Neutral Citation Number: [2013] EWCA Civ 784

Case No: A3/2012/1708 & 1720

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MR JUSTICE FLOYD
[2012] EWHC 1610 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 2nd July 2013

Before :

LORD JUSTICE LAWS
LORD JUSTICE AIKENS
and
MR JUSTICE MANN

- -

Between :

Joint Stock Company 'Aeroflot-Russian Airlines'	**Appellant**
- and -	
Berezovsky & Ors	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Francis Tregar QC & Alex Pelling (instructed by **Streathers Solicitors LLP**) for the **Appellant**
Philip Marshall QC & Justin Higgo (instructed by **Pinsent Masons LLP**) for the **Respondents**

- -

Judgment

Lord Justice Aikens :

I. The Story so far in outline

1. This is another appeal in which the jurisdiction of the English court is questioned in litigation where the parties are a Russian state controlled company, Russian-born individuals and various companies said to have been created or controlled by those individuals. In this case the claimant is the 51% state-owned Russian airline, which I will call "Aeroflot". It has alleged that in the years 1996-8 a fraud was perpetrated on it by the activities of the late Mr Boris Berezovsky and Mr Nikolay Glushkov through seven companies allegedly controlled by them. As is well-known, Mr Berezovsky left Russia some years ago and settled in the UK, where he lived until his death on 24 March 2013, very shortly after the hearing of this appeal. Mr Glushkov, a business associate of Mr Berezovsky, currently lives in the UK. I will refer to these two defendants, who took no part in the appeal before us, as "the individual defendants". Aeroflot began the present proceedings in early 2011. It served them on the individual defendants in England, that being their state of domicile.

2. The arguments on jurisdiction concern the third to fifth and seventh defendants. They are all companies in the same group, known as the Forus Group, and, Aeroflot asserts, were at the time of the relevant events all controlled by Mr Berezovsky and Mr Glushkov. Those companies are respectively domiciled in Luxembourg, Cyprus, Switzerland and the British Virgin Islands. I will refer to them, as Floyd J did in the judgment appealed, as follows: first, the third defendant, which is the Luxembourg parent company, I will refer to as "Holdings". It was formed by Mr Beresovsky in 1992. He and Mr Glushkov were directors of Holdings for some time, although Mr Berezovsky's case is that he resigned in November 1996. Secondly, Holdings' subsidiaries, which are, respectively, the fourth, fifth and seventh defendants, will be referred to as "Cyprus", "Services" and "Finance". The sixth defendant, which I shall call "Leasing", is also domiciled in Switzerland. It took no part in the applications before Floyd J or on the appeal. I will call the corporate defendants generally "the Forus companies".

3. Aeroflot's claim is that the individual defendants have, through their creatures, the Forus companies, defrauded Aeroflot of over US$ 99 million. Aeroflot asserts that the mechanism for siphoning off funds that belonged to Aeroflot was, briefly, as follows: Mr Berezovsky, who was an important and influential man in Russian business, politics and government in the 1990s, was the representative of a Russian/Italian joint venture company called AvtoVAZ, which manufactured and sold Lada cars. Holdings was formed in 1992 to assist AvtoVAZ. Aeroflot asserts that Mr Glushkov was a director of Holdings, but he says that he gave all his interests in the Forus companies to Mr Berezovsky in July 1995 and ceased to be a director or attend board meetings from mid-1996. Aeroflot alleges that Mr Berezovsky used his influence with Aeroflot's then Director General, Marshal Shaposhnikov, to "insert" Mr Glushkov as Deputy Director General of Aeroflot, with responsibility for economic and financial affairs, and also to infiltrate a LogoVAZ team in strategic places in Aeroflot.[1]

[1] Mr Berezovsky and Mr Glushkov deny this. They say that Marshal Shaposhnikov recruited Mr Glashov, in particular to undertake an examination of the financial situation of Aeroflot.

4. Aeroflot asserts that Mr Glushkov then obtained the appointment of the previously incorporated Services to act as advisor to Aeroflot, pursuant to a recommendation Mr Glushkov made to Aeroflot in December 1995 that Aeroflot ought to obtain the assistance of the Forus Group to advise it on the management of Aeroflot's finances abroad. Aeroflot says that this recommendation was made by Mr Glushkov without disclosing his and Mr Berezovsky's interest in Forus. The appointment of Services as advisor was set out in the "Advisory Mandate" dated 19 December 1995 between Aeroflot and Services. Under this contract Services would advise Aeroflot on selecting foreign partners to participate in investment projects and in the management of those projects. Services would get a fee of up to US$30,000 per annum and a 1% fee on any financing achieved by Aeroflot. The Advisory Mandate contract is governed by Swiss law and contains a Lausanne jurisdiction clause.

5. Aeroflot asserts that Services and Aeroflot, at the instigation of Mr Glushkov, then entered into a series of financial agreements which he and Mr Berezovsky had planned and which they knew had no proper commercial justification. Aeroflot asserts that through these contracts over US$90 million odd which (Aeroflot says) should have gone to Aeroflot was passed to the Forus companies and then on to Mr Berezovsky and Mr Glushkov. The initial contract was the First Credit Agreement ("FCA") between Aeroflot and Services which was dated 3 April 1996. That has an exclusive jurisdiction clause in favour of Lausanne in it and is governed by Swiss law. The FCA was amended by the Amendment Agreement of 27 May 1997, which, amongst other things, substituted a Swiss ICC arbitration clause for the jurisdiction clause. It is the amended FCA ("AFCA") which is relevant for the purposes of this appeal.

6. The second contract was the Second Credit Agreement dated 24 November 1997 ("SCA"), which was between Aeroflot and Services. That was amended on 25 June 1998 so that Cyprus was substituted for Services. Again, it is the Amended SCA ("ASCA") which is relevant. The ASCA has a Zurich ICC arbitration clause in it and is also governed by Swiss law.

7. Pursuant to these agreements, monies were loaned by the relevant Forus company to Aeroflot in return for fees and, more importantly, in return for an assignment of payments due to Aeroflot from non-Russian airlines for permission to "overfly" Russian airspace. It is said that the Forus companies received these fees knowing that Mr Glushkov was acting in breach of his duty as an officer of Aeroflot and knowing that each of the payments made to the Forus companies was made as a result of the breach of duty by Mr Glushkov and/or Services (with whom Aeroflot had concluded the Advisory Mandate), so that each of the Forus companies has acted in bad faith. Aeroflot asserts that the fees have either been retained by the Forus companies or have been passed on to Mr Berezovsky or Mr Glushkov.

8. The claims are pleaded primarily on the basis of breaches of Russian law. It is alleged that the Forus defendants are liable to compensate Aeroflot under various articles of the Russian Civil Code. The claim in respect of the diverted monies from airlines is currently put at US$90.3 million and the fees paid in respect of the

unnecessary advice are valued at US$9 million.[2] In the alternative, claims are made under Swiss law against Cyprus and Leasing.

9. Aeroflot says that it only became possible to issue proceedings in December 2010 because, since 2001, all of Aeroflot's papers and records had been taken into the custody of the Russian authorities, as a result of an audit of Aeroflot which (Aeroflot alleges) revealed that large sums had been improperly paid out to the Forus group. There followed an investigation by the Russian prosecuting authorities, so Aeroflot says it had no access to its papers and records again until September 2010.

10. Aeroflot obtained leave to serve Finance (a British Virgin Isles – BVI - company) out of the jurisdiction on the basis that it was a "necessary and proper party" to those proceedings within ***CPR Pt 6.36 and Practice Direction 6B paragraph 3.1(3).*** No leave was needed to serve Holdings and Cyprus because the rules governing jurisdiction for claims against them are contained in ***Council Regulation (EC) 44/2001*** ("the Judgments Regulation") and so ***CPR Pt 6.33*** applies. Similarly, no leave was needed to serve proceedings on Services and Leasing (Swiss companies) because the rules for jurisdiction in their cases is governed by the revised ***Lugano Convention*** (2007)[3] and so also by ***CPR Pt 6.33.*** In respect of the claims against each of these Forus companies, Aeroflot has said that the claims are "…so closely connected that it is expedient to hear and determine the claims together to avoid the risk of irreconcilable judgments resulting from separate proceedings".[4]

11. Holdings, Cyprus, Services and Finance have all challenged the jurisdiction of the English court. Services relies upon the fact that the Advisory Mandate contract has a Lausanne jurisdiction clause and claims that this is an exclusive jurisdiction clause within Article 23 of the revised ***Lugano Convention***. Alternatively, it relies on the ICC arbitration clause which was inserted in the FCA by the Amendment Agreement and submits that the court must stay the proceedings against it pursuant to ***section 9(1)*** and ***(4)*** of the ***Arbitration Act 1996*** ("***AA 1996***"). Aeroflot's response is that there was no true agreement to the Lausanne jurisdiction clause in the Advisory Mandate so that Article 23 does not apply to it. Further, Aeroflot argues that the arbitration clause in the AFCA is "null and void [or] inoperative [or] incapable of being performed" within ***section 9(4)*** of the ***AA 1996*** so that the court should not grant a stay of any proceedings concerning the AFCA in favour of arbitration.

12. Cyprus relies on the Zurich ICC arbitration clause in the ASCA and seeks a stay under ***section 9(1)***and ***(4)*** of the ***AA 1996***. Aeroflot responds in the same way as for the AFCA.

13. Holdings, the Luxembourg company, says that if Services and Cyprus are entitled to a stay under ***section 9(1)*** and ***(4)*** of the ***AA 1996*** then it will no longer be expedient to hear and determine Aeroflot's claim against Holdings here in England because the

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[2] Paras 81 and 80 respectively of the Amended Particulars of Claim.

[3] The revised Lugano Convention came into force in England and Wales on 1 January 2010 and was ratified by Switzerland with effect from 1 January 2011. The transitional provisions at Art 63 of the revised Convention states that it "*shall apply only to legal proceedings instituted…after its entry into force in the state of origin…*". As Aeroflot issued the present claim against Services and Leasing on 15 December 2010 and the revised Convention had come into force in England and Wales on 1 December 2010, it is agreed that it is the revised Convention that applies to these proceedings.

[4] This is the wording of ***Article 6(1)*** of the Judgments Regulation and of the revised Lugano Convention.

danger of "inconsistent judgments" cannot be avoided anyway. This is because if Aeroflot wishes to pursue Services or Cyprus, it will have to do so in arbitration in Switzerland, pursuant to the arbitration clauses in the AFCA and ASCA, or in court in Switzerland, pursuant to the Lausanne jurisdiction agreement in the Advisory Mandate.

14. Finance asserts that it is not a "necessary and proper party" to proceedings in England if Aeroflot has to pursue the claims against the other Forus companies in court or arbitration in Switzerland. In any event, Finance argues that there is no "serious issue" to be tried as between it and Aeroflot, so leave to serve out of the jurisdiction should have been refused in any event.[5]

15. I have set out the relevant provisions of the Judgments Regulation (Articles 2, 6(1), 23, and 28), the revised Lugano Convention (Articles 2, 6(1), 23 and 27), ***section 9(1)***and ***(4)*** of the ***AA 1996*** and ***Article II*** of the United Nations ***Convention on the Recognition and Enforcement of Foreign Arbtral Awards 1958,*** ("the New York Convention") on which ***sections 9(1)*** and ***(4)*** of the ***AA 1996*** are based, in Appendix 1 to this judgment. I have set out the jurisdiction and arbitration clauses on which the Forus companies rely in Appendix II to this judgment.

16. Floyd J heard the various challenges to the English court's jurisdiction by the Forus companies over 4 days in May and June 2012. In his judgment handed down on 18 June 2012 he concluded, first, that Services had "much the better of the argument" that the Lausanne jurisdiction clause in the Advisory Mandate contract was enforceable as against Aeroflot for the purposes of Article 23 of the revised Lugano Convention. Therefore the English court had no jurisdiction in respect of claims between those companies.

17. Secondly, Floyd J held that there should be no stay of the proceedings against Cyprus under ***section 9(1)*** and ***(4)*** of the ***AA 1996***. The judge dealt with the two arguments advanced by Aeroflot, based upon doctrines of Swiss law, which law, it was agreed, applied to determine the validity and enforceability of the arbitration clause in the ASCA. The first argument was that Mr Glushkov had been acting for both Aeroflot and Services/Cyprus when the SCA was concluded and amended, so that there was no true agreement to the arbitration clause under the Swiss law doctrine of "double representation". The judge concluded that he should not decide that point simply on the written evidence of Swiss law before him. The second argument was that the Swiss law doctrine of "abuse of right" (or *"abus de droit"*) applied in this case because Cyprus was attempting to use the existence of the arbitration clause to fragment the proceedings that Aeroflot was attempting to bring against the various Forus companies. Floyd J accepted that argument and held that, in consequence, the arbitration agreement in the SCA was "null and void" or "inoperative" within ***section 9(4)*** of the ***AA 1996.*** So he refused to grant a stay of the proceedings against Cyprus.

18. So far as Holdings was concerned (and Cyprus insofar as it relied on the same arguments once it could not obtain a stay in favour of arbitration), the judge held that Aeroflot was still entitled to rely on Article 6(1) of the Judgments Regulation because, even if any claim against Services had to be decided in Switzerland pursuant to the

[5] Services had apparently accepted that there is a serious issue to be tried as between Aeroflot and the individual defendants.

