Case No: 2012-755

Neutral Citation Number: [2014] EWHC 795 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 26/03/2014

Before :

MR JUSTICE HAMBLEN

- -

Between :

Mr Carl A Sax	**Claimant**
- and -	
Mr Lev Tchernoy	**Defendant**

- -
- -

Simon Bryan QC and David Davies (instructed by **Hausfeld LLP**) for the **Claimant**
Clive Freedman QC and David Lascelles (instructed by **Mischon De Reya**) for the **Defendant**

Hearing dates: 24 and 25 February 2014

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Judgment

Mr Justice Hamblen :

Introduction

1. The Defendant ("Mr Tchernoy") applies to set aside the service of proceedings on him out of the jurisdiction made pursuant to the order of Andrew Smith J dated 20 August 2012.

2. The jurisdictional gateway relied upon by the Claimant ("Mr Sax") is that his claims are in respect of a contract governed by English law (CPR 6BPD.3 para.3). The alleged contract is a signed Memorandum of Understanding dated "as of" 11 April 2008 but signed in late May/early June 2008 ("the MOU"). The parties to the MOU were Mr Tchernoy, Mr Sax and a businessman called Mr Sergey Soukholinski-Mestetchkin ("Mr S-M").

3. Mr Tchernoy challenges jurisdiction on the grounds that Mr Sax cannot establish:

    (1) a good arguable case (i) that there was a contract and (ii) that any such contract was governed by English law;

    (2) a serious issue to be tried in respect of the claim for breach of contract and in respect of the damages claimed;

    (3) that England is clearly and distinctly the appropriate forum for the trial.

4. Mr Tchernoy further contends that service of proceedings should be set aside for failing to provide full and frank disclosure.

5. The hearing took place over two days. The evidence comprised three witness statements from Mr Sax and four witness statements from his solicitor, Mr Maton; two witness statements from Mr Tchernoy and three witness statements from his solicitor, Mr Gerstein, and a witness statement from Mr S-M, which supported Mr Tchernoy's case. There was also Russian law expert evidence, although this does not need to be addressed. There were extensive documentary exhibits to the witness statements and lengthy skeleton arguments from both sides.

Factual background

6. Mr Sax is an American citizen and businessman. He was formerly Senior Vice President and General Counsel of Atlantic Coast Airlines United Express, a United Airlines commuter carrier. At the time of the MOU he was chairman of a Gibraltar company called Strategic Partners Group Limited ("Strategic Partners") and was based in Florida, USA. He is currently involved with a company called Partners Capital Group S.r.L., a privately held Italian company, created to develop hotels and resorts in Italy and is now living in Italy.

7. Mr Tchernoy is a Russian businessman. He and his brother, Michael Tchernoy, became very wealthy in the 1990s in the Russian aluminium business founding, along with UK metal traders David and Simon Reuben, the Trans-World Group, which produced aluminium in Russia and sold it in Western markets. He has dual

Israeli/Russian citizenship and (as is accepted for the purpose of this application) at the material time he was resident in Russia.

8. Mr S-M is a Russian businessman and a qualified Russian lawyer. Like Mr Tchernoy, he is a dual Israeli/Russian citizen. According to his witness statement, he has a range of business interests, largely focussed on Russian property development. He knew Mr Sax and Mr Tchernoy for many years prior to the MOU, having worked on business in Russia with each of them. At the material time he was a director of Strategic Partners.

9. Strategic Partners had been seeking for some time to acquire a site at Porto Conte Bay near Alghero in Sardinia, Italy ("the Property"). The Property consists of an estate of approximately 269 hectares and features a large abandoned villa known as "Villa Mugoni". This villa, which is now in a state of disrepair, is the former home of a prominent Italian politician from the 1930s/40s.

10. The Property was owned by two Italian companies, namely Societa Immobiliare per il Turismo Economicosardo S.p.A. ("S.I.T.E.") and Costa del Corallo S.p.A. ("C.D.C."). These companies were represented in the negotiations for the sale of the property by Mr Edward Baroudi ("Mr Baroudi"), who was the 50% shareholder in the Luxembourg parent company of SITE and CDC (Capinvest International SA or "Capinvest") with the remaining 50% of the shares held by Mr Baroudi's brothers.

11. The proposed project for the acquisition of the Property was first mentioned to Mr Tchernoy by Mr S-M in the middle of 2007, Mr S-M having been introduced to the proposed project by Mr Sax. The proposal was to acquire the Property and develop it into two hotels and villas.

12. In the summer of 2007 Mr Sax and Mr S-M had a series of meetings with Mr Baroudi to discuss terms for the potential acquisition of the Property. Mr S-M had identified Mr Tchernoy as a potential financial backer of the project.

13. A number of documents were produced by Mr Sax providing details of the project and its potential profitability. There were, for example, a series of documents entitled "Offering Circulars" which described the project in some detail and provided financial information. Mr Sax said that he provided these to Mr S-M on the understanding that they would be passed to Mr Tchernoy. Mr Tchernoy denied receiving them but he must have had some knowledge of the project and its potential profitability in order to agree to become involved.

14. In his evidence Mr Sax explained that the commercial rationale for the acquisition was that it was believed that the investors would be in a position to expedite the process of obtaining planning permission from the Commune of Alghero in relation to the development of the Property. The mere issuance of this planning permission should have substantially increased the value of the land. Mr Baroudi was not himself in a good position to obtain this planning permission because he had fallen out with the local authorities over a previously abandoned attempt to develop the land and his previous construction of an adjacent hotel, which the authorities considered an eyesore. Mr Sax also had a lien over the land, held

through Strategic Partners, and this accordingly put him in a good position to reach agreement with the Baroudi brothers.

15. By March 2008 a number of steps were being taken to put in place the structure for the project to move forward.

16. On 3 March 2008, Mr Sax met with Mr Alexander Milon and Mr Andrey Zykov at Keiser Beratung's offices on Regent Street, London. There is an evidential dispute in relation to their precise role, but the parties agree that Mr Milon and Mr Zykov were instructed by Mr Tchernoy to deal with the mechanical aspects of the project, such as formation of companies, preparation of documentation etc.

17. The parties intended to hold their respective interests in the project through shareholdings in a British Virgin Islands holding company. Mr Zykov acquired a BVI company for this purpose in early March called Meridian Development Asset Limited ("Meridian BVI"). From 1 March 2008 expenses in relation to the project were incurred and paid on Mr Tchernoy's behalf. This led to the Aquarius Loan agreement (dated as of 1 March 1988 but entered into on 10 April 2008) between Mr Tchernoy's company Aquarius and Meridian BVI.

18. Meridian BVI opened a London bank account with the London branch of Bank Hapoalim B.M. and the correspondence address for the company was the Regent Street office from which Mr Milon and Mr Zykov were working on the transaction. The signatories to the account were Mr Milon, Mr Zykov and a Ms Ershova.

19. London solicitors, CKFT, were instructed for the purposes of drawing up transactional documentation. It is common ground that the instruction was a joint instruction by all three prospective shareholders in Meridian BVI, Mr Sax, Mr S-M and Mr Tchernoy.

20. On 9 March 2008 Mr Sax emailed Mr S-M stating that he wanted to establish a "tentative closing date…so that our associate professionals can work towards a date certain (even if it is tentative)". Mr S-M replied on 11 March 2008 stating that: "unless we clearly understand the deal between us and not earlier that we will be able to establish the possible closing date. As you've seen lawyers have risen (sic) certain questions to answer regarding the entire relationship and partnership development matters, which I would like you to make the first comments."

21. On 18 March 2008 CKFT circulated a number of draft agreements, including a draft shareholders' agreement, a draft inducement agreement, a draft consulting agreement, a draft escrow agreement, a draft agreement for conveyance, a draft loan agreement between Mr Tchernoy and Meridian BVI and a draft security agreement.

22. At this stage the draft shareholders' agreement contained detailed provisions addressing, amongst other things, matters requiring the consent of the shareholders (cl.5), quorum (cl.7), pre-emption rights (cl.8) and governing law and jurisdiction (cl.18 – English law).

23. By clause 3.1 it was agreed that Meridian BVI or its Italian subsidiary would enter into various agreements relating to the purchase of the Property. At this stage they were an inducement agreement (with Capinvest and the Baroudi brothers), an escrow agreement (with Capinvest and the Baroudi brothers) and a consultancy agreement (with Mr Baroudi). The purchase structure contemplated at that stage involved the purchase of the Property by payment from the Italian subsidiary company to the sellers of €4 million with payment of €16 million to the Baroudis pursuant to a consultancy agreement.

