Neutral Citation Number: [2013] EWHC 2926 (Comm)

Case No: 2012 Folio 1136

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

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 03/10/2013

Before:

THE HONOURABLE MR JUSTICE FLAUX

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Between:

ERSTE GROUP BANK A.G. London Branch	**Claimant**
- and -	
(1) JSC "VMZ RED OCTOBER" **(2) RED OCTOBER STEEL WORKS** **(3) STATE CORPORATION FOR ASSISTANCE TO DEVELOPMENT, PRODUCTION AND EXPORT OF ADVANCED TECHNOLOGY INDUSTRIAL PRODUCT "RUSSIAN TECHNOLOGIES"** **(4) CJSC RUSSPETSSTAL** **(5) LLC RT-CAPITAL** **(6) CJSC NIOKRINVEST** **(7) OJSC RUSSPETSMASH** **(8) LLC SPETSSTALRESURS**	**Defendants**

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Simon Salzedo QC and David Scannell (instructed by **Gide Loyrette Nouel LLP**) for the **Claimant**
Richard Morgan QC and James Sheehan (instructed by **Macfarlanes LLP**) for the **Third Defendant**
David Mumford (instructed by **Enyo Law LLP**) for the **Fifth Defendant**

Hearing dates: 17-20, 24 June, 3 July 2013

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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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THE HON MR JUSTICE FLAUX

The Honourable Mr Justice Flaux:

Introduction

1. The Third and Fifth Defendants make applications both dated 31 January 2013 to set aside service of these proceedings upon them outside the jurisdiction in Russia pursuant to the Order of Cooke J dated 24 October 2012.

2. The Claimant (referred to hereafter as "Erste") is the London branch of an Austrian bank. It was one of a syndicate of lenders ("the Lenders") who participated to the extent of 25% each in a US$80 million loan to the First Defendant (referred to hereafter as "the borrower") pursuant to a Facility Agreement ("the Loan Agreement") dated 26 November 2007. At the time, the borrower owned and operated one of Russia's largest steel works, the Red October facility in Volgograd, employing thousands of people and supplying the Russian defence industry. The original lender was VTB Capital plc, which acted as the Facility Agent under the Loan Agreement. The Loan Agreement is governed by English law. It contains a London arbitration clause but with a mechanism under clause 37.4 whereby, at the Lenders' option, a notice can be served on the borrower requiring the relevant dispute to be determined in court, in which case the English courts had exclusive jurisdiction to settle the dispute.

3. The Second Defendant (referred to hereafter as "the guarantor") is the immediate parent of the borrower and itself a wholly owned subsidiary of the Fourth Defendant and (on Erste's case, in relation to which there is a serious issue to be tried) an indirect subsidiary of the Third Defendant. The guarantor guaranteed the performance of the borrower under the Loan Agreement pursuant to a Guarantee also dated 26 November 2007. The Guarantee is also governed by English law. It also contains a London arbitration clause but with the same mechanism under clause 13.5 whereby the Lenders can require a dispute to be subject to the exclusive jurisdiction of the English courts.

4. The Third Defendant (hereafter referred to for convenience as "RT") is a State Corporation incorporated by statute on 23 November 2007 for the purposes of managing Russia's military and manufacturing assets and developing its military industry. Its supervisory council, its ultimate management body, comprises nine members, four who are representatives of the President of Russia, four who are representatives of the Government of Russia and one who is described as the "general director". One of the representatives of the President, who was the Chief Executive Officer at all material times was Mr Sergei Chemezov. It is not disputed that Mr Chemezov is one of President Putin's oldest and most trusted friends and colleagues, they having shared a house together in Dresden in the period 1983 to 1988 when they were both KGB agents in East Germany.

5. On 31 July 2009, a repayment under the Loan Agreement of US$1,666,666.67 fell due which was not honoured by either the borrower or the guarantor. Prior to that repayments had been met on time. Notice of default was served on the borrower requiring repayment of the loan plus interest. Erste's case in these proceedings is that the default by the borrower and the guarantor was engineered deliberately by an unlawful means conspiracy between RT and the other Defendants (all of whom Erste contends are controlled by RT) designed to strip the borrower and the guarantor of

their assets and render them insolvent. In these proceedings Erste claims against the borrower and the guarantor in debt and under the contracts. It then claims against all the Defendants damages for unlawful means conspiracy, alternatively lawful means conspiracy, damages for unlawful interference with economic interests and/or with contractual relations. Erste also seeks an Order under section 423 of the Insolvency Act 1986. This case is strenuously resisted by RT and RT Capital on these applications. The inability of the borrower and the guarantor to honour their obligations is said by them to have been due to the failure of the business in 2009 due to the global economic downturn. Erste disputes that explanation, pointing out that the steel manufacturing business, although now run by different companies set up for the purpose, has been profitable in the last two years.

6. In relation to the claims against the borrower and the guarantor, on 18 August 2011 Erste served notices under clause 37.4 and 13.5 of the Loan Agreement and Guarantee respectively to litigate the dispute with them before the English courts. The dispute was described in the notices as "The Dispute concerns the Borrower's [or Guarantor's] failure to repay the indebtedness under the Facility Agreement [as required by the Guarantee]." In his submissions before me, Mr Richard Morgan QC for RT contended that, although these notices were effective in respect of the claims against the borrower and the guarantor in debt and for breach of contract, they did not encompass the claims against them in conspiracy or the other wider claims, including under section 423. I should say at the outset that I disagree: all the claims against the borrower and guarantor "concern" their failure to repay the indebtedness so that the notices caught all the claims. However, in any event, this proved a non-point because during the course of the hearing Erste's solicitors served fresh notices which on any view were wide enough to encompass all the claims. It follows that (subject to the submission by Mr Morgan that Erste has by various actions in Russia submitted to the jurisdiction of the Russian insolvency courts any wider claim against the borrower and guarantor, to which I will return in detail below) all claims against the borrower and the guarantor are subject to the exclusive jurisdiction of the English courts.

7. So far as the claims under the Loan Agreement and the Guarantee are concerned, they were the subject of a summary judgment application by Erste which was heard by HHJ Mackie QC on 14 December 2012. Both Defendants had been served with the proceedings and with notice of that application but chose not to participate save for issues raised by the liquidation manager of the guarantor that those two Defendants were subject to insolvency proceedings in Russia and that a Russian court had declared the Guarantee invalid under Russian law. Those issues (which are echoed by some of the points taken now before me) were rejected by the learned judge who decided neither issue had a reasonable prospect of success as a defence. He granted summary judgment against both defendants for US$16,843,003.13 plus interest, then standing at about €4 million. There was no appeal from that Order but equally no payment has been made to Erste.

Principles applicable on applications to set aside service out of the jurisdiction

8. A useful summary of the applicable legal principles is to be found in the recent decision of the Court of Appeal in *VTB Capital v Nutritek International* [2012] EWCA Civ 808; [2012] 2 Lloyd's Rep 313 at [99]-[100] in the judgment of Lloyd LJ:

> "99. There was no dispute between the parties on the general principles to be applied when deciding whether permission should be granted to serve proceedings on a defendant who is out of the jurisdiction, under the terms of paragraph 3.1 of Practice Direction 6B of the CPR. The three basic principles were recently restated by Lord Collins of Mapesbury in giving the advice of the Privy Council in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804 at paragraphs 71, 81 and 88. They can be summarised as follows: first, the claimant must satisfy the court that, in relation to the foreign defendant to be served with the proceedings, there is a serious issue to be tried on the merits of the claim, i.e. a substantial question of fact or law or both. This means that there has to be a real, as opposed to a fanciful, prospect of success on the claim. Secondly, the claimant must satisfy the court that there is a good arguable case that the claim against the foreign defendant falls within one or more of the classes of case for which leave to serve out of the jurisdiction may be given. These are now set out in paragraph 3.1 of Practice Direction 6B. "Good arguable case" in this context means that the claimant has a much better argument than the foreign defendant. Further, where a question of law arises in connection with a dispute about service out of the jurisdiction and that question of law goes to the existence of the jurisdiction (e.g. whether a claim falls within one of the classes set out in paragraph 3.1 of Practice Direction 6B), then the court will normally decide the question of law, as opposed to seeing whether there is a good arguable case on that issue of law.
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> 100. Thirdly, the claimant must satisfy the court that 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. This requirement is reflected in Rule 6.37(3) of the CPR, which provides that "The court will not give permission [to serve a claim form out of the jurisdiction on any of the grounds set out in paragraph 3.1 of Practice Direction 6B] unless satisfied that England and Wales is the proper place in which to bring the claim"."

9. So far as the first requirement the claimant has to satisfy, that there is a serious issue to be tried on the merits is concerned, as that summary demonstrates, the test is the same as "a reasonable [or real] prospect of success" for the purposes of strike out under CPR Part 3 or summary judgment under CPR Part 24. Any number of cases have emphasised how this is a relatively low threshold and that, in considering whether the claimant satisfies it, the court must not engage in some form of mini-trial on the merits at this early interlocutory stage. The correct approach was succinctly put by Gross J (as he then was) in *Swiss Reinsurance Company Limited v United India Insurance Company* [2002] EWHC 741 (Comm) at [27] as follows:

> "To my mind, the wording in [6.37(1)(b)] is synonymous with "real prospect of success" — wording to be found in CPR parts 3 and 24. "Real" is to be contrasted with fanciful or imaginary. Once this stage is reached, the test is the same or substantially the same as the test in *Seaconsar*: an issue which is imaginary or fanciful is not a serious issue to be tried. … Any higher test would doom parties in such applications to unwarranted mini trials on the merits."

10. The importance of the need to avoid a detailed exploration of the merits at the stage of a challenge to the jurisdiction is of particular significance in the present case where the Court is faced with 17 lever arch files of evidence, with RT and RT Capital seeking to challenge Erste on almost every point and seeking to rebut what Erste says in reply. In that context, what Lord Neuberger said recently in *VTB Capital plc v Nutritek International* [2013] UKSC 5; [2013] 2 WLR 398 at [82]-[83] has a particular resonance:

> "82. The first point is that hearings concerning the issue of appropriate forum should not involve masses of documents, long witness statements, detailed analysis of the issues, and long argument. It is self-defeating if, in order to determine whether an action should proceed to trial in this jurisdiction, the parties prepare for and conduct a hearing which approaches the putative trial itself, in terms of effort, time and cost. There is also a real danger that, if the hearing is an expensive and time-consuming exercise, it will be used by a richer party to wear down a poorer party, or by a party with a weak case to prevent, or at least to discourage, a party with a strong case from enforcing its rights.
>
> 83. Quite apart from this, it is simply disproportionate for parties to incur costs, often running to hundreds of thousands of pounds each, and to spend many days in court, on such a hearing. The essentially relevant factors should, in the main at any rate, be capable of being identified relatively simply and, in many respects, uncontroversially. There is little point in going into much detail: when determining such applications, the court can only form preliminary views on most of the relevant legal issues and cannot be anything like certain about which issues and what evidence will eventuate if the matter proceeds to trial."

11. Although his Lordship was deprecating the proliferation of documentation in relation to determination of the third requirement, of appropriate forum, his observations are obviously equally applicable to the other aspects of jurisdictional challenges. He is reflecting an oft repeated warning by judges against over-analysis of the facts at the stage of a jurisdictional challenge. I agree with Mr Salzedo QC that the approach of RT and RT Capital to the presentation of their jurisdictional challenge in the present case ignores that warning and adopts a "scattergun" approach of adducing evidence which might support every conceivable argument available in principle on a jurisdictional challenge. The positive barrage of evidence from the Defendants

continued during the hearing, even after their oral submissions had been made in support of their applications.

12. However, the reality is that, unless RT and RT Capital had some "killer point" which demonstrated that Erste's case on the facts was unsustainable (and, for reasons I will develop in detail below, they do not have any such "killer point"), the expending of so much time and energy on a full-scale evidential challenge is a fruitless exercise. All it succeeds in doing is demonstrating that Erste has raised serious issues to be tried.

13. As the summary by Lloyd LJ demonstrates, so far as the second requirement the claimant must satisfy of bringing itself within one or more of the jurisdictional gateways in para 3.1 of Practice Direction 6B is concerned, the test is higher than a serious issue to be tried. The reference to "a much better argument" is to the so-called *Canada Trust* gloss, derived from the judgment of Waller LJ in *Canada Trust v Stolzenberg (No. 2)* [1998] 1 WLR 547 at 555:

> "It is I believe important to recognise, as the language of their Lordships in *Korner* [[1951] AC 869] demonstrated, that what the court is endeavouring to do is to find a concept not capable of very precise definition which reflects that the plaintiff must properly satisfy the court that it is right for the court to take jurisdiction. That may involve in some cases considering matters which go both to jurisdiction and to the very matter to be argued at the trial e.g. the existence of a contract, but in other cases a matter which goes purely to jurisdiction e.g. the domicile of a defendant. The concept also reflects that the question before the court is one which should be decided on affidavits from both sides and without full discovery and/or cross examination, and in relation to which therefore to apply the language of the civil burden of proof applicable to issues after full trial, is inapposite. Although there is power under Ord.12 r.8(5) to order a preliminary issue on jurisdiction, as Staughton L.J. pointed out in *Attock*, at p.1156D it is seldom that the power is used because trials on jurisdiction issues are to be strongly discouraged. It is also important to remember that the phrase which reflects the concept "good arguable case" as the other phrases in *Korner* "a strong argument" and "a case for strong argument" were originally employed in relation to points which related to jurisdiction but which might also be argued about at the trial. The court in such cases must be concerned not even to appear to express some concluded view as to the merits, e.g. as to whether the contract existed or not. It is also right to remember that the "good arguable case" test, although obviously applicable to the ex parte stage, becomes of most significance at the inter partes stage where two arguments are being weighed in the interlocutory context which, as I have stressed, must not become a "trial". "Good arguable case" reflects in that context that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate i.e. 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."

14. Two caveats have to be borne in mind in considering this second requirement. First, that consideration of whether the claimant can satisfy one or other of the jurisdictional gateways must not become the subject of a trial on the facts at this interlocutory stage. That was a point which Waller LJ was himself making in the passage cited but Mr Salzedo QC for Erste drew attention to the cautionary approach to the *Canada Trust* gloss which was emphasised by Rix LJ in *Konkola Copper Mines v Coromin* [2006] 1 Lloyd's Rep 410 at [81]:

> "If a court, in applying the good arguable case test, as well as taking account of the opposing arguments as it has always done, in addition had to decide and rule as to which side had the "much better argument", I fear that, however much the judge couched his reasoning in terms of the provisional nature of his decision on the material available, he would inevitably be drawn into a trial of the merits. This is plainly undesirable. Is it necessary? I am doubtful that it is, especially in circumstances where, as was generally the case under the old RSC Order 11 or is now the position under CPR 6.20, the power to give leave to serve out of the jurisdiction is at the end of the day a discretionary one. However important the proper disposition of a jurisdictional challenge is, it is not something which should be allowed to subvert the merits of a potential trial."

15. Second, although the claimant has to have the better of the argument, that is emphatically not as stringent as establishing the jurisdictional gateway threshold on the balance of probabilities: see e.g. *Carvill America Inc v Camperdown UK Ltd* [2005] 2 Lloyd's Rep 457 at [45] per Clarke LJ. The correct approach to the jurisdictional gateway threshold was summarised in this way by Christopher Clarke J (as he then was) in *Cherney v Deripaska* [2008] EWHC 1530 (Comm); [2009] 1 All ER (Comm) 333 at [44]:

> "I do not regard this [i.e. the *Canada Trust* gloss] 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."

16. The principles applicable to the third requirement the claimant must satisfy, that England is clearly the appropriate forum, are summarised by Waller LJ in the Court of Appeal in *Cherney v Deripaska* [2009] EWCA Civ 849; [2009] 2 CLC 408 at [19]-[21]:

19. Furthermore Lord Goff [in *The Spiliada* [1987] AC 460] was not using the word "appropriate" in the sense simply of "natural". The use of the word "appropriate" as opposed to "natural" in that summary was, I think, deliberate. In the summary Lord Goff has not gone through a two-stage process; he has gone straight to what is the ultimate question – what is the forum where in the interest of the parties and the ends of justice the trial should take place?

20. I accept that there are instances in the authorities when the word "appropriate" and the word "natural" in relation to forum are used interchangeably. Indeed Lord Goff himself could be said to be doing so, even in the judgment in *The Spiliada,* in the passage at 478C, to which I have already referred but will quote in full below, where he spells out what is involved at the "second stage". Lord Goff himself in *Connelly v RTZ Corporation PLC* [1998] AC 854 at 874D, in a stay case where the "natural" forum was Namibia, was satisfied that "this is a case in which, having regard to the nature of the litigation, substantial justice cannot be done in the appropriate forum, but can be done in this jurisdiction" (my underlining). But in *The Spiliada* Lord Goff had made clear that it would be better to distinguish between "natural", i.e. the forum with which the case had the most natural connection, and "appropriate", which may be different, to meet the ends of justice [see 478A quoted above]. In my view the summary in the notes on page 22 of the White Book under CPR6.37(4) *Forum Conveniens* summarises the position correctly:-

> "Subject to the differences set out below, the criteria that govern the application of the principle of forum conveniens where permission is sought to serve out of the jurisdiction are the same as those that govern the application of the principle of forum non conveniens where a stay is sought in respect of proceedings started within the jurisdiction. Those criteria are set out in *The Spiliada,* above:
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> > (i) The burden is upon the claimant to persuade the court that England is clearly the appropriate forum for the trial of the action.
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> > (ii) The appropriate forum is that forum where the case may most suitably be tried for the interests of all the parties and the ends of justice.
> >
> > (iii) One must consider first what is the "natural forum"; namely that with which the action has the most real and substantial connection. Connecting factors will include not only factors concerning convenience and expense (such as the availability of witnesses), but also factors such as the law governing

> the relevant transaction and the places where the parties reside and respectively carry on business.
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> (iv) In considering where the case can be tried most "suitably for the interests of all the parties and for the ends of justice" ordinary English procedural advantages such as a power to award interest, are normally irrelevant as are more generous English limitation periods where the claimant has failed to act prudently in respect of a shorter limitation period elsewhere.
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> (v) If the court concludes at that stage that there is another forum which is apparently as suitable or more suitable than England, it will normally refuse permission unless there are circumstances by reason of which justice requires that permission should nevertheless be granted. In this inquiry the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the claimant will not obtain justice in the foreign jurisdiction. Other factors include the absence of legal aid or the ability to obtain contribution in the foreign jurisdiction.
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> (vi) Where a party seeks to establish the existence of a matter that will assist him in persuading the court to exercise its discretion in his favour, the evidential burden in respect of that matter will rest upon the party asserting it."

> 21. That summary correctly emphasises, in relation to service out, the distinction between what may at stage one seem the "natural forum", as the place with which the case has the closest connection, and ultimately the "appropriate or proper forum" which a plaintiff can establish, even if England is not the "natural forum" if justice requires that permission to serve out be given."

17. In *The Abidan Daver* [1984] AC 398 at 411, Lord Diplock spoke of "the risk that justice will not be obtained" in the foreign jurisdiction having to be established by positive and cogent evidence. In later cases in the House of Lords their Lordships treated Lord Diplock's dictum as requiring evidence that the claimant "will not" obtain justice in the foreign jurisdiction: see for example per Lord Goff in *The Spiliada* [1987] AC 460 at 478. In *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804, Lord Collins discusses this question of the standard of proof required. Having referred to *The Spiliada* and other decisions of the House of Lords, he says at [94]-[95]:

> "94 In two decisions of the Court of Appeal it has been held that the relevant question to which the cogent evidence will go is to the *risk* that justice will not be done in the foreign jurisdiction, and that it is not necessary to establish that on the balance of probabilities that the risk will eventuate: *Cherney v Deripaska* [2009] EWCA Civ 849, [2009] 2 CLC 408, at [28]-[29], per Waller LJ; *Pacific International Sports Clubs Ltd. v Surkis* [2010] EWCA Civ 753, [34]-[35], per Mummery LJ. See also *OJSC Oil Company Yugraneft v Abramovich* [2008] EWHC 2613 (Comm), at [496], where Christopher Clarke J said that the risk of judicial impropriety could be inferred from such matters as departure from normal judicial practice, or irrational conclusions.
>
> 95 The better view is that, depending on the circumstances as a whole, the burden can be satisfied by showing that there is a real risk that justice will not be obtained in the foreign court by reason of incompetence or lack of independence or corruption. Of course, if it can be shown that justice "will not" be obtained that will weigh more heavily in the exercise of the discretion in the light of all other circumstances."

18. Lord Collins goes on to discuss at [97] that comity requires the court to be extremely cautious before concluding that there is a real risk that justice will not be done in a foreign jurisdiction, hence the need for cogent evidence to that effect. He expands on that point at [101]-[102] in these terms:

> "101 The true position is that there is no rule that the English court (or Manx court) [because that case was an appeal to the Privy Council from the Isle of Man] will not examine the question whether the foreign court or the foreign court system is corrupt or lacking in independence. The rule is that considerations of international comity will militate against any such finding in the absence of cogent evidence. That, and not the act of state doctrine or the principle of judicial restraint in *Buttes Gas & Oil Co v Hammer*, is the basis of Lord Diplock's dictum in *The Abidin Daver* and the decisions which follow it. Otherwise the paradoxical result would follow that, the worse the system of justice in the foreign country, the less it would be permissible to make adverse findings on it.
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> 102 That conclusion is also supported by the many cases in the United States courts in which the standard of justice in the foreign court has been examined in the context of *forum non conveniens* questions. It was said in *Blanco v Banco Industrial de Venezuela*, 997 F 2d 974, at [50] (2d Cir 1993), quoting earlier decisions, that it "is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation." That is not the enunciation of the act of state doctrine (well known in the United States) or the doctrine of judicial restraint in foreign

> relations cases (which has its origin in the United States), but simply a reflection of the fact that comity considerations require the court not to pass judgment on the foreign court system without adequate evidence. Evidence of corruption in the foreign court system is admissible (as, e.g., in *Cariajano v Occidental Petroleum Corp*, 626 F 3d 1137 (9th Cir 2010)), but it must go beyond generalised, anecdotal material: *Tuazon v RJ Reynolds Tobacco Co*, 433 F 3d 1163, 1179 (9th Cir 2006); *Stroitelstvo Bulgaria Ltd v Bulgarian-American Enterprise Fund*, 589 F 3d 417 (7th Cir 2009). Cases in which justice in the foreign legal system has been found wanting have been rare but they are by no means unknown: *Rasoulzadeh v Associated Press*, 574 F Supp 854 (SDNY 1983), affd 767 F 2d 908 (2d Cir 1985) and *Osorio v Dole Food Co*, 665 F Supp 2d 1307 (SD Fla 2009) are examples in the contexts of *forum non conveniens* and enforcement of foreign judgments respectively."