Lausanne jurisdiction clause in the Advisory Mandate contract, the Swiss courts still "may" stay those proceedings in order to avoid the possibility of two irreconcilable judgments (one in England and one in Switzerland), bearing in mind that England was the court "first seised" and that the claim against Services was closely connected to those against the individual defendants.

19. As for Finance, the judge held that it remained a "necessary and proper party" and that there was enough substance in the claim against Finance to justify permission to serve out of the jurisdiction on Finance in the BVI. So he refused to set aside the leave to serve out of the jurisdiction that had been granted in respect of Finance.

20. In the result, therefore, only Services was successful before Floyd J in its challenge to the English court's jurisdiction. The judge gave permission to appeal his judgment to all parties before him. On appeal, Cyprus, Holdings and Finance challenge the judge's refusal to stay the proceedings or reject English jurisdiction and Aeroflot cross-appeals the judge's conclusion with regard to Services. We heard argument on 20 and 21 March and reserved judgment.

II. Further Facts on which the parties rely

21. **(A). The Andava affair:** Aeroflot places great emphasis on contracts that Aeroflot made with Andava SA ("Andava"), a company which is said also to have been beneficially owned and controlled by Messrs Berezovsky and Glushkov. As part of Mr Glushkov's review of Aeroflot's financial structures and financing arrangements he recommended that the collection and management of Aeroflot's hard currency assets be centralised and managed by Andava. Aeroflot says that Mr Glushkov failed to reveal his own interests in Andava in making this recommendation. As a result, so Aeroflot claims, Andava was able to misappropriate Roubles 48 million of Aeroflot's funds.

22. The Andava/Aeroflot matter has been the subject of proceedings in both Russia and Switzerland. In 2006/7 Messrs Berezovsky and Glushkov were convicted in their absence by a Moscow court for their part in what was called "the Andava fraud" and they were sentenced to terms of imprisonment. Proceedings were brought in the Swiss Federal Criminal Court against Mr Hans-Peter Jenni, a Swiss lawyer and associate of the individual defendants, who managed Andava day to day.[6] Mr Glushkov and Holdings were parties to those proceedings. In December 2008 Mr Jenni was convicted of fraud and sentenced to 21 months imprisonment (to be enforced conditionally and with a term of probation for two years) and subjected to financial penalties. The Forus defendants who were a party to those proceedings had financial orders made against them. Mr Jenni attempted to appeal these orders but the Swiss Supreme Court rejected his appeal. He has sought to appeal to the ECtHR.

23. Aeroflot relies upon adverse findings of the Swiss court against Mr Glushkov in relation to the Aeroflot/Andava affair. In particular it relies on the finding that he acted knowingly and wilfully and that he profited considerably as a shareholder in the Andava group from the arrangements between Andava and Aeroflot and inflicted damage on Aeroflot. It held Mr Glushkov was therefore guilty of "aggravated

[6] Mr Jenni made a witness statement on behalf of the Forus defendants in these proceedings to which I will refer below.

criminal mismanagement at the expense of Aeroflot, his employer" contrary to Articles 158(1) and (2) of the Swiss Criminal Code.[7] Aeroflot also relies upon the conclusion of the Swiss court that in 1996 "Forus" received a loan from Andava of US$1.525 million which had come from Aeroflot funds and then Andava waived repayment. Holdings had argued that it was Finance that was the debtor, not Holdings, so any claim was against Finance, which was not a party to the proceedings. The Swiss court rejected that argument, saying:

> "As the documents reveal, the Forus Group has a similar structure to that of the Andava group and is controlled by the same group of individuals (in particular [Jenni], [Glushkov] and [Berezovsky]). Furthermore, [Finance] is a subsidiary of [Holdings]. Nothing is known about the internal settlements, but it is clear that with the preferential treatment of the subsidiary, the holding disposed of the money in question itself, ie. benefited from this payment from Andava".

The court rejected a submission that Holdings had acted in good faith as being "absurd".[8]

24. Effectively, Aeroflot relies on these findings as "similar fact" evidence or "bad character" evidence to assist in its case on the merits against the individual defendants and the Forus companies. But the defendants say that these are separate matters which must not be confused with the present allegations.

25. **(B). The arrangements for signing agreements at Aeroflot:** In his witness statement, Mr Shaposhnikov states that he was presented with the signed Advisory Mandate and Mr Glushkov explained to him that it had been properly prepared and reviewed and approved by the legal department. Aeroflot alleges that this was a misrepresentation by Mr Glushkov of the true position. Mr Shaposhnikov states that, as a result, the only briefly reviewed the Russian translation of the Advisory Mandate. He noted its main terms but did not otherwise consider it. He does not say what his attitude would have been to a jurisdiction clause. Mr Shaposhnikov states that he received a similar assurance from Mr Glushkov in relation to the FCA and that he (Mr Shaposhnikov) saw only an English language version of that contract. He said he was not made aware of the detailed contents by Mr Glushkov at the time. However, Mr Shaposhnikov does not say that if he had been aware of the jurisdiction and arbitration clauses, he would not have signed the contracts or questioned them in some way. Mr Shaposhnikov had ceased to be Director General of Aeroflot when the amendments to the FCA and the SCA were signed.

26. Mr Okulov became the Acting Director General and then Director General of Aeroflot from May 1997 until 2009. He signed the amendment to the FCA in May 1997 and the SCA in November 1997. He says that he did not see any Russian language version of either contract and that on each occasion Mr Glushkov, who was responsible for them, explained the terms to him. He says that he would not have signed them unless they had been approved by the Aeroflot legal department, on

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[7] Judgment of the Swiss Federal Criminal Court 11 July 2008 and supplement of 27 October 2008 para 4.2.2.(a): H/525.

[8] Judgment paras 8.6.2 and 3: H/535-6.

which he relied for advice and expertise on legal issues such as jurisdiction and applicable law clauses and whether they were acceptable to Aeroflot. Mr Okulov "believes" that he was assured by Mr Glushkov that the agreements he signed had been approved by the legal department. Mr Okulov does not say that if he had been made aware of the jurisdiction or arbitration clauses he would not have signed the contracts. He only says that he relied on the legal department to ensure whether the governing law and jurisdiction clauses were "suitable and acceptable to Aeroflot".

27. The head of the Contracting and Commercial Department of Aeroflot during 1995-1997 was Mr Ostroumov, whose superior was Mr Brylov. In 1974 Mr Ostroumov had graduated from the faculty of international law in the Moscow State Institute of International Relations of the Ministry of Foreign Affairs of the USSR. He was responsible for reviewing all foreign jurisdiction and arbitration clauses in contracts. He says that no one within Aeroflot could give advice on Swiss law. In his witness statement, Mr Ostroumov says that his department did not do the drafting of agreements because it was too time consuming; that work was done either by the foreign counterparty or the relevant operational department in Aeroflot. He says that he did not review any of the contracts between Aeroflot and Forus companies because they were not shown to him at the time. He cannot explain why they were not shown to him, as it was one of his jobs to review such agreements. Mr Ostroumov does not say that if they had been reviewed by him he would not have approved them or even that had he known of the jurisdiction and arbitration clauses in the contracts he would have sought advice about them from someone else.

28. Between January 1996 and March 1999 Ms Lidia Kryzhevskaya held various senior posts in Aeroflot concerning finance and accounting. She reported to Mr Glushkov. In her witness statement she says that she was never aware that Mr Glushkov had any interest (either by way of ownership or management role) in the Forus group and if she had been aware of any such interest she would have been "unhappy because there would clearly have been a conflict of interest between him acting in the best interests of Aeroflot and in acting in the interests of the Forus group" and this would have been so in relation to the various contracts between Aeroflot and Forus.

29. Ms Kyzhevskaya states in her witness statement that Mr Glushkov explained the Advisory Mandate to her, although she thought it a strange contract. Subsequently, she was asked to sign the contract, which she did after reading it in Russian. Ms Kyzhevskaya states that in April 1996, Mr Glushkov showed her an English language version of the FCA. She did not (because she could not) read it. She does not suggest that she asked for a Russian translation. She did not know it contained a Lausanne jurisdiction clause. There was a similar process for the amendment to the FCA. In the case of the SCA, the English language document was explained to Ms Kyzhevskaya by Mrs Krokhina. Ms Kyzhevskaya states that Aeroflot contracts with foreign counterparties were drafted and mainly signed by the employees of the Commercial Department and the Centre for International Settlements, after review and approval by the legal department. She doubts whether that department generally obtained external legal opinions when entering into an agreement with a foreign counterparty. Ms Kyzhevskaya does not say what her attitude to signing the contracts would have been if she had known that they contained a jurisdiction or an arbitration clause. She says that she had a power of attorney to sign agreements on behalf of Aeroflot in 1997-8 but not before.

30. **(C). Mr Glushkov's role in the Forus group:** Mr René Kuppers, the general manager of Services at the relevant time, states that he was involved in the negotiation of the Advisory Mandate and the later agreements with Aeroflot. He states that Mr Glushkov was an initial board member of both Holdings and Services but "the Forus Group was never controlled by Mr Glushkov either before or after 1995". He states that in Forus' dealings with Aeroflot, "obviously Mr Glushkov did not have any involvement on the Forus side and never gave instructions to sign any of the Aeroflot agreements". The negotiations were handled on the Forus side by Mr Kuppers himself and Mr A Pivovarov and Mr A Zeugin. Mr Kuppers states that "all conditions were negotiated at arm's length and the credit terms obtained by Aeroflot were extremely favourable".

31. Mr Kuppers also explains that the loans made to Aeroflot by the Forus group could not have been arranged without acceptable security from Aeroflot for the banks involved. The only available assets in foreign exchange (ie. not in Roubles) for such a security structure were the receivables from "overflying" fees paid by foreign airlines to Aeroflot. These were assigned by Aeroflot to Services for repayment of the credit facilities.

32. Mr Jenni, to whom I have already referred, has known the individual defendants since 1991. He gave a long witness statement on behalf of the Forus defendants in which he set out the history of the Forus group and its dealings with Aeroflot from his point of view as a director of both Holdings and Services. He states that he drew up an assignment agreement which was signed by Mr Glushkov and Mr Berezovsky on 13 November 1995, whereby Mr Glushkov assigned to Mr Berezovsky all his shares in the Forus group (amongst other shares). Mr Jenni also states that Mr Glushkov's directorships of Holding, Services and Finance effectively ended then, although technically the directorship of Services did not do so until formal notification to the Lausanne authorities in May 1997.

33. Mr Jenni's evidence is that he was informed by Mr Glushkov that the latter was aware of the Advisory Mandate at the time of its conclusion in December 1995, but only learnt of it when he took up full-time employment with Aeroflot in 1996. Mr Jenni also states that Mr Glushkov has told him that he (Mr Glushkov) disclosed to Mr Shaposhnikov that he (Mr Glushkov) had been a shareholder in Holdings and was still a director of that company and that Mr Shaposhnikov instructed him (Mr Glushkov) to negotiate a Forus loan for Aeroflot. Paragraph 50 of Mr Jenni's witness statement continues:

> "All loans subsequently negotiated by [Mr Glushkov] for Aeroflot were approved by Aeroflot by Mr Shaposhnikov (later his replacement Valery Okulov) and were signed by them personally exercising their *ex officio* powers or by directors of Aeroflot holding powers of attorney. The person who negotiated with Aeroflot on behalf of the Forus group was Mr Kuppers: [Mr Glushkov] was working for Aeroflot and although he was named in the Commercial Registry as a director of [Services] he had no part in the development on the part of the Forus Group of its relationship with Aeroflot".

34. As for the signings of the various credit agreements and the amendments to them, Mr Jenni states: (i) the FCA was signed for Forus by Mr Kuppers and Mr Pivovarov in Moscow. Mr Jenni also read and approved it and initialled every page of it. Mr Shaposhnikov signed it for Aeroflot. (ii) The AFCA was negotiated on behalf of Services by Mr Kuppers and executed on behalf of Services by him and on behalf of Aeroflot by Mr Okulov. It was also initialled by Mr Glushkov and one other. (iii) The SCA was signed on 24 November 1997 on behalf of Services by Mr Jenni and Mr Kuppers and on behalf of Aeroflot by Mr Okulov, then the General Director. (iv) The second amendment to the SCA, signed on 25 June 1998, whereby Cyprus replaced Services, was negotiated on behalf of Cyprus by Mr Kuppers. It was signed for Aeroflot by Mr Okulov and by Mr Kuppers for Cyprus. It was "acknowledged" by Services by signatures of Mr Alain Mayor and Mr Pivovarov.

III. The arguments of the parties on the appeal and cross-appeal

35. **(A). The Forus companies.** Mr Tregear QC appeared for all three Forus appellants. He dealt first with the position of Cyprus under the ASCA, which contains the Zurich ICC arbitration clause.[9] It is common ground that the claim of Aeroflot against Cyprus is within the scope of the arbitration clause in the ASCA, so that, on the face of things, Cyprus would be entitled to a stay of the present proceedings, pursuant to ***section 9(1)*** and the first part of ***section 9(4)*** of the ***AA 1996.*** Mr Tregear submitted that it is therefore up to Aeroflot to satisfy the court that a stay should not be granted because the Zurich arbitration agreement was "null and void" or "inoperative".[10] He dealt first with the judge's conclusion at [111] that, on the assumption that the ASCA arbitration clause was valid, Cyprus could not rely on it because to do so would be an "abuse of right" under Swiss law, which the judge held would govern the issue of the "enforceability" of the arbitration clause. Mr Tregear submitted that, first, the doctrine of "abuse of right" in Swiss law does not have the effect of making an arbitration clause "null and void" or "inoperative"; and, secondly, the judge did not explain how invocation of the doctrine of "abuse of right" could bring about this result. He submitted that there was no authority in Swiss law in support of such a conclusion.