24. By clause 3.2 it was agreed that Meridian BVI would enter into a loan agreement simultaneously with entering into the shareholders' agreement and to grant Mr Tchernoy the security required under the loan agreement. This clause was to remain in all of the draft shareholders' agreements.

25. By clause 6 it was agreed that Meridian BVI would strictly comply "in all respects with the Loan Agreement". The clause then provided for details of the loan agreement to be set out. A similar clause appeared in all the draft shareholders' agreements.

26. On 23 March 2008 there was a meeting between Mr Sax, Mr S-M and Mr Tchernoy at Mr Tchernoy's dacha outside Moscow. This was the only face to face meeting between Mr Sax and Mr Tchernoy. There is a conflict of evidence about what exactly took place at this meeting. In broad terms, Mr Sax's evidence is that the meeting was a brief and informal "meet and greet" arranged at short notice to provide Mr Tchernoy with an opportunity to meet him and to move the project forward. Mr Sax speaks no more than a few words of Russian and Mr S-M acted as a translator. Mr Sax's evidence is that the Project was only discussed in brief outline terms and that there was no discussion of legal matters. There was also a discussion about Mr Sax's involvement in litigation concerning the development of St. Petersburg airport in relation to which Mr Tchernoy's assistance was sought. The evidence of Mr Tchernoy and Mr S-M is that there was a more detailed and substantive discussion of the specifics of the project and that Mr Tchernoy stated that in order to commit to the project he would need a detailed partnership or shareholders' agreement setting out all the terms between them, as well as a legal structure. Whatever the precise nature of the discussion, it was following this meeting that the MOU was drafted and produced.

27. Following the meeting Mr S-M produced a first draft MOU in Russian. Further drafts followed, all of which were in Russian, and after the document had been approved by Mr Tchernoy it was translated into English and sent to Mr Sax.

28. The MOU was sent to Mr Sax by Mr S-M by email on 11 April 2008. The covering email stated that:

> "Andrey was so kind as to make a translation what was agreed with Lev [i.e. Mr Tchernoy] ASAP.
>
> There are basic points of out partnership, which should guide UK lawyers and Paolo when they draft all papers. So you can start communicating with them to prepare final drafts"

29. On the same day Mr Sax emailed the MOU to CKFT stating that the MOU had changed a couple of points, that the agreements should be revised to comply with "Lev's MOU", and suggesting that: "you use the attached drafts and redline them with your changes (including the above agreements) based on the MOU and any additional revisions required."

30. Meanwhile, work continued in London on the transactional documentation and various revisions were made and commented upon. The expense of this work was funded by Mr Tchernoy. This was achieved by Aquarius agreeing to loan Meridian BVI the sum of US$200,000. The relevant loan agreement was backdated to 1 March 2008 to cover expenses that had been incurred prior to 10 April 2008.

31. The lawyers in Italy, Luxembourg and England expressed concern about the proposed structure involving moneys being paid to individuals or entities other than the seller and the risk that the transaction might be set aside because of money laundering rules being circumvented or illegality.

32. On 18 April 2008 CKFT wrote expressing the concerns of the English legal team as to the implications of payment being made other than to the sellers. These included implications for creditors of the sellers, shareholders of the sellers (CKFT noting that the parties were aware that there were minority shareholders in addition to the Baroudis) and Revenue authorities. They also included adverse tax consequences for the buyers on subsequent disposal. It was made clear that it could not be governed by English law and CKFT could not participate in its implementation.

33. Also on 18 April 2008 further draft agreements were circulated, including a revised draft shareholders' agreement. By this stage the agreements which it was said would be entered into under clause 3.1 were an inducement agreement and a consulting agreement (as before), a delivery agreement (with Mr Baroudi), but no escrow agreement.

34. On 25 April 2008 CKFT reiterated the seriousness of the issue concerning payment being made other than to the seller and that this prevented them from endorsing the transaction as currently structured. The proposed inducement agreement envisaged non-disclosure to the Italian notary of €16 million of the €20 million to be paid. They noted that lawyers in Luxembourg and Milan had by now also said that it was an offence not to provide full disclosure to the notary and that this could lead to Meridian BVI being liable for penalties and potential prosecution.

35. On 6 May 2008 CKFT withdrew saying that they could no longer advise in respect of the project. Mr Campbell of Jones Day was brought in to replace CKFT. On 13 May 2008 he also raised various concerns, including the payment of money to purchase an asset to people other than the sellers. He noted that this smacked of money laundering; could create later tax problems for the purchasers (for example, in the nature of capital gain), and could make it difficult to obtain finance for the development (for example, in the nature of the value lending ratio). Mr Campbell also stated that there were risks of a third party seeking to overturn the transaction as a sale at an undervalue and that the Italian authorities might

intervene on the basis that the actual value was higher than the declared value. He suggested a different structure, but said that that had different risks.

36. Another issue which had been raised about the proposed structure concerned the security to be put in place in respect of the €25 million loan from Mr Tchernoy. The jointly instructed Italian lawyer, Paolo Cieri, strongly recommended against the form of security mentioned in the MOU "because it would cost enormously taxes wise" and did not make sense from other commercial perspectives. He recommended the use of a fiduciary agent, although this would carry significant professional fees. Mr Sax confirmed his view in an email of 24 April 2008 that the security mentioned in the MOU would be "crazy" costing €1.2 million plus interest.

37. Mr Campbell also expressed his concern about Mr Sax's proposal that a €20 million property be purchased without a title opinion from the seller's Italian lawyers.

38. In the light of these various concerns, by the end of May 2008 the parties were discussing a different structure. This involved, amongst other things, the Italian companies which owned the Property transferring it to a new Italian company (for €4 million) whose shares would then be purchased by Meridian BVI's Italian subsidiary (for €17.5 million). However, this still carried with it potential fiscal disadvantages, upon which further advice was needed.

39. On 24 May 2008 Mr Sax emailed Mr S-M, Mr Campbell and Paulo Cieri with further revised draft agreements. At this stage the agreements which were to be entered into under clause 3.1 by Meridian BVI or its subsidiary were a loan agreement (with Mr Baroudi), an agreement for conveyance (with Mr Baroudi), a delivery agreement and a consulting agreement (as before), but no inducement agreement. The proposed structure involved a €12 million loan to Mr Baroudi, with €4 million earmarked to purchase the Property and with €8 million earmarked to purchase his brothers' interests and clear up third party claims, and an option in the loan agreement to purchase the Property for €4 million provided that the balance of the loan was cancelled and Mr Baroudi was paid €5.5 million as a cancellation fee and €2.5 million pursuant to a delivery agreement.

40. On 28 May 2008 Mr Zykov sent an email to Mr Sax and Mr S-M stating that:

> "Dear Carl, Sergey
>
> I'd like to draw your attention that Memorandum of Understanding has not been signed. Could you let me know whether there are objections/amendments if any. If not, we believe the Memorandum should be signed."

41. Mr Sax did not understand why the MOU needed to be signed and asked Mr S-M by email on 29 May 2008 "why are we signing the MOU, which, as we know, has to be replaced by the Shareholders Agreement". He nevertheless said that he did not "mind" signing it provided that it was made clear that it would be replaced by the shareholders' agreement but he did not understand the "rush".

42. On the same day, Mr S-M wrote to him stating: “You and I both agreed to the Memorandum. As you know, we proceeded after mutual approval. So please, get it signed”.

43. Mr Sax then signed the MOU on 29 May 2008, although it was stated to be “Dated as of April 11, 2008”. He initialled it on each page and added at the end the following wording (“the additional words”):

> "This Memorandum of Understanding shall be executed by fax, and shall be of no further force and effect upon execution of a Shareholders Agreement between the parties".

44. The MOU was then signed (and initialled on each page) by Mr S-M on 2 June 2008 and by Mr Tcherney on 3 June 2008. The full text of the MOU is set out in this Appendix to the judgment.