19. In its evidence and written submissions, Erste placed particular emphasis in contending that England was the appropriate and proper forum upon the risk that it could not obtain a fair trial of the present dispute in Russia. It is fair to say that by the time Mr Salzedo QC came to make his oral submissions, whilst that point was not in any sense abandoned (and I will deal with it below) the emphasis in Erste's submissions as to why England was clearly the appropriate and proper forum had shifted somewhat to other factors, in particular the fact that the case against the borrower and the guarantor in tort and under section 423 will proceed in England in any event on the basis that the English court has exclusive jurisdiction over that dispute, that on any view the other defendants are necessary or proper parties to the claim against the borrower and the guarantor and that, accordingly, the importance of trying the same dispute against all defendants in one forum and avoiding the risk of inconsistent judgments made England clearly the appropriate and proper forum.

Serious issue to be tried on the merits

20. It is necessary to consider Erste's case against the defendants and the various responses of RT and RT Capital in a certain amount of detail, whilst always bearing in mind the point I have already made that the Court is not engaged in any sort of mini-trial on the facts but only with whether Erste has shown a serious issue to be tried.

21. Before going through the factual history relied upon by Erste chronologically, I will deal with one aspect of Erste's overall case against all the defendants, that is the question of the control of the other defendants by RT. As already set out above, prior to the alienation of assets of which Erste complains, the borrower was a 100% subsidiary of the guarantor, which in turn was 100% owned by the Fourth Defendant, RusSpetsStal. Erste's case is that RT controls the Fourth Defendant and thus the borrower and the guarantor. In his submissions Mr Morgan QC sought to challenge that case, relying upon the fact that RT only held a minority shareholding in the Fourth Defendant of 25.3% through another entity called Promimpeks.

22. However, whatever the formal position as regards the shareholding, I agree with Mr Salzedo QC that there is evidence before the Court (both in [87] to [89] of the First

Witness Statement of Mr Rooney of Erste's solicitors and elsewhere) to demonstrate a sufficiently arguable case that RT controlled the Fourth Defendant, the guarantor and the borrower:

(1) In November 2007 an Information Memorandum was prepared for investors which stated that the majority of the board of the Fourth Defendant comprised Mr Chemezov, Mr Aleshin and Mr Zavyalov, all of whom were or became members of the board of RT. Although the evidence put forward by RT in support of its application from Mr Kudashkin, the head of its legal department, is that until RT acquired 100% of the shares in Promimpeks on 29 June 2009, Promimpeks was owned by another state enterprise, Rosoboronexport, it is striking that Mr Kudashkin only puts forward somewhat guarded evidence based on what he describes as "the publicly available information".

(2) Furthermore the suggestion that RT had no interest, direct or indirect in the Fourth Defendant, until 29 June 2009 lies uneasily with that Information Memorandum which refers to the strategic goal of the Fourth Defendant being "to create a state controlled specialised steel and alloys group in Russia". As I pointed out to Mr Morgan in argument, it is difficult to see how that state control would be achieved by RT through the Fourth Defendant merely through a minority shareholding, suggesting that it is arguable that the real extent of control was greater. The suggestion that RT had no interest in the Fourth Defendant until 29 June 2009 is also inconsistent with two other pieces of evidence: a Presidential Decree dated 10 July 2008 whereby RT acquired at least a 25.1% shareholding in the Fourth Defendant and a press release of 14 November 2008 in which RT described the Fourth Defendant as a "daughter venture".

(3) The general manager and single member executive of both the Fourth Defendant and another entity affiliated to RT, RT Metallurgica, is Sergey Nosov. He is also a member of the board of directors of the guarantor. This is all set out in a list of affiliates of the guarantor dated 30 September 2009. That list includes RT at number 22 being described in translation as "Persons belonging to the same group of persons as [the guarantor]: [RT] is entitled to control more than 50% of the charter capital of an affiliated person RT Metallurgica". Although Mr Morgan QC contended that RT was only on the list of affiliates because it controlled 50% of RT Metallurgica, I agree with Mr Salzedo QC that it is more than mere coincidence that Mr Nosov is the general manager and sole executive of not just RT Metallurgica but also the Fourth Defendant and also a member of the board of directors of the guarantor. According to the report of Mr Lyubimenko, subsequently appointed temporary manager of the borrower to the initial meeting of creditors of the company on 17 June 2010, from 4 April 2007 until 25 January 2010, the management of the borrower was carried out by the Fourth Defendant, of which of course Mr Nosov was sole executive. In other words it was Mr Nosov who was responsible for managing the borrower. Mr Salzedo QC points out that although RT has clearly had access to Mr Nosov in preparing its evidence in support of its application, it has produced no evidence from him on this important issue, let alone anything to deny what seems to me an arguable case that the borrower was under the control of RT through the Fourth Defendant and Mr Nosov.

(4) Although Mr Morgan QC placed great emphasis upon the fact that on the basis of what Mr Kudashkin described as "the publicly available information", RT only ever held a 25.3% shareholding in the Fourth Defendant through Promimpeks and submitted that this was inconsistent with RT controlling the Fourth Defendant and thus the borrower and the guarantor, not only does this ignore the overall involvement of Mr Nosov to which I have referred, but as Mr Salzedo QC pointed out 50% of the shares in the Fourth Defendant are held by two companies Briefway Trading Limited and Lacoveta Management Limited, said to be intermediary companies of Troika Dialogue which Mr Kudashkin says was a leading Russian private investment bank at the time. Mr Salzedo QC rightly pointed out that the identity of the investors is not vouchsafed by Mr Kudashkin.

(5) Furthermore, in his letter of 5 August 2009 to the lenders seeking restructuring of the debt, referred to in more detail below, Mr Zavyalov, deputy CEO of RT describes the borrower as "part of the group of companies JSC RusSpetsStal [the Fourth Defendant] and one of the largest and most important enterprises of [RT]" supporting at least the reasonable inference that whatever the formal position as regards the shareholding, these companies are all part of the same group over which RT exercises overall control. As Mr Salzedo QC submitted, that letter lies somewhat uneasily with RT's case that it was only involved in strategic decisions at a high level.

(6) The extent to which RT has controlled the borrower is further demonstrated by the extent to which it has continued to involve itself in the financial and operational affairs of the borrower. For example on 3 October 2011, the borrower issued a press release in which it described how with the aim of saving the borrower RT had undertaken "a programme of immediate financial rehabilitation measures, worked with the company's chief creditors and redeemed part of the debt". It is an obvious question why would RT do that unless it had an interest in and control over the borrower.

(7) Although Mr Morgan QC made a number of detailed submissions in reply seeking to dispute that RT controlled the other defendants, as I have already indicated, all that Erste has to show at this stage is a serious issue to be tried. Mr Morgan's submissions seemed to me to succeed, albeit unwittingly, in emphasising that there is a serious issue about control to be tried which cannot be resolved short of a trial.

23. So far as the other defendants are concerned it is accepted by RT that RT Capital is a 100% subsidiary of RT incorporated on 3 December 2010 and, according to Mr Kudashkin established to engage in debt restructuring. It is striking that within days of its incorporation it acquired the debt owed by the borrower to two of the other banks, Gazprombank and Sberbank, a matter to which I return in the chronology below.

24. The foundation agreement for the Seventh Defendant RusSpetsMash was executed by the borrower and the guarantor on 30 March 2009. On 26 May 2009, assets were transferred from the borrower and the guarantor to form the charter capital of the Seventh Defendant. As set out in more detail hereafter, the Seventh Defendant is thus the entity by which it is alleged by Erste that the Defendants diverted assets from the borrower rendering it unable to pay its indebtedness under the Loan Agreement.

25. The Sixth Defendant, NIOKRinvest, is a subsidiary of OJSC RusSpetStal, which controls more than 50% of the share capital, according to the list of affiliates. That list also states that OJSC RusSpetStal is a separate company from the Fourth Defendant although more than 50% of the board of directors are the same persons as the board of the Fourth Defendant. Mr Morgan QC said that RT's case is that the Sixth Defendant has nothing to do with RT, although the only evidence from RT about that is the somewhat guarded statement by Mr Kudashkin, based on "the publicly available information" that RT has never been a shareholder of the Sixth Defendant. However, as Mr Salzedo QC pointed out, when one examines the list of affiliates carefully, there is a little sub-group of companies at numbers 14 to 19 which includes the Sixth Defendant and OJSC RusSpetStal, at the top of which is Russpecsteel Invest Limited, a Cypriot registered company which is entitled to control more than 50% of OJSC RusSpetStal. However, what is missing from the list of affiliates is any explanation as to how they are affiliated to the guarantor. Since that sub-group is, in effect entirely inward turning, there is no explanation as to why they are on the list of affiliates of the borrower at all. I agree with Mr Salzedo QC that it is a reasonable inference that they are affiliates because they are under the same ultimate control as the borrower and guarantor, namely under the control of RT.

26. Although, as Mr Rooney explains at [89] of his First Witness Statement, there is no direct evidence (for example from the list of affiliates) that the Eighth Defendant, SpetsStalResurs is a member or affiliate of the RT group of companies, such a relationship can reasonably be inferred from the Eighth Defendant's involvement in the events which comprise the alleged conspiracy. In particular, the surety agreement referred to below was entered into between the guarantor and the Eighth Defendant. Erste's case is that that agreement had no commercial purpose but was a device to make the Eighth Defendant the largest creditor of the guarantor enabling it to influence the insolvency of the guarantor on behalf of the RT group. Furthermore, the Eighth Defendant and the borrower had managers in common, specifically Mr Dubovik. The close connection between the two entities is also indicated by the fact that in May 2010, after the borrower had been put in the supervision procedure, it took an assignment of a debt owed by the Eighth Defendant under a supply contract equivalent to some US$700,000 which the borrower did not have the resources to pay. The Russian Court subsequently ruled that that transaction was made without consideration and in breach of Russian insolvency law.

27. In conclusion on the issue of control I agree with Mr Salzedo QC that Erste has shown that there is a serious issue to be tried that all the other Defendants are affiliated to RT and that RT is in control of the other Defendants.

28. Turning to the chronology of the alleged conspiracy, according to the list of affiliates, RT became affiliated to the guarantor on 27 March 2009. In fact the evidence referred to above suggests it already had an indirect interest in the guarantor and hence the borrower, through the Fourth Defendant, before that date. However, taking that date at face value, within days the foundation agreement for the Seventh Defendant had been entered into on 30 March 2009. The Seventh Defendant had a charter capital of RUB 10,000, notwithstanding which, by a transfer dated 26 May 2009 the borrower transferred the entirety of its basic infrastructure assets (i.e. apparently plant and machinery) to the Seventh Defendant in return for a 92.64% shareholding in the Seventh Defendant which on the same date altered its charter to provide that its share

capital amounted to RUB 1,916,101,717. The remaining shares were transferred to the guarantor. Also on the same day, the borrower leased back the same assets from the Seventh Defendant at the equivalent of about US$900,000 per month. I refer to the transfer and lease back hereafter as "the borrower's asset transfer".

29. Erste's case is that the purpose and effect of the borrower's asset transfer was to put the borrower and the guarantor in the position where they would not and could not make the repayments under the Loan Agreement and Guarantee and, indeed when the sum of US$1,666,666.67 fell due on 31 July 2009, it was unpaid, notwithstanding that previous sums had been paid and there was no dispute with the banks. Erste's case is that the borrower's asset transfer was procured or authorised by RT deliberately for the purpose of rendering the borrower insolvent.

30. In fact there were other creditors of the borrower than the syndicate of banks under the Loan Agreement, including Gazprombank, Sberbank and a company called OOO Volgometallosnab ("VMS"). A month before the borrower's asset transfer, on 22 April 2009, VMS had petitioned for the bankruptcy of the borrower. Subsequently, Gazprombank brought proceedings in the Arbitrazh Court of the Volgograd Region (the "ACVR") against the borrower, the guarantor and the Seventh Defendant seeking a declaration that the borrower's asset transfer was void. Those proceedings were not resisted by the temporary manager of the borrower, Mr Lyubimenko, who had been appointed by the time of the hearing. By its judgment dated 2 June 2010, the ACVR decided that the borrower's asset transfer was designed to put the borrower's assets beyond the reach of its creditors and inflict harm on those creditors and that it was unlawful under the Russian Civil Code. The Court declared the borrower's asset transfer void and ordered the return of the assets to the borrower.

31. On these applications, Mr Morgan QC put forward three principal arguments as to why Erste could not show a serious issue to be tried in relation to its case that the borrower's asset transfer was part of an overall conspiracy. First, RT sought to contend that, contrary to Erste's case, the borrower's asset transfer had a genuine commercial purpose, in that it was necessary to set up the Seventh Defendant and transfer the assets to it in order to obtain state funding and external funding at a time when the borrower's business was suffering economically and required modernisation. However, quite apart from the fact that it remains unexplained why it was necessary to transfer the assets to a new company to obtain funding, it would be impossible for the Court to decide this issue on an interlocutory application. In any event, despite the purported explanation put forward, the fact that the ACVR considered that in effect the borrower's asset transfer was a step towards deliberate insolvency would be sufficient to support Erste's case that there is a serious issue to be tried in relation to its allegation of conspiracy, even if that Court decision were the only evidence of deliberate insolvency, which it is not.

32. That conclusion by the ACVR that the borrower's asset transfer was a step towards deliberate insolvency is also the answer to Mr Morgan's submission that the transfer of assets away from the borrower was something permitted by the terms of the Loan Agreement. That may well be the case but the Loan Agreement did not contemplate or permit the deliberate alienation of the borrower's assets with a view to rendering it insolvent and ensuring that it could not honour its obligations under the Loan Agreement.

33. Second, Mr Morgan QC placed great reliance on the fact that Erste's pleaded case at [63] of the Particulars of Claim is that the effect of the borrower's asset transfer was to render the borrower balance sheet insolvent. He relied upon a comparison of the published balance sheet of the borrower as at 30 March 2009 before the transfer and that as at 30 June 2009 after the transfer to submit that whereas in the latter the fixed assets had gone down by RUB 1,377,068, the long term investments had gone up by RUB 1,774,989, reflecting the acquisition by the borrower of the shareholding in the Seventh Defendant. Accordingly, he submitted the borrower was not rendered balance sheet insolvent.

34. To the extent that Mr Morgan QC relied upon these accounts as a "killer blow" to there being a serious issue to be tried, it seems to me his approach was misconceived. To begin with, as Mr Salzedo QC pointed out, on a fair reading of the Particulars of Claim, Erste's case does not concentrate on balance sheet insolvency to the exclusion of everything else. I agree with Mr Salzedo that the overall pleaded case makes a perfectly comprehensible and arguable case that the purpose and effect of the borrower's asset transfer was to put the borrower in a position where it could not and would not honour its obligations under the Loan Agreement. It is striking that there is no evidence produced by RT on its application that the borrower could afford to pay the monthly "rent" equivalent to US$900,000 for the lease back of its own assets or ever did pay such rent. If, as Mr Morgan insisted, the lease back arrangement was not a sham, an obvious question arises as to why rent was not paid and if it was not, that suggests the borrower was insolvent in the sense that it could not pay its debts as they fell due.

35. Furthermore, as Mr Salzedo pointed out, the argument that the accounts disprove balance sheet insolvency depends upon the value of the shareholding in the Seventh Defendant being as set out in the balance sheet as at 30 June 2009 under long term investments. However, it is at the very least arguable that the shareholding was worth nothing of the sort and was either valueless or worth very little. On the basis that the borrower did not pay any rent to lease back its own assets, it seems at least arguable that the shares in the Seventh Defendant were worth nothing like the value placed upon them in the balance sheet.

36. It is also striking that, somewhat inconsistently with its case that the borrower had not been rendered balance sheet insolvent, in a third witness statement of Mr Nurney of its solicitors put in very late, on the fifth day of the hearing, RT sought to put forward further evidence that, before the borrower's asset transfer, the borrower was in severe cash flow difficulties and not paying its creditors when they fell due, although it was accepted by Mr Morgan that it was paying its obligations under the Loan Agreement. He was unable to say on the evidence that the borrower was paying off the banks rather than its other creditors. It seems to me that this additional evidence merely serves to demonstrate that there is a serious issue to be tried. Also, if the borrower's financial position was already appallingly weak before the borrower's asset transfer, as RT now suggests, the obligation to pay the equivalent of US$900,000 a month which on that hypothesis it could never pay is all the more likely to have been a sham.

37. Third, Mr Morgan QC made two related points about the judgment of the ACVR of 2 June 2010 setting aside the borrower's asset transfer, in the first instance that in circumstances where the Russian court had set aside the transfer, it was not necessary for Erste to seek an Order under section 423 of the Insolvency Act 1986 unravelling

the transfer. The short answer to that point is that, as appears later in the chronology, the assets of the borrower were not returned to it pursuant to the judgment but the so-called "amicable agreement" (described further below) was made instead for payment of money (which was never in fact paid) in lieu of the return of the assets. As set out below, Erste has a good argument that that agreement is a very odd one and that, in any event, there is no evidence of the Seventh Defendant having paid any sum to the borrower, so that in fact the borrower has received back neither the assets nor their money equivalent, making an Order under section 423 at least arguably necessary relief.

38. As for the concern expressed by Mr Morgan that any order under sections 423 and 425 involving the restoration of assets would subvert the insolvency proceedings in Russia in some way, it seems to me there are two answers to that point. First none of the Russian liquidation managers or similar officials has applied for recognition of the Russian insolvency proceedings under the Cross-Border Insolvency Regulations 2006. Second, section 425 is in permissive not mandatory terms giving the court a wide discretion as to orders that can be made. In due course the court may need to take account of what has been happening in the Russian insolvency proceedings in determining what orders are appropriate, always bearing in mind that, if Erste makes out its case, it will have established that those insolvency proceedings in Russia have been manipulated by the Defendants.

39. The second point was that, because Erste was relying upon the judgment of the ACVR, it was not open to Erste to go beyond it or to argue that notwithstanding that, on the face of the judgment the borrower's asset transfer had been set aside and the assets revested in the borrower, the true position was that that had not happened and that further relief was at least arguably necessary under section 423. The basis for this somewhat extreme submission was that by relying on the judgment, Erste was in some way a privy of Gazprombank which obtained the judgment and therefore privy to the judgment. I pressed Mr Morgan QC in argument as to whether he accepted that this submission went further than any earlier English authority and although he did not accept that, he did accept that he could not point to any specific case to support his submission.

40. I agree with Mr Salzedo QC that this submission is fundamentally flawed and that the short answer to it is that Erste is not the privy of Gazprombank. For a party to be estopped by privity with a judgment obtained in other litigation, it is essential that the party had some kind of interest, legal or beneficial, in the previous litigation or its subject matter: see per Latham LJ in *Powell v Wiltshire* [2004] EWCA Civ 534; [2005] QB 117 at [15] citing with approval [231] in *Spencer Bower, Turner & Handley: Res Judicata* 3rd edition. Erste had no legal or beneficial interest in Gazprombank's litigation and subsequent reliance on the judgment does not somehow confer such an interest after the event. In any event, as Mr Salzedo QC rightly points out, the causes of action in the present proceedings are simply not the same as in the case of Gazprombank.

41. Returning to the chronology, shortly before the borrower defaulted under the Loan Agreement, it appears that on 17 July 2009, the Fourth Defendant succeeded VMS as the creditor of the borrower under the supply contract with VMS in the amount of RUB 37 million plus interest. A fortnight later, on 30 July 2009, just before the borrower defaulted under the Loan Agreement, the Sixth Defendant succeeded to

RUB 30 million of this debt, leaving the Fourth Defendant as a creditor of the borrower in the amount of RUB 7.5 million. The ACVR recognised that the Fourth and Sixth Defendants had succeeded VMS as creditors of the borrower in a ruling on 7 August 2009. Although RT contends that this "VMS Swap" was effected in order to save the business, I agree with Mr Salzedo QC that that explanation has a somewhat hollow ring. It is at least arguable that the VMS Swap was effected in order to retain control of the borrower at any subsequent creditor's meeting within the RT group rather than losing control to third party creditors, a pattern of "buying up" the borrower's and guarantor's debt which arguably repeats itself thereafter.

42. Within a week of those events and of the borrower defaulting under the Loan Agreement, on 5 August 2009, Mr Zavyalov, Deputy CEO of RT wrote the letter referred to at [22(5)] above to the lenders under the facility, including Erste, seeking restructuring of the borrower's debt. That letter made no mention of either the borrower's asset transfer or the VMS Swap.

43. A meeting then took place in Moscow on 2 September 2009 between VTB Bank as Facility agent under the Loan Agreement and representatives of the Fourth Defendant on behalf of the borrower, including Mr Nosov, at which VTB Bank indicated a willingness to discuss restructuring of the debt provided that other creditors, specifically Gazprombank and Sberbank, agreed. Mr Nosov then wrote to VTB Bank as Facility Agent on 15 September 2009. He made what the recipient of the letter regarded (it seems to me with some justification) as an implied threat that if negotiations for restructuring reached a deadlock, filing for bankruptcy might be the only remaining option. However, he too made no mention in his letter of the borrower's asset transfer or the VMS Swap.

44. Mr Nosov adopted an equally guarded approach when he wrote a further letter to VTB Bank as Facility Agent on 20 October 2009, stating "several commercial creditors have submitted insolvency claims against [the borrower] in the Volgograd regional court". He did not disclose that the creditors in question were companies in the same group as the borrower, the Fourth and Sixth Defendants, which in one sense could not be described as commercial creditors because they only became creditors by virtue of the VMS Swap. Since Mr Nosov was the general manager of the Fourth Defendant, it is arguable that the letter was positively misleading.

45. When the petition of the Fourth and Sixth Defendants came on for hearing on 26 November 2009, the ACVR accepted that there was nothing to suggest the borrower could repay its debt and placed the borrower into the bankruptcy procedure, appointing Mr Lyubimenko as its temporary manager. On 9 February 2010, the guarantor followed suit, petitioning the ACVR itself to be placed within the supervision bankruptcy procedure on the basis that its debt far exceeded its assets. The guarantor's petition was granted by the ACVR on 14 May 2010 and Mr Vladimir Dobryshkin was appointed as its temporary manager.

46. What does not emerge from the ruling of the ACVR is that a month earlier and two months after it had petitioned for its own bankruptcy, the guarantor entered into a so-called surety agreement whereby it agreed to guarantee the purchase by the Fourth Defendant of certain promissory notes from the Eighth Defendant for the equivalent of about £66 million. This sum was payable by the Fourth Defendant within ten days of the transfer of the notes or, if it defaulted, by the guarantor within five days of a

demand by the Eighth Defendant. The Fourth Defendant failed to fulfil its obligation and on 30 April 2010, the Eighth Defendant demanded payment under the surety agreement. However, the guarantor was in no position to pay under the surety agreement as its total assets were less than a third of the sum guaranteed.

47. It is difficult to see what legitimate commercial purpose the surety agreement would have had if the guarantor had been able to honour that obligation, but given that the guarantor had petitioned for its own bankruptcy two months earlier, the transaction made no commercial sense whatsoever. It was concluded without consideration and given the size of the guarantee there was no hope that the guarantor could have honoured it.