36. As to the application of the Swiss law doctrine of "double representation", on which the judge did not come to any conclusion,[11] Mr Tregear submitted that this court should decide the matter on the material before it. He accepted that, if the Swiss law doctrine of "double representation" applied in relation to Mr Glushkov and the arbitration agreement in the ASCA, then it would be regarded as "null and void" for the purposes of ***section 9(4)***. However, he submitted that it did not do so on the materials before the court.

37. In relation to Holdings, Mr Tregear proceeded on the assumption that the judge's conclusion on Services was upheld and that the appeal was allowed in respect of Cyprus. Thus, for Holdings, the correct question was whether Aeroflot had demonstrated that the claim against the individual defendants and that against

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[9] The AFCA between Aeroflot and Services also contains an ICC arbitration clause, but the judge did not deal with the issue of a stay of proceedings against Services on the basis of this arbitration clause because he held that the English court must decline jurisdiction regarding the proceedings between Aeroflot and Services on the basis of the exclusive jurisdiction clause in Advisory Mandate: see judgment [103] and [104].

[10] The other ground in ***section 9(4),*** viz. "incapable of being performed" was not relied upon by Aeroflot.

[11] [106]-[108] of the judgment.

Holdings were "so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". The "separate proceedings" would, in this case, be the English proceedings against the individual defendants and any proceedings against Holdings, presumably in the jurisdiction of its domicile, Luxembourg, or elsewhere, eg. Switzerland. He submitted that Aeroflot's case against Holdings and Finance appeared to be that they were conduits for money that had originally been destined for Aeroflot, alleging that Holdings and Finance (a) knew of breaches of duty of Glushkov to Aeroflot, and (b) knew that the payments were as a result of his breach of duty: [68] of the Amended Particulars of Claim. Mr Tregear submitted that Aeroflot had no arguable claim against Holdings. Therefore, contrary to the judge's conclusion at [116], this "claim" could not be closely connected to that against the individual defendants. Even if arguable, the claim was far more closely connected to the claims against the other Forus companies, viz. Services and Cyprus, which would be conducted in court or arbitration in Switzerland. The judge was wrong to suggest (at [115]) that the Lausanne court might, pursuant to Article 28 of the revised Lugano Convention, stay any proceedings brought there by Aeroflot against Services pursuant to the jurisdiction clause. First, because the court would hardly grant a stay to Aeroflot, which would itself have started the proceedings; and, secondly, Services would not seek one.

38. As concerns Finance, Mr Tregear made two submissions. First, he argued that the judge was wrong to conclude (at [117]) that there was a "serious issue to be tried" between Aeroflot and Finance, although the judge recognised that the case needed further particularisation. Secondly, the judge erred in holding that there was a "good arguable case" that Finance was a "proper" party to the English proceedings, which were focused on the individual defendants, not the Forus companies.

39. **(B). Aeroflot.** Mr Marshall QC, who appeared on the appeal for Aeroflot, submitted, in relation to Services, that the sole issue to be decided was whether, for the purposes of Article 23 of the revised Lugano Convention, there was consensus between the parties to the Lausanne jurisdiction clause. That was for Services to prove and the issue was to be decided by applying the putative applicable law of the contract to determine whether the contract was void or, possibly, voidable. This issue of the "substantive validity" of the contract was therefore to be determined by Swiss law and so the doctrine of "double representation" applied. Alternatively, the law of this forum, viz. English law, should apply. On either basis, Aeroflot had "much the better of the argument" that there was no consensus to a Lausanne jurisdiction clause. The judge therefore erred in his finding to the contrary at [97]-[103].

40. In relation to Cyprus, Mr Marshall submitted that the burden of establishing a valid arbitration agreement fell upon Cyprus and that that issue was to be determined by Swiss law. He argued that, on the facts, the doctrine of "double representation" applied, such that the ICC arbitration clause in the ASCA was "null and void". Alternatively, the judge was correct to hold that the Swiss law doctrine of "abuse of right" applied to prevent reliance on the arbitration clause when it was likely to cause fragmentation of proceedings and so lead to the risk of inconsistent findings and duplication of effort and costs.

41. As regards Holdings, Mr Marshall submitted that there was the closest possible connection between the claims of Aeroflot against the individual defendants and that against the holding company of the Forus group. Moreover, at present, there was only one set of proceedings, viz. that in the English courts, so that even if (which was disputed) in theory the court could carry out a comparative exercise to determine where the "closer connection" lay for the purposes of Article 6(1) of the Judgments Regulation, that could not be done in this case.

42. As for Finance, Mr Marshall submitted, first, that the judge was correct to conclude that there was a "serious issue to be tried" as between Aeroflot and Finance. If necessary, the third witness statement of Mr Botiuk (of Aeroflot's solicitors) demonstrated that Finance was important in the movement of funds in the Forus group. Secondly, the judge was correct to hold that Aeroflot had a "good arguable case" that Finance was a "proper" party to the English proceedings against the individual defendants.

IV. The issues to be considered and the order in which to deal with them.

43. It seems to me that the following issues arise and it is best to deal with them in this order: (1) whether, for the purposes of Article 23 of the revised Lugano Convention, the Lausanne jurisdiction clause in the Advisory Mandate between Aeroflot and Services is effective. If the judge's conclusion is upheld, then it is agreed that the English court must decline jurisdiction in respect of all Aeroflot's claims against Services in the present proceedings. (2) If the judge's conclusion is not upheld, then Services still relies on the ICC arbitration clause in the AFCA and would seek a stay of the proceedings against it pursuant to ***section 9(1) and (4)*** of the ***AA 1996.*** The parties agree that, in this case, the same issues, including issues of Swiss law arise as under the next issue. (3) Whether the proceedings against Cyprus should be stayed, pursuant to ***section 9(1) and (4)*** of the ***AA 1996,*** because of the Zurich ICC arbitration clause in the ASCA. This depends on two sub-issues. First, whether there is a concluded arbitration agreement which covers the present disputes; secondly, if so, whether the agreement is to be regarded as "null and void" or "inoperative" for the purposes of ***section 9(4),*** by virtue of the Swiss law doctrines of either (a) "double representation" or, (b) "abuse of right". (4) Whether, as against Holdings, Aeroflot can establish that there is a "serious issue to be tried". (5) Whether, for the purposes of Article 6(1) of the Judgments Regulation, the proposed claim against Holdings in the English proceedings is, "…so closely connected [with the claims against the individual defendants] that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". (6) Whether, for the purposes of obtaining permission to serve Finance out of the jurisdiction, Aeroflot has established that there is a "serious issue to be tried". (7) If so, whether Aeroflot has established that there is a "good arguable case" that Finance is a "proper" party to the proceedings that are being brought against the individual defendants.

V. Services. Issue One: Is the Lausanne jurisdiction clause effective for the purposes of Article 23 of the revised Lugano Convention?

44. Services has been named as a defendant in the English proceedings and it has then been served with them in Switzerland. Aeroflot says that the basis for English jurisdiction in respect of its claim against Services is Article 6(1) of the revised

Lugano Convention, viz. that Services is domiciled in a Contracting State (Switzerland), so that, where it is one of a number of defendants, it may be sued in the courts of the place where any one of the defendants is domiciled. The individual defendants are, of course, domiciled here in England. Services wishes to displace this rule of jurisdiction by that in Article 23 of the revised Lugano Convention, asserting that Aeroflot and Services have agreed in writing that a court of a Contracting state (to the revised Lugano Convention), viz. the Lausanne court, is to have jurisdiction to settle any disputes which may arise in relation to a particular legal relationship (ie. the Advisory Mandate). Therefore, the Lausanne court must have jurisdiction instead of the English court, pursuant to Article 23.

45. In Aeroflot's pleaded case (as amended), it accepts that Mr Shaposhnikov signed the Advisory Mandate,[12] but alleges that the Advisory Mandate was nonetheless void for want of authority in relation to Services, by reason of the prohibition under Swiss law against "double representation". The "double representation" is said to be that of Mr Glushkov, who, it is said, acted at the same time as *de jure* director of Aeroflot and "the *de facto* organ" of Forus Services.[13] As an alternative, Aeroflot alleges that the Advisory Mandate is void or unlawful or unenforceable under various provisions of the Russian Civil Code. However, before us Aeroflot did not rely on Russian law for the purposes of its present attack on the validity of the Lausanne jurisdiction clause. It will be recalled that it is accepted that if the jurisdiction clause is valid then it would govern all the disputes between Aeroflot and Services and so would otherwise be effective.

46. **Threshold Question: The proper approach to Article 23.** The threshold question that arises is how the English court should approach a challenge to the applicability of Article 23 of the revised Lugano Convention, when it is alleged that the contract containing the exclusive jurisdiction clause is void by virtue of the application, on the facts, of a doctrine of its putative applicable law? There are three questions to be decided. First, on whom lies the burden of proof; is it for Services to prove the validity of the jurisdiction clause or is it for Aeroflot to satisfy the court that it cannot be relied on in this case? Secondly, what is the appropriate standard of proof, whoever has the burden? Thirdly, is the question of the validity of the jurisdiction agreement to be determined by reference to an autonomous, European law regime, or by the putative applicable law of the contract, or by a mixture of the two?

47. On the first two questions, which are essentially matters of procedural as opposed to substantive law, it seems to me that the answers must be provided by the law of the court considering the issue, viz. English law. We were not shown any specific authority on the first question. As a matter of principle, if it is assumed that Aeroflot would otherwise be entitled to invoke Article 6(1) of the revised Lugano Convention to provide a proper basis for English jurisdiction against Services, then the burden of proof must be upon Services which seeks to displace that basis of jurisdiction. There was no debate before us about whether Services could otherwise challenge Aeroflot's ability to invoke Article 6(1), although, logically, Services could use the same argument to challenge that jurisdictional basis that Holdings has used. If that had

[12] Para 49 of the amended Particulars of Claim. There can be no dispute that Mr Shaposhnikov, as Director General of Aeroflot, had authority to sign the Advisory Mandate on Aeroflot's behalf.
[13] Para 50A.1 of the Amended P/Claim.

been the case there might have been a complication about where the burden of proof lies. But, as I say, Services did not run any fall back argument about Article 6(1). Therefore I think that the position in this case must be that the burden lies on Services to show that the basis of the English court having jurisdiction that is invoked by Aeroflot, viz. Article 6(1), must be displaced by Article 23 of the revised Lugano Convention and the Lausanne jurisdiction clause. I think that this approach is supported by the decision of the Privy Council in ***Bols Distilleries BV v Superior Yacht Services Ltd,*** [14] to which I refer more fully below in the context of the standard of proof.

48. The second question, then, is, what is the standard of proof that has to be demonstrated by Services? This issue was specifically addressed by the Privy Council (on appeal from the Gibraltar Court of Appeal) in ***Bols Distilleries BV v Superior Yacht Services Ltd*** in relation to the Judgments Regulation. The same principles must apply to the revised Lugano Convention. In that case there was a dispute about whether a contract had been concluded for the sponsorship by one or other of two Bols companies of a new racing yacht to be owned by Superior Yacht Services Ltd. A draft contract containing a Gibraltar law and jurisdiction clause was prepared, but Bols denied any contract had ever been concluded. Without a jurisdiction clause, Bols would have to be sued in one or other of the states of domicile of the Bols companies, pursuant to Regulation 2 of the Judgments Regulation. Those states were the Netherlands and Poland. But Superior Yachts relied on the jurisdiction clause in the draft contract and said that, by virtue of Regulation 23 of the Judgments Regulation, the courts of Gibraltar must therefore have jurisdiction.

