



Neutral Citation Number: [2013] EWHC 3073 (Comm)

Case No: 2013 Folio 235

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 11/10/2013

Before :

**THE HONOURABLE MR JUSTICE MALES**

Between :

**BNP PARIBAS S.A.**

**Claimant**

- and -

**(1) ANCHORAGE CAPITAL EUROPE LLP**

**(2) ANCHORAGE CAPITAL GROUP LLC**

**(3) ACOMO S.A.R.L.**

**(4) AIO III S.A.R.L.**

**Defendants**

-----  
-----  
**Mr Bankim Thanki QC and Mr Patrick Goodall** (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **Claimant**

**Mr Paul Greenwood** (instructed by **Stewarts Law LLP**) for the **Defendants**

Hearing dates: 25<sup>th</sup> & 26<sup>th</sup> September 2013  
-----

**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.

.....  
**THE HONOURABLE MR JUSTICE MALES**

## **Mr Justice Males :**

### **Introduction**

1. This case is a dispute between a bank and a hedge fund about whether a handful of instant message communications resulted in a binding contract or contracts and, if so, between which parties and on what terms. But the issue presently for decision is whether these issues should be determined in London or New York (or possibly Luxembourg). As is often the case in commercial disputes, particularly in cases where tens of millions of dollars are at stake and it is thought that where the case is fought may well determine the eventual outcome, the parties and their lawyers have left no stone unturned in seeking respectively to establish or to challenge the jurisdiction of the English court over this dispute.
2. There are two applications to be determined. The first is a challenge by the second to fourth defendants (but not the first defendant, an English LLP) to the jurisdiction of the English court. Those defendants contend that the English court has no jurisdiction over them, or alternatively that any jurisdiction which it may have should not be exercised. The second is an application by the claimant to restrain the second defendant from pursuing proceedings which it has commenced in New York which (as is common ground) raise essentially the same issues as those arising in this action.

### **The parties**

3. The claimant, BNP Paribas SA (“BNPP”), is a French public limited company (société anonyme) with its headquarters in Paris. It operates globally, providing banking and financial services across 78 countries. However, this dispute concerns the corporate and investment banking activities of the Financial Credits Trading Desk of its registered London branch and has no connection with Paris (where the Desk has no traders). BNPP engages in banking and specialised financial trading business in London, including the buying and selling of high yield distressed debt securities.
4. The Anchorage group is an investment management group with its principal centre of operations in New York. It provides investment management and trading services, operating through a structure of affiliated companies that provide investment management services or act as portfolio holding companies (ie funds) incorporated across a number of jurisdictions. Its legal, compliance, tax and accountancy functions are located centrally in New York, with the same individuals performing those functions for all group entities.
5. Four entities within the Anchorage group are defendants to this action. The first defendant, Anchorage Capital Europe LLP (“Anchorage London”), is an English LLP with an office in London. It provides investment management services to funds within the group. It was granted authorisation by the FSA (now the FCA) to act as an investment management business on 22 December 2009. The second defendant, Anchorage Capital Group LLC (“Anchorage New York”), is a Delaware company with its headquarters in New York which acts as an investment manager and adviser to the funds within the group. It is registered with the U.S. Securities and Exchange Commission as an investment adviser. The third and fourth defendants, respectively ACMO Sàrl (“ACMO”) and AIO III Sàrl (“AIO”), both Luxembourg companies, are two of the investment funds within the group. I shall refer to “Anchorage” when there

is no need to distinguish between the different defendants and to the second to fourth defendants together as “the overseas defendants”.

### **The AIB Notes**

6. This action is concerned with subordinated private placement notes issued by Anglo Irish Bank (“AIB”) with a face value of US \$95 million (“the Notes”). The Notes were issued pursuant to a Note Purchase Agreement dated 28 September 2005. Under the Note Purchase Agreement, AIB issued a principal amount of US \$165 million Subordinated Notes, Series A, due 29 September 2015 (the “A Notes”) and US \$35 million Subordinated Notes, Series B, due 29 September 2017 (the “B Notes”). The Notes the subject of this action are A Notes. They are not listed on any exchange and are physically certificated.
7. AIB is a bank incorporated in the Republic of Ireland, which was nationalised by the Irish Government in 2009. On 1 July 2011 it was merged with the Irish Nationwide Building Society, which had also been nationalised, to form the Irish Bank Resolution Corporation Limited (“IBRC”). On 7 February 2013, it was announced that IBRC would be liquidated, rendering the Notes virtually worthless.

### **The rival cases**

8. It is BNPP’s case that two binding English law contracts were concluded. The first is said to have been concluded on Friday 7 December 2012, when BNPP sold Notes with a face value of US \$50 million. I shall refer to this as “the Friday trade” or “the Friday contract”. The second was on the following Monday, 10 December 2012, when BNPP says that a contract for the sale of Notes with a face value of a further US \$45 million was concluded (“the Monday trade” or “the Monday contract”). BNPP’s primary case is that the Friday contract was concluded with Anchorage New York, while the Monday contract was concluded with Anchorage London, although it says also that both Anchorage companies were acting as agents for undisclosed principals, namely ACOMO and AIO, the funds to which it is said that Anchorage had decided to allocate the Notes. However, BNPP has yet to plead its case in detail and Mr Bankim Thanki QC for BNPP reserved the right to plead the case in alternative ways as there is scope for more than one analysis of which Anchorage entity was BNPP’s counterparty.
9. In contrast, Anchorage’s case in very brief summary is that no binding contract was concluded on either day because material terms remained to be agreed; that the parties’ dealings were governed by New York law and that any agreement reached at that stage was what is known as a “Type II preliminary agreement” under New York law whereby the parties’ only obligation is to negotiate final terms in good faith; that as a result of the parties’ subsequent conduct they either concluded a binding contract on 14 February 2013 for the first time or varied any existing contract, in either case so as to provide expressly for New York law and for BNPP to give certain representations, of which BNPP is in breach; or if no such binding contract was then concluded, that is because BNPP was in breach of its obligation to negotiate in good faith. However, if (contrary to Anchorage’s case), binding commitments for the purchase of the Notes were undertaken as a result of the parties’ dealings on 7 and 10 December, it says that there was a single contract concluded on 7 December 2012

between BNPP and Anchorage New York, to which the other defendants were not parties.