48. As Mr Salzedo QC points out, the effect of the surety agreement was to dilute the share of the creditors of the guarantor, including Erste, in the total claims against the guarantor, reducing the probability of a return, since by the agreement the Eighth Defendant became the largest creditor of the guarantor, representing 31.2% of the creditors' claims. Mr Salzedo QC submits that the surety agreement was a sham, designed to dilute the voting rights of legitimate creditors and ensure that RT through the Eighth Defendant could control creditors' meetings. Not only is that case fully arguable, but eventually, by a ruling dated 29 March 2012, the ACVR decided in terms that it was a sham concluded solely in the interest of the Fourth Defendant and that it defrauded the interests of the guarantor and its creditors. The Court declared the surety agreement void.

49. However, before that ruling was eventually made, the Eighth Defendant had succeeded in obtaining a ruling from the ACVR that it be included on the creditors' register of the guarantor in an amount of some RUB 3 billion. An appeal by the Lenders, including Erste, to the Arbitrazh Appellate Court ("AAC") failed and in February 2011, principally on the basis of the vote of the Eighth Defendant, the guarantor was placed in external management, with Mr Dobryshkin as external manager. The Lenders failed to get a declaration from the ACVR at that stage that the surety agreement was void and an appeal to the AAC failed.

50. The lawyer representing Mr Dobryshkin informed Erste's solicitors' Moscow office that if the Lenders insisted on challenging the surety agreement, he would endeavour to set aside the Guarantee. Undaunted, the Lenders applied to the ACVR for the removal of Mr Dobryshkin as external manager for failure to apply to set aside the surety agreement as being contrary to the Bankruptcy Law. The day before that application was due to be heard, Mr Dobryshkin did apply to set aside the surety agreement but, as his lawyer had threatened, he accompanied that with an application to set aside the Guarantee. Somewhat inconsistently, he did not apply to set aside guarantees granted by the guarantor in 2008-2009 to Gazprombank and Sberbank. Erste's case is that that omission was not an oversight but deliberate, since by the time of his application, those other guarantees had been assigned to RT Capital, as set out in more detail below. In due course in a ruling on 5 December 2011 the ACVR declared both the surety agreement and the Guarantee invalid. That judgment is the judgment about which Erste makes specific complaint in relation to the reasoning and ruling in relation to the Guarantee in that part of its case on appropriate forum which questions the availability of a fair trial in Russia, so that it will be necessary to consider it further in that context.

51. Returning to the chronological analysis, on 14 May 2010, Mr Lyubimenko, the temporary manager of the borrower circulated a report to the creditors recommending that the borrower be put into compulsory liquidation as part of a three stage process. The first stage was to attempt to recover the assets alienated by the borrower's asset transfer and he reported that he had filed a claim with the ACVR on 22 April 2010 to recover those assets. The second stage was the sale of the borrower's land and other assets to increase the estate available to creditors. The third stage was to solicit potential investors, including the Russian Government. He anticipated that if the proposal were accepted, the creditors could expect to recover between 78.46% and 100%, whereas if nothing were done he predicted a recovery rate of 13.18%. Although this is disputed by RT, that figure of 13.18% suggests that he did not accept that the shareholding in the Seventh Defendant was worth anything like its face value.

52. However, on the same day as Mr Lyubimenko presented his report to the creditors and at a time when the borrower had been in bankruptcy for some six months, the borrower in fact entered an agreement with the Eighth Defendant under which it assumed the latter's obligations under an agreement between the Eighth Defendant and a company called SRP dated 27 October 2009, pursuant to which the Eighth Defendant owed about RUB 20 million. Erste's case, which is fully arguable, is that there was no proper commercial purpose for this SRP transaction between the borrower and the Eighth Defendant, given that the borrower was already in default under the Loan Agreement. The transaction appears to have simply created another debt the borrower could not satisfy, but one owed to another company in the RT group.

53. The decision of the ACVR that the borrower's asset transfer was void already referred to in [30] above was then made on 2 June 2010, shortly after which Mr Lyubimenko reported to the first meeting of creditors on 17 June 2010 that, having reviewed the flow of funds out of the borrower, its alienation of core assets and its assumption of additional liabilities, there were features of deliberate bankruptcy. His proposal in his earlier report of 14 May 2010 for compulsory liquidation was approved by over 60% of the creditors by value. Although Mr Morgan QC sought to make much of a suggestion that Erste was inconsistent in its approach, sometimes (as at this stage) favouring liquidation of the borrower and at other times resisting it, the short answer is that Mr Lyubimenko's proposal involved recovering the alienated assets as part of the liquidation process with a substantial recovery rate as a consequence, a proposal which would make obvious sense to any commercial creditor such as Erste.

54. The Fourth and Sixth Defendants (who had only become creditors by virtue of the VMS Swap) voted against liquidation at the creditors' meeting and in favour of external management. Erste's case is that, having failed to defeat that motion and given that, by virtue of the ACVR ruling of 2 June 2010, there was a risk that the alienated assets would be returned to the borrower, the Fourth and Sixth Defendants needed to take steps to ensure that the process of compulsory liquidation contemplated by Mr Lyubimenko did not happen. Accordingly, on 25 June 2010 the Sixth Defendant applied to the ACVR to remove Mr Lyubimenko as temporary manager on the basis of a series of technical and footling complaints. The ACVR acceded to that application on the basis that payments he had authorised totalling the equivalent of £3,300 to a company specialising in maintaining creditors' registers was unreasonable. Mr Salzedo submits, it seems to me with some force, that his dismissal

was on the basis of an irrelevant technicality and there was no valid commercial reason why the borrower, the guarantor or the Sixth Defendant should have objected to his incurring trifling expenses to ensure that an accurate picture of the borrower's financial position was maintained.

55. Following his dismissal, a further creditor's meeting was held on 5 July 2010 at which the Sixth Defendant achieved the election of Mr Akimov as temporary manager. That appointment was approved by the ACVR, rejecting submissions by another independent creditor LLC Partner that the approval of the Sixth Defendant's nominee was premature. Erste's case is that by these means of removing Mr Lyubimenko and achieving the appointment of their nominee Mr Akimov in his stead, the RT group averted the threat of the compulsory liquidation of the borrower and obtained control over the creditors' meeting. Although that challenge to the bona fides of the actions of the RT group is disputed by RT, in my judgment there is a serious issue to be tried as to whether this is not all part of the overall conspiracy alleged by Erste.

56. Thereafter, on 23 September 2010, the Lenders' claims (including that of Erste) were entered on the claims register of the guarantor by the ACVR which rejected a challenge by the guarantor on what Erste contends was the spurious basis that the Guarantee is governed by English law. The Seventh Defendant sought to appeal that decision of the ACVR, disputing the validity of the Guarantee even though the guarantor had expressly warranted its valid execution. That appeal was dismissed on 27 December 2010. As already recorded earlier, the external manager of the guarantor, Mr Dobryshkin, continued to threaten to dispute the validity of the Guarantee to the extent that the Lenders were persisting in challenging the validity of the surety agreement and ultimately he succeeded in having the Guarantee set aside by the ACVR in December 2011. That decision was upheld by the AAC. The Court of Cassation dismissed a further appeal and the Supreme Arbitrazh Court refused permission to appeal that decision on 25 May 2012, with the consequence that Erste cannot rely upon its rights under the Guarantee in Russia.

57. Following the decision of the ACVR of 2 June 2010 in favour of Gazprombank declaring the borrower's asset transfer invalid, Gazprombank applied for and was granted an enforcement order by the ACVR Execution Judge on 30 September 2010 entitling it to pursue the Seventh Defendant for the return of the borrower's alienated assets. At that point, on 6 December 2010 (three days after its incorporation) RT Capital (admitted to be a wholly owned subsidiary of RT) intervened and agreed to take an assignment of Gazprombank's claims against the borrower and the guarantor for 58% of their face value, then on 9 December 2010 agreed to acquire Sberbank's claims against the borrower and the guarantor for 46% of their face value. It is clearly arguable that RT Capital was set up for the purpose of taking over those debts.

58. Erste's case is that by those agreements with Gazprombank and Sberbank, which it refers to as the "Bank Debt Swaps", the Defendants secured the majority creditor votes by value in the borrower and the guarantor. In fact on 2 December 2010, four days before the Bank Debt Swaps, but at a time when it can reasonably be inferred they had been agreed, a creditors' meeting of the guarantor was held and the Eighth Defendant, Gazprombank and Sberbank voted in favour of removing the guarantor from the supervision procedure and placing it in external management, with Mr Dobryshkin as external manager. Similarly, on 28 December 2010, at a creditors' meeting of the borrower, the Eighth Defendant, Gazprombank and Sberbank voted in

favour of placing the borrower in external management rather than liquidation, with Mr Akimov as external manager. Those appointments were approved by the ACVR.

59. On 21 December 2010, Gazprombank filed applications with the ACVR, supported by the borrower and the guarantor, to be replaced by RT Capital in the insolvency proceedings and on 25 January 2011, RT Capital applied to replace Sberbank as a creditor. Those applications were all granted by the ACVR.

60. On Erste's case the position had then been reached by which through the Bank Debt Swaps, two of the major external creditors had been removed from the scene and the Defendants had ensured that the enforcement order of 30 September 2010 was not enforced and was able to influence the voting of Gazprombank and Sberbank at the creditors' meetings in December 2010 (just before and after the Bank Debt Swaps) referred to above. This all smoothed the way for the "amicable settlement". Although all these inferences are disputed by RT and RT Capital, I cannot possibly decide that point at this stage but would simply reiterate there is a serious issue to be tried.

61. On 25 January 2011 the Lenders' Russian lawyer, Mr Marinichev, received an email from a Mr Traian Cabba claiming to act for the Roel Group, copied to an email address which on the face of it was connected with RT. The email proposed the purchase by the Roel Group of the debt under the Finance Documents for only 7% of face value "in order to resolve this imbroglio in which the syndicate of banks find themselves". He said that if the proposal commended itself, he and Mr Vladimir Bekish (whom he described as his partner) would draw up the necessary contracts. Mr Bekish is the General Manager of RT. A further email was sent by Mr Cabba two days later which sought to emphasise the connection between Roel and RT and invited Mr Marinichev to visit RT's website. Mr Cabba followed up the emails on the telephone, indicating he was acting on RT's instructions.

62. Erste's case is that this was an attempt by RT through another related party to buy off external commercial creditors at a low recovery rate. In his submissions, Mr Morgan QC sought to pour scorn on this suggestion, pointing out that the email address was not one for RT at all and denying vehemently any involvement of RT in this offer. However, if that is right, as Mr Salzedo pointed out, it is odd that, when Erste subsequently wrote to RT on 18 March 2011 about this proposal, referring to Roel acting as an intermediary for RT, in response RT did not deny its involvement. In my judgment, there is enough material here for there to be a serious issue to be tried that RT was trying to buy off the Lenders at a low recovery rate.

63. On 4 April 2011 a creditors' meeting of the borrower was held, of which RT Capital was in control, holding the majority of the votes. The purpose of the meeting was to approve the External Management Plan, drafted by Mr Akimov. The Plan proposed the incorporation of two new subsidiaries to hold the borrower's assets free of liabilities. No mention was made in the Plan of the recovery of the borrower's assets from the Seventh Defendant following the decision of the ACVR that the borrower's asset transfer should be set aside. RT Capital approved the Plan, the other creditors abstaining.

64. A creditors' meeting of the guarantor was also convened on 22 April 2011 to approve the External Management Plan of the guarantor, drafted by Mr Dobryshkin. He proposed that the assets transferred to the Seventh Defendant be recovered and that an

option be exercised to acquire the freehold of land leased by the guarantor with a view to then selling the land at a substantial profit. The Plan envisaged an anticipated return of RUB 8 to 10 billion, enough to repay the guarantor's debts in full and that this could be achieved by August 2012.

65. It would appear that around that time in April 2011, the amicable agreement was reached. This was subsequently approved by the ACVR on 13 July 2011 on the application of RT Capital. At the hearing approving the agreement, not only RT Capital, but the borrower, the guarantor and the Seventh Defendant were represented. The agreement was that, notwithstanding that, following the earlier decision setting aside the borrower's asset transfer, Article 167 of the Russian Civil Code and the enforcement order obtained by Gazprombank required restoration by the Seventh Defendant to the borrower of the alienated assets "in full and in their natural form", the parties agreed that taking account of natural wear and tear resulting from the use of the assets by the Seventh Defendant, the Seventh Defendant could not return the assets to the borrower in their full and natural form. Instead it was agreed that the Seventh Defendant would restore the value of the assets in monetary form, paying to the borrower RUB 183,281,167.61 (equivalent to about US$6 million) in two equal instalments before 1 August 2011 and 1 September 2011 respectively.

66. Some further supposed explanation for the amicable agreement is provided in the evidence in support of RT's application from Mr Talanov, one of its Russian lawyers:

> "it was impossible to return the assets in full under the Execution Writ [i.e. the Order obtained by Gazprombank on 30 September 2010], as the assets had suffered deterioration through wear and tear. In addition, the full return of the assets was not possible as some of the old assets were completely worn out and unusable. Thus they would have been written-off on the balance sheet. A modest proportion of assets (10% as evaluated by Mr Fomenko [Head of Legal at the borrower]) which was not needed in the technological chain was sold at market value to cover the operational costs ..."

67. As Mr Salzedo submits, this begs more questions than it answers: why was that explanation not given to the ACVR in July 2011 when it was invited to approve the amicable agreement? Why was no mention made of the sale of the assets, to whom were they sold and what account has been given of what was sold? Overall there remains something distinctly odd about the alleged need for this amicable agreement: since the borrower remained in physical possession of the assets throughout, given that it was paying the equivalent of US$900,000 to lease them back, why was it impossible to return them to the borrower? It would surely just have been a question of ensuring that ownership reverted to the borrower. In the circumstances, notwithstanding its approval by the ACVR, Erste is understandably critical of this amicable agreement.

68. The amicable agreement was a means by which the Defendants avoided the enforcement of the order for enforcement obtained by Gazprombank which would have required the borrower's assets to be restored in full by the Seventh Defendant. In fact the Seventh Defendant did not pay any of the agreed compensation and it is difficult to see how it can ever have been intended to do so. As Erste points out, it was

never more than a holding company for the assets of the borrower and the guarantor. Furthermore, upon the application of the Sixth Defendant, the Seventh Defendant was placed into insolvency by order of the Arbitrazh Court of the City of Moscow dated 24 August 2011, only a few weeks after the first instalment of compensation fell due. The borrower submitted a claim in the Seventh Defendant's insolvency, but has otherwise taken no enforcement action against the Seventh Defendant.

69. In my judgment Erste has a fully arguable case that the amicable agreement was a device by which RT and the other Defendants were able to continue to keep the assets of the borrower out of the reach of the external creditors, including the Lenders. Although RT now contends that Erste could have chosen to challenge the decision of the ACVR approving the amicable agreement, none of the external creditors was party to this deal between the Defendants and the contention presupposes such a challenge would have been successful.

70. The External Management Plan of the borrower was carried out, in that the remaining assets of the borrower (said to be worth RUB 6 billion after the partial return by the Seventh Defendant) were transferred to two new companies, JSC "VMZ Red October" ("VMZ") and "Volgogradmetallobrabotka" ("VMO") on 12 September 2011 in return for shares in the new companies. There is no evidence that any valuable consideration was paid for the alienation of these remaining assets. It was only after these transfers that the external manager, Mr Akimov, determined that the borrower could not be restored to solvency, which begs the question why he did not reach the conclusion before the transfers to VMO and VMZ. In any event, RT's Russian law expert Professor Karelina, appears to accept that these transfers of assets were unlawful, as they were in breach of Russia's "mobilisation" laws which prohibit the alienation of strategic assets save in strictly regulated circumstances. Erste and VTB made an application to the ACVR to have the transfers declared invalid and on 17 December 2012 the ACVR held that the transfer to VMO was void.

71. In relation to the guarantor, the Lenders were concerned about the validity of the surety agreement. In April 2011 they requested Mr Dobryshkin as external manager to apply to the Russian Court to invalidate the surety agreement on the basis that external managers are required under Article 20.3 of the Bankruptcy Law to take steps to protect the property of the debtor and act reasonably and in good faith in the interests of the debtor. Mr Dobryshkin refused to make such an application so the Lenders petitioned the Court for his dismissal. As already noted above, the day before that application was due to be heard, he eventually made an application to have the surety agreement declared invalid, although he coupled it with an application to have the Guarantee declared invalid.

72. The ACVR refused the Lenders' application to remove Mr Dobryshkin, but the AAC allowed the appeal, finding that Mr Dobryshkin had violated Article 20.3 of the Bankruptcy Law by failing to take measures to protect the debtor's property, leading to the infringement of the rights and lawful interests of the creditors. Mr Dobryshkin applied to the court subsequently to resign rather than be dismissed and was later sanctioned by his professional body and fined by the ACVR.

73. At the same time as a new external manager was required for the guarantor, RT Capital (which held the majority of the voting rights of the creditors of the borrower by virtue of the Bank Debt swaps) was seeking a new external manager for the

borrower. This was apparently because a new company, Uralvagonzavod had acquired an interest in the debt assets of RT Capital acquired by the Bank Debt Swaps. At his own request Mr Akimov was released from his role. At creditors' meetings of the borrower and the guarantor held on 24 November 2011, Mr Lysov and Mr Chikrizov were respectively appointed external managers. Those appointments were approved by the ACVR.

74. The ACVR having declared the Guarantee invalid by its ruling on 5 December 2011, on 16 December 2011, the Lenders asked Mr Chikrizov to contest the guarantees in favour of Gazprombank and Sberbank, to which RT Capital had succeeded by the Bank Debt Swaps on the basis that by parity of reasoning with the judgment of the ACVR, those guarantees too, made in the same time period as the Guarantee, must have been transactions aimed at defrauding creditors. That request was ignored, so on 20 January 2012, the Lenders applied to the ACVR for an Order directing him to challenge those guarantees and also seeking his dismissal for failure to act earlier. Mr Chikrizov did then make the application to challenge the guarantees on 23 March 2012, by which time his challenge was time barred and, in due course, RT Capital successfully resisted the application on the basis of time bar on 6 August 2012. I agree with Erste that it must be a reasonable inference Mr Chikrizov would have realised any challenge was time barred.

75. At the creditors' meeting of the borrower on 24 November 2011, the Lenders secured a place for their lawyer, Mr Marinichev, on the creditors' committee. However despite requests from Mr Marinichev to convene a creditors' meeting, Mr Lysov, the new external manager, did not do so. What then happened is that an important creditors' meeting of the borrower was held on 6 March 2012, but Erste was not given notice of the meeting and so did not attend, only learning about it afterwards from other creditors. The reason why Erste did not have notice is that Mr Lysov sent the notice of the meeting to an old address which was no longer being used. Erste submits with some force that he knew or ought to have known he was using the wrong address, as he had used the correct up to date address on several previous occasions.

76. At the meeting on 6 March 2012 held in the absence of Erste, RT Capital, which was the majority creditor by value, voted in favour of the liquidation of the borrower. Also the creditors' committee was re-elected but did not include Mr Marinichev so that the Lenders were unrepresented on the committee. Erste's case is that this was all quite deliberate, another step in the conspiracy designed to give RT through RT Capital complete and unfettered control of the borrower to the exclusion of Erste and the other Lenders. Both Mr Morgan QC and Mr Mumford sought to pour scorn on this point, suggesting it was a non-point, because it would always have been open to Erste to reconvene another creditors' meeting to hold another vote and that, in fact, another meeting was convened on 10 April 2012.

77. However, what those submissions fail to address is that whilst if the Lenders had been at the meeting on 6 March 2012, they would have had enough of the votes (23%) to keep Mr Marinichev on the committee, when it came to a request at the meeting on 10 April 2012 to re-elect the creditors' committee, which would have enabled the Lenders to elect Mr Marinichev, a majority of the votes (i.e. more than 50%) was required to force a re-election and the request for a re-election was defeated by a majority of the creditors led by RT Capital. The decisions taken at the meeting on 6 March 2012 were approved by the ACVR on 22 May 2012 and the Lenders' appeal to

the AAC was dismissed on 23 August 2012. Contrary to the submissions of Mr Morgan QC and Mr Mumford, I consider that Erste has shown a serious issue to be tried that its exclusion from the creditors' meeting of 6 March 2012 was deliberate and was part of the overall conspiracy between the Defendants.

78. As Mr Salzedo QC pointed out, the Lenders fared no better in relation to the guarantor. Following the ruling of the ACVR that the Guarantee was invalid as a matter of Russian law, Erste was excluded from the claims register of the guarantor by an order of the ACVR dated 20 February 2012. Notwithstanding the promising nature of the External Management Plan, which might if implemented have returned the guarantor to full solvency, nothing in the Plan was ever implemented and, on 26 March 2012, a creditors' meeting was held at which RT Capital voted in favour of liquidating the guarantor.

79. Subsequently RT Capital assigned its debt assets in respect of the borrower and the guarantor to another affiliate of RT, ZAO Trade House VMZ Red October. On 6 and 7 September 2012, the ACVR amended the creditors' registers of the borrower and the guarantor to replace RT Capital with Trade House.

80. To complete the chronology, the Claim Form was issued on 23 August 2012. An application for permission to serve the Third to Eighth Defendants outside the jurisdiction in Russia was made on 19 October 2012. A few days before the application for permission to serve out was made, Erste learnt that the liquidation of the Fourth and Eighth Defendants in Russia was imminent. So far as the Fourth Defendant is concerned, the Russian Court had made an order that the liquidation was complete and an appeal against that order by another creditor was dismissed on 12 October 2012. So far as the Eighth Defendant is concerned, the Russian Court had made an order on 27 September 2012 that the liquidation was complete.

81. In those circumstances, Erste asked for the application to be dealt with as a matter of urgency. On 24 October 2012, Cooke J granted Erste permission to serve the Claim Form on the Third to Eighth Defendants outside the jurisdiction in the Russian Federation. The proceedings were served on the Fourth and Eighth Defendants by registered post in Russia on 26 October 2012 and also delivered by Erste's lawyer in person on 31 October 2012 to the addresses for service specified in the order of Cooke J.

82. On 31 October 2012 Erste made an urgent application to the English court that in view of their imminent liquidation, the Fourth and Eighth Defendants should give early standard disclosure. In fact immediately before Erste's application was due to be heard by Hamblen J on 1 November 2012, Erste learnt that the Fourth Defendant had been dissolved and had ceased to exist. Accordingly, the application proceeded only against the Eighth Defendant. Having heard Leading Counsel for Erste, Hamblen J made an order for disclosure by the Eighth Defendant of specific categories of documents including documents relating to the surety agreement. The Eighth Defendant had until 4pm on 23 November 2012 to comply with that order. However, the dissolution of the Eighth Defendant took place and it ceased to exist shortly before the date for compliance with the order. As Mr Salzedo QC put it in submissions, the Fourth and Eighth Defendants have escaped justice in England by ceasing to exist after the Claim Form was issued.

