effective way of resolving the issues raised by the affiliate claims to allow CGML to claim declaratory relief. They would more effectively be resolved in the FINRA reference if the corporate defendants are not restrained from pursuing it. If they are restrained, the issues will not need to be resolved unless the corporate defendants were to pursue claims in another forum, but then too, as it seems to me, they are better resolved in a forum seised of the real issue (whether CGMI are liable to the defendants), and not the distorted issue before this court (on what basis CGML are entitled to have it determined whether CGMI are liable to the defendants).

iii) The affiliate claims are not useful, and seem to me to be a creature of inappropriate forum shopping, notwithstanding the jurisdiction agreements, because the jurisdiction agreements cover only disputes between CGML and the corporate defendants, and in reality the disputes to which the affiliate claims are directed are between CGMI and the defendants.

I therefore conclude that the affiliate claims against the corporate defendants do not satisfy the merits requirement, and for this reason I shall set aside the permission to serve the proceedings out of the jurisdiction in so far as they relate to them.

60. In reaching this conclusion, I do not overlook that Mr Zacaroli cited the judgment of Lord Collins in the A K Investment case, cit sup, at paras 125 and 126, in which he dismissed an argument that the declaration there sought would serve no purpose

because "declaratory relief is discretionary and depends on the circumstances at the date of trial". As I understand the judgment, those paragraphs simply state Lord Collins' view that in that case the claim was sufficiently arguable to satisfy the merits requirement, and not that the merits requirement need not be satisfied where the question is whether realistically the court might exercise its discretion to grant declaratory relief.

61. Although the affiliate declarations would cover the defendants' relationship with all affiliates other than Citibank (Switzerland), I have only considered the position in relation to the position of CGMI. The fact that the claims cover the positions of other affiliates only reinforces my conclusion. Mr Zacaroli acknowledged that CGML is "probably" not entitled to relief in respect of any affiliate other than CGMI, and that he "suspected" that CGML would not press for such wide declarations. He suggested, however, that that is for determination at trial rather than for consideration on these applications. I do not agree: the court would not be justified in exercising the exorbitant jurisdiction on the basis that in due course the claim will be properly limited by CGML. If the position is as Mr Zacaroli presented it, CGML should not have sought and obtained permission from Flaux J in the terms that they did.

The discretion whether to exercise jurisdiction over the affiliate claims against the corporate defendants

62. For essentially similar reasons, I would also decline to exercise exorbitant jurisdiction as a matter of discretion because:

i) Although the affiliate claims are within the letter of contractual jurisdictional gateways (the relevant contracts being governed by English law and disputes between CGML and the corporate defendants under them being subject to the jurisdiction agreements), they do not fall within their spirit. As I have sought to explain, I consider that CGML have no significant purpose of their own in claiming these declarations. The real protagonists in the dispute behind this litigation are the defendants and CGMI, against whom the defendants have brought their claim, and the real purpose of these proceedings is to aid CGMI in the claims against them in the FINRA reference. Indeed, CGML have not asserted otherwise.

ii) The declarations are therefore directed to the claims in the FINRA arbitration, a regulatory scheme to which CGMI have subscribed and which, subject to the decision of the New York court, the defendants are entitled to invoke. I do not think that this court should trample upon the territory of the reference unless there is proper reason to do so.

Is AA a necessary or proper party?

63. For the same reasons, I allow the challenge of GA and AA to the court's jurisdiction over the affiliate claims against them. Indeed, in the case of AA CGML now recognise that there is no proper basis upon which they can pursue the affiliate claims against him. However, GA and AA challenge the court's jurisdiction over the non-affiliate as well as the affiliate claims. Therefore I come to AA's submission that he is not a necessary or proper party to them. (GA does not so challenge the jurisdiction because, although he does not admit that the non-reliance letter was

contractual, he accepts that CGML's contention about this is sufficiently arguable for present purposes.)

