Neutral Citation Number: [2014] EWHC 355 (Comm)

Case No: 2013 FOLIO NO 115

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/02/2014

Before :

HIS HONOUR JUDGE MACKIE QC

- -

Between :

Mar-Train Heavy Haulage Limited	**Claimant**
- and -	
Shipping.Dk Chartering A/S (Trading As Frank&Tobiesen A/S) and four others	**Defendants**

- -
- -

Tim Jenns (instructed by **Swinnerton Moore**) for the Defendant Applicant
John Kimbell (instructed by **Hill Dickinson**) for the Claimant Respondent

Hearing dates: 13 December 2013 and 27 January 2014

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Approved Judgment

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

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HIS HONOUR JUDGE MACKIE QC

Judge Mackie QC:

1. This is an application by the Defendant ("F&T") to set aside service of the claim form issued by the Claimant ("Mar-Train") and for a declaration that the Court has no jurisdiction to hear the case. Mar-Train says that it has a good arguable case that F&T consented to English jurisdiction in the form of clause 16 of the RHA Terms 1998 and/or clause 28 of the BIFA 2005 terms in a manner which satisfies the requirements of Article 23 of Regulation (EU) 44/ 2001. F&T disagrees.

2. Unfortunately the application was optimistically listed for a two hour hearing on a Commercial Court Friday and it was necessary to adjourn. There are seven witness statements. Three are from solicitors, Ms Protopapas and Mr Swinnerton for F&T and Mr Marsh for Mar-Train. Four are from employees of companies involved in the dispute, Mr Martin, the Managing Director of Mar-Train, Mr Jerry Smart formerly operations manager of ALS (a company to which I will refer and who has given two statements) and Mr Per Ebdrup, the Manager of F&T. There are also detailed points of law. Mr Jenns' admirable skeleton argument alone is 34 pages long.

3. Mar-Train is a road haulier, a small family firm incorporated and domiciled in Ireland. F&T is a freight forwarder incorporated and domiciled in Denmark. F&T entered into a project freight forwarding Framework Agreement dated 25 June 2007 with Siemens, a company incorporated and domiciled in Denmark. One of these projects was the transportation of eight wind turbines from Ejsberg, Denmark to Curragh Mountain Wind Farm, Cork, Ireland. F&T engaged an English company based in Hull, Abnormal Load Services (International) Limited ("ALS"), to handle the inland operations within Ireland, which in turn engaged Mar-Train physically to perform the road transport from Cork port to the windfarm. On 29 May 2009 an 87 tonne nacelle (which was a component part of one of the 8 wind turbines) was being transported by Mar-Train by road to the Curragh windfarm and fell off the truck into a peat bog. This incident has given rise to an earlier action in this Court (now settled) and separate proceedings in Denmark which are due to be tried in November 2014 and this action. It is common ground that if this action remains alive it should be stayed until the Danish case is over.

The contracts

4. The Framework Agreement is in English. It set out terms governing the execution by F&T of project related transportation of Siemens' wind turbine components world-wide, except for North America. It contemplated that F&T could appoint sub-contractors (clauses 2 and 15), and provided for Danish law and jurisdiction (clause 18).

5. The scope of the services to be supplied by F&T was defined as:

> *"Scope of Supply:*
>
> *Support Siemens on budgetary inquiries*
>
> *Assist Siemens in developing technical solutions*

Assist Siemens in preparing feasibility studies for the various projects

Supply Siemens with full (or partly [sic]*) transport solutions and execution thereof, including all necessary logistical planning, documentation, negotiations with sub-contractors/authorities/agents etc for various projects"*

6. On 13 May 2009, Siemens entered into a contract with F&T ('the Transport Contract') under which F&T agreed to supply freight forwarding services for the project. Although the Framework Agreement had expired by then, "*All services provided by the Supplier are subject to the provision as described in the Framework Agreement*". The price Siemens Ltd agreed to pay F&T for services supplied under the Transport Contract is not clear from the contract but in a Freight Quotation, F&T quoted a lumpsum price of €45,750 for sea carriage and €45,650 for road carriage and handling in Ireland. The quotation referred to Mar-Train as performing handling after discharge and "*trucking from port to site"*. This was in materially the same terms as an offer from F&T of 3 February 2009.In that earlier email exchange F&T stated in a passage on which Mr Jenns relies: "*As requested and confirmed by mail if (sic) February 2nd 2009 a separate reduction on the whole project of totally D.kr 300,000 is agreed. We hope that our revised freight quotation meets the agreed terms and conditions and we are looking forward to hear further from you in order for us to commit our sub contractors."*

7. Neither the Framework Agreement nor the Transport Contract makes any reference to ALS.

8. In May 2009 ALS produced its own Operation Manual for the windfarm project which was provided to F&T and to Siemens. ALS described itself in the header (which appeared on each page) and on the front page as "*agents for Franck & Tobiesen*". The Operation Manual contained a few references to subcontractors.