83. In the meantime, on 11 October 2012, the ACVR recognised the borrower as insolvent and placed it into insolvency liquidation for six months. Mr Tarasov was appointed the Insolvency Liquidator. On 7 February 2013, Mr Tarasov made an application to the ACVR to reconsider its order of 18 February 2010 admitting Erste to the list of creditors of the borrower. The basis for his application appears to have been that Erste had filed its claim in England against the borrower before the borrower was placed into the insolvency procedure and that it had concealed the proceedings in England from the borrower. In a Statement of Defence dated 21 March 2013, Erste comprehensively refutes that suggestion, pointing out that the proceedings in England were commenced on 23 August 2012 and that the borrower and Mr Tarasov had been sent the Claim Form and other documents at the end of October 2012.

84. Subject to dealing with a series of specific points raised by RT and RT Capital which Mr Morgan QC and Mr Mumford submitted were in effect "killer blows" fatal to Erste's case, I consider that this chronology of events demonstrates a serious issue to be tried that RT and the other Defendants have conspired together to divert the borrower's and guarantor's assets and put them out of the reach of external creditors of those companies, including Erste. In effect, as Mr Rooney puts it, the claims of those legitimate external creditors were "washed out".

85. However, RT and RT Capital submit that they have two points which provide a complete answer to Erste's claim: governing law and reflective loss. Mr Morgan QC submitted that the governing law of the tort claims in conspiracy and for unlawful interference was Russian law, on the basis of Article 4.1 of Regulation EC 864/2007 ("Rome II"). He then submitted that since Erste has only pleaded its tort claim as a matter of English law, there was no case of Russian law made out or pleaded so that the case against RT was unsustainable.

86. In support of his submission that any alternative case that the facts alleged by Erste if proved would establish a civil wrong or tort as a matter of Russian law had to be specifically pleaded, he relied upon passages in the judgment of Sir Andrew Morritt C in *Global Multimedia International Ltd v Ara Media Services* [2006] EWHC 3107 (Ch); [2007] 1 All ER (Comm) 1160 at [38] and [39]. Although he accepted that these passages were obiter, he submitted that they stated the correct principle applicable in the present case:

> "The true proposition, I believe, is that as foreign law is in most cases a question of fact to be proved by evidence, in the absence of such evidence the court has no option but to apply English law. But if the facts alleged demonstrate that, for example, the proper law of a contract is not the law of England then as the law of England includes the principles of private international law those principles may demonstrate that some other system of law is applicable to the claim and if the relevant principles of that system of law are not sufficiently proved the claim may fail for that reason.
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> 39 The Part 20 claim in this case is a good example. In paragraphs 10 to 15 AMS avers the existence of certain duties to be implied in the various contracts of employment entered

> into by AMS and each of Mr. Aljadail, Mr. Abougabal and Mr. Al Serafi. Paragraph 14 avers that obligations of fidelity "were implied by law." Given the allegations in relation to the parties to and formation of the employment contracts the law there referred to must be the law of Saudi Arabia, yet there is no attempt to say what it is or, in the sense of legal source, where it is to be found. In my view such a pleading is deficient. It is not a mere pleading point but one of justice. If, as in this case, the true claim is based on propositions of foreign law then the party who advances it should make it good by reference to the system of law on which he relies. This is an *a fortiori* case because the defence of AMS in the proceedings brought by Global in Saudi Arabia does precisely that. It is true that that defence was advanced on 4th March 2006 as opposed to the Part 20 claim which was brought forward by AMS on 14th September 2005. But if AMS can provide the requisite details in the one it should be required to do so in the other. Quite apart from giving fair notice to the opposing party of the claim he has to meet, it merely increases costs if both parties have to carry out the same initial research into the relevant system of law."

87. In reliance on those passages, Mr Morgan QC submitted that given that the applicable law of the tort claims is Russian law and no case of a civil wrong or delict is pleaded by Erste, the pleaded case is unsustainable and Erste cannot show any serious issue to be tried.

88. Mr Salzedo QC submitted that, in circumstances where it was not being suggested by RT or RT Capital that the conspiracy case if proved on the facts would not give rise to a cause of action for a civil wrong in Russia, the question of applicable law is irrelevant to the question of whether there is a serious issue to be tried, although he accepts that it is relevant to the question of appropriate forum. I agree with Mr Salzedo about this and propose to leave over further consideration of the issue of applicable or governing law until later in the judgment when I consider the question of appropriate forum.

89. The correct analysis is, as Mr Salzedo QC submitted, that Erste has pleaded in the Particulars of Claim a sufficiently arguable case of the tort of conspiracy and other torts having been committed as a matter of English law. If RT or any of the other defendants wish to allege that the applicable law is Russian law and that as a matter of Russian law the ingredients of the relevant delict or civil wrong are different from the position in English law, they will need to plead that in due course and, if Erste wishes at that stage to plead an alternative case in Russian law, it will be in a position to do so.

90. As Mr Salzedo QC pointed out, that analysis is supported by the decision of the Court of Appeal in *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271 at [178] and [180]. Although that was dealing with the issue of double actionability which no longer arises, the applicable principle is the same:

> 178. Mr Brodie's first argument is essentially a pleading point. He submitted that Kuwait being the lex loci delicti, the claimants should have begun by identifying the causes of action open to them under the law of Kuwait. He submitted that, had they done so they would have seen under the Articles previously quoted that the acts of wrongdoing on which they relied provided them prima facie with individual causes of action in respect of each of the misappropriations alleged against one or more of the defendants jointly and severally. Had those causes of action been pleaded it would have been seen that essentially similar claims for deceit, conversion and restitution lay against the defendants as several and joint tortfeasors under the laws of England, which claims could and (as Mr Brodie submitted) should have been pleaded without resort to the tort of conspiracy. He conceded that, had that been done, the double actionability rule would have been satisfied. However, he submitted that, the claimants having decided to pin their colours to the conspiracy mast in order to gain what they regarded as a more advantageous cause of action, it was appropriate that the question of double actionability should depend upon whether or not a cause of action for conspiracy to injure or defraud is known to the law of Kuwait.
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> 180. Mr Brodie's first argument is neither founded upon authority nor hallowed by practice. The claimant's case, as originally pleaded, was a straightforward case in conspiracy in respect of which the claimants placed no reliance upon foreign law, it being their case that the lex loci delicti was English. Once the defendants had pleaded that the law governing any claim by the claimants arising out of any alleged breach of duty owed by the defendants was Kuwaiti law and it was expressly denied that the tort of conspiracy was actionable under the law of Kuwait, the claimants amended their claim to plead that each of the unlawful means by which the conspiracy was put into effect, and upon which the claimants would rely as a self-standing cause of action, was unlawful under the law of Kuwait as a breach of each of the defendants' duties of good faith and honesty owed as directors (in the case of Mr Al Bader and Mr Qabazard) and as an employee (in the case of Captain Stafford) and that the deliberate assistance by one defendant of any breaches committed by another defendant would be actionable under Article 227. That was a perfectly proper way to proceed and, save that the claimants later added to the Articles of the Kuwaiti Civil Code on which they relied, that was the way matters proceeded.

91. That the correct analysis is that it is for the Defendants to allege and plead that the applicable law of the torts is Russian law is also borne out by [166] of the judgment of the Court of Appeal in *VTB Capital v Nutritek International* [2012] EWCA Civ 808; [2012] 2 Lloyd's Rep 313. Although the Supreme Court held that the Court of Appeal

had been wrong to conclude, albeit provisionally, that the applicable law was Russian law, the Supreme Court did not disapprove this part of the reasoning of the Court of Appeal. As Mr Salzedo pointed out, in that case, as in the present case, the claims in deceit and conspiracy were pleaded on the basis of English law and the claimants had not pleaded an alternative case as to the position under Russian law. Although Arnold J and the Court of Appeal concluded that the applicable law was Russian law, they evidently did not consider that the failure by the claimants to plead their case on Russian law was fatal in terms of there being a serious issue to be tried.

92. Furthermore, I agree with Mr Salzedo that *Global Multimedia* is a very different case from the present. The Chancellor was considering a contract which was expressly governed by Saudi law and, in circumstances where the claimant was alleging that terms were to be implied into that contract as a matter of law, one can quite see why he considered that it was incumbent upon the claimant to set out its case in its Particulars of Claim as to the applicable principles of Saudi law. It is also to be noted that the Chancellor did not consider the absence of a pleading on Saudi law fatal to the claim. He would clearly have permitted an amended pleading to be served rather than striking out the claim.

93. In any event, for reasons I will set out in more detail when I come to deal with appropriate forum, it seems to me that it is arguable that the applicable law of the torts alleged is English law, from which it follows that, even if applicable law were relevant to the question of whether there was a serious issue to be tried, one aspect of that serious issue to be tried is applicable law. Accordingly, this question of applicable law is in no sense a "killer blow" in favour of the defendants.

94. Mr Morgan QC also submitted that on a proper analysis the claim under section 423 should be regarded as a cause of action in tort or delict and that as with the other tort claims the governing law of the tort or delict is Russian law. The basis for this rather surprising submission was said to be the historical derivation of the section which traces its roots back through section 172 of the Law of Property Act 1925 to the Act against Fraudulent Deeds, Gifts and Alienations of 1571 and the fact that whereas the Statute of Frauds had been promulgated across the common law world, civil law jurisdictions had a similar right of redress derived from the *actio Pauliana* in Roman law which is characterised as part of the general law at least in Holland and Germany. Therefore, submitted Mr Morgan, section 423 should be regarded for the purposes of Rome II as a cause of action in tort or delict and accordingly, although he accepted the section has worldwide ambit it could only be used where the Regulation identifies English law as the applicable law. Since, as he submits, the applicable law here under Article 4.1 is Russian law, section 423 has no application.

95. These submissions seem to me to be founded on a fundamental misconception. Whatever its historical derivation, section 423 provides statutory relief and a statutory remedy if the requirements of the section are otherwise satisfied. It is not in any sense a cause of action in tort and the mere fact that the same facts as will give rise to an entitlement to an Order under section 423 may also give rise to a distinct cause of action for example in deceit or conspiracy do not make section 423 some form of "statutory" tort. The fact that civil law systems may not have an equivalent statutory regime is wholly irrelevant. It follows that even if the applicable law in relation to the tort claims is Russian law, that does not in itself affect the availability of relief under section 423. Given that, contrary to Mr Morgan's submissions, the assets of the

borrower have not been restored to it pursuant to the decisions of the Russian courts and Erste has shown a serious issue to be tried that there has been a deliberate alienation of the borrower's and guarantor's assets, Erste has shown a sufficiently arguable case that it is entitled to relief under section 423 of the Insolvency Act 1986.

96. The other alleged "killer blow" on which RT and RT Capital rely is the assertion that Erste's claim is for reflective loss, in other words that its claim is for the diminution in the value of the borrower's assets, which is said on analysis to be the borrower's claim not Erste's. RT contends not only that this demonstrates clearly that the applicable law of the torts in Russia, because that loss was suffered by the borrower in Russia, but also that Erste does not have a sustainable claim since that is a claim for reflective loss which is not recoverable. Mr Mumford on behalf of RT Capital placed particular emphasis on that latter point, submitting that by the time his client is alleged to have become involved in the conspiracy, which cannot have been before its incorporation in December 2010, the borrower was in insolvency in Russia. Accordingly, he submitted, any claim that Erste has must necessarily be derivative because the only loss must be the diminution in the insolvent estate, prejudicing Erste's entitlement as a creditor to receive a distribution *pari passu*.

97. Mr Salzedo QC submitted that the defendants were mischaracterising the nature of Erste's claim. In respect of each claim in tort, the pleaded loss was the sums due but unpaid under the Loan Agreement and/or the Guarantee on the basis that, but for the conspiracy and/or other torts committed, the borrower and the guarantor could and would have honoured their contractual obligations: see [120] to [127] of the Particulars of Claim. So far as Mr Mumford's point is concerned, Mr Salzedo contended that the short answer to it is that, at the point that RT Capital came on the scene, the borrower was in fact moving from supervision to external management which, not unlike Chapter 11 in the United States, involves a moratorium on claims by creditors and is designed to return the company to solvency not liquidation. Accordingly, he submits that Mr Mumford's point about reflective loss falls away.

98. Although Mr Mumford sought to demonstrate in reply that this was wrong and that the termination of the process of external management would still lead to a distribution amongst creditors on a *pari passu* basis, on analysis that was a false point. As Mr Salzedo demonstrated, when there is a return to solvency and a termination of external management, the settlement with creditors is on the basis that they are paid in full or receive full satisfaction if they are prepared commercially to settle for less than 100% of their claim. It is not a *pari passu* distribution.

99. In my judgment, on the basis of those submissions, Erste has a sufficiently arguable case for present purposes that its claims are not ones for reflective loss. In any event, even if the clams were for reflective loss, it is also arguable that the rule against reflective loss does not apply to creditors of a company: see [79] of my judgment in *Fortress Value Recovery Fund 1 LLC v Blue Skye Special Opportunities Fund LP* [2013] EWHC 14 (Comm); [2013] 1 All ER (Comm) 973. Like the applicable law point, this point about reflective loss is not a killer blow in favour of the defendants in relation to a serious issue to be tried.

100. In the context of whether Erste had shown a serious issue to be tried against RT Capital, Mr Mumford made two related submissions, first that his clients could only have joined any conspiracy late in the day when RT Capital was incorporated in

December 2010 and second that everything his clients were then alleged to have done pursuant to the conspiracy had been done in the context of an insolvency process, administered by independent professional managers acting under the supervision of the Russian court or otherwise sanctioned by the court. Accordingly, he submitted Erste had not properly shown that the acts of RT Capital were unlawful as a matter of English law, and no alternative case of unlawfulness under Russian law is pleaded.

101. The answer which Mr Salzedo QC gave to both these points was that, in English law, it is enough that RT Capital joined the conspiracy at a stage where a tortious plan was being executed using unlawful means, even if RT Capital did not carry out the unlawful acts itself, but they were carried out by other Defendants. Provided a sufficiently arguable case was shown that other Defendants had used unlawful means (and Mr Salzedo submitted correctly that the unlawful means, starting with the borrower's asset transfer are pleaded in detail in the Particulars of Claim), there was a sufficiently arguable case in conspiracy against RT Capital as well.

102. In support of that submission, Mr Salzedo relied upon the decision of the Court of Appeal in *Kuwait Oil Tanker Company SAK v Al Bader* [2000] 2 All ER (Comm) 271 and in particular at [111] and [112] of the judgment of the Court (Nourse, Potter and Clarke LJJ) setting out what has to be proved to establish the tort of conspiracy:

> "111. A further feature of the tort of conspiracy, which is also found in criminal conspiracies, is that, as the judge pointed out at page 124, it is not necessary to show that there is anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end. Although civil and criminal conspiracies have important differences, we agree with the judge that the following passage from the judgment of the Court of Appeal Criminal Division delivered by O'Connor LJ in *R v Siracusa* (1990) 90 Cr. App. R. 340 at 349 is of assistance in this context:
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> 'Secondly, the origins of all conspiracies are concealed and it is usually quite impossible to establish when or where the initial agreement was made or when or where other conspirators were recruited. The very existence of the agreement can only be inferred from overt acts. Participation in a conspiracy is infinitely variable: it can be active or passive. If the majority shareholder and director of a company consents to the company being used for drug smuggling carried out in the company's name by a fellow director and minority shareholder, he is guilty of conspiracy. Consent, that is agreement or adherence to the agreement, can be inferred if it is proved that he knew what was going on and the intention to participate in the furtherance of the criminal purpose is also established by his failure to stop the unlawful activity.'

> Thus it is not necessary for the conspirators all to join the conspiracy at the same time, but we agree with the judge that the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of. In a criminal case juries are often asked to decide whether the alleged conspirators were 'in it together'. That may be a helpful question to ask, but we agree with Mr Brodie that it should not be used as a method of avoiding detailed consideration of the acts which are said to have been done in pursuance of the conspiracy.
>
> 112. In most cases it will be necessary to scrutinise the acts relied upon in order to see what inferences can be drawn as to the existence or otherwise of the alleged conspiracy or combination. It will be the rare case in which there will be evidence of the agreement itself. Curiously this is such a case, although it appears to us that in crucial respects it is also necessary to draw inferences as to the extent of the agreement from what happened after it. Thus the essential nature of the agreement can be seen in part from the evidence of Mr Al Bader and Captain Stafford, although, especially in the case of Captain Stafford, the extent of the agreement will depend upon inferences to be drawn both from the surrounding circumstances and subsequent events."

103. That case also demonstrates, from a consideration of the position of one of the conspirators, Captain Stafford, that a party can be party to a conspiracy to use unlawful means even if he does not himself commit some or all of the relevant unlawful acts: see [133] of the judgment of the Court of Appeal quoting with approval the judgment of Moore-Bick J at first instance. See also my judgment in *Concept Oil Services Limited v En-Gin Group LLP* [2013] EWHC 1897 (Comm) at [51]-[52]. Mr Mumford made the perfectly valid point that *Kuwait Oil Tanker* also establishes that a late joiner to a conspiracy cannot be liable for loss which has already been caused before he joins the conspiracy. However in the present case, it seems to me that the issue of which act or acts caused Erste's loss and when is quintessentially an issue for trial. In the circumstances, I consider that Erste has shown a serious issue to be tried that RT Capital is liable in conspiracy even though it joined the conspiracy late and even though it might establish it had not itself committed any unlawful acts.

Jurisdictional gateways: necessary and proper party

104. The principal jurisdictional gateway relied upon by Erste to found jurisdiction against all the defendants other than the borrower and the guarantor is para 3.1(3) of CPR 6BPD: "A claim is made against a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and - (a) there is between the claimant and the defendants a real issue which it is reasonable for the court to try; and (b) the claimant wishes to serve the claim form on another person who is a necessary and proper party to that claim". Erste's case is quite simple: it has

founded jurisdiction in England against the borrower and the guarantor under the exclusive jurisdiction clauses in the Loan Agreement and the Guarantee, appropriate litigation notices having been served before the proceedings commenced or during the hearing of the current applications. It has precisely the same wider claims in conspiracy and pursuant to other torts and for relief under section 423 against the borrower and the guarantor as it has against the other Defendants. It intends to pursue those claims against the borrower and the guarantor in England and the other Defendants (specifically RT and RT Capital) are both necessary and proper parties to the claims against the borrower and the guarantor. Furthermore, the issue of whether the other Defendants are necessary or proper parties to the claim against the borrower and the guarantor is to be considered at the date that Cooke J granted permission to serve out, 24 October 2012, so it is unaffected by whether the borrower and guarantor choose to defend the proceedings or summary judgment is entered against them (as it has been on the contractual claims) or even by their dissolution in Russia pursuant to the liquidations taking place: see *Mohammed v Bank of Kuwait* [1996] 1 WLR 1483 at 1492H-1493B per Evans LJ.

105. Mr Morgan QC seeks to challenge the conclusion that the other Defendants are necessary or proper parties to the claims against the borrower and the guarantor, submitting that the English court in fact has no jurisdiction over the claims against the borrower and the guarantor (including the claims which have already been the subject of a successful application for summary judgment before HHJ Mackie QC) because Erste has submitted to the jurisdiction of the Russian bankruptcy court, the ACVR, in the case of the borrower by submitting claims in its liquidation in Russia and in the case of the guarantor by resisting Mr Dobryshkin's application to set aside the Guarantee as invalid under Russian law and by appealing the decision of the ACVR of 5 December 2011 declaring it invalid. Mr Morgan goes so far as to submit that Erste was at fault for failing to inform HHJ Mackie QC that it had submitted to the Russian bankruptcy jurisdiction and that, had he been so informed, HHJ Mackie QC should have declined jurisdiction.

106. Reference was made by Mr Morgan QC to the Cross-Border Insolvency Regulations 2006, Chapter III of which relates to recognition of a foreign insolvency proceeding where a foreign liquidator or administrator or the like (described as a foreign representative) makes an application for recognition. Mr Morgan referred in particular to Article 20 which provides, in summary, that where the foreign insolvency proceeding is recognised by the English court, any proceedings in England in relation to the debtor's assets or liabilities or any insolvency proceedings in England will be stayed.

107. Although Mr Morgan accepted that these Articles in Chapter III on recognition and its effect were not triggered unless and until a foreign representative made an application for recognition (which of course has not happened in the present case), he seemed to be submitting that the court should proceed as if such an application had been made. He drew attention to Article 29 (in Chapter V) which refers to concurrent proceedings in the foreign country and in England, but, contrary to his submissions, that Article is predicated upon there being an application for recognition by the foreign representative. There is no such application here. To the extent that what he appeared to be saying was that the English Court should take judicial recognition of the fact that there are insolvency proceedings in Russia, even though the Russian insolvency

representative is not making an application for recognition, and should either stay the claims against the borrower and the guarantor or decline jurisdiction in respect of those claims or under section 423 generally, there is nothing in the Regulations which supports or justifies that approach.

108. Furthermore, in circumstances where there is no application for recognition and Erste's case is that the insolvency proceedings in Russia have come about as a consequence of the tortious conspiracy between the Defendants, it seems to me it would be quite wrong for this court to make some sort of assumption in favour of the Russian insolvencies and stay the present proceedings. In any event, as Mr Salzedo QC points out, even if there were an application for recognition, under Article 20.2(b) any stay of proceedings would be "subject to the same powers of the court… as would apply under the law of Great Britain in such a case", preserving the power of the English Court to permit the continuation of proceedings if it were just and convenient to do so. The factual background to the present dispute is such that even if there were recognition of the Russian insolvency proceedings by this Court, this might well be a case where the Court would permit the present proceedings, and specifically the claim for relief under section 423, to continue in this jurisdiction.

109. Mr Morgan QC placed particular reliance on the judgment of Lord Collins in the Supreme Court in the conjoined appeals of *Rubin v Eurofinance SA* and *New Cap Reinsurance Corporation (in liquidation) v Grant* [2012] UKSC 46; [2013] 1 AC 236. His decision (with which three other of their Lordships agreed, Lord Clarke dissenting) was that there is no special, more liberal rule as regards the recognition and enforcement of a foreign judgment in cases of insolvency or bankruptcy in the interests of the universality of bankruptcy or similar procedures. The rule in such proceedings is the same as in any other proceedings, as set out in what is now Rule 43 in *Dicey, Morris & Collins, The Conflict of Laws* 15th edition [14R-054]:

> "A court of a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it was given in the following cases:
>
> First Case- If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.
>
> Second Case- If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.
>
> Third Case- If the person against whom the judgment was given submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.
>
> Fourth Case- If the person against whom the judgment was given had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country."

