N THE HIGH COURT OF JUSTICE
HANCERY DIVISION

Royal Courts of Justi
Mr Justice Flovd : Rolls Building London EC4A1N

Date: 18/06/20

Before:
THE HON MR JUSTICE FLOYD

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Between:

JOINT STOCK COMPANY "AEROFLOT RUSSIAN AIRLINES" Claimant
Claimant

- and -

(1) BORIS BEREZOVSKY (2) NIKOLAY GLUSHKOV (3) FORUS HOLDINS S.A. (4) FORUS (CYPRUS) LIMITED (5) EM FINANCE S.A. (6) FORUS LEASING S.A. (7)FORUS FINANCE LTD **Defendants** Defendants

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Philip Marshall QC and Simon Hattan (instructed by Pinsent Masons LLP) for the Claimant (Respondent)
Francis Tregear QC and Alexander Pelling (instructed by Streathers Solicitors LLP) for the Third to Fifth and Seventh Defendants (Applicants)

Hearing dates: 29, 30, 31 May and 1 June 2012

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Judgment

1. The claimant, Aeroflot, is the 51% state-owned airline of the Russian Federation. It claims in this action that it is the victim of frauds perpetrated on it by the first two defendants, Messrs Berezovsky and Glushkov, using companies controlled by them, namely the third to seventh defendants, all companies then in the Forus Group. By these applications the third to fifth and seventh defendants (respectively Luxembourg, Cypriot, Swiss and British Virgins Islands companies and together "the applicants") challenge the jurisdiction of the English court to entertain the actions against them. Messrs Berezovsky and Glushkov are sued here on the basis that England is their state of domicile. They have both served defences to the claim without any challenge to the jurisdiction. Apart from the seventh defendant where jurisdiction is governed by the provisions of the CPR, the challenges of the applicants depend on the terms of the Judgments Regulation or (in the case of the Swiss defendant) the equivalent provisions of the Lugano Convention. The sixth defendant, Forus Leasing S.A. ("Leasing"), a further Swiss company, does not join in the applications.

Aeroflot's pleaded case and the defence of Dl and D2

2. Mr Berezovsky was, successively between October 1996 and February 2000, the Deputy Secretary of the Security Council of the Russian Federation, Executive Secretary of the Commonwealth of Independent States, and a Deputy of the State Duma of the Federal Assembly of the Russian Federation. AvtoVAZ was a Russian company which manufactured and sold Lada motor vehicles. LogoVAZ was a Russian/Italian joint venture company of which Mr Berezovsky was the representative. It is alleged that the third defendant, Forus Holding S.A. ("Holding") was formed in 1992 at the instigation of Mr Berezovsky for the purpose of assisting AvtoVAZ in the export of Lada cars and the purchase of equipment for the production of such cars in Russia. Messrs Berezovsky and Glushkov are said to have been directors of Holding and Holding is said to have been beneficially owned (at least in part) and controlled by them.

3. Mr Berezovsky admits that Holding was formed at his instigation and that he and Mr Glushkov were directors, but he denies that he and Mr Glushkov controlled Holding or were involved in its day to day management. Mr Berezovsky says he resigned his directorship in Holding in November 1996.

4. Mr Berezovsky is alleged to have "inserted" Mr Glushkov and his LogoVAZ team into Aeroflot starting in late 1994. It is pleaded that he did this by making recommendations to Mr Shaposhnikov, then Director General of Aeroflot. Mr Shaposhnikov was a former Commander in Chief of the Soviet Air Force, Minister of Defence of the Soviet Union, and Commander in Chief of the Armed Forces of the Commonwealth of Independent States. Mr Glushkov joined Aeroflot in late 1995, and was formally appointed First Deputy Director General in early 1996.

5. Mr Berezovsky denies "inserting" Mr Glushkov into Aeroflot, and alleges that the appointment of Mr Glushkov was as a result of efforts by Mr Shaposhnikov to find candidates to undertake an examination of the financial situation of Aeroflot. Mr Gluzhkov pleads that he joined Aeroflot at the request of Mr Shaposhnikov.

6. Mr Glushkov pleads that he gave his interests in (among other businesses) the Forus Group to Mr Berezovsky in July 1995, with a written record being executed on 13 November 1995. He claims therefore to have ceased to have any economic interest in Forus with effect from July 1995 and ceased to be a director or attend any board meetings of Forus from mid-1996 onwards.

7. Before formally taking up his position at Aeroflot, Mr Glushkov made a number of recommendations concerning Aeroflot's finances. One of the recommendations relied on by Aeroflot is that in December 1995 Mr Glushkov represented that Aeroflot ought to obtain the assistance of the Forus Group for the purposes of advising it on the management of its financial

affairs abroad. It is said that Mr Glushkov made this recommendation without disclosing his own interest or that of Mr Berezovsky in Holding or the Forus Group.

8. Mr Glushkov's case is that he did disclose his position as a director when he became involved in arranging finance from Forus. The day to day management of Forus was in the hands of a Mr Kuppers. It was on the basis of advice from Mr Kiippers that the recommendations for involving Forus were made.

9. On the basis of Mr Glushkov's recommendation, on 19th December 1995 Aeroflot entered into an advisory mandate ("the Advisory Mandate") with the fifth defendant EM Finance S.A. (formerly Forus Services S.A.) ("Services"). Under the Advisory Mandate, Services would assist Aeroflot in the identification and selection of suitable foreign partners to participate in its investment projects; assist Aeroflot in the structuring and organisation of the financing schemes for its investment projects, including project finance loans and advise Aeroflot on all aspects, including legal, related to such financing and investment schemes. Services was to be remunerated by fees of not more than $30,000 per annum, plus a success fee of 1% of any financing achieved.

10. The basis of Aeroflot's case is that there was no need for Aeroflot to seek assistance from Services because the key individual within the Forus Group who purported to have the relevant skills and experience to provide the services was Mr Glushkov who would shortly be obliged to use those skills and experience for the benefit of Aeroflot as a result of his appointment as First General Deputy Director. So the recommendation was a false representation made dishonestly and in bad faith.

11. There followed a series of agreements under which Services and the fourth defendant ("Cyprus") lent money to Aeroflot. As security for these loans, by a series of assignments, Aeroflot assigned to Services Aeroflot's rights to receive payments from foreign airlines, including Lufthansa, Air France, British Airways, Alitalia, SAS and KLM, under airline overflight agreements which entitled Aeroflot to substantial sums in foreign currency ("the Airline Agreements").

12. The credit agreements included (i) an agreement dated April 1996 under which Services agreed to advance up to US$30m to Aeroflot ("the First Credit Agreement"); (ii) an amending agreement to the First Credit Agreement dated May 1997 ("the Amending Agreement"); (iii) an agreement dated November 1997 under which Services agreed to advance up to US$50 million to Aeroflot ("the Second Credit Agreement"). The Second Credit Agreement was later amended to substitute Cyprus for Services as lender.