45. Meanwhile, on 30 May 2008, Mr Sax emailed Mr S-M indicating that he was preparing a “Restructuring Memorandum”.

46. On the same day Mr S-M emailed Mr Campbell indicating that Mr Sax would revert to him with details of the new structure, the exact nature of which would depend upon the receipt of further tax advice. Mr S-M also emailed Messrs Zykov and Milon noting that changes were envisaged to the “implementation of the deal which should simplify the process and lower our risks”. Mr S-M noted the changes were currently subject to further consideration by Mr Sax with “Italian specialists”, consultation with Mr Campbell, and agreement with the Baroudis with “the choice of a scenario depend[ing] on the professional advice that [would] be provided to us and to Campbell”.

47. On 2 June 2008, Mr Sax emailed Mr S-M and set out details of the proposed “revised restructured transaction”. There was a 22 stage process outlined in the email and it envisaged that the loan would not be made until all the terms of all the other agreements had been negotiated, and after various steps had been carried out including execution of the shareholders’ agreement, loan agreement and the appointment of a collateral agent. The proposed transaction involved purchase by the Italian subsidiary of a newly formed Italian company rather than of the Property itself.

48. On 16 June 2008 Mr Sax emailed Mr Campbell and Mr S-M, saying that he had been in Rome since 4 June 2008 working with Paolo Cieri as well as Richard Rossotto and Marco Scagliona of Hammonds (the Baroudi’s Italian lawyers) and Cravero (a tax adviser retained by Mr Baroudi), to produce a different structure for the transaction to minimise the taxes payable.

49. Further revisions took place in July 2009 including a revised draft shareholders’ agreement circulated by Mr Campbell on 9 July 2008 which he had “amended to take account of the changed structure of the transaction”. Mr Campbell further noted that he had also “amended the management provisions as…the business should be managed by the directors collectively rather than by one or more individuals.”

50. On 16 July 2008, Marco Scagliola of Hammonds sent an email to Mr Campbell attaching 16 draft "main documents" and 4 draft "ancillary documents". There was also attached a list of 49 draft documents (including the attached documents), entitled "Porto Conte transaction – document list" necessary for the transaction which were "in the process of being completed and translated". The table stated a level of importance for each of the documents, with 27 of the draft documents being listed as "main" and 22 draft documents as "ancillary". The email requested comments on the major and minor documents and the attached document list. Hammonds were proposing that purchase of the Property be completed within 6-9 days.

51. On 4 August 2008, Mr Campbell drew attention to various issues remaining with the transaction including: a risk of transfer taxes and notarial fees of the whole transaction falling on the BVI company; the fact that all urban development within 2 kilometres of the coast had been frozen; the lack of certainty that a shepherd's claim in relation to the land would settle for the proposed €2.5m or at all, and that any disposal of the land owned by Meridian BVI would be "extremely tax inefficient" due to the proposed structuring.

52. By mid-August Mr Tchernoy had numerous concerns about the transaction which he expressed in a letter sent to Mr S-M on 19 August 2008. By this stage he was concerned as to structure and in particular a tax risk of up to €2.75m. He also believed that the position had been misrepresented to him as regards the ability to resolve the shepherd's rights and the two-kilometre restriction. He was not prepared to go ahead unless these matters were resolved to his satisfaction. This never occurred and the project did not go ahead.

53. In October 2008 there were exchanges between Mr Sax and Mr S-M in which the legally binding nature of the MOU was disputed. Mr Sax claimed that it was a contract. Mr S-M denied that it was legally binding, stating that it was "just guidance for the legal professionals to prepare drafts for discussions and final negotiation." Mr S-M's position was supported by Mr Campbell who stated that in his view it was "intended for exactly the purpose that it states: that is to create a basis for a transaction between the parties to be reflected in a binding shareholders agreement". He added that he could find no evidence in the language of the MOU, the status of the draft documents or the position of the contractual negotiations to suggest the MOU is "anything more than a statement of intent".

54. On 17 October 2008 Hammonds emailed Mr Campbell stating that all negotiations were deemed terminated.

55. In May 2012 Mr Sax issued the present proceedings.

Service out – relevant principles

56. The applicable test for service out was set out by reference to the earlier authorities by Lord Collins in *AK Investment CJSC v Kyrgyz Mobil Tel Limited and Others* [2011] UKPC 7 at [71]. In summary the claimant must satisfy the court of the following:

(1) There is a good arguable case that the claim falls within the relevant ground under CPR 6BPD.3 para 3. In this context, a good arguable case connotes that one side has a much better argument than the other (the test from *Canada Trust Co v Stolzenberg (No 2)* [1988] 1 WLR 547, *per* Waller LJ; affirmed [2002] 1 AC 1).

(2) There is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. This is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success.

(3) In all the circumstances England is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

57. Where, as in this case, the relevant gateway entails there being a contract governed by English law, the claimant must demonstrate to the requisite standard both that the contract exists and that it is governed by English law: see, for example, *Global 5000 Ltd v Wadhawan* **[**2012] EWCA Civ 13 at [58] *per* Rix LJ.

58. In relation to the *Canada Trust* test, Christopher Clarke J in *Cherney v Deripaska* [2008] EWHC 1530 observed as follows at [41] and [44]:

> "…even in a case where there is a dispute between two apparently credible witnesses the Court should usually, before giving permission, be satisfied that the claimant's contentions about the alleged agreement provide a much better, or at any rate a better, argument in favour of there being the ground for jurisdiction alleged than of there not being one. In granting permission to serve out of the jurisdiction the court is exercising an exorbitant jurisdiction over those who are not within its ordinary reach. In those circumstances the court is, as it seems to me, justified in applying the good arguable test in that manner in order to avoid the risk of compelling individuals or companies to submit to a jurisdiction to which they ought not in truth to be made subject. Further if, as Canada Trust indicates, the concept which the phrase reflects is "of the court being 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*",* it ought ordinarily to require that, when the Court looks at the material, it finds the points in favour of the ground for jurisdiction alleged to be more than just evenly balanced by those which point the other way.
>
> I do not regard this as introducing by the back door a requirement that a claimant seeking permission should prove his case on the balance of probabilities. The Court is concerned, at this stage, with the *arguments* in favour of the respective parties in the light of the material then tendered. Whilst the Court is entitled to reject the wholly implausible, what it will be concerned with is the relative plausibility of the contentions. Proof on the balance of probabilities would require a finding of fact, not a decision

about the strength of arguments, and would probably require the availability of oral evidence and discovery."

The issues

59. The issues which arise may be stated as follows:

(1) Whether Mr Sax has a good arguable case (i) that there was a contract and (ii) that any such contract was governed by English law;

(2) Whether there is a serious issue to be tried in respect of the claim for breach of contract and in respect of the three heads of damages claimed;

(3) Whether England is clearly and distinctly the appropriate forum for the trial;

(4) Whether there has been a failure to provide full and frank disclosure and, if so, whether permission to serve out should be set aside.

(1) Whether Mr Sax has a good arguable case that there was a contract

The law

60. Mr Tchernoy contends that there was no binding contract on three grounds;

(1) there was no intention to create legal relations in relation to the MOU;

(2) if there was, any agreement made thereby was an agreement to agree rather than a contract;

(3) if it was more than an agreement to agree, it was insufficiently certain to amount to an enforceable agreement.

61. These are separate requirements for an enforceable contract although the issues may overlap – see, for example, *Barbubev v Eurocom Cable Management* [2012] 2 All E.R. (Comm) 963.

62. The test of whether there is an intention to create legal relations is objective and does not depend upon the parties' state of mind. The applicable general principles were summarised by Lord Clarke in *RTS Flexible Systems Ltd. v Molkerei Alois Muller GmbH* [2010] 1 WLR 753 at [45]:

> "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that

> they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement".

63. The fact that a formal written contract is contemplated may be of relevance. As stated by Sir Andrew Morritt C in *Whitehead Mann Ltd v Cheverny Consulting Limited* [2006] EWCA Civ 1303 at [45], although each case depends on its own facts, "where solicitors are involved, formal written agreements are to be produced and arrangements made for their execution the normal inference will be that the parties are not bound unless and until they sign."

64. The fact that a document has been signed may also be of relevance – see, for example, *Diamond Build Limited v. Clapham Park Homes Limited* [2008] EWHC 1439 at [51(e)]. In *Dhanani v Crasnianski* [2011] EWHC 926 (Comm), Teare J described this as a "cogent indication" (at [76]). However, he also stated (at [75]):

> "…the circumstance that an agreement is no more than [an] agreement to negotiate and agree may show objectively that the parties to it cannot objectively have intended it to be legally binding, notwithstanding that it had certain characteristics which otherwise might have evinced an intention to agree, for example, that it was signed by each party."

