

JUDGMENT : Mr Justice Flaux: Commercial Court. 30th April 2008

Introduction and background

1. This is the Claimants' application for permission to amend the Claim Form and Particulars of Claim to plead two additional causes of action in the light of the Defence. The Defendants oppose the application on the ground that the Court does not have jurisdiction over the proposed new claims.
2. The background can be stated relatively briefly. The existing claims are for repayment of monies advanced by various lenders (the Claimants consisting of those lenders or their successors in title) under a Credit Agreement dated 31 March 2006 whereby the Claimants made available a credit facility of some US\$210 million to the First Defendant ("APBW"), a telecommunications company in Taiwan which operated a mobile phone network. The loan was ostensibly to finance the purchase by APBW of equipment from another Taiwanese company, Huawei. The Second Defendant, which is the parent company of APBW, guaranteed the loan and became a co-obligor with APBW under the Credit Agreement. At the time the Agreement was made, both Defendants were companies in the Rebar Group controlled by the Wang family.
3. By clause 34 of the Credit Agreement, the Agreement was governed by English law. Clause 35 consisted of an exclusive jurisdiction clause in the following terms:
"35. ENFORCEMENT
35.1 Jurisdiction
(a) The English courts have exclusive jurisdiction to settle any dispute in connection with any Finance Document.
(b) The English courts are the most appropriate and convenient courts to settle any such dispute in connection with any Finance Document. Each Obligor agrees not to argue to the contrary and waives objection to those courts on the grounds of inconvenient forum or otherwise in relation to proceedings in connection with any Finance Document.
(c) This Clause is for the benefit of the Finance Parties only. To the extent allowed by law, a Finance Party may take:
(i) proceedings in any other court; and
(ii) concurrent proceedings in any number of jurisdictions.
(d) References in this Clause to a dispute in connection with a Finance Document includes any dispute as to the existence, validity or termination of that Finance Document."
4. The credit facility was duly provided to APBW, which then made withdrawals under it and paid interest due until about December 2006. At that time members of the Wang family, including the Chairman of APBW, Mr Wang Ling-Tai, were indicted before the criminal courts of Taiwan for fraud. Those allegations gave rise to default under the Credit Agreement in January 2007. In February 2007 entirely new management was brought into both defendant companies.
5. On 9 March 2007, the First Claimant, Deutsche Bank AG, as Facility Agent on its own behalf and on behalf of the other lenders declared various events of default and made formal demand for sums outstanding against both Defendants. After various monies had been paid out of escrow accounts, the sums outstanding were equivalent to some US\$175 million. The Defendants did not pay any part of the sums outstanding and on 30 April 2007, the present proceedings were commenced in the Commercial Court. The Claim Form stated (supported by a statement of truth signed by the Claimants' solicitors) that the Court had jurisdiction on the basis that the Defendants were parties to an agreement conferring jurisdiction to which Article 23 of the Judgments Regulation 44/2001 applies (evidently a reference to Clause 35 of the Credit Agreement).
6. The Claim Form was served on the Defendants pursuant to Clause 35.2 of the Credit Agreement by service on Law Debenture Corporate Services Limited, being the agent for service within the jurisdiction appointed by the Defendants. At that stage no objection was raised as to the jurisdiction of the English Courts.
7. After several extensions of time, the Defence was served on 14 September 2007. It is a lengthy document but in essence (as set out in the Summary served pursuant to CPR 16 PD 1.4), it contends that the Credit Agreement is void because the members of the Wang family who were the Chairmen of the defendant companies and who signed the Credit Agreement and other documents on behalf of the companies did not have authority to enter into this transaction on behalf of the companies. In particular:
(i) There was no or no effective board resolution of the First Defendant to authorise the transaction contemplated and/or evidenced by the various agreements;
(ii) Alternatively, if there was an effective board resolution, the agreements were not authorised because they were not in the best interests of the Defendants.
8. The Claimants' Skeleton Argument sought to characterise these defences as "technical" but as Mr Christopher Butcher QC for the Defendants pointed out, by reference to the Response to a Request for Further Information served by the Defendants on 18 January 2008, the Defendants' case is that the transaction involving the Credit Agreement was entered into by the Wang family as part of a large scale fraud perpetrated by them upon the defendant companies, including the extraction of US\$800 million from the Second Defendant which this transaction was designed to conceal. The supposed board resolutions of the defendant companies were created by the Wang family entirely for their own interest and in reality board meetings were not held, the family having had complete disregard for the principles of corporate governance. Furthermore, it is the Defendants' case that Deutsche Bank knew or ought to have known (i) of the bad reputation of the Wang family in Taiwan and (ii) that this transaction was not in the best interests of the defendant companies.

