Neutral Citation Number: [2018] EWHC 2340 (Comm)

Case No: CL-2018-000566

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

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

Date: 31st August 2018

Before :

The Honourable Mr Justice Bryan

- -

Between :

DP World Djibouti FZCO	**Claimant**
- and –	
Port de Djibouti S.A.	**Defendant**

- -
- -

Alec Hayden (instructed by **Quinn Emanuel**) for the **Claimant**

Hearing date: 31st August 2018

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APPROVED JUDGMENT

MR JUSTICE BRYAN

1. This is an application made on an ex parte basis by an application notice dated 28 August 2018 for a preliminary interim injunction pending a return date, if I am minded to grant the relief that is sought, in relation to the trial of a part 8 arbitration claim, which itself seeks relief in the form of an interim injunction to preserve assets under section 44(3) of the Arbitration Act 1996.

2. The assets sought to be protected by the injunctions are the claimant's contractual rights under a joint venture agreement to control a joint venture company, Doraleh Container Terminal SA (DCT), jointly owned by the parties, until relevant disputes have been determined by London-seated arbitration.

3. The injunctions will prevent the defendant from treating the JVA as terminated on the grounds currently alleged to justify the defendant's termination and prevent the defendant from ignoring terms of the JVA which: (1) restrict the removal of directors appointed by the claimant to the board of DCT; (2) guarantee the claimant a majority of directors on the board of DCT, and; (3) prescribe voting procedures that give the claimant a determinative vote in relation to reserved matters. In particular, the injunction sought will prevent the removal of directors appointed by the claimant to the board of DCT at a shareholders' meeting called for by the defendant, which is scheduled to be convened on 9 September 2018 (the “Shareholders' Meeting”).

4. The injunctions are sought on an urgent basis under section 44 of the Arbitration Act 1996 as it is said it is not possible to appoint a Tribunal under the rules of the London Court of International Arbitration (“LCIA”) before 9 September 2018 at which the defendant threatens to approve by its majority vote a proposal to remove the directors appointed by the claimant to the

board of DCT and replace them with directors nominated by the defendant. In doing that, I should say, based on the terms of the JVA, both those actions would prima facie be a breach of the terms of clause 7 of the JVA and also Article 17 of DCT's Articles of Association.

5. The hearing has been in private, this being an arbitration matter, and is also made on a without notice basis. The reason for that being is that it is submitted, and I am satisfied, pursuant to paragraph F2.1(b) that there are good reasons for making the application without notice because notice would, or might, defeat the object of the application. It is said that if notice had been given in this case, then either the defendant could take steps, for example, to call an emergency meeting, which would have achieved the same effect as the meeting of 9 September, or indeed could take steps to thwart any applications, such as the present, through the Djibouti courts.

<u>Background – the parties and the Joint Venture Agreement</u>

6. The claimant is a company incorporated in Dubai and a subsidiary of DP World Limited ("DP World"), a successful international port operator located in Dubai. The assistance of DP World was recruited by the Republic of Djibouti ("the Republic") at a time when Djibouti's port infrastructure required development to build and operate a new container shipping port in Djibouti called the Doraleh Container Terminal ("the Terminal").

7. Doraleh Container Terminal SA ("DCT") was incorporated as a joint venture vehicle and became party to a concession agreement dated 30 October 2006 with the Republic of Djibouti, governed by English law, under which DCT was granted a concession to develop and operate the Terminal for a minimum period of 30 years and up to 50 years, if extended at DCT's option, for two consecutive periods of ten years.

8. The defendant and DCT are companies incorporated under Djibouti law and are all parties to a joint venture agreement dated 22 May 2007 ("the JVA"), which is itself governed by Djibouti law.

9. The JVA contains the dispute resolution clause at clause 20, which requires all unresolved disputes to be referred to arbitration. Clause 20 of that JVA provides as follows:

> "Disputes.
> 20.1. In the event of any dispute between the shareholders arising out of or relating to this agreement representatives of the shareholder shall within 10 business days of service of a written notice from any shareholder to the others (a disputes notice) hold a meeting (a dispute meeting) in an effort to resolve the dispute. In the absence of agreement to the contrary the dispute meeting shall be held at the registered office for the time being of the company.
> 20.2. Each party shall use all reasonable endeavours to send their respective chief executive officers having the authority to settle the dispute to attend the dispute meeting.
> 20.3. Any dispute which is not resolved within 20 business days after the service of a disputes notice, whether or not on dispute meeting has been held, shall at the request of either party made within 20 business days of the disputes notice being served be referred to arbitration under the rules of the London Court of International Arbitration (the rules) before a single arbitrator, who shall be appointed in accordance with the rules. The place of the arbitration shall be London, England, although hearings may be held elsewhere, and the language of the arbitration shall be English. The parties waive any right of application or appeal to any court insofar as such waiver can validly be made."

10. I should say that the Articles of DCT at Article 52.1 contain the following provision:

> "Article 52. Jurisdiction election of domicile.
> 52.1. All disputes which could arise during the course of the company or its liquidation, either between the shareholders themselves regarding the company affairs or between the shareholders and the company, are subject to arbitration in accordance with the rules of the International Court of Arbitration of London. The state and the artificial persons of Djibouti and public law, shareholders of the company expressly waive any privilege of jurisdiction or enforcement."