### **The trades**

10. The circumstances in which these issues (and the related issue of where they should be determined) arise were as follows.
11. In October 2012, a New York investment firm called Fir Tree Partners (“Fir Tree”) approached Jonathan Lett, a trader with BNPP in London, with a view to seeing whether it wished to purchase the Notes. BNPP was interested, and explored with a number of market participants, including Matt Hartnett of Anchorage London, the possibility of an on-sale. Although Anchorage’s evidence suggested that BNPP’s role was merely as a broker to conclude a prospective contract between Fir Tree and Anchorage, before me Anchorage’s counsel Mr Paul Greenwood expressly accepted that BNPP was acting as a principal in purchasing the Notes from Fir Tree and was likewise acting as a principal in any contract concluded with any Anchorage entity for the onward sale of the Notes. It was at all times made clear to Anchorage that BNPP was purchasing the Notes from Fir Tree, and that its ability to sell to Anchorage was dependent on lining up a purchase of the Notes from Fir Tree with a sale to Anchorage, on which no doubt BNPP would make its own turn.
12. Anchorage was interested in purchasing the Notes and carried out due diligence upon them. BNPP was aware that Anchorage was doing this, and there was some discussion about the Notes between analysts employed by the respective parties. Although Anchorage (not surprisingly) did not share with BNPP the results of its due diligence, this was a prospective sale of Irish distressed debt. BNPP would reasonably have concluded, therefore, that Anchorage would identify the major risk associated with the Notes as being a default brought about by the conduct of the Irish government, as in fact it did.
13. Although the initial contact had been with Matt Hartnett of Anchorage London, negotiations were taken up by Anchorage’s New York office. On 5 December 2012 Scott Goodwin of Anchorage New York provided Anchorage’s initial offer, saying in an e-mail of that date that “we are good for 60mm face on this at 65” -- or in other words, offering to buy Notes with a face value of US \$60 million at a price of 65 cents on the dollar.
14. Further negotiations took place over the next two days, not only on the price, but also on the quantity of Notes to be sold. By 18:26 London time on Friday 7 December 2012 Mr Goodwin’s proposal was that Anchorage would “buy 50mm right now ... and then we have an option to buy the remaining 45mm until noon US time on Monday barring any news.” By this stage, the proposed price had been negotiated down to 62.5 cents. He also indicated that “I’m going to need u to mark this for us every month”, or in other words, to provide a valuation of the illiquid Notes each month up to their maturity date so that Anchorage could ensure that they were correctly valued in its books for internal accounting and reporting purposes, which BNPP agreed to do.
15. At 20:36 London time the following exchange took place between Mr Goodwin and Mr Lett via Bloomberg Instant Message, which BNPP contends resulted in a binding

contract for the purchase by Anchorage New York of US \$50 million of Notes, at a price of 62.5 cents on the dollar:

“20:36:45 JONATHAN LETT, BNP PARIBAS Says Scott – pls can you confirm that Anchorage will buy USD50m BBG001MFY449 @ 62½ plus USD25m Ireland 5yr at 215bps. You have the exclusive on the balance until noon Monday at the same level subject to news from the seller.

20:36:59 SCOTT GOODWIN, ANCHORAGE GROUP GR Says done thank you

20:37:17 JONATHAN LETT, BNP PARIBAS Says this is done – thanks for the trade”

16. This was followed at 21:50 London time (by which time trading had ceased in London and those working at BNPP in London had gone home) by a voice confirmation recording this trade which was sent to Mr Goodwin by a credit sales representative at BNP Paribas Securities Corp, an affiliate of BNPP in New York. This described the customer as “Scott Goodwin @ Anchorage” and set out the terms of the trade, including the quantity, price, accrued interest and settlement date. Mr Goodwin replied with the subject line “VCON TRADE CONFIRMED”.
17. Two aspects of these exchanges call for explanation. First, as indicated in the Bloomberg messages set out above, in addition to purchasing Notes with a face value of US \$50 million, at the same time Anchorage also purchased “USD25m Ireland 5yr at 215bps”. This was a credit default swap providing protection against a specified credit event involving the Republic of Ireland and required payment by Anchorage of an upfront fee of almost US \$1.3 million. It represented a partial hedge against the risk of default on the Notes. Second, the parties had also been discussing the sale and purchase of further Notes with a face value of US \$45 million. These were referred to as being subject to an “option” in Mr Goodwin’s message at 18:26 and were what was referred to as “the balance” in Mr Lett’s message at 20:36, on which Anchorage was to have “the exclusive”. However, this was "subject to news from the seller", that is to say from Fir Tree, which reflected the fact that (as both parties understood) BNPP did not own these Notes and would only be in a position to sell them if it was able to purchase them from Fir Tree once Anchorage had made up its mind that it wanted them.
18. Shortly after noon London time on the following Monday, 10 December 2012, David Bodenstein of BNPP contacted Mr Hartnett of Anchorage London by Bloomberg Instant Message to see whether Anchorage did want these further Notes, as BNPP was also discussing a possible sale of them to others and wanted “to make sure that I give you guys a last look”. Mr Bodenstein offered to call Mr Goodwin in New York, but Mr Hartnett responded that “either of us is fine”. Mr Hartnett indicated that he thought that Anchorage did want to buy the remaining Notes, but was “just figuring out what funds to put it in”. Later in the day he confirmed that Anchorage did want to buy, in response to which Mr Bodenstein indicated, after checking with Fir Tree, that BNPP was in a position to sell. The following exchange then took place via Bloomberg Instant Message:

“16:05:45 DAVID BODENSTEIN: 45mm  
16:05:49 MATT HARTNETT: done?  
16:06:22 DAVID BODENSTEIN: @62.5 we sell  
16:06:44 MATT HARTNETT: perfect  
16:06:49 MATT HARTNETT: thx again for the trade  
16:06:58 DAVID BODENSTEIN: ANGIR  
We sell \$45mm 09/15 to Anchorage at 62½.”

19. BNPP’s case is that this exchange resulted in a further binding contract, for the purchase by Anchorage London of US \$45m of Notes, again at 62.5 cents on the dollar.

### **Subsequent events**

20. On 11 December 2012, Melissa Griffiths of Anchorage sent an email to BNPP which referred to the “BNP sale to Anchorage” and advised that she would be responsible at Anchorage for settling the purchase. Her email referred to two distinct trades, on 7 and 10 December respectively. She indicated that the US \$50 million of Notes traded on the Friday were to be allocated to ACMO, while the US \$45 million of Notes traded on the Monday were to be split, with US \$29 million allocated to ACMO and US \$16 million to AIO. This was the first occasion on which BNPP was told of this allocation although it had been told, shortly before the Monday trade, that Anchorage was “just figuring out what funds to put it in”.
21. The trades could not be settled immediately, because the physical Notes had (it transpired) been destroyed by flood damage resulting from Hurricane Sandy in October 2012. In order for the trades to be settled, it was necessary for Fir Tree to get the Notes re-issued. They would then have to be re-registered and physically transferred from Fir Tree to BNPP, and then from BNPP to Anchorage. Although it appears that Anchorage was not told the detail of what would be required, it was told on 12 December 2012 that it would take some time and perhaps as much as four weeks to re-register the Notes. In the event it appears to have taken longer than this.
22. On 14 December 2012 Ms Griffiths sent a further e-mail attaching what was described as a “sample draft trade acknowledgement”. This acknowledgment was a draft contract between BNPP and ACMO relating to the Friday trade (although with an indication that, once finalised, a similar contract could be prepared for the Notes to be allocated to ACMO and AIO as a result of the Monday trade) which was stated to be subject to New York law and contained (among other things) a proposed representation and warranty by BNPP that there were no defaults pursuant to the Notes either at the date of the contract or the Settlement Date (the date when rights to the Notes were to be transferred to ACMO and BNPP would be paid). BNPP responded that it would pass the draft onto its Compliance/Legal department and reply in due course, but in the event it never did so.