65. It has been said that in a commercial context the onus is on the party who asserts that no legal effect is intended - see *Edwards v. Skyways* [1964] 1 WLR 349 at p. 355 per Megaw J:

> "In the present case the subject matter of the agreement is business relations, not social or domestic matters. There was a meeting of minds – an intention to agree. There was, admittedly, consideration for the company's promise. I accept the propositions of counsel for the plaintiff that in a case of this nature the onus is on the party who asserts that no legal effect was intended, and the onus is a heavy one".

66. This may often be so but it must depend on the facts and circumstances of the particular case. In the memorable words of Lord Bingham in *Pagnan Spa v. Feed Producers* [1987] 2 Lloyd's Rep 601 at p611:

> "The parties are to be regarded as masters of their contractual fate".

67. In relation to agreements to agree, it is well recognised that the court will not enforce an agreement to negotiate. In *Walford v Miles* [1993] 2 AC 128 at 138, Lord Ackner (with whom the other Law Lords agreed) held:

> "…A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. …while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for

any reason. There can be thus no obligation to continue to negotiate until there is a "proper reason" to withdraw. Accordingly a bare agreement to negotiate has no legal content."

The facts

68. The starting point is the stated objective of the MOU. This is set out in the preamble and is said to be to set out the "purpose, plan and terms and conditions" for the preparation of the "partnership agreement" and other "necessary documents". The MOU therefore relates to the preparation of formal contractual documentation which is to be entered into.

69. The MOU then sets out the "purpose" in section A – "Project Objectives". This is a general statement of objectives which it is accepted has no contractual effect.

70. The MOU then sets out the "plan" in section B – "General financial plant (*sic*)". Although Mr Bryan QC for Mr Sax submitted in oral argument that this sets out matters of contractual obligation, it purports to be and is expressed as no more than a "general" financial "plan".

71. The MOU then sets out the "terms and conditions" "to be incorporated" into the partnership agreement which is to be established. The subject matter of section C is therefore terms which are to be included in an agreement to be made, rather than terms which purport to or do govern the parties' existing relationship.

72. Finally, in section D the MOU sets out "Business Management" arrangements.

73. The apparently "legal" section of the MOU is Section C and its "terms and conditions". However, as noted above, these terms look to the future rather than the present. This is borne out by the fact that the matters set out in C3-14 relate to terms which would apply after the purchase had been completed and the "partnership agreement" and other "necessary documents" have been entered into. By that stage the parties' contractual obligations would be governed by the "partnership agreement" and other "necessary" agreements. C3-14 were therefore never going to govern the parties' contractual relations. They relate to a time at which the parties' relations would be governed by agreements to be entered into.

74. C1 and C2 need to be seen in this context. It is Mr Sax's case that they give rise to a free-standing obligation on Mr Tcherney to provide a loan, regardless of whether and, if so, what agreements might be entered into. However, in context, like C3-14, and as the introductory words make clear, they are terms which are to be incorporated in the "partnership agreement" to be made, rather than matters giving rise to any free-standing obligation.

75. This is entirely consistent with the fact that it was at all times envisaged that the shareholders' agreement, as the draft agreements make clear, would contain terms requiring the then applicable purchase related agreements and the loan agreement to be entered into.

76. The position is made all the more clear if one considers the content of the alleged obligation to provide a loan. C2 makes it clear that the loan is to be secured

directly or indirectly on the Property. It can only be so secured as and when the Property is purchased. There is accordingly not going to be any loan unless and until the Property is purchased, by which time all the necessary agreements will be in place, including the loan agreement. By the time that any loan was to be made it would therefore be governed by and made under the loan agreement, not the MOU.

77. The fact that there could be no security and therefore no loan without the Property being purchased highlights a fundamental flaw in Mr Sax's case. If the MOU contains any obligation to advance a loan it can only be as and when the Property is purchased. However, the MOU contains no obligation to purchase the Property. If there is no obligation to purchase then there can be no obligation to advance a loan dependent on that purchase.

78. It might be suggested that the last sentence in C1 imposes an obligation to purchase, but this was rightly disavowed by Mr Bryan QC in oral argument, not least because it was known by the time the MOU was signed that Meridian BVI would not be purchasing the Property. Mr Sax's skeleton argument was also replete with references to the fact that the MOU did not impose an obligation to purchase. As Mr Bryan QC stated, the last sentence in C1 "is identifying what is contemplated will happen at that stage…(it) is contemplating the mechanics of the structure at that time but it was never suggested between the parties that matters could not evolve or change".

79. No doubt in recognition of the implications for Mr Sax's case in relation to the loan, in oral argument Mr Bryan QC nevertheless sought to contend that there was an implied obligation on the parties "to do whatever was necessary to carry the joint venture (namely the purchase and development of the property and land) into effect" and thereby an obligation on them to ensure that the Property was purchased.

80. This suggested term was not foreshadowed in the pleadings or the skeleton argument. It is an extraordinarily broad, vague, open-ended and uncommercial term. If one focuses merely on the supposed obligation to ensure that the property was purchased, this would be tantamount to an agreement to agree. There was as yet no finalised purchase agreement. There were all sorts of matters which needed to be addressed and negotiated before there could be any such finalised agreement, as the history of the transaction reveals. Further negotiation and agreement was required both as between the parties themselves and with the third party sellers. This was required both in relation to the purchase itself, and its structure, and the series of interlocking agreements of which it formed part, all of which were to be executed together. There were no objective criteria by which the innumerable outstanding issues could be resolved. There could not be any enforceable contractual obligation to ensure that the purchase was carried out.

81. As a matter of analysis Mr Sax's contract case therefore faces a fundamental difficulty. If there is no obligation to purchase the Property then there can be no obligation to advance the loan which is dependent on that purchase being made. However, there can be no obligation to purchase the Property since that would amount to an agreement to agree. These considerations strongly indicate that there was no intention to create legal obligations in relation to these matters.

82. Further, even if one only considers the alleged obligation to advance the loan it is replete with uncertainty. As the MOU recognises, the loan is dependent upon security being provided. By the time that the MOU was signed the security envisaged in the MOU was agreed to be inapt or inappropriate. The form which the security would take had yet to be finalised, but this was fundamental to the loan. Again, this inherent uncertainty was recognised in argument. As Mr Bryan QC stated, the security set out in C2 was not a matter of obligation or settled – "there will no doubt be some protection in force for Mr Tchernoy's loan but as all the parties to this MOU knew, the actual structure and how Mr Tchernoy's loan would be protected was a matter which was likely to evolve and indeed was evolving during the course of this project".

83. There are in any event a number of other features of the MOU which indicate that no binding obligations were being undertaken thereunder. In particular:

(1) The MOU is not expressed to be a contract or an agreement. It purports to record an "understanding".

(2) The informal and loose language used is not the language of a contract. There are many typographical errors (including the misspelling of Mr Sax's name) and there are a number of provisions that make little grammatical sense (e.g. "…Upon project approval no later than after 3 years and 6 months from partnership date LT may refuse further financing…" (C3); "In the event that any of the partners willing to leave the project at any stage…" (C8); "...explanations from Paulo in regards what "parere favourable" consist of shall be ensured" (C10); "...not earlier than exclusion of land to be purchased from cadastal records…" (C12)). Further the MOU refers to establishing a "partnership" and a "partnership agreement" whereas it was common ground that a legal partnership was never intended.

(3) If, as Mr Sax contends, the MOU was meant to be an interim shareholders' agreement, it is remarkable that it does not include various of the provisions already set out in the existing draft shareholders' agreements.

84. There are also a number of contextual matters which point to the same conclusion. In particular:

(1) When it was first provided to Mr Sax the MOU was stated by Mr S-M to be the "basic points of our partnership, which should guide UK lawyers and Paolo when they draft all papers."

(2) At the time that it was provided it was known that the parties' "partnership agreement" (i.e. the shareholders' agreement) was being drafted by lawyers and that a final, signed and executed agreement was contemplated.

(3) Despite the teams of lawyers on board at the time the MOU was drafted, it is striking that no input was sought from them as to its content.

(4) There was no need for an interim contractual agreement, and, as explained above, its terms are not directed at and do not apply to the interim period.

(5) At the time of both the production and the signing of the MOU the structure of the deal and the necessary agreements were in a state of flux and uncertainty which made it inherently unlikely that the parties would at that stage bind themselves to any part of those arrangements.