11. At the time the JVA was made the defendant was known as Port Autonome International de Djibouti, but its name was changed in 2013. It is owned as to 76.5% ultimately by the Port Authority of Djibouti, which itself is a public company owned by the Republic of Djibouti and as to 23.5% by China Merchants, a competitor of the claimant. The defendant is the majority

shareholder in DCT owning 66.66% of the shares. The claimant is the only other shareholder holding 33.34% of the shares. However, that equity allocation was agreed at the same time as important terms were negotiated between the parties which entitle the defendant at all times to remain in control of DCT through being entitled to a majority of the directors on the board (see clause 7 of the JVA), and being granted a right to veto any resolution on important "reserved matters" (see clause 11), whether voted for at a board meeting (see clause 8), or a shareholders' meeting (see clause 9).

12. As a result of those provisions, the claimant currently has a majority on the board of DCT, as was the intention under the JVA. That current board of DCT comprises three directors, Mr Hadi, the sole director nominated by the defendant, and Mr Al Banna and Mr Wallia, the directors nominated by the claimant.

13. As I have already foreshadowed, there were various terms agreed within the JVA which were negotiated to guarantee the claimants control of the board, including a number of terms under clause 7. In particular

(1) Clause 7.1(a) guarantees that:

"The DPW shareholders shall at all times have the right to nominate a majority of the directors on the board of directors of the company.

(2) Clause 7.1(b), which provides that any increase in the number of directors beyond three must be dealt with by the shareholders as a "reserved matter" (which means that unless the claimant votes in favour of such an increase, the number of directors shall remain at three (see Clause 9.3).

(3) Clause 7.2(a), (d) and (f), which respectively allow the defendant, the claimant and the manager (that is the claimant) to nominate only one director on the board.

(4) Clause 7.3(a) which provides that:

"Only the DPW shareholders shall be entitled to ... remove the DPW directors."

and:

"The power of nomination and removal of the managing director shall vest solely with the manager."

(5) Clause 7.3(b), which provides that:

"A director shall be appointed to or removed from the board with or without cause upon and only upon the affirmative vote of the shareholder who nominated such director in accordance with clause 7.2 and the provisions of the applicable laws. Each other shareholder shall vote for the appointment or removal of a director upon the directions of the shareholder that nominated such director, otherwise no shareholder shall vote for the appointment or removal of a director."

(6) Clause 7.7 provides:

"The shareholders hereby acknowledge and agree to vote their respective shares in the company in such manner as to ensure the appointment of the nominees of the DPW shareholders ... as directors on the board of the company from time to time in accordance with the provisions of this clause 7 and applicable laws."

14. The terms of these clauses were anticipated in the Articles of Association of DCT which contained virtually identical provisions to all but clause 7.3(a) of the JVA. As will be apparent from the provisions that I have just quoted, the consequence is that under both the JVA and the Articles Mr Al Banna and Mr Wallia cannot be removed from office otherwise than if the claimant votes for them to be removed.

15. In this regard, article 17.2 of the Articles of Association provides in addition that:

"(i) The directors of the board shall be appointed and removed by the general meeting of the shareholders provided always that the general meeting shall decide in accordance with the instruction of the shareholder (S) nominating or removing a director pursuant to this article 17.2 and the provisions of the shareholders pact."

16. I should say "the shareholders pact" is a reference to the JVA, which at that stage had not yet been entered into - see the definition of "shareholders pact" in Article 5(a).1.

17. As I have also already foreshadowed, in addition to being in control of the board, certain acts of the company are defined as "reserved matters" under the JVA and can only take place if the claimant or its directors approve a resolution authorising these acts at a board meeting or a shareholders' meeting – see, in particular, Clause 11.1, Clause 8 and Clause 9.

18. There are a number of reserved matters which are of potential significance in the context of the issues involved in what will be the arbitration. In particular:

(1) increasing the number of directors of DCT beyond three, see clause 7.1(b);

(2) winding up DCT, see clauses 11.1(b) and (d);

(3) creating new shares in DCT, see clause 11.1(c);

(4) disposing of assets worth more than FD100 million, which is, I am told, around £435,000, see clause 11.1(h);

(5) revoking, rescinding or waiving or assigning rights under the concession agreement, see clause 11.1(g) and 11.1(s);

(6) settling disputes under various agreements including the concession agreement, see clause 11.1(i) and 11.1(dd);

(7) modifying the delegated authority of the managing director in deviation from the management services agreement, see clause 11.1(q);

(8) approving the issue of press releases of DCT, see clause 11.1(u).

19. It will be seen from the previous provisions that I have identified that there is a comprehensive package of provisions, both within the JVA and also in the Articles of Association the purpose of which is quite clear: to ensure that at all times, and notwithstanding the fact that the claimant is not the majority shareholder, it remains in control of the company.

20. That fact was recognised in a judgment of Flaux J in the case of *Republic of Djibouti v Boreh* [2016] EWHC 405 Comm ("the Boreh judgment") where, at paragraph 862, he referred to "the capricious nature of the regime in Djibouti" and found that:

> "Those investing there, specifically DP World and the banks who finance these projects, were only prepared (to invest in Djibouti) on the basis that management control rested with DP World and that there was no interference from the government."