23. On 11 January 2013 Max Lipkin of Anchorage asked BNPP for a confirmation that “we hold this position at 12/31” (ie by the 31 December 2012 year end), the stated purpose of the request being “to get our administrator comfortable” that the Notes were held by Anchorage. In response BNPP confirmed that “the below trades are agreed, and still awaiting settlement”. The “below trades” referred to were the Friday trade, allocated in its entirety to ACMO, and the Monday trade, split between ACMO and AIO as Anchorage had requested.
24. On 16 January 2013, in a conversation between Mr Lett of BNPP and Vladimir Bermant, an analyst at Anchorage London, the latter agreed with the former’s observation that “this was an excellent trade for you guys”, the point being that the value of the Notes had risen substantially since the trades had been agreed.
25. On 18 January 2013, Eric Sacks, the Chief Financial Officer of Anchorage New York, requested BNPP to confirm to Anchorage’s auditors, Ernst & Young, the purchase of the Notes by ACMO and AIO.
26. On 7 February 2013, however, the position changed dramatically. AIB (in the form of IBRC) was placed into special liquidation in Ireland by emergency legislation passed in an overnight session of the Dáil. The effect of this liquidation was to render the Notes worthless or virtually so.
27. Also on 7 February 2013, Fir Tree tendered physical Notes to BNPP. BNPP was therefore in a position to settle the trades with Anchorage, and attempted to contact Anchorage to arrange settlement. Anchorage did not respond. Accordingly BNPP re-registered the Notes in ACMO and AIO’s names and confirmed that the physical Notes would be delivered upon payment. The total sum demanded was US \$59.375 million. Payment was requested at an account in New York. It is this conduct which is said by Anchorage to amount to acceptance of the terms proposed in Ms Griffiths’ draft trade acknowledgment of 14 December 2012, thus resulting in a concluded or varied contract or contracts containing representations by BNPP and expressly subject to New York law.
28. Having demanded payment for the Notes on 15 February 2013, BNPP issued these proceedings on 19 February 2013, initially against the overseas defendants only. On 11 March 2013 Anchorage New York commenced an action against BNPP in New York seeking declarations that Anchorage New York was not obliged to purchase the Notes (i) because what I have called the Friday and the Monday trades did not create any binding contract as the parties had not reached agreement on all the material terms or on formal documentation necessary to consummate the contemplated transaction, and (ii) because BNPP’s delay in tendering the Notes prior to IBRC’s liquidation had the effect of frustrating any contract which had been concluded. Anchorage New York also sought damages for breach by BNPP of a duty to negotiate in good faith said to arise under New York law.
29. BNPP was not aware of those proceedings until after 12 March 2013, on which date the claim form in the English proceedings was re-issued on amendment, the amendment being to join Anchorage London as a defendant.
30. In order to avoid the time and expense involved in serving these proceedings on the various overseas defendants out of the jurisdiction, the parties reached a sensible

agreement whereby Anchorage's solicitors would accept service while reserving the right to challenge the jurisdiction of this court. Although at an earlier stage there was some disagreement as to the effect of this agreement, by the time of the hearing before me it was common ground that this service agreement had no effect on the right of the overseas defendants to challenge jurisdiction and that the burden remained on BNPP to justify the exercise of jurisdiction just as it would have done if BNPP had been required to serve the overseas defendants in the United States and Luxembourg respectively.

### **The parties' prior dealings and the jurisdiction clause**

31. This was not the first occasion on which BNPP and Anchorage had dealt together. Although there may be some dispute as to the extent of those dealings, there have been at least a number of prior contracts between BNPP's London branch and Anchorage entities, as well as other transactions in which BNPP's branches in other jurisdictions had dealt with Anchorage.

32. Like many large financial institutions, BNPP's London branch trades on standard terms of business. BNPP has sent Anchorage several versions of these terms over the years. These terms, headed "London Terms of Business for Professional Clients or Eligible Counterparties" and to which I shall refer as BNPP's London terms, are stated by clause 2.1 to apply

"where either BNP Paribas London Branch or BNP Paribas UK Limited (or any other UK Affiliate of BNP Paribas from time to time) is the contractual counterparty for any transaction you enter into with us, or where the business relationship between you and us is conducted through either entity."

33. Clause 34 of the terms applicable at the time of the Friday and Monday trades (and at all previous material times) provided for English law and jurisdiction in the following terms:

"This Agreement shall be governed by, and construed in accordance with, English Law and you irrevocably submit to the jurisdiction of the English courts in respect of any matter arising out of this Agreement, or our services to or Transactions with you under this Agreement."

34. On 27 February 2008 BNPP informed Anchorage's central compliance manager that Anchorage New York had been classified as an eligible counterparty for the purpose of the Markets in Financial Instruments Directive (2004/39/EC) and its implementing regulations and sent him a MIFID pack (a pack of paperwork sent by BNPP to clients for the purposes of complying with this directive), requesting consent to this classification. This was given on 4 March 2008. At that stage BNPP's London terms were not sent, but they were sent in August 2008 as part of a MIFID pack sent to Anchorage New York and another Anchorage entity, Anchorage Capital Partners LP. In response Anchorage's compliance officer confirmed that the consent to classification as an eligible counterparty given earlier by Anchorage New York was also valid for this further entity. There was no objection to the BNPP London terms.

35. BNPP's London terms were also sent to Ms Griffiths and Sara Tin (both of Anchorage New York) in connection with a transaction involving Anchorage Capital Master Offshore Ltd, a Cayman Islands company within the Anchorage group, in July 2011. In response to that, Kathryn Pruess, who was (and who in her email was described as) Anchorage New York's Associate General Counsel, responded by email on 28 July 2011:

“We have reviewed and are comfortable with these terms”.

### **BNPP's case on jurisdiction**

36. In summary, BNPP's case for jurisdiction over each defendant is as follows.
37. *Anchorage London*. No question of jurisdiction arises. Anchorage London is an English LLP which was served here, and which does not challenge the court's jurisdiction over it.
38. *Anchorage New York*. BNPP seeks to found jurisdiction over Anchorage New York for its claim under the Friday contract (and if necessary the Monday contract, although BNPP's primary case is that the Monday contract was concluded with Anchorage London) by any of the following routes:
- 38.1 first, pursuant to Article 23 of the Brussels Regulation (because Anchorage New York accepted an English jurisdiction clause in BNPP's London terms);
- 38.2 second, pursuant to CPR PD6B para 3.1(6)(a) because the contract was made within the jurisdiction;
- 38.3 third, pursuant to CPR PD6B para 3.1(6)(c), because the contract was governed by English law, either because of the express choice of English law in BNPP's London terms or as a result of applying Article 4 of the Rome I Regulation;
- 38.4 fourth, pursuant to CPR PD6B para 3.1(6)(d), because the contract contains a term (again, in BNPP's London terms) to the effect that the English court shall have jurisdiction;
- 38.5 fifth, pursuant to CPR PD6B para 3.1(7) because a breach of the contract was committed within the jurisdiction; and
- 38.6 sixth, pursuant to CPR PD6B para 3.1(3), because Anchorage New York is a necessary or proper party to the claims made against Anchorage London, ACMO and/or AIO.
39. *ACMO and AIO*. BNPP seeks to found jurisdiction over ACMO and AIO under the following provisions of the Brussels Regulation:
- 39.1 Article 23, because they are bound by the English jurisdiction clause in BNPP's London terms;
- 39.2 Article 5(1)(a), because the place of performance of the obligation in question under the contracts is England;

- 39.3 in relation to the Monday contract, Article 5(5), because the dispute arises out of the operations of ACMO and AIO's agent, Anchorage London, situated in England; and
- 39.4 Article 6(1), because the claim against ACMO and AIO is so closely connected to the claim against Anchorage London, which is sued in the court of its place of domicile, that it is expedient to hear and determine them together.