(6) At the time that the MOU was signed, if the purchase was to proceed at all, it was not going to be as contemplated in clauses B1 and C1. The proposed purchase was to be of the shares of an Italian company rather than of the Property and security was not going to be provided in the "crazy" manner envisaged by the MOU. Instead, an alternative proposal was under discussion. The first drafts of the transactional documents for the new structure (including the shareholders' agreement) were still awaited.

(7) Despite these developments the MOU was being signed "as of 11 April 2008". If the signing of the MOU was intended to make it legally binding the parties were thereby signing up to an agreement the terms of which they knew were not applicable.

85. The fifth point is important and is effectively acknowledged by Mr Sax. He accepts that the MOU was not intended to be a legally binding agreement when it was produced: "I do not allege, and did not understand, that the MOU was legally binding before it was signed".

86. He also acknowledges that even when the MOU was signed the terms and conditions of the partnership agreement and the other necessary agreements could evolve and change: "transactions have to evolve in view of changing circumstances and legal advice as to structures and terms that are and are not advisable and permissible. I certainly never understood, and it was never suggested to me that, by signing the MOU, we would somehow be prevented from agreeing to appropriate terms for the Project within the overall agreed framework…the Shareholders Agreement and other transaction documentation were intended to be more detailed than the MOU and might, in some respects, depart from it… I agree with Mr Gerstein that the MOU was not "definitive" in that it was intended that it would be replaced by much more detailed transactional documentation".

87. The fact that it was recognised that the terms of the agreements to which the MOU related and the agreement into which its terms and conditions were "to be incorporated" could depart from those set out in the MOU is a strong indicator that it was not intended to be legally binding. That applied both at the time that it was produced and at the time of the signature of the MOU. In fact it applies with even more cogency at that time since by then it was known that the purchase and loan security structure contemplated and referred to in the MOU would not be followed.

88. On Mr Sax's case everything is nevertheless transformed by the signature of the MOU and the additional words he added to it. However, the contemporaneous documents do not bear this out.

89. When Mr Zyrkov asked Mr Sax to sign the MOU on 28 May 2008 there was no objective reason to suppose that the purpose of the MOU had changed from that explained at the time that it was originally provided, namely to set out the "basic points" of the partnership to guide the drafting process.

90. Mr Sax did not appear to consider that signature was changing the status of the MOU since his reply was that he could not understand why it needed to be signed. He nevertheless did not "mind" doing so provided that it did not affect the status of the shareholders' agreement, which he clearly regarded as being the all important agreement.

91. The explained background against which the additional words were inserted by him was therefore that Mr Sax did not want anything in the MOU to affect the draft shareholders' agreement which was being negotiated when the latter was executed. They were therefore inserted to protect against the MOU having binding effect rather than to transform it into an agreement with binding effect.

92. Whilst in many cases the fact of signature, and of wording such as that contained in the additional words ("...no further force and effect…"), might be strong indicators of an intention to create legal relations, in the circumstances of this case I consider them to be factors of little weight. They do not have the transformative effect which, on Mr Sax's own case, is required.

93. Mr Sax's explanation of the purpose of rendering the MOU legally binding was so that the parties could not "walk away" from the project. However, that is not what the MOU says. Moreover, if it was intended to impose a legal obligation to this effect the parties would be expected and indeed would need to set out the limits of such obligation. As was accepted, it could not possibly have been intended that the parties could not "walk away" from the project in any circumstances but, if not, in what circumstances would it be permissible/impermissible? The MOU does not begin to address this.

94. Central to the argument advanced by Mr Sax at the hearing was the proposition that the MOU was intended to be an interim shareholders' agreement. However, for reasons already explained, that is not its effect. The "terms and conditions" of the MOU are directed at what is to be contained in agreements to be entered into, rather than the parties' existing relationship pending such agreements.

95. The other main points made by Mr Sax were as follows:

    (1) The language of the MOU is the language of contract.

    (2) The language is mandatory.

    (3) The MOU includes defined terms, a characteristic of an agreement intended to have a legal effect.

    (4) The MOU sets out definitive "terms and conditions".

(5) The MOU is expressed in terms of what has been agreed rather than what is to be agreed.

(6) It was signed against the context of Mr Tchernoy having incurred expenses and being concerned that Mr Sax would "walk away" from the project.

96. A number of these points have already been addressed. It is also to be noted that points (1) to (5) equally apply to the MOU when it was first produced, at which stage it is acknowledged that it was not intended to have legal effect. I shall nevertheless briefly address each point made.

97. As to (1), it is correct that the MOU contains some legal language. However, it also contains a number of loose and vague expressions which are very far from being legal language. The main apparently legal section is Section C which sets out "terms and conditions". However, as already noted these are terms and conditions to be incorporated in an agreement to be made, which terms it was recognised might be subject to change, and indeed which had already changed in important respects by the time of signature of the MOU.

98. As to (2), it is correct that Section C in particular contains a number of provisions as to what "shall" be done. However, this is in the context of what is "to be incorporated" into the agreement to be made and was recognised as being subject to change.

99. As to (3), this is correct but that is a useful drafting device for the MOU regardless of whether or not it is legally binding.

100. As to (4), the "terms and conditions" were not definitive. It was recognised that the terms might be departed from and evolve "in view of changing circumstances and legal advice".

101. As to (5), the MOU (and in particular Section C) is expressed in terms of what has been agreed to be incorporated into an agreement still to be finally agreed, so that it is looking forward to what is to be agreed, as is also borne out by the introductory preamble.

102. As to (6), significant expenses were incurred prior to the production of the MOU, as reflected in the Aquarias loan agreement. However, it is not suggested and was not understood that the MOU was binding at that stage. There is no evidence that further significant sums had fallen due or were to fall due at the end of May 2008. I have already addressed the issue of "walking away". Mr Sax relied on an allusion thereto made by him in an email on 7 May 2008. However, if, which was disputed, Mr Tchernoy had any concerns about that it is striking that no steps were taken by him at that time. In any event, the strong impression given by the documentary evidence is that it was Mr Sax who was pressing for the transaction to be completed and that the delay was being caused by difficulties in structuring the transaction in a legally and commercially sensible manner. Further, there is no evidence that Mr Sax had any potential finance source options other than Mr Tchernoy.

103. I do not therefore consider that there is much force in any of the points made by Mr Sax. His apparently strongest points are the signature of the MOU and the additional words added, but, in context, these add little and do not outweigh all the other factors which point to the conclusion that the MOU was never intended to be and was not a legally binding agreement.

104. For all these reasons I have reached the clear conclusion that Mr Sax cannot show that he has much the better, or the better, of the argument that there was an intention to create legal relations. In my judgment it is Mr Tchernoy who has much the better of the argument.

105. Further or alternatively, Mr Sax cannot show that he has much the better, or the better, of the argument that there was a contract rather than an agreement to agree. In my judgment it is Mr Tchernoy who has much the better of the argument.

106. Further, in so far as it is suggested that there was an obligation to purchase the Property, Mr Sax cannot show that he has much the better, or the better, of the argument that this was sufficiently certain to be enforceable. In my judgment it is Mr Tchernoy who has much the better of that argument. The same applies to the alleged loan obligation given the recognised uncertainty in relation to the fundamental issue of security.

107. I accordingly conclude that Mr Sax cannot show that he has much the better, or the better, of the argument that a contract was made. Indeed, I do not consider that on this issue he has satisfied the lesser standard of proof of real prospect of success.

(1) Whether Mr Sax has a good arguable case that the contract was governed by English law

The law

108. It was common ground that the Rome Convention (as opposed to the Rome I Regulation) determines the governing law of the MOU.

109. Mr Sax contends that there is a good arguable case that either (i) the parties impliedly chose English law to govern the MOU under Article 3.1 of the Convention; alternatively (ii) English law is the law that applies in the absence of choice pursuant to Article 4 of the Convention.

110. Article 3.1 of the Convention provides:

> "A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case."