64. It is not, I think, said that AA is a necessary party to the proceedings, but in CPR 6BPD para 3.1(3) the expression "necessary or proper" is disjunctive and CGML say that AA is a proper party to the proceedings against the corporate defendants and GA because he too makes claims in the FINRA reference. The question whether AA is a proper party depends upon the answer to the question, "supposing both parties had been within the jurisdiction, would they both have been proper parties to the action?": see the AK Investment case, cit sup, at para 78. CPR19.2 provides that the court may order a person be added as a party if this is desirable so that the court can resolve all matters in dispute in the proceedings, or there is an issue in the proceedings which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue. Mr Picken, citing Briggs & Rees on Civil Jurisdiction and Judgments (5th Ed, 2009) para 4.57, submitted that there is "no pleaded sustainable claim against [AA] or the claim against [AA] is not well founded in fact and law"; and argued that AA is not a proper party for two reasons:

i) Because the claim form does not set out a sustainable case against him.

ii) Because there is no claim against him that is well founded in law or fact because he is not party to any of the Relevant Provisions.

More precisely, he denied that CGML have much the better of the argument about these points.

65. CGML state their claims only in the claim form: they have not pleaded particulars of claim. The claim form describes by way of "brief details of claim" the Option Transactions, the documentation thereof by way of the Option Transaction agreements, the Structuring Services letters and the non-reliance letter. The only reference to AA here is in the averment that the corporate defendants are special purpose vehicles "controlled, directly or indirectly, by [GA] and/or members of his family". It is then said that "All four defendants have made certain allegations concerning the transactions and a dispute has arisen in respect thereof". Nothing more is said as to the basis upon which the declarations are sought against AA.

66. Mr Picken submitted that the claim form does not comply with the requirements of CPR 16.2(1) with regard to the claim against AA. Adopting the approach of Cooke J in Nomura Group International Plc v Granada Group Ltd, [2007] EWHC 642 (Comm.) esp at para 39, who said that authorities about what was required under RSC Order 6 Rule 2 are relevant to interpreting CPR16.2(1) "Because of the similarity of the terms of the rule and because the policy underlying it must be the same", I consider that criticism justified. Given that the Relevant Provisions cannot justify a claim against AA, the claim form merely asserts that AA has made "certain allegations concerning the Transactions" that have given rise to a dispute, and that, to my mind, is not "a concise statement of the nature of the claim" against him: see CPR16.2(1)(a). However, I do not regard that as a reason for accepting his challenge to the jurisdiction. I do not consider that, when Briggs & Rees refer to a "pleaded, sustainable claim", they mean that permission to service out of the jurisdiction will never be given if the claim form or pleading is technically defective.

Nothing in CPR 6PDB would justify that. They mean that the claim must be one that could be pleaded as a sustainable claim.

67. Mr Picken's second argument is, effectively, that no such claim could be pleaded because AA was not party to any of the Relevant Provisions. However, CGML's contention that they are entitled to declarations against him is not put on the basis that he was. Their contention is that they anticipate that a claim will be made against them because of what AA (with others) alleges in the pleading in the FINRA arbitration, which, they say, justifies their apprehension that he will aver that they are liable to him. (Mr Chakrabarti suggested that this apprehension is also justified because of Quinn Emanuel's letter of 2 October 2009. Mr Zacaroli did not rely upon the letter in submissions, and I consider that it adds nothing to CGML's argument.)

68. Before the hearing, CGML, in solicitors' correspondence, offered to have the claims against AA dismissed if he "confirm[ed]" that he had no claim against them arising out of or in connection with Option Transactions, and irrevocably waived, and covenanted not to sue them on, any such claim; and accepted "that there is no duty of care, duty to advise or other relationship between him and CGML". AA has not accepted that offer, understandably in my judgment - not least because CGML required that AA should not recover his costs but also because he could not be expected to agree in no circumstances to sue in relation to the Option Transactions, regardless of what he might learn in the future. The fact that AA has not accepted the offer does not improve CGML's contention that the court should exercise its exorbitant jurisdiction.

69. I therefore come back to the question whether the pleading in the FINRA arbitration gives rise to a reasonable apprehension on the part of CGML that AA will bring proceedings against them. I do not find this issue easy, but on balance I conclude that it does not. The only claims made or, as far as the evidence goes, threatened by AA are those in the FINRA reference, and they could not be made against CGML. The criticisms of CGML in the pleading are made in the context of claims of vicarious liability against CGMI. Of course, if the reference is restrained by the New York court, the defendants might bring claims in other litigation against CGML, but that is entirely speculative. As things stand, as it seems to me, the claims against AA are (in the words of Rix J's third principle) premature or hypothetical, and I do not accept that CGML have the better of the argument (or much the better of the argument) that AA is a proper party to the proceedings against the other defendants.