13. Aeroflot's case is that there was no need for Aeroflot to borrow money from the Forus Group because the latter could only supply funds which it borrowed from third parties, and from whom Aeroflot could have borrowed directly. Accordingly Mr Glushkov, by procuring Aeroflot to enter into these transactions, was acting in breach of his duties.

14. The case against the Forus Group, which in addition to Holding, Services and Cyprus includes the seventh defendant ("Finance") is pleaded in somewhat general terms as follows:

> "Each of the companies in the Forus group assisted in the breaches of duty of Glushkov ... by providing the advice, entering into the agreements hereinbefore pleaded and/or by receiving fees, interest and other payments as a result of the various agreements and other steps set out above, carried out in breach of duty. Each of the said Defendants knew of the breaches of duty of Glushkov and knew that the said payments were made as a result of a breach of duty on the part of Glushkov and/or [Services], and accordingly each of them acted dishonestly and/or in bad faith."

15. Mr Berezovsky denies that Aeroflot was induced to enter into these arrangements by any

misrepresentation or unlawful acts by Mr Glushkov. He says that it was his understanding that Aeroflot lacked the expertise to arrange the finance needed to acquire new aircraft and modernise its operations without the assistance of Forus and that the arrangements made with Forus were believed by Aeroflot to be, and were, beneficial to Aeroflot. Mr Glushkov also pleads that the arrangements were beneficial to Aeroflot, enabling it to improve the use of its existing fleet and upgrade the fleet. The fees and interest paid by Aeroflot were "less than, or no more than, the fees and interest that Aeroflot would have had to have paid to obtain financing from any other lender". He also refers to a number of independent reports into the activities of the Forus Group, including one by PWC.

16. So far as the money is concerned, Aeroflot pleads that such monies as were received by the defendants under or as a result of the Airline Agreements and which have not been accounted for to Aeroflot were acquired without any lawful basis under Russian law, and accordingly they are liable to account to Aeroflot. The claim in respect of the alleged unnecessary fees is some $US 9 million. The claim in respect of monies received from airlines is currently put at $US75.3 million.

The Andava fraud

17. The summary in the preceding paragraphs relates to what the pleading calls "the Forus fraud", concentrating as it does on money alleged to have been unnecessarily paid to Forus or wrongly received by Forus from the airlines. The pleading, however, contains extensive reference to another alleged fraud, also involving Messrs Berezovsky and Glushkov, but not directly any of the Forus companies, referred to as "the Andava fraud".

18. The Andava group was another group of companies including a Swiss holding company and a Luxembourg holding company. Aeroflot alleges that this group was also used as a vehicle for fraud on Aeroflot. Also in late 1994 Mr Glushkov is alleged to have recommended to Mr Shaposhnikov that Aeroflot's hard currency funds, at that time widely dispersed amongst various foreign institutions, should be concentrated in a single "treasury" in Switzerland under the control of Andava S.A. Again it is Aeroflot's case that in making this representation Mr Glushkov did not disclose his alleged interest in Andava. Aeroflot say that Andava misappropriated funds belonging to Aeroflot.

19. In proceedings in 2006 and 2007 Messrs Berezovsky and Gkushkov were convicted by the Savelovsky District Court in Moscow in relation to the Andava fraud. In December 2008 the Swiss Federal Criminal Court convicted Hans-Peter Jenni, who had managed Andava, on the basis that he was an accessory of Mr Glushkov in relation to aspects of the Andava fraud.

20. Messrs Glushkov and Berezovsky deny the relevance of the Russian and Swiss judgments. The pleadings contain extensive allegations as to the circumstances in which the Russian judgments were obtained. They maintain that they are the object of political persecution by the Russian authorities. Mr Glushkov refers in his defence to the fact that he was granted asylum in the UK because the Asylum and Immigration Tribunal found that the motivation of the investigation and trials involving him was the political persecution of Mr Berezovsky.

The arbitration and jurisdiction clauses

21. The Advisory Mandate provided by Clause 6:

> "This agreement is subject to Swiss law and place of jurisdiction is Lausanne."

22. The Advisory Mandate was signed by Mr Shaposhnikov on behalf of Aeroflot after reading it in Russian translation. His evidence on this application is that he signed it based on representations by Mr Glushkov that the agreement was correct and had been approved by the finance and legal departments. He describes this as a "precondition". Lidia Kryzhevskaya, who

was Aeroflot's Director of Financial Policy and Taxation added her signature to the Advisory Mandate after reading it in Russian. She says that her English is not good enough to read documents without translation, and she does not believe she saw translations of subsequent documents which she signed. Ms Krzhevskaya was a longstanding employee of Aeroflot, having joined the state owned entity in 1988 as Deputy Head of the Finance Department. She signed the Russian version. Mr Krasnenker also placed his signature on the Mandate before Mr Shaposhnikov signed it.

23. The First Credit Agreement provided by Clause 14:

> "This agreement shall be governed in all respects by substantive laws of Switzerland. Regarding any dispute arising out of this agreement or in the context of this agreement, exclusive jurisdiction shall be with the competent courts of Lausanne, each party having the right of appeal to the Federal Supreme Court in Lausanne."

24. The First Credit Agreement was signed by Mr Shaposhnikov on behalf of Aeroflot. He says again that he signed it on the basis of advice from Mr Glushkov, and on the basis of Mr Glushkov's statement that it had been reviewed and approved by the legal department. Ms Kryzhevskaya, by then Director of Finance and Taxation Reporting and Chief Accountant of the Department for Financial Accounting and Reporting, had placed her signature on the document. The fact that Ms Krzhevskaya had signed was important to Mr Shaposhnikov. Ms Krzhevskaya had not read it because it was in English. Mr Glushkov also put his signature on this document.

25. The Amending Agreement substituted the following clause for clause 14 of the First Credit Agreement:

> "This Amendment shall be governed in all respects by the substantive law of Switzerland. All disputes arising in connection with the present agreement shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

26. Although the amendment appears to say that it is only the amendment which is governed by Swiss Law, it was common ground that the effect was that the First Credit Agreement was governed as a whole by Swiss law, and that ICC arbitration replaced the courts of Lausanne. This agreement was signed by Mr Shaposhnikov's successor as Director General, Mr Okulov, after Mr Shaposhnikov resigned that post in the spring of 1997. Mr Okulov's evidence is that he signed the agreement on the recommendation of Mr Glushkov. His co-signatories were Galina Moisseyeva (Aeroflot's Chief Accountant), and Mr Glushkov.

27. The Second Credit Agreement provided by Clause 13.1 that the applicable law was Swiss law. Clause 13.2.1 provided that:

> "All disputes arising in connection with the Agreement shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The arbitration shall be conducted in the English language."

