Neutral Citation Number: [2012] EWHC 721 (Comm)

Case No: 2011-1406

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3/04/2012

Before :

MR JUSTICE ANDREW SMITH

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Between :

Ferrexpo AG	**Claimant**
- and -	
Gilson Investments Limited and ors	**Defendants**

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- -

Joe Smouha QC and Stephen Houseman
(instructed by **Linklaters LLP**) for the **Claimant**
Ali Malek QC and Peter de Verneuil Smith
(instructed by **Skadden, Arps, Slate, Meagher & Flom (UK) LLP**) for the **Defendants**

Hearing dates: 8, 9, 10 & 16 February 2012

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Judgment

Mr Justice Andrew Smith:

Introduction

1. The defendant companies are challenging the jurisdiction of the English court over these proceedings, which were brought by the claimant on 22 November 2011. They apply for a declaration that the court has no jurisdiction to try the claim and should set aside the claim form and service of it upon the defendants, or a declaration that the court should not exercise any jurisdiction that it may have over the defendants in respect of the proceedings and should stay them.

2. The claimant is Ferrexpo AG ("Ferrexpo"), a Swiss company owned by Ferrexpo Plc, who are a FTSE 250 public company listed on the London Stock Exchange. Mr Kostyantin Zhevago is the Group Executive Officer of Ferrexpo Plc, and he and his family are the ultimate beneficial owners of 51% of their shares. Ferrexpo are represented by Mr Joe Smouha QC and Mr. Stephen Houseman.

3. The defendants are English companies with share capital of £1 or £2 and a single director. It appears from Mr Zhevago's evidence, which is not contradicted and which I accept for present purposes, that because they were incorporated here they

could take advantage of double taxation arrangements between Ukraine and the United Kingdom and so not pay tax on dividends that they receive. The proceedings were served on them at their registered offices in England on 22 November 2011. They are represented by Mr. Ali Malek QC and Mr. Peter de Verneuil Smith.

4. The proceedings concern a Ukrainian company called OJSC (sc. Open Joint Stock Company) Ferrexpo Poltava Mining ("OJSC"), which owns and operates the Poltava mine. I understand that the mine is Ukraine's largest exporter of iron ore pellets. The evidence is that the mine is now worth at least US$1.2 billion, and I accept that as a realistic indication of its value. I also accept Mr Zhevago's evidence that it is one of the key economic assets of Ukraine.

5. Ferrexpo claim to own over 98% of the shares in OJSC, and the indirect interest in the mine is the only significant asset of Ferrexpo and their parent. The defendants dispute Ferrexpo's shareholding in OJSC or their right to retain it.

Background

6. The background to these proceedings is a long-running dispute between Mr. Zhevago and Mr. Alexander Babakov. Mr. Zhevago is a Ukrainian, and he has since 1998 been a State Deputy (broadly equivalent to a Member of Parliament) for the Poltava Oblast electoral district. He has many business interests. In the 1990s he became one of the richest men in Ukraine and he remains so.

7. Mr. Babakov, a Russian, has since 2003 been a member of the Russian Duma and is chairman of the State Duma Committee for Foreign Affairs. He apparently has substantial business interests in Ukraine. Ferrexpo plead that he is the ultimate beneficial owner of the defendants, and there is no evidence that contradicts that verified averment. I proceed on the assumption that it is correct.

8. Mr. Zhevago's rivalry with Mr. Babakov apparently goes back to the 1990s. In 1993 Ukraine began a privatisation programme, which included privatisation of natural resources enterprises. Mr. Zhevago and Mr. Babakov both invested in that privatisation programme, and competed in 1998 for a 35% share of EC Odessaoblenergo, a utility company transmitting and distributing electricity to the Odessa region. The bid was won by Overcom Enterprises Ltd, one of Mr. Babakov's affiliated companies, and Mr. Zhevago avers that his affiliate, FS Trading Ltd LLS ("FST"), should properly have had their tender accepted. This dispute has resulted in a protracted litigation in Ukraine. The Superior Arbitration Court held initially that the tender was improperly awarded to Overcom Enterprises Ltd, and, although that decision was overturned in 2000, in 2007 the Supreme Court of Ukraine reinstated it. In 2010 the Supreme Court overturned the 2007 decision, and at a new trial in 2011 the Court rejected FST's complaint on the basis that there was no right to appeal to the court in respect of the decision of a privatisation body.

9. The rivalry between Mr. Zhevago and Mr. Babakov in relation to OJSC also goes back many years. By 2001 both men with their respective associates had built up share holdings in OJSC, and, according to Mr. Zhevago, Mr. Babakov and others proposed to buy out him and his associates. Mr. Zhevago led a counter-offer to buy out Mr. Babakov's group. According to Mr. Zhevago, in the months of negotiation that followed he received threats from Mr. Babakov and "his allies": Mr. Babakov is

said to have threatened to use political and other influence in Russia and Ukraine to take control of the company. Mr. Babakov denies this.

10. However that may be, eventually there was concluded an agreement dated 18 November 2002 and entitled "Agreement for sale and purchase of securities No K1911/27" (the "2002 SPA"), together with a so-called "lock-up agreement" (or "blocking agreement") of the same date. Both agreements were governed by the law of Ukraine. OJSC's registered and issued share capital was then UAH16,477,505, being 65,910,020 ordinary shares with a par value of UAH 0.25. (I shall refer to these shares as the "Original Shares") The defendants were the registered owners of some 40% of the issued share capital, 26,490,518 shares. The shareholding of Mr. Zhevago and his associates was nearly 55%. By the 2002 SPA four companies, which have been referred to as "Initial Purchasers" and which were beneficially owned by Mr. Zhevago and his associates, bought or purported to buy the defendants' entire holding in consideration of US$27 million. The parties to the 2002 SPA included, as well as the defendants and the Initial Purchasers, CJSC Dilovi Partnery (or CJSC Business Partners, "CJSC"), who were security traders and representatives of the Initial Purchasers, and JSB ING Bank Ukraine ("JSB ING") as custodian. Under the lock-up agreement the shares that were to be sold were to be held by JSB ING as custodian.

11. By clause 2.1 of the 2002 SPA the defendants were to sign and deliver to JSB ING instructions for the shares to be withdrawn from their accounts with JSB ING and transferred to the Initial Purchasers' accounts with them; and clause 2.4 provided that, "Ownership right to the Securities shall pass from the Sellers to the Purchasers only as of the date of deposit of the Securities to the Purchasers' account with the Custodian". As I shall explain, this method of transfer reflects that the Original Shares were electronic or "immobilised documentary", and that there were no traditional paper share certificates.

12. On 20 November 2002, according to Ferrexpo, a general meeting of shareholders in OJSC was held and resolutions were passed to increase the share capital in the company to UAH 639,986,294.20 and to increase the par value of an ordinary share to UAH 9.96. The defendants contend that they were then still registered shareholders, and it is in dispute whether they attended the meeting on 20 November 2002 and whether they voted in favour of these resolutions: according to Mr. Zhevago, they did so, but the defendants deny both that they attended and that they voted.

13. Following the resolution to increase the par value of the shares, the State Securities and Stock Market Commission ("SSSMC") issued a certificate dated 20 January 2003 certifying the issue of the new shares. In October 2004, November 2005, June 2006, December 2007 and October 2008 OJSC purported further to increase the number of its shares at a series of shareholder meetings. On each occasion a new share issuance certificate was issued by the SSSMC.

14. According to Mr. Zhevago it was common in Ukraine after a major corporate acquisition such as the 2002 SPA to seek to "de-risk" it (to adopt Mr. Zhevago's expression, which I understand to mean, or at least to include, taking steps to protect the acquisition from effective challenge) by moving the acquired shareholding through a chain of companies and usually dissolving the companies once they had transferred the shares. By 2006 the Initial Purchasers had transferred their shares.

Collaton Ltd ("Collaton"), an Isle of Man company beneficially owned by Mr. Zhevago, purported between July and September 2006 to transfer to Ferrexpo 28,691,769 shares in OJSC in consideration of US$121,691,281.94 and CHF134,923,800 under four agreements (the "2006 SPAs"). All the 2006 SPAs were said to be governed by Swiss law and provided for disputes to be subject to arbitration in Zurich, Switzerland. By May 2007 Ferrexpo were ultimately owned by Ferrexpo PLC, who themselves were floated on the London Stock Exchange on 15 June 2007.

15. Between 2000 and 2004 Mr Zhevago gradually bought out the interests in the mine of his original partners or associates. From the time when Mr Zhevago first acquired an interest in the mine, very significant sums have been invested in it, and Ferrexpo have continued to make large investments. As a result, OJSC have been extremely profitable.

16. I have referred to the transfer of shares under the 2002 SPA and the increase in the number of shares issued and their par value. The relevant procedures under Ukrainian law are explained by Mr Oleksiy Filatov, who gave expert evidence of Ukrainian law for Ferrexpo, and whose evidence in this regard is not disputed by Professor Roman Maidanyk, who gave expert evidence on behalf of the defendants.

17. Provisions about title to securities are found in the Law of Ukraine on the National Depositary System and the Specifics of Electronic Circulation of Securities in Ukraine, and in particular in article 5(4). In 2002, shares might have been in documentary or electronic form. If they were in documentary form, the shareholders' title to them was confirmed by certificates issued by the company's registrar, who was responsible for maintaining the register of shareholders. However, as I have indicated, I infer from the 2002 SPA that the shares of OJSC were electronic in 2002, and title to them was confirmed by a statement of the securities account issued to the owner of shares by the custodian. (Since 2011 all shares in Joint Stock Companies have been in electronic form only, a change introduced by the Ukrainian Act on Joint Stock Companies of 2008.)

18. If a company's share structure is changed, whether by an increase in the issued shares or by a change in the par value of shares, there is issued a new certificate, which records a new International Securities Identification Number ("ISIN") allotted by the National Depository of Ukraine. Such certificates were until last year issued by the SSSMC, but by the order of the President of Ukraine "On Regulation of the National Commission on Securities and Stock Market" dated 23 November 2011 the SSSCM has been replaced by the National Securities and Stock Market Commission ("NSSMC"). The SSSMC was and the NSSMC now is, as Mr Filatov explains, the "government agency primarily responsible for regulation of the stock market".

19. When new shares are issued, the shareholders' title to documentary shares is confirmed by a new share certificate issued by the company's registrar. If the new shares are electronic, they are credited by what Mr Filatov called the "depositary" (which I understand to be a reference to the All Ukrainian Depositary of Shares, to which I refer at para 26(iii) below) to the issuer's securities account and the previous shares of the company are cancelled and so debited from the account. The shares are then transferred by the depositary to the securities accounts of the shareholders with their custodians. Therefore, as Mr Filatov put it, "upon registration of [OJSC's] share capital increase through the restatement of the shares' par value and new shares

issuance, the shares of the previous issuance ceased to exist and are replaced by new shares having new ISIN and par value different from the "old" shares". Thus, the increase in the number of shares in the OJSC and the change in their par value (together with the change in the ISIN) involved the SSSCM in issuing a new certificate and also changes in the Unified State Register of Legal Entities and Individual Entrepreneurs (the "Unified State Register"), which came into existence, I understand, on 1 July 2004 and which I describe at paragraph 26 below.

20. There is some uncertainty about when the defendants ceased to be shareholders in OJSC. OJSC kept a register of their shares and a translation of the register in evidence appears to show the Initial Purchasers registered as shareholders on 29 December 2002. Ferrexpo plead in their Particulars of Claim that after the 2002 SPA "The defendants were duly removed from the Ukrainian share register with effect from 29 December 2002, reflecting their transfer and divestment of all their [OJSC] shares". It is not clear to what register this refers. (During the hearing before me, Ferrexpo acknowledged that that is not a material averment, but, as things stand, it is part of the pleaded case.) There is also in evidence a letter from the OJSC dated 6 July 2007 that states that "as at" 20 November 2002 two of the defendants, Gilson Investments Ltd ("Gilson") and Calefort Developments Ltd were "absent from the register of shareholders of [OJSC]".

The 2005 proceedings

21. On 3 November 2005 Gilson brought what I shall call the "2005 proceedings" in the Commercial Court of the Donetsk region of Ukraine. The defendants to the 2005 proceedings included the Initial Purchasers, the other defendants to these proceedings and other parties to the 2002 SPA and the lock-up agreement, including CJSC and JSB ING. In those proceedings Gilson challenged the validity of the 2002 SPA and the lock-up agreement, alleging that, in breach of Ukrainian law, the 2002 SPA had been concluded by the Initial Purchasers and not by CJSC, a licensed securities trader. Ferrexpo were not, of course, parties to the 2005 proceedings when they were brought, then having no interest in the shares in OJSC, and they were never joined as a party to those proceedings.

22. On 23 December 2005 the Donetsk Commercial Court held that the 2002 SPA was invalid and void ab initio and, consequently, the lock-out agreement was similarly void ab initio. On 18 January 2006 the Donetsk Court of Appeal dismissed an appeal of CJSC and JSB ING against this decision and refused the request of Gilson to amend their claim and seek restitution of the status quo ante. However on 17 February 2006 the High Commercial Court of Ukraine granted an appeal of CJSC (who had argued that the dispute should have been brought before the International Commercial Arbitration Court ("ICAC") for the Ukraine Chamber of Commerce and Industry), and ordered that the claim against them be determined in arbitration. The first instance decision was otherwise upheld by the High Commercial Court of Ukraine, but on 11 April 2006 the Supreme Court overturned all lower court decisions and referred the whole dispute to arbitration before the ICAC, making no determination as to the merits of the claim.

23. Accordingly, between May and October 2006 Gilson bought arbitration proceedings in Ukraine in respect of the 2002 SPA and the lock-up agreement, but those references were dismissed because not all parties to the 2002 SPA and the lock-up

agreement had agreed to arbitration. On 26 September 2006 the Supreme Court ordered that the dispute about the lock-up agreement be sent for re-trial in the Donetsk Commercial Court and on 16 January 2007 the Supreme Court ordered that the dispute about the 2002 SPA be sent for retrial in the Donetsk Commercial Court. The Supreme Court also ordered that agency agreements appointing CJSC should be taken into account at the retrial. On 27 March 2007 the Donetsk Commercial Court again held that both the 2002 SPA and the lock-up agreement were invalid, but they reached that conclusion without seeing the agency agreements (and without assessing the evidential significance of them being unavailable). The Donetsk Court of Appeal and the High Commercial Court upheld that decision on 25 April 2007 and 26 July 2007 respectively, but on 23 October 2007 the Supreme Court overturned the lower court decisions because of the failure to give consideration to the agency agreements.

24. On 12 May 2009 the High Commercial Court joined OJSC to the proceedings and transferred them to the Poltava Commercial Court. According to Professor Maidanyk, the decision to transfer the case was not in accordance with article 15 of the Commercial Procedure Code of Ukraine ("CPC"), but it is not suggested that the decision was corrupt or improper in a way that is significant for present purposes. On 18 August 2009 the Poltava Commercial Court held that the 2002 SPA and the lock-up agreement were valid, having been executed by a securities trader. The panel that made that decision, a decision contrary to the contentions of Gilson, included Judge O M Tymoshchenko. The decision of the Poltava Commercial Court was upheld by the Kyiv Court of Appeal on 11 January 2010, but it was overturned on 21 April 2010 by the High Commercial Court, which concluded that the 2002 SPA and the lock-up agreement were both invalid and void ab initio because they had not been concluded by CJSC and therefore had been concluded unlawfully. On 12 April 2011 the High Commercial Court refused to allow an appeal to the Supreme Court.

The 2011 Ukrainian proceedings

25. After the 2005 proceedings had been so concluded, on 6 October 2011 the defendants brought proceedings (the "2011 Ukrainian proceedings") against OJSC in the Poltava Commercial Court. Relying upon the outcome of the 2005 proceedings, the defendants seek to restore their shareholders' interest in OJSC to what it was before the 2002 SPA. On 10 October 2011 the 2011 Ukrainian proceedings came before Judge O M Tymoshchenko. She admitted the statement of claim for hearing and made an order "to engage for participation in the case, as third parties without independent claims regarding the subject matter, on the respondent's side" Ferrexpo and also these entities: the State Registrar of the Executive Committee of Komsomolsk City Council of Poltava Region; the Territorial Department of the SSSMC of Poltava Region; SSSMC; "Limited Liability Company Mining-Register"; and "Private Joint Stock Company All-Ukrainian Depository of Securities". (I have largely cited the certified translation of the ruling that was presented by Ferrexpo during the hearing before me: the translation that they had originally used described the parties joined as "interveners", rather than "third parties". I shall revert to their standing in the proceedings later: see para 183 below.)

26. I have explained the role of the SSSMC, but the evidence did not explain the nature of the registers that these various entities kept. However, after the hearing the parties were (largely) able to reach agreement about this. In summary:

i) The State Registrar of the Executive Committee of the City of Komsomolsk is responsible for keeping a state register of legal bodies and individual entrepreneurs, who are required to supply certain information to the registrar. The information held in the register includes the share capital of an entity such as OJSC.

ii) The Mining Register LLC is an entity that, licensed by the SSSCM, maintains a register of the owners of stock securities in joint stock companies. All joint stock companies that issued documentary shares had to have a register of securities owners, although those who issue shares in electronic form do not have to do so. The licensed share registrar issued and cancelled share certificates confirming title to documentary shares and updated the register if there was a change in a company's share capital.

iii) The All Ukrainian Depository of Shares is a private joint stock company, also licensed by the SSSMC, that holds securities accounts of custodians. It does not hold a register of shares.

As I explain below (at para 98), the prayer in the 2011 Ukrainian proceedings also refers to the Unified State Register. This is a national state register maintained by the authorised government entity and is based on information held by state registrars, including that of the Executive Committee of the City of Komsomolsk. It is open to public inspection. The information that it holds includes the total share capital of all companies registered in Ukraine, and any change in share capital must be recorded on the Register. Par values of shares are not directly entered on the Register, but a change in par value requires a change in the company's charter, which is recorded on the Register.

27. Judge O M Tymoshchenko directed a further court hearing on 23 November 2011. Before the further hearing in the 2011 Ukrainian proceedings, as I have said, on 22 November 2011 Ferrexpo issued and served on the defendants these English proceedings.

28. On 23 November 2011 Judge O M Tymoshchenko ordered that Ferrexpo and the other "third parties without independent claims", apart from the Territorial Department of the SSSCM of Poltava Region, be joined as respondents in the proceedings. This was done upon the motion of the defendants (the claimants in the 2011 Ukrainian proceedings) on the basis that the claims concerned not only OJSC but also the third parties. The court directed that Ferrexpo should be notified of the proceedings in accordance with the Convention of the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial matters, because they were a Swiss company. Otherwise consideration of the case was adjourned until 12 June 2012.