70. I therefore uphold AA's challenge to the jurisdiction in respect of the non-affiliate claims as well as the affiliate claims.

The forum convenience requirement with regard to the claims against GA and AA

71. GA argues, and AA advances an alternative argument, that CGML do not satisfy the forum conveniens requirement in respect of either the affiliate or the non-affiliate claims against them. I do not accept this argument because, if the court accepts jurisdiction over claims against the corporate defendants, GA and AA will both inevitably be closely involved with the proceedings, given that their involvement with the Option Transactions was sufficient for them (bona fide, as I must assume) to bring claims in the FINRA reference and in view of their interest in the corporate

defendants. This essential point is bolstered by the following, as it appears from the evidence on these applications: that some relevant witnesses for CGML, an English company, are in England; that English solicitors acted for the defendants in negotiating the Option Transactions; that some meetings that involved GA and AA or their representatives took place in England; that there was established in London for the defendants a "family office" that "assessed and monitored risks in the Option Transactions"; that agreements recording the transactions are expressly governed by English law; and that, as I conclude, CGML have much the better of the argument that the non-reliance letter, if contractual, is governed by English law.

72. These considerations far outweigh the fact that GA and AA are domiciled in Saudi Arabia, and connections that the Option Transactions have with New York: sc. that employees of CGMI based in New York were involved in selling and structuring the Option Transactions; that some meetings leading to the transactions were held in New York, and work to structure them was done there; that CGMI monitored and managed the transactions in New York; that GA travelled to New York to meet them there; and that possibly representatives of Citigroup entities involved with the investments were answerable to CGMI (as the defendants allege in FINRA pleading but CGMI deny in the proceedings before the New York court).

Stay of the proceedings

73. The defendants' alternative application is that the court should stay the proceedings in view of the FINRA reference and the litigation in New York in order to avoid duplication of proceedings involving the same issues and the associated risk of inconsistent decisions. Accordingly the defendants say that these proceedings should be stayed pending determination of the dispute between the defendants and CGMI, who are said to be the real protagonists and against whom the defendants have made their claim. The defendants' primary position is that both the affiliate claims and the non-affiliate claims should be stayed, but they say that at least the affiliate claims should be.

74. The application is not for a permanent stay. Again, the defendants have a primary position and a secondary position: they say that there should be a stay pending determination of the FINRA reference or, if not that, a stay pending the decision of the New York court, and possibly on any appeal therefrom. According to Mr Bunting the FINRA reference is likely to take 18 months to 2 years. Mr Picken submits that the defendants have every reason to pursue it energetically (subject to CGMI's challenge in the New York court being resolved), and so there is no realistic risk that, these proceedings having been stayed, the dispute will become dormant.

75. As was confirmed by the Court of Appeal in Reichhold Norway ASA v Goldman Sachs, [2000] 1 WLR 173, the court has an inherent jurisdiction (preserved by section 49 of the Senior Courts Act, 1981) to stay an action pending determination of foreign litigation or arbitration proceedings related to the action but between the different parties, although the jurisdiction should be exercised only in "rare and compelling circumstances" (per Lord Bingham MR at p.186C). The jurisdiction agreements do not deprive the court of this power, although the case for a stay might need to be all the more cogent: see Equitas Ltd v Allstate Insurance Ltd, [2008] EWHC 1671 (Comm). Undoubtedly it is "most unusual for an English court to stay proceedings

brought in England pursuant to an English jurisdiction agreement", per Lord Collins in UBS AG v HSH Nordbank, [2009] EWCA Civ 585 at para 100, and this is an important consideration bearing upon whether a stay should be ordered. That said, the jurisdiction agreements here are not to my mind a conclusive answer to the defendants' applications because (i) on the back of claims against the corporate defendants who made agreements, CGML have elected also to bring proceedings against GA and AA who did not, and (ii) CGML seek to use jurisdictional agreements directed to their own disputes against the contracting defendants in aid of CGMI's differences with the defendants.