### **Jurisdiction - the tests to be applied**

#### *Under the Brussels I Regulation*

40. Where jurisdiction is founded under the Brussels Regulation, it is for the claimant to show a good arguable case that jurisdiction is available under the Regulation. This means that, on the material available at this preliminary stage, the claimant must have "much the better of the argument" (*Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547). There has been detailed analysis in many cases of what is meant by this formulation, including such issues as what if anything is added by the word "much", but as the question of jurisdiction in this case does not depend upon such precise nuances, I need not rehearse those cases or enter into that debate.

#### *Under CPR PD6B*

41. By contrast, where jurisdiction is sought to be established under the provisions of CPR PD6B, a three-stage test applies.
- 41.1 First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits. This is the same test as for summary judgment, namely whether there is a real (as opposed to fanciful) prospect of success.
- 41.2 Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more of the jurisdictional gateways set out in CPR PD6B. Again, this means that the claimant must have much the better argument on this point.
- 41.3 Third, 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.

### **Article 23 of the Brussels Regulation**

42. As will have been observed, although there are various routes by which BNPP seeks to found jurisdiction against the different overseas defendants, in the case of all of them BNPP relies on the jurisdiction clause in its London terms of business as a clause falling within Article 23 of the Brussels Regulation.
43. It is common ground that jurisdiction can only be established against ACMO and AIO pursuant to the terms of the Brussels Regulation as they are companies domiciled in

an EU member state. Anchorage New York is not so domiciled and contends that it is not subject to the Regulation. However, it is well established that the Regulation is part of English law and that jurisdiction may be established under Article 23 by reason of a jurisdiction clause fulfilling the requirements of that Article between an English domiciled claimant and a defendant domiciled outside the EU: *Antec International Ltd v Biosafety USA Inc* [2006] EWHC 47 (Comm); *Thomas Cook Tour Operations Ltd v Kaya Turistic Tesisleri Otelcilik* [2009] EWHC 720 (QB).

44. Under Article 23(1), a jurisdiction agreement is effective if it is: (a) in writing or evidenced in writing; (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned. The purpose of these requirements is to ensure that there is consensus between the parties to the jurisdiction clause, and to this end for the purposes of Article 23(1)(a) it is the agreement to the jurisdiction clause (and not merely the clause itself) which must be in writing: *Estasis Salotti di Colzani Aimò e Gianmario Colzani v RUWA Polstereimaschinen GmbH* (Case 24/76) [1976] ECR 1831; and *Galleries Segoura v Rahim Bonakdarian* (Case 25/76) [1976] ECR 1851.
45. In the present case the jurisdiction clause applies, by its own terms, when a contract is concluded with BNPP's London branch. In order to establish jurisdiction under Article 23 it is therefore necessary for BNPP to show a good arguable case that it did conclude a binding contract with the defendant which it is sought to bring before the court and that the defendant agreed to the jurisdiction clause. I consider these questions in turn. However, although the question whether the Friday and/or the Monday trade resulted in a binding contract or contracts for the sale of the Notes and, if so, with whom and on what terms, seems likely to be determinative of liability in this action, at this stage I am concerned only with the question of jurisdiction, applying the test of good arguable case. It is unnecessary and would not be appropriate to attempt finally to determine these matters.

#### **Was there a binding contract or contracts for the sale of the Notes?**

46. I summarised the relevant principles (which are well established) for determining whether a contract has been concluded in *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc* [2012] EWHC 3162 (QB), [2013] 1 Lloyd's Rep 63 at [5] to [9] and need not repeat that summary here. It is clear, applying those principles, that BNPP has a good arguable case, at any rate if English law applies, that the Friday and the Monday trades were intended to result in immediately binding contracts for the sale and purchase of the Notes at the agreed price and were not subject to later negotiation of detailed contractual terms. My reasons for this conclusion are as follows.
47. First, on both occasions the traders used the language of binding contract ("done", "thanks for the trade"), with no suggestion that either the Friday or the Monday trade was subject to further negotiation of detailed terms and conditions. Nor was there any such suggestion in Mr Goodwin's unqualified approval of the voice confirmation on the Friday evening. Second, the US \$25m credit default swap purchased on the Friday demonstrated an intention by Anchorage to hedge the Notes purchased under the

Friday trade, which only made sense if a binding contract to purchase those Notes had been concluded. Third, the background against which the trades were negotiated on both the Friday and the Monday was one in which it was known that BNPP would need to align its purchase from Fir Tree with its sale to Anchorage, that the price at which Fir Tree was willing to sell was liable to change, and that BNPP was also known to be negotiating with other prospective buyers who were interested in purchasing the Notes. In such circumstances it was essential to strike a deal which would be immediately binding on both parties. Fourth, even Ms Griffiths' e-mail of 14 December 2012 attaching the draft trade acknowledgment did not suggest that agreement on these terms was necessary before the parties would be contractually bound. Fifth, in numerous ways between the conclusion of the trades and the liquidation of AIB on 7 February 2013, the parties' dealings with each other set out above suggested a mutual understanding that the trades had resulted in binding contracts.

48. There was some debate about whether, if the Friday and the Monday trades resulted in binding agreements, there was (as Anchorage contended) a single contract concluded on Friday for the sale and purchase of Notes with a face value of US \$50 million together with a binding option for the purchase of further Notes with a face value of US \$45 million or (as BNPP contended) two separate contracts. Again, it is unnecessary and would not be appropriate to reach a final conclusion on this question, and ultimately I doubt if it makes much difference, at any rate so far as the question of jurisdiction is concerned. The question of one contract or two depends in part on whether the provision in the Friday trade that "You have the exclusive on the balance until noon Monday at the same level subject to news from the seller" created a legally binding option unilaterally exercisable by Anchorage. BNPP contends that the subject ("news from the seller") was too vague to give rise to a binding obligation and that the "exclusive" was merely a moral rather than a legal commitment undertaken by BNPP. However, even if this was a legally binding option, its exercise was clearly dependent on BNPP being able to conclude a purchase with Fir Tree on the Monday at the same price as the purchase it was concluding on the Friday. Thus the option could not be exercised by a unilateral notice without more and a process of negotiation or at any rate investigation would be required before the parties could know whether it had been exercised successfully. The judgment of Hoffmann J in *Spiro v Glencrown Properties Ltd* [1991] Ch 537 demonstrates that an option is not strictly speaking either a conditional contract or an irrevocable offer, although there are some ways in which it resembles each of them, and that how it is to be characterised depends upon the context. In my judgment, for the purposes of a dispute about jurisdiction in the circumstances of this case, the Monday trade is best regarded as a distinct contract, which is in fact how the parties treated it. I consider that BNPP has at any rate a good arguable case to this effect.

#### **With whom were the contracts made?**

49. Identification of the Anchorage entity or entities which concluded the contracts is more complex. It may well be that no real thought was given to this by the traders who concluded them. They may well have regarded the substance of the matter as a deal between BNPP and Anchorage, in which identification of the particular purchaser was no more than an unimportant detail which could be sorted out when the paperwork was written up. From the viewpoint of traders who knew and trusted each

other and who had often dealt with each other in the past, that would not be surprising. Nevertheless, as there can in law be no contract without a contracting party or parties, it is necessary to analyse the parties' dealings in order to identify the parties to the contracts. However, in circumstances where there was an evident intention to be bound, the law should seek to give effect to the commercial parties' intentions and it would be wrong to approach this issue in an unduly technical way.