<u>Disputes between DCT and the Republic concerning the Concession Agreement.</u>

21. In fact, it is an underlying dispute between DCT and the Republic in relation to the Concession Agreement which, it is said, explains the reason for the current dispute between the shareholders in DCT under the JVA. The Terminal itself, I am told, has been a great success, but the Republic of Djibouti has twice attempted to terminate the Concession Agreement, (says the claimant) prematurely, first by alleging that it was entitled to rescind it and then by passing legislation purporting to terminate it on the grounds that its terms were contrary to "the fundamental interests of the Republic". Neither of those attempts has been successful.

22. The Republic's claim for rescission was rejected by an arbitral tribunal in an award of 20 February 2017 ("the Boreh arbitration"), and then most recently a second appointed arbitrator granted declaratory relief sought by DCT that, notwithstanding the Djibouti legislation, the Concession Agreement remained binding under English law. That arbitrator's award was issued as recently as 31 July 2018 ("the Termination Arbitration).

23. The position is that although DCT remains contractually entitled to operate the Terminal under the Concession Agreement, it is not currently able to do so in practice, because the Republic has transferred control of the Terminal to a newly created company owned by the state and

incorporated in Djibouti. I am also told that the Republic has excluded DCT's personnel from the Terminal. In that regard, DCT has lodged notice of a political force majeure event and change in law by letter of 1 March requiring the Republic to mitigate the effects of that legislation and suspending DCT's obligations under the Concession Agreement in the meantime. The evidence before me from Mr Sinclair at paragraph 36 of his first affidavit is that the Republic has not responded to that notice and has refused to recognise the award in the Termination Arbitration.

The present disputes between the shareholders in DCT

24. As is addressed in some detail at paragraphs 46 to 63 of Mr Sinclair's witness statement there have been a number of recent developments:-

(1) A few days prior to the issue of the award in the Termination Arbitration by a letter to the claimant dated 28 July, the defendant claimed to be entitled to terminate the JVA and notified the claimant of its decision to do so with immediate effect.

(2) The defendant referred to the termination of the Concession Agreement, but its main allegation was that the claimant *had "seriously breached its shareholders' duties by refusing to act in DCT's best interests"* as the basis of its claimed entitlement to terminate the JVA. This allegation is based on what might be thought to be a somewhat curious proposition that it was not in DCT's best interests to have sought to protect its rights against the Republic by commencing the Termination Arbitration. That is, of course, an arbitration which resulted in a successful and favourable award in favour of DCT.

(3) The claimant disputes the defendant's right to terminate JVA and sets out its grounds for doing so in a letter dated 2 August 2018 referring to the Termination Arbitration award, which had been issued in the meantime on 31 July, and which confirmed that the Concession Agreement

remained in place, and asserting that it had acted in the mutual best interests of the shareholders of DCT in taking action against the Republic.

(4) The response to that letter from the claimant was not, as it were, to resile from its position but in fact the defendant wrote a letter to the claimant on 8 August informing it that it had called for a shareholders' meeting to take place on 9 September 2018 at which it proposes a resolution to remove the two directors appointed by the claimant and to replace them with directors nominated by the defendant. That would, of course, leave the claimant with no directors on the board, which is, as I have said, comprised of three directors.

(5) In letters to the claimant's nominated directors, also bearing that same date, 8 August, the defendant told them that a resolution had been proposed to remove them from office, explaining its position that although they were appointed pursuant to the company's Articles of Association the relevant provisions shall be deemed *"null and void as contrary to public order and contrary to the interests of the company"*, and although they were also appointed on the basis of JVA, that agreement had been terminated by its letter dated 28 July 2018.

(6) The claimant wrote disputing that entitlement of the defendant to remove those directors from the board in a letter on 10 August contending that the JVA had not been terminated and that there was no legal basis for the defendant to contend that the terms of article 17 of the Articles of Association of DCT, or any other articles, are null and void.

25. So, essentially, the effect of what is proposed by the defendant is the passage of two resolutions, firstly to remove the claimant's nominees, Mr Al Banna and Mr Wallia, from their office as directors of DCT, and secondly that the defendants' nominees, Mr Elmi Achkir and Mr Nouh Hassan, would be appointed as replacements.

26. Now, as will be apparent from the provisions of the JVA that I have already quoted, the position of the claimant, who are represented before me today by Mr Alec Haydon, are that the defendant is already in breach of the JVA in purporting to terminate it without just cause. That obviously is an issue which will have to be resolved in the arbitration. But additionally -- and it is in this context that the injunctive relief is sought -- on the assumption that the JVA and/or the Articles remain valid, then in voting for the resolution as proposed the defendant will be acting in breach of various provisions of the JVA and the Articles because, firstly, the removal, it is said, of the directors appointed by the claimant will (a) remove the claimant's majority on the board, which is protected under Clause 7.1(a) of the JVA and Article 17.1(i); (b) contravene Clauses 7.3(a) of the JVA by exercising rights reserved to the claimant and (c) breaching Clause 7.3(b) of the JVA and Article 17.2(iv), which require an affirmative vote by the claimant. The proposal to appoint additional directors is said to be in breach of Clause 7.2(a) which limits the defendant to one nomination, and causing the shareholders' meeting to decide appointments and removals is a breach of Article 17.2 of the Articles.