111. The inquiry is not limited to the terms of the contract itself. The choice of a particular law can also be inferred from "the circumstances of the case". In the Giuliano-Lagarde Report, which is a relevant guide to the interpretation of the

Convention (see ss. 3(3)(a) of the Contracts (Applicable Law) Act 1990), the commentary on Article 3.1 states as follows:

> "The choice of law by the parties will often be express but the Convention recognizes the possibility that the Court may, in the light of all the facts, find that the parties have made a real choice of law although this is not expressly stated in the contract… In other cases a previous course of dealings between the parties under contracts containing an express choice of law may leave the court in no doubt that the contract in question is to be governed by the law previously chosen where the choice of law clause has been omitted in circumstances which do not indicate a deliberate change of policy by the parties…. Other matters that may impel the court to the conclusion that a real choice of law has been made might include an express choice of law in related transactions between the same parties…"

112. An example of choice inferred from an express choice of law in related transactions is the case of *FR Lürssen Werft v. Halle* [2011] 1 Lloyd's Rep 265. In that case the Court of Appeal upheld the decision of the first instance judge that there was a "good arguable case" that a commission agreement was governed by English law under Article 3.1, despite the absence of an express choice of law, because it was closely related to two shipbuilding contracts between the same parties that were expressly governed by English law.

113. Another example is the case of *Gard Marine and Energy Ltd v. Tunnicliffe* [2011] Bus LR 839, in which the Court of Appeal upheld the decision of the first instance judge that there was a "good arguable case" that a reinsurance slip containing no express choice of law was governed by English law under Article 3.1 where the underlying insurance was governed by English law and the slip was part of a more general reinsurance placement in the London market.

114. Article 4 of the Convention provides so far as material:

> "1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.
>
> 2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence…. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated….

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country."

115. The concept of "characteristic performance" is not defined nor explained in the text of the Convention itself but it is considered in the Giuliano-Lagarde Report. The commentary on Article 4.2 states:

> "Identifying the characteristic performance of a contract obviously presents no difficulty in the case of unilateral contracts. By contrast, in bilateral (reciprocal) contracts whereby the parties undertake mutual reciprocal performance, the counter-performance by one of the parties in a modern economy usually takes the form of the payment of money. This is not, of course, the characteristic performance of the contract. It is the performance for which the payment is due, i.e. depending on the type of contract, the delivery of goods, the granting of the right to make use of an item of property, the provision of a service, transport, insurance, banking operations, security, etc., which usually constitutes the centre of gravity and socio-economic function of the contractual transaction."

116. The Convention does not require the court to assume that there is always one "characteristic performance" under a contract. Article 4.5 begins with the words: "Paragraph 2 shall not apply if the characteristic performance cannot be determined…", thereby contemplating that there would be a category of contracts in which the concept of "characteristic performance" could not be applied.

117. This is particularly likely to be the case in complex, multi-party contracts. As stated in *The European Private International Law of Obligation*, Plender & Wilderspin, 3rd Ed, at para. 7-086:

> "Obvious examples of cases where the characteristic performance cannot be determined are contracts under which goods and/or services are exchanged, or more complex contracts, joint ventures or indeed any contracts involving several parties performing interrelated obligations".

118. As stated in *Chitty on Contracts* (31st Ed) at 30-076: "in a contract of loan, the characteristic performance is that of the lender (since he provides the "service" for which repayment is due)" – see *Surzur Overseas Ltd v Ocean Reliance Shipping Co Ltd* [1997] C.L. 318; *Atlantic Telecom GmbH, Noter* 2004 S.L.T. 103.

119. In considering the position under Article 4.5, the Court looks at all the circumstances of the case in order to determine whether "it appears from the circumstances as a whole that the contract is more closely connected with another country".

120. The Giuliano-Lagarde Report comments:

> "Article 4(5) obviously leaves the judge a margin of discretion as to whether a set of circumstances exists in each specific case justifying the

non-application of the presumptions in paragraph 2, 3 and 4. But this is the inevitable counterparty of a general conflict rule intended to apply to almost all types of contract."

121. The ECJ has considered the operation of Article 4.5 in *Intercontainer Interfrigo SC (ICF) v. Balenende Oosthuizen BV* [2010] QB 411 where a Dutch court referred a number of questions including whether "the second clause of article 4(5) was to be interpreted such that the presumptions mentioned were to be disregarded only where there was no genuine connection with the defined country, or also where there was a stronger connection with another country". The ECJ ruled the latter approach was the correct one: see paras. [59] – [64].

122. The approach indicated by English court decisions as to how the presumption is rebutted is summarised in *Chitty* at [30-089] as follows:

(1) "First, the presumption in art 4(2) must be given due weight".

(2) "Secondly: "…unless art.4(2) is regarded as a rule of thumb which requires a preponderance of connecting factors to be established before the presumption can be disregarded, the intention of the Convention is likely to be subverted"." – *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd* [2001] EWCA Civ 2019.

(3) "Thirdly…the court will apply the presumptively applicable law unless satisfied on a balance of probabilities that the contract, having regard to the circumstances as a whole, is clearly more closely connected with another country and…the burden lies on the party who asserts it".

(4) "Fourthly….the application of art.4 (5) will be very fact dependent and general statements are of limited value."

The facts

Article 3

123. Mr Sax's original application for permission to serve out of the jurisdiction relied on Article 4 of the Convention only. The possibility of reliance on Article 3 was raised for the first time in the skeleton argument for the hearing.

124. Mr Sax contends that when all the circumstances are taken into account, and in particular the draft agreements and signed Aquarius loan agreement that are all expressly governed by English law, there is ample objective material from which to conclude that there was an implied choice of English law.

125. In relation to draft agreements, Mr Sax relies in particular on the fact that the drafts of the shareholders' agreement that was intended to replace the MOU, which pre-dated both the first draft of the MOU on 11 April 2008 and the signed MOU, consistently contained an express choice of English law (and English jurisdiction), as did the drafts of the loan agreement between Mr Tchernoy and Meridian BVI.

126. In relation to the Aquarius loan agreement, Mr Sax stresses that this agreement between Mr Tchernoy's company Aquarius and Meridian BVI dated as of 1

March 2008 but signed on 10 April 2008 (before the MOU was circulated and subsequently signed), also contained an express choice of English law.

127. I do not consider that the Aquarius loan agreement is of relevance since there is no evidence that its terms and choice of law were known to Mr Sax at any material time.

128. As to the draft agreements, the main difficulty with Mr Sax's argument is that they were drafts. They were not concluded agreements. The stage had not been reached at which it would be necessary for the parties to decide whether or not to include the English law provision included in the drafts. What ultimately would have been agreed is a matter of speculation.

129. In none of the reported cases has a relevant transaction which was not a concluded contract been relied upon, still less been found to be sufficient to show real choice.

130. Nor, if it be relevant, do I accept that it is more than a possibility that English law would have been agreed. Some of the draft agreements were governed by English law, but other draft agreements were governed by Italian law and the subject matter of the project was property in Italy. There may well have been a case for the whole suite of agreements to be governed by the same law. If so, that would have been Italian law since the purchase agreement and the consultancy agreement were going to be so governed.

131. Further, the circumstances surrounding the making of the MOU were very different to the other agreements. The agreement was being made directly between the individuals involved and without the involvement of lawyers. Although it was relevant to the shareholders' agreement, it was very different to it and was in no sense a draft of it.

132. Yet further, it is incumbent on Mr Sax to demonstrate both that a choice was made and what that choice was with "reasonable certainty". The Giulano-Lagarde Report indicates that this is an onerous requirement, as reflected in the strong expressions used, such as "may show in no uncertain manner"; "may leave the court in no doubt"; "may impel the court to the conclusion" – see the *FR Lürssen Werft* case at [14] per Aikens LJ.

133. For all these reasons I conclude that Mr Sax cannot show that he has much the better, or the better, of the argument that the parties chose English law to govern the MOU pursuant to Article 3 of the Convention.

Article 4

134. Mr Tchernoy contends that if there was a contract as contended for by Mr Sax then the characteristic performance of the MOU was the provision of the loan by Mr Tchernoy.

135. In this connection it is pointed out that paragraph 7 of the Particulars of Claim describes the "essential features" as being that (1) Mr Tchernoy would advance the loan; and (2) the loan would be used to fund the acquisition of the Property and its development.

136. Mr Sax contends that it cannot be said that one parties' performance is the single "characteristic performance" of the MOU and therefore no presumption applies.

137. For reasons already stated, the MOU is devoid of contractual obligation. For the purpose of the argument it has to be assumed that there is an obligation on Mr Tchernoy to advance the loan, but it is difficult to identify other positive obligations undertaken by the parties under the MOU. The only other specific positive obligation which Mr Bryan QC could identify was the alleged obligation on Mr Sax and Mr S-M under D1 to "independently conduct activity on interaction with Italian authorities through technical communication facilities, attorneys, architect bureau and personally in the course of business trips to Rome and Sardinia". It is by no means clear that Section D in general, or this vague and unclear provision in particular, is dealing with matters of obligation, even if the MOU is a contract. However, assuming that this is a contractual obligation it is of far less significance in financial and practical terms than the advance of the loan. On Mr Sax's own case this was key to the whole project.