The English proceedings

29. Ferrexpo plead in these proceedings that they intend to challenge the jurisdiction of the Poltava Commercial Court over them if they are served with the 2011 Ukrainian proceedings. Ferrexpo brought these proceedings because, as is explained by Mr Michael Abrahams, the chairman of the Board of Ferrexpo plc, in a statement dated 2 February 2012, the Board of Ferrexpo plc (which includes a Mr Ihor Mitiukov, a former Ukrainian Minister of Finance, Ukrainian Special Representative to the

European Union and Ambassador to the United Kingdom) is concerned "about unfair treatment if this litigation were to be heard in Ukraine", and because "it is important for Ferrexpo plc that the ownership dispute is resolved in the near future and by an English court in whom the investment community will have trust and confidence". Mr Smouha acknowledged that the only connection that the litigation has with this country is that the defendants are English companies and were served here and that Ferrexpo's parent company is English.

30. On 5 December 2011 the defendants acknowledged service, and gave notice of their application challenging the jurisdiction of the English court and seeking a stay of these proceedings.

31. Ferrexpo applied on 12 December 2011 for an order that these proceedings be conducted on an expedited basis, and also directions with a view to an expedited hearing of the defendants' application. In a witness statement dated 12 December 2011 and made in support of the application, Mr Nicholas Porter, a partner in their solicitors, Linklaters LLP, said that, if Ferrexpo succeed at the trial of the proceedings and obtain "appropriate declaratory relief", their intention is then to seek an anti-suit injunction before the hearing in the 2011 Ukrainian proceedings in order "to give effect to the English judgment and protect [Ferrexpo's] interests as fully as possible". Mr Houseman, explaining Ferrexpo's intentions to Flaux J at a hearing on 15 December 2011, said that Ferrexpo needed a trial in "early May at the latest" because, if they succeeded in obtaining declaratory relief, "Our next stage would be to seek post-judgment anti-suit injunctive relief … on the basis that the continuing pursuit thereafter of the claim in Ukraine … would be abusive re-litigation…". He said that an application for injunctive relief and any enforcement proceedings if the defendants did not comply with an order would have to be decided before the hearing in the Ukraine on 12 June 2012. Mr Smouha confirmed at the hearing before me that this remains Ferrexpo's strategy.

32. Flaux J ordered that these proceedings be conducted on an expedited basis, the defendants not opposing such an order. He explained that this would enable Ferrexpo "at least [to] pencil in some dates in May". However, after the hearing before Flaux J and his order of 15 December 2011 Ferrexpo did not arrange any provisional dates for a trial in May 2012, and they did nothing to secure dates for an expedited trial apart from making an enquiry of the listing office whether dates might be available. When the matter came before me, Mr Smouha estimated that the trial might take five days (plus "a day or so pre-reading"), but this had not been discussed with those representing the defendants. (Mr Malek estimated that the trial might take 16 days.) In order to ensure that the court could, if necessary, accommodate an expedited trial, on the first day of the hearing I arranged that a six day trial should be "pencilled in", but at the end of the hearing, it had become apparent, to my mind, that the order for an expedited trial should be discharged, and I so directed. I shall revert to this later (see para 201), but I emphasise in passing that, when parties obtain orders for expedited hearings and trials, their advisers need to act promptly to make arrangements with the court.

<u>Is there a risk that injustice will be done in the Ukrainian courts?</u>

33. I first consider Ferrexpo's contention that (as Mr Smouha put it) there is "a real risk of injustice to Ferrexpo at the hands of the Ukrainian courts". It is convenient to do so

although, as Mr Smouha emphasised, his primary arguments for resisting the defendants' applications do not depend upon Ferrexpo establishing such a risk, nor indeed do all the arguments of the defendants in support of their challenge to the jurisdiction of the English court depend upon them refuting it.

34. In his statement dated 12 December 2011 Mr. Porter said that Ferrexpo justifiably fear that proceedings before the Ukrainian courts might be unfair to them because of the practice in Ukraine of "raiding" (see para 58 below), and because of influence exerted to that end over the judiciary through bribery of them and through political intervention in the judicial process. I observe that it is not said (as it was, for example, in Cherney v Deripaska [2008] EWHC 1530(Comm)) that, unless there is a trial in England, the issues between Ferrexpo and the defendants cannot be tried at all.

35. On an application of this kind the court should not determine whether it has been established that justice will not be done in the foreign court. The question is whether Ferrexpo have discharged the burden of 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": per Lord Collins in AK Investment CJSC v Kyrgyz Mobil Tel Ltd and ors, [2011] UKPC 7 at para 95. (In this case Ferrexpo's contention is that there is such a risk is because of lack of independence or corruption, and they do not suggest incompetence.) Lord Collins observed (at para 97) that "Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required to establish the risk".

36. In Deripaska v Cherney, [2009] EWCA Civ 849 at para 60 Moore-Bick LJ said that allegations that impugn the integrity of a foreign court must be "distinctly alleged and supported by positive and cogent evidence". When Mr Smouha first made submissions, I expressed concern that the matters upon which Ferrexpo relied were not identified with the required clarity, and in response Ferrexpo set them out in a document headed, "Particulars of contention that there is a real risk that Ferrexpo will not obtain justice in the Ukrainian Courts by reason of lack of independence or corruption". In summary, it alleged that there is such a risk because of these matters (taken individually or in combination):

    i) A high level of corruption in the judiciary.

    ii) Control of the Ukrainian regime over the Ukrainian courts.

    iii) An "ongoing and escalating campaign by the regime against its political opponents".

    iv) The involvement of Mr Zhevago with Ferrexpo, Mr Zhevago being aligned with the political opposition.

    v) The involvement of Mr Babakov with the dispute.

    The document also made clear that Ferrexpo allege with regard to the 2005 proceedings that "Certain aspects of the judicial decisions adverse to Mr Zhevago were clearly irregular and, in the context of the endemic corruption of the judiciary, may indicate undue and improper influence on certain judges", and it is said that

"Certain features of the 2005 Ukrainian Proceedings are indicia of those proceedings being a sophisticated type of "raiding" involving the courts of Ukraine", the expression "raiding" being used to refer to tactics whereby control of a business or an interest in it is acquired illegitimately, often through improper influence over state officials or the judiciary.

37. I observe that, although in written submissions and initially in Mr Smouha's oral submissions Ferrexpo had also complained about delay in judicial proceedings in Ukraine and "fragmentation" (that is to say, that they can involve numerous appeals and cases being remitted for re-hearing), these complaints were not included in the document formulating the case that there is a real risk of injustice. This detracts from the weight of another piece of evidence upon which Ferrexpo relied: they pointed to statistics reported by the European Court of Human Rights ("ECHR") of cases from different countries and the violations of human rights that it found proved; and specifically they pointed out that in 2011 the ECHR had concluded that there had been a violation of rights in all the 105 cases from Ukraine. Only Turkey and Russia were found guilty of more violations that year. However, in 66 of the 105 cases Ukraine's violations were attributed to the length of proceedings.

38. I add that after the hearing before me the Court of Appeal gave judgment in Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniia Naftogaz, [2012] EWCA Civ 196, and Ferrexpo drew it to my attention. They rely upon the finding that a judgment of the Supreme Court of Ukraine was "flagrantly" in breach of article 6 of the European Convention on Human Rights, and the support found for that conclusion in the decision of the ECHR Agrokompleks v Ukraine, [2011] ECHR 1549, to which I refer below (at para 52). However, in the Naftogaz case there was no issue as to the independence of the Ukrainian courts (see para 35 of the Court of Appeal judgment) nor of personal impropriety or bias by any judge of a Ukrainian court (see para 77). The case further illustrates that statistical evidence about findings of breaches of article 6 does not itself demonstrate a risk of judicial corruption or political interference with the courts.

39. In support of this part of their case, Ferrexpo relied mainly upon two reports made by Professor Sergii Koziakov dated 15 January 2012 and 3 February 2012. They also relied upon the evidence of Mr Zhevago in two witness statements dated 16 January 2012 and 3 February 2012, the statement of Mr Abrahams to which I have referred, and a report entitled "The Rule of Law in Ukraine" dated December 2008 and made by Sir Brian Neill and Sir Henry Brooke for the Lord Slynn of Hadley European Law Foundation (the "Slynn report"). The defendants waived any requirement that the Slynn report be exhibited to a witness statement and agreed to it being adduced without formal proof.

40. Professor Koziakov is the managing partner at a law firm in Ukraine called Sergii Koziakov and Partners; a Professor of Law with the Chair of Private International Law at the Kyiv Institute of International Relations of the Kyiv National Shevchenko University; and an associated Professor at the Ukraine Diplomatic Academy. For three years he was Head of the Arbitration Court of the Association of Lawyers of Ukraine. On 5 November 2010 he was appointed by decree of the President of Ukraine as a member of the Commission on Strengthening Democracy and the Rule of Law. In his report Professor Koziakov concluded that "it is very likely that

[Ferrexpo] will not be afforded a fair hearing in the New Ukrainian Proceedings"; that this risk is aggravated by the "involvement" of Mr Babakov; and that:

i) Ukraine suffers from a high level of corruption, including corruption of the judiciary, despite "a raft of "anti-corruption" measures".

ii) The Ukrainian judiciary is no longer independent of political pressure, but is highly susceptible to it.

iii) So-called "raider" tactics are common in Ukraine, often accompanied by "facilitation by the Ukrainian courts".

iv) Ukrainian politics is marked by deep divisions and personal rivalries.

41. The defendants relied (as well as upon evidence of fact) upon an expert report of Professor Roman Maidanyk made in reply to Ferrexpo's evidence, including the first report of Professor Koziakov and the first statement of Mr Zhevago. Professor Maidanyk is a Doctor of Law, and Professor and Head of the Civil Law Department at Kyiv National Taras Shevchenko University. While acknowledging "ongoing issues in the Ukraine concerning the integrity of the legal process", he considers that Ferrexpo are "likely to receive a fair trial in the 2011 Ukrainian Proceedings".

42. In so far as there are differences between the evidence of Professor Koziakov and Professor Maidanyk, Mr. Smouha emphasised that Ferrexpo seek only to establish a real risk of injustice, and they do not seek to prove (either on the balance of probabilities or to any other standard) that they would not receive justice in the 2011 Ukrainian proceedings or other proceedings in Ukraine. He submitted that Professor Koziakov's distinguished standing and his conclusions themselves demonstrate a real risk of injustice. With regard to the specific reasons upon which Professor Koziakov relied in his reports, Mr Smouha emphasised that Professor Koziakov's conclusions rested not upon individual considerations but upon the material to which he referred them examined accumulatively.

43. I accept this last observation as far as it goes: the value of the opinion of an expert such as Professor Koziakov does not depend upon proof of "each individual piece of original information" and the court is concerned about whether his "conclusions about the whole picture are correct" (or here that there is a real risk that they are correct): see R v Ahmed, [2011] EWCA Crim 184 para 62 per Hughes LJ. Moreover, even at common law the courts have always allowed expert witnesses to rely upon hearsay evidence in relation to their evidence of opinion (once the primary facts on which their opinion is based are proved by admissible evidence): R v Abadom, (1982) 60 CAR 48,52 per Kerr LJ, and English Exporters (London) Ltd v Eldonwall Ltd, [1973] Ch 415,421E. There are obvious difficulties in presenting direct or primary evidence of matters such as concern Ferrexpo.

44. But this is no reason that allegations of the kind made by Ferrexpo need not be supported with evidence that enables the court to examine their basis, and which is sufficiently detailed and focused to justify them. In my judgment, some of Ferrexpo's evidence, including evidence upon which Professor Koziakov relied, is not of this quality. Some of it could properly be described as mere "press or political comment" unsubstantiated by independent evidence, such as Aikens J criticised in

Dornoch Ltd and ors v Mauritius Union Assurance & anor, [2005] EWHC 1887 (Comm).

45. For example, Mr Zhevago asserted in his evidence that in his experience this is a particularly difficult time for someone who is "not aligned with the government" to obtain a fair trial in the Ukrainian courts, and that his companies have lost cases "where it is clear that the rule of law has not been applied". As well as the decision in April 2010 in the 2005 proceedings (that he wrongly described as a decision of the Supreme Court), to which I shall refer later (see para 61), he gave three other examples.

    i) One was the decision of the Supreme Court in the litigation about Odessaoblenergo, which Mr Zhevago said was "in clear contravention of the principles of fairness and finality of judicial decisions", and the decision in the new trial that FST had no right to appeal to the courts in respect of the determination of a privatisation body, which Mr Zhevago said was "contrary to legal practice and legislation". The decisions so criticised are not in evidence, the legislation to which Mr Zhevago referred is not identified and the legal practice is not explained either in expert evidence or otherwise.

    ii) Mr Zhevago referred to another decision of the Supreme Court arising from an agreement in February 2005 between Ferrexpo Ukraine Ltd and two individuals (one or both being "of the Chief Department of Justice in Kiev"), under which, it is said, Ferrexpo Ukraine Ltd paid a "subscription amount" that was not returned after termination of the agreement. His complaint is that the Supreme Court entertained an appeal that was out of time, and later allowed the appeal. Again the decisions of the Supreme Court are not referred to, and the time limit that Mr Zhevago said was not observed is not stated.

    iii) Thirdly, Mr Zhevago referred to litigation involving another of his companies, Labunska Angelica Viktorivna Ltd, which he called "Mega Motors". In 2001 and 2003 Mega Motors had succeeded in litigation about a commercial tender for a stake in Lvivskiy Autobusniy Zavod, because Mega Motors were not permitted to have their tender registered. Mega Motors successfully challenged the validity of the tender process and consequent sale. However, in 2010 the courts that had so decided, the Desnyanskiy District Court and the Commercial Court of Kyiv, overturned their decisions on the grounds that "new facts" had been discovered. Mr Zhevago stated that he was "advised that this was in flagrant disregard of the procedural rule that court decisions only be revised due to discovery of "new facts" within a period of three months. Again, the decisions that are criticised are not in evidence, nothing is said about what "new facts" were the basis of the decisions, the procedural rule is not identified and it is not said who so advised Mr Zhevago.

46. Professor Maidanyk's evidence, which was not disputed, is that "judicial decisions in civil and commercial cases are public, reasoned statements of law". There is no apparent reason that Ferrexpo rely upon Mr Zhevago's assertions without presenting such directly relevant material to the court. Nor is it explained why, if there is validity in these criticisms, they are not explained by Professor Koziakov or Mr Filatov. I observe in passing that in Pacific International Sports Club Ltd v Soccer

Marketing International Ltd, [2009] EWHC 1839 (Ch), in which Blackburne J decided, albeit "not without considerable hesitation", that the evidence before him was not sufficiently cogent for him to conclude that the claimants would be denied justice in Ukraine, the evidence about proceedings in the Ukraine was, apparently, considerably more detailed than Ferrexpo's. (Blackburne J's judgment was before the A.K.Investment CJSC case (cit sup) established that the relevant question is whether there is a real risk of injustice.)

47. By way of further example, Professor Koziakov cited in support of his opinion about the level of corruption in the Ukraine information apparently produced by an entity called "Transparency International", which publishes, it seems, a "Corruptions Perceptions Index" upon which Ferrexpo rely, and a publication by an entity called "Heritage". When I asked what those organisations are and in which country they are based, no information was available (although Mr Smouha observed that Transparency International are mentioned in the judgment in the Pacific International case; and that, according to a report that they published they are (or were) supported by Ernst & Young and by the Australian Agency for International Development). Before the end of the hearing, Ferrexpo produced a note that sets out what Transparency International and the Heritage Foundation (apparently the entity referred to as "Heritage") say of themselves on their websites and observes that material from Transparency International has been cited in three other English cases and an expert from the Heritage Foundation was cited by the United States Court of Appeals for the 11th Circuit in State of Florida et al v US Dept of Health and Human Services, (12 August 2011). This case cites an extract from a speech by an expert from the Heritage Foundation in 1989 about health care in the USA, which, it was said, did not reflect the policy of the Foundation or even the current views of the speaker. As for the English decisions in which reference was made to material from Transparency International, in Alberta Inc v Katanga Mining Ltd, [2008] EWHC 2697 (Comm) Tomlinson J referred at para 27 to Transparency International in a list of entities on whose reports an expert drew when expressing an opinion about the rule of law in the Democratic Republic of Congo ("DRC"). In Long Beach Ltd and anor v Global Witness Ltd, [2007] EWHC 1980 (QB), in which the second claimant was the son of the President of the DRC, Stanley Burnton J, when determining an application for an injunction made without formal notice, recited evidence of an employee of the defendant which described Transparency International's Corruption Perceptions Index as "a respected global benchmark on corruption", and said that he had no reason to doubt the accuracy of three paragraphs of the witness statement which included this description. In Marco Trading Ltd v Revenue and Customs, [2011] UKFTT 646 a Tribunal referred to evidence produced by the taxpayer by way of a report of the arrest of an anti-corruption official in Bangladesh that stated that Bangladesh is "the worst on the Berlin based Transparency International's global list of the most corrupt nations covering the five years from 2001 to 2005", recorded that HM Customs and Revenue raised no objection to the evidence being introduced but commented that its evidential weight was "slight" in relation to the issues before the Tribunal. Faced with this material presented in the course of the hearing, it is not surprising that the defendants were not willing to accept "what is stated by the organisations regarding their status and function". These authorities do not reflect any significant consideration of the standing of Transparency International or the Heritage Foundation.

48. None of this, of course, implies any criticism of Transparency International or the Heritage Foundation. I have no reason to doubt their standing. However, in my judgment the court should be cautious about relying upon material drawn from the internet from organisations about which it is given no information. I am unable to accept that evidence of this quality could be described as cogent.

49. I have another concern about some of Ferrexpo's evidence. They rely upon the conclusions reached by the ECHR ("ECHR"). The general rule of English common law (sometimes called the rule in Hollington v Hewthorn, [1943] KB 587) is that in principle (and in the absence of relevant statute) a judgment, verdict or award of another tribunal (whether delivered in civil proceedings or criminal proceedings) is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between other parties (or between one party to the previous decision and a stranger to it, at least to the prejudice of the stranger): see Land Securities v Westminster City Council, [1993] 1 WLR 286, 288E-F. Although the decision in Hollington v Hewthorn itself was reversed by section 11 of the Civil Evidence Act, 1968 in relation to criminal convictions, the reasoning of the judgment remains authoritative: Secretary of State for Trade & Industry v Bairstow, [2004] Ch 1, at para 18. The application of the rule is not confined to conclusions reached by judicial authorities, but to other inquiries and investigations: see Secretary of State for Business Enterprise and Regulation Reform v Aaron, [2009] EWCA Civ 1146, in which the Court of Appeal considered that the rule applies to reports of investigations by the Financial Services Authorities and the Financial Services Ombudsman.