27. The response of the defendant has not been to back off from its proposed course of conduct, but instead to reiterate its position that the JVA has been terminated, and in a letter dated 21 August 2018 has asserted that:

> "The provisions of the joint venture agreement regarding the appointment and removal of directors, and more generally the composition of DCT's board, are no longer applicable."

28. So the position of the claimant before me this morning is that unless restrained by injunction, the defendant can be expected to proceed with the shareholders' meeting on 9 September 2018 and vote in favour of the resolutions it has proposed in breach of the JVA and also the Articles of DCT.

29. The consequence of that would be that the claimant's control of DCT would be lost and with it control over DCT's assets and claims. Those assets and claims include claims in relation to the Concession Agreement and against the Republic of Djibouti, and also in relation to money standing to the credit of DCT, including in this jurisdiction.

30. It is said that in the absence of the injunctive relief that is sought such control will be lost, which is contrary to, it is said, the whole purpose of the structure within the JVA and on the basis of which the initial investment was made, as recognised by Flaux J in the decision that I have referred to.

Activation of the procedure for the resolution of disputes.

31. I have already quoted Clause 20 of the VA. The claimant has instigated that dispute resolution procedure relying upon its letter of 10 August 2018 as a disputes notice served under Clause 20.1 of the JVA. In particular, those disputes which arise in relation to that disputes notice are whether the JVA has been terminated and whether the defendant is entitled to vote to remove the directors nominated by the claimant and itself nominate directors to replace them.

32. There is evidence before me given by Mr Sinclair in relation to the circumstances in which that dispute notice has come to the attention of the defendant. More specifically, it was emailed to the defendant on 10 August, there was an attempt by fax on 12 August, which failed because the defendant's machine was not receiving faxes, and it was also delivered to the defendant on 14 August. The consequence of that is that even though none of those are a prescribed method of service, the reality is that the dispute notice has come to the attention of the defendant. That can be seen from the fact that it has since replied to that in the letter of 21 August.

33. It may have been noted when I quoted Clause 20 that there is an oddity in the wording of Clause 20 which requires a request for arbitration to be made within 20 business days after service of the notice. The likelihood is, on its true and proper construction, that in fact it means after 20 business days, but, proceeding cautiously, the claimant has assumed that the notice was validly served when it was first delivered on 10 August.

34. It will be recalled from Clause 20 that one of the requirements is to attend a disputes meeting (see Clause 20.1) is that there is to be a meeting of representatives of the parties within 10 business days. However, by its letter of 21 August 2018, the defendant refused to attend such a meeting and again repeated its invitation to attend the shareholders' meeting on 9 September. It is against that backdrop that the intention of the claimant is to refer the dispute to LCIA arbitration.

35. The 20 business day period is calculated by Mr Sinclair to expire on 6 September, and so the intention of the claimant is to make a request for arbitration on 5 September. The seat of that arbitration is in London, and accordingly, this court has got supervisory jurisdiction under the Arbitration Act 1996 ("the Act").

Section 44 of the Act

36. The specific relief that is sought in this case by the claimant in relation to the arbitration claim is discretionary relief under section 44 of the Arbitration Act 1996, which provides:-

> **Court powers exercisable in support of arbitral proceedings.**
>
> (1)Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.
>
> (2)Those matters are—
>
> (a) the taking of the evidence of witnesses;
>
> (b) the preservation of evidence;

(c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—

(i) for the inspection, photographing, preservation, custody or detention of the property, or

(ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;

and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;

(d) the sale of any goods the subject of the proceedings;

(e) the granting of an interim injunction or the appointment of a receiver.

(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

(4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

(5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

(6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order."

37. I am satisfied that this case is one of urgency and that therefore one is within section 44(3) in terms of this not being a section 44(4) case where, if the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings upon notice to the other parties and to the Tribunal made with the permission of the Tribunal or the agreement in writing of the other parties.

38. A question that has arisen in a number of cases, including this case, is what is meant by "for the purpose of preserving evidence or assets". The leading case in that regard is *Cetelem SA v Roust Holdings* [2005] 1 WLR 3555 in the Court of Appeal. That case establishes that the power to make an order for the purpose of preserving evidence or assets includes the preservation of

contractual rights, and of course it is the preservation of contractual rights which the claimant is seeking to protect by the relief which is sought in this case.

39. In *Cetelem* itself, Clarke LJ addressed matters in particular at paragraphs [57] to [73]. At paragraph [57] he noted that counsel in that case had correctly accepted that *"Assets are not limited to tangible assets but include, for example, choses in action",* that there was no good reason for construing the meaning of "assets" narrowly, and that the learned judge could see no reason why assets should be limited to the defendant's assets.