9. In May 2009 Mar-Train produced a Method Statement for the Curragh contract which on the front page identified ALS as Mar-train's client and referred to ALS's responsibilities on the project. At the back of the Method Statement was set out Mar-train's insurance details which included under the goods in transit policy: "*LIMITS OF INDEMNITY: RHA 1998 LIMIT: £5,000 per tonne and CMR LIMIT: £750,000*".

Mar-Train's invoices – sent to ALS

10. Mar-train sent ALS various invoices dated between 30 April 2009 and 30 June 2009 in relation to the Curragh windfarm project, totalling €360,050. Almost every invoice included Mar-train's VAT number and was addressed to ALS at its address in the UK and with ALS's VAT No. Printed on the bottom of each invoice was "*All goods transported under our conditions of carriage – copy on request"*.

ALS's invoices – sent to F&T

11. ALS sent its own invoices to F&T totalling €516,799.25. Each stated ALS's VAT number, was addressed to F&T in Denmark and stated on the right hand foot of the

page: "*All business transacted under the Standard Trading Conditions (2005 Edition) of the British International Freight Association*".

12. ALS's final invoice of 26 November 2009 recorded ALS's 50% share of the profit on the project "*Profit share as agreed*", in the sum of €20,687.50.

13. Mr Smart of ALS says that it was made clear to F&T over an extended course of previous dealing that all services provided by ALS were supplied subject to ALS standard terms, the BIFA 2005 terms which contain an English Jurisdiction clause at clause 28. It is not disputed that ALS referred to the BIFA 2005 terms on every invoice sent to F&T over a course of dealing stretching back a number of years, including four previous wind farm projects and that these invoices were all paid without objection.

14. Clause 16 of the RHA 1998 Terms provides for English jurisdiction. In the settlement agreement which brought the first English proceedings, referred to below, to an end it was expressly agreed and accepted by all parties that Mar-Train contracted with ALS upon RHA 1998 terms. In the Danish proceedings, F&T has relied on the fact that Mar-Train traded on the RHA 1998 Terms to limit its own liability**.**

The first English and the Danish proceedings

15. On 26 February 2010, Siemens and others commenced the proceedings in the English Commercial Court against ALS, Mar-train and F&T (the Claim Form was subsequently amended to remove F&T as a party to the action). The claims were framed in contract, tort and bailment and claimed damages estimated at €1.1 million.

16. On the same day that F&T was removed as a Defendant to the first English Proceedings, a claim was commenced in Denmark against F&T by five of the six claimants in the first English proceedings. In the Danish proceedings Siemens claim €500,000 in damages as compensation for the damage to the nacelle. It is alleged that F&T was vicariously liable for the negligence of Mar-Train. The Danish proceedings were then stayed in favour of the first English proceedings. The stay was removed following the settlement of the first English action.

17. The first English proceedings progressed. ALS and Mar-Train both served contribution notices. Disclosure was made. The proceedings settled at a mediation held on 24 January 2013. F&T attended this mediation but says that it did not participate. The settlement agreement subsequently drawn up and signed on 1 February 2013 by all parties to the English action provided for ALS to pay the Claimants £20,000 and Mar-Train to pay the Claimants £80,000. All additional/Part 20 claims were discontinued. Paragraph 1 of the settlement agreement provided: *"In reaching this agreement it is expressly recognised by the parties that [Mar-Train] contracted with [ALS] upon terms of the Road Haulage Association Conditions of Carriage 1998 edition."*

18. A witness statement dated 18 January 2013 by Mr Smart of ALS, confirmed that when Mar-Train were appointed to act in the Project he had known and accepted that the RHA 1998 terms should apply. This statement had been tabled at the mediation.