110. Although Mr Morgan referred me extensively to a number of passages from the judgment, I agree with Mr Salzedo that much of Lord Collins' analysis is of no relevance to the issues in the present case. As he correctly submits Sections V, VI and VII of the judgment are all predicated upon there being an application for recognition and enforcement of the foreign insolvency proceedings or judgment, whereas there is no such application in the present case, as I have already found in the context of the Cross-Border Insolvency Regulations. Thus, although the section 423 claim would seem to fall within the definition of avoidance proceedings in [94], in my judgment in the absence of an application for recognition of judgments or orders made by the Russian courts in the insolvencies of the borrower and guarantor, there is nothing in Lord Collins' judgment to suggest that Erste should in some way be precluded from bringing the section 423 claim. Furthermore, as I have already said in the context of the Cross-Border Insolvency Regulations, even if there were such an application for recognition and a corresponding stay of the section 423 claim, the Court would always have a discretion to permit the claim to continue, which in the circumstances of this case, it might well exercise in Erste's favour.

111. I agree with Mr Salzedo QC that the only section of the judgment which is of specific relevance in the present case is Section VIII, concerned with submission to the jurisdiction of the foreign bankruptcy court, the third case in Dicey Rule 43, which was a point which arose in the case of the Respondent Lloyd's syndicate in the *New Cap Re* appeal. In that case, the syndicate had not taken steps in the avoidance proceedings in Australia and had objected to the jurisdiction of the Australian court, but the syndicate had submitted its claim for proof in the liquidation in Australia. Lord Collins found that by doing so, the syndicate had submitted to the jurisdiction of the Australian court responsible for the supervision of the liquidation.

112. The critical part of the judgment on this point is at [164]-[167]:

> "164. The Syndicate did not take any steps in the avoidance proceedings as such which would be regarded either by the Australian court or by the English court as a submission. Were the steps taken by the Syndicate in the liquidation a submission for the purposes of the rules relating to foreign judgments?
>
> 165. In English law there is no doubt that orders may be made against a foreign creditor who proves in an English liquidation or bankruptcy on the footing that by proving the foreign creditor submits to the jurisdiction of the English court. In *Ex p Robertson, In re Morton* (1875) LR 20 Eq 733 trustees were appointed over the property of bankrupt potato merchants in a liquidation by arrangement. A Scots merchant received payment of £120 after the liquidation petition was presented, and proved for a balance of £247 and received a dividend of what is now 20p in the pound. The trustees served a notice of motion, seeking repayment of the £120 paid out of the insolvent estate, out of the jurisdiction. The respondent objected to the jurisdiction of the English court on the ground that he was a domiciled Scotsman. On appeal from the county court, Sir James Bacon CJ held that the court had jurisdiction. He said, at pp 737-738:

> "… what is the consequence of creditors coming in under a liquidation or bankruptcy? They come in under what is as much a compact as if each of them had signed and sealed and sworn to the terms of it - that the bankrupt's estate shall be duly administered among the creditors. That being so, the administration of the estate is cast upon the court, and the court has jurisdiction to decide all questions of whatever kind, whether of law, fact, or whatever else the court may think necessary in order to effect complete distribution of the bankrupt's estate. … [C]an there be any doubt that the Appellant in this case has agreed that, as far as he is concerned, the law of bankruptcy shall take effect as to him, and under this jurisdiction, to which he is not only subjected, but under which he has become an active party, and of which he has taken the benefit .. [The Appellant] is as much bound to perform the conditions of the compact, and to submit to the jurisdiction of the court, as if he had never been out of the limits of England."
>
> 166. The Syndicate objected to the jurisdiction of the Australian court. Barrett J in his judgment of 14 July 2009 accepted that it had made it clear that it was not submitting to its jurisdiction, and he also accepted that as a result the judgment of the Australian court would not be enforceable in England. His judgment is concerned exclusively with the preference claims, and he did not deal with the question of submission by reference to the Syndicate's participation in the liquidation by way of proof and receipt of dividends. He decided that the court had jurisdiction because the New South Wales rules justified service out of the jurisdiction on the basis that the cause of action arose in New South Wales.
>
> 167. I would therefore accept the liquidators' submission that, having chosen to submit to New Cap's Australian insolvency proceeding, the Syndicate should be taken to have submitted to the jurisdiction of the Australian court responsible for the supervision of that proceeding. It should not be allowed to benefit from the insolvency proceeding without the burden of complying with the orders made in that proceeding."

113. On the basis of that analysis, Mr Morgan QC submitted that by putting in a claim for proof in the insolvency of the borrower in Russia, Erste had submitted its claims against the borrower to the exclusive jurisdiction of the Russian courts and that it was not open to Erste to pursue its claims against the borrower in England.

114. In the context of that submission, it is important to note that Lord Collins was not purporting to lay down some rule of law that putting in a claim for proof in a foreign bankruptcy or liquidation constitutes a submission to the jurisdiction of the foreign court. On the contrary, as Lord Collins said in terms at [161]: "The question whether there has been a submission is to be inferred from all the facts". In my judgment on the material before the Court there are three critical aspects of the facts of this case

which distinguish it from *New Cap Re* and which mean that Erste has not submitted to the jurisdiction of the Russian court in relation to its claims against the borrower so as to preclude it from pursuing those claims in England.

115. First, in stark contrast to *New Cap Re* where the application to enforce the Order of the Australian Court that the syndicate repay the sums paid to it by New Cap Re pursuant to the relevant commutation agreement, which the Australian Court found was a preference which should be set aside, was being made by the Australian liquidator, there is no such application by any of the court appointed managers or administrators in the present case. Rather the argument that there has been a submission to the Russian jurisdiction is being run by two of the Defendants to claims which I have held give rise to a serious issue to be tried that they are parties to a conspiracy to engineer the liquidation of the borrower and the guarantor by alienation of their assets and deliberate manipulation of the insolvency process in Russia.

116. As I pointed out to Mr Morgan QC in argument, if he were right that RT can in effect subsume all the claims against it or its affiliates into the Russian liquidation procedure before any application for recognition has been made by the liquidator, that goes way beyond the principle of modified universalism of bankruptcy recognised in the authorities: see for example [19]-[20] of Lord Collins' judgment in *Rubin*, into some form super universalism. According that level of supremacy to a foreign bankruptcy proceeding (which is itself the subject of criticism in the claimant's case before the English court) goes beyond anything justified by the case law.

117. Second, liquidation in Russia uses a completely different procedure from that in a common law jurisdiction. The evidence of the Defendants' own Russian law expert, Professor Karelina, is that when a claim is put forward to be placed upon the list of creditors' claims, the procedure is that the court will examine whether all formalities have been completed and the amount and priority of the claim. Whilst the court may assess the validity of the underlying transaction, no final decision is made at that stage because this procedure is not intended to replace ordinary civil proceedings. It will be in such ordinary civil proceedings that the validity or otherwise of the underlying transaction will be determined. Thus, as Mr Salzedo QC points out, unlike in common law jurisdictions such as Australia where an order of the Court dealing with bankruptcy or winding up will bind the parties, in Russia the procedure for admitting a claim to the list of creditors' claims is provisional. The validity or otherwise of the underlying transaction may be determined in separate proceedings and, depending upon the decision in those proceedings, the decision to admit the claim may need to be revisited.

118. I agree with Mr Salzedo that what this demonstrates is that by putting forward its claim against the borrower to be placed on the list of creditors' claims, Erste has not submitted the determination of the merits of that claim (let alone the conspiracy claims) to the jurisdiction of the Russian courts in separate proceedings. It remains the case that those claims are to be determined in England pursuant to the exclusive jurisdiction clause.

119. In his submissions in reply, Mr Morgan QC sought to rely upon Erste's Statement of Defence dated 21 March 2013 to the application by the Insolvency Liquidator of the borrower in effect to have Erste removed from the list of creditors as somehow a submission to the jurisdiction of the Russian courts. I consider that submission to be

hopeless. All Erste was doing was saying to the Russian court that the fact that it had obtained summary judgment in England was no reason for being removed from the list of creditors. Far from submitting the claims against the borrower to the jurisdiction of the Russian court, Erste was asserting that the dispute with the borrower had not been submitted to the Russian jurisdiction but to the jurisdiction of the English courts.

120. The third matter which demonstrates that putting forward the claim to be placed on the list of creditors' claims did not amount to a submission of the determination of the merits of the claim to the Russian courts is closely related to the second and concerns the operation of the doctrine of *res judicata* in the Russian arbitrazh court system. The evidence of Dr Gladyshev, one of Erste's Russian law experts is that, in the arbitrazh court system, the doctrine of *res judicata* only applies within the Russian federation and then only to the facts found, not to the legal qualification of those facts or the application of the law to the facts. In other words court decisions are only binding as to the facts found and do not have extra-territorial effect. That point is not disputed by Professor Maggs, the defendants' Russian law expert.

121. It follows in my judgment that *New Cap Re* does not necessitate the conclusion that by putting forward its claim against the borrower for proof in the liquidation, Erste submitted to the jurisdiction of the Russian courts for the determination of the merits of that claim or its conspiracy and other claims.

122. That leaves the claims against the guarantor. Mr Morgan QC submits that Erste has submitted those claims to the jurisdiction of the arbitrazh courts in Russia by participating in the proceedings concerning the validity of the guarantee, resisting the application by Mr Dobryshkin to have the Guarantee declared invalid and appealing the decision of the ACVR declaring it invalid. Mr Morgan submits that this falls fairly and squarely within the third case of Dicey Rule 43.

123. Mr Salzedo QC pointed out that it is clear from the judgment of the ACVR dated 5 December 2011 that the Lenders, including Erste, were submitting that the Russian court had no jurisdiction to determine the dispute as to the validity of the Guarantee as that dispute had to be determined by the LCIA pursuant to the London arbitration clause in the Guarantee. Although at that stage Erste had already elected to invoke the exclusive jurisdiction of the English courts so that in one sense the arbitration clause had fallen away and although no mention is made of the exclusive English jurisdiction clause in the judgment of the ACVR, what matters is that Erste was clearly challenging the jurisdiction of the Russian court, not submitting to that jurisdiction. As Mr Salzedo also pointed out, that challenge to the jurisdiction could not be taken as a separate point distinct from the merits as it would be in a common law jurisdiction. In civil law systems, even if you challenge the jurisdiction, you still have to set out your defence on the merits and those issues are dealt with by the court at the same time.

124. Similarly, in the appeal process before the AAC, it is clear from its judgment dated 24 January 2012 that one of the points being taken by the Lenders was that the ACVR had erred in not applying the arbitration agreement. It is also apparent that the Lenders maintained before the Court of Cassation that the ACVR had violated the Arbitrazh Procedural Code by not recognising and applying the arbitration agreement. In any event, it seems to me that if the Lenders did not submit to the jurisdiction of

the ACVR, seeking to appeal the decision it had made in breach of the arbitration clause did not amount to a submission to the jurisdiction of the Russian courts.

125. Mr Morgan QC sought to answer this point by submitting that Erste had submitted a claim against the guarantor to be included on the list of creditors in the liquidation, which was accepted by the ACVR on 22 September 2010 and in doing so it had not reserved its position that any dispute had to be arbitrated in London. Accordingly, Mr Morgan submitted that Erste had thereby submitted any dispute under the Guarantee to the jurisdiction of the arbitrazh courts. The answer to that point is the same one as I have given in relation to the borrower. The proof of claims in the liquidation and their approval by the Russian court is an entirely separate procedure from the determination of the merits of the dispute. But putting forward a claim in the liquidation, Erste did not submit any dispute as to the validity of the Guarantee to the jurisdiction of the Russian courts.

126. On the basis that Erste did not submit to the jurisdiction of the Russian courts in relation to the determination of the validity of the Guarantee, the decision of the ACVR and the appellate courts that the Guarantee is invalid, which applied Russian law to the Guarantee, notwithstanding that it is expressly governed by English law, will not be recognised by the English Court. This is an application of the long-standing principle that discharge from liability under a foreign bankruptcy procedure will only be a discharge in England if it is a discharge under the law applicable to the contract. That principle was applied by the Court of Appeal in *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399 and has been applied many times since, most recently by Teare J in *Global Distressed Alpha Fund v PT Bakrie Investindo* [2011] EWHC 256 (Comm); [2011] 1 WLR 2038 at [11]-[13] (where the earlier authorities are summarised) and [25]-[27] (refusing an invitation not to follow the *Antony Gibbs* case).

127. Once it is recognised that the argument based upon *New Cap Re*, that the claims against the borrower and the guarantor in England are unsustainable because they have been submitted to the jurisdiction of the Russian Courts dealing with the insolvency proceedings, is misconceived, the fact that the borrower and the guarantor may be in liquidation in Russia does not affect the entitlement of Erste to bring the wider tort claims or the claim under section 423 against them in England pursuant to the contractual jurisdiction provisions.

128. I should add that, even if I had considered Mr Morgan was right that Erste had submitted its claims against the borrower and the guarantor to the jurisdiction of the Russian courts, I consider the only claims that would have been so submitted would be claims under the Loan Agreement and Guarantee themselves. I do not see any basis for the contention that it had submitted its wider claims in conspiracy and other torts to the jurisdiction of the Russian courts. To the extent that it were suggested that because the Guarantee had been declared void, Erste could not demonstrate that it had suffered any loss and damage, Erste still has an arguable case against the guarantor in conspiracy and the other torts in respect of the default of the borrower under the Loan Agreement.

129. In conclusion on this jurisdictional gateway, for present purposes, I do not need to go beyond concluding that Erste has much the better of the argument that it has not submitted its claims against the borrower and guarantor to the jurisdiction of the

Russian courts and that it is free to and intends to pursue those claims in England. It is fair to say that, if he was wrong in his argument that Erste was precluded by the insolvencies in Russia and the judgment(s) of the Russian courts, Mr Morgan QC did not advance to any great extent an alternative argument that the other Defendants (and specifically RT and RT Capital) were not necessary or proper parties to the claims in tort and under section 423 against the borrower and the guarantor.

130. Any such argument would be hopeless. The test as to whether the other defendants are proper parties to the claims against the borrower and the guarantor remains that formulated by Lord Esher MR in *Massey v Heynes* (1887) 21 QBD 330. As Lord Collins put it, giving the judgment of the Privy Council in *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804 at [87]:

> "Third, the question whether D2 is a proper party is answered by asking: "Supposing both parties had been within the jurisdiction would they both have been proper parties to the action?": *Massey v Heynes & Co* (1888) 21 QBD 330 at 338, per Lord Esher MR. D2 will be a proper party if the claims against D1 and D2 involve one investigation: *Massey v Heynes & Co* at 338, per Lindley LJ; applied in *Petroleo Brasiliero SA v Mellitus Shipping Inc (The Baltic Flame)* [2001] EWCA Civ 418, [2001] 1 Lloyd's Rep 203, at [33] and in *Carvill America Inc v Camperdown UK Ltd* [2005] EWCA Civ 645, [2005] 2 Lloyd's Rep 457, at [48], where Clarke LJ also used, or approved, in this connection the expressions "closely bound up" and "a common thread": at [46], [49] ."

See also [36]-[38] in *United Film Distribution Ltd v Chhabria* [2001] EWCA Civ 416; [2001] 2 All ER (Comm) 865 per Blackburne J in the Court of Appeal.

131. In my judgment the application of that test allows of only one answer: the claims in tort and under section 423 against the borrower and the guarantor are claims which are the same claims as are made against the other Defendants. Those claims involve one investigation and are, on any view, closely bound up with each other. It follows that Erste has much the better of the argument that RT and RT Capital (and the other Defendants) are necessary or proper parties to the claims against the borrower and the guarantor.

Jurisdictional gateways: claim in respect of a contract

132. In one sense, once Erste has demonstrated, as it has, that the other Defendants are necessary or proper parties to the claims against the borrower and the guarantor, it is not necessary for Erste also to demonstrate that it could bring its claims against the other Defendants within one or other of the other jurisdictional gateways in the Practice Direction. However, since the matter was fully argued, I will deal with the other gateways.

133. Erste relied also upon three sub-heads of para 3.1(6) of Practice Direction 6B: that the claims against the other Defendants were in respect of a contract or contracts made in England (sub-head (a)), governed by English law (sub-head (c)) or which contained an English jurisdiction clause (sub-head (d)).

134. Mr Salzedo QC contended that the claims in tort against the other Defendants (and specifically, the claims for inducing breach of contract and interference with contractual relations) were claims "in respect of a contract" made in England, even though the other Defendants were not parties to the Loan Agreement or the Guarantee. He relied upon the decision of the Court of Appeal in *Greene Wood & McClean LLP v Templeton Insurance Ltd* [2009] EWCA Civ 65; [2009] 1 WLR 2013. The claimant was a firm of solicitors which had acted for a number of miners under a Group Litigation Order. The defendant was an Isle of Man insurance company which was an ATE insurer and it was the claimant's case that the defendant had agreed to indemnify the miners in respect of costs orders, which the defendant refused to do, leaving the claimant to satisfy those orders. The claimant claimed a contribution or indemnity from the defendant under the Civil Liability (Contribution) Act 1978 and sought permission to serve out on the basis that the claim was made "in respect of a contract", that is the contract between the defendant and the miners, even though the claimant was not party to that contract.

135. Longmore LJ (with whom Sir Anthony Clarke MR and Hooper LJ agreed) held at [17]-[20] that the claim was indeed one made in respect of the ATE contract and that the claimant did not need to be a party to the contract to bring itself within that jurisdictional gateway. He doubted whether it was even necessary for the defendant to be party to the contract:

> "17 The first question is whether the claim for a contribution or indemnity pursuant to the 1978 Act is "a claim in respect of a contract" for the purposes of sub-rule 5(c). The claim is only being made because, as it happens, the insurers do have a contract with the miners whereby they have agreed to indemnify the miners in respect of costs which may be ordered against them in the GLO application and in respect of own disbursements. But can it be said that GWM's claim is a claim in respect of a contract? It is not a contract to which GWM are a party and the paradigm case of a contract pursuant to which permission is given under part 6.20(5)(c) is a contract between the intended claimant and the intended defendant. Indeed the notes to the rule in the White Book (6.21.34) do actually say that the contract has to be a contract between those parties. That is adopted by Mr Sweeting for the insurers who says that is not enough for only one of the parties to the intended action to be a party to a contract. Suppose that there is a contract to which only the intended claimant is a party and the defendant merely has a tortious or fiduciary obligation to the third party, would that be sufficient for the sub-rule to apply? That would be odd because the defendant would be brought before the court under a contractual provision of CPR 6.20 when he was not a party to a contract at all.
>
> 18 To say that, for a claim to be "in respect of a contract", it must be "in respect of a contract between the intended claimant and the intended defendant" is to add words to the rule which are not there. The commentary in *Dicey, Morris and Collins,*

> *Conflict of Laws*, 14th ed (2006) 11-182 to 11-184 does not suggest any such requirement. Moreover since the Contracts (Rights of Third Parties) Act 1999, Parliament has contemplated cases in which a third party can sue on a contract made between two persons for his benefit. If such a contract is governed by English law (or, even, made or broken in England) why should the third party not be able to take advantage of sub-rule (5)(c) of CPR 6.20? It would be odd if he could not and every reason to suppose that he should be able to utilise the sub-rule, always subject to the court being satisfied that England is the "proper place" in which to bring the claim, pursuant to CPR 6.21(2A).
>
> 19 The claim in the present case clearly has a connection with a contract governed by English law. To my mind that makes it a claim in respect of that contract even if it is not a claim brought under the contract. No doubt some connections with contracts are more remote than others but the present claim has a very close connection with insurers' contract with the miners to pay their costs and own disbursements if they lose. As the judge said the remoteness from the contract (if any) is something that can be dealt with when the court considers whether England is the proper place for a claim under CPR 6.21(2A).
>
> 20 I doubt if it would be any different if it was the intended claimant rather than the intended defendant who was a party to the contract in respect of which the claim was brought but I am content to leave that question to be decided in a case in which it actually arises.

136. Mr Salzedo QC submitted that that was a binding authority of the Court of Appeal that it was not necessary for the purposes of this gateway that the defendant was party to the contract in question. He also relied upon the application of the same principle by Hamblen J in *Cecil v Bayat* [2010] EWHC 641 (Comm) at [135]. However, as Tomlinson LJ pointed out in *Alliance Bank v Aquanta Corporation* [2012] EWCA Civ 1588; [2013] 1 All ER (Comm) 819, what Longmore LJ said in *Templeton* in relation to a defendant who was not a party to the contract was not binding, as the point was left open and what Hamblen J said was strictly obiter: see [67] and [71].

137. In *Alliance Bank* the Court of Appeal was faced with the argument that claims in conspiracy were claims "in respect of a contract" even though the defendant was not a party to the contract in question, but the claimant was, in other words the same situation as in the present case. Mr Morgan QC, who appeared in that case, relied upon passages in the judgment of Tomlinson LJ (with whom Elias and Lloyd LJJ agreed) in support of his submission that the claims in tort against the other Defendants are not "in respect of a contract", since those Defendants were not parties to the Loan Agreement or the Guarantee.

138. At [63], having cited Longmore LJ's observation at [19] in *Templeton* that the remoteness of the connection with the contract can be dealt with in relation to appropriate forum, Tomlinson LJ said:

> "Even so, I am intuitively resistant to the notion that gateway (6) can be used to justify service out of the jurisdiction by reference to a contract to which the intended defendant is not party. In such circumstances there is, as it seems to me, likely to be no sufficient link between the conduct of the intended defendant and this jurisdiction so as to justify the English court assuming an extra-territorial jurisdiction."

139. He then goes on to consider a number of authorities relied on by the claimants in that case, including *Templeton* and *Cecil v Bayat* reaching his conclusion on this issue at [71]:

> "Notwithstanding the width of the language used by Longmore LJ in *Greene Wood,* plainly that case does not compel us to decide that connection of a claim with a contract to which an intended defendant is not party is a qualifying jurisdictional link under gateway 6. That point was left open. I am for my part attracted by the argument that a claim is not for that purpose properly described as "made in respect of a contract" where the contract in question is not one to which the defendant is party. For my part I see great force in the argument that it is implicit in the rule that the contract upon which reliance is placed must be one to which the intended defendant is party. I am also attracted by Mr Morgan's formulation which I would tentatively restate as follows:- unless the claimant is suing in order to assert a contractual right or a right which has arisen as a result of the non-performance of a contract, his claim is not in this context properly to be regarded as one made in respect of a contract. I think it likely that ordinarily such claims can only be made in respect of contracts to which the intended defendant is party. However the case of the intended defendant, Warner, considered by Hamblen J in *Cecil v Bayat* may show that that will not always be so. It is sufficient to dispose of the point in this case to indicate that the required connection between claim and contract must inevitably be the more difficult to establish in a case where the intended defendant is not party to the contract upon which reliance is placed than in a case where he is party to it. Longmore LJ was able to say in *Greene Wood* that the claim for contribution clearly had a connection with the Templeton contract which established the liability of Templeton to the miners, because that (contractual) liability was a prerequisite to *Greene Wood* claiming contribution from Templeton. Here there is in my judgment no clear connection, or no connection with any real content, between the claims in tort or delict against Ds 6-9 and the Reachcom loan agreements. Those agreements may be an incidental product of the conspiracy but it puts the cart before the horse to describe the claim in respect of the conspiracy as a claim in respect of the contracts to which it may, incidentally, have given rise. It would be more natural, but still in my judgment artificial, to

> regard the claim as made in respect of the contracts of guarantee between Alliance and Reachcom rather than the loan agreements between Reachcom and Ds 3 and 4, since it was by the former that Alliance was deprived of its money. Similarly, I consider that the claims in unjust enrichment against the wrongdoers who allegedly participated in the scheme to divert Alliance's assets and the equitable claims for dishonest assistance and knowing receipt arising from the breach of fiduciary duty that arguably occurred when the contracts of guarantee were executed have a closer affinity to those contracts than to the contracts of loan. In these cases too however the necessary connection between the claim and the contracts is in my view lacking. In none of these formulations is Alliance suing Ds 6-9 in order to assert a contractual right or a right which has arisen as a result of the non-performance of a contract."