50. Ferrexpo do not rely upon any of the common law exceptions to the rule in Hollington v Hewthorn that are found in the text books (for example, by analogy with the exception regarding public or general rights: Phipson on Evidence (17th Ed, 2010) at para 43-83). They submit, however, that the rule has no application in this case because they seek to establish not that they will not receive justice in the courts of Ukraine but that there is a risk that they will not do so. They cite no authority that this precludes the evidential rule, and for my part I see no reason that it should. However, Mr Malek did not object to Ferrexpo relying upon this material as admissible evidence. Further, it appears that English courts have had regard to such material when considering the risk that a party will not receive justice in foreign courts: for example, in Cherney v Deripaska, (loc cit) Christopher Clarke J said (at para 237), "It is ... right to have some regard to any consensus of academic opinion, based on research and personal familiarity, particularly when backed by specific instances ... or determinations of the ECHR or other courts".

51. In these circumstances, I shall proceed on the basis that Ferrexpo can properly rely upon the decisions of other courts, including the ECHR, and reports of other inquiries and investigations as admissible evidence to establish the risk that they allege. However, the rationale for the rule in Hollington v Hewthorn is of some interest when assessing the weight of the evidence. As Lord Rodger observed in Calyon v Michailaidis, [2009] UKPC 34 at para 27, one reason for the rule is that "unless the second court goes into the facts for itself, it cannot actually tell what weight it should properly attach to the previous decision. Which means that the previous decision itself cannot be relied upon". This difficulty is magnified if, as in this case, the party relying upon a judgment puts it forward without any information about how the argument before the other court proceeded.

52. The decisions of the ECHR to which Ferrexpo refer are these:

    i) Sovtransavto v Ukraine, [2002] ECHR 626, in which the applicant, a Russian company, complained that the Ukrainian President had intervened in proceedings concerning its shareholding in a Ukrainian company being diluted by illegal increases in its share capital. The ECHR concluded (esp. at para 80) that the actions of the Ukrainian executive in particular in 1998 were such as to be "ipso facto incompatible with the notion of an "independent and impartial tribunal" within the meaning of article 6(1)" of the European Convention on Human Rights.

    ii) Salov v Ukraine, [2005] ECHR 580, which concerned the complaint of Mr Sergey Salov, a lawyer who published in a newspaper article in 1999 that President Kuchma was dead and that he was being impersonated in an election, and was arrested and faced criminal prosecution. The ECHR concluded (esp. at para 86) that there had been insufficient guarantees that in 1999 the judge hearing the case in the Kuybyshevsky District Court of Donetsk was free from pressure from the President of the Regional Court.

    iii) Agrokompleks v Ukraine, [2011] ECHR 1549, which concerned an allegation of intervention in insolvency proceedings relating to an oil refining company between 1995 and 2004. The ECHR concluded (at para 129) that "various state authorities" intervened in the judicial proceedings on a number of occasions. Its decision was that the independence and objective impartiality of the court was compromised because in September 2000 the President of the High Arbitration Court gave instructions to two of his deputies to reconsider a ruling (see para 138). The breach of article 6 of the European Convention was because of the apparent influence of a "judicial superior".

53. Thus, the three decisions of the ECHR cited by Ferrexpo all concern events that occurred some ten or more years ago. Professor Koziakov cites the cases in support of his view that from around 1999 "politicians" in the Ukraine have sought to exert influence over the judiciary, but, as I read them, the decisions provide no real evidence of political influence of a kind or on a scale or at a date significant to my decision. In two of the cases, the ECHR found Ukraine in breach of the European Convention because of pressure upon the court from another judge rather than from the executive.

54. I also have regard to the rule in Hollington v Hewthorn when the defendants refer to the decisions in the Pacific International case of Blackburne J (loc cit) and the Court of Appeal ([2010] EWHC Civ 753), which upheld Blackburne J's decision. That case turned on the evidence presented in those proceedings, and does not influence my determination of questions of fact, which depends upon the evidence presented by the parties to this litigation.

55. As I have said, Ferrexpo's contention that there is a risk that they will not receive justice in the Ukrainian courts depends largely upon the evidence of Professor Koziakov, but it is convenient to refer next to the Slynn report. It was produced in December 2008 by the Lord Slynn of Hadley European Law Foundation for the EU Ukraine Business Council. It was the product of a four days visit to Ukraine in September 2008, the purpose of which was to learn how, if at all, the Foundation's

experience might be "of value to the people of Ukraine as they seek to strengthen their judicial system consistently with the Rule of Law". To this end the authors met lawyers, academics and others including the Deputy Minister of Justice, but not judges. They were told, they report, that some judges are corrupt and take bribes and that there were different opinions as to whether corruption among judges was more frequent at lower levels. Understandably in view of its purpose, their report is based on anecdotal evidence, criticisms were not supported by specific examples and the sources of the comments that they recounted were not identified. The authors specifically acknowledge that the report inevitably "touches only lightly on the surface of the issues we were concerned to discuss".

56. The general conclusion is that the "administration of justice in Ukraine was in a most unsatisfactory state and that reforms were required as a matter of urgency". The passage of the Slynn report upon which Mr Smouha particularly relied was introduced with the words, "The criticisms fell under the following principal headings", and, while it is not necessary to set out all the criticisms, they included these: that "Though there were some notable exceptions, many judges at all levels were personally corrupt and were willing to take bribes"; "The judges, though in theory independent, were subject from time to time to political interference"; and "There was no effective system in operation for holding judges to account for improper behaviour".

57. Mr Malek submitted that the authors would be appalled at the prospect of the report being deployed to establish corruption in Ukraine such as alleged by Ferrexpo, and certainly they would, I think, recognise that information that the Slynn Foundation would wish to have in order to consider whether it could provide assistance is very different in kind from evidence that the court needs to determine allegations such as Ferrexpo's. In any case, it is acknowledged by Professor Maidanyk, and, as I understand it, accepted by the defendants that there is in Ukraine "a serious problem" with regard to the integrity of the legal process and there are instances of judicial corruption. I have to make a more specific and detailed assessment of whether that presents a real risk that Ferrexpo would not receive justice in relation to the 2011 Ukrainian proceedings. I do not consider that, given what Professor Maidanyk himself acknowledges, the Slynn report provides evidence that significantly goes beyond this.

<u>"Raiding" and the fairness of the 2005 proceedings</u>

58. According to Mr Zhevago, in his experience Mr Babakov is a "raider" who seeks to take control of businesses by unlawful means, and Ferrexpo submit that the 2005 proceedings were by way of a "raiding" scheme to gain control of OJSC and the Poltava mine, and so to seize the benefit of Mr Zhevago's and Ferrexpo's investment in it. I shall next consider this contention, and Ferrexpo's contention that the 2005 proceedings themselves indicate how they are likely to be treated by the courts in the 2011 Ukrainian proceedings.

59. In his first report dated 15 January 2012 Professor Koziakov said that the 2005 proceedings and the 2011 Ukrainian proceedings "appear to be a sophisticated type of raiding involving the courts of Ukraine". He described raiding as a tactic for illegitimately obtaining control of or a stake in a business that is "employed by those with political, economic or other power … relying upon their ability to exert control or influence over relevant authorities, including the judiciary", and said that it is a

widespread problem in Ukraine. In his opinion the 2005 proceedings and the 2011 Ukrainian proceedings have "typical" characteristics associated with raiding, namely:

i) That the defendants willingly disposed of their shares under the 2002 SPA.

ii) That the defendants' case "is based on an alleged technical defect with the documentation of the original transaction".

iii) That representative offices were established "seemingly" in order to ensure the jurisdiction of the courts of Donetsk.

iv) That Gilson brought the 2005 proceedings against (among others) the other defendants, who did not object to the proceedings against them.

v) That the "final court decision applied inapplicable laws and did not follow the comments of the Supreme Court of Ukraine".

It is only the last of these observations, which I understand to refer to the decision on the High Commercial Court dated 21 April 2010, that might indicate that Ferrexpo might be unjustly treated by the Ukrainian courts, but in his first report Professor Koziakov did not explain it, either by identifying the "inapplicable laws" or by identifying the comments of the Supreme Court or in any other way.

60. In his report dated 30 January 2012 Professor Maidanyk examined the 2005 proceedings in some detail and concluded that he had seen "nothing to suggest … bad faith or … undue or improper influence" with regard to them. However, in his second report dated 2 February 2012 Professor Koziakov identified three aspects of the 2005 proceeding that he considered "highly irregular". One is apparently the matter to which he alluded in his first report and he had not previously made the other two criticisms. It is unfortunate that criticisms of this kind were not made or developed by Professor Koziakov in his first report so that they might have been considered by Professor Maidanyk. There has been no explanation why they were not.

61. Professor Koziakov's criticism of the decision of 21 April 2010 is that the High Commercial Court, overturning the decisions of lower courts, determined that "a licensed securities trader had not been involved [in the 2002 SPA] as required even though a licensed securities trader had signed the 2002 SPA". They did so notwithstanding that the Supreme Court of Ukraine had found in its decision of 23 October 2007 that "a licensed securities trader was engaged in concluding the 2002 SPA as is also recorded in the preamble to that agreement", and that, "… in circumstances where CJSC … was engaged in concluding of the [2002] SPA on the basis of agency agreements, the conclusion of the courts stating CJSC … did no legally significant acts as regards its principals is mistaken".

62. The basis of the decision of the High Commercial Court was that the 2002 SPA had been signed by representatives of each of the Initial Purchasers. However, in Professor Koziakov's opinion:

i) The reason given by the Court for its conclusion and for overturning the decisions of lower courts was not "persuasive"; and

ii) The decision was contrary to "the very similar case of Absolute Ltd v Lina Ltd".

63. In October 2007 the Supreme Court remitted the case to the lower courts to make findings of fact in light of their decision, and the 2005 proceedings were thereafter conducted accordingly. The decision of the High Commercial Court in April 2010 was based upon the fact that the 2002 SPA was signed not only by CJSC but also by the sellers themselves (the defendants) through their authorised representatives. Whereas the lower courts had concluded that an additional signature of CJSC meant that the agreement was concluded in conformity with the relevant Ukrainian legislation, the High Commercial Court considered that signature by the sellers answered the contention that the agreement was concluded by CJSC as a licensed securities trader.

64. I am unable to understand why it is said that the decision in the 2005 proceedings is inconsistent with the decision in the Absolute Ltd case, another decision of the same court dated 20 April 2004. In that case the High Commercial Court decided that the contract in question had not been proved to be covered by the relevant legislation: to cite the translation of the judgment exhibited by Professor Koziakov, "the panel of Judges concluded that the Claimant had provided no evidence and the court had failed to prove [sic] that the conclusion of the contested agreement caused any redistribution of financial resources, and that the agreement is any organizational, information, technical, advisory or other support for issuing and circulation of securities; further the court has failed to prove that the purchase and sale of securities is a sole or dominating type of business of Absolute Ltd LLC". There is no evidence that the decision in the Absolute Ltd case was cited by any party in the 2005 proceedings, although CJSC were controlled by Mr Zhevago, but, if it was, I see no reason that it could not properly have been distinguished from the decision before the High Commercial Court in the 2005 proceedings.

65. Of the two criticisms of the 2005 proceedings first made in Professor Koziakov's second report, one again concerns the decision in the Absolute Ltd case. He opined that the decision of the High Commercial Court of 17 February 2006 was inconsistent with Absolute Ltd v Lina Ltd, notwithstanding that in both cases the Presiding Judge was Judge Plyushko (although the other two members of the court were different in the two cases). I have explained why I reject that criticism, but in any case it does not in itself show judicial corruption or lack of independence for a judge to reach decisions that are inconsistent (especially, perhaps, in a legal system that does not have a doctrine of precedent, such as the Ukrainian system), and the criticism is even less telling where the decisions were reached by different panels with only one member of the court party to both decisions. (As far as appears from the material presented to me, dissenting judgments seldom if ever are given in the courts of Ukraine.)

66. Professor Koziakov's third criticism of the Ukrainian proceedings is that in their decisions of 27 March 2007, 25 April 2007 and 26 July 2007 the Donetsk Commercial Court, the Donetsk Commercial Court of Appeal and the High Commercial Court did not comply with the decision of the Supreme Court of Ukraine in that they did not consider the commission agreements between the Initial Purchasers and CJSC. Professor Maidanyk drew attention to this in his report and described it as a "procedural error" in that the courts did not either consider the

agreements or, if they were not available, consider the evidential significance of this. It seems that the courts were at fault for the second reason that Professor Maidanyk suggests because the decision of the Donetsk Commercial Court of 27 March 2007 records that CJSC told it that they had destroyed the agreements following the expiry of the "three year preservation term". Professor Koziakov does not refer to this, nor criticise the court for failing to evaluate the significance of the documents not being available.

67. The 2005 Ukrainian proceedings involved 12 decisions, five of which, as Mr Malek observed, were adverse to Gilson. I am unable to accept that any of the criticisms made by Professor Koziakov of the 2005 proceedings identify anything that could properly be described as "highly irregular". There is nothing in the material about the 2005 proceedings that to my mind suggests that any of the decisions was not made bona fide by judges turning their minds independently to the legal questions before them and reaching their determinations for the reasons that they gave in their judgments.

68. It is not suggested by Ferrexpo that there is any indication of irregularity on the part of the judiciary in the conduct of the 2011 Ukrainian proceedings.

69. I return to Ferrexpo's further contention that, in any event and regardless of the evidence of impropriety on the part of the judiciary conducting them, there is reason to think that the 2005 proceedings and the 2011 Ukrainian proceedings were and are pursued by way of raiding tactics. I have stated the characteristics of the proceedings to which Professor Koziakov drew attention at paragraph 59 above. It might be that the defendants are seeking to exploit technical legal arguments to mount a claim, but that is far removed from a criticism that they are using illegitimate means to obtain an interest in OJSC. The factual basis for the observation about establishing a representative office "seemingly" to ensure the jurisdiction of the courts of Donetsk is not explained and the point was not developed in argument: in fact the 2005 proceedings were transferred to the courts of Poltava and the 2011 proceedings have been brought there. I cannot understand why it made any difference, or advanced the supposed "raiding" tactic, that the defendants other than Gilson were not claimants in the 2005 proceedings but defendants who did not object to Gilson's claim, and again the point was neither explained by Professor Koziakov nor developed in argument.

70. As for the 2011 Ukrainian proceedings, Professor Maidanyk's evidence is that the defendants have reasonable grounds as a matter of law both for establishing their claims and for obtaining the remedies that they seek, and his opinion is that they have "a reasonable prospect of success". Mr Filatov's evidence is that he considers it "doubtful" that the defendants had any right infringed by reason of the matters about which they complain in the 2011 Ukrainian proceedings. I am not in a position to form a view as to the merits of the claim, but nothing in Mr Filatov's evidence (or in any other evidence) suggests to me that the claim in the 2011 Ukrainian proceedings is so weak or so wanting in a proper legal basis as to indicate that it is not brought bona fide with a view to it being adjudicated by an independent court.

Evidence of corruption in the Ukrainian judiciary

71. I therefore come to the evidence of Professor Koziakov that there is a significant level of corruption among the Ukrainian judiciary such as to present a risk that Ferrexpo might experience injustice in litigation brought by the defendants. His general view is that Ukraine has a high level of corruption generally and that this includes corruption among the judiciary. He recognised that foreign investment in Ukraine has enhanced transparency in business and corporate best practices, but in his view this has not influenced the public sector, including the judiciary.

72. Professor Koziakov referred to international bodies who have expressed concerns about the Ukrainian judicial system. Thus, in January 2011 representatives of the European Business Association in Ukraine expressed seven major concerns including the judiciary and corruption. In November 2011 the Director of the World Bank for Ukraine, Moldova and Belarus, Mr Martin Raiser, gave warnings of "raiding" and referred to that problem being connected with the judiciary. These concerns were expressed in general terms, and indeed it is not clear whether they were that the judiciary is corrupt or that the judiciary was ineffective in dealing with corruption.

73. I have already referred to Professor Koziakov's opinion that raiding tactics on occasions involve the corruption of the judiciary. Does he therefore advance other specific material about why he considers that such corruption is at a significant level? First, he cited a case in which he acted for one of the main shareholders of a television channel called "Studio 1+1" in 2005 and 2006. He explained that an "oligarch" sought illegally to carry out a corporate "raid" and to this end brought proceedings in numerous local courts. Professor Koziakov observed that different courts gave rulings that were "surprisingly similar in content and with identical typographical errors". I cannot draw from this account an inference that the judges were corrupt: courts handling similar claims appear to have adopted the same precedent to determine them, but that in itself does not indicate corruption. I observe that Professor Koziakov states that the decisions at lower level were reversed on appeal, and so even on his account appellate courts remedied any corrupt decisions.

74. This is one of three instances that Professor Koziakov gave of corporate raids. He gave two examples of "raiding" in 2011. One was a case about a business producing steel ropes called Stalkanat-Silur, that in May 2011 "unexpectedly" became the subject of investigation and criminal proceedings over an alleged forgery of documents about transporting goods. The District Court of the Malinowsky district of Odessa issued a writ allowing documents to be seised from the company's registered office and other offices. The other example concerned a raid by officers of the Ministry of Internal Affairs on the "Foxtrot" group of electronic retailers in September 2011. I do not need to examine these examples in detail because it is not, I think, disputed that "raiding" does occur in Ukraine.

75. Professor Koziakov also gave evidence in his reports about legislation in Ukraine by way of anti-corruption measures, and in particular three laws to this end that were passed in 2009 but which never in fact came into force. The laws "On the Principles of Preventing and Combating Corruption" and "On Amending Certain Legislative Acts relating to Liability for Corruption Offences" apply to judges, but in the opinion of Professor Koziakov nevertheless Ukraine has not "made substantial progress in combating corruption".

76. It is therefore common ground between the parties that there is a level of corruption among the Ukrainian judiciary, but Professor Koziakov has not adduced any cogent evidence that, to my mind, establishes that it is more widespread or that it presents a greater risk of injustice to Ferrexpo than Professor Maidanyk has acknowledged. Professor Maidanyk summarised the position as follows:

> "There are ongoing issues in the Ukraine concerning the integrity of the judicial process. However, it would be wrong to say that the entire judicial system is inherently corrupt or corruptible; there are many judges who are honest and fully abide by their judicial obligations, deciding cases purely for legal (as opposed to political) reasons. Further, the corruption of judges is prosecuted and punished in practice and there are severe penalties for those involved in such criminal behaviour."