Article 23- the approach to an application

19. The relevant part of Article 23 says this;

> *"1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:*
>
> *(a) in writing or evidenced in writing; or*
>
> *(b) in a form which accords with practices which the parties have established between themselves; or*
>
> *(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned."*

20. Counsel helpfully cited a considerable number of cases. Except in one respect, which I will deal with below, the differences of emphasis in the submissions do not, as I see it, matter in this case. The task of the Court can be summarised in extracts from two cases.

21. Mar-Train must show a good arguable case. This was explained by Lord Rodger in the Privy Council in Bols Distilleries-v-Superior Yacht Services [2007] 1 WLR 12 at Para 28.

> *"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 art 2(1) is ousted by art 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 art 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."*

22. In Antonio Gramsci Shipping Corp and others v Lembergs and others - [2013] 4 All ER 157 at 170 Beatson LJ, in a judgment with which his colleagues agreed, said this;

> *"[35] I turn to the Brussels Regulation. The general rule under the Regulation is that jurisdiction is generally to be based on*

the defendant's domicile. The underlying principle is that it must always be so based, save in well-defined situations in which the subject matter of the litigation or the autonomy of the parties requires a different linking factor: see recital (11) to the Regulation. A further principle (see recital (15)) is that it is necessary to minimise the possibility of concurrent proceedings.

[36] Article 23, which requires a consensus between the parties that a particular court is to have jurisdiction, like its predecessor art 17 of the Brussels Convention, is based on the autonomy of the parties. Its material part provides:[and he then sets out the text]

[37] The purpose of art 23 is to ensure that the parties have actually consented to the choice of jurisdiction. The decisions of the ECJ (now the CJEU) make it clear that, to be effective for the purpose of art 23, an agreement to confer jurisdiction must establish consensus between the parties 'clearly and precisely': Estasis Salotti di Colzani Aimo e Gianmario Colzani snc v Rüwa Polstereimaschinen GmbH Case 24/76 [1976] ECR 1831 and Galeries Segoura SPRL v Socieìteì Rahim Bonakdarian Case 25/76 [1976] ECR 1851.

[38] There is, however, a measure of flexibility. Although (see Iveco Fiat SpA v Van Hool NV Case 313/85 [1986] ECR 3337) the ECJ stated that 'the sole purpose of the formal requirement [in art 23] is to ensure that the consensus between the parties is in fact established', an oral agreement conferring jurisdiction can suffice. This will be so where the oral agreement is later confirmed in writing by one party and the other party has raised no objection in sufficient time: see Berghoefer GmbH & Co KG v ASA SA Case 221/84 [1985] ECR 2699. Briggs on Civil Jurisdiction and Judgments (5th edn, 2009) ed Rees, p 178 states that the formal requirements 'are a means to an end, and are not an end in themselves', and—

'[t]he only question, sight of which must not be lost, is that the formal requirements are there to ensure that there was consensus. If the consensus can be clearly and precisely established by other means, they serve no additional function, and there is no further need to consider them.'

[39] Secondly, written consensus may exist in the absence of a binding contract: see Fentiman International Commercial Litigation (2010) para 2.40, giving a non-binding memorandum and an unsigned version of a contract which requires a signature as examples.

[40] Despite this measured flexibility, the jurisprudence of the ECJ regards the departures from the general rule of domicile-

> *based jurisdiction, including art 23, as derogations. In that sense they are regarded as exceptions to the general rule, although to regard jurisdiction based on art 23 as exceptional may (see Fentiman International Commercial Litigation (2010) para 2.42) risk placing an obstacle to giving effect to party autonomy.*
>
> *[41] There are also statements that departures from the general rule of domicile-based jurisdiction should be strictly construed (see Estasis Salotti v Rüwa Case 24/76 [1976] ECR 1831 (para 7) and Bank of Tokyo-Mitsubishi Ltd v Baskan Gida Sanayi ve Pazarlama AS [2004] EWHC 945 (Ch) at [191], [2004] 2 Lloyd's Rep 395 at [191] per Lawrence Collins J, as he then was) and interpreted in 'keeping with the spirit of certainty'. This means they should be interpreted so as to ensure that they are only applicable in clear cases and without having to delve into the merits of the underlying dispute: see Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA Case C-159/97 [1999] ECR I-1597 (paras 48–49). This last point has particular relevance when what is under consideration is an inquiry at the interlocutory stage in a case such as this one where there is a sharp conflict of evidence."*

Is there a good arguable case that Mar-train contracted with ALS on RHA 1998 terms and that F&T contracted with ALS on BIFA terms?