140. In my judgment, what emerges from that passage is that, despite the reluctance of Tomlinson LJ to accept that Para 3.1(6) could be applicable at all where the defendant is not a party to the contract in question, Mr Salzedo QC is right that Tomlinson LJ is recognising that a distinction can be drawn in principle between a case such as the Court of Appeal was considering there, of a contract made in effect pursuant to or incidental to the conspiracy where it is difficult to see the claim in conspiracy as being "in respect of" that contract and a case where there is a close connection between the claim being made and the contract. Mr Salzedo QC submitted that it was one thing to conclude that the conspiracy was not "in respect of the contract" where, as in *Alliance Bank*, the tort was "upstream" of the contract, preceding it, but it was another where the essence of the conspiracy was procuring the non-performance of the contract, in other words where the tort is "downstream" of the contract. He submitted that the present case fell into the latter category. Whilst it seems to me that, for reasons I will come to, this concept of the torts in the present case being "downstream" of the Loan Agreement and Guarantee (both governed by English law and containing an English jurisdiction clause) assists Erste in relation to the issue of appropriate forum, my own instincts are cautious like those of Tomlinson LJ and, in the light of the decision of the Court of Appeal in *Alliance Bank* I do not consider that Erste has much the better of the argument that the tort claims against the defendants other than the borrower and the guarantor are "in respect of a contract".

Jurisdictional gateways: claim in tort where damage sustained within the jurisdiction

141. Erste also relies upon para 3.1(9)(a) of Practice Direction 6B which provides: "A claim is made in tort where- (a) damage was sustained within the jurisdiction." As I have already indicated, Erste contends that the damage it has sustained as a consequence of the conspiracy and other torts is the non-fulfilment of the obligations of the borrower and the guarantor under the Loan Agreement and the Guarantee. Erste's case is very simple: its designated Facility Office for the purposes of the finance documents is at 68 Cornhill, London EC3V 3QE, where its London branch has its office and the Transfer Certificate (to which I refer in detail below) provided for payment to an account of Erste at a bank in London. Accordingly the damage claimed was sustained in England.

142. Mr Morgan QC seeks to challenge Erste's entitlement to rely upon this gateway in three ways: (i) that the real loss is in fact the diminution in the value of the asset base of the borrower and the guarantor, a loss suffered in Russia; (ii) that even if the loss sustained is the non-fulfilment of the obligations under the finance documents, upon a close analysis of the Loan Agreement, the place of payment was New York so that the loss and damage was sustained in New York not London: (iii) that para 3.1(9) of the Practice Direction should be read as if it reflected Article 5(3) of the Brussels I Regulation. I have already concluded in the section of the judgment dealing with serious issue to be tried that the first head of challenge, the so-called reflective loss point, is misconceived, so it is not necessary to go back over that ground in the present context. However, I do need to deal with Mr Morgan's other two points in some detail.

143. The starting point for Mr Morgan's submission that this gateway should be read as reflecting Article 5(3) was to refer to the Rules of the Supreme Court as they stood in 1982, immediately prior to the enactment of the Civil Jurisdiction and Judgments Act 1982 which brought the Brussels Convention into force in this jurisdiction. Order 11 rule 1(1)(h) as it then was, permitted service out when a tort was committed within the jurisdiction and, as was clear from the case law under that gateway summarised in the Supreme Court Practice 1982, it was not enough that the damage was sustained within the jurisdiction. With the coming into force of that part of the Civil Jurisdiction and Judgments Act 1982 which enacted into English law the Brussels Convention, RSC (Amendment No. 2) 1983 (S.I. 1983 No. 1181) made a number of amendments to adapt the Rules of the Supreme Court to the Convention.

144. New Order 11 rule 1(1)(f) dealt with claims in tort and was essentially the same text as what is now para 3.1(9) of Practice Direction 6B. The alteration was made in order to ensure that English law was consistent with Article 5(3) of the Convention: see per Mance LJ in *ABCI v Banque Franco-Tunisienne* [2003] 2 Lloyd's Rep 146 at [43]. Mr Morgan QC argues that the gateway should be construed in accordance with Article 5(3) which permits claims in tort to be brought in "the courts of the place where the harmful event occurred" and the case law under that Article. However, as Mr Morgan QC recognises, that very argument has been raised and rejected in two first instance decisions.

145. In *Cooley v Ramsey* [2008] EWHC 129 (QB); [2008] ILPr 27, Tugendhat J recorded and rejected this argument at [35] and [36] in these terms:

> "35 Mr Palmer starts his submissions on the Art 5(3) cases with the citation from *Metall & Rohstoff v Donaldson* [1990] 1 QB 391 at 437A, and *ABCI v Banque Franco-Tunisienne* [2003] EWCA Civ 205; [2003] 2 Lloyd's Rep 146 para 43, to the effect that the rule relating to service out of the jurisdiction in states not parties to the Brussels Convention (New York in that case) was changed to give effect to that Convention and the Civil Jurisdiction and Judgment Act 1982 and the decision of the European Court of Justice in *Handelskwekerij GJ Bier v Mines de Potases d'Alsace SA* (Case 21/76) [1978] QB 708. I accept that that is so up to a point. But Parliament did not fully assimilate the rules relating to non-party states with those relating to states which are parties. The significant difference

> that Parliament left in being was that under the Convention and the Judgments Regulation the court retains no discretion, whereas in relation to non-party states there is the discretion to be found in CPR Part 6.20 and 6.21(2A). "
>
> 36 It follows from this, in the words of Professor Briggs in "Civil Jurisdiction and Judgments" 4th ed para 4.43, that "there is no compelling reason to apply this line of Convention and, probably, Regulation authority outside the field of application of the Convention or Regulation itself".

146. The same argument was rejected for the same reasons by Haddon-Cave J in *Wink v Croatia Osiguranje DD* [2013] EWHC 1118 (QB) at [41], following and approving *Cooley v Ramsey*:

> "Miss Crowther's proposition (5), that Ground 9(a) 'falls to be read consistently with Article 5(3) of Brussels I', was comprehensively dismissed by Tugendhat J. in *Cooley (supra)* (at paragraphs [35]-[46]). In my judgment, Tugendhat J was right to do so. The case law of the Court of Justice ("CJEU") on Article 5(3) of the Brussels Convention/Brussels I Regulation is not relevant to the construction of Ground 9(a) because the two schemes are fundamentally different in structure and policy. The EU rules seek certainty at the price of inflexibility: thus *forum conveniens* arguments are not permitted (see *Owusu v Jackson* [2005] ECR I-01383). By contrast, in respect of non-Regulation countries, the common law rules adopt a more flexible legal framework which admits *forum conveniens* and makes the assumption of jurisdiction discretionary. "

147. Mr Morgan QC rightly recognised that those authorities are completely against him. He seemed to be suggesting that in some way they could be distinguished because they failed to appreciate, that when the Rules Committee altered the wording of the gateway, it was intending to mirror the meaning and effect of "the place where the damage was sustained" in the Brussels Convention as interpreted by Professor Jenard in his report which constitutes the travaux preparatoires for the Convention. However in my judgment that point is hopeless, since, whilst neither judgment refers to Professor Jenard, the reason for rejecting the attempt to equate para 3.1(9) with Article 5(3), namely that the terms of the domestic rule are wider and the English Court retains a discretion as to jurisdiction absent from the Convention, would be unaffected by what Professor Jenard may have said, which only purports to deal with the position under the Convention, not with domestic jurisdictional rules of the Courts of the member states.

148. It follows that, like Tugendhat J and Haddon-Cave J, I consider that the correct approach to the meaning of "damage was sustained within the jurisdiction" in para 3.1(9) is that adopted by Teare J (when still a Deputy High Court Judge) in *Booth v Phillips* [2004] EWHC 1437 (Comm); [2004] 1 WLR 3292 at [35]:

> "I shall start (and perhaps ought to finish) with the words of the rule themselves. CPR r 6.20(8)(a) [what is now para 3.1(9) of Practice Direction 6B] refers to a claim in tort where "damage was sustained within the jurisdiction"… It should be given its ordinary and natural meaning, namely, harm which has been sustained by the claimant, whether physical or economic. Further, it is to be observed that CPR r 6.20(8)(b) refers to a claim in tort where "the damage sustained resulted from an act committed within the jurisdiction". The definite article is used here whereas it is not used in CPR r 6.20(8)(a). This suggests that it is sufficient for the purposes of sub-paragraph (a) that some damage (not all of the damage) is sustained within the jurisdiction. …"

149. Applying that approach in the present case, in my judgment Erste has much the better of the argument that it has sustained damage within the jurisdiction and therefore brings itself within this additional jurisdictional gateway.

Jurisdictional gateways: claim under an enactment

150. Finally in relation to jurisdictional gateways, Mr Salzedo QC submits that the claim under section 423 of the Insolvency Act 1986 is a claim made under an enactment within para 3.1(20)(a) of the Practice Direction. He is clearly correct about that. I have already rejected Mr Morgan QC's argument that it is to be regarded as some form of statutory tort and, shorn of that argument, RT and RT Capital are essentially constrained to accept that the section 423 claim falls strictly within the ambit of this gateway. However, what they contend is that the court retains a residual discretion to refuse permission to serve out. That is no doubt correct but to the extent that, at this stage of determining whether the Court has jurisdiction, they are seeking to argue that the Court should decline jurisdiction on the basis that there is insufficient connection with England to justify the application of section 423, I agree with Mr Salzedo QC that this approach is misconceived for the reasons I gave in *Fortress Value v Blue Skye* at [113]-[114]:

> "113 The other objection to the section 423 claim recently raised by the defendants is that there is insufficient connection with this jurisdiction, so that the court should effectively strike out the section 423 claim now. This approach is misconceived. It is well-established that section 423 can have extra-territorial effect. The principle was stated by Sir Donald Nicholls V-C in *Re Paramount Airways (No 2)* [1993] CH 223 at 239-240:
>
> > 'The court's discretion: a sufficient connection with England
> >
> > This conclusion is not so unsatisfactory as it might appear at first sight. The matter does not rest there. Parliament is to be taken to have intended that the difficulties such a wide ambit may create will be sufficiently overcome by two safeguards built into the statutory scheme. The first lies in the discretion the court has under the sections as to the order it will make. Section 423(2) provides that the court "may" make such

order as it thinks fit for restoring the position and protecting victims of transactions intended to defraud creditors. Sections 238, 239, 339 and 340 provide that the court "shall," on an application under those sections, make such order as it thinks fit for restoring the position. Despite the use of the verb "shall," the phrase "such order as it thinks fit" is apt to confer on the court an overall discretion. The discretion is wide enough to enable the court, if justice so requires, to make no order against the other party to the transaction or the person to whom the preference was given. In particular, if a foreign element is involved the court will need to be satisfied that, in respect of the relief sought against him, the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element. This connection might be sufficiently shown by the residence of the defendant. If he is resident in England, or the defendant is an English company, the fact that the transaction concerned movable or even immovable property abroad would *by itself* be unlikely to carry much weight. Likewise if the defendant carries on business here and the transaction related to that business. Or the connection might be shown by the situation of the property, such as land, in this country. In such a case, the foreign nationality or residence of the defendant would not *by itself* normally be a weighty factor against the court exercising its jurisdiction under the sections. Conversely, the presence of the defendant in this country, either at the time of the transaction or when proceedings were initiated, will not necessarily mean that he has a sufficient connection with this country in respect of the relief sought against him. His presence might be coincidental and unrelated to the transaction. Or the defendant may be a multinational bank, carrying on business here, but all the dealings in question may have taken place at an overseas branch.

Thus in considering whether there is a sufficient connection with this country the court will look at all the circumstances, including the residence and place of business of the defendant, his connection with the insolvent, the nature and purpose of the transaction being impugned, the nature and locality of the property involved, the circumstances in which the defendant became involved in the transaction or received a benefit from it or acquired the property in question, whether the defendant acted in good faith, and whether under any relevant foreign law the defendant acquired an unimpeachable title free from any claims even if the insolvent had been adjudged bankrupt or wound up locally. The importance to be attached to these factors will vary from case to case. By taking into account and weighing these and any other relevant circumstances, the court will ensure that it

> does not seek to exercise oppressively or unreasonably the very wide jurisdiction conferred by the sections.'
>
> 114 As that passage indicates, the question whether there is sufficient connection with England to justify relief under section 423 is a matter which depends upon all the circumstances of the case. This is not a threshold question of jurisdiction, but a question of discretion. Clearly a question of discretion which depends upon a fact-sensitive enquiry is not appropriate for determination on a summary basis at an interlocutory stage, such as when permission to amend is sought. That is borne out by what Evans-Lombe J said in *Jyske Bank (Gibraltar) Ltd v Spjeldnaes* [1999] 2 BCLC 101 at 122. In that case, at the stage when permission to amend to add a section 423 claim was being sought, he had been invited to decline to exercise the discretion to grant relief. He had not been prepared to decide the point at that stage but considered that he should wait until he had heard full evidence and argument."

Appropriate Forum: Factors other than the issue of a fair trial in Russia

151. As I have already recorded earlier in the judgment, in its evidence and its written submissions, Erste focused heavily on what it contends is its inability to obtain a fair trial in Russia, because of the risk of improper influence on the part of the Defendants with the judicial process. This point was described by Mr Salzedo QC as a "torpedo" at the outset of his oral submissions on this part of the case, in the sense that it may dominate other factors concerning forum, but as he put it, there is a risk that the point comes to dominate more than it ought in the debate on forum. Accordingly, Mr Salzedo began his submissions on this part of the case by assuming that I was against him on the torpedo point, making submissions in relation to the other factors which he submitted point to England clearly being the appropriate forum, irrespective of whether Erste could obtain a fair trial in Russia. I propose to adopt the same approach and consider first the merits or otherwise of the other factors said by Erste to make England clearly the appropriate forum, before coming on to deal with the issue of fair trial.

152. In relation to the factors which Erste contends point to England as clearly the appropriate forum even if the Court considers that Erste has not shown by cogent evidence that there is a risk that it would not get a fair trial in Russia, Erste relies upon five points. First and foremost is that Erste is proceeding in England with the conspiracy claims against the borrower and the guarantor and RT and RT Capital are necessary or proper parties to those claims, since the same claims are made against them. Mr Salzedo pointed out that those conspiracy claims are being pursued here not only against the borrower and the guarantor who have been served as of right pursuant to the notice and service provisions of the contracts, but also against the Seventh Defendant which has been served in Russia and has not applied to set aside service.

153. Mr Salzedo submits that the question of whether there is a conspiracy which is largely a question of fact will thus be litigated in this jurisdiction in any event and this is not a case where there are already proceedings on foot in Russia concerning the conspiracy.

In these circumstances, Mr Salzedo submits that the fact that Erste will pursue its claim against the borrower, guarantor and Seventh Defendant in this jurisdiction, seeking a determination of the issues at a trial on the merits even if those three Defendants choose not to participate in the proceedings, is an overwhelming factor in favour of England being the appropriate forum for the determination of this dispute.

154. In his reply submissions in answer to this point Mr Morgan QC emphasised the anomalous nature of the necessary or proper party gateway and the need to exercise caution in relation to this head of jurisdiction, by reference to what Lord Collins said at [73] of *Altimo Holdings*:

> "The necessary or proper party head of jurisdiction is anomalous, in that, by contrast with the other heads, it is not founded upon any territorial connection between the claim, the subject matter of the relevant action and the jurisdiction of the English courts: *The Brabo* [1949] AC 326, 338, per Lord Porter. Piggott, *Foreign Judgments and Jurisdiction* (3rd ed, 1910), pt III, p 238, said: "This is perhaps the most important of the sub-rules, for it throws the net of jurisdiction over a wider area; and the principle of considering the nature of the cause of action which pervades the whole subject, appears here to be ignored." Consequently as Lloyd LJ said in *The Goldean Mariner* [1990] 2 Lloyd's Rep 215 at 222:
>
> > 'I agree … that caution must always be exercised in bringing foreign defendants within our jurisdiction under O.11 r.1(1)(c). It must never become the practice to bring foreign defendants here as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction.'"

155. Mr Morgan submitted that, if the Court acceded to Mr Salzedo's submission on this point, then in every case where a defendant was a necessary or proper party to a claim against another defendant, the claimant could demonstrate that England was the appropriate forum because of the risk of inconsistent findings or judgments in this and another jurisdiction. This plea in terrorem seems to me to overstate the position, since whether England is or is not the appropriate forum will turn upon an assessment by the Court, albeit at an interlocutory stage, of the circumstances of the particular case.

156. In the present case, for the reasons I have set out earlier in the judgment, Erste clearly has a fully arguable case against the borrower and the guarantor in conspiracy which it is entitled to pursue here, to which the other Defendants are necessary or proper parties on the basis that they are or were at the relevant times companies in the same group, of which RT was in overall control and that they were all parties to the same conspiracy as the borrower and the guarantor. In my judgment, it would be verging on the perverse for Erste to have to litigate the conspiracy and other tort claims against companies arguably in the same group as the borrower and the guarantor in Russia (a fortiori in the case of RT in relation to which there is a serious issue to be tried that it was in overall control of the conspiracy), involving as that would litigating the same complex issues of fact twice with all the attendant waste of costs and risk of inconsistent findings in the two jurisdictions. As I said during the course of argument,

whilst that is not quite unthinkable, it is certainly not something the Court would want to contemplate. In my judgment this is a very strong factor in favour of England being the appropriate forum for the determination of the dispute, even if that point stood alone, which it does not for reasons set out below.

157. The second point was related to the first, that the Loan Agreement and the Guarantee both of which contained English law and jurisdiction clauses, were at the heart of the current dispute. Mr Salzedo QC points out that the tort claims in this case are all about breaching and undermining the obligations under those contracts. He submits that those claims are closely bound up with the contracts themselves so that the natural forum for the determination of the entire dispute is England. As a forensic point he relies upon the fact that the solicitors for RT, Macfarlanes, themselves asserted in correspondence: "These proceedings are clearly relating to the facility agreement."

158. Mr Salzedo QC also relies in this context on a passage in the judgment of Lord Neuberger in *VTB Capital v Nutritek*. The context was an argument by VTB that the fact that the defendants had by fraudulent misrepresentations induced it to enter a contract with a third party RAP which contained a clause, clause 35, giving VTB the option to sue RAP in England, was a powerful pointer to England being the proper forum. There was in fact no claim by VTB against any party to that contract. At [105] Lord Neuberger considered that the judge at first instance, Arnold J, had been right to consider that clause 35 was a factor in favour of VTB but not a particularly strong factor. He went on at [108]-[109] in these terms:

> "108 However, clause 35 is not an exclusive jurisdiction provision: it merely gives VTB what is in effect an option to sue the other parties to the agreements in England in respect of any claim arising out of or in connection with those agreements. The present proceedings do not involve VTB suing any party to the agreements, although it may be that they could fairly be said to include any claim arising under the agreements. The fact that RAP was content to be sued under the agreements in England does not mean that Mr Malofeev would have been content to have been sued in tort here. The fact that VTB apparently wanted to have the right to sue RAP here does not mean that it would have wanted to have the same right against Mr Malofeev (e.g. RAP may have been believed to have assets here).
>
> 109 I accept that it would be different if VTB had a claim under the agreements against RAP to which its claim against Mr Malofeev was somehow connected. There is obvious force in Mr Hapgood QC's point that, if Mr Malofeev is to be treated as having had notice of clause 35 and its implications, it goes no further than helping VTB in suing him in this jurisdiction in proceedings which include a claim brought under the agreements against one or more of the parties to the agreements. However, I do not consider that the fact there are no such claims destroys VTB's reliance on clause 35 of any validity, but it severely weakens it."

159. Reliance is also placed by Mr Salzedo on a passage in the dissenting speech of Lord Clarke at [221] where he concludes that the inclusion of the English law and jurisdiction clauses in the agreements which VTB was induced to enter into by fraudulent misrepresentation is a strong pointer to the conclusion that the natural forum is England. In my judgment, that passage needs to be approached with some circumspection, since Lord Clarke was in the minority in considering that the permission to serve out of the jurisdiction should stand.

160. However, it seems to me Mr Salzedo is correct in his submission that the present case falls within the different case contemplated by Lord Neuberger in the first sentence of [109]. Whilst Lord Neuberger only deals with that different case briefly, the clear implication is that, if there is before the Court a claim against another party under a contract containing an English jurisdiction clause with which the particular claim in tort is connected, that is a potentially significant factor in favour of England as the appropriate forum. Since Erste's case is that the Defendants conspired to undermine the performance of two contracts governed by English law and containing English jurisdiction clauses, Mr Salzedo submits that that connection between the contracts and the torts is established here and also points to England as the appropriate forum.

161. The answer which Mr Morgan puts forward to this point is that RT and RT Capital are not parties to the contracts and that all the events with which the factual dispute is concerned have taken place in Russia pursuant to relationships governed by Russian law, applying Russian accountancy reporting standards and that pretty well all the factual witnesses on each side will be Russian speaking and resident. I accept that this is a factor pointing away from England and towards Russia as the appropriate forum, as was the case in *VTB v Nutritek.* Accordingly, if Mr Salzedo's second point stood alone, I would not consider it a sufficiently significant factor to outweigh the obvious connection of the facts with Russia rather than England.

162. The third point which Mr Salzedo QC makes is that if the claims had to be litigated in Russia, the starting point for the Russian court would be the invalidity of the Guarantee as a matter of Russian law, even though the Guarantee is subject to English law and jurisdiction. He submits that the invalidity of the Guarantee would have various potential impacts on the liability of each Defendant, as regards matters such as whether particular acts were wrongful and would on any view make Erste's claims more difficult to establish in Russia.