28. By clause 13.2.2 the Second Credit Agreement provided that:

> "Place of the arbitration shall be Zurich, Switzerland."

29. This agreement was again signed by Mr Okulov. It was also signed by Ms Kryzhevskaya, by then Deputy Director General for Financial and Accounting Policy, again without seeing a Russian translation. Mr Okulov says that he signed it on the recommendation of Mr Glushkov.

30. Evidence about the legal department at Aeroflot comes from Mr Ostroumov. In 1995 he

was head of the Contracting and Commercial Department, which was part of the legal department. His responsibilities included review of foreign trade agreements. His superior from 1995 to 1998 was Mr Brylov, who has subsequently died.

31. Mr Ostroumov says that his "section" never dealt with drafting of agreements. He says that he was responsible for reviewing all foreign jurisdiction and arbitration clauses.

32. Mr Ostroumov explains that when entering into large lease transactions for aeroplanes, Aeroflot's practice was to instruct foreign law firms to provide full legal support. This was because foreign aircraft manufacturers would insist on foreign jurisdiction or arbitration clauses. Aeroflot would endeavour to have Russian jurisdiction where possible.

33. Mr Ostroumov says that he did not review any of the agreements or documents referred to by the applicants in their witness statements and which are said to govern the commercial relationship between Aeroflot and Forus. This description would have included the Advisory Mandate and the other agreements I have referred to above. It was one of his roles to review such agreements and they should have been passed to him for review and approval.

34. The applicants challenge the reliability of Mr Ostroumov's evidence on the basis of an opinion he wrote giving approval to an addendum to one of the Airline Agreements, that between Aeroflot and Alitalia. The opinion, which is dated November 1996, shows that Mr Ostroumov was aware of the existence of the Advisory Mandate, that Services made funds available to Aeroflot under a working capital facility and that the purpose of the relationship with Forus was that Forus was organising the international financing requirements for Aeroflot. The addendum itself makes it clear that Mr Ostroumov was aware of the way in which the payments under the Airline Agreement were being used as repayment of the credit facility. The addendum, which only contains seven clauses, is said to be subject to Swiss law and gives exclusive jurisdiction to the courts of Lausanne.

35. The evidence from the Forus side comes from Hans-Peter Jenni and Rene Kiippers. Mr Jenni is a Swiss lawyer who has acted for Mr Berezovsky and Mr Glushkov for a number of years. He has been a board director of the third to seventh defendants. Between 1978 and 1982 he moved to Moscow to set up the Moscow office of Andre & Cie, a large Swiss commodities trading group based in Lausanne. From 1983 to 1989 he held various posts working for the Swiss federal government. From 1989 he practised from his own law office in Berne. In 1998 he emigrated to Cyprus. In 2010 he retired. Mr Jenni first met Mr Berezovsky and Mr Glushkov in 1991 at a meeting at Andre & Cie's offices in Lausanne. Mr Jenni says that the purpose of the meeting was to consider replacing an Italian joint venture partner of LogoVaz with Andre & Cie. Subsequent to that meeting, Mr Glushkov contacted Mr Jenni asking whether Mr Jenni would represent Messrs Berezovsky and Glushkov and their Russian partners in relation to the development of their business outside Russia. After clearing the matter with Andre & Cie, Mr Jenni says that he agreed so to act.

36. According to Mr Jenni, a special purpose vehicle, Anros S.A., was set up. The majority of the shares in Anros were held by Messrs Berezovsky and Glushkov and their Russian partners, with Andre & Cie owning 10%. Anros acquired a 50% shareholding in LogoVAZ from 1991.

37. After the establishment of Anros, Mr Jenni says that Messrs Berezovsky and Glushkov decided to establish a group of companies in Western Europe to provide project and import finance to support the operations of AvtoVAZ. This led to the formation of the Forus Group. A Luxembourg holding company, Holding, was incorporated with a capital of US$ 10 million and a Swiss service company, Services, was incorporated with a capital of 2 million Swiss Francs. Later other companies were added. Thus, in 1992, Finance was established in the BVI with a capital of US$ 1 million as "the offshore arm of the group"; in October 1997 Cyprus was established to take

advantage of a favourable tax regime concluded between Cyprus and Russia; and a further Swiss company, Leasing, was established, but according to Mr Jenni never used. All the companies were wholly owned subsidiaries of Holding.

38. Mr Jenni explains that Luxembourg law required the agenda, minutes and other documents of an annual general meeting to be made public, unless 100% of the shareholders attended the meeting. It was accordingly decided that all the bearer shares in Holding should be held by a BVI company, Profor Management Limited ("Profor"). The bearer shares in Profor were then "allocated" according to the percentages agreed amongst the Russian partners and Andre & Cie.

39. The Board of Holding consisted of Messrs Berezovsky and Glushkov and two other Russian directors, together with, from the Swiss side, Mr Mayor for Andre & Cie and Mr Jenni. Services was, according to Mr Jenni, always intended to be the principal operational and commercial entity. The Board of Services was Mr Jenni, Mr Mayor and Mr Glushkov.

40. In 1992 Mr Mayor and Mr Jenni appointed Rene Kuppers as General Director and General Manager of Services. Mr Kuppers had previously been employed as a project finance director with ABB, a large Swedish energy company. The day to day management of Services was entrusted to Mr Kuppers, who assembled a team to develop the business.

41. Mr Jenni maintains that the business of Forus was the rendering of management and financial advice and obtaining and organising foreign finance from international, non- Russian banks for projects undertaken by Russian businesses. He says that Forus gave leverage and added credibility by providing guarantees from Andre & Cie, as Russian businesses were not trusted outside Russia.

42. Initially Services' sole client was AvtoVAZ. Later other companies were approached. By 1995, when Forus group had been trading for three years, it had organised over US$1 billion worth of transactions for Russian companies.

43. Mr Jenni also deals with the decision by Mr Glushkov in mid 1995 to transfer all his shareholdings in LogoVAZ, Anros and Forus to Mr Berezovsky. The transfer, by way of gift, was agreed in the middle of 1995, but confirmed in writing later in the year. Mr Jenni also says that his understanding was that Mr Glushkov intended to cease acting as a director from the date of his gift to Mr Berezovsky, but that this was to be recorded formally at the next annual general meeting in May 1996. However the removal of Mr Glushkov was not recorded at the Commercial Register in Lausanne until September 1997.

44. Mr Jenni's evidence is that Mr Glushkov never intervened or played any part on Forus' side in the negotiation or contracts with Aeroflot that followed the latter's involvement with Aeroflot. Mr Jenni says that he is informed by Mr Glushkov that Mr

Glushkov was not aware of the Advisory Mandate, which was signed on behalf of Forus by Jenni and Kiippers, until after he took up his formal appointment with Aeroflot in January 1996. This is in stark contrast to the evidence of Ms Kryzhevskaya and Mr Shaposhnikov.