40. At paragraph 62 he stated as follows:

> "62. It is important to note that we are considering only the powers of the court and not how those powers should be exercised. Thus section 44(3) only gives jurisdiction to the court to make orders which are *necessary* for the purpose of preserving evidence or assets (my emphasis). It is evident that the purpose of the order must be to facilitate the arbitration or the enforcement of an award and not to usurp the functions of the arbitral process. However, as I observed earlier, there is nothing in the subsection to limit the power of the court to orders which do not involve a preliminary determination of a contractual right of the parties. I see nothing in the subsection or the Act which provides that the court has no power to make an order which it thinks necessary for the purpose of preserving evidence or assets because it will also involve forming a view on the merits of the dispute which the parties have agreed to submit to arbitration or because it involves directing a party to take a step which the contract provides that it must take. Whether it is right in principle to make such an order in any given case is an entirely different question but I cannot see that there is anything in the subsection or the Act which deprives the court of the power to make an order which it thinks is necessary for the purpose of preserving evidence or assets. It is that power which is expressly conferred by the subsection."

41. In that case, and whilst accepting that a chose in action was an asset, counsel for one of the parties sought to distinguish between the substantive rights created by the contract, which were accepted to be choses in action and thus assets, and the remedies which were or might be available to enforce those rights, such as specific performance. Clarke LJ at [70] to [72] stated as follows:-

> 70. For my part, I prefer the submissions of Mr Black on this point to those of Mr Dunning. I would not accept the submission that the injunction was granted merely for the protection or preservation of Cetelem's claim for specific performance and not for the protection or preservation of its contractual right to buy the shares. It appears to me that the right to purchase the shares under the SPA was indeed a substantive right, although it may properly be regarded as a conditional right since it depended upon the performance of certain conditions precedent. In my opinion, whether regarded as a conditional right or not, it was to my mind an asset within the meaning of section 44(3) . It follows from the language of the subsection that, if the judge thought that it was necessary to grant the injunction in order to preserve the right, he had the power (but not of course the obligation) under the subsection to make an appropriate order. Moreover, it appears to me that it was that right (and not simply Cetelem's equitable remedies) which the order was designed to protect or preserve.
>
> 71. In these circumstances I would hold that the court had jurisdiction to grant the injunction under section 44(3) , even though it did not have the wider discretion which it had been held to have in *Hiscox* . I would repeat here the point I made earlier that I do not think that this decision in any way usurps the functions or powers of the arbitral tribunal. The whole purpose of giving the court power to make such orders is to assist the arbitral process in cases of urgency before there is an arbitration on foot. Otherwise it is all too easy for a party who is bent on a policy of non-cooperation to frustrate the arbitral process. Of course, in any case where the court is called upon to exercise the power, it must take great care not to usurp the arbitral process and to ensure, by exacting appropriate undertakings from the claimant, that the substantive questions are reserved for the arbitrator or arbitrators.
>
> 72. The question arises what order this court should now make. Mr Black submits that, even on the narrow basis which I would hold to be the correct approach, it follows from the above that the order made by the judge fell within his jurisdiction under section 44(3) of the 1996 Act and that, since the judge did not give leave to appeal, from it this court has no jurisdiction to review it. On the assumption that we reached the conclusions on construction which I have set out, I understood Mr Dunning to accept that that was the case."

42. He ultimately concluded at paragraph 73:

> "The order would not be dispositive of the parties' rights but merely facilitated the administrative processes necessary to give the contract effect. Making the order did not prevent RHL from raising such arguments as it wished before the arbitrators to justify refusal to complete the transaction. As I read the judgment, the judge essentially accepted those submissions and must to my mind have been satisfied that the order was necessary for the purposes of preserving Cetelem's contractual rights and thus its assets."

43. Mr Haydon draws a parallel with the present case where he says the right to control DCT is itself a substantive contractual right under the JVA which is in need of protection in the light of the conduct of the defendant.

44. As part of the duty of full and frank disclosure, Mr Haydon has drawn to my attention a decision of Males J, *Zim Integrated Shipping Services Limited v European Containers KS & Another* [2013] EWHC 3581, in particular at [24] to [33]. In that case Males J expressed a certain degree of hesitation about whether or not, on the facts of the case, contractual rights are assets within section 44(3). In particular I have regard to what he said at [24]. However, ultimately, albeit he said with some hesitation, he concluded that that was a case which falls within subsection (3) of section 44.

45. In my view, there is nothing within the decision of Males J which calls into question the principles that I have identified from the *Cetelem* case, or which would derogate from the nature of the relief that is sought in the draft order, including paragraph 2.1 of that draft order, if I am otherwise minded to grant that injunction.

46. In relation to section 44(3), I was referred to *Commercial Injunctions 6th edition* by Steven Gee QC, in particular on page 180 where the editor draws attention to the *Cetelem* decision and expresses the following view:

> "Therefore section 44(3) could apply to a contractual right of a joint venture to communicate with government authorities or a claim for repayment of a loan. The interpretation of section 44 in Cetelem v Roust Holdings does not restrict relief under section 44(3) to an order which as a matter of form preserves assets, the court looks to the purpose of the order. Also, the assets do not have to be the assets of the applicant or those of the respondent, they can be assets of a non-party such as, for example, assets of a joint venture company, or a company in which the applicant or the respondent holds shares."

47. Mr Haydon draws my attention to that because he says that such sentiments are particularly apt in the context of this JVA and the position of DCT.

48. The applicable principles in relation to an application under section 44 of the Act are well established. The court will exercise its discretion in broadly the same way as it does in exercise

of its power to grant injunctions under section 37(1) of the Senior Courts Act 1981 in all cases in which it appears to the court to be just and convenient to do so.