49. Lord Rodger of Earlsferry gave the advice of the Board. He held, at [28], that the Gibraltar Court had to decide whether it had jurisdiction by virtue of Regulation 23 of the Judgments Regulation and a written agreement. Therefore, the Gibraltar Court had to be satisfied, "…or as satisfied as it can be having regard to the limitations which an interlocutory process imposes", that factors exist which allowed the Gibraltar Court to take jurisdiction. The standard of proof that had to be demonstrated by the claimant, which asserted that the Gibraltar jurisdiction clause was effective, was that of "a good arguable case". What amounts to a "good arguable case" will depend on what requires to be shown in any particular situation in order to establish jurisdiction. In that case, Lord Rodger held that, in order that the claimant could demonstrate that Regulation 2(1) was "ousted" by Regulation 23 and the Gibraltar jurisdiction clause, the claimants had to demonstrate:

> "… 'clearly and precisely'[15] that the clause conferring jurisdiction on the court was in fact the subject of consensus between the parties. So, applying the "good arguable case" standard, the claimants must show that they have much the better of the argument than the defendants that, on the material available at present, the requirements of form in Article 23(1) are met and that it can be established, clearly and precisely,

[14] ***[2007] 1WLR 12*** at [28].
[15] The wording in Art 23(1).

that the clause conferring jurisdiction on the court was the subject of consensus between the parties".[16]

50. There has been debate on whether the qualifier "much" to the phrase "the better of the argument" adds anything.[17] In ***Briggs & Rees "Civil Jurisdiction and Judgments"*** (***"Briggs & Rees"***) the authors suggest that, at least in the context of Judgment Regulation and revised Lugano convention cases, the use of "much" has now pointed the law in the right direction and should be "allowed to slip from view".[18] I respectfully agree. The only point of the word is to emphasise the fact that if the two arguments are equal, then the party asserting the Article 23 jurisdiction will not succeed. Too much emphasis on the word "much" would simply lead to the error of imposing too high a standard of proof on the party wishing to establish the Article 23 jurisdiction. The whole point of the jurisprudence on the standard of proof in jurisdictional disputes is to emphasise that such decisions are made at an early stage in a dispute and that the same or very similar questions on the substantive dispute between the parties (eg. on whether the substantive contract itself has been concluded) may have to be decided at the trial. Any conclusion at the jurisdiction stage must not preclude the possibility of a different finding when all the evidence has been collected and considered at trial.[19] There is this very danger in the present dispute, because Aeroflot alleges that the Advisory Mandate itself is void by virtue of the doctrine of "double representation" in Swiss law[20].

51. **What law governs the issue of the validity of the jurisdiction clause?** So to the third and vital question: is the validity of the jurisdiction agreement in the Advisory Mandate to be determined by reference to an autonomous, European law regime, or by the putative applicable law of the contract or by a mixture of the two? The judge held that doctrines of Swiss law are inapplicable to decide whether Article 23 of the revised Lugano Convention applies. He held that this turned on whether there was a consensus "as a matter of the autonomous law".[21]

52. The argument of Aeroflot is that the Advisory Mandate was concluded by Mr Glushkov acting as an organ or representative of both Aeroflot and Services and so, under Swiss law, a situation of "double representation" arises. This situation is, under Swiss law, prohibited, so that if this situation exists, the consequence is that any contract concluded as a result would be void. Therefore, it is said, there would be no consensus for the Lausanne jurisdiction agreement, so that "the parties" have not "agreed" that a Court of a Contracting State is to have jurisdiction to settle disputes which may arise between the parties for the purposes of Article 23 of the revised Lugano Convention. It is important to note that Aeroflot attacks the validity

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[16] See [28] of the Advice of the Board.

[17] The phrase "*much the better of the argument"* was first used by Waller LJ in ***Canada Trust Co v Stolzenberg (No 2) [1998] 1 WLR 547 at 555*** and endorsed by Lord Steyn on appeal to the House of Lords in ***[2002] AC 1*** at page 13.

[18] 5th Ed (2009) at ***2.111*** page 169.

[19] See the discussion in ***Antonio Gramsci Shipping Corp v Lembergs [2013] EWCA (Civ) 730*** at [15]-[17] in the judgment of Beatson LJ.

[20] Para 50A.1 of the Amended Particulars of Claim. Aeroflot also pleads that it was void/unlawful/unenforceable under Russian law: para 50A.2 and 3.

[21] [98] of the judgment. The judge referred to Art. 23 of the Regulation, although, strictly speaking, in the case of Services, a Swiss company, the relevant regime must be that of the revised Lugano Convention. The wording is identical.

of the contract as a whole. It does not focus particularly on whether the parties *have agreed* the jurisdiction clause. It is said that the lack of agreement, for the purposes of Article 23, flows automatically from the fact that, as a matter of Swiss law, the substantive contract itself is regarded as void because the doctrine of "double representation" applies.

53. The construction of Article 23 itself and so what is comprised within the phrase "…the parties …have agreed that a court or courts of a State bound by this Convention are to have jurisdiction to settle any disputes which…may arise in connection with a particular legal relationship…" must be determined by autonomous rules of construction rather than any rules of national law. These autonomous rules of construction are decided ultimately by principles established by what is now the Court of Justice of the European Union ("CJEU"), formerly called the European Court of Justice ("ECJ"). Swiss law is only potentially relevant if the European court has determined that, as a matter of construction according to autonomous rules, the issue of whether parties have agreed to a court having jurisdiction is to be determined by national law rules as opposed to autonomous rules. Swiss law will only actually be relevant if, by the same autonomous rules of construction, it is determined that the relevant national law is the putative applicable law of the contract.

54. So, what, if anything, has been said on this issue of the construction of Article 23 (or its equivalent in the Brussels Convention, the original (1988) Lugano Convention or the Judgments Regulation) by the CJEU or its predecessor?[22] We had cited to us the ECJ decision of ***Powell Duffryn plc v Wolfgang Petereit.***[23] The issue before the ECJ was whether a clause in the statutes of a company limited by shares by which all shareholders agreed to confer jurisdiction on a particular court for disputes between the shareholder and the company constituted an "agreement conferring jurisdiction"[24] for the purposes of what was then Article 17 of the Brussels Convention. The Court noted, first, at [13], that the concept of an "agreement conferring jurisdiction" was decisive in assigning exclusive jurisdiction to a court (in a Contracting State) that had been designated by the parties, in derogation from the general jurisdictional rules set out in the Brussels Convention. Secondly, it noted that it was important that there be equality and uniformity of the rights and obligations for both Contracting States and persons arising from the Convention. Therefore, the Court concluded that "…it is important that the concept of "agreement conferring jurisdiction" should not be interpreted simply as referring to the national law of one or other of the States concerned. Rather, the concept of "agreement conferring jurisdiction" in Article 17 [23 as it is now] must be regarded as an independent concept": see [14]. Using this "independent concept" of what constituted an "agreement conferring jurisdiction", the Court held that the company's statutes were to be regarded as a contract governing relations between shareholders and each of them and the company. Thus a clause

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[22] In ***Article 1*** of ***Protocol 2*** to the revised Lugano Convention, the Contracting Parties agreed that any court applying and interpreting the revised Convention "shall pay due account to the principles laid down by any relevant decision concerning the provision(s) concerned or any similar provision(s) of the 1988 Lugano Convention and the instruments referred to in ***Art 64(1)*** of [this Convention] rendered by the courts of the states bound by this Convention and by the Court of Justice of the European Communities". The instruments referred to in ***Art 64(1)*** include the Brussels Convention (original and as amended) and the Judgments Regulation.

[23] ***[1992] ECJ I – 1745.***

[24] This is the phrase, put in inverted commas, that is used by the Court in its judgment. The phrase is not found in Article 17, but seems to have been adopted as a shorthand by the Oberlandesgericht in posing the first of the two questions which it referred to the ECJ and the phrase was adopted by the ECJ.

conferring jurisdiction in the company's statutes constituted an agreement within Article 17 and was binding on all shareholders: see [17]. Those general principles remain applicable. It is clear that the ECJ ruled that the concept of "agreement conferring jurisdiction" should be an independent concept, not one fashioned according to different national laws.

55. However, Mr Marshall pointed out that this decision did not deal with a situation where one party to the contract challenges its substantive validity by virtue of a rule of the putative applicable law of the contract. That is true, but it does not follow, as he argued, that it is correct to resort to the putative applicable law of the contract to decide whether, for the purposes of Article 23, there has been an "agreement conferring jurisdiction" when one party challenges the validity of the contract containing the jurisdiction clause according to that law. I think that is clear from the statements of the ECJ in the ***Powell Duffryn*** case. Moreover, as the authors of ***Briggs & Rees*** point out,[25] one should notice how the Court of Justice "has persistently stated that the formalities required by Article 23(1) [of the Judgments Regulation] are a full, perfect and sufficient guarantee of the existence of consent or consensus".[26]

56. Traditionally, English courts have got around the problem of enforcing an arbitration or jurisdiction clause in a contract which is alleged to be void or voidable for illegality, fraud, misrepresentation or non-disclosure by invoking the doctrine of "separability." This means that a jurisdiction clause, like an arbitration clause, is treated as a separate agreement from the contract as a whole in which it is contained. In ***Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc***[27] the Court of Appeal said that this doctrine was "uncontroversial" so far as English domestic law was concerned, but it also said, more importantly, that it was uncontroversial as a matter of European law, citing the ECJ decision in ***Benincasa v Dentalkit Srl.***[28]

57. In the context of the present argument the ***Benincasa*** case is, in my view, very important. It is unfortunate that neither it nor the ***Deutsche Bank*** case was cited to us in oral argument; nor were those cases included in the bundle of 46 cases, statutes, regulations and other materials prepared for the appeal. However, at the request of the court the parties provided further short written submissions on those cases and a third, very recent case,[29] for which submissions the court is grateful.

58. The contract in the ***Benincasa*** case was a franchise agreement which contained an exclusive jurisdiction clause. The franchisee claimed that the whole contract including the jurisdiction clause was void and argued that it followed that the

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[25] Para 2.128 at page 194 of the 5th Ed.

[26] I have read the judgment of Beatson LJ in ***Antonio Gramsci Shipping Corp v Lembergs [2013] EWCA (Civ) 730*** which analyses the ***Powell Duffryn*** case and other ECJ decisions in the context of an attempt to bind a non-party to a contract to an exclusive jurisdiction clause for the purposes of Art. 23 of the Judgments Regulation. It does not change my analysis or views on this issue.

[27] ***[2008] 2 Lloyd's Rep 619*** at [24] in the judgment of Longmore LJ. Keene and Laws LJJ agreed with Longmore LJ's judgment.

[28] ***[1997] ECR-I 3767*** at [23] to [32].

[29] The decision of Popplewell J in ***Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd [2013] EWHC 1240 Comm,*** which considered issues concerning ***section 9(1)*** and ***(4)*** of the ***AA 1996,*** relevant to the arguments on a stay of the proceedings against Cyprus.

jurisdiction clause must also be ineffective. Three questions were referred to the ECJ by the Oberlandesgericht Munich. The third question was, effectively, whether the jurisdiction clause would operate even where the claim was for a declaration as to the invalidity of the contract as a whole.

59. The ECJ expressed the principles broadly. It stated, at [25], that a jurisdiction clause, which serves a procedural process, "is governed by the provisions of the [Brussels] Convention", whose aim was to establish uniform rules of international jurisdiction. In contrast, "the substantive provisions of the main contract in which that clause was incorporated and likewise any disputes as to the validity of that contract are governed by the *lex causae* determined by the private international law of the State of the court having jurisdiction". The judgment of the court continued, at [29], as follows:

> "Article 17 of the [Brussels] Convention sets out to designate, clearly and precisely, a court in a Contracting State which is to have exclusive jurisdiction in accordance with the consensus formed between the parties, which is to be expressed in accordance with the strict requirements as to form laid down therein. The legal certainty which that provision seeks to secure could easily be jeopardised if one party to the contract could frustrate that rule of the Convention simply by claiming that the whole of the contract was void on grounds derived from the applicable substantive law".

60. In ***Estasis Salotti de Colzani Aimo et Gianmario Colzani v RUWA Polstereimaschinen GmbH***[30] which pre-dates ***Benincasa*** and in two cases subsequent to the ***Benincasa*** case,[31] the ECJ has emphasised that the purpose of the requirements as to form imposed by Article 17, (now Article 23 of the Judgment Regulation) and the equivalent in the revised Lugano Convention, is to ensure that consensus between the parties as to the clause conferring jurisdiction is, in fact, established. The ECJ has held that, as a matter of the construction of Article 17/23, the court considering whether that Article can be invoked has to determine whether the clause conferring jurisdiction on the particular court was in fact the subject of consensus between the parties, which itself must be "clearly and precisely demonstrated".

61. In the ***Deutsche Bank*** case the substantive issue was whether the credit agreement sued upon was void because the chairman of the defendant companies had signed the contract without authority. Longmore LJ drew a distinction between a case where, as in the ***Bols Distilleries*** decision, there had been no agreement at all because the parties "were still in the realms of negotiation" and a case where there had been outward agreement but there was an issue as to the extent of the authority of the person purporting to agree the contract for one party.[32] In the first a party could not rely on the jurisdiction clause, but in the second it could do so. Longmore LJ then reviewed some of the ECJ decisions, in particular the ***Estasis Salotti*** case. He

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[30] ***[1976] ECR 1831*** at [7].
[31] ***MSG v Les Gravières Rhénanes Sarl [1997] QB 731*** at [15], ***Corek Maritime GmbH v Handelsveem BV [2001] CLC 550*** at [13].
[32] See [26] and [27].

concluded that it held that the purpose of Article 17's formal requirements was to ensure that consensus was, in fact, established. Paragraph 30 of Longmore LJ's judgment continues:

> "That is authority for the proposition that if the formal requirements are established (eg that the clause is in writing) that will be enough to ensure that consensus is established for the purpose of enabling the case to be determined. It is no support for a proposition that a plausible contention of lack of authority renders the clause inapplicable. The use of the phrase 'independent will of the parties' in ***Coreck Maritime GmbH v Handelsveem BV***[33] at para 14 was not intended to express any different concept…".

62. The *ratio* of the ***Deutsche Bank*** case is binding on this court. I take it to be that set out in the extract quoted. In any event I respectfully agree with Longmore LJ's analysis on the issue of "separability" in European law and the approach of European law to the question of the validity of jurisdiction clauses in contracts.