45. Mr Jenni says that the First Credit Agreement was signed in Moscow by Mr Kiippers and Mr Pivovarov on behalf of Services. He explains that money was lent and repaid under the agreement. The Amending Agreement was signed by Mr Kiippers. The Second Credit Agreement was signed by Messrs Kiippers and Jenni.

46. Mr Jenni also explains how the relationship between Forus and Aeroflot came to an end following the collapse in 1998 of the Russian stock, bond and currency markets. On 23rd March 1999 commercial co-operation between Aeroflot and Forus was terminated by Aeroflot. He explains that in July 1999 the offices of Services were raided by the Swiss prosecutor acting on a

request for assistance from the Russian prosecutor. Services commissioned a report from Price Waterhouse Coopers forensic accountancy team, which reported in January 2000. Subsequently the Swiss prosecutor commissioned its own report from an independent export, Mr Sperdin.

47. Mr Jenni also explains that he has been the subject of criminal proceedings in Switzerland concerning Andava S.A. He was found guilty of aiding and abetting disloyal management of a company. His convictionis the subject of an application to the ECtHR. That court has yet to decide whether to hear the complaint.

48. Mr Kiippers gives evidence that the nature of the business of Services was similar to that of a merchant bank. Mr Kiippers explains that he, and not Mr Glushkov, was responsible for the negotiation of the Advisory Mandate and the later agreements. The negotiations on the Forus side were conducted by him with Mr Pivovarov and Mr Zeugin. He says the contract terms negotiated with Aeroflot were extremely favourable.

The present applications

49. **Holding,** domiciled in Luxembourg, was served on the basis of Article 6(1) of the Judgments Regulation:

> "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"

50. By its application, Holding seeks an order declaring that the court has no jurisdiction over the claim or that it will not exercise its jurisdiction over the claim against it, and that upon the court so declaring, the claim form be set aside and the proceedings against Services be dismissed or stayed. No question of the direct effect of a jurisdiction or arbitration clause arises in the case of Holding. Holding's case is parasitical on that of Services and Cyprus. It is said that if those companies succeed in their challenge to jurisdiction or obtain stays for arbitration, it is not expedient for the claim against Holding to proceed here with the claim against Messrs Berezovsky and Glushkov.

51. **Services,** domiciled in Switzerland, was sued pursuant to the Lugano Convention. Aeroflot accepts that the Lugano Convention is for practical purposes to the same effect as the Judgments Regulation.

52. Services claims to have the benefit of:

i) The Swiss law (Lausanne) jurisdiction clause in the Advisory Mandate;

ii) The arbitration clause inserted into the First Credit Agreement by the Amending Agreement providing for Swiss law ICC arbitration (but without providing for a seat);

iii) The arbitration clause contained in the Second Credit Agreement providing for Swiss law ICC arbitration with a seat in Zurich.

53. It is common ground that the jurisdiction and arbitration clauses, if valid, cover the present dispute between the parties. Aeroflot maintains that the clauses are invalid on a number of grounds which I will have to examine. Services says that, if the jurisdiction clause is valid, this court must refuse jurisdiction in relation to Services on the basis that Switzerland has exclusive jurisdiction.

Further or alternatively Services seeks a stay based on the arbitration clauses under section 9 of the Arbitration Act 1996, or under the court's inherent jurisdiction.

54. **Cyprus** was served out of the jurisdiction without the court's permission on the basis that the court has power to hear the claim under the Judgments Regulation. Aeroflot's case is that it is entitled to sue Cyprus in England under Article 6 of the Judgments Regulation.

55. Cyprus' case is that, if Services is successful in preventing the claim against Services from being heard in England, then it is not expedient to hear the case against Cyprus here either. Rather it is expedient to have the case against all companies in the Forus group heard together.

56. Further, Cyprus was substituted as lender under the second credit agreement which contains the arbitration clause set out above: Swiss law/ICC/Zurich. It therefore seeks a stay under Section 9 of the Arbitration Act or under the court's inherent jurisdction

57. The position of **Finance,** the seventh defendant, is somewhat different. It is not party to any jurisdiction agreement or arbitration clause. Moreover because the BVI is not party to the Judgments Regulation, permission to serve out of the jurisdiction in the British Virgin Islands was required. Permission was granted on the basis that there was a real issue between Aeroflot and Messrs Berezovsky and Glushkov which it is reasonable for the court to try and that Finance was a "necessary or proper party": CPR Part 6 PDB paragraph 3.1 Ground (3). Finance say that if Services succeeds in preventing the claim against Services from being tried in England, the question of necessary or proper party needs to be re-examined, as well as the question of whether there is a proper basis for invoking the court's jurisdiction on the merits.

59. As to the standard to be applied, in *Bols Distilleries* v *Superior Yacht Services* [2007] UKPC 45, Lord Rodger of Earlsferry, giving the judgment of the Privy Council, said:

> "The rule is that the court must be 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. In practice, what amounts to a "good arguable case" depends on what requires to be shown in any particular situation in order to establish jurisdiction. In the present case, as the case law of the Court of Justice emphasises, in order to establish that the usual rule in article 2(1) is ousted by article 23(1), the claimants must demonstrate "clearly and precisely" 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 a much better 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, that the clause conferring jurisdiction on the court was the subject of consensus between the parties."

60. In *Powell Dujfryn pic* v *Wolfgang Petereit* Case C-214/89, the Court of Justice had to consider whether a clause conferring jurisdiction in the statutes of a company limited by shares could constitute an agreement. The argument of the company was that such a clause could not constitute an agreement, because such statutes were normative by nature and are not open to discussion by shareholders. The Court held that the term "agreement conferring jurisdiction" was an independent concept, rather than one to be construed by reference to individual national laws. The Court went on to reason that, just as the obligations imposed on a person in his capacity as a member of an association were to be considered contractual obligations (on the ground that membership of an association created close links of the same kind as those which are created between the parties to a contract) so also the links between shareholders and a company were "comparable to those between the parties to a contract". By becoming and remaining a shareholder in a company, the shareholder agrees to be subject to all the provisions appearing in the statutes of the company and to the decisions adopted by the organs of the company.