49. The approach of the court was summarised by Clarke J in *Sabmiller Africa BV v East African Breweries Limited* [2009] EWHC 2140 Comm, at [47]-[53]. In particular, at [47] to [49] where he said as follows:

> "…It is not possible, on an interlocutory application such as this, to resolve conflicts of evidence on issues of fact on which the outcome of the case may depend. The general approach of the court in the exercise of its powers to grant an injunction under section 37 (1) of the Supreme Court Act 1981 is well known. If the court is satisfied that there is a serious question to be tried, it must go on to consider whether the claimant would be adequately compensated in damages and whether the defendant would be in a financial position to pay them. If the answer to both of those questions is in the affirmative, no injunction should normally be granted. If not the court must consider whether the defendant would be adequately compensated under the claimants undertaking as to damages in the event of his succeeding at trial. If the answer to that question is "yes" the fact that the defendant may succeed at trial is no bar to the grant of an injunction. Where there is doubt as to the adequacy of damages for both parties the court must determine where the balance of convenience lies. If matters are evenly balanced it may be wise to take such measures as are calculated to preserve the status quo.
>
> 48 These guidelines - derived from the speech of Lord Diplock in *American Cyanamid Co. Ltd v Ethicon [1975] AC 396* - are just that. They are not a fetter on the Court's jurisdiction under section 37 to grant an injunction where it is just to do so: see Lord Goff in *Reg. v. Secretary of State for Transport ex p. Factortame Ltd [1991] 1 A.C. 603* at 671E-674A; and Mance, LJ (as he then was) in *Bath and North East Somerset District Council v Mowlem Plc [2004] BLR 153* , at para 12. A fundamental principle is that the court should take whatever course appears to carry the lower risk of injustice if it should turn out to have been the "wrong" course — in the sense that the court either grants an injunction which should have been refused or refuses to grant an injunction that should have been granted: Factorrtame p 683, approving Hoffman J in *Films Review Ltd v Cannon Film Sales Ltd [1987] 1 WLR 670* , 680.
>
> 49 Further, the question whether damages are an adequate remedy is to be asked in the context of the underlying purpose of the jurisdiction, namely that of doing what is just. As Sachs LJ (with whom Edmund Davies and Cairns LJJ agreed) said in *Evans Marshall & Co. v. Bertola S.A. [1973] 1 W.L.R. 349* , at 379H:
>
> "The standard question in relation to the grant of an injunction, "Are damages an

> adequate remedy?", might perhaps, in the light of the authorities of recent years, be rewritten: "Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?"

50. As is now well established, and as is recognised in *Gee On Commercial Injunctions*, supra, the *American Cyanamid* principles are "guidelines" and are not "a straitjacket". Where the function of the court is to hold the position as justly as possible pending trial, with an interim order such as that sought in the present casethe object is to make whatever order will be likely best to enable the trial judge to do justice between the parties whichever way the decision goes at trial. It is submitted on behalf of the claimant that in the present case this involves the maintenance of the *status quo* until the arbitrator can decide the substance of the dispute.

51. The question of the inter-relationship between the arbitrators and the court is a matter which was addressed in the *Sabmiller* case in which Clarke J said as follows at paragraph 200:

> "I take into account that the parties have agreed to have their disputes determined by arbitration. I do not regard that as a reason why the court should make an order if it would not have done so in the absence of an arbitration clause. But a case such as this is, in my view, one in which it is appropriate to grant interim relief on the footing that there should be a speedy determination, at least of the issues of liability. If there were no arbitration clause that would involve ordering a speedy trial. An ICC arbitral tribunal should be able, with the same and possibly greater facility than the court, to arrange for a speedy hearing. In view of the volume of evidence already produced the parties are well on the way so far as preparation for such a hearing is concerned. The appropriate course seems to me to grant interim relief which is subject to termination upon a further order of the arbitral tribunal. That will have the advantage that any further question as to the continuance of relief can come before the very tribunal which is to determine the merits; and should mean that the interim relief I am about to be order is not, in effect, final."

52. Of course, in the present case, what is being sought is *ex parte* relief pending a return date at which the issues that arise can no doubt be aired in greater detail than has been possible before me today.

Serious Issue to be Tried

53. The threshold to be passed in order to establish a serious issue to ne tried is not a high one. It is the well- known requirement of real prospects of success. That does not involve, and the court should avoid, any detailed analysis of the merits. In this regard, Lord Diplock said in the well known passage in *American Cyanamid* as follows, at page 407G:

> "The use of an expression such as 'a probability', a 'prima facie case', or a 'strong prima facie case' in the context of the exercise of discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words that there is a serious issue to be tried."

54. I have had careful regard to the matters identified by Mr Sinclair at paragraphs 83 to 109 of his first affidavit. I am satisfied, for the purpose of this application today, that the claimant's position is certainly not frivolous or vexatious and that there is a serious issue to be tried. It would be wrong for me to express any firm views on the merits at this stage, not least because ultimately that will be a question for the Tribunal and not for this court, but on the material currently before me, I am satisfied that there is certainly serious issues to be tried, and indeed that the merits of the claimant's position in relation to those points are very much higher than that low threshold. That is not expressing any concluded views on the merits, it is simply expressing a view for the purpose of today's application based on the material that is currently before me.