63. In ***Briggs & Rees,*** at para 2.128 the authors suggest that it would be "absurd" to argue that the effect of the ECJ decisions is that a written agreement obtained "by extreme duress or the grossest fraud" would satisfy Article 23 (or 23 of the Judgments Regulation). Yet, at least in circumstances where there is simply an *allegation* of invalidity because of duress, fraud, illegality or misrepresentation, or any other doctrine of national law, I think that this is precisely the trend of the ECJ/CJEU decisions so far. After all, in the ***Benincasa*** case itself it was alleged that the franchise agreement was void. Neither ***Briggs & Rees*** nor the parties before us have cited any decision of the ECJ/CJEU where, for the purposes of Article 17/23, it has accepted the proposition that, in some circumstances, the court considering whether that article applies must resort to the applicable law of the substantive contract concerned to see whether the jurisdiction clause in it is valid.

64. At the hearing I drew the parties' attention to a recent article of Professor Briggs[34] which further discusses these (amongst other) issues and which, for my part, I find as persuasive as it is characteristically robust. For present purposes the important arguments are, first, that "the parties" in Article 23 means the parties to the litigation, not necessarily to a contract, so one is immediately not concerned with the substantive validity of a contract for the purposes of deciding whether the conditions in Article 23 have been satisfied. Secondly, Professor Briggs reaffirms his previously expressed view that the ECJ "has gone out of its way" to emphasise that the jurisdictional validity and effect of a jurisdiction clause is to be assessed by reference to the requirements of the Article, not any national law, whether it be the putative applicable law of the contract or some other law. Thirdly, the agreement of a party is not bilateral or contractual, but unilateral. And the tests of whether there has been the necessary unilateral agreement are those set out in Article 23, viz. a "written manifestation of consent" or some other sufficiently formal act of agreement, as laid down in the Article. Fourthly, however, there may be an autonomous principle by which one party cannot rely on the written manifestation of consent by the other

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[33] ***[2000] ECR-I 9337***

[34] ***"The subtle variety of jurisdiction agreements"*** in ***[2012] LMCLQ 364***: see ***376-381.***

party, because to do so would be an exercise of bad faith.[35] Professor Briggs expressed doubts on whether, despite contrary statements in the ***Deutsche Bank*** case, the European approach to consent to jurisdictional clauses is based on the doctrine of "separability". However, I think I am bound by what this court held in that case, so that I must proceed on the basis that the doctrine of "separability" is now uncontroversial as a matter of EU law.

65. I can now answer the third question I have posed, viz.: is the validity of the jurisdiction agreement in the Advisory Mandate to be determined by reference to an autonomous, European law regime, or by the putative applicable law of the contract (Swiss law) or by a mixture of the two? My answer, based on the cases and materials I have analysed is that it is the first, viz. by reference to the autonomous European law regime as expounded by the various ECJ cases and as adopted by this court in the ***Deutsche Bank*** case.

66. That leads on to a fourth question. In ***Corek Maritime GmbH v Handelsveen BV***[36] the ECJ stated that the court before which the matter is brought has the duty of examining, first of all, whether the clause conferring jurisdiction upon a court was in fact the subject of consensus between the parties, which must be "clearly and precisely demonstrated…". So, is that "consensus" or, as Professor Briggs would have it, the unilateral agreement of each party to the litigation, clearly and precisely demonstrated in this case? Mr Shaposhnikov signed the Advisory Mandate, after it was explained to him by Mr Glushkov. Mr Glushkov said that the contract had been approved by the legal department. Mr Shaposhnikov does not assert that Mr Glushkov made any specific representations about whether there was or was not a jurisdiction clause in it or its effect. Moreover, Ms Kyzhevskaya also signed the contract. She had read it in Russian before she did so. As already noted, Ms Kryzhevskaya does not say anything in her witness statement about whether she noted the jurisdiction clause or her attitude to jurisdiction agreements in contracts.

67. So I conclude that, so far as the jurisdiction clause in the Advisory Mandate is concerned, it is clearly and precisely demonstrated by Services that Aeroflot gave its written manifestation of consent by the two signatures on the contract. I am not satisfied that, *so far as the jurisdiction clause is concerned*, there is any evidence to found a tenable argument that there was bad faith on the part of Mr Glushkov or Services. The truth is that a responsible employee of Aeroflot, Ms Kyzhevskaya had read the contract in Russian before signing it. Either she saw that there was a Lausanne jurisdiction clause or else she failed to spot it. Neither can constitute bad faith by Services. Moreover, I am not satisfied on the evidence we have that Mr Glushkov made any misrepresentation *about the jurisdiction clause* to Mr Shaposhnikov, even assuming that he did not accurately state the position by saying that the contract had been considered and approved by the "legal department", although the "legal department" appears to have been a somewhat amorphous concept at Aeroflot at the time. Mr Shaposhnikov himself states that, as far as he was concerned, the signatures of Ms Kryzhevskaya and Mr Krasnenker on the Advisory

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[35] I take this to be the effect of fn 87. But none of the cases referred to advance the present argument, including the decision of the Court of Appeal in ***Sherdley v Nordea Life and Pensions SA [2012] EWCA Civ 88.***

[36] ***[2000] ECR I – 9337*** at para 13, adopted by the Privy Council in the ***Bols Distilleries*** case at [23].

Mandate he saw "were to confirm that they had read the agreement and approved it".[37]

68. Accordingly, I would uphold the conclusion of the judge on this issue. Services is entitled to invoke Article 23 of the revised Lugano Convention and claim the benefit of the Lausanne jurisdiction clause in the Advisory Mandate. Therefore, in respect of the proceedings against Services, the English court must decline jurisdiction.

69. This conclusion means that I do not have to deal with the second issue identified above, viz. whether Services can rely on the arbitration clause in the AFCA and obtain a stay of proceedings under ***section 9(1) and (4)*** of the ***AA 1996.***

VI. Cyprus: Issue Three (a). Is the arbitration clause in the Amended Second Credit Agreement "null and void" for the purposes of *section 9(4)* of the *AA 1996* by virtue of the Swiss law doctrine of "double representation"?

70. It will be recalled that the judge declined to decide this issue on the written evidence alone of the witnesses of fact and the Swiss law experts, despite the parties' agreement that he could do so.[38] It will also be recalled that it was accepted before the judge and again before us that the subject matter of the dispute between Aeroflot and Cyprus comes within the terms of the arbitration clause in the ASCA that is relied on by Cyprus. Therefore, if Cyprus were to obtain a stay, it would drop out of the present proceedings altogether.

71. Mr Marshall submitted to us that there was sufficient evidence on the written material, particularly on the evidence of fact, to establish Aeroflot's case that there was "double representation" by Mr Glushkov, so that, by virtue of the Swiss law doctrine, there was either no consent to the arbitration agreement or it is to be regarded as "null and void". He relies particularly on the findings of the Swiss criminal proceedings. In the alternative, he submitted that we should direct that there be a trial of two issues. First, whether Mr Glushkov caused Cyprus to enter into the arbitration agreement in the ASCA; secondly, whether Mr Glushkov made a representation that the arbitration agreement in the ASCA had been specifically reviewed and approved by Aeroflot's legal department. In either case, as I understand the submission, if the answer was in Aeroflot's favour then it would result in a conclusion that there was no concluded arbitration agreement in the ASCA or that it is to be regarded as "null and void" for the purposes of ***section 9(4)*** of the ***AA 1996.***

72. **How should the court deal with an application to stay under *section 9* of the *AA 1996?*** It is necessary first to analyse the structure of ***section 9(1)*** and ***(4)*** of the ***AA 1996,*** to see where the burden lies and what standard of proof is required when there is an application for a stay of proceedings because one side asserts that two parties are bound by an arbitration agreement to submit the disputes being litigated to arbitration and the other side asserts that there was no concluded arbitration agreement or it is is "null and void". ***Section 9(1)*** and ***(4)*** are based on ***Article II*** of the ***New York Convention 1958.*** That stipulates that each Contracting State "shall" recognise arbitration agreements in writing and it further obliges a court of a Contracting State

[37] Shaposhnikov statement para 28.
[38] [106]-[108] of the judgment. However, Mr Marshall said that Aeroflot's agreement was on the premise that the judge would decide the matter on a "good arguable case" basis, not finally to determine the matter.

to refer the parties to arbitration if requested to do so by one of the parties in the context of an action in a matter which is the subject of an arbitration agreement, unless the court "finds that the said agreement is null and void, inoperative or incapable of being performed".

73. That has been translated into the terms of ***section 9(1)*** so as to give a party the right to apply for a stay of proceedings "in respect of a matter which under the [arbitration] agreement is to be referred to arbitration". Therefore, it seems to me in principle that there is a burden on the party asserting that there is (a) a concluded arbitration agreement as defined in the 1996 Act, and (b) that it covers the disputes that are the subject of the court proceedings, to prove that this is the case. This is borne out by the authorities.[39] If the party seeking a stay cannot prove both (a) and (b), then there is no jurisdiction to grant a stay under ***section 9(1)*** and ***(4)*** of the ***AA 1996.*** However, if the court considers that it cannot decide those issues for itself in a summary fashion on the written evidence, it has two other options, as this court made clear in ***Ahmed Al-Naimi (T/A Buildmaster Construction Services) v Islamic Press Agency Inc.***[40] It can direct an issue to be tried, pursuant to ***CPR Pt 62.8(3),*** or it can stay the proceedings (under its inherent jurisdiction) so that the putative arbitral panel can decide the issue of the existence of the arbitration agreement, pursuant to ***section 30*** of the ***AA 1996.*** If the court decides that it will and can determine whether or not there was a concluded arbitration agreement on the written evidence before it, then, in my view, the authorities establish that it is for the party asserting the existence of the concluded arbitration clause to prove it on a balance of probabilities. As I point out below, the position appears to be different if the court decides, on an application for a stay, that it cannot, on the materials before it, determine whether there was a concluded arbitration agreement.[41]

74. Under ***section 9(4)*** the court "shall grant a stay" unless "satisfied" that the arbitration agreement is "null and void, [or] inoperative…". This means, in my view, that once the first party has established the existence of an apparently concluded relevant arbitration agreement and that it covers the matters in dispute in the proceedings, it is for the party resisting a stay to "satisfy" the court that the apparently existing arbitration agreement is "null and void". That was the position under the old law, ie. ***section 1*** of the ***Arbitration Act 1975,*** which provision first gave statutory effect in English law to the New York Convention.[42] This court has said that this remains the position under the ***AA 1996,*** albeit without elaborating on its reasoning.[43] I will have to consider below the issue of the standard of proof to be achieved at this stage.

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[39] See eg: ***Fiona Trust & Holdings Corp v Privalov [2007] 1 CLC 144*** at [36] per Longmore LJ; ***Albon (trading as NA Carriage Co v Naza Motr Trading Sdn Bhd (No 3) [2007] 2 All ER (Comm) 513*** at [15] per Lightman J; ***JSC BTA Bank v Ablyazov [2011] 2 Lloyd's Rep 129*** at [31] – [33] per Christopher Clarke J; ***Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd [2013] EWHC 1240*** at [49] – [50] per Popplewell J.

[40] ***[2000] 1 Lloyd's Rep 522*** at 524-6, Waller LJ giving the judgment of the court. See also ***Fiona Trust & Holdings Corp v Privalov [2007] 1 CLC 144*** at [37] per Longmore LJ giving the judgment of the court. This point was not dealt with on appeal to the HL.

[41] This issue has most recently been analysed in detail by Popplewell J in ***Golden Ocean Ltd v Humpuss Intermoda Transportasi Tbk Ltd [2013] EWHC 1240 (Comm)*** at [47] – [59].

[42] See: ***Overseas Union Insurance Ltd v Mutual Insurance Co Ltd [1988] 2 Lloyd's Rep 63 at 70, per Evans J.*** See also: ***Mustill & Boyd on Commercial Arbitration, 2nd Ed (1989)*** page 464.

[43] See: ***Downing v Al Tameer Establishment v another [2002] 2 All ER (Comm) 545*** at [20] per Potter LJ, with whom Keene LJ and Sumner J agreed. However, Potter LJ's statement, based on a decision under the

75. It was common ground before us that issues concerning the material validity, scope and interpretation of an arbitration agreement are governed by its applicable law[44] and that, in the case of the arbitration agreement in the ASCA, the applicable law is Swiss law. There was also no dispute that, on the face of it, a written arbitration agreement in the ASCA exists. The question is whether there was a lack of true consensus to the agreement. That issue has therefore to be decided by Swiss law.

76. As Dicey correctly notes, neither Article II of the New York Convention nor ***section 9*** of the ***AA 1996*** indicates which law is to decide whether the arbitration agreement that is found to exist is "null and void". The editors of Dicey suggest that, in practice, the English court is likely to determine the other matters mentioned for itself, "uninfluenced by foreign law".[45] However, that cannot strictly be right in the context of a non-English arbitration agreement whose substantive applicable law is not English law and given that the concepts "null and void", "inoperative" and "incapable of being performed" are taken from an internationally agreed Convention. It seems to me that the correct approach for the English court, when a stay is resisted on the grounds of a non-English law arbitration agreement being "null and void", is to take the issue in two stages. First, the court must examine and decide (on whatever standard of proof may be necessary, see below) the rules of the applicable law of the arbitration agreement which are said (on the facts) to lead to the arbitration clause being impugned. Secondly, the court must then decide the effect of that applicable law, by reference to the facts and the English law concepts of "null and void" and "inoperative"; those being the words of the relevant English statute. Of course, in considering those concepts the English court must have in mind that the phrases are taken from an International Convention so they should not be interpreted in an "anglo-centric" way but in a broad, international sense.