61. The opinion of Advocate General Tessauro in the same case addresses the question of how consensus is to be demonstrated. Thus at paragraph 6 he says that it is "closely linked to the proof of the existence of the agreement between the parties". At paragraph 7 he says this:

> "Having said that, it is also true that the Court has always stressed that the reality of the consensus between the parties with regard to the clause in question must be proved, as must the fact that they agreed to it knowingly. The purpose is always to avoid a jurisdiction clause being inserted surreptitiously, that is to say in a situation in which one of the parties is not in fact aware of it, whether under the reasonable care doctrine or under the presumption of awareness of usages, as referred to in the Salotti and Tilly Russ judgments cited above.
>
> With regard to the case before the Court, it is necessary to establish whether there was conscious acceptance, or at least awareness, of a clause contained in the statutes of the company which, by way of derogation from the general principle of the defendant's forum and the special jurisdictions laid down in Articles 2,5 and 6 of the Convention respectively, provides that the competent courts for disputes involving the company are to be those of the company's principal office, irrespective of the nature of the dispute."

62. In *Roche* v *Provimi* [2003] EWHC 961 at [84], Aikens J applying *Powell Dujfryn,* concluded that when a jurisdiction clause is subject to Article 23, a court seised of the issue of whether it is valid and applicable must not apply national laws to the issue of validity. Similarly, in *Antonio Gramsci Shipping* v *Stepanov* [2011] EWHC 333, it was common ground before Burton J that EU law governs formality and consensus.

Stay pending arbitration

63. It is common ground that a valid arbitration agreement is capable of taking a dispute outside the scope of the Judgments Regulation. Section 9 of the Arbitration Act 1996 provides so far as relevant as follows:

> "(1) A party to an arbitration agreement against whom legal proceedings are brought...in respect of a matter which under the agreement is to be referred to arbitration may...apply to the court in which the proceedings have been brought to stay the proceedings as 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."

64. Accordingly, the court must first decide whether there is an arbitration agreement, and whether the agreement covers the matters in issue in the litigation (section 9(1)). If the court decides these questions in the affirmative, and there is no assertion that the agreement is "null and void, inoperative, or incapable of being performed" (section 9(4)), a stay is mandatory. If any of these matters is asserted, however, the court will have to go on to decide them, and if satisfied as to any of them, will refuse the statutory stay.

65. It is common ground that issues concerning the substantive validity of the arbitration agreement are to be decided in accordance with its applicable law, in this case Swiss law. Mr Tregear pointed out that Dicey comments at paragraph 16-077 that:

> "The validity of the arbitration agreement is a matter for its governing law. But in practice the English court is likely to determine the other matters mentioned [i.e. 9(4)] for itself, uninfluenced by foreign law."

66. It is not clear quite what the second sentence of this passage is based on. It could of course be a reference to the rule that foreign law is deemed to be the same as English law, unless there is evidence to the contrary, although this would not be a basis for distinguishing section 9(1) and 9(4). It was also suggested that the proposition would be true if it meant that English courts would apply English law, including its private international law: although this latter suggestion does not fit easily with the language used. For my part I consider that if an agreement is null and void, inoperative or incapable of performance under its applicable law, that is a matter which is properly to be taken into account under section 9(4).

67. As Lightman J made clear in *Albon (trading as NA Carriage Co) v Naza Motor Trading SDN BHD (No 3)* [2007] EWHC 665 Ch; [2007] 2 All ER 1075, section 9(1) requires a concluded arbitration agreement before the court can order a stay, and not merely an arguable case that there was such an agreement. Mr Tregear submitted that the same standard did not apply to all the requirements of section 9, in particular it did not apply to the requirements of section 9(4). In particular he submitted that it was enough if the applicants could show an arguable case that the agreement was not null and void or inoperative.

68. Mr Tregear's submission gains support from the judgment of Potter LJ in *Downing* v. *Al Tameer Establishment* [2002] EWCA Civ 721. In that case he said at that:

> "The burden of proving that any of the grounds in s.9(4) has been made out lies upon the claimant and, if the defendant can raise an arguable case in favour of validity, a stay should be granted: *Hume* v AA *Mutual International Insurance Co Ltd* [1996] LRLR 19."

69. The question at issue in *Downing* was whether the claimant had accepted a repudiation of the arbitration agreement. The Court of Appeal, disagreeing with the first instance judge, came to the very clear conclusion that he had repudiated the agreement: see paragraphs 38-39. It follows that the dictum of Potter LJ was not necessary for the decision which he reached.

70. Neither side was able to point me to anything in *Hume* v *AA Mutual International Insurance Co Ltd*, the case cited by Potter LJ in *Downing*, which supported the proposition that an arguable case of validity under section 9(4) was enough. Moreover Mr Tregear did not put forward any reason why the court should adopt such a radically different approach under the two limbs of the section.

71. In *Albon*, Lightman J was faced with an argument which sought to build on Potter U's dictum, saying that it was sufficient if the defendant could raise an arguable case as to the existence of the agreement. Lightman J rejected that argument, and expressly left open the question of whether Potter LJ's dictum in *Downing* as to the sufficiency of an arguable case under section 9(4) was supported by the authority cited.

72. In *A v B* [2006] EWHC 2006 (Comm), Colman J said this about the approach to section 9(4) at [137]:

> "The structure of Section 9 of the 1996 Act leaves no doubt that once the existence of an arbitration agreement has been established by the applicant, a stay will be granted unless one of the section 9(4) matters is established. The respondent to the application must therefore make good the existence of one of those matters. If the

> court is unable to determine whether it is so satisfied on the witness statements before it, consideration has to be given to whether to order a trial of the issue or whether a stay should be granted and the question of substantive jurisdiction under Section 9(4) left to the arbitrators. Whether the latter course is adopted may in many cases depend heavily on the extent to which the resolution of that issue will involve findings of fact which impact on substantive rights and obligations of the parties which are already in issue and whether in general the trial can be confined to a relatively circumscribed area of investigation or is likely to extend widely over the substantive matters in dispute between the parties. If the latter is the case the appropriate tribunal to resolve the jurisdictional issues is more likely to be the arbitration tribunal, provided it has Kompetenz-Kompetenz."

73. In my judgment the correct approach is that the burden of establishing the matters identified in section 9(4) rests on the party asserting them, namely the claimant. Beyond that, I am prepared to accept that the use of the word "satisfied" in subsection (4) is an indication that the court must come to a clear conclusion that the agreement is null and void, inoperative or incapable of performance. However I am unable to go as far as accepting that the existence of a mere arguable case of to the contrary would be sufficient for the court to give effect to the arbitration agreement.

74. CPR 62.8(3) provides that:

> "Where a question arises as to whether:
>
> (a) an arbitration agreement has been concluded; or
>
> (b) the dispute which is the subject matter of the proceedings falls within the terms of such an agreement,
>
> the court may decide that question or give directions to enable it to be decided and may order the proceedings to be stayed pending its decision."