77. In support of Ferrexpo's allegation of corruption in the judiciary in Ukraine, Mr Smouha asserted that the Ukrainian judiciary are susceptible to corruption "just as much as others living and working in the public sector in Ukraine". I have already commented upon the reliance that Ferrexpo place upon Transparency International and their index, but, while there is evidence of some corruption among the judiciary in Ukraine to which I have referred, no evidence compares it with the level of corruption in other areas of life in Ukraine so as to justify this submission.

78. However, it is argued that the risk of injustice in the future is aggravated because the Supreme Court of Ukraine has "traditionally" been the forum that has provided a remedy in cases of judicial corruption but recent legislative changes have undermined this safeguard. According to Professor Koziakov, "it is widely believed in Ukrainian political and legal circles" that, because the Supreme Court has become controlled by those aligned to the regime since the election of Viktor Yanukovych as President of Ukraine in February 2010, its role has been reduced. In May 2010 some procedural powers of the Supreme Court were reduced by the law "On Amending some Legislative Acts of Ukraine in relation to Prevention of Abuse of the Right of Appeal". In July 2010 it was provided by the law "On the Judiciary and Status of Judges":

    i) That a new Superior Specialised Court in Civil and Criminal Cases should be established as the primary appellate court for some cases, along with the existing appellate courts for commercial and administrative cases; and

    ii) That the primary appellate courts should decide whether to permit a further appeal to the Supreme Court.

79. Thus, a party's right to appeal to the Supreme Court has been restricted. Professor Koziakov reports concerns about this change expressed by the Parliamentary Assembly for the Council of Europe in a paper "On the Functioning of Democratic Institutions in Ukraine" (which was approved by the relevant committee on 9 September 2010) and a Joint Opinion dated 18 October 2010 of the Venice Commission (the European Commission for Democracy through Law) and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe. The Joint Report regarded the reduced role of the Supreme Court as one of "two main problems" with the legislative changes.

(The other that they identified was the enhanced role of the High Council of Judges, to which I refer below at paragraph 84). In the Joint Report the Venice Commission welcomed other changes and the Ukrainian Government's expressed intention to make further changes, and observed that there had been amendments in the course of drafting the legislation that brought about "the strengthening of judicial independence in some areas". Professor Koziakov has stated, however, that these measures have not in practice noticeably reduced corruption in Ukraine.

80. Professor Maindanyk has explained that the background to these changes is that some lawyers and academics had criticised the previous system of appeals on the grounds that disputes were not resolved within a reasonable time and finality of judgments was not achieved. He disagrees with the criticisms of the changes. More importantly, he observes that the suggestion that they prejudice the prospects of proceedings being fairly determined assumes that the specialist appellate courts are likely to be partisan and that there is no evidence of this.

81. I do not consider that there is cogent evidence that these recent changes aggravate the risk of corruption or of injustice in consequence thereof, essentially for the reasons that Professor Maidanyk gives. In my judgment, there is no proper evidence that, in the event of judicial corruption, the new specialised courts will be less effective than the Supreme Court has been.

Political influence and the regime's "campaign" against political opponents, including Mr Zhevago.

82. Apart from corruption of the judiciary in Ukraine, Ferrexpo also express concern that they will not receive justice in the 2011 Ukrainian proceedings because of political interference in the judiciary. Professor Koziakov gave evidence that in the years after Ukraine became independent, from 1991 until about 1998 or 1999, the court system in Ukraine generally provided independent access to justice, and successive regimes, although they tried to control the judiciary, failed to do so. However, thereafter the judges have become less independent: Professor Koziakov cited a survey published in 2009 by the Centre of Judicial Schools, the Council of Judges of Ukraine and the Association of Judges in Ukraine (the evidence does not explain what these bodies are) which showed that judicial perception of their independence declined between 1996 and 2009.

83. President Yanukovych defeated Yulia Tymoshenko and her "Motherland" party in the 2010 presidential election. Ms Tymoshenko has recently been imprisoned on charges of corruption relating to her time in office, and Ferrexpo's contention, supported by the evidence of Professor Koziakov, is that, since the election of President Yanukovych, the level of political control over the judiciary has markedly increased not only because the Supreme Court has (as he put it) been marginalised but also because the regime has taken control over the appointment of judges.

84. Judges in Ukraine are appointed through the High Council of Justice, a body created in 1996, which consists of judges, prosecutors, attorneys and academics. Its role is to submit to the President of Ukraine proposals to appoint and dismiss judges, to appoint and dismiss the heads and deputy heads of councils of judges and to handle complaints and disciplinary proceedings against judges. According to Professor Koziakov, the High Council has become "highly politicised"; he considers that "at

least" 12 of its 20 members are "politically aligned" to President Yanukovych (He also observed that in a class action brought in the United States District Court for the Southern District of New York by Ms Tymoshenko and others, it is said that the "Yanukovych regime has the allegiance of at least 16 members [of the Council]", but there is no evidence before me that supports that more extreme assertion. The pleading also asserts that this "preclude[s] the possibility of any independent judiciary", another more extreme assertion than Ferrexpo's allegations.) Professor Koziakov gave two illustrations of appointments to the Council that he considers to have been partisan. He also stated, with examples, that by the end of 2011 "almost all the major courts (except the Supreme Court) were headed by supporters of President Yanukovych's party "Regions of Ukraine" or by judges of the areas where the party had a majority of votes". In his second report, Professor Koziakov added that on 26 January 2012 the Parliamentary Assembly of the Council of Europe passed a resolution expressing "deep concern" about shortcomings in the justice system in Ukraine, including lack of independence of the judiciary, and made specific criticisms concerning the appointment of judges and the composition of the High Council of Justice, and reports that judges have been removed from office on the basis of complaints by the Prosecutor's office.

85. Ferrexpo have alleged that, since President Yanukovych came to office, the political opposition, including Ms Tymoshenko, have been subject to numerous criminal investigations and prosecutions, which has led to expressions of concern from foreign governments. I need not comment upon those allegations, but must consider Ferrexpo's argument that this gives rise to a risk that they will receive unjust treatment in the courts, because of the influence of President Yanukovych's regime over the judiciary and the changes that have increased that influence, because Mr Zhevago is associated with the political opposition, because he and his businesses have been the subject of unwarranted investigations and similar pressure from the authorities and because this indicates that his association with Ferrexpo will mean that political interest in the 2011 Ukrainian proceedings will militate against a fair trial.

86. The defendants dispute that Mr Zhevago's political history and position is such as to justify this argument. According to the evidence of Mr David Kavanagh, a partner in Skadden, Arps, Slate, Meagher & Flom (UK) LLP, the defendants' solicitors, Mr Zhevago's political affiliations have been fleeting and he is not aligned to any political faction in any substantive way. Mr Smouha disputed this and submitted that press reports on which Mr Kavanagh relies in fact confirm that Mr Zhavago is, and is widely perceived to be, an opposition politician aligned with the bloc of Ms Tymoshenko. Mr Smouha cited three such press reports, but to my mind they do not support Mr Smouha's submission but are consistent with Mr Kavanagh's evidence.

i) The first, a CNBC Business report of April 2007, states that Mr Zhevago is "known for attaching himself to politicians who are either in power or soon will be. Currently he is a member of the Bloc of Yulia Tymoshenko, but considering the fact that Tymoshenko and her party members have been forced to take seats in the opposition, how long this allegiance will last is anybody's guess."

ii) Secondly, Mr Smouha referred to a report dated 17 February 2011 that the change of power in the Ukraine "has brought no obvious consequences for the ByuT MP", Mr Zhevago. It observed that "the businessman has found the

common language with the new authorities" and that "the authorities are not very active in preventing Zhevago from influencing the state of play in his basic Poltava region". It continued, "Political preferences of Mr Zhevago, who has not left the BYuT faction, should not be overestimated. It is his business that defines his preferences. Over the entire period while he has been in parliament, Zhevago changed a number of parties and has authored no single bill…".

iii) The other article that Mr Smouha cited is from Ukraine Pravda and dated 19 August 2011, and it reported that, while President Yanukovych generally sends birthday greetings only to MPs in the majority faction, Mr Zhevago is one of the few opposition MPs who receives them.

87. It is Mr Zhevago's evidence that he has always regarded himself as "representing an industry and a community rather than a political party", although he is known to be aligned to the "Yulia Tymoshenko bloc". He keeps a "low profile" in Parliament, he said, and his work is by way of parliamentary committees and monitoring legislation. I am not in a position to assess his political activities in any detail, but Mr Smouha's submission that Mr Zhevago's status and public allegiance to the bloc of Ms Tymoshenko "places him fairly and squarely on the wrong side of current Ukrainian politics" is not, to my mind, justified by credible evidence. Unlike Ms Tymoshenko and some closely associated with her, he has not faced criminal charges or sought to leave Ukraine.

88. However, Mr Zhevago complains that his businesses are "suddenly (and for no obvious proper reason) attracting greater interest from, for instance, tax and regulatory authorities". In particular, OJSC have been the subject of investigations and in July and August 2011 the "tax police" brought against the company three sets of criminal proceedings, all of which have been dismissed (subject to appeal). Other companies with which he is associated have also been investigated and had their premises searched.

89. There is evidence, which is not contradicted and which I accept for present purposes, that Mr Zhevago's businesses, including OJSC, have been the subject of recent investigations, and I shall suppose that there was no proper reason for them. This does not in itself demonstrate that he would not receive fair treatment in the courts, and indeed, as I have said, the proceedings brought by the tax authorities against OJSC have all been dismissed.

90. Mr Malek argued that in fact many decisions in the courts of Ukraine have been favourable to Mr Zhevago's business interests. Mr Kavanagh gave as examples of Mr Zhevago successfully using the Ukrainian court system details of six decisions (at first instance or on appeal) between December 2010 and November 2011 in which claims against his businesses were dismissed. Mr Zhevago responded that in each of these cases his companies were defendants and the sums involved were small, but he has not given evidence that his companies have not brought proceedings in Ukraine or that he considers that he could not do so because of judicial corruption or partiality.

91. I recognise that the importance to Ukraine of the Poltava mine distinguishes the dispute between Ferrexpo and the defendants from the litigation to which Mr Kavanagh referred. However, there is no specific evidence that the Government will

intervene (or has intervened) in what is a dispute between private entities. There is no specific evidence that the Government have intervened in any comparable dispute in order to bring pressure against political opponents. Mr Zhevago stated that there is "proof of direct political interest in the dispute" because his Ukrainian legal advisers have received telephone calls from Ukrainian Members of Parliament seeking information about the 2011 Ukrainian proceedings, but nothing is said of the nature of the enquiries and there is no indication that the interest was improper.

92. I accept Mr Malek's submission that there is no cogent evidence of a politically motivated attempt or intention to interfere improperly in the 2011 Ukrainian proceedings.

The involvement of Mr Babakov

93. Ferrexpo contend that the risk of injustice in the Ukrainian courts is the greater because (i) Mr Babakov is in a position that *might* enable him to exercise political influence in Ukraine, (ii) he has a *reputation* in Ukraine as a "raider", and (iii) his conduct *suggests* that he would be willing to seek improperly to influence the outcome of Ukrainian court proceedings. The allegation is not that he has in fact exercised improper political influence, that he is or has been a "raider" or that he has improperly influenced court proceedings.

94. The only direct evidence of any activity of Mr Babakov is that Mr Zhevago states that in 2006 Mr Babakov approached him to settle the 2005 proceedings in consideration of $500 million, making an "extortionate proposal to drop the claim, amounting to a ransom demand". No documents about this were produced in evidence, and the allegation is denied by Mr Babakov. In any case, despite the emotive language, Mr Zhevago did not explain why he regarded the proposal as amounting to a ransom demand rather than a (perhaps extravagant) proposal for settlement of the litigation.

95. Otherwise Mr Zhevago referred to reports about Mr Babakov being in a group of businessmen who "raided" a number of businesses involved in shopping centres and hotels, and a reported complaint of the owners of one hotel that the raid on them was made possible by "rigged judicial decisions". However, the evidence of this amounts to press reports, which Mr Babakov denies. Mr Malek observed that there have been comparable reports about Mr Zhevago's activities. I recognise the inevitable difficulty in finding convincing evidence of such matters, but I cannot accept that this evidence about Mr Babakov could fairly be described as cogent. It is not alleged that he has been associated with bribing or otherwise corrupting the judiciary. Nor is there evidence that he has political influence whereby he could bring pressure to bear upon the judiciary to uphold the defendants' claims in the 2011 Ukrainian proceedings or to prevent Ferrexpo being justly treated.

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.

The claims in these proceedings and their relation to the 2011 Ukrainian proceedings

97. I shall set out later (see para 123 below) the grounds upon which the defendants apply for these proceedings to be dismissed or stayed. They include an allegation that they are an abuse of the court's process, and this and other submissions requires that I examine the claims in both these proceedings and the 2011 Ukrainian proceedings. It is convenient to do this next.

98. As I have said, in the 2011 Ukrainian proceedings the defendants seek to restore their shareholders' interest in OJSC to what it was before the 2002 SPA. Their pleading is headed "Statement of claim on Invalidation of Resolution of the General Shareholders Meeting and Recognition of Title to Shares". The prayer to their claim includes the following:

    i) That the Court "invalidate the decisions of the General Shareholders Meeting of [OJSC on 20 November 2002] … with respect to increase of the charter capital and change in par value of the shares …".

    ii) That they "obtain restitution to the status quo ante as existed before the right was violated…".

    iii) That the Court "compel the State Register of the Executive Committee of Komsomolsk City Council in Poltava Region to make the corrections with respect to [OJSC], in particular, restore in the Unified State Register of Legal Entities and Individual Entrepreneurs the information on the charter of [OJSC] as in force as of 20 November 2002, and information on the share capital of [OJSC] in the amount of [UAH 16,744,505]".

    iv) That the Court compel the SSSMC to cancel certificates related to the increase in OJSC's share capital with the par value of 9.96 UAH.

    v) That the Court declare the defendants' ownership of the Original Shares.

    vi) That the Court compel OJSC and "Limited Liability Company "Mining Register" to bring in line the register of owners of securities of [OJSC] by 18 November 2002 by making the respective corrections".

    vii) That the Court compel OJSC and "Private Joint Stock Company "All-Ukrainian Securities Depository" to bring in line the list of owners of registered securities of [OJSC] by 18 November 2002 through making the respective corrections".

99. The statement of claim pleads that the resolutions at the meeting of 20 November 2002 were not valid for four reasons: (i) because at the time only some 55% of OJSC's shares were registered and the Initial Purchasers' shares bought under the 2002 SPA were not registered, and therefore the meeting was not quorate; (ii) because the agenda of the meeting did not include necessary procedures; (iii) because mandatory requirements for a valid resolution for shares to be issued at a new par value were not observed; and (iv) because the single resolution wrongly included (or purported to include) both a decision to increase the share capital and amendments to the charter of OJSC. These allegations are drawn together at paragraph 38, where it is alleged:

> "Thus, taking into account the foregoing, based on [specified provisions of Ukrainian law] we believe that the general meeting of [OJSC] was held with gross violation of the provisions of substantive and procedural law, without duly determined quorum, and the decisions made at such meeting and executed in the form of minutes No 7 dated 20 November 2002 are invalid."

100. The pleading also challenges the validity of resolutions passed at subsequent General Shareholders Meetings of OJSC, including resolutions to increase the issued share capital, and it is pleaded that the resolutions were of no legal consequence because the meetings were held in the absence of the defendants, who held over 40% of the shares, and were therefore inquorate. It is pleaded at paragraph 39 of the statement of claim that:

> "Since the general meeting of [OJSC of 20 November 2002] is invalid due to the fact that only representatives of the shareholders, who owned only 55.09% of all shares at the time, participated therein, which is inconsistent with the then applicable laws, such meeting and decisions adopted at such meeting may and could not have any legal consequences both to the company itself and to the company's shareholders. Thus, it follows that all subsequent General Shareholder Meeting, as well as the decisions adopted thereat with respect of [OJSC] was held in the absence of the shareholders, who collectively owned block of shares in the amount of 40.19% of all shares issued in the company, and therefore, subject to [specified provisions of Ukrainian law], such meeting was held in violation of the applicable laws, without minimum statutory quorum required in such cases, and therefore may not give rise to any legal consequences for the company as a whole and for third parties in particular."

101. There is a difference between the parties about the meaning of this paragraph of the pleading. The defendants submit that the pleaded case is that the purported increases in share capital subsequent to 20 November 2002 were all invalid because the resolutions at the meeting of 20 November 2002 were without legal effect. This contention is supported by Professor Maidanyk's evidence. Ferrexpo observe that at paragraph 20 of the statement of claim it is pleaded that, because the 2002 SPA is invalid, therefore it had no legal consequences and this meant that the meeting of 20 November 2002 was inquorate. They submit that at paragraph 39 it is pleaded that for this same reason, i.e. because the 2002 SPA was invalid, the decisions taken at subsequent meetings to increase the share capital were similarly of no legal consequence. Thus they submit that the defendants' case depends upon an allegation that the invalidity of the 2002 SPA nullifies all the subsequent resolutions and that the defendants' claim will fail unless they establish this.

102. I do not find it easy to determine the meaning of a foreign pleading, which I read only in translation. Although I recognise the rigid logic of Ferrexpo's argument, to my mind it places an excessively inflexible meaning upon paragraph 39. I find it more natural to understand the defendants to allege that the subsequent increases in share

capital were invalid because the resolutions at the meeting on 20 November 2002 (which included the resolution to increase the par value of shares) were of no legal effect.

103. Ferrexpo have a second submission about the defendants' pleading in the 2011 Ukrainian proceedings. They argue that the relief sought involves two distinct claims. The first, they say, is the "corporate claim", which seeks to unwind the corporate steps taken as a result of the invalid resolutions. This, it is said, is logically directed principally against OJSC, but involves Komsomolsk City Council and the SSSMC, who were responsible respectively, it seems, for maintaining records of OJSC's charter and for issuing OJSC's certificates of shares. Secondly, Ferrexpo say that the defendants make what they call an "ownership claim", a separate claim whereby the defendants seek recognition of their ownership of the Original Shares, which is directed against Ferrexpo. Ferrexpo accept that the so-called ownership claim is necessarily dependent upon the corporate claim because, unless the Original Shares are reinstated, they do not exist and cannot be owned.