77. As for the standard of proof that must be achieved by a party wishing to establish that an arbitration agreement is "null and void" or "inoperative", the starting point must be the wording of ***section 9(4).*** That stipulates that a stay will be granted unless the court is "satisfied" that the arbitration agreement is "null and void" or "inoperative" or "incapable of being performed". The wording in Article II of the New York Convention is stronger: it states "unless [the court] *finds* that" the arbitration agreement is "null and void" and so forth. The words "satisfied" and "find" suggest that, in the context of civil proceedings in the English court, the standard of proof which must be attained in order that the court should refuse a stay is one of the balance of probabilities.

78. I think that this must be correct. After all, it is for the court finally to decide the issue of whether or not to refuse a stay because the arbitration agreement is "null and void" or "inoperative". No other tribunal has or can have this jurisdiction.

79. In theory I suppose the court could order that there be a trial of an issue to determine whether the arbitration agreement was "null and void" or "inoperative". But if the evidence and possible findings going to the issue of whether the arbitration agreement

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Arbitration Act 1975, that "if the defendant can raise an arguable case in favour of validity, a stay should be granted" does not accord with case law under ***section 9*** of the ***AA 1996,*** which is in different terms from ***section 1*** of the ***1975 Act.*** See: ***Ahmad Al-Naimi v Islamic Press Agency [2000] 1 Lloyd's Rep 522,*** referred to above.

[44] See ***Dicey, Morris & Collins: The Conflict of Laws 15th Ed (2012)*** – "Dicey"***: Rule 64(1),*** vol 1 page 829.

[45] See: ***para 16-177.***

is "null and void" or "inoperative" also impinge on the substantive rights and obligations of the parties the court is unlikely to do so unless such a trial can be confined to "a relatively circumscribed area of "investigation".[46] Otherwise, in such a case, where the court is satisfied of the existence of the arbitration agreement and that the matters in dispute are within its scope, then logically it must be for the arbitral tribunal finally to decide the "***section 9(4)*** matters", assuming it has *compétence-compétence* to do so. [47] In such a case, the right course for the court to take is to grant a stay under ***section 9(4)*** and let the arbitral tribunal get on with determining the dispute.

80. In ***JSC BTA Bank v Ablyazov*** Christopher Clarke J held that, in circumstances where the court could only definitively decide the question of whether the arbitration clause was "null and void" by deciding the substantive issue between the parties and that was not a realistic option, either at the interlocutory stage or by directing a trial of the issue, then, for the purposes of ***section 9(4),*** it was sufficient for the applicant for a stay to satisfy the court that there was an arguable case that the arbitration clause was valid. This was because if it did so, then it must follow that the party resisting a stay could not discharge the burden on it of "satisfying" the court that the agreement was null and void.[48] In ***Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd***[49] Popplewell J emphasised that if the court *can* itself resolve the issue of whether the arbitration agreement is "null and void" (or "inoperative"), then a "merely arguable case" that the arbitration agreement is a valid one will not suffice to obtain a stay under ***section 9;*** it only does so if the court cannot decide or it cannot or will not direct an issue to be tried, for reasons outlined above.[50]

81. **Application of the principles to this case: the doctrine of "double representation".** In this case, neither side applied to the judge to direct a trial of the "double representation" issue. Aeroflot may have decided not to do so because it was under a misapprehension as to the standard of proof that it needed to attain to prevent a stay, but, to my mind, it cannot benefit from that.

82. It follows from what I have said that, although I agree with much of the analysis of Floyd J on how the court should approach an application for a stay under ***section 9,*** I respectfully disagree with the judge's decision not to decide the issue of whether the arbitration agreement is "null and void" on the written evidence in respect of the doctrine of "double representation". It is not disputed by Aeroflot that, on the face of it, a written arbitration agreement was made. It is argued that there was not true consent or that the arbitration agreement is "null and void" because of the doctrine of "double representation" in Swiss law, the putative applicable substantive law of the arbitration agreement. The judge concluded, at [106], that the extent of Mr Glushkov's continued involvement in the day to day affairs of the Forus group was "at the heart of the allegations made in the action", and so to decide the issue of the execution of the SCA in the absence of Mr Glushkov and independently of the trial of the action "…would be undesirable". But in that case, the judge should have

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[46] ***A v B [2007] 1 Lloyd's Rep 237 at 261*** per Colman J, quoted in ***JSC BTA Bank v Ablyazov [2011] 2 Lloyd's Rep 129*** at [50].
[47] ***A v B [2007] 2 CLC 157*** at [133] – [139] per Colman J. In England, that decision of the arbitrators can, of course, be challenged in the courts under ***section 67*** of the ***AA 1996.***
[48] ***[2011] 2 Lloyd's Rept 129*** at [31], [33], [36] ,[46] and [49].
[49] ***[2013] EWHC 1240 (Comm)*** at [54].
[50] See [54].

considered granting a stay under the inherent jurisdiction of the court so as to allow those matters to be decided by the arbitral tribunal. I appreciate that ran the risk that the arbitral tribunal might find that there was no valid arbitration agreement; but that is inherent in the doctrine of *compétence-compétence*.

83. However, Mr Marshall's primary submission to us was that there is enough material before the court for it to be satisfied, on a balance of probabilities, that there was no true consensus as to the arbitration agreement or that it is "null and void" by virtue of the Swiss law doctrine of "double representation". So, in my view, this court has to decide whether (i) Cyprus has satisfied the court that there is a concluded arbitration agreement and, if so, (ii) whether Aeroflot can resist a stay by satisfying this court that the arbitration agreement is "null and void" or inoperative" by virtue of the Swiss law doctrine.

84. **Swiss law:** To do so, it is first necessary to analyse, under the putative substantive law, the effect on the arbitration agreement in the ASCA when there is a challenge to the validity of that agreement in which the arbitration agreement is to be found. The Swiss law experts of the parties, Prof Dr Nobel for the Forus defendants and Mr Paul Gully-Hart for Aeroflot, agreed that, under Swiss law:

> "…arbitration agreements are autonomous and independent of the validity of the main agreement containing the arbitration agreement. However, by way of exception, there are cases in which a specific defect does not only affect the validity of the main agreement but entails the nullity of the arbitration agreement contained therein".[51]

The experts disagreed on whether there would be an "identity of defect" as between the main agreement and the separate arbitration agreement within it in a situation where, as Aeroflot alleges, the agreement containing the arbitration agreement was entered into in a situation of "double representation".[52] Prof Dr Nobel considered that the defects that affected the validity of the agreement and also the arbitration agreement within it as well are very limited in Swiss law. He considered that a situation of "double representation" could only affect the validity of the arbitration agreement if the "double representation" was "so severe and had a direct significant intent on the inclusion of the arbitration agreement as opposed to a different dispute resolution clause or establishment of jurisdiction".[53] Mr Gully-Hart considered that this position found no support in Swiss case law or legal doctrine.[54]

85. The experts further agreed that "Mr Glushkov would be deemed to have acted in a situation of double representation if, as Mr Gully-Hart assumed, Mr Glushkov instructed the representative(s) of Services to enter into the contracts containing the arbitration agreements with Aeroflot and also caused Aeroflot to enter into those contracts…".[55] They also agreed that the absence of prejudice is an exception to the prohibition of "double representation", which is exceptionally acceptable if the nature of the act excludes the risk of prejudice to the interests of the two represented

[51] Point 7 of the "Scott Schedule" of the Joint Memorandum on Swiss law.
[52] Point 8.
[53] Point 8, comment of Prof Dr Nobel.
[54] Point 8. Mr Gully-Hart's view is expressed in his opinion at para 53, but without any citation in support of it.
[55] Point 18

parties.[56] Furthermore, they agreed that an arbitration agreement was *a priori* unlikely to cause *per se* any prejudice to the interests of the party represented, although Mr Gully-Hart opined that fragmentation of a dispute caused by different dispute resolution clauses may cause a prejudice to the party suffering from a situation of double representation.[57] But this view is based on Mr Gully-Hart's opinion that the "abuse of right" theory has been used by the Swiss court to prevent a party from "abusively relying on different dispute resolution clauses which lead to a fragmentation of the resolution of the dispute".[58] He cites no case law or doctrine to support his opinion that, as a matter of law, in a situation of "double representation" an arbitration agreement would, itself, be regarded as prejudicial.

86. **Was there a concluded arbitration agreement in the ASCA? Conclusions:** I repeat, on the face of things, there is a valid written arbitration agreement in the ASCA. It is Aeroflot's case that there was a lack of consensus to the arbitration agreement in the ASCA because, it asserts, Mr Glushkov was, at the time of the conclusion of the SCA in November 1997, acting for Services, or he controlled Services or he instructed representatives of Services to enter into the SCA, which contained the arbitration agreement. Alternatively, Aeroflot asserts that, at the time that Cyprus became a party to the ASCA, under the second amendment in June 1998, Mr Glushkov acted for, or controlled or instructed representatives of Cyprus. There must be some evidential burden on Aeroflot to show that this is so, in relation to the arbitration agreement in the ASCA, otherwise, the *prima facie* position must remain that there was a concluded written arbitration agreement in the ASCA.

87. I am not satisfied that Aeroflot has discharged any evidential burden. The evidence at the moment leans towards the conclusion that Mr Glushkov was formally removed from the Lausanne Commercial Register as a board member and signatory for Services on 5 September 1997, that is before the conclusion of the SCA, which was between Aeroflot and Services. There is no satisfactory evidence that Mr Glushkov "controlled" Services as at November 1997, (Mr Gully-Hart simply "assumes" that he did), or that he instructed either Mr Kuppers or Mr Jenni to sign the SCA on behalf of Services. In May 1998, when the ASCA was signed, Mr Glushkov was neither a director nor signatory for Services, nor a director of Cyprus. Nor is there satisfactory evidence that, at that time, he "controlled" Cyprus. The findings of the Swiss criminal proceedings concerning Mr Glushkov, which are more concerned with his relations with Holdings and Finance than with Services or Cyprus, are very general and unspecific. They certainly do not help on the question of whether Mr Glushkov had control for the purposes of proposing or agreeing the arbitration clause in the ASCA. The findings are not enough to satisfy me that Aeroflot has discharged any evidential burden to upset the *prima facie* position that there is a concluded arbitration agreement in the ASCA. Accordingly, overall I am not satisfied on the existing evidence that Mr Glushkov was in a position to create a situation of "double representation" as between Aeroflot and Services/Cyprus.

88. Aeroflot faces two other difficulties as well. First, even assuming that I were satisfied that the doctrine of "double representation" applied to the main agreement (ie. the SCA or the ASCA), then, given the Swiss law experts' agreement that there

[56] Point 20
[57] Point 21 and 22.
[58] Opinion para 65.

has to be a "specific defect" that affects both the main agreement and the arbitration agreement so as to nullify the arbitration agreement, there must be some evidential burden upon Aeroflot to satisfy the court that there would be such a "specific defect" that affected the arbitration agreement in the SCA/ASCA in circumstances where the main agreement was entered into in a situation of "double representation". Mr Gully-Hart challenges Prof Dr Nobel's view (as set out above) but provides no support for his assertion. Thus I would hold that Aeroflot has not fulfilled the evidential burden placed on it to show that the situation of "double representation" affected the arbitration clause as well as the main agreement.

89. Secondly, there must be an evidential burden on Aeroflot to show that, in relation to the arbitration agreement, there was some prejudice, given the experts' agreement that, *a priori*, an arbitration agreement is unlikely *per se*, to cause any prejudice to the interests of a party "doubly represented". Mr Gully-Hart has provided no support for his proposition that, as a matter of Swiss law, in a situation of "double representation" concerning the main agreement, an arbitration clause thereby concluded would, itself, be regarded as prejudicial. Therefore it seems to me that the position must be that no prejudice is demonstrated and so, in the absence of such prejudice, the prohibition of 'double representation" will not apply to the arbitration agreement in the SCA/ASCA.

90. **Has Aeroflot "satisfied" the court that the arbitration agreement in the ASCA is "null and void" by virtue of the Swiss law doctrine of "double representation"?**

91. It must follow from my analysis above that Aeroflot cannot discharge the burden on it to establish, on the facts and on Swiss law that a situation of "double representation" existed at the material time, so that it also cannot "satisfy" the court that the arbitration agreement in the ASCA is "null and void". Therefore, I do not need to decide whether, in terms of the English law concept of "null and void", proof of the applicability of the Swiss law doctrine of "double representation" in this case would render the arbitration agreement in the ASCA "null and void" for the purposes of ***section 9(4)*** of the ***AA 1996.***

92. In Mr Marshall's most recent written submissions, he has reverted, I think in the alternative, to the submission that this court should order a trial of the issues of whether Mr Glushkov caused Services/Cyprus to enter into the arbitration agreement and whether he made a misrepresentation about the arbitration agreement being approved by the legal department. As I have concluded that the issue of whether the arbitration agreement is valid or is "null and void" can be decided by this court for the purposes of whether or not to grant a stay under ***section 9(1)*** and ***(4),*** it would be wrong in principle to do so. Those issues, which are part of the core dispute between the parties, concerning the role played by Mr Glushkov, will be addressed by the arbitral tribunal.