50. As already indicated, BNPP's primary case is that the Friday contract was concluded by Anchorage New York acting as an agent for ACMO as an undisclosed principal, and that the Monday contract was concluded by Anchorage London acting as an agent for ACMO and AIO as its undisclosed principals. On that basis BNPP contends that it is entitled to sue both the agent and the principal (see the summary of the law on undisclosed principals by Lord Lloyd of Berwick in *Siu Yin Kwan v. Eastern Insurance Co Ltd* [1994] 2 AC 199 at 207). Anchorage, however, contend that if any binding contract was concluded, it was concluded with Anchorage New York; that no decision was made until after the conclusion of the trades about the fund or funds to which the Notes would be allocated; and that there can be no question of an agent acting for an undisclosed principal whose identity has not been determined at the time of conclusion of the contract. The result, according to Anchorage, is that there is no arguable case against Anchorage London (which therefore cannot be used as an "anchor" defendant for the purpose of founding jurisdiction against the overseas defendants) and no basis on which jurisdiction can be established against ACMO or AIO as there is no good arguable case that they were parties to any contract. Anchorage accepts that there is a serious issue to be tried against Anchorage New York, but contends that Anchorage New York did not agree to the jurisdiction clause in BNPP's London terms and that BNPP is unable to found jurisdiction against it by means of any of the gateways in CPR 6PD.
51. In response BNPP invites me to infer, contrary to Anchorage's evidence, that decisions to allocate the funds to ACMO and AIO had been made before the conclusion of the trades. It contends that Anchorage New York and Anchorage London must have intended to contract on behalf of one or more of the funds rather than on their own behalf, that a decision about allocation must have been made before concluding the trades as Anchorage would need to know where the money to pay for the Notes was to come from, and that the fact that decisions appear already to have been made very shortly after conclusion of the trades is an indication that they had in fact been made beforehand. In the alternative it contends that there is no conceptual difficulty with holding a party liable as an undisclosed principal notwithstanding that its identity has not been determined at the time of concluding that contract, provided that at the time of contracting the agent intends to contract for one of a range of principals and is authorised to do so, at any rate in circumstances such as the present where the identity of a contracting party within a group of companies is a matter of no significance to the counterparty.
52. I must bear in mind that at this stage the question is only whether there is a good arguable case and that I am not deciding these issues. It seems to me that the question whether a decision on allocation had been made before the trades were concluded is a factual question which may be determined either way, and which may have a significant bearing as a matter of law on the identity of the contracting Anchorage party, even though it would appear to be a point of little commercial significance.

There is force in the points made by BNPP suggesting that the decision had already been made, but Anchorage's evidence that no decision had been made is unequivocal and cannot at this stage be regarded as wrong.

53. If a decision had been made to allocate the Notes to ACMO and AIO respectively, there would appear to be a compelling case that ACMO and AIO were BNPP's only contractual counterparties, on the basis that there was an understanding from the parties' prior dealings that Anchorage New York and Anchorage London were not purchasing the Notes on their own behalf, but were acting as agents on behalf of funds within the group, and that BNPP was content to deal with whichever fund was determined by Anchorage. If that is so, ACMO and AIO would be liable on the contracts, although Anchorage New York and Anchorage London, whose role was known to be merely that of agents, would probably not be.
54. On the other hand, if no decision on allocation had been made when the trades were concluded, it seems to me that there is at least a good arguable case that Anchorage New York incurred personal liability on the Friday contract and that whichever of Anchorage New York and Anchorage London is to be regarded as having concluded the Monday contract likewise incurred personal liability on that contract, at any rate if Anchorage is correct in its submission that there can be no question of agency on behalf of a principal who has not yet been identified, a point which (as it seems to me) should not be determined at this stage but is best left for decision once the full facts are established. As to which of these two entities is to be regarded as having concluded the Monday contract, I accept BNPP's submission that as the contract was in fact concluded as a result of dealings with personnel at Anchorage London, there is a good arguable case that it is that company which should be regarded as having done so. While there is an argument that the option given on the Friday (whether or not legally binding) was given to Anchorage New York as the party with whom the Friday trade had been concluded, so that the exercise of this option on Monday must also have been by Anchorage New York, it is also possible (and in the end seems more plausible) to regard the option as being given on the Friday to whichever Anchorage company would wish to purchase the further Notes.
55. It seems to me that there is also a good arguable case that even if the contracts were not initially concluded with ACMO and AIO because their identity had not yet been determined, the post-contractual exchanges in which BNPP confirmed the purchases (including confirmation of the allocation to ACMO and AIO) had the effect that these funds undertook liability under the contracts, although it would be debatable whether such liability was intended to be instead of or in addition to that of Anchorage New York and Anchorage London who had initially concluded the contracts. However, the parties' submissions did not analyse the position in this way and I do not rest my judgment on this way of viewing the matter.
56. At trial, and when deciding against which if any of the defendants to enter judgment on either contract, final decisions will need to be made about these matters. At this stage, when the issue is one of jurisdiction and the test is that of good arguable case, I consider that there is a sufficient case against each of the overseas defendants to satisfy that test. I conclude, therefore, that there is a good arguable case that (i) Anchorage New York is liable on the Friday contract, either as principal or as agent, (ii) ACMO is liable on the Friday contract as principal, (iii) (if, contrary to BNPP's primary case but as contended by Anchorage, the Monday contract is to be regarded

as having been concluded by Anchorage New York) Anchorage New York is also liable on the Monday contract, either as principal or as an agent, and (iv) ACMO and AIO are liable on the Monday contract as principals, each for their respective allocation.

57. It is true that some of these conclusions appear to be mutually exclusive. For example, if Anchorage New York is liable on the Friday contract as a principal, it may be that ACMO could not also be so liable. In such circumstances, if the test of good arguable case means that the claimant must have much the better of the argument on the point, is there any inconsistency in concluding that there is a good arguable case against both defendants? In my judgment there is not. The test of good arguable case is sufficiently flexible to allow for a conclusion that there is a good arguable case that each of two defendants is liable on a contract, even if ultimately only one of them can be. In circumstances where the contractual analysis is not straightforward and depends at least to some extent on facts which are exclusively within the knowledge of the defendants, a rigid application of the test of good arguable case is clearly not appropriate.