76. I accept the defendants' contention that, if these proceedings are not stayed, there is the prospect that the parties will face the costs and the inconvenience of duplicated proceedings. CGML respond that the defendants have only themselves to blame for this because they have chosen to bring the FINRA reference despite the jurisdiction agreements and the recognition in the Option Transaction agreements that CGML made them as principal and not as agents. I do not find that persuasive: apart from the fact that GA and AA were not parties to the Option Transaction agreements, the response apparently assumes that the defendants have no valid claim against CGMI, but I am not able to form even a preliminary view about that. If they do have a claim, they cannot be criticised for bringing it under the FINRA regime.

77. The defendants also support their application for the proceedings to be stayed on the basis that otherwise there is a risk of inconsistent decisions. I see rather more force in Mr Zacaroli's response to that argument. He cited Curtis and anor v Lockheed Martin UK Holdings Ltd, [2008] EWHC 260 (Comm), in which Teare J observed (at para 18) that, in cases where a stay is "to all intents final", it effectively avoids the risk of inconsistent decisions, but the position is different where a stay is not. The temporary nature of the stay means that the English proceedings will or might be pursued in due course, and a stay defers, rather than removes, the risk of inconsistent decisions.

78. This reasoning seems to me to go some way to meet this point in the defendants' argument, but it is not a complete answer. There is some risk that, having been stayed pending resolution of the reference or at least the proceedings before the New York court, these proceedings will be pursued and then issues might be decided inconsistently with American decisions. However, it is far from certain that, if stayed, any party will have reason to pursue them once the American proceedings are determined. As I see it, a stay would not completely remove the risk of inconsistent decisions, but would significantly reduce it.

79. I do not, however, think that the duplication of proceedings and the reduced risk of inconsistent decisions in themselves amount to unusual and compelling circumstances justifying a stay such as were contemplated by the Court of Appeal in the Reichhold case (and subsequently in Konkola Copper Mines Plc v Coromin Ltd, [2006] EWCA Civ 5). However, what is unusual here is that the foreign proceedings are not brought under an arbitration agreement of the usual kind made consensually between the defendants and a third party, but are brought under a regulatory regime to which CGML's affiliate is subject as a matter of American public policy. These proceedings, in my judgment, risk unwarranted interference with that regime. The risk would, of course, be the greater if the court were to exercise exorbitant

jurisdiction over the affiliate claims, but I have upheld the defendants' jurisdictional challenge as far as they are concerned. However, I consider that the risk remains a significant one unless the non-affiliate claims are stayed. I conclude that in these unusual circumstances they should be.

80. The defendants' argument is not that (or supported with a contention that) the English court is not the forum conveniens to determine the claims as between CGML and the defendants. It would not be open for the corporate defendants so to contend, and I need not consider an argument of Mr Zacaroli that none of the defendants could advance an argument of forum non conveniens because of the decision of the European Court of Justice in Owusu v Jackson, (Case C-281/02).

81. CGML contended that the court should not order a stay because the FINRA arbitration would be assisted by the English court's decision on issues about the meaning of the Relevant Provisions, which are governed by English law. As I have explained, I do not accept that argument: no such issues have been identified as arising either between the defendants and CGML or between the defendants and CGMI.

82. This conclusion leads to the question whether the non-affiliate claims should be stayed pending resolution of the New York court proceedings or pending the resolution of the FINRA reference. In my judgment, the reasons for ordering the stay logically mean that it should continue until the resolution of the FINRA reference if the New York court allows the defendants to pursue it.

Conclusion

83. I conclude that all the defendants succeed in their challenge to the exorbitant jurisdiction over the affiliate claims, and AA's challenge also succeeds in relation to the non-affiliate claims. I order a stay of the other claims. I shall invite submissions as to the form of order to give effect to these conclusions.

Annex

(1) Agreements and Acknowledgments by Amatra and Ajial

A. ISDA Master Agreement (at section 9(a))

"This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter. Each of the parties acknowledges that in entering into this Agreement it has not relied on any oral or written representation, warranty or other assurance (except as provided for or referred to in this Agreement) and waives all rights and remedies which might otherwise be available to it in respect thereof, except that nothing in this Agreement will limit or exclude any liability of a party for fraud."