9. Although the Claimants have been disparaging about these defences, they raise serious issues which will require to be tried, as the Claimants themselves recognise by the fact that they served a detailed and lengthy Reply which raised the alternative claims for the first time. At a Case Management Conference on 14 November 2007, I ordered that the Claimants should serve any proposed amendment to the Claim Form and Particulars of Claim to raise these alternative claims by 19 November 2007 and that, by 3 December 2007, the Defendants through their solicitors should indicate whether the amendments were accepted or whether the Defendants disputed the Court's jurisdiction in relation to the alternative claims. On 13 December 2007, the Defendants' solicitors wrote indicating that jurisdiction was disputed; hence this contested application for permission to amend.
10. There are two alternative claims set out in the draft Amended Particulars of Claim:
 - i) The Claimants contend that if the Credit Agreement is void (as the Defendants allege but the Claimants deny) the monies paid out pursuant to it were paid under a mistake of fact and/or law and/or for a consideration which wholly failed. Accordingly, the Claimants claim repayment of the monies in restitution.
 - ii) If, as the Defendants contend, the Credit Agreement is void because there was no board meeting of the First Defendant authorising Mr Wang as its chairman to enter the Credit Agreement, then Mr Wang made misrepresentations to the Claimants that such a meeting had taken place, misrepresentations for which the First Defendant is said to be liable to the Claimants.
11. It will be seen immediately that both the restitution claim and the misrepresentation claim are true alternatives to the primary claim in contract already before the Court. These alternative claims are both predicated upon the Defendants establishing that the Credit Agreement is void for want of authority on one or other of the grounds alleged in the Defence. Unless the Defendants' case succeeds on one or other basis, the alternative claims are unnecessary because on that hypothesis, the Claimants will succeed on their primary claim in contract.
12. It is common ground between the parties that the application raises two issues:
 - i) Whether the jurisdiction clause in Clause 35 of the Credit Agreement operates to give the English Court jurisdiction by virtue of Article 23 of the Judgments Regulation 44/2001 notwithstanding that the Credit Agreement itself is found to be void ("the severability issue").
 - ii) If the Clause is valid, whether the alternative claims fall within its scope ("the construction issue").

Legal principles applicable in relation to the severability issue

13. It is accepted by both parties that, because the First Claimant is domiciled in a Member State of the European Union, the validity of the jurisdiction clause is to be assessed by reference to Article 23 (1) of the Judgments Regulation which provides as follows:

"If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing...."
14. Article 23 forms part of Section 7 of Chapter II of the Regulation, dealing with Jurisdiction. The general provisions in Section 1 of Chapter II include the general rule of jurisdiction over a defendant domiciled in a Member State, that such a defendant shall be sued in the Courts of that state. Article 3 then provides that a defendant domiciled in a Member State may be sued elsewhere only by virtue of the rules set out in Sections 2 to 7 of the Chapter. Section 2 then deals with Special Jurisdiction (such as under Article 5) and Sections 3 to 6 with jurisdiction under various types of contract. Section 7 is headed "Prorogation of Jurisdiction". Article 4 deals with the position where the defendant is not domiciled in a Member State and provides that, subject to Articles 22 and 23, the jurisdiction of the Courts of each Member State shall be determined by the law of that Member State.
15. In the present case, unless jurisdiction in respect of the alternative claims can be founded upon the jurisdiction clause, the validity of which is to be assessed pursuant to Article 23, this Court would have no jurisdiction over the Defendants in respect of those claims. Although the Claimants did pursue a case of waiver by the Defendants of any objection to the jurisdiction of the English Courts, for reasons set out hereafter, that alternative basis for jurisdiction is hopeless. In the present case, jurisdiction is either to be derived from the jurisdiction clause or not at all.
16. The principles concerning the application of Article 23 laid down by the jurisprudence of the European Court of Justice are summarised in paragraph 23 of the judgment of the Privy Council in **Bols Distilleries v Superior Yacht Services** [2006] UKPC 45; [2007] 1 WLR 12 as follows:

"In Estasis Salotti di Colzani Aimo et Gianmario Colzani v RÜWA Polstereimaschinen GmbH (Case 24/76) [1976] ECR 1831, 1841, para 7, having pointed out that the effect of conferment of jurisdiction by consent is to exclude the jurisdiction provided for in article 5 of the Convention, the Court of Justice continued:

'In view of the consequences that such an option may have on the position of parties to the action, the requirements set out in article 17 governing the validity of clauses conferring jurisdiction must be strictly construed.

By making such validity subject to the existence of an 'agreement' between the parties, article 17 imposes on the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated.

The purpose of the formal requirements imposed by article 17 is to ensure that the consensus between the parties is in fact established.'

For the reasons given by the Court, the policy of the legislation requires that it is "clearly and precisely demonstrated" that the parties actually agreed to any clause conferring jurisdiction. There is a risk that a jurisdiction clause in a standard form contract put forward by one party might be overlooked by the other and the purpose of article 23(1), as of article 17(1), "is to neutralize the effect of jurisdiction clauses that might pass unnoticed in contracts": *Partenreederei ms Tilly Russ and Ernest Russ v NV Haven- & Vervoerbedrijf Nova and NV Geominne Hout* (Case 71/83) [1984] ECR 2417, 2435, para 24. As the Court had indicated earlier in the same judgment, at p 2432, para 16, fulfilling the requirements of the article will "guarantee that the other party has actually consented to the clause derogating from the ordinary jurisdiction rules of the Convention." In *Coreck Maritime GmbH v Handelsveem BV* (Case C-387/98) [2000] ECR I-9337, 9371, para 13, the Court summarised its jurisprudence in this way:

'The Court has held that, by making the validity of a jurisdiction clause subject to the existence of an 'agreement' between the parties, article 17 of the Convention imposes on the court before which the matter is brought the duty of examining first whether the clause conferring jurisdiction upon it was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated, and that the purpose of the requirements as to form imposed by article 17 is to ensure that consensus between the parties is in fact established....'