### **The requirements of Article 23**

58. On the basis that there is a good arguable case against each of the overseas defendants that it is liable on one or both of the contracts, it remains to consider whether the requirements of Article 23 of the Brussels Regulation are satisfied. The jurisdiction clause in BNPP's London terms is in writing. As already noted, Anchorage expressly indicated its agreement to that clause (among others) in writing by means of Kathryn Pruess' email of 28 July 2011 which, over a signature reading "Associate General Counsel, Anchorage Capital Group LLC" (ie Anchorage New York) said "we have reviewed and are comfortable with these terms". That satisfied the requirement of agreement to the clause in writing – but agreement by whom?
59. The issue is whether, in expressing that agreement, Ms Pruess should properly be understood as expressing agreement on behalf of the Anchorage group as a whole or only on behalf of the particular Cayman Islands entity, Anchorage Capital Master Offshore Ltd, which was to be the counterparty in the particular transaction then under consideration. The context in which this issue must be determined is that BNPP was dealing with an investment management company based in New York which managed a number of funds in a number of jurisdictions including offshore jurisdictions, and that BNPP would not necessarily be told at the time of concluding a trade the identity of the Anchorage fund to which the asset in question would be allocated (indeed, on Anchorage's case, that decision might not yet have been made). BNPP would simply deal with Anchorage New York (or London) without needing to inquire on whose behalf the individuals in the New York (or London) office were acting. In the past, moreover, BNPP had been told that consent to classification as an eligible counterparty given by one Anchorage company was also valid for another entity within the group.
60. In these circumstances, it seems to me to be clear (and at any rate that BNPP has much the better of the argument) that the confirmation given by Ms Pruess is properly to be understood as given on behalf of the Anchorage group as a whole. It would make no sense to read her e-mail as saying that the particular Cayman Islands entity was comfortable with BNPP's London terms including the jurisdiction clause, but that

other Anchorage entities were not. Indeed, the absurdity of such a reading can be illustrated by supposing that Anchorage had decided to allocate some of the Notes purchased in the present case to its Cayman Islands fund. It would be a strange outcome if that fund was bound by the jurisdiction clause but other funds to which the remaining Notes were allocated were not. The agreement of an agent to a jurisdiction agreement will bind the principal for the purposes of Article 23 and accordingly Ms Pruess's agreement in her capacity as Associate General Counsel of Anchorage New York was effective to bind ACMO and AIO (see *Standard Steamship Owners' Protection & Indemnity Association (Bermuda) Limited v GIE Vision Bail* [2004] EWHC 2919 (Comm), [2005] 1 All ER (Comm) 618 at [51]-[55]).

61. Accordingly I am satisfied that BNPP has the better (or, if different, much the better) of the argument that the court has jurisdiction over each of the overseas defendants under Article 23(1) of the Brussels Regulation – unless, that is, the position at the time of concluding the contract was changed by a subsequent variation whereby the parties agreed to New York law (as to which, see further below).

### **Applicable law**

62. My conclusions so far have been reached as a result of applying English law. In my judgment that is the applicable law governing these issues, either because of the parties' express choice of English law in BNPP's London terms, or because English law applies pursuant to Article 4(1)(a) of the Rome I Regulation whereby, in the absence of a choice of law made by the parties, a contract for the sale of goods is governed by the law of the country of the seller's habitual residence. The effect of Article 19(2) is that, as the contracts were concluded by BNPP's London branch, London is treated as the place of its habitual residence.
63. Anchorage contends that the choice of English law in clause 34 of BNPP's London terms applies only to matters dealt with in those terms and does not apply to "Transactions" concluded pursuant to those terms. I reject that distinction as unrealistic. It represents the kind of semantic approach to such clauses which English law has firmly left behind. Anchorage contends also that there was a choice of New York law for the purpose of Article 3 of the Rome I Regulation, so that Article 4 does not apply, but I can see no basis in the evidence for any such contention. Certainly the matters relied on, which essentially amount to no more than an assertion that it would have been sensible and desirable to agree to apply the law of New York, together with the reference to New York law in Ms Griffiths' draft trade acknowledgment, cannot constitute such a choice.
64. As to Article 4 of the Rome I Regulation, Mr Greenwood for Anchorage accepted that if there was no express choice of law in BNPP's London terms and there was otherwise no choice of law by the parties, Article 4 would apply to the sale of the Notes and would have the effect that English law is the applicable law, unless the primary rule in Article 4(1)(a) can be displaced as a result of Article 4(3). This provides that "where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated" by Article 4(1), "the law of that other country shall apply". Anchorage contends that this is such a case and that it is clear that the contracts are manifestly more closely connected with New York than they are with London. I do not agree. Article 4(3) deliberately places a high hurdle in the way of a party seeking to displace the primary

rule. The most that can be said in Anchorage's favour is that there are factors pointing in both directions. This comes nowhere near satisfying the test of "clear that the contract is manifestly more closely connected" with New York than with London.

65. Accordingly it is appropriate in my judgment to have approached the questions so far considered as a matter of English law. This means that it is unnecessary for present purposes to consider whether, if New York law applies, the Friday or Monday trades amounted to no more than a "Type II preliminary agreement" giving rise to an obligation to negotiate in good faith, a matter which in any event is in dispute between the parties and on which it would be difficult to reach any conclusions at this stage.

### **Anchorage's variation theory**

66. Anchorage's primary case is that the Friday and the Monday trades did not result in concluded contracts because there were terms which remained to be agreed. I have dealt with that argument above. Alternatively, however, it contends that the draft trade acknowledgment sent to BNPP by Ms Griffiths on 14 December 2012 (which provided for New York law to apply) was accepted by BNPP's sending of the Notes, re-issued in the names of ACMO and AIO, to Anchorage New York together with a demand for payment on 14 February 2013. It contends, therefore, that any contract already concluded on 7 or 10 December 2012 was varied by conduct, not only to provide for New York law, but also to include the representations and warranties to be given by BNPP set out in the draft acknowledgement.
67. I would accept that, if such a variation occurred, its effect would probably have been that the law and jurisdiction clause in BNPP's London terms would no longer apply to this transaction even though Ms Griffiths' draft trade acknowledgment did not expressly refer to jurisdiction as distinct from governing law. The consequence would be that BNPP would no longer be able to rely on Article 23 of the Brussels Regulation. However, I regard the argument that BNPP's conduct on 14 February 2013 was an acceptance of the terms proposed by Ms Griffiths as hopeless. Whether that conduct should be regarded as constituting such an acceptance is a question to be determined objectively. As it is put in *Chitty on Contracts* (31st ed, 2012), vol 1, para. 2-030:

"conduct will amount to acceptance only if it is clear that the offeree did the act of alleged acceptance with the intention (ascertained in accordance with the objective principle) of accepting the offer."

68. No sensible person could have considered that BNPP's conduct on 14 February 2013 was intended to be an acceptance of Ms Griffiths' draft. There had been no reference to her draft for some weeks and it had simply dropped from view. There was no reason to suppose that by causing the Notes to be re-issued in the names of ACMO and AIO BNPP was intending to accept the terms of her draft. On the contrary it had been told on many occasions that these were the funds to which the Notes should be allocated. Moreover, and fatally to Anchorage's argument, Ms Griffiths' draft included a proposed warranty by BNPP that on the Settlement Date there was no default on the Notes, but by 14 February 2013 it was known that there was such a default as a result of the liquidation of AIB a week earlier. BNPP would have had to

be mad to give such a warranty on 14 February and Anchorage cannot reasonably have thought that it was doing so.

### **Conclusion on Article 23**

69. The conclusions reached so far mean that BNPP succeeds in establishing jurisdiction against all three of the overseas defendants and that those defendants' application challenging the exercise of jurisdiction over them must be dismissed. That being so, I can deal very briefly with the other routes by which if necessary BNPP would seek to establish jurisdiction.