B. ISDA 2002 Equity Derivative Definitions (at section 13.1).

"...each party to a Transaction represents to the other party that (a) it is entering into such Transaction as principal (and not as agent or in any other capacity); (b) neither the other party nor any of its Affiliates or agents are acting as a fiduciary for it; (c) it is not relying upon any representations except those expressly set forth herein or in the ISDA Master Agreement (including the related Confirmations between them); (d) it has consulted with its own legal, regulatory, tax, business, investments, financial, and accounting advisors to the extent that it has deemed necessary, and it has made its own investments, hedging, and trading decisions based upon its own judgment and upon any advice from such advisors as it has deemed necessary and not upon any view expressed by the other party or any of its Affiliates or agents; and (e) it is entering into such Transaction with a full understanding of the terms, conditions and risks thereof and it is capable of and willing to assume those risks."

C. ISDA 2002 Equity Derivative Definitions (at section 13.4).

"... each party to a Transaction acknowledges that:

(a) neither the other party nor its Affiliates provides investment, tax, accounting, legal or other advice in respect of such Transaction; and

(b) it has been given the opportunity to obtain information from the other party concerning the terms and conditions of such Transaction necessary in order for it to evaluate the merits and risks of the Transaction. Notwithstanding the foregoing, it and its advisors are not relying on any communication (written or oral and including, without limitation, opinions of third party advisors) of the other party or its Affiliates as: (i) legal, regulatory, tax, business, investments, financial, accounting or other advice, (ii) a recommendation to enter into such Transaction or (iii) an assurance or guarantee as to the expected results of such Transaction; it being understood that information and explanations related to the terms and conditions of such Transaction are made incidental to the other party's business and shall not be considered (A) legal, regulatory, tax, business, investments, financial, accounting or other advice, (B) a recommendation to enter into such Transaction or (C) an assurance or guarantee as to the expected results of the Transaction. Any such communication should not be the basis on which the recipient has entered into such Transaction, and should be independently confirmed by the recipient and its advisors prior to entering into the Transaction."

D. Structuring Letters

"[Each of Amatra and Ajial] acknowledges that (i) CGML is acting as an independent contractor in connection with the Structuring Services and not in any other capacity including as a fiduciary, advisor or agent; (ii) [each of Amatra and Ajial] is not relying on the advice of Citigroup [sc. CGML and their affiliates] for legal, regulatory, financial, tax, accounting or investment matters, but instead [each of Amatra and Ajial] is seeking and will rely on the advice of its own professionals and advisors for such matters; (iii) [each of Amatra and Ajial] will make its own independent analysis and decision regarding the Transaction and the pricing and valuation thereof based on the advice from its own professionals and advisors, without reliance on Citigroup; (iv) [each of Amatra and Ajial] will determine, without reliance upon Citigroup, the economic risks and merits as well as the legal, regulatory, tax and accounting characterizations and consequences of the Transaction and will be capable of assuming such risks; (v) Citigroup has not, and will not, make any recommendations or representations regarding the expected or projected success, performance, result, consequence, benefit or risks (whether legal, regulatory, tax, financial, accounting or otherwise) of the Transaction; (vi) Citigroup shall have no responsibility to take into consideration the effect of the Transaction on [each of Amatra and Ajial] or its legal or beneficial owners; and (vii) nothing herein shall give rise to any liability or responsibility on the part of Citigroup for the success or anticipated benefits of the Transaction or any transactions contemplated thereby."

E. Confirmations

"In making calculations and determinations pursuant to the Transactions, [CGML] shall ... act as principal and not agent, fiduciary or advisor of any person."

(2) Acknowledgments and Agreements by GA

Non-Reliance Letter

"Citigroup's willingness to enter into the proposed leveraged option transactions and associated transactions is based on the following understandings:

(a) [GA] is duly authorized to act in connection with the proposed transactions on behalf of [Amatra and Ajial], all legal or beneficial owners of [Amatra and Ajial] and all persons who are legal and beneficial owners of the Reference Funds on the date of this letter.

(b) [GA] has had substantial experience in evaluating the economic risks and merits of transactions similar to the proposed transactions.

(c) [GA] has obtained independent professional advice (including but not limited to legal, accounting and investment advice) with respect to the proposed transactions and has not relied on Citigroup [sc CGML together with their affiliates] for advice of any kind as to such matters or as to the tax consequences of the proposed transactions.

(d) Based on [GA's] experience, the advice of his independent advisors and such other considerations as he deemed relevant, and having regard to the matters summarized in this letter, [GA] has concluded that the proposed leveraged option transactions and associated transactions are appropriate for [Amatra and Ajial] and their legal and beneficial owners."