23. Mr Kimbell for Mar-Train relies on the evidence of Mr Smart of ALS, consistent he says with the Method Statement, that these terms applied, on the fact that these are standard in the industry and on the fact that this was explicitly accepted in the Settlement Agreement in the English action.

24. Mr Jenns contends otherwise. He raises some legitimate concerns about the reliability of the evidence of Mr Martin and Mr Smart (which cannot be pursued at this point), notably that the statement of the latter is not consistent with his former company's pleaded case in the first action. He points to the fact that in the Method Statement the RHA limit was higher than that provided in the terms themselves (but this almost makes the point that in principle the terms apply). There is a difference about the significance of what is said in the Danish proceedings which I see as immaterial.

25. As Mr Jenns seemed to recognise, at this stage of the action and given the relevant test, Mar-Train has a good arguable case that the RHA terms, with their English law jurisdiction clause, applied, as the representatives of both sides to that contract testified.

26. F&T now concedes the inevitable, given the evidence and the documentary trail, there is a good arguable case that it contracted with ALS on BIFA terms with their English jurisdiction clause.

Did ALS act as F&T's agent when it contracted with Mar-Train?

27. Can Mar-Train show a good arguable case that ALS acted not as a principal but as F&T's agent in the contract with Mar-Train? If so F&T contracted on RHA terms with their English jurisdiction clause and thus consented under Article 23.

28. Mr Jenns correctly summarises the test to be applied, as it so frequently is in the Mercantile court, to transactions of this kind. Forwarding agents act in many capacities, sometimes as agents and sometimes as principals. In Tetroc Ltd v Cross-Con (International) Ltd [1981] 1 Lloyd's Rep 192 at 198 Judge Martin approved the statement of Bean J that: "*when a Judge has to decide whether a party is acting as a principal or an agent, it is very much a matter of impression, what impression the evidence forms."* In Aqualon (UK) Ltd v Vallana Shipping Corporation [1994] 1 Lloyd's Rep 669 at 674, Mance J set out five relevant factors, (a) the terms used by the parties in making their contract; (b) any description adopted in relation to a party's role; (c) the course of any prior dealings; (d) the nature and basis of charging; and (e) the terms of any CMR note- a factor which does not apply here.

29. I take the four relevant factors in turn. I emphasise that this is a matter of impression looking at the individual elements and then stepping back to look at the question overall. The exercise often involves evaluation of expressions like 'agent' and 'sub contractor' which not only have a broad commercial as well as a legal meaning but are used loosely by busy business people, including many for whom English is not the first language. Similarly in transport industries messages are often left and deliveries signed for by drivers and others whose job does not require them to weigh carefully expressions to which lawyers attach significance. Furthermore in international trade, where services are often provided in different ways in what may be several countries in the course of a transaction, the range of activity of an agent or a subcontractor may be very wide or narrow and still be consistent with that function.

The terms used by the parties in making their contract

30. Mr Jenns argues that the terms of the contract between ALS and F&T are primarily set out in Mr Smart's email to F&T of 30 January 2009. There is nothing in Mr Smart's email to suggest that ALS was contracting as F&T's agent to procure carriage. Mr Kimbell says that the e-mail is dealing with costs and expenses of performance. It has to be seen in the context an existing relationship between ALS and F&T and their prior course of dealing (including 4 previous wind farm projects). As I see it the email is equivocal.

31. It is common ground that the BIFA terms which give ALS the option of contracting as agent or as principal are of themselves neutral on the issue but they do show that ALS had actual authority to act as agent of F&T.

32. Mr Jenns relies on BIFA Clause 6(B) of the BIFA 2005 terms which requires ALS to provide F&T on demand with evidence of any contract entered into by it as agent for F&T, failing which it shall be deemed to have contracted as a principal. Mr Jenns says that there can be no such evidence so ALS ought to be deemed to have contracted as principal. Mr Kimbell says that disclosure in the earlier action and the two witness statements of Mr Smart all constitute 'evidence' that Mar-Train's RHA terms were agreed for all the wind farm projects and that ALS acted as F&T's agent. Further all that must be shown by Mar-Train is that ALS had actual or ostensible authority to act as F&T's agent and so acted when it contracted with Mar-Train. As I

see it this point is too technical to bear much weight in a context where the court is forming an impression based on a range of factors the relevant one of which is the terms used by the parties in making their contract.