75. Apart from the two ways forward indicated under that rule (deciding the question or giving directions for trial) the court may decide to stay the court proceedings to allow the arbitrator to rule on his own jurisdiction: see *Al Naimi* v *Islamic Press* [2000] Lloyd's LR 522. Such a stay is not ordered under section 9 of the Act, because that section requires, as a pre-condition of the jurisdiction to grant the statutory stay, a conclusion that an arbitration agreement has been made. Instead the court exercises its inherent jurisdiction: *Al Naimi* at 525, right-hand column. In *Al Naimi* Waller LJ endorsed a passage from the judgment of HHJ Humphrey Lloyd QC in *Birse Construction Ltd* v *St David Ltd* [1999] B.L.R. 194 in which he said that the course of leaving the issue of whether there is an arbitration agreement to the arbitrator was a course to be followed only where the court is "*virtually certain that there is an arbitration agreement or if there is only a dispute about the ambit or scope of the arbitration agreement*". However, in the course of his own judgment, Waller U suggested that a stay under the inherent jurisdiction "*may in fact be sensible in a situation where the Court cannot be sure of those matters, but can see that good sense and litigation management make it desirable for the arbitrator to consider the whole matter first"*. Waller LJ gives the example of a case where a trial was necessary to decide the scope of the arbitration clause, where the court thought it likely that it would turn out that the matters were within the clause, that there were matters which would fall within the clause anyway and it would only be a short step to deciding the real issues. In short he was suggesting a case where there was little risk that the matter would have to return to the court following a decision by

the arbitrator. Thus, Lightman J said in *Albon:*

> "The court may in exercise of its inherent jurisdiction in its discretion order such a stay both where the issue is as to the conclusion or as to the scope of the arbitration agreement. But the court should only exercise its inherent jurisdiction to order such a stay and decline to decide the issue of the conclusion of the arbitration agreement or of the scope of the arbitration agreement in an exceptional case. The inherent jurisdiction should be exercised with particular caution where the issue is as to the conclusion of the arbitration agreement. The court may very exceptionally order such a stay e.g. if virtually certain that
>
> the arbitration agreement was concluded. Exceptional but less compelling circumstances (e.g. overwhelming considerations of convenience and cost) may justify such a stay where the issue of the scope of the arbitration agreement is in issue e.g. when the issue is closely bound up with the issues in the arbitration: see *Al Naimi* at 525 and *El Nasharty v. J Sainsbury* [2004] 1 LI Rep 309 at paragraphs 28-9."

76. Where the court takes the course of deciding the matter, the Court of Appeal, again in the *Al Naimi* case, indicated that the court should direct a trial where there are triable issues on the facts material to the jurisdiction question on which there were requests for cross examination. However this principle may give way to the agreement of the parties that the matter should be decided on witness 'statements alone. Waller LJ expressly stated that there may be situations where, even with the parties' agreement, the Court "*may simply feel it cannot resolve the issue without hearing the witnesses*."

77. In the present case the parties reached agreement that the applications could be decided without the need to hear oral evidence. However, they recognise that the court may not be able to decide every issue which arises, in particular all the issues which arise under section 9 as to the existence of the arbitration agreement and as to whether it is null, void or inoperative. Both parties had suggestions as to how the court should proceed in the present case, to which I will come in due course.

Swiss law

78. Both sides put in evidence from an expert on Swiss law. Aeroflot relied on Mr Gully-Hart. The applicants relied on Professor Dr Nobel. Their evidence was directed to whether the present dispute falls within the scope of jurisdiction clause in the Advisory Mandate and the arbitration clauses in the Credit Agreements, and to whether all those instruments are valid or void and ineffective.

79. The experts are agreed that the present dispute falls within the scope of both the jurisdiction clause in the Advisory Mandate and the arbitration clauses in the Credit Agreements. As to the rest, they helpfully produced a Joint Memorandum on Swiss Law which sets out the areas of agreement and disagreement.

80. Two doctrines of Swiss law are invoked. These are known as "double representation" and "abuse of right".

Double representation

81. The experts agree that a situation of double representation exists where a person, acting as

organ or representative of two legal entities, concludes a legal transaction between these two legal entities. Mr Gully-Hart's view is that the effect of the doctrine is to render the agreement null and void.

82. Both experts recognise that there are exceptions to the double representation rule. In particular the rule will not apply where the double representation is such that it will not cause prejudice to either party.

83. The experts also agree that a situation of double representation would exist if it were established that Mr Glushkov instructed a representative of Services to enter into the contracts containing the arbitration agreements with Aeroflot and also caused Aeroflot to enter into these contracts.

Abuse of right

84. The experts agree that the Swiss doctrine of abuse of right is expressed by the proposition that the manifest abuse of a right is not protected by Swiss law. This is by way of exception to the implementation of formal, valid and undisputed personal rights.

85. Mr Gully-Hart is of the view that, in the present case, the defendant's potential interest in relying on different dispute resolution clauses and in compelling Aeroflot to initiate different proceedings before different tribunals and a state court is clearly disproportionate with the interest of all parties to have this dispute resolved within a single forum.

86. Mr Gully-Hart relies on a decision of the Swiss Federal Court dated December 8th 1999 in *Arthur Andersen Business Unit Member Firms v Andersen Consulting Business unit Member Firms.* These two rival groups of firms (referred to as AABU and ACBU) were split out of Andersen Worldwide Organization (AWSC) in 1999. Each group had its own managing partner. Each firm had an agreement with AWSC referred to as a Member Firm Interfirm Agreement (MFIFA). The MFIFA contained a term that each member firm recognised the rights and obligations arising from the MFIFA it had signed and any MFIFA that had been or will be concluded by AWSC from which the other member firms benefit or which burden them. Paragraph 24 of the MFIFA said it could only be altered by means of signed instruments by the parties. At some point the dispute resolution clause in the standard MFIFA was changed from one which applied, in some circumstances, the Swiss Concordat for Arbitration, to one which applied the Rules of the International Chamber of Commerce. The member firms of the ACBU commenced ICC arbitration proceedings against the AABU at a time when only some of the MFIFAs had been changed to incorporate the new clause. The Swiss Court decided that the new version bound all member firms, notwithstanding the fact that their individual contracts had not been amended. There was a "network of contracts, in which the reciprocal rights and obligations, including the arbitration clause ... benefit and burden each member of the firm".

87. In reaching that conclusion the Swiss court did not rely on the doctrine of abuse of right. However the Court went on to consider the appellant's argument that the requirement for writing prohibited the conclusion that the arbitration clause applied to those members whose agreements had not been amended. The Court held that the arbitrator had been correct to reject reliance on this clause saying:

> "There is a manifest abuse of law on the part of the appellants when they claim that a formal rule has been violated in relation to an arbitration clause that their leaders knew, thought, and definitively, wanted. Moreover, there can be little understanding for the appellant's criticism of a judicious solution which consisted of a sole arbitrator to untangle a multiparty dispute."

88. The case is plainly not on all fours with the present case. It is an illustration only of one application of the Swiss law doctrine.