104. I reject as artificial the argument that these two separate claims are pleaded or that two legally and logically distinct claims are made. I consider that the "corporate claim" and the "ownership claim" are simply two aspects of the question to what (if any) remedies are the defendants entitled if they succeed in their central allegation that the resolutions at the meeting on 20 November 2002 were of no legal effect.

105. The 2011 Ukrainian proceedings do not include a claim by the defendants (or by any other person) to ownership of the shares presently registered in Ferrexpo's name, the Relevant Shares as they are called in the English proceedings, and the 2011 Ukrainian proceedings are not about who owns the Relevant Shares. They are essentially about whether (for one or more of the four reasons that they plead) the resolutions passed on 20 November 2002 were invalid, and if not, what remedies are available. Among the remedies sought is a declaration that the defendants own the Original Shares. This is likely, no doubt, to involve the Court considering whether the Original Shares can be reinstated and this is likely in turn to involve taking account of Ferrexpo's interest in the Relevant Shares. I infer that is why Ferrexpo were joined in the 2011 Ukrainian Proceedings, initially as third parties and then as defendants. Professor Maidanyk recognises that this claim might not be straightforward: he acknowledges that, since the defendants do not hold certificates to the Original Shares, "it can be argued that recognition of title is not possible", but says that this is "a complex and developing area of Ukrainian law and there is no settled binding position in respect of this issue." But what is important as far as the applications before me are concerned is that the 2011 Ukrainian proceedings are not about a dispute about ownership of the Relevant Shares, and they are not referred to in the prayer to the statement of claim.

106. In these proceedings, on the other hand, Ferrexpo seek declarations and injunctive relief in relation to the Relevant Shares (sc. the 187,396,678 shares in OJSC with a par value of UAH 9.96 that they claim currently to hold). More specifically, the relief that they seek is as follows:

    i) Declaratory relief that as a matter of Ukrainian law:

        a) Ferrexpo are the lawful owner of the "Relevant Shares".

b) None of the defendants has any right to claim ownership of any of the Relevant Shares.

c) The invalidation of the 2002 SPA has no legal consequences upon Ferrexpo's ownership of or rights in relation to the Relevant Shares.

d) Restitutio in integrum as between the parties to the invalidated 2002 SPA is impossible.

See paragraph 36(1) of the Particulars of Claim.

ii) Declaratory relief that any dispute, controversy or claim arising out of or in relation to and/or any challenge to the validity of the 2006 SPAs falls to be determined under Swiss law and through arbitration in Zurich, in according with the express terms of the agreements.

See paragraph 36(2) of the Particulars of Claim.

iii) Injunctive relief to protect their ownership of the Relevant Shares, including anti-suit relief in respect of the 2011 Ukrainian proceedings.

See paragraph 37 of the Particulars of Claim.

107. It is necessary to set out something more of the Particulars of Claim. The pleading sets out under the heading "Background" the shareholdings before the 2002 SPA, the sale under the 2002 SPA, and the acquisition of shares by Collaton after the change in their par value and increases in OJSC's capital. It then pleads Ferrexpo's acquisition of shares under the 2006 SPAs and that those agreements are stated to be governed by Swiss law and to include agreements for arbitration in Zurich, and further increases in OJSC's share capital after the 2006 SPAs. Under the heading "The 2005 Ukraine Proceedings", Ferrexpo plead the judgment of 21 April 2010 "declaring the 2002 SPA invalid"; and under the heading "The 2011 Ukrainian Proceedings" they describe the proceedings in these terms:

> "In the 2011 Ukraine proceedings, the Defendants claim to be entitled to various remedies which, if granted, are said to have the effect of restoring the shareholding position of [OJSC] to the position as at 18 November 2002… The Defendants seek a declaration to the effect that they are still the lawful owners of the Original Shares. They also seek further orders the effect of which is said to be to unwind or reverse the various decisions taken by [OJSC] after 18 November 2002 to increase its share capital…".

108. Ferrexpo then plead under the heading "Ferrexpo's Ownership of the Relevant Shares" that as a matter of Ukrainian law the "invalidation of a transaction" does not have legal consequences for a third party or any effect on any other transaction or third party's rights of ownership in property even where the property (or part of it) comprises the subject matter of the invalidated transaction. After setting out a provision from article 216 of the Civil Code of Ukraine ("CCU"), Ferrexpo assert that "the invalidation of the 2002 SPA has and would have no legal effect on Ferrexpo's

position as the registered owner of the Relevant Shares"; and plead that, although, the defendants seek in the 2011 Ukrainian proceedings to have restored the status quo ante as at 18 November 2002 they have not taken steps necessary to do so and in any case it is impossible to bring about restitutio in integrum between the defendants and the Initial Purchasers.

109. This pleading and, as Mr Smouha explained, the rationale for the declarations sought in paragraph 36(1) are based upon the remedies that Ferrexpo understand the defendants to be seeking in the 2011 Ukrainian proceedings. Both parties have adduced expert evidence about the possible remedies under Ukrainian law, the claimants by way of two reports of Mr Filatov dated 15 January 2012 and 3 February 2012 and the defendants through Professor Maidanyk's report.

110. Article 16 of the CCU sets out various remedies whereby civil rights and interests may be protected, including (i) recognition of rights and (ii) "restore the situation that existed prior to the violation" (as the translation agreed between the parties reads).

111. Article 392 of the CCU provides for "The recognition of property rights". The parties' agreed translation of the article is: "The owner of property may submit a claim for recognition of his property rights, if that right is not contested or other recognised person, as well as in the case of loss of a document certifying his ownership". I find it difficult to understand the translation, and the translation in Mr Filatov's first report seems to me more probable: "An owner of the property can bring a claim for recognition of his title if this title is disputed or challenged by another person…". But the precise terms of the provision are not important for present purposes.

112. Article 216 is headed "Legal consequences of invalidity of contract," and provides as follows:

> "An invalid contract does not give rise to any legal consequences, save for those which are related to its invalidity.
>
> In the event of invalidity of a contract, each of the parties shall return to another party everything received under such transaction in kind, and if such return proves to be impossible, in particular, if what received involved use of assets, performed works or rendered services – then the other party shall reimburse the value of what it received at the prices, which exist at the time of reimbursement….
>
> A court may apply the consequences of invalidity of a void contract on its own initiative."

113. Mr Filatov also referred to the remedy of "vindication" under articles 387 and 388 of the CCU. There is no agreed translation of article 387, but according to Mr Filatov it states that "an owner is entitled to retrieve its property from the person who unlawfully, without proper legal grounds, got possession of the property". Article 388 is headed "Right of owner to reclaim property from fraudulent purchaser", and the agreed translation is:

> "1. If the property for paid contract purchased in person had no right to alienate, as purchaser did not know and could not know (bona fide purchaser), the owner has the right to request a property from the purchaser only if the property:
>
> (1) was lost by the owner or person to whom he gave the property in possession;
>
> (2) was stolen from the owner or the person to whom he gave property in possession;
>
> (3) dropped from the possession of the owner or the person to whom he gave property in possession, not of their will by other means.
>
> 2. The property can not be claimed from the fraudulent purchaser if it was sold in the manner prescribed for judgments.
>
> 3. If the property was acquired by Grant the person who had right to dispose of, the owner has the right to request it from fraudulent purchaser in all cases."

114. Mr Smouha explained the declarations sought in paragraph 36(1) of the Particulars of Claim by reference to these remedies as follows:

i) He said that the declaration that Ferrexpo are the lawful owner of the Relevant Shares relates to the defendants' claim for recognition under article 392 of the CCU, a claim that, as Ferrexpo submitted, is misconceived. However, Ferrexpo do not plead that in the 2011 Ukrainian proceedings the defendants claim ownership of the Relevant Shares; and, whatever the basis of the defendants' claim that they should be recognised as owners of the Original Shares, they make no claim that they own the Relevant Shares.

ii) With regard to the declaration that none of the defendants has any right to claim ownership of any of the Relevant Shares, Mr Smouha explains that this is directed to a claim that the defendants might make to the shares under articles 387 and 388 of the CCU. However, Ferrexpo do not plead that the defendants make such a claim in the 2011 Ukrainian proceedings (or elsewhere), and no such claim is made.

iii) The declaration that the invalidation of the 2002 SPA has no legal consequences upon Ferrexpo's ownership or rights in relation to the Relevant Shares (which was said by Ferrexpo to be the "key declaration") was described by Mr Smouha as largely tracking the wording of article 216, and it is directed to Ferrexpo's contention that the statement of claim in the 2011 Ukrainian proceedings "alleges or assumes that invalidation of the 2002 SPA resulted automatically and retrospectively in the defendants retaining ownership of the Original Shares". However, again the declaration sought in these proceedings is not about the Original Shares but the Relevant Shares.

iv) The declaration sought at paragraph 36(1)(d) that "restitutio in integrum as between the parties to the invalidated 2002 SPA is not possible" is also directed to article 216, and its purpose is to establish that the parties to the 2002 SPA cannot return what they received under it, and more specifically that the defendants cannot have the Original Shares returned to them.

115. During the hearing, Ferrexpo said that they would not pursue their claim for declaratory relief as sought in paragraph 36(2) of the particulars of claim about the 2006 SPAs. They rightly acknowledge that there is no proper basis for it: the defendants were not even parties to the 2006 SPAs.

116. It is not pleaded that the 2011 Ukrainian proceedings are unconscionable, and no recognisable basis for an anti-suit injunction is alleged. Ferrexpo did not argue that at present they have any proper basis for seeking this injunction. They said that it was included in the claim form in the hope that, after obtaining declaratory relief, they might then apply for an injunction on the grounds that the 2011 Ukrainian proceedings would then be abusive.

Ferrexpo's contention based on article 2 of the Brussels Regulation and Owusu

117. Ferrexpo argue that the court has jurisdiction over their claim against the defendants because the defendants are domiciled here and under article 2 of Council Regulation (EC) No 44/2001 (the "Brussels Regulation"), "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of the Member State". The defendants do not dispute that these proceedings are within the scope of the Brussels Regulation, as it is defined by article 1.

118. Ferrexpo also say that the court is not entitled to decline jurisdiction or to stay the proceedings on the grounds that Ukraine is a more appropriate forum for determination of the dispute, or to stay the proceedings on the grounds of forum non conveniens. In Owusu v Jackson (Case C-281/02) the European Court of Justice ("ECJ") was asked for a ruling on a first preliminary question

> "Is it consistent with the Brussels Convention, where a claimant contends that jurisdiction is founded on article 2, for a court of a contracting state to exercise a discretionary power, available under its national law, to decline to hear proceedings brought against a person domiciled in that state in favour of the courts of a non-contracting state (a) if the jurisdiction of no other contracting state under the 1968 Convention is in issue, (b) if proceedings have no connecting factors to any other contracting state?".

The Court answered the question as follows:

> "In light of all the foregoing considerations, the answer to the first question must be that the Brussels Convention precludes a court of a contracting state from declining the jurisdiction conferred on it by article 2 of that Convention on the ground that a court of a non-contracting state would be a more appropriate forum for the trial of the actions, even if the

> jurisdiction of no other contracting state is in issue or the proceedings have no connecting factors to any other contracting state."

The Court was asked a second question, "if the answer to question 1(a) or (b) is yes, is it inconsistent in all the circumstances or only in some and if so which?" The ECJ declined to answer this question on the grounds that the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered, but it enables the court to answer questions necessary for the resolution of a dispute, and the facts supposed in the second question did not arise on the facts.

119. The EJC stated in Owusu v Jackson that, "It must be observed … that article 2 of the Brussels Convention is mandatory in nature and that, according to its terms, there can be no derogation from the principle it lays down except in the cases expressly provided for by the Convention": see para 37. Ferrexpo say that no relevant provision of the Brussels Regulation displaced the general rule, and that the judgment of the ECJ leaves no room for implicit exceptions from the mandatory effect of article 2. They would undermine the rationale for the Owusu decision, namely the promotion of legal certainty as to jurisdiction in the contracting states.

120. Finally, Ferrexpo say that any discretionary powers that the court has to prevent abuse of its process and to manage proceedings before it must not be exercised so as to prevent them from pursuing the proceedings. As it has been put by Lewison J in Syype Technologies SA v Joltid Ltd, [2009] EWHC 2783 (Ch), the court must not "under the guise of case management, achieve by the back door a result against which the ECJ has locked the front door".

121. Thus, Mr Smouha submitted that the Owusu case "provides a complete answer [to the defendants' application] whether it is said to be based upon the so-called reflexive application of the regulation in a non-EU context or the existence of a residual discretionary power to stay proceedings founded on article 2".

The defendants' arguments

122. In response, the defendants argue that, notwithstanding the decision in Owusu v Jackson, the court has power to decline jurisdiction over these proceedings and should exercise that power, and alternatively that the court has power and should exercise its power to stay them. They applied to amend their notice of application in the course of the hearing. The parties suggested that I hear argument on the proposed amended application and rule on the application for permission to amend in this judgment, and I do so. Ferrexpo accepted that they were not prejudiced because they did not receive more notice of the amended application. The amendment would introduce the argument that the court does not have subject matter jurisdiction over the proceedings: see para 123 i) b) below.

123. The applications that the defendants make are these:

    i) The court should decline jurisdiction for these reasons –

a) While Ukraine is not a member state, the reflexive application of article 22 of the Brussels Regulation should be given a "reflexive" application and the court should recognise the provisions of the article with regard to exclusive jurisdiction.

b) The court does not have subject matter jurisdiction over the issues in these proceedings.

c) Article 28 of the Brussels Regulation should be given a reflexive interpretation and accordingly the court should recognise that the 2011 Ukrainian proceedings are a related action and decline jurisdiction over these proceedings.

ii) The court should stay these proceedings –

a) Because, in view of article 22 of the Brussels Regulation, the court should recognise that the issues in these proceedings are properly matters for determination by an Ukrainian court.

b) Because article 28 of the Brussels Regulation should be given a reflexive application and the court should recognise that the Poltava Commercial Court was seised of the related action, the 2011 Ukrainian proceedings, before the English court was seised of these proceedings.

c) Because these proceedings are an abuse of process.

d) Because case management considerations demand that the 2011 Ukrainian proceedings should be decided before these proceedings.

124. The defendants do not argue:

i) That it is significant that Owusu v Jackson was decided under the Brussels Convention, whereas these proceedings are governed by the Brussels Regulation. There is no relevant difference between the Convention and the Regulation.

ii) That the court should decline jurisdiction or stay the proceedings because of article 27 of the Brussels Regulation or a reflexive application of it (notwithstanding in their notice of application, both in its original form and in the proposed amended notice, the defendants rely on article 27).

iii) That the court should decline jurisdiction or stay its proceedings on the grounds that the appropriate forum for the proceedings is Ukraine and England and Wales is not the proper forum in which to bring the claim (notwithstanding this is stated as a ground of application both in the notice of application and in the proposed amended application).

iv) That the proceedings should be *dismissed* as an abuse of process.

125. I have referred to the arguments that article 22 and article 28 should be given a "reflexive application", although the expression does not, as I understand it, have a precise meaning. (I have, as I think is conventional, referred to the question in terms

of whether article 22 should be given a reflexive effect, although it might also be expressed in terms of whether this effect should be given to article 25, but that is only semantics.) It covers at least three lines of argument that in some circumstances the court may decline jurisdiction or stay proceedings in favour of the jurisdiction of a non-member state, and that Owusu does not (or does not always) preclude the court from doing so.

i) The most rigid reflexive theory would require the court to apply provisions of the Brussels Regulation by analogy, as though non-member states were member states, so that:

   a) the court would not have jurisdiction in a case that would be covered by article 22 (or at least the relevant parts of article 22) if the non-member state were a member state; and

   b) in a case that would be covered by article 28, the court would have similar discretion as in a case where the related action was before a court of a non-member state.

ii) The most flexible reflexive theory would afford the court discretion whether or not to accept jurisdiction in cases involving issues covered by (at least the relevant parts of) article 22, exclusive jurisdiction agreements, lis alibi pendens and related actions.

iii) The third theory would allow the court to exercise powers available under the doctrines of national law in cases where, had there been a similar connection with a member state, the court would have had to decline jurisdiction.

See Clarkson and Hill, The Conflict of Laws (4th Ed, 2011) at p.143.

126. There is wide academic support for the view that some reflexive approach should be adopted: see, for example, Dicey, Morris and Collins, The Conflict of Laws (14th Ed, 2006), esp. at para 12-021 (where the argument for giving reflexive effect to articles 22 and 23 is described as "overwhelming"), the articles of Professor Peel ("Forum non conveniens and European ideals") and Professor Briggs ("Forum non conveniens and ideal Europeans") in [2005] LMCLQ p.363 and p.378 respectively and, perhaps more tentatively, Briggs and Rees, Civil Jurisdictions and Judgments (5th Ed, 2009), esp. at para 2.256.

127. The argument that the law *does* require a reflexive application of these articles of the Brussels Regulation (rather than the law *should* do so) does not, as I see it, suppose that the Brussels Regulation itself confers on the court the power to decline jurisdiction or stay proceedings. Rather it is that the Regulation allows the court to exercise the powers available to it under its national law: here the Civil Procedure Rules ("CPR") include a power to "stay the whole or part of any proceedings or judgment either generally or until a specific date or event" (CPR 3.1(2)(f)), a power expressly recognised by section 49 of the Senior Courts Act, 1981. Its proper exercise is not unfettered, in that the court must not order a stay that is contrary to the letter or purpose of the Brussels Regulation. The argument for giving some articles reflexive effect is that this is required in order to give effect to the purpose (albeit not the letter) of the Regulation. If the court accepts this argument and therefore decides

not to accept jurisdiction, to my mind (pace Cheshire, North and Fawcett 2007, 14th Ed p.333) the proper form of order is to stay the proceedings.

The reflexive application of Article 22

128. Article 22 is in section 6 of the Brussels Regulation, which is headed "Exclusive Jurisdiction", and it provides as follows:

> "The following courts shall have exclusive jurisdiction, regardless of domicile:
>
> 1. in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.
>
> However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;
>
> 2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;
>
> 3. in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;
>
> 4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.
>
> Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State;
>
> 5. in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced."

129. Article 25 provides that, "Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of article 22, it shall declare of its own motion that it has no jurisdiction". Thus, the language of article 25 is directed to circumstances where article 22 confers exclusive jurisdiction on the courts of a member state, and it does not refer to non-member states.