55. Those issues are in relation to whether or not the claimant is in serious breach of the JVA. Certainly at first blush, the claimant has got strong arguments that it is not in serious breach of the JVA, because to cause DCT to bring the claim against the Republic would not, on the material before me, appear to be contrary to the best interests of DCT, particularly given the outcome and the arbitration award that resulted.

56. Secondly, in relation to the termination of the JVA, therefore, on the ground of the alleged breach of the claimant, I consider that there is a serious issue to be tried in relation to that. Even if the JVA had been properly terminated on 28 July -- and of course that is one of the issues which will be tried -- that does not, it seems to me (on the material currently before me) entitle a defendant to ignore the provisions in DCT's Articles of Association regarding the appointment and removal of directors and the composition of DCT's board.

57. In this regard I bear well in mind the points that are identified both in the skeleton argument and in the witness statement in which the claimant rightly acknowledges that the defendant would be entitled to terminate the JVA under Djibouti law if the claimant had been in a sufficiently serious breach of the JVA, and also the fact that the claimant does owe a duty under Clause 10.2 of the JVA to use its best efforts to cause directors appointed by them in their capacity as a director of the company to execute and do all matters, deeds, documents and things within their power to procure compliance with the terms of the agreement. In this regard Clause 7.12 provides that:

> "In exercising their powers directors shall be obliged to act in the best interests of all the shareholders and the company and so as to ensure that the company meets all of its obligations under the concession agreement, and that the company acts in accordance with all applicable laws."

58. Those provisions will no doubt be relied upon by the defendant hereafter, but nevertheless, on the question of "serious issue to be tried", I consider that there clearly is a serious issue to be tried as to whether the claimant's directors failed to act in the interests of DCT, and the claimant's position of course is that it did not do so, and indeed acted very much in the best interests of DCT, and that the claimant was not in breach of the JVA, still less a serious breach.

In any event, having regard to the matters identified in Mr Sinclair's affidavits and the skeleton argument of Mr Haydon, I am satisfied that there is a serious issue to be tried.

The balance of convenience

59. That being the case, the next question is the balance of convenience. In this regard, the first question is whether, if the claimant were to succeed in the arbitration in establishing its right to a permanent injunction, it would be adequately compensated for the loss it would have sustained by the defendant continuing to act, which was sought to be enjoined in the meantime. Is it just to confine the claimant to a remedy in damages?

60. In this regard I have been referred to the decision of *Evans Marshall v Bertola* [1973] 1 WLR 349 in the Court of Appeal. While the court often asks the question of whether damages would be an adequate remedy, the issue is always to determine what is just, in all the circumstances, and whether the claimant should be confined to its remedy in damages.

61. In this regard Mr Haydon has referred me to the case of *Re Canterbury Travel (London Limited) v Collins* [2010] EWHC 1464 (Ch) where Briggs J (as he then was) stated at [27]:

> "Mrs Collins faces a real risk of immediate and irremediable prejudice not, in my judgment, from the risk that Mr Collins will damage the company, still less that he will do so to an extent greater than the value of his shares, but rather from being wrongly kept out of control of the business. If it should turn out that Mrs Collins' petition is unfounded she will have lost in effect a year's control of the business and she will not ever be able to get that back if, at the end of the day, the petition fails."

62. Mr Haydon submits that a similar position applies here in relation to the position of DCT and the consequences of the course of conduct which is proposed by the defendant unless restrained by this court.

63. One of the relevant considerations, of course, is whether or not the effect of an injunction such as the present would be to force parties to work together closely in circumstances where there has been a breakdown in trust and confidence between those parties (see what was said by Clarke J in *Sabmiller* at [161] to [164].

64. However, the present case is not such a case, firstly because DCT is not currently operating the Terminal and secondly, and in any event, because the management of the Terminal is delegated to the claimant under a separate management services agreement, as is addressed by Mr Sinclair at paragraphs 17 and 38 of his first affidavit. In any event, and by virtue of the provisions which I have quoted, it is quite clear that the JVA was negotiated to ensure that at all times -- that is even if there is a dispute between the parties -- the claimant was to remain in control of DCT.

65. Of course, even if this had been a case where some degree of mutual co-operation and confidence is needed, that does not preclude the court from granting negative injunctions designed to encourage a party in breach to perform his part - see what was said by the Court of Appeal in *Evans Marshall* at page 379F.

66. I consider that set against that background it would not be just to confine the claimant to a remedy in damages. The likelihood is that in fact, if the course of conduct which is proposed was carried into effect, there would indeed be a real risk of immediate and irremediable prejudice through the claimant losing control of the business as a consequence of the actions that are proposed at the forthcoming meeting.

67. Set against that, I am satisfied that there is no substantial prejudice to the defendant to be weighed against the prejudice that I have just identified to the claimant. It is to be borne in mind that the defendant contracted away the right to control DCT to the claimant and those rights

were indeed enshrined within the Articles of Association. I have seen material before me this morning which suggests -- I put it no higher than that at the moment -- that the defendant is wishing to take control of DCT not for any genuine commercial reason but in order to take control of DCT's assets and dispose of those, which are claims against shareholders in the defendant.