VII. Issue Three (b): Cyprus. Is the arbitration clause in the Amended Second Credit Agreement "null and void" or "inoperative" for the purposes of *section 9(4)* of the *AA 1996* by virtue of the Swiss law doctrine of "abuse of right"?

93. As the judge correctly pointed out at [109], the very name of the Swiss law doctrine "abuse of right" presupposes that a particular right exists; it therefore presupposes that there is otherwise a valid arbitration agreement on which Cyprus could rely to

obtain a stay, but for the application of this doctrine. Given the experts' agreement that there is a Swiss law doctrine of "abuse of right," the two questions remaining are: (i) whether the doctrine applies somehow to impugn an arbitration agreement which (it is assumed for these purposes) is otherwise valid by its putative applicable law, viz. Swiss law; and (ii) if so, whether this renders that arbitration clause "null and void" or "inoperative" for the purposes of ***section 9(4)*** of the ***AA 1996.*** The first question concerns Swiss law only. The second must involve both Swiss and English law, which is the law by which this court must decide whether the arbitration clause in the ASCA is "null and void" or "inoperative".

94. Mr Gully-Hart has relied on the decision of the Swiss Federal Court (Civil Division) of 8 December 1999 in ***Arthur Andersen Business Unit Member Firms v Anderson Consulting Business Unit Member Firms*** ("the ***Andersen*** case") for the proposition that the doctrine of "abuse of right" can be applied to an arbitration agreement to prevent a party from relying on it so that the arbitration agreement is to be regarded as "null and void" or "inoperative". I have re-read the judgment in the original French version supplied to us. The case concerned disputes that had arisen between Andersen Worldwide Société Coopérative (AWSC), a Swiss corporation whose members were Arthur Andersen companies worldwide, which companies were themselves grouped into two separate commercial units called Andersen Consulting Business Unit (ACBU) and Arthur Andersen Business Unit (AABU). So all the national Andersen entities belonged to either ACBU or AABU. Each of the national entities entered into contracts with AWSC. These contracts were called "Member Firm Agreements" (MFIFAs). Each of the MFIFAs contained a clause 24 stipulating that it could only be altered by means of the signed agreement by the parties. Before 1991 those contracts contained an arbitration clause. That clause was modified in 1991 so that any arbitration (whether in or outside Switzerland) would be conducted according to the rules of the International Chamber of Commerce (called CCI in the report – *la Chambre de Commerce Internationale*). The 1991 arbitration clause was agreed to be modified in 1994 following recommendations by the Board of Partners of AWSC and these changes were ratified by the associate members of AWSC. Then in 1997 44 member entities of ACBU deposited with the CCI a demand for arbitration against 97 members of the AABU and against the AWSC. But at that stage only several MFIFAs had been modified in accordance with clause 24 so as to contain the modified 1994 version of the arbitration clause. The key difference in the clause was the identity of the authority entitled to appoint the sole arbitrator in default of agreement. 68 of the respondent Andersen entities sought to challenge the validity of the CCI arbitration under the 1994 version of the arbitration clause on the ground that many of the MFIFAs did not contain that version, because their MFIFAs had not been modified in accordance with clause 24.

95. The CCI appointed arbitrator (under the 1994 version of the clause) held that he had jurisdiction. The Swiss Federal Tribunal agreed. It characterised the key question as being whether the defendant entities, members of AABU, were bound by the 1994 clause even though their contracts did not formally contain it. The court analysed the circumstances in which the contracts and their modifications had been agreed and concluded that they were bound because the modified version corresponded to the intention of the parties.

96. Lastly the court considered the argument that the contracts could only be modified by individual written and signed agreements containing the modified clause in accordance with clause 24 of the MFIFAs. It commented that one searched in vain to find a legitimate reason for rejecting the 1994 version, which differed on very few points, the only significant one being the identity of the authority that could appoint an arbitrator in default of agreement. The court held that the arbitrator was correct to consider that the challengers could not, in good faith, renounce their agreement and rely on the form of clause 24 in their MFIFAs in order to avoid the arbitration. Then, in the very last two sentences of the judgment, the court mentions the doctrine of "*abus de droit*" for the first time and says:

> « Il y a manifestement abus de droit de la part des recourantes à invoquer la violation d'une prescription de forme à l'encontre d'une clause compromissoire qui corresponde à ce que leurs dirigeants savaient ; pensaient et, en définitive, voulaient. Au demeurant, on ne comprend guère pourquoi les recourantes critiquent la solution judicieuse consistant à charger un arbitre unique de démêler multipartite » :

97. I am quite satisfied that Prof Dr Nobel is correct to say that the court did not, by this statement, elaborate a general rule on the applicability of the doctrine of "abuse of rights" to invalidate an otherwise valid arbitration clause in circumstances where party A has disputes with several other parties B, C, D and E, where the result of upholding the arbitration clause between A and B would be to "fragment" the overall dispute. To my mind, all the court was saying was that it would be an abuse of the rights of parties to the MFIFAs to rely on the formality of clause 24 of their contracts to insist that the modified arbitration clause be formally agreed in writing and signed, in circumstances where it was quite clear that a modification had, in fact, been agreed between all parties and that is what they had wanted. The court was not commenting at all on whether the reliance on a valid arbitration clause by the claimant entities was itself an "abuse of right." In fact, the court was saying the exact opposite; ie. that it was an "abuse of right" for the AABU members to challenge the existence of an agreed and valid arbitration clause.

98. The decision is thus a far cry from saying that Swiss law has developed the doctrine of "abuse of right" to the extent that it will hold that an otherwise valid arbitration clause will be regarded as either "null and void" or "inoperative" for the purposes of the New York Convention in circumstances where, to uphold the arbitration clause, there would necessarily be a "fragmentation" of a multi-party dispute that one of the parties to the arbitration clause has with the other party to that clause and with third parties. With great respect, I find the analysis of the judge at [92] to the contrary unpersuasive. First, it presupposes, that the doctrine of "abus de droit" can, of itself, prevent a party from relying on what would otherwise be a valid arbitration clause. The ***Andersen*** case does not support that proposition and no other authority or doctrine of Swiss law was cited which does so. This is not surprising, given that Switzerland is a party to the New York Convention and so must uphold arbitration agreements and give effect to them unless they are "null and void, inoperative or incapable of being performed" within Article II of the Convention. Secondly, the judge does not explain how the Swiss law doctrine of "abuse of right", by itself, can, as a matter of Swiss law, turn an otherwise valid arbitration clause into one that is

"null and void", or "inoperative" to use the terms of both the New York Convention and ***section 9(4)*** of the ***AA 1996***. For these purposes, I would accept Lightman J's characterisation of "null and void" in the ***AA 1996*** (and so the New York Convention) as being "devoid of legal effect" and that of "inoperative" as being 'ceasing to have legal effect' altogether.[59] At best, the doctrine of "abuse of right" in Swiss law appears to amount to a principle that, in all the circumstances of the case, it would be "inequitable" (to use English terminology) for a party to rely on its strict legal rights. That, to my mind, is nothing like a conclusion that, as a matter of law, an arbitration clause has become "devoid of legal effect" or "ceased to have legal effect".

99. Having made this conclusion on the effect of the doctrine of "abuse of right" in Swiss law, I can deal with the second question quickly. If the Swiss law doctrine of "abuse of right" is no more than the principle I have stated above, in my judgment it is impossible to say that an application of that principle can, for the purposes of ***section 9(4)*** of the ***AA 1996,*** render the arbitration clause in the ASCA either "null and void" or "inoperative". At best, the doctrine might give rise to a submission that, in all the circumstances, the party seeking to rely on the arbitration agreement should not be allowed to do so. But that takes the court into an area of forming a judgment or exercising a discretion. The whole point about the New York Convention and ***section 9(4)*** of the 1996 Act is that no exercise of judgment or discretion can be involved. Either the arbitration agreement is valid, in which case there must be a stay, or the court is satisfied that it is "null and void" or "inoperative" or "incapable of being performed", in which case there is not. There is no halfway house in which the court can decide whether, on the facts, it would be an "abuse of right" or "inequitable" to rely on an otherwise valid arbitration agreement.

100. **Overall conclusion on the effectiveness of the arbitration agreement in the ASCA:** Accordingly, I must disagree with the judge's conclusion that Aeroflot is entitled to rely on the Swiss law doctrine of "abuse of right" so as to make the arbitration agreement in the ASCA either "null and void" or "inoperative". Given my conclusions on "double representation", the overall result is that the proceedings of Aeroflot against Cyprus must be stayed pursuant to ***section 9(4)*** of the ***AA 1996.***

VIII. Issue (4): Can Aeroflot establish, as against Holdings, that there is a "serious issue to be tried".

101. It will be recalled that Holdings is a Luxembourg company, so that the issue of whether Aeroflot is entitled to invoke the English court's jurisdiction against Holdings depends on whether Aeroflot can rely on Article 6(1) of the Judgments Regulation, which provides:

> "A person domiciled in a Member State may also be sued:
>
> (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings".

[59] ***Albon v Naza Trading Sdn Bhd (No 3) [2007] 2 Lloyd's Rep 1.***

102. Mr Tregear's argument is that it cannot be "expedient to hear and determine" Aeroflot's claim against Holdings together with those against the individual defendants if, in fact, there is no arguable claim against Holdings. So, it is said, Aeroflot must first of all demonstrate that it has either a "good arguable case" on the merits against Holdings or that there is, at least, a "serious issue to be tried" as between Aeroflot and Holdings. It is said that only if that issue is decided in Aeroflot's favour should the court go on to consider whether there is a sufficient "connection" between Aeroflot's case against the individual defendants and that against Holdings to enable Aeroflot to establish the English court's jurisdiction in relation to Holdings pursuant to Article 6(1).

103. For this proposition Mr Tregear relies on the decision of the Court of Appeal in ***Unilever Plc v Chefaro Proprietaries Ltd***[60] ("the ***Chefaro*** case"). In that case the claimant sued the first defendant for alleged infringement of an English patent. The defence was "obviousness" and the first defendant counterclaimed revocation of the patent. The first defendant was the UK marketing company in an international group of which the second defendant, Azko NV, a Dutch company, was the holding company. The second defendant had developed and manufactured the product said to infringe the claimant's patent. Azko NV was served out of the jurisdiction without leave. The report simply says that no leave was required because it was a Brussels Convention case. The basis for invoking the English court's jurisdiction under the Convention could have been either the Convention equivalent of Article 6(1) or that of Article 22(4)[61] of the Judgment Regulation. The Court of Appeal held that the claimant did not have an arguable case that the second defendant was party to a common design to commit acts which were alleged to constitute an infringement of the patent. But the claimant also wished to obtain discovery of documents from the parent company concerning the defendants' product (said to have infringed the claimant's patent) to support its case against the "obviousness" defence.

104. Glidewell LJ held that before Azko could be served with proceedings out of the jurisdiction, even when no leave was required because it was a Brussels Convention case, it had to be demonstrated that there was an "good arguable claim" against the party to be served.[62] McCowan LJ agreed with Glidewell LJ. Hoffmann LJ held that in a patent case, when it was asserted that the infringer in the UK was one company in a group, but the research and development had been done by another company in the group which is either inside or outside the UK, then "whether one can obtain discovery against the latter company in an ***RSC Order 11*** or Brussels Convention case depends, as this court decided in ***Unilever Plc v Gillette (UK) Ltd***[63] on whether "an arguable case" can be shown for joining the company as a substantive defendant. This will involve demonstrating that it was arguably party to a common design to commit the acts which are alleged to constitute infringement".[64]

105. From this Mr Tregear seeks to draw the general proposition that in a case where a claimant wishes to serve proceedings (without needing permission) on a defendant

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[60] ***[1994] FSR 135.***
[61] This confers exclusive jurisdiction (regardless of domicile) in a case concerning the validity of a patent on the courts of the Member State where the patent has been registered.
[62] Page 141-2.
[63] ***[1989] RPC 583***
[64] Page 142

pursuant to the Judgment Regulation and ***CPR Pt 6.33,*** on the basis that Article 6(1) of the Regulation applies, then, as a matter of English procedural law, there is a requirement that the claimant must establish that there be a "good arguable case" or a "serious issue to be tried" as against that defendant, or else the service on the foreign defendant must be set aside. In effect, he asserts that the ***Chefaro*** case imported into Brussels Convention cases (and so Lugano Convention and now Judgments Regulation cases) the first part of the tripartite test that has to be satisfied before permission will be granted to serve proceedings on a foreign defendant out of the jurisdiction in a ***CPR Pt 6.36*** and ***PD 6B para 3.1*** case.[65] Mr Tregear accepted that there is no European case law that required the imposition of such a test and he also noted that there is no discussion of this point in ***Briggs & Rees.***

106. I do not accept that such a broad proposition can be derived from the ***Chefaro*** case. First, in principle it is inappropriate simply to import into Judgment Regulation cases all or part of the tripartite test established in cases where ***CPR Pt 6.36*** and ***PD 6B*** applies (ie. where permission to serve out of the jurisdiction is needed). This is because in a Judgments Regulation case (or a Lugano Convention case), I think that the sole question that has to be decided at this "jurisdiction" stage in the proceedings is that stated by Lord Rodger of Earlsferry in the ***Bols Distilleries*** case:[66] ie. whether the court is satisfied "…or as satisfied as it can be having regard to the limitations which an interlocutory process imposes, that factors exist which allow the court to take jurisdiction". The standard of "satisfaction" is that of a "good arguable case", as the Privy Council decided in the ***Bols Distilleries*** case.