89. Professor Dr Nobel's position is that the doctrine of abuse of right does not apply to the present situation. He says that the doctrine provides a rare exception when an equitable result cannot be achieved because of formalities which present insignificant obstacles. He contends, based on texts which he cites, that the doctrine "cannot create new law", so that the parties' agreement to four different dispute resolution clauses cannot create a fifth (by which he means, I think, confer jurisdiction on the English court). Mr Gully-Hart disagrees that the application of the doctrine in the present case creates a fifth dispute resolution clause. The doctrine would merely prevent reliance on the dispute resolution clause in question.

90. The experts also disagree on the practicality of fragmenting the dispute amongst the different judicial bodies. Professor Dr Nobel considers that the Advisory Mandate and the Credit Agreements are each separate agreements, and Aeroflot's claim could be separated and brought before the different courts or tribunals. Needless to say Mr Gully-Hart disagrees, saying in effect that Aeroflot's claim is a coherent whole, in which the Agreements appear as *"instrumenta sceleris"* of the alleged unlawful scheme. Fragmenting the dispute in reliance on the dispute resolution clauses would give rise to a risk of contradictory decisions.

91. Mr Gully-Hart's conclusion that reliance by the defendants on the various arbitration clauses in the Agreements amounts to an abuse of rights under Swiss law is disputed by Professor Dr Nobel on the ground that the challenge comes many years after the agreements were terminated. He says that such behaviour could itself be regarded as an abuse or right, and that a "mere inconvenience" cannot itself be considered an abuse of right.

92. I have come to the conclusion that Mr Gully-Hart's analysis of the Swiss law is the more persuasive. Firstly, I prefer Mr Gully-Hart's view that the doctrine would not produce "new law". It merely prevents reliance on the arbitration clauses. Of course, it may not be abusive to rely on the arbitration clauses where there is no other available forum, but that is a different question. Secondly, although the doctrine of abuse of right is obviously one which is sparingly applied, there was nothing in the evidence to suggest that it is incapable of applying to reliance on multiple dispute resolution clauses. I do not find it surprising that no case precisely on the present facts has been found. It would be rare to find that a party wished to fragment a dispute and have it determined by multiple tribunals. Thirdly, whilst I can understand that the principle might not be applied to relieve a party of what Professor Dr Nobel calls a "mere inconvenience", I am unable to accept his characterisation of the consequences of the application of the multiple arbitration clauses in the present case in that way. Finally, I do not think Professor Dr Nobel's reliance on the passage of time since the termination of the agreements is germane.

Russian law

93. Both parties put in evidence of Russian law. Professor Maggs is Aeroflot's expert; Professor Simon is the applicants' expert.

94. Article 169 of the Russian Civil Code provides that a transaction made with a purpose of either party *"knowingly contrary to the bases of the legal order or morality"* is void.

95. Article 10 of the Russian Civil Code prevents a party enforcing a contract against a company if the purpose of it doing so is to cause or aggravate harm to the company, even if the intent of the party when entering into the contract fell short of that necessary to trigger Article 169.

96. Professor Maggs' evidence was given on the basis of three assumed scenarios. Two of these were related to the validity of powers of attorney. Given that the relevant contracts in the

present case were executed by at least one officer of the company, the validity of powers of attorney does not arise. The third scenario examined by Professor Maggs is closer to the facts relied upon by Aeroflot in this case. It assumes that Mr Glushkov colluded with a foreign company controlled by him to divert funds from Aeroflot to his company, and to that end caused the General Director of Aeroflot to enter into contracts. His view is that in these circumstances the agreement would be void under Article 169, although he points out that the arbitration or jurisdiction clause would have to be considered separately, because of the further principle of Russian law that such clauses are severable.

The jurisdiction clause in the Advisory Mandate

97. Mr Tregear submits that the jurisdiction agreement in the Advisory Mandate means that the present proceedings brought by Aeroflot against Services are not within the jurisdiction of the court. He submits essentially as follows:

> i) It is common ground that all the disputes in the present proceedings fall within the scope of the jurisdiction agreement in the Advisory Mandate;
>
> ii) The Advisory Mandate was in writing, and duly signed by an authorised representative of each party;
>
> iii) Accordingly, a consensus was reached, and the consensus is clearly and precisely established;
>
> iv) There is no scope for the application of a principle of Swiss national law, such as the principles of double representation or abuse of right: *Powell Duffryn;*
>
> v) Accordingly, the applicants have much the better of the arguments, and this court must enforce the agreement.

98. Mr Marshall submitted on behalf of Aeroflot in his skeleton argument that the applicants would need to show that they had much the better of the argument that the jurisdiction agreement they relied on was not entered into in circumstances such as to offend against the principles of double representation or abuse of right under Swiss law. I reject that submission. Those doctrines of Swiss law do not apply to the issues which I have to decide under Article 23 of the Regulation. Those issues turn on whether there is consensus as a matter of the autonomous law.

99. In his oral submissions, Mr Marshall focussed on the factual evidence concerning the signing of the Advisory Mandate. In particular he stressed the fact that Mr Shaposhnikov had described the prior approval of the legal department as a precondition of any agreement coming to him for signature, and the fact that he relied on Mr Glushkov's statement that the agreement had been reviewed. This was to ensure that any technical requirements were in Aeroflot's interests. Mr Marshall submits that the jurisdiction clause was exactly such a technical requirement. Focussing on the opinion of Advocate General Tessauro in *Powell Dujfryn,* he submits that there was *in reality* no consensus.

100. I accept Mr Tregear's submissions, and reject Mr Marshall's. The evidence does not show that Aeroflot did not agree to the jurisdiction clause. On the contrary, it shows that it did. Both Mr Shaposhnikovand Ms Kryzhevskaya read the document. It cannot be said that they were not aware of the jurisdiction clause. It is true that the evidence raises the possibility that they agreed to it under a misapprehension that it had been reviewed by the legal department. Even if those facts were established, they do not show that Aeroflot did not agree to the jurisdiction clause. Describing review by the legal department as a pre-condition does not alter that analysis. A unilateral condition of that kind does not negate awareness of, or intention to be bound by, the clause. In short it does not negate the reality of the consensus which was achieved.

101. I think the reliance on the opinion of Advocate General Tessauro is misplaced. The passage in question is concerned with the absence of reality which may be said to arise when one party is not aware of a clause, or cannot with reasonable care find out that it exists. Where a party confirms that he had read the document and signed it, there is no absence of reality of this kind involved at all.

102. I would add that, were it relevant, I would not in any case attach much weight to Aeroflot's evidence about their belief that the Mandate had been reviewed by the legal department. Mr Ostroumov does not go as far as to say that he would have advised Aeroflot not to agree to the jurisdiction clause in the Advisory Mandate.