130. However, the defendants rely on article 22 to argue that the court should decline jurisdiction. They refer to the decision of the ECJ in Coreck Maritime GmbH v Handelsveem BV (Case C-387/98), which concerned article 17 of the Brussels Convention, an article about jurisdiction agreements (broadly corresponding to article 23 of the Brussels Regulation). Although article 17 referred to an agreement that a court or the courts of a contracting state should have exclusive jurisdiction to settle disputes and therefore did not apply to agreements designating a court of a non-contracting state, the ECJ did not consider that therefore the Brussels Convention prevented the courts of contracting states from giving effect to the parties' agreement as to jurisdiction. At paragraph 19 of its judgment, the ECJ said that, "A court situated in a Contracting State must, if it is seised notwithstanding such a jurisdiction clause, assess the validity of the clause according to the applicable law, including the conflict of law rules, where it sits …". It cited the Schlosser Report at para 176.

131. This in itself shows that paragraph 37 of the judgment in Owusu v Jackson, upon which Mr Smouha relied (see para 119) is not to be understood to prevent the national court declining jurisdiction in all circumstances unless they are expressly recognised by the Brussels Regulation. A basic principle of the Regulation emphasised by the ECJ in Owusu itself is that a well-informed party should be able to predict where he might be sued and where he is entitled to sue, and it would not promote this principle to interpret the Regulation so as to defeat the parties' express agreement for exclusive jurisdiction, an agreement that is generally designed to achieve just such certainty. I cannot accept that in Owusu v Jackson the ECJ intended to overturn its decision in Coreck Maritime. Further, Briggs and Rees on Civil Jurisdiction and Judgments (5th Ed, 2007) observe at para 2-256 fn 5, that so to interpret paragraph 37 of the Owusu judgment would not easily fit with the ECJ's description of the second question that they were asked as "hypothetical". The ECJ itself, in the context of explaining the applicability of article 2 although only one contracting state was involved in the relevant legal relationship, said (at para 28), "… the rules of the Brussels Convention on exclusive jurisdiction or express prorogation of jurisdiction are likely to be applicable to legal relationships involving only one contracting State and one or more non-Contracting States".

132. At first instance the English courts have decided that Owusu v Jackson does not prevent them from enforcing exclusive jurisdiction clauses and have stayed proceedings brought in the English courts in breach of them: Konkola Copper Mines v Coromin, [2005] EWHC 898 (Comm) and Winnekta Trading Corp v Julius Baer International Ltd, [2008] EWHC 3146 (Ch). (Whatever the precise basis for the decision in Samengo-Turner and ors v J & H Marsh & McLennan (Services) Ltd., [2007] EWCA Civ 723, a decision robustly criticised in Briggs and Rees (loc cit) at paras 2.17, 2.256 and elsewhere, I cannot accept that it detracts from the authority of these first instance decisions. On the other hand, I cannot find support in it for giving reflexive effect to article 23 of the Brussels Regulation, as Mr Malek suggested.)

133. Accordingly, the defendants submit, once it is recognised that the mandatory effect of article 2 of the Brussels Regulation is subject to the exception of an exclusive jurisdiction clause whereby the parties have chosen to resolve their disputes in the courts of a non-member state, there is no reason to interpret the judgment in Owusu v Jackson as requiring the courts of member states to exercise jurisdiction over matters covered by article 22. There is support for this conclusion in Choudhary v Bhatter, [2009] EWCA 1176, in which Sir John Chadwick said this (at para 52):

> "… Properly understood, the decision in Owusu provides no direct authority on the question whether a court of a contracting state is precluded from declining the jurisdiction (if any) conferred on it by art 22 of the Judgments Regulation in respect of a person not domiciled in a member state on the ground that a court of a non-contracting state would be a more appropriate forum for the trial of the action".

In Masri v Consolidated Contractors International (UK) Ltd (No 2), [2008] EWCA (Civ) 303 (at para 125) Lawrence Collins LJ recognised the similarity of questions about declining jurisdiction in favour of non-member states in relation to article 22 and article 23:

> "Consequently the question whether Article 22(5) has "reflexive" effect does not arise. The problem has long been recognised: see Dicey, paras 12-021-12-022; 23-026-027. The way in which it arises can be illustrated by two examples. First, Article 22(1) of the Brussels I Regulation gives exclusive jurisdiction, in the case of proceedings which have as their objects rights *in rem* in immovable property, to the courts of Regulation State where the property is situate. What if the defendant is domiciled in England and is sued in England, and the land is in a non-Regulation State, such as Canada? Second, Article 23 provides that if the parties, one or more of whom are domiciled in a Regulation State have agreed that the courts of a Regulation State are to have jurisdiction to settle any disputes which may arise between them. (sic) What if they have designated the courts of a State which is not a Regulation State, such as the courts of New York and an action is brought in England in breach of the jurisdiction agreement? In such cases it would be odd if the Brussels I Regulation did not permit the English court to stay its proceedings."

See too Owusu (loc. cit.) at para 28.

134. Ferrexpo rely upon the decision in Catalyst Investment Group v Lewinsohn, [2009] EWHC 1964 (Ch), in which Barling J considered applications challenging the jurisdiction of the English court on the grounds of forum non conveniens, reliance being placed on the existence of corresponding proceedings between the same parties in Utah in the United States of America. Barling J observed that in Owusu there was no lis alibi pendens and that the ECJ had expressly declined to answer whether its ruling applied in such a case. Barling J heard two main submissions: a "primary submission" that, where there was lis pendens in a non-member state, the court should

adopt a reflexive application of article 27 of the Brussels Regulation and, applying its national rules about forum non conveniens, decide whether to stay its proceedings on the basis that the other forum was more appropriate or natural; and a "fall-back" submission that, if the court could not apply its own forum non conveniens criteria, then it should simply apply strictly the criteria of article 27 by analogy and yield jurisdiction to the court first seised.

135. Mr Smouha cited in particular paras 60-74 of the judgment in the Catalyst case, where Barling J analysed what can properly be derived from the decision in Owusu, but it suffices, I hope, only to record that Barling J recognised the importance that the EJC had attributed to the principles of legal certainty and uniform application of the rules of jurisdiction.

136. He rejected the primary submission on the grounds (inter alia) that it requires an interpretation of article 27 that "would introduce the wide forum non conveniens discretion by the back door, contrary to the ruling of the EJC in Owusu" (at para 99). He rejected the fall back submission on the grounds (inter alia) that it would require a member state to defer to the jurisdiction of a foreign state in which justice was likely to be unavailable or impaired, unless the court has some residual discretion to do otherwise, which itself would introduce an element of discretion that would fall foul of the reasoning in Owusu (para 103).

137. As I shall explain later, while I recognise the force of these points, I cannot agree with the decision in the Catalyst case, even in its application to cases of lis alibi pendens. However, on any view it is no answer to the defendants' argument for a reflexive application of article 22. Barling J did not consider that his decision would mean that the court is obliged to assume jurisdiction in cases covered by the categories of exclusive jurisdiction in article 22. He considered them comparable to cases where the parties have made a jurisdiction agreement, saying this (at paras 94 and 95):

> "[94] In a case where there is a jurisdiction agreement the claimant has commenced proceedings in breach of the agreement to litigate elsewhere. It is a more or less universal principle that people should be held to their compacts, freely entered into. A rule requiring a court to entertain proceedings brought in breach of a valid agreement to sue in a different jurisdiction could be seen as making the court complicit in a breach of contract or even in an abuse of its own procedure. To enable the court to give effect to such an agreement in the case of a non-Regulation state does not compromise the legal certainty and uniform application of the jurisdictional rules, which are at the heart of the Regulation. Rather it enhances legal certainty by holding the parties to their agreement.
>
> [95] So, too, there are different, but equally compelling, reasons for allowing a court to stay proceedings in order to enable disputes with very specific subject matter, widely acknowledged as such, to be litigated in the courts of the relevant jurisdiction. Therefore the availability of a stay enabling a dispute with subject matter of the kind described in Article 22 of the Regulation to be resolved in the non-

> Regulation state to which the dispute relates, would not in my view assist the argument for a "reflexive" interpretation of Article 27 of the Regulation in relation to *lis alibi pendens*."

138. Similarly Barling J made it clear that he did not consider that either the Brussels Regulation or the decision in Owusu affects or restricts the court's powers to stay proceedings that are abusive: see para 100.

139. In Lucasfilm v Ainsworth, [2009] EWCA Civ 1328 the Court of Appeal expressed no view upon whether Barling J's decision was correct with regard to cases of lis alibi pendens, but they confirmed that it has no application to cases about the matters covered by article 22. The Court said this at para 134:

> "Finally as regards the Owusu contention is concerned, our attention was drawn to a decision of Barling J [in Catalyst]. The question there was whether the court could stay proceedings in a case where the same point was being litigated between the same parties in the courts of a third country. He held that Owusu prevented that, essentially because the *lis pendens* rule is to some extent a facet of *forum non conveniens*. We do not have to decide whether that was correct, though we note that, if he is right, there is this oddity: that there is a clear *lis pendens* rule, with associated court first seized rule, for parallel cases within the EU but none for parallel cases where one is running within an EU Member State and one without. What Barling J did not decide was that Art. 2 conferred extra-EU subject matter jurisdiction generally."

The decision of the Court of Appeal was reversed by the Supreme Court [2011] UKSC 39, but that was on the basis of a different point, which is not relevant for present purposes.

140. The reasons that the ECJ in Owusu decided that a defendant could not challenge the jurisdiction of the court of his domicile in favour of the jurisdiction of a non-contracting state do not, to my mind, apply to a case where the subject matter of the jurisdiction is within article 22. A reasonable well-informed defendant could, I think, reasonably foresee that he might be sued in relation to such matters in the courts of the non-member state associated with the subject matter of the litigation: see para 40 of Owusu. It was not suggested in argument before me that the principles reflected in article 22 are not widely recognised both in member states and in other legal systems: see para 43 of Owusu.

141. The matters covered by article 22 are defined with distinctly more particularity than the principles about the application of forum non conveniens, and this goes some way to meet the concern about uncertainty. In any case recital 11 to the Regulation contemplates that, notwithstanding the requirement that the rules of jurisdiction must be highly predictable, sometimes the subject-matter of the litigation warrants that jurisdiction should not be based on the defendant's domicile:

> "The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on

> the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject matter of the litigation or the autonomy of the parties warrant a different linking factor… "

142. I cannot accept that the Brussels Regulation requires the court to assume jurisdiction over litigation when the subject matter is as apt for trial in another jurisdiction as the cases covered by the parts of article 22 with which I am concerned.

143. I shall consider whether the subject matter of this litigation is such as to be within article 22 before reverting to the question whether the court is obliged to decline jurisdiction in such circumstances or has a discretionary power to do so. The defendants say that, if Ukraine were a member state, article 22 would mean that the Ukrainian courts have exclusive jurisdiction over this litigation because:

i) These proceedings have as their object the validity of the decisions of organs of OJSC, whose seat is in Ukraine.

ii) The proceedings have as their object the validity of entries made in public registers which are kept in Ukraine.

It is not said that this litigation is, in substance, about the enforcement of the judgment in the 2005 litigation so as to be covered by article 22(5).

144. Although the English version of article 22 refers to the "object" of the proceedings, other versions refer to the "subject-matter" or to the courts where a company has its seat having exclusive jurisdiction "in the matter" of the validity of (eg) the decisions of its organs. Although I was not referred to any versions of the Regulation other than the English, the various versions of the text must be given a uniform interpretation and one consistent with the objective of "centralising jurisdiction" with a view to avoiding conflicting decisions: see Berliner Verkehrsbetriebe (BVG) Anstalt des offentlichen Rechts v J P Morgan Chase Bank NA, (Case C-144/10).

145. In line with this, the Court of Appeal has said that the expression "proceedings which have as their object", as it is used in article 22.2, means "proceedings which are principally concerned with": Berliner Verkehrsbetriebe (BVG) Anstalt des Offentlichen Rechts v J P Morgan Chase Bank NA, [2010] EWCA Civ 390 at para 83. The expression must be given the same meaning in article 22.3. As an exception to the general principles of the Brussels Regulation and specifically to the general right of a party in a member state to be sued in the courts where he is domiciled, it must be interpreted restrictively and article 22 is to be given no broader interpretation than necessary to ensure that, in the interests of the proper administration of justice, exclusive jurisdiction is given to the court of the state concerned with (in this case) the company and the public registers. It is not enough that the proceedings involve *an* issue about the validity of the decisions of an organ of a company or *an* issue about the validity of entries on a public register, even if the determination of the issue would potentially resolve the case. When the case went to the Supreme Court, the matter was referred to the ECJ for a preliminary ruling. Meanwhile parallel proceedings had been brought in Germany in the Landgericht Berlin, who decided to stay its proceedings and refer questions to the ECJ, to whose

judgment I have already referred. As I read their judgment, it is entirely in accord with that of the Court of Appeal.

146. The proper approach is, I think, illustrated by the case of Speed Investments Ltd and anor v Formula Holdings Ltd, [2004] EWCA Civ 1512, which concerned a dispute about whether a director's appointment was permitted by the shareholders' agreement, and the Court of Appeal rejected the argument that the real dispute was about the contract and the internal management of the company was a "consequence" of that. Carnwarth LJ said (at para 30):

> "I am unable to accept that, merely because the main area of live dispute may be as to the effect of the agreement, rather than of the articles, it ceases to be within Article 16(2). If, as I think, the real subject-matter of the dispute is the composition of the Board, it does not matter that the answer may require one to look beyond the strict limits of the company's constitution, in the technical sense."

147. It is inherent in this approach that the court will not have regard only to what is pleaded in the particulars of claim or the form of relief sought by the claimants. It must look realistically at what is the real nature of the dispute that is to be litigated, and proceedings might fall within article 22 although the challenge to the validity is raised after the proceedings are brought and, for example, by the pleaded defence: Gesellschaft fur Antriebstechnik mbH & Co KG v Lamellen und Kupplungsbau Beteiligungs KG (case C4-03) at para 25. There is some uncertainty about whether the application of article 22 depends upon the issues actually raised in a defence (see Briggs and Rees, loc cit, at paras 2.53,2.58 and 2.65), but I do not need to engage with that debate because in this case no defence has been pleaded. The court will determine the nature of the dispute in light of issues likely to be raised.

148. The defendants' first submission is based upon article 22(2) of the Brussels Regulation and is that the proceedings are primarily concerned with the resolutions at the meeting on 20 November 2002 and their validity. The declarations that Ferrexpo seek in paragraph 36(1) of the particulars of claim are focussed on their title to the Relevant Shares and whether it is vulnerable to challenge. The meeting of 20 November 2002 is not mentioned in Ferrexpo's pleading and Ferrexpo argued that their claim could succeed whether or not the defendants' complaints about the meeting are justified. However, the proceedings are brought in response to the defendants' claims which challenge, and which Ferrexpo see as challenging, their interest in OJSC and the defendants say that they are therefore about the validity of resolutions at OJSC's general meetings.

149. It is not in dispute that the shareholders meeting is an organ of the company: article 41 of Law of Ukraine on Business Associations provides, "The highest governing body of a joint-stock company shall be the company's general meeting". Ferrexpo, however, take issue with the defendants' contention that these proceedings are principally concerned with the validity of resolutions at OJSC's general meetings, although they acknowledge that the claims for declarations in paragraph 36(1) "intersect" with what they call the ownership claim in the 2011 Ukrainian proceedings: see para 103 above. They say that the proceedings are principally concerned with the issue whether the validity of the 2002 SPA had "the automatic and

retrospective effect of reinstating the [defendants'] ownership of the Original Shares with effect from the date of transfer to title". On this basis, it might be said that the real focus of the dispute is about the transfer of ownership of the Original Shares under the 2002 SPA and that the invalidity of resolutions at the general meetings was simply a consequence of that, an argument that would echo that advanced, albeit unsuccessfully, in the Speed Investments case.

150. I reject Ferrexpo's argument. First, it does not recognise that, their title to the Relevant Shares being challenged on the basis that it depends on the validity of the resolutions of 20 November 2002, their validity is not disputed only on the basis that the defendants were still shareholders and the meeting was inquorate, which is only one of the four reasons asserted in the 2011 Ukrainian proceedings (see para 99 above). Secondly, it depends upon Ferrexpo's argument that the resolutions at subsequent meetings are challenged only on the basis of the invalidity of the 2002 SPA, an argument based upon an interpretation of the defendants' pleading in the 2011 Ukrainian proceedings that I have rejected (at para 102 above). I therefore accept the defendants' submission that these proceedings have as their object the validity of the resolutions of OJSC's general meetings, an organ of a company whose seat is Ukraine.

151. If I am right in this conclusion the defendants do not need to rely upon their argument that these proceedings (also or alternatively) have as their object the validity of entries on public registers in Ukraine. I do not find it easy to determine this issue because, as I have explained, at the hearing the evidence about the various registers and share records and the entities involved with them was confused and incomplete.

152. Ferrexpo submit that their title to the Relevant Shares depends upon the record in their custodian account, in accordance with article 5(4) of the Law on the National Depository System and the Specifics of Electronics Circulation of Securities in Ukraine, and therefore it does not depend upon the entries in a *public* register. I accept that the custodian account is not a public register, but I do not accept Ferrexpo's submission. The dispute between the parties is not principally concerned with ownership of the Relevant Shares. Indeed, it is not clear to me that there is any dispute at all that Ferrexpo presently own the Relevant Shares. The main dispute is whether their interest in the Relevant Shares is vulnerable because the Relevant Shares themselves can be cancelled as a result of the invalidity of the resolutions upon which they depend. The challenge is to the register entries whereby the increased par value and the increased number of issued shares are recorded. It is agreed between the parties that they were made in the Unified State Register (described at para 26 above). The meaning of the expression "public register" is not free from difficulty: it might connote a register maintained by a public authority or official, or one that is open to public inspection, or both. The uncertainty was identified and considered by Harman J in Re Fagin's Bookshop plc, [1992] BCLC 118. I would respectfully question his view that "in considering the words 'public register' the emphasis must be upon a register to which the public have access". To my mind the words and their context more naturally connote a register maintained by a public authority or official. But on any view the Unified State Register is a public register within the meaning of article 22, and indeed this too was common ground between the parties.

153. I would therefore conclude, if it were necessary to do so and if I had rejected the defendants' argument these proceedings have as their object the validity of resolutions

of OJSC's general meetings, that they have as their object the validity of entries in a public register in Ukraine.