163. I accept that this is not a question of a legitimate difference between two equally appropriate fora, but of the Russian court reaching the wrong result by applying the wrong governing law as a matter of English conflicts of laws rules. That this is a significant factor pointing to England as the appropriate forum is borne out by the judgment of Christopher Clarke J (as he then was) in *Stonebridge Underwriting v Ontario Municipal Insurance Exchange* [2010] EWHC 2279 (Comm); [2010] 2 CLC 349. That case concerned inter alia a dispute as to the effect of non-compliance with the Claims Cooperation Clause in a reinsurance contract whereby the claimant Lloyd's syndicate, of which XL was the managing agent, reinsured the defendant, a not-for-profit insurance exchange in Ontario. The defendant sought to set aside service out of the jurisdiction. The reinsurance did not contain an express choice of law provision, but it was in effect common ground that the putative proper law was English law. There was evidence in that case that notwithstanding that, as a matter of English conflicts rules and the Rome Convention, the proper law of the contract was

English law, if the dispute were litigated in Ontario, the Ontario court would be likely to determine it according to its own conflicts rules, under which the contract would be deemed to have been made in Ontario and held to be governed by Ontario law, which had a concept of relief from forfeiture under its Insurance Act. This would mean that the defendant could recover under the reinsurance contract even if it was in breach of the Claims Cooperation Clause, whereas as a matter of English law, compliance with that Clause was a condition precedent to XL's liability under the reinsurance contract.

164. The learned judge considered that the English court should favour its own conflicts rules and that the fact that under those rules the contract was governed by English law was of considerable significance in pointing to England as the appropriate forum, since the alternative forum would deprive XL of the benefit of English law. Two passages in the judgment were relied upon in particular by Mr Salzedo at [33] and [36]:

> "33 Since different countries may have different private law rules the identification of the "*correct proper law*" will inevitably depend on which court is deciding the question. There is however authority that the English Court should favour its own conflict rules: see per Staughton LJ in *The Irish Rowan* [1991] 2 Q.B. 206, 229G (cited by Longmore J in Tiernan at [18], p525):
>
> > 'In an ideal world there would be no difference between the conflict rules applied by all nations. … But unfortunately uniformity is far from achieved. … [I]t seems to me fairly arguable that a plaintiff is entitled to claim the benefit of the conflict rules prevailing here. So far as concerns domestic law, it would be wrong for us to suppose that our system is better than any other. But in the case of conflict rules, which ought to be but are not the same internationally, there is a case for saying that we should regard our rules as the most appropriate.'
>
> 36 The fact that the parties have impliedly chosen English law is, as it seems to me, in this case, of considerable significance. Firstly this is so because, as I have said, the choice of the only alternative venue may deprive XL of the benefit of English law, to which the parties agreed and rights under the condition precedent in the claims co-operation clause to which, under that law it is entitled. I do not think this consideration is trumped by the fact that any relief against forfeiture would be granted only if the Ontario court thought that it was just to do so."

165. In my judgment, the present is an a fortiori case, since the Guarantee is expressly governed by English law, pursuant to which it is a valid and binding contract and the Russian court has already applied its own law to declare the contract invalid, so there can be no doubt that if Erste were required to litigate in Russia it would be deprived not only of the benefit of English law but of a valid binding contract of guarantee. Mr Morgan QC really has no sustainable answer to this point. He reiterated that the judgment of the Russian court declaring the Guarantee invalid was binding on Erste,

but that contention depends upon Erste having submitted to the jurisdiction of the Russian courts, which I have already held it did not.

166. The only other argument he raised on this point was that the validity or otherwise of the Guarantee did not impact upon either Erste's cause of action or the quantum of its loss. Although that argument has a superficial attraction, it seems to me on closer analysis it is misconceived. The conspiracy alleged by Erste does not involve just the deliberate insolvency of the borrower, but of the guarantor as well and the loss claimed is in respect of the non-fulfilment of their obligations by both: see for example [120] and [121] of the Particulars of Claim. Accordingly, the fact that the Russian court would consider the Guarantee invalid would have a considerable impact upon Erste's ability to recover the loss it claims to have suffered. That is a significant factor pointing to England as the appropriate forum.

167. Mr Salzedo's fourth and fifth points in a sense go together. The fourth is that the Russian court would apply the wrong governing law, Russian law, to the conspiracy, a point the validity of which depends on the correctness of the fifth point which is that the governing law of the torts alleged is English law. Logically, therefore, that fifth point should be considered first.

168. It is common ground that the question of governing law falls to be decided pursuant to the Rome II Regulation. Article 4 of the Regulation sets out the general rule that the applicable law of the tort or delict should be the lex loci damni, that is the law of the place where the damage occurs, in these terms:

> "Article 4
>
> General rule
>
> 1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
>
> 2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
>
> 3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

169. To repeat what I said at [44] and [45] of my judgment in *Fortress Value*, Article 4(1) expressly provides that only the law of the place where the damage occurs is relevant, not the law of the place where the harmful event occurred, representing a deliberate departure from the case law of the European Court of Justice on Article 5(3) of the Judgments Regulation which provides that both systems of law are alternative gateways to jurisdiction. That deliberate departure in favour of a rule focused solely on the place where the direct damage arises is reflected in the Explanatory Memorandum i.e. the *travaux preparatoires* for the Regulation and in Recitals (15) to (17) to the Regulation itself. As the wording of Article 4(1) itself and the previous case law on what has become Article 5(3) of the Judgments Regulation make clear, the court is concerned with the law of the place where the direct damage occurred, not of the place where indirect adverse consequences or financial loss were suffered: see the decision of the European Court of Justice in *Marinari v Lloyd's Bank* [1995] ECR I-2719; [1996] QB 217, a case under Article 5(3).

170. Mr Morgan QC particularly relied on that case in support of his submission that the enquiry as to governing law under the Regulation is "cause of action blind" as he put it, involving looking at the facts independent of the cause of action to determine the place where the damage occurred and that the Regulation is looking at damage in the abstract, not at what the claimant suffers. I accept that *Marinari* supports Mr Morgan's submission about cause of action blindness, in the sense that both the Brussels Convention and the Rome II Regulation do not intend the determination of territorial jurisdiction to be dictated by national law on non-contractual civil liability: see [16] to [19] of the judgment.

171. However I do not consider that that case supports the more extreme submission, that the Regulation is only focusing on abstract damage, not on the loss the claimant has suffered. What the European Court decided at [21] is, as I have already said, that the court is concerned with the law of the place where the direct damage occurred, not of the place where indirect adverse consequences or financial loss were suffered, but the direct damage in question is the damage suffered by the claimant, not some abstract damage as Mr Morgan contended. That is clear from the end of [21]: "[the Regulation] must be interpreted as not referring to the place where the victim claims to have suffered financial loss consequential upon initial damage arising and suffered by him in another contracting state" (my emphasis).

172. Whilst the other cases relied upon by Mr Morgan, *Kronhofer v Maier* [2004] 2 All ER (Comm) 759 and *Dumez France SA v Hessische Landesbank* [1990] IL Pr 299 reiterate that same principle at [21] and [20]-[22] of the respective judgments, they simply do not support Mr Morgan's more extreme submission. Rather, [20] of the judgment in *Dumez* would seem flatly contrary to that submission:

> "It follows from what has been said that although, according to the Court's case law, the phrase 'the place where the harmful event occurred' in Article 5(3) of the Convention may refer to the place where the damage occurred, the latter should be taken to mean only the place where the causal event, giving rise to delictual or quasi-delictual liability, directly produced the harmful effects in relation to the person who is the immediate victim".

173. Mr Morgan's primary submission was that the only loss suffered by Erste was the diminution in the asset base of the borrower and the guarantor, i.e reflective loss and I can see the force of the submission that that loss must have occurred in Russia for the purposes of Article 4(1) of the Regulation. However, as I have already held above in dealing with the question of serious issue to be tried, Erste's pleaded case is not as Mr Morgan would like it to be, but is that its loss consists of the sums due but unpaid under the Loan Agreement and/or the Guarantee on the basis that, but for the conspiracy and/or other torts committed, the borrower and the guarantor could and would have honoured their contractual obligations. Erste has a sufficiently arguable case that that is the loss it has suffered and that that loss occurred in the country where Erste would have been paid had the borrower and the guarantor honoured their obligations.

174. Mr Morgan submitted that, even if that was right, on a proper analysis of the Loan Agreement the loss was suffered in Russia. This was because under Clause 7 the borrower was bound to maintain Russian accounts into which at least two business days prior to the date any repayment instalment was due, the borrower had to ensure there were sufficient funds. His argument was that the moment the borrower failed to top up those accounts, Erste and the other Lenders suffered a loss and that loss was suffered in Russia.

175. Even if that was wrong, Mr Morgan submitted that the place of payment under the Loan Agreement was New York. He relied upon Clause 28 .1 and 28.2 of the Loan Agreement which provided:

> "28.1 Payments to the Facility Agent
>
> (a) On each date on which the Borrower…is required to make a payment under a Finance Document, the Borrower…shall make the same available to the Facility Agent…for value on the due date at the time and in such funds specified by the Facility Agent as being customary at the time for settlement of transactions in the relevant currency in the place of payment.
>
> (b) Payment shall be made to such account in the principal financial centre of the country of that currency with such bank as the Facility Agent specifies.
>
> 28.2 Distributions by the Facility Agent
>
> Each payment received by the Facility agent under the Finance Documents for another Party shall…be made payable by the Facility agent as soon as practicable after receipt to the Party entitled to receive payment in accordance with this Agreement (in the case of a Lender, for the account of its Facility Office) to such account as that Party may notify to the Facility Agent by not less than five Business Days' notice with a bank in the principal financial centre of the country of that currency."

176. As Mr Morgan pointed out, payment under the Loan Agreement was to be made in US Dollars and the principal financial centre of the United States is New York. Accordingly, he submitted that, even if Erste's analysis as to the loss it had suffered was right, which he disputed, the governing law of the torts was New York law, not English law as Erste contended. To the extent that Erste sought to avoid that consequence by reliance on Article 4(3), as Recital (18) to the Regulation makes clear: "Article 4(3) should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country." Mr Morgan submitted that, since the entire dispute on the facts concerned events in Russia, Russian entities and individuals, Russian insolvencies and decisions of the Russian courts, that provision was of no assistance to Erste; on the contrary, that demonstrated that the torts were manifestly more closely connected with Russia than with any other country.

177. Mr Salzedo's primary submission in response was that applying Article 4(1), the governing law was, at least sufficiently arguably, English law. The point about the Russian accounts was a false point because the Lenders had no proprietary interest in those accounts and, in any event, whilst it may have been a breach of contract not to top up those accounts, Erste did not suffer any immediate loss because, by definition, this breach occurred two business days before any payment was due to Erste. It seems to me that Mr Salzedo must be right about that.

178. Mr Salzedo submitted that the place where the loss was suffered was the place where the individual lender, in this case Erste, was to receive payment into the account it had notified to the Facility Agent, as contemplated by Clause 28.2. That notification was effected by means of the Transfer Certificate defined in the Loan Agreement as being "a certificate substantially in the form set out in Schedule 4 or any other form agreed between the Facility Agent and the Borrower". As Mr Salzedo pointed out, the actual Transfer Certificate which was signed by both VTB Bank Europe plc as Facility Agent and Erste as accepted by both, dated 31 January 2008, provided for payment to Erste Bank…AG London and gave the Swift Code for Erste in London. In other words, what was agreed with the Facility Agent is that Erste would be paid in London. Accordingly, Mr Salzedo submitted that the damage occurred in England and, pursuant to Article 4(1) "the law of the country where the damage occurs" was English law.

179. In support of that conclusion, Mr Salzedo also relied upon the decision of Christopher Clarke J (as he then was) in *Dolphin Maritime & Aviation Services Ltd v Sveriges Angfartygs Assurans Forening* [2009] EWHC 716 (Comm), a case in which Dolphin (a recovery agent and claims correspondent) claimed against the defendant P&I Club for conspiracy and procuring breach of contract. A ship entered with the Club was involved in a collision and became semi-submerged and grounded. Cargo was damaged and the cargo underwriters paid the cargo interests and became subrogated to their rights. The cargo underwriters instructed Dolphin to seek to recover compensation in respect of the cargo. Under its trading terms Dolphin would be entitled to deduct any commission from recoveries it made. Dolphin negotiated two important agreements on behalf of the cargo underwriters with the shipowners, an escrow agreement and a letter of undertaking from the Club by way of security for the cargo claim. Essentially what happened is that, without Dolphin's knowledge, a settlement agreement was made between the shipowners who were represented by the

Club and the cargo underwriters, whereby the underwriters' claims were settled for US$8.5 million to be paid direct by the Club to the underwriters. Dolphin's case was that the Club knew that the settlement agreement involved a breach by the cargo underwriters of their obligation to pay commission to Dolphin and that in entering that agreement the Club was procuring a breach of the contract between the underwriters and Dolphin and conspiring with the underwriters to damage Dolphin.

180. The Club sought to strike out those claims on the ground that the English court had no jurisdiction to hear them, on the basis that any claim had to be brought against it in Sweden under Article 2 of the Judgments Regulation. Dolphin relied upon Article 5(3), which provides that in cases of tort or delict a defendant can be sued "in the courts for the place where the harmful event occurred". The learned judge recorded at [28] that in *Handelskwekerij GJ Bier BV v Mines de Potasse d'Alsace SA* [1978] 1 QB 708 the European Court had established that those words were to be construed so as to enable the claimant to commence proceedings "at the place where the damage occurred or the place of the event giving rise to it". Dolphin relied upon the former alternative, so the question before the court was where the damage occurred.

181. The learned judge found that Dolphin had a sufficiently arguable case that the US$8.5 million should have been paid direct to its bank account in London. He went on to find, at [58] and [59] of his judgment, that the place where, in the words of *Dumez*, the damage to the direct victim occurred, was England, where Dolphin did not receive the money which, if the contract had been performed, it should have received and that if the tort had not been committed, payment would have been made to Dolphin in England and the essence of its complaint was that that did not occur.

182. Mr Salzedo QC relied in particular on [60] of the judgment as setting out an analysis which deals with precisely the kind of damage which occurred in the present case, supporting the conclusion that the damage occurred where, but for the tort, Erste should have received payment, i.e. in England:

> "I do not ignore the danger of conflating the place where the damage occurred with the place where the loss was suffered. There is, however, a difference between a case in which the claimant complains that he has lost his money or goods (as in *Domicrest* or *The "Seaward Quest"*) and a case in which the claimant complains that he has not received a sum which he should have received. In the former case the harm may be regarded as occurring in the place where the goods were lost (*Domicrest*) or the place from or to which the monies were paid (*The "Seaward Quest"*), although the loss may be said to have been suffered in the claimant's domicile. In the latter case the harm lies in the non receipt of the money at the place where it ought to have been received, and the damage to him is likely to have occurred in the place where he should have received it. That place may well be the place of his domicile and, therefore, also the place where he has suffered loss. An analogy may be drawn with the non delivery of cargo at the destination port: see *Reunion Europeenne.*"

183. Mr Morgan did not have any convincing answer to Mr Salzedo's submission that the analysis in *Dolphin Maritime* supported Erste's case as to where the damage occurred, other than to reiterate that the real loss was the reflective loss of the borrower in Russia, a submission I have already rejected. Mr Morgan sought to challenge the conclusion that the damage occurred in England by submitting that, so far as the contractual position was concerned, payment was to be made in New York and that is what the borrower and the guarantor and thus the other Defendants would expect, but the answer to that is that this claim is in tort, not in contract and, whatever the Loan Agreement might have contemplated, the actual place of payment under the Transfer Certificate was London. Mr Morgan then submitted that the Transfer Certificate was non-contractual, but it seems to me that, since the Certificate was signed as accepted by both Erste and the Facility Agent, it is fairly clear that they had agreed payment would be made in London. In any event, even if the Certificate was non-contractual, the fact remains that Erste was to be paid in London so that it seems to me that, in accordance with Mr Salzedo's submissions, the loss Erste suffered occurred in England, in which case the governing law under Article 4(1) would be English law.

184. Mr Salzedo submits that if he is wrong about English law being the governing law under Article 4(1), then the torts are nonetheless manifestly more closely connected with England. He relies on the second sentence of Article 4(3) pointing out that so far as the borrower and the guarantor are concerned they fall fair and square within that sentence: there are pre-existing contractual relationships governed by English law and the torts involve interference with and the undermining of those contracts, so that a close connection between the torts and the contracts are established. So far as the other Defendants, including RT and RT Capital are concerned, although they were not parties to those contracts, Erste has a sufficiently arguable case that they were parties to the same conspiracy and other torts involving interference with and undermining of the contracts, so that the close connection is established.

185. As for Mr Morgan's point about all the events and acts alleged to comprise the conspiracy or other tortious acts having taken place in Russia, Mr Salzedo submits that this does not detract from the fact that the conspiracy and other torts involved interference with contracts governed by English law or damage to Erste's rights under those contracts, which remains a sufficiently manifest close connection with England. He relies in that context on [72] and [73] of my judgment in *Fortress Value*. Mr Salzedo submitted that, looking at the evidence as a whole, there was a clear case that the causes of action in tort were governed by English law, another factor which points to England as the appropriate forum.

186. It seems to me that, on these applications concerned with jurisdiction, the Court is not engaged in making a final determination of the governing law but only with determining the question of governing law on a provisional basis as part of the assessment as to whether the claimant has satisfied the burden of showing that England is clearly the appropriate forum. Indeed, particularly in relation to the application of article 4(3) which depends in terms upon "all the circumstances of the case" it is undesirable for the court to reach a concluded view until it has the full factual picture at trial: see [59] to [62] of *Fortress Value* and the cases cited there.

187. For the present, in my judgment all that it is necessary or desirable to find, whether under Article 4(1) or 4(3), is that Erste has a strongly arguable case that the governing law of the torts is English law. The question which then arises is how powerful a

factor that is in pointing to England as the appropriate forum, which really leads into Mr Salzedo's fourth point. There will be cases where, even if the governing law of the tort is English law, that is not a particularly compelling factor pointing to England as the appropriate forum, because the case will turn on a factual dispute where all the evidence and witnesses are in the alternative foreign forum and there is no evidence that the law of that foreign forum would lead to a different result if the claimant's case were established on the facts.

188. *VTB Capital v Nutritek* was such a case, as is apparent from the judgment of Lord Mance at [45] to [47] :

> "45 The Court of Appeal was wrong to regard Russian law as governing the alleged torts, but it acknowledged that possibility and it dealt with the alternative, that English law governed them. However, in relation to this alternative, it was in my opinion also wrong to approach the matter on the basis that it made no difference which law governed, because each side would have in any event to prepare evidence on both legal systems in whichever country the case was tried.
>
> 46 The governing law, which is here English, is in general terms a positive factor in favour of trial in England, because it is generally preferable, other things being equal, that a case should be tried in the country whose law applies. However, that factor is of particular force if issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues in the two countries in contention as the appropriate forum. Neither of these considerations here applies.
>
> 47 VTB's claims are for deceit and for conspiracy. The conspiracy alleged is to obtain finance by the deceit. Accepting that the governing law of both alleged torts is, to English legal eyes, English, there is nothing to show that Russian law would reach any different conclusion. Parties are able to plead and rely on English law in Russian courts. But, even if there were reason to think that a Russian court would regard Russian law as governing the alleged torts, there is nothing to suggest that Russian law does not recognise and impose tortious liability for deceit, and for conspiracy to commit a deceit, on bases for material purposes equivalent to those which would be recognised under English law. It is unlikely that it does not, and no evidence has been adduced that it does not. It would have been for VTB to adduce evidence on all these points, if it could, in support of its case that England was the appropriate forum."

189. Although the present case is also one involving allegations of conspiracy where the relevant alternative forum is Russia, in contrast with that case, there is evidence in this case (ironically from one of the Defendants' Russian law experts, Professor Maggs) that the Russian law equivalent of conspiracy, the liability for jointly caused harm under Article 1064 and 1080 of the Russian Civil Code, would involve a narrower

basis of liability than the English law of tort and that the damages recoverable might well be more circumscribed than under English law. It follows that, in my judgment, Erste's fourth and fifth points do support an arguable case that, since the Russian court would apply Russian law to the conspiracy case, it would not only be applying the wrong governing law, but a governing law that would potentially provide a more restrictive recovery than would be available under English law.

190. In my judgment, Erste's first point about RT and RT Capital being necessary or proper parties to the claims against their related companies, the borrower and the guarantor is, as I have said, a very strong factor in favour of England as clearly the appropriate forum, even if it stood alone. However, that point does not stand alone, it is supported by Erste's other points, particularly that the Russian courts have held and would continue to hold a binding and valid contract of guarantee invalid by the application of the wrong system of law and that the Russian courts would apply the wrong governing law also to the torts alleged, potentially limiting Erste's recovery. Taking all the points raised together, I am quite satisfied that they demonstrate that England is clearly the appropriate forum, irrespective of whether, as Erste contends, there is a risk that it could not get a fair trial in Russia.

Appropriate Forum: the issue of a fair trial in Russia

191. In those circumstances, in one sense it is not necessary to decide whether Erste could get a fair trial in Russia and it might be thought invidious to embark on that enquiry unless it is strictly necessary to do so. However, given the extent of the evidence and submissions expended on the point, it is appropriate to set out my findings on this issue, albeit in shorter form than I would have done if, contrary to the conclusion I have already expressed that England is clearly the appropriate forum, this issue of fair trial had been determinative on the issue of appropriate forum.

192. As I have already indicated, although the evidence adduced by Erste on this issue was extensive and its written submissions set out a detailed and wide-ranging critique both of the decisions of the Russian court to date in relation to the matters in issue and of the Russian court system generally, it is fair to say that in his oral submissions, Mr Salzedo QC presented a narrower and more focused case as to why, if the tort claims had to be pursued in Russia, improper influence of the courts would affect their outcome. In support of that proposition, he relied upon three points: (i) that RT is an entity of the first importance to the Russian state and very strongly connected to President Putin through Mr Chemezov; (ii) that an entity such as RT is capable of improperly influencing proceedings in Russia should it choose to do so; and (iii) that there is a real risk that it would choose to do so.

193. As Mr Salzedo says, the first of these points is not seriously in dispute and is borne out by the expert evidence of Professor William Bowring on behalf of Erste. He is Professor of Law at Birkbeck College, University of London. He is a fluent Russian speaker and has a particular interest in the independence of the Russian judiciary. In 2008, he produced a report on behalf of Mr Cherney in *Cherney v Deripaska* [2008] EWHC 1530 (Comm); [2009] 1 All ER (Comm) 333 setting out in detail his expert opinion that if Mr Cherney's claims were pursued in Russia, he was highly unlikely to get justice. That expert evidence was accepted by Christopher Clarke J who concluded on the evidence before him that there was a close link between Mr Deripaska and the Russian state, whose interests were aligned in that case and that

there was a significant risk of improper government interference if Mr Cherney were to bring his claims in Russia, so that justice would not be done (see the discussion of the question of a fair trial in Russia at [237] to [248] of the judgment).