138. If the MOU was a contract I am accordingly satisfied that its central obligation and characteristic performance was the advance of the loan. It follows that the Article 4.2 presumption applies.

139. It was accepted for the purpose of this application that the evidence shows that at all material times, including in 2008, Mr Tchernoy had his habitual residence and main place of business in Russia.

140. It follows that pursuant to Article 4(2) the presumption is that Russia is the country with which the contract is most closely connected and (subject to that presumption being rebutted) Russian law governs under Article 4(1).

141. There are a number of connecting factors with Russia. These include the following:

(1) Mr S-M was specifically contacted by Mr Sax in respect of the project because of his Russian business contacts and interests. Indeed, Mr Sax told Mr S-M that he wished to do the deal with him because "…this should be a Russian deal. And, you and I both know it".

(2) Two of the three parties to the MOU were resident in Russia, had offices and substantial business interests there and were Russian citizens.

(3) The only meeting between the parties to the MOU was in Russia.

(4) It was this meeting which led to the MOU being produced.

(5) As Mr Sax himself asserted in an email of 7 October 2008, "at that time we collectively agreed to proceed with the acquisition of the Sardinia property".

(6) The MOU was drafted and produced in Russia.

(7) It was drafted in Russian and then translated into English.

(8) The MOU was signed by Mr S-M in Russia.

(9) The MOU itself indicated that the operation of the "partnership" would be coordinated from Mr S-M's office, which was in Moscow – see D1 and D2.

(10) The loan was to be arranged and made by Mr Tchernoy, whose main business base is Russia.

142. There are also connecting factors with Italy. These include:

(1) The claim relates to the proposed development of a property located in Italy.

(2) The owners of the Property were Italian, represented by Mr Baroudi who lived on the Property and by Italian lawyers.

(3) The purchaser of the Property was to be an Italian company. Italian lawyers were also instructed by Mr Sax, Mr Tchernoy and Mr S-M.

(4) It was anticipated that most of the transactional documents required to put in place the project were to be governed by Italian law.

(5) The Property was to be purchased in Euros and the costs in the MOU were denominated in Euros.

(6) As the MOU recognised, planning permission was required from Italian authorities. The MOU also made express reference to Italian legal concepts.

(7) The MOU also required litigation in Italy to be settled (see C11).

(8) Italian lawyers were to provide input into the transactional documents and it was also intended that they would provide assistance post-completion (see C10 and D2).

(9) It is clear from the transaction history that there were important questions of structuring that needed to be resolved by Italian lawyers in order to ensure the transaction was legal and commercially prudent including from an Italian tax perspective.

143. There are also connecting factors with England. The main factors put forward by Mr Sax were as follows:

(1) The transaction was put together in London using London lawyers (first CKFT, then Jones Day, London);

(2) Mr Tchernoy's interests were represented by Mr Milon and Mr Zykov, who were based in London and carried out their work on the transaction from there;

(3) The parties were operating on the basis that their legal relationship would be governed by English law, as reflected in every draft of the shareholders'

agreement. The draft shareholders' agreement also provided for notices to be served on Mr Tchernoy at Keiser Beratung's offices in London.

(4) The signed loan agreement by which Mr Tchernoy's company Aquarius advanced funds to Meridian BVI was expressly governed by English law;

(5) Although Meridian BVI was incorporated offshore for tax reasons, its bank account was in London. Thus, it would receive the loan from Mr Tchernoy in London. Its correspondence address was the office used by Mr Milon and Mr Zykov in London;

(6) The draft shareholders' agreement provided that Mr Milon and Mr Zykov were to be directors of Meridian BVI, a function that they would have exercised from their offices in London;

(7) Meridian Italy had its bank account and correspondence address in London.

144. It is to be noted, however, that most of these factors do not relate directly to the MOU. Neither the London lawyers nor Mr Milon and Mr Zykov were involved in the production or drafting of the MOU. The MOU resulted from discussions in Russia between Mr Sax, Mr Tchernoy and Mr S-M. It was in Russia that it was prepared and drafted. It was sent to by Mr S-M to Mr Sax directly.

145. Further, most of the other transactions relied upon involved different parties. The only transaction which would have involved the same parties was the shareholders' agreement. As already explained, no final decision had been made as to the governing law for the shareholders' agreement, nor was this a matter addressed in the MOU.

146. The main relevant connecting factor with England was the fact that the loan would be paid to Meridian BVI's bank account in London. However, that is to be set against all the connecting factors with Russia already identified.

147. In summary, this is not a case where there are no connecting factors with the presumed country. On the contrary there are a number of real and important connecting factors. Nor is it a case where there is one alternative country with which there are connecting factors. There are connecting factors with both Italy and England.

148. In my judgment, if one focuses on the MOU contract itself, the most important connecting factors are probably with Russia. However, on any view it has not been shown that there is a preponderance of connecting factors with England or that on the balance of probabilities the contract, having regard to the circumstances as a whole, is clearly more connected with England. It follows that Mr Sax cannot rebut the presumption under Article 4(2).

149. I accordingly conclude that Mr Sax cannot show that he has much the better, or the better, of the argument that a contract was governed by English law.

(2) Whether there is a serious issue to be tried in respect of the claim for breach of contract and in respect of the three heads of damages claimed

Breach

150. Mr Tchernoy contends that Mr Sax cannot prove any breach of the MOU since the time for provision of the loan never arose. The loan was required to complete the purchase of the Property. It was accordingly to be provided as and when it was needed for that purpose. However, the transaction never reached that stage. The parties were never in a position where all aspects of the transaction were finalised to their satisfaction so that the purchase could go ahead.

151. I consider that this analysis is correct. The MOU does not specify when the loan is to be made. The requirement that it be secured means that it is dependent on the purchase going ahead and indeed Mr Sax's case was that it was required "to complete" the purchase. The purchase never did go ahead and, for reasons already given, there could not be and was not any obligation to ensure that it did.

152. Mr Sax submits that the stage was reached in July 2008 where the documentation was all in place and that the loan should have been provided at that stage. However, although the documentation was complete to the satisfaction of Mr Baroudi's solicitors, Hammonds, there remained a number of outstanding concerns and issues, as Mr Campbell's email of 4 August 2008 makes clear. In any event, Mr Tchernoy was free not to go ahead with the purchase if he so chose and the outstanding issues were never resolved to his satisfaction.

153. I therefore accept Mr Tchernoy's case that no serious issue to be tried has been established that he was in breach, still less repudiatory breach, in refusing or failing to provide the loan. The time at which he may have been required to provide the loan was never reached.

154. However, Mr Sax further contends that there was a renunciation of the MOU in October 2008 when it was asserted by or on behalf of Mr Tchernoy that there was no contract. I accept that Mr Sax can establish a serious issue to be tried in relation to this way of putting the case of breach.

Damages

155. The renunciation of the MOU can only have caused Mr Sax loss if the loan would have been provided had there been no such renunciation. However, as a matter of fact it never would have been (since Mr Tchernoy was not prepared to go ahead with the transaction) and as a matter of law there was no obligation on him to do so, for the reasons stated above, and it is to be assumed that the party in breach will perform the contract in the way which would result in least cost to him.

156. It follows that the alleged breach cannot have caused any loss.

157. Further, even if there had been an obligation to provide the loan, failure to perform that obligation can have caused no loss unless there was also an obligation to purchase the Property. Mr Sax's damages claims are premised on the transaction going ahead and the Property being purchased. But Mr Tchernoy

was under no obligation to do so and, as stated above, it is to be assumed that the party in breach will perform the contract in the way which would result in least cost to him.

158. Mr Sax suggests that had the loan been advanced the transaction would have gone ahead as a matter of fact and causation. This is completely unrealistic. The transaction did not go ahead because Mr Tchernoy was not prepared to proceed with the purchase, a decision he was legally entitled to make. Had the loan been made it would simply have sat in Meridian BVI's account until it was clear that the transaction was not going ahead, at which stage it would have been returned.

159. The three damages claims made by Mr Sax are:

(1) EUR 1.5million alleged to be due under clauses B1 and C12 of the MOU on "closing date".