154. As I have said, there are differing views about whether, if article 22 has a reflexive application at all, that application is mandatory or whether the court has discretion whether or not to apply it. I received only brief submissions about this. Having decided that the article has a reflexive approach to these proceedings, I conclude that it is a matter of discretion whether the court should or should not assume jurisdiction, for three main reasons:

i) First, there appears to me no reason of principle or policy that the reflexive application of the article should be adopted slavishly and, as stated in Dicey Morris and Collins (loc cit) at para 12-022, it is inappropriate to do so.

ii) Secondly, a mandatory rule would require the court to refuse to assume jurisdiction in favour of courts in which the parties would not receive justice (or where there was a real risk that they would not do so).

iii) Thirdly, the machinery of the English court whereby it refuses to assume jurisdiction in a case such as this, is, as it seems to me, to grant a stay under paragraph 3.1(2)(f) of the CPR or its inherent jurisdiction, a power that is inherently discretionary.

155. I conclude that I should exercise my discretion to grant the stay. Whatever the precise considerations that should bear upon the exercise of the discretion (about which I did not receive submissions and I decline to express unnecessary views), having rejected Ferrexpo's argument that there is a real risk that they will not receive justice in the courts of Ukraine, there is, to my mind, no significant argument in favour of the court assuming jurisdiction. Against that there are powerful reasons that the dispute should be decided in Ukraine (if it cannot be resolved without litigation), in particular:

i) That there is now most likely multiplicity of proceedings and therefore a risk of inconsistent decisions will be avoided; and

ii) That other parties interested in the dispute, including OJSC, can be joined, and indeed have been joined, in the 2011 Ukrainian proceedings.

Justiciability (or subject matter jurisdiction)

156. In view of my decision about the reflexive application of article 22, I deal only briefly with the application that the defendants seek to introduce by amendment of their application notice, that the court does not have subject matter jurisdiction over the dispute in the proceedings, or, to put it another way, that the dispute is not justiciable in this court. Mr Malek relied upon this argument, I think, only if his argument for a reflexive application of article 22 was rejected, and he acknowledged that it could only succeed if the proceedings were of a kind that would have been within article 22 if Ukraine had been a member state.

157. In support of this argument the defendants rely heavily on the decision of the Court of Appeal in Lucasfilm v Ainsworth, (loc cit), in which proceedings were brought in the English court alleging an infringement of a United States copyright relating to some

helmets designed for a Star Wars film. The Court of Appeal concluded that the court lacked jurisdiction over the subject matter of the claim, and, although the defendant was domiciled in England, the English court should decline to adjudicate the claim. In British South Africa Co v Cia de Moçambique [1893] AC 602 the House of Lords drew a distinction with regard to a dispute about title to land in South Africa between "matters which are transitory … and those which are local in nature" (per Lord Herschell at p.622), and held that the English courts did not have jurisdiction over matters local in nature: they were non-justiciable, despite the court's personal jurisdiction over the defendant. The Court of Appeal concluded that similarly "claims for infringement of foreign, non-EU (or Lugano) copyrights are non-justiciable here" (at para 174), and that this conclusion is consistent with Owusu v Jackson, which is concerned with a court's personal jurisdiction over a defendant rather than justiciability in the English court. They rejected the argument that the Brussels Convention and then the Brussels Regulation "have, by a side-wind, created the extra-EU jurisdiction even though the subject matter has nothing do with the EU" (at para 106), and said that "the whole of article 22 only makes sense if the proposed extra-EU jurisdiction is not conferred by the Regulation" (at para 108).

158. The case went to the Supreme Court, where the main judgment was that of Lords Walker and Collins. They emphasised ([2011] UKSC 39 at para 101) that there was no issue that "the Mozambique rule [applied] to intellectual property rights dependent on the grant or authority of a foreign State, and to cases where what is in issue is the validity of the patent, as opposed to its infringement". However, they decided (at para 103) that "Although at trial the infringement arguments sometimes merged into a subsistence argument, the substantial dispute has always been about the ownership of the relevant copyrights and their infringements rather than about their subsistence". The Supreme Court's decision that the claim was justiciable depended upon an analysis of the particular claim in the case. Lords Walker and Collins drew attention to article 22(4) of the Brussels Regulation, and, while declining to delve into the question whether it should be applied "reflexively", observed that it "only assigns exclusive jurisdiction to the country where the right originates in cases concerned with registration of rights or validity of rights which are required to be deposited or registered" and does not apply to infringement actions where there is no issue as to validity, and that this can rarely, if ever, apply to copyright (at para 109).

159. The defendants submitted that the judgment of Lords Walker and Collins casts no doubt upon the part of the Court of Appeal decision upon which they rely, that the English court does not have subject matter jurisdiction over matters where article 22(2) of the Regulation provides for exclusive jurisdiction. They argue that it is a general principle of private international law that matters covered by articles 22(2) and 22 (3) are to be determined in the courts of the state where the company was incorporated or the public registers are kept, a principle required in the interest of certainty and sound administration and (at least as far as state registers are concerned) considerations of comity explained by Diplock LJ in Buck v Attorney General, [1965] Ch 745 at p.770.

160. Mr Malek cited no judicial or academic authority in support of the argument that matters of the kind with which these proceedings are concerned are not justiciable. I do not need to decide whether the court would for this reason refrain from adjudicating upon certain issues concerning legal persons or public registers. Even if

so, the management of cases about justiciability differs from proceedings in which the court has to determine issues of personal jurisdiction over the defendant (or a defendant) under the Brussels Regulation or otherwise. The court need not decide at the outset whether the proceedings raise non-justiciable issues, and there is no reason that it should seek to identify at the outset their object or principal concern, or should decide before any defence is pleaded whether or not issues likely to arise between the parties (but not yet pleaded or defined) would be justiciable. In light of what is in fact in issue on the pleadings between the parties, the court might well allow to proceed to trial a case that might be determined in whole or in part without adjudication upon what is non-justiciable.

161. In this case the defendants have not pleaded a defence or even stated with any specificity what their defence in the English proceedings would be. Therefore, even if in principle I accepted the defendants' argument, I would regard as premature an application on this basis. In these circumstances, I refuse the application to amend the application notice because it would introduce a ground for an application that cannot succeed at this stage of the proceedings.

The reflexive application of article 28

162. Articles 27 and 28 are in section 9 of the Brussels Regulation, that is headed "Lis pendens – related actions". They provide:

> Article 27
>
> "1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
>
> 2. Where the jurisdiction if the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."
>
> Article 28
>
> "1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.
>
> 2. Where these actions are pending at first instance, any court other than the court first seised may also on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.
>
> 3. For the purposes of this Article, actions are deemed to be related where they 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."

163. As I have said, in the Owusu case the ECJ did not answer the second question referred to it because it was hypothetical, and therefore did not decide whether it was consistent with the Brussels Convention for the court to decline jurisdiction or to stay proceedings on the grounds of lis alibi pendens in the court of a non-contracting state. I have already observed that in the Lucasfilm case (at para 134), the Court of Appeal said that otherwise the position is "an oddity" (and the Supreme Court (loc cit at para 113) declined to express any view about this). However, in the Catalyst case Barling J decided that a lis pendens in a non-member state is irrelevant to the existence and exercise of jurisdiction by an English court seised under article 2, and there is no room for the court, consistently with the Brussels Regulation and the decision in Owusu, to give reflexive effect to either article 27 or article 28.

164. Against this, however, the defendants rely upon the decision of Miss Lucy Theis QC (sitting as a Deputy High Court Judge) in JKN v JCN, [2010] EWHC 843 (Fam), who considered a case in which a wife issued divorce proceedings in England and her husband issued divorce proceedings in New York. There was therefore a question whether, because of the decision in Owusu, the Court could properly stay the English proceedings (as the husband asserted but the wife denied). Miss Theis analysed the decision in Owusu, and she emphasised the importance that the ECJ, following Advocate General Leger's opinion, saw in the policy, reflected in recital 11 to the Brussels Regulation (cit sup at para 141), that rules as to jurisdiction should be highly predictable and, subject to well-defined exceptions, generally based upon the defendant's domicile. She carefully reviewed the decision in Catalyst and other judicial and academic authority, to only some of which I have referred in this judgment. I set out her conclusion (at para 149(i)):

> "It is neither necessary nor desirable to extend the *Owusu* principle in cases where there are parallel proceedings in a non-Member State. I have reached this conclusion for the following principal reasons:
>
> (a) The risk of irreconcilable judgments which undermine two important objectives of the Brussels scheme namely: avoiding irreconcilable judgments between Member States and ensuring recognition of judgments between Member States.
>
> (b) It would lead to an undesirable lacuna, as there will be no mechanism in place for resolving this situation with the consequence of both proceedings continuing with the consequent increased uncertainty and cost.
>
> (c) The supporting rationale by Jacob LJ in *Lucasfilm*
>
> '… the EU could not legislate for third countries' [111]:
>
> 'The Regulation is not setting up the courts of the Member States as some kind of non-exclusive world tribunals for wrongs done outside the EU by persons who happen to be domiciled within the EU.' [129]

> 'We do not have to decide whether [*Catalyst*] was correct, though we note that, if he is right, there is this oddity: that there is a clear lis pendens rule, with associated court first seized rule, for parallel cases within the EU but none for parallel cases where one is running within the EU Member State and one without. What Barling J did not decide was that art 2 conferred extra-EU subject matter generally' [134] [emphasis added, Jacob LJ is speaking for the Court]
>
> (d) The reasoning that underpins *Owusu* is not incompatible with retaining the discretionary power where there are parallel proceedings in a non-Member State. It does not undermine certainty for the defendant (as he will be bringing the proceedings in the non-Member State); the claimant (although not mentioned in Article 2) will have knowledge of the proceedings in the non-Member State and it is likely to be in his interests to have one set of proceedings rather than two (the latter would happen if the *Owusu* doctrine was extended); there would be less risk of irreconcilable judgments given in Member States which are not recognised in another Member State; *Coreck* (which was decided 4 years before *Owusu*) permits judicial discretion in circumstances where there is no provision for it in Brussels 1."

165. The "general rule" is that where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred, if it is reached after full consideration of the earlier decision: Minister of Pensions v Higham, [1948] 2 KB 153,155. There is good reason for the rule and I should depart from it only if convinced that Miss Theis was wrong: Colchester Estates v Carlton Plc, [1986] Ch 80,85. I am not. On the contrary, I agree with both her decision and her reasoning. As Mr Malek submitted, many of the reasons for giving article 22 reflexive effect apply to article 28, and this conclusion reflects the opinion expressed in textbooks such as Dicey, Morris and Collins (loc cit at para 12-022) and Briggs and Rees (loc cit at para 2.260).

166. The connection between the principle of forum non conveniens and the principle of lis alibi pendens is undeniable, and was recognised by Hobhouse J in S & W Berisford Plc v New Hampshire Co, [1990] 2 All ER 321 at p.331j and Potter J at Arkwright Mutual Insurance Co v Bryanston Insurance Co Ltd, [1990] 2 All ER 335 at p.347 (as well as Barling J in the Catalyst case). Both doctrines are aspects of the law's general policy expressed by Bingham LJ as being "to favour litigation of issues only once, in the most appropriate forum": Du Pont v Agnew, [1987] 2 Lloyd's Rep 585, 589. The fact that there is lis alibi pendens might influence the court's decision on an application to stay on the grounds of forum non conveniens, as Barling J observed in Catalyst at para 109. But I see no difficulty in giving effect to the ECJ's injunction that because of article 2 a defendant cannot dispute that his domicile is an appropriate forum (and so not contend that it is forum non conveniens), but be protected from multiplicity of proceedings. Mr Smouha accepted that, notwithstanding Owusu, a defendant is entitled to have stayed proceedings against him that are abusive, and therefore would be entitled to a stay if a claimant has oppressively started proceedings

both in another jurisdiction and here, but he distinguished the position where a defendant to English proceedings has brought the foreign proceedings, albeit before the proceedings were brought here. I cannot accept that the court's powers to protect a party from multiplicity of proceedings are subject to this limitation, or that, whereas Owusu allows protection in the former circumstances, it prevents it in the latter.

167. I must therefore consider whether article 28 would apply if Ukraine were a member state. Article 28 applies where a "related action" is pending in another jurisdiction, and actions are related for this purpose if "they are so closely related that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". It is common ground that this requirement is met with regard to the proceedings and the 2011 Ukrainian proceedings: both concern, for example, the validity of the resolutions at the meeting on 20 November 2002, the validity of the subsequent share issues and the validity of the share certificates and entries in registers concerning the Relevant Shares. Mr Smouha initially submitted that two actions could be related proceedings only if they are between the same parties, arguing that otherwise there is no risk of irreconcilable judgments, but article 28.3 does not say that and it is not the law: see, for example, Sarrio SA v Kuwait Investment Authority, [1997] UKHL 49, [1999] AC 32. Mr Smouha abandoned this argument, and it is not now disputed that these proceedings and the 2011 Ukrainian proceedings are related within the meaning of article 28. It is also not disputed that the Poltava Commercial Court was seised of the 2011 Ukrainian proceedings before this court was seised of these proceedings.

168. However, Mr Smouha then introduced another argument: that article 28 is displaced if article 27 is engaged, that article 27 is engaged in this case and that for the purposes of article 27 the English court was seised of proceedings between Ferrexpo and the defendants before the Poltava Commercial Court was seised of proceedings between them. Because the argument was introduced at a relatively late stage in the hearing, I did not have full submissions on it, and had the defendants' application turned upon it, I would have sought further assistance. In view of my decisions on other points, however, I determine it as best I can.

169. I accept that, if article 27 is engaged, at least generally there is no scope for the operation of article 28, and that, once there are proceedings in different member states involving the same cause of action and between the same parties, the matter is governed by article 27 and its mandatory regime. Mr Malek disputed this, and submitted that the proposition is not supported by Dicey, Morris and Collins (loc cit), referring specifically to paras 12-63 to 12-66, and that it is inconsistent with the approach of the Court of Appeal in Research in Motion UK Ltd v Visto Corp., [2008] EWCA Civ 153. Mr Malek did not develop this submission, but I see nothing in those paragraphs or elsewhere in Dicey, Morris and Collins or in the Research in Motion case that is inconsistent with this part of Ferrexpo's argument. Article 28 operates in "a range of circumstances, from cases where the matters before the courts are virtually identical (though not falling within the provisions of article [27]) to cases where although this is not the position, the connection is close enough to make it expedient for them to be heard together": Sarrio SA v Kuwait Investment Authority (loc cit) at p.40C-D. There is support for the proposition that there is no room for article 27 and article 28 to operate concurrently in Briggs and Rees (loc cit at para 2.241): "Article 28 is best thought of as the provision that may apply if the English

court is seized second but the conditions of article 27 are not met". The ECJ said in The Tatry, C-406/92, [1994] ECR 1-5439 that article 22 of the Brussels Convention (the equivalent of article 28) might be relevant "only if the conditions for the application of Article 21 of the Convention [article 27 of the Regulation] are not satisfied". I accept this stage of Ferrexpo's argument.

170. Therefore Ferrexpo's argument that, if Ukraine were a member state, article 27 would be engaged and this court would be first seised within the meaning of article 27 depends upon their contentions:

i) That the 2011 Ukrainian proceedings and these proceedings are "proceedings involving the same cause of action" within the meaning of article 27; and

ii) That the English court was first seised of "proceedings … between the same parties".

171. Do the 2011 Ukrainian proceedings and these proceedings involve the "same cause of action" within the meaning of article 27, where the expression has an autonomous meaning independent of domestic law: see Gubisch Maschinenfabric KG v Palumbo, (144/86)? In The Tatry (loc cit) it was explained by the ECJ, who referred to the French text of article 21 of the Brussels Convention that used the expression "le meme objet et la meme cause", that the two causes of action have to have the same end in view and involve the same facts and rules of law. As Briggs and Rees observe (loc cit at para 2-229), the question can be asked in terms of whether it is evident that the result of one set of proceedings would provide a conclusive answer to the other, or whether the "two decisions would be reconcilable, albeit a little awkwardly so", in which case article 27 is not engaged.

172. Ferrexpo submit that all the issues in these proceedings are comprised in the 2011 Ukrainian proceedings, albeit the Ukrainian proceedings involve additional issues and additional parties. This is because they submit that the 2011 Ukrainian proceedings involve a challenge to their *ownership* of the Relevant Shares. As I have explained, I do not understand the 2011 Ukrainian proceedings to do so: the defendants' position is that, because the series of resolutions that led to the issue of the Relevant Shares were invalid, the Relevant Shares can properly and should be cancelled in order the restore the status quo ante 20 November 2002.

173. The question whether proceedings involve the same cause of action under article 27 requires a comparison between the claim documents (as I shall call the claim forms and accompanying statement or particulars of claim) to see if the causes of action in the two proceedings are the same: see Kolden Holdings v Rodette Commerce Ltd, [2008] EWCA Civ 10 at para 93 per Lawrence Collins LJ. (In contrast, article 28 involves the court looking at issues raised by the claim, the defence and any counterclaim or cross-claim: Briggs & Rees (loc cit) at para 2-242.) For the reasons that I sought to explain in Evialis v SIAT, [2003] EWHC 863 (Comm) at paras 116 to 130, I think that generally the proper approach is to look at the proceedings as a whole and to ask what is the central or essential matter with which they are concerned; see too Lloyd's Syndicate 980 v Sinco, [2008] EWHC 1842 (Comm) and WMS Gaming Inc v B Plus Giocolegale Ltd, [2011] EWHC 2620 (Comm). In this case the defendants did not suggest that, if they do not succeed in their challenge in relation to the whole of the proceedings, some of the claims should be stayed.

174. In these proceedings Ferrexpo make two claims that have no parallel in the 2011 Ukrainian proceedings. One is the declaration sought in paragraph 36(2) of the particulars of claim about the 2006 SPAs. Secondly, the anti-suit injunction set out in paragraph 37 is not the same cause of action as the proceedings that it would prohibit the defendant from pursuing: see, for example, Alfred C Toepfer International GmbH v Molino Boschi Sarl, [1996] 1 Lloyd's Rep 510 and Lloyd's Syndicate 980 v Sinco SA, (loc cit). In their submissions Ferrexpo said that they did not intend to pursue the claim in paragraph 36(2), and in their evidence and submissions they said that an injunction would be sought only after they had obtained declaratory relief. However, in my judgment what matters for present purposes are the causes of action found in the claim documents, and I do not consider that I should take account of Ferrexpo's subjective purpose or the "end in view" as explained in evidence or submissions.

175. It therefore seems to me that I must first consider whether it appears from Ferrexpo's particulars of claim that these proceedings are mainly or centrally concerned with the declarations set out in paragraph 36(1). In my judgment, it does. I have explained at paras 107 et seq above that essentially the pleading is directed to allegations upon which the claims for those declarations are made. There is nothing in the pleading that indicates that there is any dispute about the governing law of or arbitration provisions in the 2006 SPAs and there is no pleaded basis for the injunction claim.