103. In my judgment the applicants have much the better of the arguments that the jurisdiction clause in the Advisory Mandate is enforceable, and the court is obliged to declare that it does not have jurisdiction over the claim against Services.

Arbitration clauses

104. Mr Tregear submits that the arbitration clauses in the Credit Agreements have the consequence that the court should stay the proceedings against Services and Cyprus under the Arbitration Act or under the inherent jurisdiction. As I have decided that the court does not have jurisdiction in the case of Services, the argument focuses on Cyprus. Aeroflot challenge the validity and enforceability of the arbitration clause under Swiss law on the grounds of the double representation rule, and abuse of right. Aeroflot also relied on illegality under Russian law.

105. Mr Tregear relies on the fact that it is common ground that the arbitration agreement in the Second Credit Agreement, in which Cyprus was substituted as lender, covers the present dispute with Cyprus. He submits that the double representation rule does not come into play on the evidence in this case. He says that the evidence of Mr Kuppers and Mr Jenni shows that Mr Glushkov did not control Services or any other Forus company at the time. Moreover he submits that there is no prejudice in the sense of fragmentation of proceedings.

106. Despite the parties' agreement that I can decide these applications on the written evidence, I do not think it would be just to decide the issue which arises under the double representation rule on the basis of the written evidence which I have and which I have endeavoured to summarise above. Firstly, the extent of Mr Glushkov's continued involvement in the day to day affairs of Forus is at the heart of the allegations made in the action. Although it is true that the actual execution of the Second Credit Agreement is a relatively limited issue, the extent to which the signatories were acting under instructions from Mr Glushkov is not something of which Aeroflot can be expected to have direct knowledge, but would be likely to be clarified by disclosure and cross-examination. To decide that question against Aeroflot on this evidence, in the absence of Mr Berezovsky and Mr Glushkov, and independently of the trial of the action, would be undesirable.

107. In the course of argument the parties canvassed various possibilities for resolving the double representation issue. One was to stay the matter under the court's inherent jurisdiction to allow it to be decided by the arbitrator. Another was to decide the matter at trial, without prejudice to Cyprus' challenge to the jurisdiction, with a further trial if the jurisdiction challenge fails. None of these options seem to me to be desirable or practical. The first seems to me to leave the arbitrator with much the same problem as that which faces me, as well as the possibility that the matter will have to return to court if he or she determines that the clause is void. The second raises difficult problems of case management, forces Cyprus to participate in proceedings in respect of which it claims the court has no jurisdiction and raises the spectre of a second trial if its jurisdiction challenge fails.

108. It would of course not be right to take any of these steps if I came to the conclusion that,

even if a valid arbitration clause had been concluded, it could not be enforced for any of the reasons given by Aeroflot. I propose therefore to consider, to the extent necessary, those points.

109. Both parties agreed that the Swiss law doctrine of abuse of right, if it applied, fell within section 9(4) rather than section 9(1) of the Act. I agree. The very name of the doctrine demonstrates that a right is presumed to exist.

110. I have reviewed and reached certain conclusions on the evidence of Swiss law on this doctrine above. Unlike the issue of double representation, a resolution of this issue does not involve issues of importance which are likely to arise in the action. Moreover I bear in mind that the parties have agreed that I can decide the issues on this application without the need for oral evidence, should I think it right to do so.

111. I have come to the clear conclusion on the basis of the evidence that it would be an abuse of right under Swiss law for Cyprus to rely on the arbitration clause in the Second Credit Agreement in circumstances where to do so will cause fragmentation of the dispute. Arbitration clauses are designed to give parties a convenient alternative forum to the courts for resolving their disputes. The exercise of the right in the Second Credit Agreeement would not achieve that aim, but would succeed in hiving off from the body of any dispute an arbitrary fragment, making the dispute more difficult to try and promoting the likelihood of conflicting judgments. That was the effect of including the clause in the Second Credit Agreement, against the background of the exclusive jurisdiction clause in the Advisory Mandate and the different arbitration clause in the First Credit Agreement.

112. Accordingly, on the assumption that the arbitration agreement is valid, I would refuse Cyprus' application for stay under section 9(4). It is not necessary for me to consider Aeroflot's alternative case based on Russian law.

Should the cases against Holding, Cyprus and Finance follow that against Services?

113. The applicants' case is that, if I were to decide, as I have, that the court should decline jurisdiction over the claim against Services because of the Swiss law jurisdiction clause, then it no longer makes sense for the cases against Holding, Cyprus and Finance to be heard here together with the case against Messrs Glushkov and Berezovsky. So far as Holdings and Cyprus are concerned, they submit that it is no longer the case that 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". In relation to Finance, they submit that it is no longer a "proper party".

114. The heart of the applicants' submissions on this aspect of the case is that, once the case against Services is being heard elsewhere, proceedings in England will not "avoid the risk of irreconcilable judgments", but will actively promote it. Proceedings against all the companies in the Forus Group should be heard together. Services, as one of the contracting parties, has an important role in the proceedings. By contrast, the case against Holding and Finance is sketchy.

115. I reject those submissions. They are founded on the suggestion that a claim by Aeroflot against Services in the Swiss courts will proceed to judgment in parallel with these English proceedings, with a risk of irreconcilable decisions. However, as Mr Marshall QC pointed out on behalf Aeroflot, it by no means follows from the fact that jurisdiction is declined here that a Swiss court will proceed in that way. If proceedings are started in the Swiss court, that court may stay them under Article 28 of Convention as a "related action" to the English proceedings. In those circumstances any risk of irreconcilable decisions would be avoided.

116. I do not think that the fact that this court declines jurisdiction over Services affects the position in relation to the other defendants. The claims against them remain as closely connected

to the claims against Messrs Berezovsky and Glushkov as they were before Services was removed. Just as it was expedient to hear and determine those claims together to avoid the risk of irreconcilable judgments when Services was a party, it will remain expedient to do so when Services is not a party. Thus the tests under the Judgments Regulation in respect of Holding and Cyprus are satisfied. Similarly, in my judgment, Finance remains a "proper party" to the claim against Messrs Berezovsky and Glushkov.

117. In the course of his oral submissions Mr Tregear submitted that the case as presently pleaded as against Finance and Holding was so tenuous as not to meet the threshold of seriously arguable case required for service on a foreign defendant. I am satisfied that a sufficient case is raised against them to meet this not very demanding threshold. Aeroflot's case is that the entire group which was under common control and of which Aeroflot was one of its two principal clients, was implicated in the fraud. Whilst the case is undoubtedly in need of further particularisation, Mr Marshall satisfied me on the material available that the case against Holding and Finance meets this threshold.

Conclusion

118. It follows that the court is obliged to decline jurisdiction in respect of Services, but the applications of Holding, Cyprus and Finance will be dismissed.

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