Any description used or adopted by the parties in relation to the contracting party's role

33. F&T relies on the fact that its offer to Siemens of 3 February 2009 said it waited to hear from Siemens "*in order for us to commit our subcontractors"*. This, it says, reflected F&T's and ALS's understanding that ALS who would, as principals, engage Mar-Train. ALS says that the use of the term "subcontractors" in a commercial quotation carries very little weight in determining the capacity in which F&T engaged ALS. ALS is correct.

34. The May 2009 Operation Manual refers on the front page and header to every page to ALS acting as "agents" of F&T. F&T says that these references should be accorded little weight because the Manual was produced unilaterally by ALS several months after the contract was concluded. Further the fact that a person describes himself as an agent is not determinative and the Manual refers to ALS appointing subcontractors to carry out the work. Mr Kimbell submits that the Operations Manual is an important document. It states on every page that ALS was acting as agent for F&T. Identical manuals were produced on the three previous wind turbine projects. In the context of a document which states on every page that ALS acts as an agent, he says that occasional references in the document to "subcontractors" carry no weight.

35. The Manual is a significant document. The Manual was one of a series generated for each project. ALS is described prominently on the front page "As Agents for" F&T. ALS is expressly referred to as having responsibilities as such and the terminology heads every page. References to "subcontractor" are few and not directly relevant (such as in the section dealing with health and safety). The quality of these references to subcontractor is low. The Manual is the only document describing clearly what the relationships are on the project. F&T is described as having been awarded a contract by Siemens and ALS, working as F&T's agents, has the responsibilities set out.

36. I bear in mind other documents and factors relied on by F&T. Mar-Train's Method Statement describes ALS as its "Client" and sets out in detail ALS's ongoing responsibilities on the project. But this does not touch on whether ALS was in fact acting as F&T's agent. It is not disputed that Mr Smart handled all communications with sub-contractors and attended the discharge ports and windfarm sites to supervise and oversee the operations, but this is consistent with both cases. ALS invoiced F&T €5,000 for its attendance at two site visits. This is correct but ALS could choose which tasks to delegate to third parties and which to do for it. I appreciate that ALS did not inform F&T of the terms of the contracts it had entered into with its sub-contractors and suppliers- but it was under no obligation to do so unless asked to do so by F&T.

The course of any dealings between the parties

37. F&T points to Mr Martin's evidence that ALS sometimes performed physical carriage itself and sometimes engaged Mar-Train to carry, if it did not have the resources or capacity to do so itself. This too points both ways.

The nature and basis of charging

38. Mr Martin's evidence is that Mar-Train invoiced ALS and looked to ALS for payment of its costs. Mr Smart's evidence is that ALS paid Mar-Train's invoices and did not look to F&T to pay them. ALS then raised its own separate invoices which were compendious, including all the costs of ALS's sub-contractors (or, to put it neutrally, suppliers). ALS did not enclose Mar-Train's invoices or any other underlying documents or invoices. ALS's invoices did not include full details of the underlying invoices received. F&T's 3 February 2009 quote to Siemens was presented on a lump sum basis and included an undisclosed margin for profit that F&T and ALS would make on the transaction. F&T and ALS agreed to split the profit on the project 50/50, notwithstanding that ALS had no involvement in the sea leg. Accordingly, ALS's quote to F&T was effectively presented via F&T to the ultimate client, Siemens, on a lump sum basis with an undisclosed profit element built in. ALS invoiced F&T for its €20,687.50 agreed profit share at the end of the project, after all the costs had been worked out.

39. F&T argues that ALS's remuneration was therefore worked out on a risk/reward basis. If the costs were higher than expected ALS's share of the profit element would reduce pro rata with the profit F&T was making on the deal. This is inimical to the concept of agency. It cannot be right for ALS to take the reward of a profit on a transaction and not the risk.

40. ALS says that the manner in which ALS passed on to F&T sums claimed by Mar-Train plus its own expenses and fee is consistent with it acting as F&T's agent. The only arrangement which would have been a strong counter indicator of agency is if ALS had charged a lump sum price to F&T and Mar-Train had charged a different lump sum price to ALS.

41. Mr Kimbell argues that the fact that ALS did not pass on Mar-Train's invoices to F&T is neither here nor there – it was not required to do so unless required by F&T. A profit sharing agreement is not at all inconsistent with agency, it is a means of agency remuneration aimed to incentivise the agent to achieve favourable rates for its principal.