176. This leads to the more difficult step in Ferrexpo's argument, whether the claims in paragraph 36(1) involve the same cause of action as the 2011 Ukrainian proceedings. On the face of it, they do not in that the declarations, or at least three of the four declarations, are about the Relevant Shares, which are not mentioned in the 2011 Ukrainian proceedings.

177. Moreover there is some tension between Ferrexpo's argument on this point and arguments that they advanced about the nature of their claim for the purpose, no doubt, of answering the defendants' application based on a reflexive application of article 22. Mr Smouha, contending that these proceedings are focussed upon issues about the ownership of the Relevant Shares, submitted that Ferrexpo's claims are not dependent upon the determination of the issues that arise in relation to the so-called corporate claim in the 2011 Ukrainian proceedings and that they do not require the court to determine whether the resolutions of 20 November 2002 are valid. His argument was that, unless the defendants show that, because the 2002 SPA was invalid, the resolutions at *all* the subsequent General Meetings were of no effect, the defendants cannot successfully challenge Ferrexpo's interest in the Relevant Shares. Accordingly, Mr Smouha said, Ferrexpo's claim does not depend essentially upon the (disputed) challenge to the resolutions of 20 November 2002 but upon a defined question of Ukrainian law about whether all changes in the shareholdings in OJSC can be reversed.

178. However, it is necessary to examine the nature of the respective claims in more detail. As I have explained (at paras 102 and 104**)** I do not accept Ferrexpo's interpretation of the defendants' pleading, on which Mr. Smouha's submission was based. I conclude that the "objet" of both proceedings is to adjudicate upon the defendants' challenge to Ferrexpo's interest in OJSC, and it is of only incidental significance that in the 2011 Ukrainian proceedings the claim is couched in terms of the challenge to the resolutions and in these proceedings the central claims are couched in terms of

Ferrexpo's interest in OJSC (in the form of the Relevant Shares) not being vulnerable to challenge. Proceedings for a claim and proceedings for a declaration denying the claim do involve "le meme objet", (see The "Tatry", loc cit). I also accept that the two sets of proceedings involve "la meme cause", in that they involve the same facts and the same Ukrainian rules of law, and therefore that they involve the same cause of action.

179. Was this court or the Poltava Commercial Court first seised of proceedings between Ferrexpo and the defendants? On 10 October 2011, Ferrexpo were joined as third parties in the 2011 Ukrainian proceedings, but they say that it was only on 23 November 2011 that these proceedings were between them and the defendants. Accordingly the Poltava Commercial Court was seised of the 2011 Ukrainian proceedings before this court was seised of these proceedings between Ferrexpo and the defendants, but Ferrexpo say that it was seised of proceedings involving a lis between Ferrexpo and the defendants only at a later date. Thus, there are two questions:

    i) Whether the Poltava Commercial Court is to be taken to be seised of relevant proceedings for the purpose of article 27 (or its reflexive application) when it was seised of the 2011 Ukrainian proceedings, or only when Ferrexpo were joined in the proceedings in a relevant capacity? and

    ii) If they are to be taken to be seised only when Ferrexpo were joined in the proceedings in a relevant capacity, when were they so joined?

180. The first of these questions depends upon when a court is deemed to be seised with proceedings which are brought against one defendant and to which another defendant is joined by amendment. In Grupo Torras SAV Sheik Fahad Mohammed al-Sabah [1995] 1 Lloyds Reports 374, Mance J considered that under the Brussels Convention, under which national law determined when a court was seised, the court was seised of proceedings against all defendants named in a writ when process was served on one defendant, a conclusion driven by the practical requirement that the determination of a multi-party dispute should not be fragmented between jurisdictions. However, the ECJ in the Tatry (loc cit) and the Court of Appeal in Fox v Taher [1997] I L Pr 441 considered that a defendant-by-defendant approach determined when a court should be so seised.

181. Under the Brussels Regulation, the time when a court is seised depends not upon the national law of the court but upon article 30 of the Regulation, which provides that a court is deemed to be seised of proceedings when "the document instituting the proceedings or an equivalent document is lodged with the court" or "If the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service". However, it seems to me that, as under the Brussels Convention, similarly under the Brussels Regulation the question when a court was seised of proceedings between a claimant and a defendant depends upon consideration of the position between that claimant and that defendant. Thus, as Briggs and Rees, Civil Jurisdiction and Judgment (loc cit) observe at para 2-235, "In principle, where new defendants are concerned, it seems that article 30 of the Regulation has had no real impact and that the claim will not be pending against them until the claim form is re-issued with amendment made to it".

182. If this is so, the question whether this court or the Poltava Commercial Court was first seised of proceedings "between" Ferrexpo and the defendants within the meaning of article 27 therefore depends upon the status of Ferrexpo in the 2011 Ukrainian proceedings before 23 November 2011. In his second report, Mr Filatov explained the different standing of participants in proceedings under the CPC, the code applicable to the 2011 Ukrainian proceedings.

183. The standing of Ferrexpo in the 2011 Ukrainian proceedings is governed by article 27 of the CPC. It was unsatisfactory that during the hearing there were produced at least three different translations of the article (and different translations of the order made under article 27 by the Poltava Commercial Court on 10 October 2011), and there was confusion between the parties about whether any and if so which translation was agreed between them. I understand that it is now not disputed that the relevant part of the article is in these terms:

> "Third parties without independent claims regarding the subject matter of the dispute may be join [sic] the case on the claimant's side or the defendant's side before a judgment has been passed by the economic court [which I understand to mean commercial court], if such judgment may affect their rights and responsibilities in relation to the parties".

According to Mr Filatov, such a third party is not directly bound by a judgment resolving the dispute and a judgment can be enforced only in respect of the direct parties (not the third parties) to it. Accordingly, as he explained, no proceedings were afoot between the defendants and Ferrexpo in the Poltava Commercial Court until 23 November 2011.

184. It is unfortunate that this evidence was included only in Mr Filatov's second report and so it was not considered by Professor Maidanyk. However, Mr Malek did not, I think, dispute the substance of it and I accept it. Accordingly I accept that before 23 November 2011 there were no proceedings in Ukraine between the same parties as these proceedings.

185. I add that during the hearing before me it was, I think, assumed that by the order on 23 November 2011 the Poltava Commercial Court was seised of proceedings between the defendants and Ferrexpo. I do not find it easy to understand how by the order of the court on 23 November 2011 the Poltava Commercial Court became seised of such proceedings in accordance with the definition in article 30 of the Brussels Regulation. There was no evidence about a relevant document being lodged with the court, Ferrexpo apparently have not been served with the proceedings pursuant to the order of the Poltava Commercial Court and there is no evidence about them being received by the "authority responsible for service". However, nothing turns on that.

186. I also record that Ferrexpo dispute (as Mr Smouha put it in his written submissions) the "propriety of [their] purported joinder as respondent in the New Ukrainian Proceedings on 23 November 2011". Again, nothing turns upon whether their apparent joinder was valid and effective.

187. I therefore conclude that, although I should adopt a reflexive approach to articles 27 and 28, article 27 (so applied) and not article 28 covers this case. However, for

completeness I shall consider the remaining question, whether, had I discretion to order a stay under a reflexive application of article 28, I should have exercised it

188. In Owens Bank Ltd v Bracco, (case C-129/92), the ECJ identified (at para 76) three considerations that might be relevant in exercising the discretion under article 22 of the Brussels Convention (and they apply no less to the discretion under article 28 of the Brussels Regulation). They are "(1) the extent of relatedness and the risk of mutually irreconcilable decisions; (2) the stage reached in each set of proceedings; and (3) the proximity of the courts to the subject matter of the case". For reasons that I have explained, the cases are closely related and there is a correspondingly high risk of irreconcilable decisions, a risk that is the greater if this court were to determine a question of Ukrainian law before a Ukrainian court decides the same question (which, as I conclude from the expert evidence, might well be one of some difficulty). There is no reason that the Ukrainian court should accept an English court's decision, reached on the basis of expert evidence, as providing any useful guidance as to the law of Ukraine. As for the consideration about the stage that the proceedings have reached, for practical purposes I regard these proceedings and the 2011 Ukrainian proceedings as both being at an early stage. As for considerations relating to the "proximity of the courts to the subject matter of the case", the claims in these proceedings are closely connected with Ukraine, both because of the factual subject matter of the litigation and because (as is apparent on the face of the declarations sought in paragraph 36(1) of the particulars of claim) the central issues in the litigation are governed by the law of Ukraine.

189. It is, as Mr Smouha submitted, legitimate for the court second seised to refuse a stay under article 28 in order to proceed to trial before the court first seised if it is likely to be of practical benefit to do so: see Cooper Tire & Rubber Co Europe Ltd v Dow Deutschland Inc and anor, [2010] EWCA Civ 864, esp at paras 54 to 56. Here there is said to be such practical benefit because of the likely delay in the 2011 Ukrainian proceedings, as well as the risk of injustice. I also have in mind Mr Abraham's evidence about Ferrexpo's wish to have a decision by an English court "in whom the investment community will have trust and confidence".

190. I have already expressed my conclusion about the risk of injustice in the Ukrainian proceedings. Mr Smouha submitted that "Ukraine civil proceedings are notoriously long and drawn out", but there is no expert (or other) evidence directed specifically to the likely progress of the 2011 Ukrainian proceedings, and the court cannot take judicial notice of the usual progress of civil proceedings in Ukraine (and indeed I have no such knowledge). There is evidence of other civil proceedings in Ukraine have been protracted: in particular the 2005 proceedings and the proceedings concerning EC Odessaoblenegro (which apparently lasted from 1998 to 2011). I am prepared for the purposes of dealing with this application to assume (without deciding) that the 2011 Ukrainian proceedings will probably be long and drawn out and might involve appeals at different levels.

191. However, even so assuming, I am unable to conclude that the considerations to which I have referred at para 189 outweigh "the proximity of the courts to the subject matter of the case". Had I power to do so, I would have ordered a stay on the basis of a reflexive application of article 28 (as well as a reflexive application of article 22).

Should the proceedings be stayed as an abuse?

192. As Barling J observed in the Catalyst case (cit sup) at para 100, nothing in the Brussels Regulation and the decision in Owusu has removed or limited the court's power to prevent parties from using it oppressively or abusing its process. The defendants submit that the claims in these proceedings are abusive and oppressive because pointlessly and oppressively they duplicate the litigation in the 2011 Ukrainian proceedings.

193. As I have said, Ferrexpo do not intend to pursue the declaration set out in paragraph 36(2) of the particulars of claim and the claim for injunctive relief is parasitic upon the other claims for declaratory relief. Moreover, the declarations set out in paragraphs 36(1)(a) and 36(1)(b) are directed to matters about which Ferrexpo do not plead that there is any dispute and about which the evidence indicates no dispute. These proceedings can be justified only by the claims for the declarations in paragraphs 36(1)(c) and 36(1)(d).

194. Although Ferrexpo's pleading is not specific about their intended target, I understand from Mr Smouha's submissions that the two proposed declarations largely if not entirely duplicate each other and are directed to what relief (if any) the Ukrainian court might grant under article 216 of the CCU if the defendants succeed on liability in the 2011 Ukrainian proceedings. If so, there are formidable, indeed insuperable, obstacles to these claims.

195. First, Mr Malek observed that they are directed to questions about the validity of decisions of an organ of OJSC, a foreign company, and entries in foreign registers, but neither OJSC nor the relevant registries are joined as parties in the proceedings. The declaration in paragraph 36(1)(d) is sought notwithstanding many parties to the 2002 SPA (not only the Initial Purchasers, who no longer exist, but, for example, CJSC and JSB ING) are not party to these proceedings. Nevertheless, Ferrexpo have not indicated any intention to join other parties.

196. Secondly, the question about what relief might be available under article 216 and whether it might affect Ferrexpo's interest in the Relevant Shares is hypothetical unless and until the defendants' attack upon the validity of resolutions at the general meetings of OJSC is established. The court does not generally make declarations about hypothetical matters, and at least the declaration sought in paragraph 36(1)(d) is, to my mind, hypothetical.

197. Further, there is no realistic prospect that declarations of this kind would have any effect. As is said in Woolf and Zamir, The Declaratory Judgment, at para 4-99, "If it can be shown that a declaration would not serve any practical purpose, this will weigh heavily in the scales against the grant of declaratory relief". The only country in which Ferrexpo might seek to enforce the judgment is Ukraine and there is no realistic likelihood that a declaration of this court about Ukrainian law would be given effect in Ukraine, particularly with regard to matters which would generally be regarded as being within the exclusive jurisdiction of the courts of Ukraine. Ferrexpo acknowledged that this court could not or should not make a declaration about what the Ukrainian court should decide about Ukrainian law in the 2011 Ukrainian proceedings. That would be contrary to principles of comity. The court can only direct relief against parties to the proceedings. However, it is clear from article 216 of the CCU that, regardless of what arguments the parties to the 2011 Ukrainian proceedings (including the defendants) advance in those proceedings about whether it

is "impossible" for the parties to "return … everything received under [a] transaction in kind", the court will consider this of its own motion. Further, although there was no evidence about this, it seems to me that the Ukrainian court might properly and understandably expect assistance of the parties before the court and their representatives in that regard, and no declaration of this court could or should interfere with them doing so.

198. Mr Smouha submitted that the powers of the court to stay proceedings which are oppressive (or at least which are oppressive in view of litigation that has been brought in other jurisdictions) are restricted to two situations: (i) where a party seeks to re-litigate a question that has already been determined, and (ii) where a party brings proceedings in more that one jurisdiction. I reject that submission: the courts have emphatically declined to define or delimit the circumstances in which it will stay proceedings as oppressive: see McHenry v Lewis, (1882) 22 Ch D 397 at pp.407-408 per Bowen LJ, whose views were endorsed by the Privy Council in Société Nationale Industrielle Aerospatiale v Lee Kui Jak, [1987] AC 871. It is true that multiplicity of proceedings does not itself give rise to a presumption that there is oppression or abuse, and it is true that, as Lord Bingham said in Johnson v Gore Wood & Co, [2000] UKHL 65, [2002] 2 AC 1 at p.31C, proceedings will rarely be an abuse unless they involve unjust harassment of a party. However, I conclude that these proceedings are oppressive and an abuse involving unjust harassment of the defendants because they can have no purpose other than pointlessly to duplicate the 2011 Ukrainian proceedings. The defendants are, in my judgment, also entitled to have them stayed for this reason.

Should the proceedings be stayed for case management reasons?

199. Even if these proceedings are not an abuse, the court has power, and the duty, to manage proceedings before it in accordance with the overriding objective of the CPR and, as I have said, it may to this end "stay the whole or part of any proceedings or judgment either generally or until a specific date or event": CPR 3.1(2)(f). The court has an interest in deciding the order in which concurrent proceedings in the same or different jurisdictions should be tried "not only because the existence of concurrent proceedings may give rise to undesirable consequences in the form of inconsistent decisions, but also because the outcome of one set of proceedings may have an important effect on the conduct of the other": Reichhold v Goldman Sachs, [1999] 2 Lloyd's Reports 567 at p.571 per Moore-Bick J. The power to stay proceedings for this purpose is not readily exercised: in the Court of Appeal in the Reichold case Lord Bingham CJ said that it should be exercised only in "rare and compelling circumstances" and account is always taken of the legitimate interests of claimants which are to be prejudiced no more than the interests of justice require. But subject to those limits the power is available both when this jurisdiction has concurrent proceedings with those either in a member state (eg. Curtis v Lockhead Martin UK Holdings Ltd [2008] EWHC 260 (Comm)) or in a non-member state (eg. Jefferies International Ltd v Landsbanki Islands HF,[2009] EWHC 894 (Comm)). As Moore-Bick J explained in the passage of his judgment that I have already cited, one reason for exercising it is to avoid inconsistent decisions, which have been described as "a potential disaster from the legal point of view": The "El Amria", [1981] 2 Lloyd's Reports 119, 128 per Brandon LJ.

200. As I have already said, the court will not exercise this discretionary power if to do so would conflict with the Brussels Regulation or allow it to introduce thereby considerations of foreign non conveniens. However, even if I had not accepted the defendants' submission that the Brussels Regulation should be applied reflexively and that these proceedings are an abuse of process, the court should, if sufficiently compelling circumstances justify it, exercise its powers to avoid conflicting decisions being reached in these proceedings and the 2011 Ukrainian proceedings. I have already explained why I consider that there are sufficiently compelling circumstances in this case.

Expedition

201. At the end of the hearing on 16 February 2011, I directed that these proceedings should not be expedited and I revoked that part of the order of Flaux J of 15 December 2011. I gave brief reasons for my decision but I should confirm them in this judgment.

202. In my judgment, I am entitled to revisit a case management order of this kind. It might have been permissible to do so even if there had been no material change of circumstances since the order of Flaux J and he had a correct understanding of the facts. (I refer to the approach to revoking procedural orders under CPR 3.1(7) recognised by Morgan J in Simms v Carr, [2008] EWHC 1030 (Ch), explaining the decision in Lloyds Investment (Scandinavia) Ltd v Ager Hanssen, [2003] EWHC 1740 (Ch), approved by the Court of Appeal in Collier v Williams, [2006] EWCA Civ 20 at para 40). It appears clear that the parties and Flaux J always contemplated that the direction for expedition would be reconsidered upon the hearing of the defendants' application challenging the jurisdiction.

203. In any event, since 15 December 2011 there has been a change of circumstances. The purpose of the direction for expedition was that there could be a trial of and judgment in these proceedings before the hearing in the 2011 Ukrainian proceedings that is due to begin on 12 June 2012. No dates for a trial of these proceedings having been reserved by Ferrexpo after the order for expedition was made and the length of the likely hearing being, in my judgment, significantly more than 5 or 6 days, the court cannot now (and could not by June 2012) accommodate such a hearing. Furthermore, I have more complete information than Flaux J had in December 2011 about the nature of these proceedings, their relationship with the litigation in the Ukraine and the risk of injustice to Ferrexpo. The reason for the order for expedition was because on the material before Flaux J it appeared that this might be necessary in order to avoid exposing Ferrexpo to an unwarranted risk of injustice in proceedings in the Ukraine, but I have concluded that there is not cogent evidence of such a risk.

204. In view of the conclusions that I have reached, the question of the expedition of the proceedings does not arise, but even if I had not decided to stay these proceedings, I should have revoked the order that they be expedited. I accept Mr Malek's submission that the result otherwise would be a race for judgment that would have no justification.

Conclusion

205. I therefore refuse the defendants' application to amend their notice of application. I conclude that the defendants are entitled to a stay for the reasons that I give at paras 155, 198 and 200 above.