### **Jurisdiction over Anchorage New York under CPR PD6B**

70. In my judgment BNPP would if necessary succeed in showing a good arguable case against Anchorage New York under each of the "gateways" set out above on which it relies.
71. Whether the Friday contract was made within the jurisdiction depends on whether Mr Lett's message of 20:36:45 was an offer accepted by Mr Goodwin's response "done thank you". If so, the acceptance was received by Mr Lett in London and the contract, concluded by instantaneous means, was made in London where the acceptance was received: *Entores v Miles Far East Corp* [1955] 2 QB 327. Anchorage accepts this analysis, but submits that Mr Lett's first message was not an offer to sell but an invitation to Mr Goodwin to make an offer in those terms, so that it was his message ("done thank you") which constituted the offer and Mr Lett's response ("this is done – thanks for the trade") received in New York which constituted the acceptance. It would be unfortunate if the important question of jurisdiction should depend on such niceties, but for what it is worth I consider that BNPP has much the better of the argument on this point. There is no doubt that the Monday contract was made in England, so that if (contrary to BNPP's primary case) that was a contract concluded with Anchorage New York, jurisdiction would also be established in respect of the Monday contract under this gateway.
72. For the reasons already given, both contracts were governed by English law and contained a term to the effect that the English court should have jurisdiction.
73. Whether a breach of the contracts was committed within the jurisdiction depends on where Anchorage's obligation to pay for the Notes had to be performed. In general, as Anchorage accepted, it is the duty of a debtor to seek out and pay his creditor at the creditor's residence or ordinary place of business. However, Anchorage contends that this rule does not apply for two reasons. The first is that as BNPP was incorporated in France, albeit with a branch in London, payment could be made either in France or in England. I do not accept this. In accordance with the reasoning in the Northern Irish case of *ICS Computing Ltd v Capital One Services Inc* [2002] NIQB 2, [2002] NI 76 I would hold (and in any event there is a good arguable case) that the obligation to pay arises at the creditor's place of business and that in a case where the creditor has more than one place of business, the relevant place of business is the place through which the parties' dealings have taken place. Indeed *ICS Computing Ltd* was a case where there had been dealings through the plaintiff's offices in both England and Northern Ireland, but what mattered was that the office in Northern Ireland was "the main centre of activity" in these dealings. Anchorage's second argument is that when

BNPP demanded payment on 14 February 2013, the demand was for payment at a bank account in New York. That is so, but (as Mr Greenwood accepted) such a demand cannot constitute a unilateral variation of the contractual obligation to pay in London. However, Mr Greenwood contends that, as a matter of construction, Anchorage New York was under an obligation to pay at such place as might reasonably be demanded by BNPP, and that what BNPP demanded, perfectly reasonably, was payment in New York. I do not accept that the contracts are to be construed in this way. It is not what they say and there is no need to imply a term that BNPP should be free to demand payment elsewhere than in London. To do so would introduce unnecessary uncertainty as there might be scope for dispute about where it was reasonable to demand payment. BNPP's demand was merely an acceptance by BNPP that if payment was made in accordance with the demand, that would discharge Anchorage's obligation.

74. Finally, I would accept that Anchorage New York is a necessary or proper party to the claims made against Anchorage London, ACMO and AIO. The issue here is not whether there is a sufficient connection between the various claims, but whether there is a sufficient case either on the merits or as a matter of jurisdiction against the "anchor" defendants to justify exercising jurisdiction over Anchorage New York. As to this, there is and can be no jurisdictional challenge by Anchorage London and, although Mr Greenwood submitted that the claim against Anchorage London is weak, there has been no application to strike it out. For the reasons given above it seems to me that there is a real issue to be tried as between BNPP and Anchorage London and that any strike-out or summary judgment application would be most unlikely to succeed. Accordingly the claim will continue against Anchorage London. Whether ACMO and AIO are also available as "anchor" defendants depends on whether BNPP is able to establish jurisdiction over them under the Brussels Regulation, which I consider further below.
75. As already indicated, in order to establish jurisdiction under CPR PD6B (and in contrast with the Brussels Regulation) BNPP must also show that there is a serious issue to be tried on the merits (which Anchorage New York does not dispute) and that England is clearly or distinctly the appropriate forum for the trial so that in all the circumstances the court ought to exercise its discretion in favour of English jurisdiction. I return to this after considering the position of the Luxembourg defendants, ACMO and AIO. The question of discretion does not arise in their case, but it seems sensible to address the exercise of discretion in Anchorage New York's case once it is known whether jurisdiction is established against the Luxembourg defendants.

### **Jurisdiction over ACMO and AIO under the Brussels Regulation**

76. As ACMO and AIO are domiciled in Luxembourg, jurisdiction over them can only be established by reference to the provisions of the Brussels Regulation. I have already concluded that jurisdiction can be founded under Article 23, but jurisdiction can also be founded under other Articles in addition, again applying the test of good arguable case.
77. For the same reasons as already given in relation to the place of breach as against Anchorage New York, jurisdiction can be founded under Article 5(1) on the basis that the place of performance of the obligation in question is England. This requires a little

explanation. For the purposes of the Brussels Regulation, the contracts for sale of the Notes were contracts for the sale of goods (the Notes being negotiable instruments). Thus, *prima facie*, Article 5(1)(b) would apply, such that the place of the performance of the obligation in question would be the place in a Member State where the goods were delivered or should have been delivered. However, the place of delivery of the Notes was New York, and thus there was no place in a Member State where the goods were to be delivered, with the consequence that Article 5(1)(b) does not apply in this case. In that situation, Article 5(1)(c) makes it clear that Article 5(1)(a) applies, such that a claim can be brought in the courts for the place of performance of the obligation in question. The “obligation in question” which is the basis of the action is ACMO and AIO’s obligation to pay for the Notes, an obligation which was required to be performed in England as already explained.

78. In relation to the Monday contract, there is a good arguable case that both ACMO and AIO were represented by their agent, Anchorage London, who negotiated the contract. For the purposes of Article 5(5) of the Brussels Regulation, a contractual dispute is closely connected to the operation of a branch or agency if the contract was negotiated by that branch: *Anton Durbeck GmbH v Den Norske Bank ASA* [2003] EWCA Civ 147, [2003] QB 1160 at [40]. Accordingly jurisdiction is also available under Article 5(5) because Anchorage London is established in England.
79. Finally, under Article 6(1) of the Brussels Regulation, a defendant may be sued in the Member State where a co-defendant is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. In this case, the claims against ACMO and AIO are closely connected with the claims against Anchorage London. Anchorage contends that Article 6(1) is not available because there is no serious issue to be tried on the merits against Anchorage London as the “anchor” defendant (see *The Xing Su Hai* [1995] 2 Lloyd’s Rep 15 at 22), but for the reasons already given I do not agree.

### **Forum conveniens**

80. Questions of *forum conveniens* do not arise if, as I have held, jurisdiction is established against all the overseas defendants under Article 23 of the Brussels Regulation. Further, such questions do not arise as against ACMO and AIO in any event. Nor do they arise if I am right to conclude that Anchorage New York has agreed to the English jurisdiction clause in BNPP’s London terms, as there is no reason (let alone any strong reason) why effect should not be given to that clause (see eg *Antec International Limited v. Biosafety USA Inc* [2006] EWHC 47 (Comm) at [7]; and *Sebastian Holdings Inc v Deutsche Bank* [2010] EWCA Civ 998, [2011] 1 Lloyd’s Rep 106 at [74] and [78]). If I am wrong about that, the question whether England is clearly or distinctly the appropriate forum for the trial arises only as against Anchorage New York and even then falls to be considered on the basis that, as I have also held, jurisdiction has been established against ACMO and AIO so that the action will proceed against them here as well as against Anchorage London, the English domiciled defendant. On that basis it seems to me to be clear that England is the appropriate forum for a trial against Anchorage New York. Quite apart from the obvious inconvenience (to put it no higher) of having a trial against Anchorage New York in New York and a trial against the other defendants here, this is a case where English law applies to the parties’ dealings which on the facts of this case is a matter

of real weight. By comparison the matters relied on by Anchorage as pointing towards New York are in my judgment insignificant. In particular, the inconvenience to Anchorage if witnesses are required to attend a trial in London seems to me to be greatly exaggerated. In a case where an objective assessment of the parties' dealings is required and where those dealings are almost entirely in writing, there seems to me to be relatively limited scope for relevant witness evidence.