(2) US$57,431 alleged to be payable in relation to expenses in attempting to close the acquisition of the Property and which would have been reimbursed from the Loan "as set out in the draft Meridian BVI Shareholders' Agreement had [Mr Tchernoy] not wrongfully repudiated the Contract".

(3) EUR50million which Mr Sax claims would have been his 20% share of the profits made by Meridian BVI had the acquisition of the Property and the development proceeded.

160. Claim (1) is premised on there being a "closing". There never would have been a closing, nor was there any obligation to achieve it.

161. Claim (2) does not arise out of the MOU. It is premised on there being a finally agreed shareholders' agreement, which would only have occurred if the transaction and purchase had gone ahead. It never would have done, nor was there any obligation to ensure that it did.

162. Claim (3) depends not only on the purchase going ahead but the development also going ahead. Neither would have done, nor was that any obligation to ensure that they did.

163. I accordingly conclude that Mr Sax cannot establish a serious issue to be tried in respect of any of the damages claimed. Mr Sax does not have a real prospect of establishing any claim to substantial damages and there can be no purpose in proceedings for the purpose of claiming nominal damages.

Other issues

164. I have accordingly concluded that service of the proceedings should be set aside on three separate grounds. In those circumstances I do not consider that it is necessary to address the two further grounds relied upon. I am prepared to assume, without deciding, that Mr Sax succeeds on those issues, but this can make no difference to the overall outcome.

Conclusion

165. Mr Sax cannot bring himself within the jurisdictional gateway relied upon. In any event this is not an appropriate case for service out since Mr Sax cannot show that there is a serious issue to be tried in respect of his damages claim. The service of proceedings should accordingly be set aside.

APPENDIX

PROJECT Porto Conte
Memorandum of Understanding

Lev Tchernoy (hereinafter referred to as LT, Sergey Soukholinski-Mestechkin (SSM), Karl Sax (KS) have agreed to establish a partnership in connection herewith a partnership agreement and other necessary documents shall be prepared in accordance with the purpose, plan and terms and conditions set forth below.

A. Project Objectives:

1. Acquire a permission for building of hotel complex with a maximum possible floor area comprising of two hotels, including buildings and individual villas, as well as SPA hotel at Villa Mugoni;
2. In the event of project found attractive execute construction of hotels with eventual operation thereof;
3. Alternatively to sell the project at any mature phase.

B. General financial plant as of the date of establishment of partnership (and purchase and preliminary construction phase):

1. Land purchase and settlement with KS regarding costs incurred by him prior to established of partnership; maximum amount 21.5 million EUR;
2. Conducting all necessary legal verifications in the course of purchase and execution of transaction, capitalization of companies; estimated amount 120-150 thousand EUR;
3. Development of few architecture and design concepts with an architect bureau; up to 1.5. million EUR;
4. Operating costs for project monitoring subject to full prior approval; estimated amount 2 million EUR.
5. Total scheduled direct and indirect costs; not exceeding 25.16 million EUR.

C. Transaction terms and conditions (to be incorporated into partnership agreement as general provisions):

1. Holding company at BVI with 60% of shares to be owned by LT and 25% of shares to be vested to each KS and SSM shall be established. The structure of shareholders representatives through directors shall be the same. An Italian company (wholly-owned subsidiary BVI) shall be established, which shall purchase an asset in the form of land plot with Villa Mugoni located thereon.

2. LT shall ensure USD loan for BVI company for the period not exceeding 3 years and 6 months in the amount specified above in section B (General Financial Plan). Interest in the amount of LIBOR +4.5% per annum shall be accrued for each year (365 calendar days). The loan shall be secured by the land plot with Villa Mugoni or Italian company's shares to be pledged to LT as if may be selected by LT.

3. Directors' decisions regarding costs and encumbrances shall be limited to 250 thousand EUR, however shall be full subject to the general financial plan (section B) approved by all partners at the partnership establishment. Approvals at the preliminary stage shall be followed by the next stage of the project (project design, approval and construction). In relation to which no financial plan has been developed yet. Upon project approval no later than after 3 years and 6 months from partnership date LT may refuse from further financing of the project and may refuse to continue implementation of project on the whole and at the same time may decide to sell the project at the market cost. The loan will be extended by the project sale date.

4. In the event that approvals at the preliminary stage requiring more costs that those provided for by the financial plan (section B) or in the event of unforeseen costs the partners shall make a unanimous decision on additional financing or otherwise the project shall be sold at the market cost.

5. In the event that LT shall decide to continue the project implementation at the following stages in accordance with approval received he shall agree with the partners upon a new financial plan. The partners shall agree upon an estimated project budget and financing resources thereof, where the primary role shall be given to external borrowing and priority loans repayment secured by LT.

6. In the event of failure to receive authorities' approval for project implementation within 3 years and 6 months the loan shall extended for 6 months and the project shall sold at the market cost within 6 months. In the event of failure to sell the project within the period specified the partnership shall be terminated and LT shall have the right for pledge recovery and disposal thereof at its own discretion.

7. Distribution of proceeds from the project and/or sale thereof shall be made pro rata to the shares in the partnership company and upon repayment of loan principal and interest secured by LT.

8. In the event that any of the partners willing to leave the project at any stage, other than in connection with the company sale, the partners shall either make an unanimous decision on leaving and share repurchase procedure or otherwise the project shall be sold in full at the market cost.

9. Consultancy agreement shall be made with Baroudi, under which he shall be liable to acquire an approval for construction of over 58,200 square meters of air-conditioned hotel premises (including SPA hotel instead Villa Mugoni) for consideration in the amount of 500 EUR per each additional square meter above specified. In the event of failure to acquire such permission by June 1, 2009 the consultancy agreement shall be terminated. Permission of construction of 58,200 square meters shall be included into transaction cost and shall not be paid additionally.

10. Anywhere in this Memorandum (excluding clause 9 of section C) the term "approval" in relation to construction shall mean "parere favoravola", i.e. approval of land zoning for hotel and other development and other ancillary

activities included in city development plan necessary and sufficient for approval of the detailed working project and further construction of the hotel complex. In addition prior to the establishment of partnership explanations from Paolo in regards what "parere favoravole" consist of shall be ensured.

11. Partnership documents shall include provision requiring Baroudi to settle claims of the parking owner suing for occupied parking area on the shore, claims of deceased attorney's family and attorney. Gorovito's personal claims to Baroudi, as well as settle all other, debts pertaining Italian companies of Baroudi to the extend of possible claims. Exception shall be made for shepherd's claim to be settled within 16 months against security of Baroudi in the amount of 2.5 million EUR out of purchase price, which shall be in escrow together with 500 thousand EUR payable to KS and 500 thousand EUR promissory note of SSM;

12. 1 million EUR shall be paid to KS (apart from 500 thousand EUR transferred to escrow) closing date, however not earlier than exclusion of land to be purchased from cadastrel records, Indication of claims to Baroudi, claims of Gorovic, claims of deceased attorney's family and parking owner and/or other claims, which may occur prior to closing date, excluding shepherd's claim;

13. The loan from LT shall be substituted with external financing acceptable by LT as soon as possible, which shall be supported by efforts of SSM and KS.

14. Anywhere in this Memorandum the term "market cost" shall mean the assessed projects sale price received from independent professional appraiser.

D. **Business Management.**

1. Prior to approval of the preliminary stage the operation of partnership shall be coordinated from SSM's office, for which purpose a coordinator shall be hired, and information shall be transferred to LT's secretary office in London. SSM and KS shall independently conduct activity on interaction with Italian authorities through technical communication facilities, attorneys, architect bureau and personally in the course of business trips to Rome and Sardinia.

2. In Italy all correspondence shall be received by attorney office Paolo Cieri, which shall monitor the first stage of the project and transfer copies of information received to London and Moscow.

3. In the event of making a decision to proceed to the following stage of the project the partners shall negotiate on the establishment of a separate office in Rome as it may be required by project workflow. This Memorandum of Understanding shall be executed by fax, and shall be of not further force and effect upon execution of a Shareholders Agreement between the parties.

This Memorandum of Understanding shall be executed by fax, and shall be of no further force and effect upon execution of a Shareholders Agreement between the parties.

Dated as of 11 April 2008:

_____
Lev Tchernoy

_____
Segey Soukholinski-Mestetchkin

_____
Carl A. Sax