68. And of course there is an inherent conflict of interest which would arise if the defendant were to take control of DCT given the fact that the claims concerned relate to the Republic and China Merchants. Those are not claims in relation to which the defendant could act independently, given its own self-interest, and the claimant is the party which it might be thought to be best placed to negotiate with the Republic and China Merchants.

69. I am therefore satisfied that justice requires that the claimant remain in control of DCT, at least in terms of maintaining the status quo pending a return date, and of course at that return date the question that arises is whether or not the relief -- if I grant relief -- should continue until that dispute as to whether the JVA has been terminated by the Tribunal has been resolved in due course by that Tribunal.

70. I turn then to the question whether the defendant will be in a position to pay the claimant damages. In terms of likely damage that could be caused I consider it to be self-evident that it may be difficult to assess the extent of damage caused by the change of control. I am satisfied that on the evidence before me the defendant may be able to cause significant harm to the claimant and may not have the financial means to pay damages, I am also alive to the potential difficulties of enforcing an award of damages given that the defendant's assets are in Djibouti.

71. On that latter point, however, I do not consider that there is evidence before me which would justify a conclusion that the courts of Djibouti do not act in accordance with the rule of law, or

indeed would not, at least potentially, respect any orders that were made. In this regard, Mr Sinclair in his second affidavit foreshadows the intention of the claimant, if it gets the relief that it seeks, to investigate whether or not it can in fact use the courts of Djibouti to further such relief as it gets, either on this application, or indeed in the context of any arbitration.

72. It is also right to say that there is considerable uncertainty as to exactly what the defendant might do in terms of harming DCT, but that of course would be avoided if the claimant remained in control of the company.

73. I have already foreshadowed the nature of the claims that exist, but giving more flesh to that, firstly DCT has outstanding claims against each of the defendant's ultimate beneficial owners, that is the Republic and China Merchants. It is clear that the Republic wishes to terminate the Concession Agreement, and indeed the defendant supported its claim to rescind it in the Boreh arbitration. And unless the terms of the Concession Agreement are varied, DCT will be entitled to substantial compensation.

74. The consequence, if the defendant were to take action to compromise DCT's claims against the Republic under the Concession Agreement and bring about the termination of that agreement, is that the defendant would be required to pay the claimant compensation under clause 14.3(f) of the JVA. The evidence of Mr Sinclair in his affidavit at paragraphs 119 to 126 is that, doing the best he can, he estimates that the claimant will be entitled to many hundreds of millions of dollars by way of compensation. Certainly there is no evidence before me to suggest that the defendant has sufficient assets to compensate the claimant in such a sum.

75. It is right that there is also the question of whether or not any award of damages would be satisfied even if the defendant did have the money to pay, but certainly, at the very at least, it is appropriate to bear in mind the potential difficulties of enforcement.

76. Set against that background, therefore, I am satisfied that the balance of convenience is very much in favour of granting interim relief. There is a cross-undertaking in the usual form. There is also evidence before me that the parent company of the claimant, DP World, is willing to fortify the undertaking if required, and DP World has written to the claimant agreeing to indemnify it in respect of any liabilities it may incur under its cross-undertaking.

77. At this stage, I do not require any fortification of the cross-undertaking. At the moment it is difficult to see exactly what harm could come to the defendant as a result of the injunctive relief which I am going to grant. Firstly, it is only being granted until a return date, which shall be an early return date, which I will discuss with counsel for the claimant shortly. But also, in circumstances where the position is that there is no evidence that the defendant will be able to operate DCT more profitably, or will suffer any real loss as a result of being unable to treat the JVA as terminated, any loss would be likely to be limited, and potentially relate only to costs. Set against that background, I am satisfied that the standard cross-undertaking, coupled with a letter from DP World to stand behind the claimant, suffices for present purposes.

78. This is, of course, an application made without notice, and the claimant rightly accepts and acknowledges that there is a duty of full and frank disclosure arising out of that. Mr Sinclair's affidavit identifies at some length those matters which he considers are appropriate and should be disclosed to this court, which I have borne well in mind. Equally, Mr Haydon during the course of his oral submissions this morning, has taken me to a number of provisions within the exhibits, which I bear well in mind.

79. In the above circumstances I am satisfied there is a serious issue to be tried and that the balance of convenience is in favour of the granting of the relief sought, and I am prepared to grant the

relief sought on the terms sought in the draft order, subject to finalising the same with Mr Haydon at the conclusion of this judgment.

80. I am also satisfied that this is an appropriate case for permission to serve out under CPR 62.5(1)(b) of the arbitration claim form in the context of the claim for an order under section 44 of the Act, and equally that it is an appropriate case to grant permission to serve the other documents that are specified in the proceedings out of the jurisdiction.

81. I have also had regard to the evidence of Mr Sinclair in relation to the addresses at which the defendant is thought to be found in Djibouti, and against that background I give permission to serve the claim form out of the jurisdiction together with the other documentation that is also sought.

82. Therefore, for the reasons that I have stated, I consider this is an appropriate case, in the exercise of my discretion, for the granting of the interim relief sought. I also grant permission to serve out the claim form and the documents that I have identified in the circumstances that exist.