42. This factor, taken on its own, points more towards ALS being a principal, not an agent for F&T but it cannot of course be seen in isolation.

Other factors said to be relevant – the Witness Evidence and the First English Proceedings

43. Counsel make able and detailed submissions based on the positions apparently adopted or not adopted in the other proceedings but there is no question of estoppel and I attach little weight to these tactical expressions of the suggested position at particular times.

44. There is evidence from both sides on the agency issue. Mr Ebdrup's evidence is that ALS had no actual authority to bind F&T to a contract with a third party. He says that F&T never represented to Mar-Train or held ALS out as having authority to bind F&T directly to a contract with Mar-Train. Mr Smart gives evidence to the contrary relying mainly on the Manual. None of the witnesses add to the material available except by

understandably but not helpfully setting out their subjective understanding of the contractual position.

Agency- Decision

45. There are as usual factors pointing both ways but the Operation Manual is by far the most significant document for reasons I have already given. ALS had actual authority to act on behalf of F&T because of the BIFA terms. The Manual describes the relationship between F&T and ALS and is a document that ALS passed to F&T and Siemens. A document produced by one of the parties affected and seen and not objected to by the other, generated at the time of the project and defining their relationship is strong evidence, particularly when there is no equivalent document suggesting the reverse. As I see it Mar-Train has much the better of the argument on this point and it follows that the application fails.

Unilateral consent

46. Mr Kimbell argues in the alternative that the question for the Court on this application is simply whether on the evidence before it Mar-Train can establish a good arguable case that F&T unilaterally consented to English jurisdiction by agreeing to the BIFA 2005 terms and/or RHA 1998 terms. He says that it is now clear that the relevant question is whether there has been unilateral consent to jurisdiction rather than bilateral consent evidenced in a contract and he relies on the decision of the Court of Appeal in Aeroflot v Berezovsky [2013] 2 Lloyd's Rep 242 at [46] – [68] endorsing the approach of Professor Briggs. At para 64 Aikens LJ says this;

> *"At the hearing I drew the parties' attention to a recent article of Professor Briggs ("The subtle variety of jurisdiction agreements" in [2012] LMCLQ 364: see 376 – 381.) which further discusses these (amongst other) issues and which, for my part, I find as persuasive as it is characteristically robust. For present purposes the important arguments are, first, that "the parties" in art 23 means the parties to the litigation, not necessarily to a contract, so one is immediately not concerned with the substantive validity of a contract for the purposes of deciding whether the conditions in art 23 have been satisfied. Secondly, Professor Briggs reaffirms his previously expressed view that the ECJ "has gone out of its way" to emphasise that the jurisdictional validity and effect of a jurisdiction clause is to be assessed by reference to the requirements of the Article, not any national law, whether it be the putative applicable law of the contract or some other law. Thirdly, the agreement of a party is not bilateral or contractual, but unilateral. And the tests of whether there has been the necessary unilateral agreement are those set out in art 23, viz a "written manifestation of consent" or some other sufficiently formal act of agreement, as laid down in the Article. Fourthly, however, there may be an autonomous principle by which one party cannot rely on the written manifestation of consent by the other*

> *party, because to do so would be an exercise of bad faith. (I take this to be the effect of fn 87. But none of the cases referred to advance the present argument, including the decision of the Court of Appeal in Sherdley v Nordea Life and Pensions SA [2012] EWCA Civ 88, [2012] 2 All ER (Comm) 725, [2012] NLJR 293.) Professor Briggs expressed doubts on whether, despite contrary statements in the Deutsche Bank case, the European approach to consent to jurisdictional clauses is based on the doctrine of "separability". However, I think I am bound by what this court held in that case, so that I must proceed on the basis that the doctrine of "separability" is now uncontroversial as a matter of EU law."*

47. Mr Jenns responded to this submission by reference in particular to the ECJ case of Refcomp-v-AXA Corporate Solutions Assurance [2013]1All ER 1201. He also submitted that I should hold that the passage from Berezovsky which I have quoted is obiter and wrong. I duck this issue for two reasons. First it is not necessary for my decision in this case and there are no findings that I can reach which would assist an appellate court. Secondly it is not generally a good idea for a judge at my level to pursue such a bold course.

Conclusion

48. The application fails. I shall be grateful if Counsel will let me have a list of corrections of the usual kind and a draft order, both preferably agreed, and a note of any matters they wish to raise at the hand down of this judgment not less than 72 hours before the hearing.