107. Secondly, the ECJ has stated in ***Freeport plc v Arnoldsson***[67] that in an Article 6(1) case, it is for the national court to determine a single question: whether there is a connection between the different claims brought before it, "…that is to say, a risk of irreconcilable judgments if those claims were determined separately…". To determine this question, the national court must "take account of all the necessary factors in the case file", which may require it to take into consideration also the legal bases of the actions brought before the court. The ECJ also held in that case[68] that, where it is asserted that the national court has jurisdiction by virtue of Article 6(1), the national court should not concern itself with the question of whether the claim against the non-resident defendant was brought in those proceedings with the sole object of ousting the jurisdiction of the court of the Member State where that defendant is domiciled. The ECJ therefore specifically rejected the proposition that the national court should consider and decide whether other possible motives for bringing that defendant into the proceedings should be taken into account. The judgment does not indicate, at any stage, that the national court has to assess the merits of the claimant's case against the non-domiciled defendant. The whole approach of the ECJ seems to me to be consistent with the principle that the Judgments Regulation is only concerned with the basis for establishing jurisdiction

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[65] In ***Altimo Holdings & Investments Ltd v Kyrgyz Mobil tel Ltd [2012] 1 WLR 1804,*** the Privy Council confirmed the rule that on an application for permission to serve a foreign defendant out of the jurisdiction, the applicant must satisfy the court that: (i) there is a serious issue to be tried on the merits against that defendant, that (ii) there is a good arguable case that the claim fell within one of the classes of case in which permission to serve out of the jurisdiction may be given and that (iii), in all the circumstances England is clearly or distinctly the appropriate forum for the trial of the dispute.

[66] ***[2007] 1 WLR 12*** at [28].

[67] ***[2008] QB 634*** at [41] and [47].

[68] At [54]

and has nothing to do with assessing the merits of the claims against the various defendants.

108. Thirdly, in the ***Chefaro*** case itself, it is not clear whether the basis for the English court's jurisdiction was the Brussels Convention equivalent of Article 6(1) or Article 22(4) of the Judgments Regulation. So it is not clear that this Court was attempting specifically to impose a further test in relation to Article 6(1). Moreover, the case on which the court relied for the imposition of a "good arguable case" test as to the merits, ***Unilever plc v Gillette (UK) Ltd,***[69] was not a Brussels Convention case. The foreign defendant in that case was a US company, so that leave to serve out was needed under the non-Convention procedure then to be found in ***RSC Order 11 rule 1.*** Under that regime, (as Mustill LJ noted in his judgment in ***Uniliver v Gillette***) it was long established that there had to be a "good arguable case" on the merits before leave to serve out would be granted.

109. I would, if necessary, distinguish the ***Chefaro*** case on its facts, because it is clear that the prime motivation for including the second defendant in the proceedings was to obtain discovery and the court held that this was not good enough. But, in any event, I think that a straightforward requirement that, in an Article 6(1) case, the claimant must establish a "good arguable case" or "serious issue to be tried" against the non-domiciled defendant is inconsistent with the "autonomous" construction of Article 6(1) taken by the ECJ in ***Freeport plc v Andersson.*** Insofar as the Forus argument might be that Aeroflot has joined Holding so as to establish English jurisdiction and to avoid the Luxembourg court having jurisdiction in any dispute against Holdings, that consideration is impermissible, as ***Freeport plc v Arnoldsson*** makes plain.

110. Accordingly, I reject Mr Tregear's submissions on this issue. I would, however, accept that, in principle, it must be open to Holdings, once the jurisdiction issues have been determined, to attempt to strike out Aeroflot's claim against it. That may be difficult where, as here, the claim is based on foreign law, which itself would therefore involve determination of issues of "fact". But that is for another day.

IX. Issue (5): Holdings. Has Aeroflot satisfied the Article 6(1) test?

111. I move on then to what I regard as the sole question to be answered so far as Holdings is concerned: has Aeroflot demonstrated a "good arguable case" in the sense that it has shown that it has "the better of the argument" that there is a connection between the different claims brought before the English court so that "…there would be a risk of irreconcilable judgments if those claims were determined separately…"? To determine this question, the national court must "take account of all the necessary factors in the case file", which may require it to take into consideration also the legal bases of the actions brought before the court. In my view Aeroflot has plainly satisfied this test. The "anchor" claim of Aeroflot to establish the English court's jurisdiction is that against the individual defendants and that case is based on an allegation of a conspiracy. The anchor claim relies primarily on breaches of Russian law. That claim will remain before the English court, despite the removal of the claims against Services and Cyprus if my views are shared by my colleagues.

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[69] ***[1989] RPC 583***

112. The Amended Particulars of Claim allege that Holdings is a party to this same conspiracy: see paragraphs 24 and 25. Factual issues about whether Mr Glushkov and Mr Berezovsky were parties to a conspiracy and whether they controlled Forus companies and used those companies to further their fraudulent aims affect both the claim against the individual defendants and against Holdings. All the claims are primarily based on breaches of Russian law, although the precise bases of the claim in Russian law against Holdings may be different from that against the individual defendants. In my judgment there is the necessary context of "the same situation of law and fact" referred to by the ECJ in ***Freeport plc v Arnoldsson,***[70] such that there is a *risk* that if the case against Holdings were tried in Luxembourg and those against the individual defendants in England, there may be irreconcilable judgments. I deliberately emphasise the word "risk". It does not have to be shown that there is any greater probability of irreconcilable judgments if the cases were not to be tried together.

113. Mr Tregear argued that there was a much closer connection between the claim against Holdings and those against Services and Finance and that the risk of "irreconcilable" judgments in different jurisdictions was greater in respect of those claims. That may be so but it is irrelevant. If Aeroflot pursues Services it must do so (on my ruling) in the Lausanne court and if it pursues Cyprus it must do so in arbitration. So, necessarily, there are going to be different tribunals that deal with each of these claims. That is simply the result of the jurisdictional agreements made between the parties. It has nothing to do with the claims against the individual defendants, which must be brought in England under Article 2 of the Judgments Regulation. Mr Tregear suggested at one point that Aeroflot could pursue the individual defendants in any proceedings against Services in Lausanne. That is wrong, because the individual defendants are entitled to be sued in their state of domicile and now that the English Court is seised of that matter, it would be impossible for the Swiss court to take over such proceedings. It is from the fact that Aeroflot has rightly chosen England as the "anchor" forum against the individual defendants that it is entitled to rely on Article 6(1) to sue Holdings in England.

114. **Conclusion: re Holdings.** I therefore conclude that Holdings' challenge to the jurisdiction of the English court must fail.

X. Issue (6): Finance: Is there a "serious issue to be tried"?

115. Because Finance is a BVI company, Aeroflot needed permission to serve proceedings on it out of the jurisdiction pursuant to ***CPR Pt 36 and Practice Direction 6B.*** It relied on ***paragraph 3.1(3),*** saying that Finance was a "necessary or proper party" to the proceedings against the individual defendants. It is common ground that Aeroflot therefore has to demonstrate that there is a "serious issue to be tried" as between Aeroflot and Finance. Mr Tregear submitted that there was insufficient in even the Amended Particulars of Claim to justify proceeding against Finance. He pointed out that there is no allegation that Aeroflot had any dealings with Finance. He said that the sole basis of the claim against it was that (a) it was one of the Forus group through which the individual defendants pursued their conspiracy to defraud Aeroflot; and (b) each of the Forus companies assisted in the breaches of duty of Mr Glushkov, in particular by taking fees and other payments, knowing that

[70] at [40].

those payments were made as a result of breaches of duty by him.[71] He submitted that there was no evidence to support these assertions.

116. The judge concluded that this claim was in need of further particularisation, but there was enough in the pleaded case to meet "this not very demanding threshold": see [117]. I agree. For the purposes of demonstrating that there is a "serious issue to be tried", Aeroflot can properly rely on the Swiss criminal court finding that, in the "Andava fraud" affair, Finance was involved in the movement of funds whose origin was Aeroflot. Mr Marshall argued that, if necessary, Aeroflot should be permitted to rely on evidence in the third witness statement of Mr Yuri Botiuk of McGrigors LLP, Aeroflot's solicitors, which was produced during the hearing before Floyd J at short notice when it was appreciated that Finance was taking the "no serious issue to be tried" point. In my view this material does not add much to the Swiss criminal court findings.

XI. Issue (7): Finance. Has Aeroflot established that there is a "good arguable case" that Finance is a "proper party" to the proceedings being brought against the individual defendants?

117. Mr Tregear submitted that it does not make sense for a claim against Finance to be continued in the English court in the absence of both Services and Cyprus, which were the Forus companies with whom Aeroflot had contracts and through which, if at all, any sums due to Aeroflot were wrongfully diverted. There is a greater "connection" between the claims against Services, Cyprus and Finance than between Finance and the individual defendants.

118. That may or may not be so, but it is irrelevant for present purposes. It seems to me to be obvious that if the claim against the individual defendants is continued in England then there is a "good arguable case" that it is "proper" for one of the companies through which the conspiracy is said to have been operated to be a party to those proceedings. No more need be said.

119. **Conclusion on Finance.** I agree with the judge's decision. Finance's appeal against the judge's refusal to set aside the permission to serve proceedings on Finance out of the jurisdiction (originally granted by Master Bragge) should, in my judgment, be dismissed.

XII. Overall conclusions and disposal

120. My overall conclusions and proposal for disposal of these appeals and cross-appeals is as follows:

i) The appeal of Aeroflot against Floyd J's decision to decline jurisdiction in respect of Aeroflot's claim against Services should be dismissed. The judge was correct to hold that Services has demonstrated a "good arguable case" that Article 17 of the Lugano Convention applies, so the Lausanne jurisdiction clause in the Advisory Mandate governs the jurisdiction for the disputes between Aeroflot and Services.

[71] Paras 24 and 68 of the Amended Particulars of Claim.

ii) The appeal of Cyprus against the judge's decision holding that the arbitration agreement in the ASCA was "null and void" or "inoperable" within ***section 9(4)*** of the ***AA 1996,*** so that there should be no stay of the proceedings against Cyprus, should be allowed. The arbitration agreement in the ASCA is valid and is not either "null and void" or "inoperative" within ***section 9(4)*** by virtue of the Swiss law doctrines of "double representation" or "abuse of right".

iii) The appeal of Holdings against the judge's decision not to decline jurisdiction on the basis of Article 6(1) of the Judgments Regulation should be dismissed. The new argument of Holdings advanced on appeal that Aeroflot had additionally to demonstrate, for Article 6(1) purposes, that there was a "serious issued to be tried" as against Holdings, should be rejected. There is no such requirement upon a proper construction of the Regulation.

iv) The appeal of Finance against the judge's decision to refuse to set aside the permission to serve the proceedings on Finance out of the jurisdiction should be dismissed. There is a "serious issue to be tried" as between Aeroflot and Finance and Aeroflot has a "good arguable case" that Finance is a "proper party" to the proceedings in England against the individual defendants.

Mr Justice Mann:

121. I agree.

Lord Justice Laws:

122. I also agree.

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Appendix 1

Relevant provisions of Council Regulation (EC) No 44/2001; the Lugano Convention (1988); the Arbitration Act 1996 and the New York Convention 1958.

(1) Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Article 2

1. Subject to the provisions of this Convention, persons domiciled in a contracting State shall, whatever their nationality, be sued in the courts of that State.
2. Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

Article 6

A person domiciled in a Member State may also be sued:

(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

Article 23

1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".

3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

4. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

Article 28

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the

court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

(2) The revised Lugano Convention (2007)

Article 2

1. Subject to the provisions of this Convention, persons domiciled in a State bound by this Convention shall, whatever their nationality, be sued in the courts of that State.

2. Persons who are not nationals of the State bound by this Convention in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

Article 6

A person domiciled in a State bound by this Convention may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

3. on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;

4. in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in immovable property, in the court of the State bound by this Convention in which the property is situated.

Article 23

1. If the parties, one or more of whom is domiciled in a State bound by this Convention, have agreed that a court or the courts of a State bound by this Convention are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing, or

(b) in a form which accords with practices which the parties have established between themselves, or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".

3. Where such an agreement is concluded by parties, none of whom is domiciled in a State bound by this Convention, the courts of other States bound by this Convention shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

4. The court or courts of a State bound by this Convention on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to the provisions of Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

Article 28

1. Where related actions are pending in the courts of different States bound by this Convention, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

(3) The Arbitration Act 1996

Section 9

(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to

the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

(4) Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1985 ("the new York convention")

Article II

(1) Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

(2) The term "agreement in writing" shall include a arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

(3) The court of a Contracting State when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

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