81. If necessary, therefore, I would hold that jurisdiction is established over Anchorage New York pursuant to the provisions of CPR PD6B.

### **BNPP's application for an anti-suit injunction**

82. BNPP applies for an anti-suit injunction against Anchorage New York, on the basis that the New York proceedings are in breach of the jurisdiction clause in BNPP's London terms. Although at this stage BNPP seeks an interim injunction pending trial rather than a final injunction, the question whether the New York proceedings are in breach of the jurisdiction clause is a question of the construction of the clause which has been fully argued and which the parties have invited me to decide. I propose to do so.

83. For ease of reference, I set out the terms of the clause again:

“This Agreement shall be governed by, and construed in accordance with, English Law and you irrevocably submit to the jurisdiction of the English courts in respect of any matter arising out of this Agreement, or our services to or Transactions with you under this Agreement.”

84. BNPP's case is that this clause is an exclusive jurisdiction clause, while Anchorage contends that even if (as I have held) the clause was incorporated into the Friday and/or Monday contracts, commencement of the New York proceedings was not a breach of the clause because it merely provided for the non-exclusive jurisdiction of the English court, leaving Anchorage at liberty to sue BNPP in New York or, for that matter, in any court anywhere where it can establish jurisdiction over BNPP.
85. The question whether the jurisdiction clause is exclusive or non-exclusive is the subject of lively debate in the New York proceedings between the English law experts instructed by the parties for the purpose of BNPP's challenge there to the jurisdiction of the New York court. Lord Collins of Mapesbury, the expert instructed by BNPP, maintains that the clause provides for exclusive jurisdiction, while Professor Adrian Briggs, the expert instructed by Anchorage, maintains the opposite. It is of course hard to think of experts of greater eminence in this field. Their reports discuss such matters as the significance of the word “irrevocably”, whether the verb “submit” is used transitively or intransitively and whether that makes any difference, and whether the “*contra proferentem*” rule has any role to play.
86. While there have no doubt been cases in which these matters have been accorded some weight in determining whether a jurisdiction clause should be regarded as exclusive or non-exclusive, the leading textbooks have not been impressed with the distinction between transitive and intransitive clauses. *Dicey, Morris & Collins on The Conflict of Laws* (15<sup>th</sup> edition 2012) comments at para 12-105 that the distinction

between transitive and intransitive verbs to determine whether a clause is exclusive or non-exclusive “would appear to have practically nothing to recommend it”. Professor Briggs is equally scathing:

“The idea that parties submit themselves to the jurisdiction of a court for something *other* than a dispute is surreal. If one were to ask what the parties meant when they agreed to submit, the answer will be that they agreed to submit to trial. It is improbable ... that the parties appreciated that there could be a difference between the two forms, and even more improbable that they predicted the consequences which followed from the difference. Most graduates of English universities would be hard put to it to see and explain the difference...” (*Briggs & Rees, Civil Jurisdiction and Judgments*, 5th ed, 2009, para. 4.45; emphasis in the original).

87. I must confess that (even with the benefit of a university education) the distinction in the present case between submitting to the jurisdiction in respect of certain matters (intransitive and therefore, so the argument goes, non-exclusive) and submitting disputes in respect of certain matters to the jurisdiction of the court (transitive, and therefore exclusive) is so elusive that it escapes me altogether.
88. In the end all of these factors are only signposts which may sometimes assist in determining the intention of the parties, while the terms “exclusive” and “non-exclusive” themselves are merely convenient labels. In agreement with *Dicey* at para 12-105 (“the true question is whether on its proper construction the clause obliges the parties to resort to the relevant jurisdiction, irrespective of whether the word ‘exclusive’ is used”), I prefer to ask the question whether the commencement and pursuit of the foreign proceedings in question are things which a party has promised not to do.
89. It is clear that the jurisdiction clause in this case constitutes a promise by Anchorage to submit to the jurisdiction of the English court, but there is no equivalent promise by BNPP. BNPP is therefore free, if it wishes, to sue Anchorage elsewhere. In that sense, at least, the clause does not make England the exclusive venue for litigation between the parties and may be regarded as non-exclusive. But the clause does require Anchorage to submit to English jurisdiction, and thus gives BNPP the right to litigate in England, “in respect of any matter arising out of this Agreement, or our services to or Transactions with you under this Agreement” if BNPP chooses to litigate here.
90. The first question, therefore, is whether Anchorage’s New York proceedings are “in respect of” such a matter. In my judgment they clearly are and Anchorage does not contend otherwise. On the contrary it accepts, correctly, that the New York proceedings are in respect of “essentially the same issues” as are raised in these proceedings in England.
91. Since it is clear that BNPP wishes to exercise its right to litigate these issues in England, the next question is whether by seeking to litigate them in New York Anchorage is in breach of its promise to submit to the jurisdiction of the English court in respect of those matters. That question must be addressed with a measure of common sense. The clause provides that BNPP is entitled to litigate its claim here if it

wishes to. It is entitled to require Anchorage to honour its promise to submit to the jurisdiction of the English court. By attempting to litigate in New York, Anchorage is seeking to deprive BNPP of that right or, at the least, to render it worthless. Its challenge to the jurisdiction here (contrary to its promise to submit) and its attempt to litigate in New York are two sides of the same coin. Even if, now that its jurisdictional challenge has been rejected, Anchorage does now submit to English jurisdiction as it has promised to do, what is to happen to the New York proceedings? It would make no sense, in my judgment, to construe the clause as permitting Anchorage, so long as it submits to the jurisdiction of the English court, also to bring a claim of its own in New York in respect of essentially the same matters as arise here. It cannot sensibly be supposed that the parties would have regarded such a prospect as acceptable. On the contrary they would rightly have regarded it as a procedural nightmare.

92. Accordingly I accept BNPP's submission, presented by its junior counsel Mr Patrick Goodall, that the New York proceedings are in breach of the jurisdiction clause in BNPP's London terms. With all due respect to Professor Briggs' views in his capacity as an expert in the New York proceedings, I regard this conclusion as clear.
93. The principles applicable to the grant of an anti-suit injunction to prevent a breach of a legal right not to be sued in a foreign court are well established and uncontroversial. In short, unless strong reasons to the contrary are shown, the parties should be kept to their contractual bargain. In cases not involving the courts of other member states of the European Union, if proceedings are commenced in a foreign jurisdiction in breach of contract, the English court will ordinarily exercise its discretion to restrain the foreign proceedings: *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 Lloyd's Rep 425 at [24]. No reason is suggested here as to why, if the New York proceedings are in breach of the jurisdiction clause, an injunction should not be granted.

### **Conclusion**

94. Anchorage's challenge to the jurisdiction is dismissed. The English court has jurisdiction over all the defendants. There will be an injunction pending trial to restrain Anchorage New York from taking any step to pursue the proceedings commenced by it in New York.