194. In the present case, Professor Bowring has put forward a wealth of evidence to show the close connection between RT and the Russian state and its strategic importance to the Russian state. Since this is not really in dispute, one citation from his first report will suffice:

> "[RT] could not be more intimately bound up with the Russian State and the Putin regime, in terms of its importance for Russia's manufacturing future, the prevention of the most serious social explosions, and the very close longstanding working relationship between its Director General and Mr Putin."

195. So far as the second and third points are concerned, Mr Salzedo QC submitted that it seemed to be common ground that it was the case a few years ago that entities or individuals closely connected with the Russian state were capable of influencing court proceedings and did so. He pointed out that RT's own expert Professor William Simons, Professor of Law at the University of Leiden, who has extensive knowledge and experience of the Russian legal system, relies upon and refers to the work of Professor Kathryn Hendley which he describes as "grounded in her sound empirical research". He exhibits a paper of Professor Hendley's *"Are Russian Judges still Soviet?"* published in 2007. Mr Salzedo referred the court to a passage where Professor Hendley said this:

> "Where does that leave Russia in its quest for an independent judiciary? If we conceptualize independence as existing along a spectrum, with complete independence as an elusive (and perhaps undesirable) goal, then Russia would certainly seem to have made substantial forward progress in the post-Soviet era. But there are real limits on the extent of this progress. Russia can fairly be regarded as a dualistic legal state. Many cases are resolved by judges in accord with the law and without any outside interference. But the political and economic elite can and do interfere when their core interests are in play."

196. Christopher Clarke J referred to and relied upon a not dissimilar passage in Professor Hendley's book *Putin's Russia* at [248] of his judgment in *Cherney v Deripaska*. Mr Salzedo also referred to an article by Professor Hendley in the second half of 2009 entitled Telephone Law and the Rule of Law which discusses an apparent paradox, that increasing numbers of Russians are willing to use their legal system, even though, as she described it, it is "deeply and patently flawed". Her explanation is that Russians are what she describes as "savvy consumers" who know when to bring a case and when to stay away. She maintains the opinion that outcomes are manipulated in cases with high political stakes.

197. Although Mr Morgan sought to suggest by reference to the opinion of his expert, Professor Simons, that Professor Hendley had changed her views, in the sense that she detected a marked improvement, particularly in the arbitrazh court system, in a paper

published in August 2011 entitled *Explaining the Use of Russian Courts* she essentially reiterates her view expressed in her earlier papers that, whilst in the vast majority of mundane cases the courts will apply the written law, in high profile politicised cases, there remains manipulation of the courts.

198. Mr Morgan sought to downplay much of this material by suggesting that what Professor Hendley was describing was the public perception of manipulation of the court system based upon some high profile cases in the past rather than the reality on the ground today. I consider that there is some force in that point. Mr Salzedo relied upon what was said by Professor Skvortsov, the Russian law expert on behalf of RT Capital to the effect that there are accusations of lack of impartiality on the part of arbitrazh courts in disputes involving the state or state companies. However, Professor Skvortsov goes on to say that there are relatively few instances where such criticisms are based on material factual evidence. Whilst Mr Salzedo was able to say that the Professor was not saying there were no cases at all where there was evidence of improper influence, in my judgment, the thrust of the point he was making was that the criticisms were as he said frequently unsuccessful parties expressing dissatisfaction at the outcome, part of ordinary litigation risk.

199. This is not an instance of cogent evidence of a real risk of injustice, it is once again a perception that courts are the subject of improper influence without any concrete evidence to that effect. Mr Mumford rightly pointed out that the state of the expert evidence on concerns about the Russian judicial system in the present case is not dissimilar to the expert evidence as to concerns about the Ukrainian judicial system in *Ferrexpo AG v Gilson Investments Ltd* [2012] EWHC 721 (Comm); [2012] 1 CLC 645 and yet in that case Andrew Smith J concluded that despite those concerns, there was no cogent evidence of a real risk Ferrexpo would not get a fair trial in Ukraine.

200. It is also noteworthy that many of the high profile cases which are considered by the experts to be ones where influence was brought to bear are criminal cases or cases which are before courts of general jurisdiction, not the arbitrazh courts. Furthermore, much of Professor Bowring's opinion that there is a significant risk of a biased decision wherever the interests of the state are engaged seems to be based on his experience in *Cherney v Deripaska* which is some five years ago. I agree with Mr Morgan that there is a fair amount of material amassed by Professor Simons to show that the arbitrazh court system is much more transparent and open than it was in 2008-2009. The judges for particular cases are selected at random by computer, judges have to give reasons for their judgments, judgments are published on the internet and there is a proper complaints system.

201. It also has to be borne in mind that *Cherney v Deripaska* was an extreme case, in the sense that Mr Cherney was seen as something of an enemy of the Russian state and had good reasons for not returning to Russia because he might be a political target. Christopher Clarke J was at pains to point out at [247]-[248] of his judgment that he was not deciding that a fair trial could never be obtained in the arbitrazh system or that the state would always succeed in that system, just that, on the peculiar facts of that case, Mr Cherney could not obtain justice in Russia.

202. The present case is in a completely different category, and although the amount of money involved (US$80 million if one takes account of all the Lenders) is not perhaps merely "chicken feed" as it was described by counsel then representing RT at an

earlier hearing before me, it is not so great or of such apparent financial significance to the Russian state to warrant improper interference with the courts dealing with the case. Furthermore, for reasons I will expand below, there is a complete absence of any evidence of some sustained "political" campaign already being successfully waged in the Russian courts against Erste and the other Lenders through improper influence on those courts by RT.

203. Professor Bowring remains of the opinion that there is a significant risk of a biased decision wherever the interests of the state are engaged and that a compliant judge will be selected by the Court Chairman without even the need for a telephone call, a point he reiterates in his second report. Without echoing in any sense Mr Morgan's rather astringent criticism of Professor Bowring, it does seem to me that, on analysis, there are a number of difficulties with that opinion. To begin with, if the judge for the particular case is randomly selected by computer, it is difficult to see how the Court Chairman would be able to influence that selection. This point is borne out by the report of Gabriela Knaul, the Special Rapporteur of the European Commission on Human Rights, dated 25 April 2013. She compares the arbitrazh court system where there is a "sophisticated computer-based system" of assignment of cases favourably with the general jurisdiction courts where there is a lack of transparency and judges are indeed selected by the Court Chairman.

204. Furthermore, even if the Court Chairman of the aribtrazh court could influence the selection of the judge, the hypothesis would have to be, in decisions which went on appeal, as several decisions of the arbitrazh courts have in the present case, that similar unspoken manipulation was being exercised over the chairmen of the AAC, the Court of Cassation and the Supreme Arbitrazh Court, in order to get the right result. Furthermore, in order for the improper influence to be successful, the chairmen of each Court would have to make sure the case was "stitched up" sufficiently cleverly to ensure that no one spotted that manipulation had taken place. At this point it seems to me there is an air of unreality about Professor Bowring's opinion.

205. In his first report Professor Bowring also expresses the opinion that, whilst there appeared to have been a desire for openness and reform of the court system during the presidency of Mr Medvedev, matters have gone sharply into reverse with the re-election of Mr Putin as President. However, he produces no concrete evidence to support that opinion, at least so far as the arbitrazh courts are concerned.

206. Erste also relies upon the report of the Special Rapporteur of the European Commission on Human Rights dated 25 April 2013, which is therefore up to date so far as the issues before the court are concerned. In that report she refers in terms to reports she had received during her visit of improper influence on the judiciary and how some judges were still under the influence of the Soviet system. She also refers to how there was a lack of independent evidence of disciplinary action in cases of corruption. However, the overall tone of her report is optimistic: although much remains to be done, the independence of the judiciary is taken seriously in Russia.

207. Towards the end of his oral submissions, Mr Salzedo submitted that there were five reasons why the evidence as a whole establishes that there is a real risk that Erste would not get a fair trial in Russia. (1) that on the basis of Erste's case (which I have held is fully arguable) RT has deliberately and improperly rendered the borrower and the guarantor bankrupt and a state entity which is prepared to do that is unlikely to

stop there in furthering its own ends, in other words if it has the means of influencing the result of the case, it is likely to use them; (2) that if the tort claims were to proceed in Russia they would be more serious than anything which had happened so far in Russia, since the allegations would directly impugn RT, a major state entity; (3) that the amount of money at stake here, US$80 million, is sufficient for those in charge at RT to consider it worth seeking to influence the judges hearing the tort claim; (4) that the fact that certain court decisions to date have been favourable to the Lenders or other external creditors is a weak answer to Erste's case, because RT itself has not been directly involved in the proceedings to date and the only favourable decision of any real significance is that declaring the borrower's asset transfer invalid, which was an application made by another state entity, Gazprombank; (5) that the decision invalidating the Guarantee in particular is so doubtful that there is a real risk that it was the result of improper influence having already been exercised.

208. In my judgment, the evaluation of these points needs to start with that last point, consideration of whether it can be said the decision invalidating the Guarantee is, in effect perverse, so that it provides cogent evidence of a real risk that Erste could not get a fair trial in Russia. Although the evidence of Mr Marinichev in support of Erste's application for permission to serve out contained a more wide-ranging criticism of the court decisions in Russia, with the exception of the decision invalidating the Guarantee that wider case is unsustainable, not least because there are a number of decisions which were favourable to the external creditors and in relation to which, if RT were going to seek to exercise influence, one might have expected it to intervene to obtain a favourable decision. Mr Salzedo QC has not sought to support the more extreme case advocated by Mr Marinichev, but has only sought to criticise the decisions invalidating the Guarantee.

209. As appears from the judgment of the ACVR dated 5 December 2011, the court held that the Guarantee was invalid on two distinct legal grounds, although the factual basis for both seems to have been the same, that the Guarantee was guaranteeing the obligations of a wholly owned subsidiary and that the transaction was one which harmed the interests of the guarantor and its creditors. In other words, as Mr Morgan QC said, the Russian court was deciding that the Guarantee was a related party transaction.

210. The first ground upon which the court then went on to hold that the Guarantee was invalid was that it contravened Article 61.2 of the Bankruptcy Law which provides that a transaction which harms the interests of creditors made within three years of the insolvency of the company can be declared invalid. That is a perfectly explicable concept of preference, but the problem is that, as is common ground between all the experts on Russian law, the Guarantee was dated 26 November 2007 whereas Article 61.2 only applies to transactions concluded on or after 5 June 2009. Accordingly that ground for the decision was simply wrong and cannot be sustained.

211. However, the court also reached its decision on the distinct ground that the transaction contravened Article 10 of the Russian Civil Code which provides that actions taken exclusively with the intention of causing harm to another person are not allowed and abuse of rights in other forms is also restricted. The court effectively decided that on the facts it had found the Guarantee was a transaction which contravened that Article (which was in force and applicable, unlike Article 61.2). In the context of Erste's argument that the decision invalidating the Guarantee was in effect so doubtful it can

only have been reached on the basis that the judges were leant on by RT, it is striking that in his witness statement in support of the application for permission to serve out, Mr Marinichev does not seek to criticise this second ground for the decision. Indeed, he does not mention it at all. Professor Maggs, one of the experts on Russian law instructed by RT, considers that Article 10 was a proper basis for reaching the result declaring the Guarantee invalid.

212. The decision of the ACVR was the subject of an appeal by Erste and the other Lenders to the AAC. In its decision of 24 January 2012, the AAC dismissed that appeal, on the same grounds as had the ACVR, that is that it should be declared invalid under Article 61.2 of the Bankruptcy Law and Article 10 of the Civil Code. Again Mr Marinichev is highly critical of the Court's reliance on Article 61.2 because it was not in force at the date of the Guarantee, but it is striking that, whilst the various lawyers who represented the banks at the appeal hearing argued that Article 61.2 should not apply because the entering of the Guarantee did not harm the interests of the creditors of the guarantor (an argument the AAC rejected), none of them appears to have argued that the Article did not apply at all because it was not in force when the guarantee was entered into and did not have retrospective effect. Mr Marininchev does not mention the alternative ground upon which the appeal was dismissed, Article 10 of the Civil Code, and so is not critical of that ground of the decision.

213. That decision was the subject of a further appeal to the Federal Arbitrazh Court which delivered its judgment dismissing the Lenders' appeal on 19 April 2012. It essentially upheld the decision of the courts below on the basis that since the Guarantee had been concluded under conditions knowingly unfavourable to the guarantor solely in favour of related parties, it was not permitted under Article 10 of the Russian Civil Code.

214. VTB Bank and Erste applied for permission to appeal to the Supreme Arbitrazh (Commercial) Court which, on 14 May 2012 ordered a stay of the decisions of the lower courts whilst the application for permission to Appeal was dealt with. On 25 May 2012, the Supreme Arbitrazh Court found no basis for a discretionary review on the basis of incorrect interpretation and application of the law by the courts. The Court stated that in declaring the Guarantee invalid the lower courts had proceeded on the basis that the Guarantee had been entered into in favour of related parties on terms unfavourable to the guarantor. The Court said that in those circumstances, the application of Article 61.2 of the Bankruptcy Law had not led to the lower courts making the wrong decision. Although the reasoning is rather opaque, I accept what Professor Maggs says, that the Supreme Arbitrazh Court was saying that the incorrect application of Article 61.2 did not lead to the wrong result because there was a proper basis for that result, namely Article 10 of the Civil Code.

215. As I have said, in its original evidence in support of the application for permission to serve out, Erste did not criticise the application of Article 10 at all. Indeed Mr Marinichev did not mention it. In evidence for the purposes of resisting the Defendants' applications Erste relies upon the evidence of another Russian lawyer Dr Gladyshev that, for Article 10 to be applicable, proof of intention to cause harm is necessary, but in none of the judgments of the lower courts was any consideration given to the question whether the parties to the Guarantee intended to inflict harm.

216. However, Professor Maggs disputes that analysis. He points out how a very expensive guarantee of a high-risk loan would reduce the value of the guarantor which would provide a plausible basis for the application of Article 10. He also disagrees with Dr Gladyshev, saying that Article 10 does not require an intent solely to cause harm. It also deals with abuse of rights in other forms which could include a mixed intent, to benefit oneself or some third party but with the knowledge that the transactions would cause harm to creditors. His view is that the language of Article 10: "nor is an abuse of a legal right allowed in other forms" is very broad and gives a wide discretion to the court.

217. Mr Salzedo QC was highly critical of the reasoning that the Guarantee was not in the interest of the guarantor or its creditors, pointing out that if a guarantee from the parent is required to enable the loan to be made to a 100% owned subsidiary which it requires for its survival, it can hardly be said that the guarantee is not in the best interests of the guarantor and it might well be said it was in their joint interests. I can see the force in that argument but it seems to me that Professor Maggs is right that there is at least a plausible basis for the application of Article 10. At the conclusion of his second report he says this:

> "…there is a sound Russian law basis (Article 10) for the [ACVR] decision having been made in the way it was, without resorting to a conclusion that the decision was 'skewed' or 'biased'. For some reason the court applied not only Article 10, but also applied a provision of the bankruptcy law that was not yet in effect. For what it is worth, that is not something I would expect if someone was putting in place a well-crafted and/or sinister plot to invalidate the guarantee".

218. I agree with that conclusion. It seems to me that merely because a Russian court applying Russian law has reached a decision which seems strange to an English court which would apply English law to the contract, but which a Russian law expert like Professor Maggs considers plausible and arguable as a matter of Russian law, that does not give rise to any inference that the decisions of the ACVR and the appellate courts were procured by improper influence from RT. I agree with Mr Morgan's submission that the decision of the ACVR and the appellate courts are intelligible and explicable and are within the margin of appreciation for judicial decisions. It is simply not possible to say they are so perverse no reasonable court could have reached them without being biased in favour of RT and its affiliates. Accordingly, in my judgment Erste has not made out an arguable case that the decisions invalidating the Guarantee were or even might have been procured by improper influence or interference.

219. It seems to me that the absence of any improper influence or interference by RT to date is really borne out by the fact that, whilst certain court decisions (such as that invalidating the guarantee) have gone against the external creditors, a number of others have been in their favour, not least the other part of the ACVR judgment of 5 December 2011, declaring the surety agreement invalid, a further indication that that judgment as a whole was not procured by improper influence or interference. I do not accept Mr Salzedo's fourth submission that this is a weak point or that the only decision which matters is the one declaring the borrower's asset transfer invalid. On the basis that Erste has an arguable case that the surety agreement was part of the conspiracy, that decision is of equal importance in frustrating RT's objectives.

220. So far as the decision invalidating the borrower's asset transfer is concerned, whilst it is of course true that it was obtained on the application of Gazprombank, I was unconvinced by Mr Salzedo's submission that somehow it was not inconsistent with RT being able to exercise improper influence over the judges of the arbitrazh courts because Gazprombank is also state owned. Rather, it seems to me that if RT really were seeking to exercise such influence, that application which sought to impugn the borrower's asset transfer, which on Erste's case is a critical aspect of the conspiracy, is one where RT could have been expected to seek to influence the court to ensure that a decision favourable to it upholding the transfer was reached, notwithstanding the involvement of another state owned entity.

221. That one might have expected RT to intervene in relation to both the application to invalidate the borrower's asset transfer and the application to invalidate the surety agreement also seems to me to be one of the answers to Mr Salzedo's second point, that if the tort claims are brought in Russia, they will directly impugn RT and that it is only when that happened that RT would be likely to seek to influence the decisions of the courts. In my judgment, if RT had been going to seek to improperly influence the courts, they would have done so already, in relation to the attacks on the validity of the borrower's asset transfer and the surety agreement.

222. The other answer to Mr Salzedo's second point seems to me to be that, contrary to Professor Bowring's view that the reason why there is no evidence of improper influence to date is that none of the court decisions has involved RT itself, if, on Erste's case all the Defendants are in the control of RT, surely that will have been well known to the courts deciding the cases, which on Mr Salzedo's hypothesis, would then have been seeking to reach decisions favourable to RT and its subsidiaries and affiliates. Yet, with the exception of the decisions invalidating the Guarantee, there has been no suggestion by Erste that the courts have been influenced improperly in the decisions they have reached.

223. Mr Salzedo's third point is, as he put it, the counterpoint to the second point, that the amount of money at stake (US$80 million in all) is sufficient for whoever would be conducting the defence of the proceedings in Russia to consider it worth RT's while to seek improperly to influence the outcome of the proceedings. I am unconvinced by that submission, which seems to me to be completely speculative. As I have already said, the amount at stake, although perhaps more than "chicken feed" in the context of commercial litigation, is not so great or of such apparent financial significance to the Russian state to warrant improper interference with the courts dealing with the case.

224. That leaves Mr Salzedo's first point, which is essentially that an entity such as RT, if it has participated in a conspiracy to strip its affiliates of their assets, is unlikely to stop there if proceedings are on foot which would have the effect, if successful, of unravelling the conspiracy, but would seek improperly to influence the outcome of those proceedings if it could. Mr Salzedo submitted that what emerges, particularly from the work of Professor Hendley is that there is a completely different cultural background and history in Russia compared with the United Kingdom in terms of influence being brought to bear on the judiciary. This is a point of some force, but ultimately I have concluded that, even if RT wanted to try to improperly influence the judges and their decisions, there is simply no cogent evidence of a risk that they would be able successfully to do so.

225. In that context, it seems to me there are three matters which point away from RT being able to influence the outcome of proceedings in Russia. The first I have already dealt with extensively above, which is that notwithstanding that proceedings in relation to the borrower and the guarantor and their assets have been ongoing in Russia for more than three years, there is no evidence that the court decisions have been improperly influenced and, if RT were going to try to influence the court decisions, it would surely have done so by now.

226. The second matter is the fact that, in the arbitrazh court system, judges who hear cases are selected at random by computer. It follows that the point Professor Bowring makes about the court chairman being able to select compliant judges to hear cases, which is a cornerstone of his opinion that Erste could not get a fair trial in Russia, is simply factually incorrect. Whatever may happen in courts of general jurisdiction, it is not possible to select the "right" judge in the arbitrazh courts.

227. The third matter is that, despite Mr Salzedo's submissions to the contrary, it does seem to me that the fact that the arbitrazh courts are required to give publicly available reasoned judgments for their decisions militates against there being any effective improper influence over those courts. Mr Salzedo relied upon the fact that Mr Morgan had told me, on instructions, that at the end of the hearing before the arbitrazh court, the judge has to announce his or her decision and then has a few days to produce written reasons. Mr Salzedo submitted that this would not prevent the judge from giving reasons which were not the true reasons but which hid the fact that the decision was in fact made on the basis of improper influence. It seems to me that would require a degree of deviousness on the part of the judges hearing the cases which they are unlikely to possess.

228. Furthermore, the resort to the "wrong " reasons for a decision which was the one the judge thought RT or the state wanted would in all probability lead to reasoning which was manifestly odd, if not perverse. It is striking that, notwithstanding that the dispute between entities in the RT Group and external creditors concerning the assets of the borrower and the guarantor has been before the Russian courts since 2010 and there have been a substantial number of court judgments (some in favour of the creditors) the only one which Erste has tried to impugn is the one invalidating the Guarantee and, as I have already held, on analysis, that decision is not perverse and there is no evidence it was procured by improper influence.

229. In conclusion on the question of whether Erste could get a fair trial in Russia, I find myself in a very similar position to the one in which Andrew Smith J found himself in *Ferrexpo AG v Gilson Investments Ltd* [2012] EWHC 721 (Comm); [2012] 1 CLC 645. Having examined all the evidence of Ukrainian law and about the Ukrainian judiciary and court system in that case, he concluded at [96]:

> "There are grounds for some general concern about the independence of the judicial system in Ukraine, but I am unable to accept that Ferrexpo have produced cogent evidence of a real risk that Ferrexpo will not receive justice in the courts of Ukraine in the 2011 Ukrainian proceedings or in other litigation. Looking at the material as a whole, it is too fragmentary, too vague and often too unreliable in its nature to justify such a conclusion."

230. In my judgment, Erste has not produced cogent evidence of a real risk that it would not receive justice in the Russian courts if the tort claims proceeded in Russia. However, the other factors I have identified in the previous section of the judgment do point clearly to England as the appropriate and proper forum for the determination of the conspiracy and other tort claims.

Conclusion

231. Erste has demonstrated that there are serious issues to be tried on the merits in relation to all the claims which it advances against the Defendants. It has also shown that it has much the better of the argument that it can bring itself within three jurisdictional gateways in para 3(1) of Practice Direction 6B: 3.1(3), that the other Defendants are necessary or proper parties to the claims against the borrower and the guarantor; 3.1(9)(a) that its conspiracy and other tort claims are claims made in tort where damage was sustained within the jurisdiction; and 3.1(20), the claim under section 423 of the Insolvency Act 1986 is a claim made under an enactment. Erste has also demonstrated that England is the appropriate and proper forum for the determination of the dispute between the parties.

232. It follows that the applications of RT and RT Capital to challenge the jurisdiction and set aside service out are dismissed.