17. Paragraph 28 of the judgment then sets out the approach which a Court should adopt when considering whether it has jurisdiction under Article 23. Although the Privy Council was setting out the approach which should be applied by the Courts of Gibraltar, their reasoning is equally applicable to the English Courts:
- "Their Lordships would respectfully join Lord Steyn in endorsing the approach in the judgment of Waller LJ. Despite the submissions of counsel for the defendants to the contrary, it appears to the Board that, if the standard of "a good arguable case" is properly understood and applied, there is no risk that the effectiveness of the Regulation will be impaired. The rule is that the court must be satisfied, or as satisfied as it can be having regard to the limitations which an interlocutory process imposes, that factors exist which allow the court to take jurisdiction. In practice, what amounts to a "good arguable case" depends on what requires to be shown in any particular situation in order to establish jurisdiction. In the present case, as the case law of the Court of Justice emphasises, in order to establish that the usual rule in article 2(1) is ousted by article 23(1), the claimants must demonstrate "clearly and precisely" that the clause conferring jurisdiction on the court was in fact the subject of consensus between the parties. So, applying the "good arguable case" standard, the claimants must show that they have a much better argument than the defendants that, on the material available at present, the requirements of form in article 23(1) are met and that it can be established, clearly and precisely, that the clause conferring jurisdiction on the court was the subject of consensus between the parties."*
18. In this context, I would also gratefully adopt the summary of the applicable principles set out by Lewison J in paragraph 30 of his recent judgment in *Knorr-Bremse Systems v Haldex Brake Products* [2008] EWHC 156 (Patents). It is only necessary to quote his conclusions (vi) to (x):
- "vi) If there has been no succession, the court seised must ascertain whether the person against whom the jurisdiction clause is invoked actually accepted the jurisdiction clause relied on against him;*
- vii) The court must decide this question by reference to the requirements laid down in the first paragraph of article 23 of the Judgments Regulation, which is also a matter of the law of the Regulation, rather than the national law applicable to the substantive provisions of the contract;*
- viii) The formal requirements of that paragraph are strict;*
- ix) It is for the party relying on the jurisdiction clause to demonstrate clearly and precisely that the formal requirements are met;*
- x) The scope of a valid jurisdiction clause, in the sense of delimiting the disputes that fall within it, is a question of the national law governing the contract."*
19. For present purposes, I consider that the following principles emerge from the European jurisprudence and the domestic authorities (including the judgment of the Privy Council) interpreting that jurisprudence:
- i) The interpretation of Article 23 is a matter of autonomous European law, not a matter of English law as the national law governing the Credit Agreement. English law only becomes relevant and applicable if Clause 35 is valid under Article 23 and the Court has moved on to consider the second issue as to the scope of the Clause.
- ii) European law has laid down requirements which must be satisfied strictly, specifically that the party relying on the jurisdiction clause must demonstrate clearly and precisely that the clause was the subject of consensus between the parties. The strict approach of the European Court of Justice to the validity of jurisdiction clauses under Article 23 is to be contrasted with the more liberal approach adopted by the English courts to arbitration clauses (and by parity of reasoning jurisdiction clauses) most recently enunciated by the Court of Appeal and the House of Lords in *Fiona Trust v Privalov* [2007] EWCA Civ 20; [2007] 1 All ER (Comm.) 891 and [2007] UKHL 40; [2007] 4 All ER 951.
- iii) In deciding whether those formal requirements have been satisfied, the Court must be satisfied that a good arguable case has been demonstrated to that effect by the Claimant, which in the present context means that on the materials available to the Court, the Claimant has much the better of the argument.

The parties' submissions on the severability issue

20. Both parties accepted that the essence of this first issue is that the Court must be satisfied (in the sense set out in paragraph 19 (iii) above) that the Claimants have demonstrated clearly and precisely that the clause was the

subject of consensus between the parties. However the parties were diametrically opposed as to how that test is to be applied in practice.

21. Mr Bankim Thanki QC for the Claimants submitted that the Defendants' approach of looking at the question of consensus through the prism of the alternative claims and then arguing that there could be no consensus because those claims were predicated on the Credit Agreement being void was a flawed approach. He submitted that the Court was concerned with a narrower question: is there a good arguable case that the jurisdiction clause was the subject of consensus between the parties? The question of which causes of action were caught by the jurisdiction clause went only to the second issue, of the scope of the clause.
22. Mr Thanki submitted that not only was that narrower approach more consistent with the jurisprudence of the European Court of Justice but that the Defendants' approach was inconsistent with the judgment of the European Court in *Benincasa v. Dentalkit Srl* [1997] ECR I-3767 which stated as follows at paragraphs 25 and 29:

"25. A jurisdiction clause, which serves a procedural purpose, is governed by the provisions of the Convention, whose aim is to establish uniform rules of international jurisdiction. In contrast, the substantive provisions of the main contract in which that clause is incorporated, and likewise any dispute as to the validity of that contract, are governed by the lex causae determined by the private international law of the State of the court having jurisdiction.

...

29. Article 17 of the Convention sets out to designate, clearly and precisely, a court in a Contracting State which is to have exclusive jurisdiction in accordance with the consensus formed between the parties, which is to be expressed in accordance with the strict requirements as to form laid down therein. The legal certainty which that provision seeks to secure could easily be jeopardised if one party to the contract could frustrate that rule of the Convention simply by claiming that the whole of the contract was void on grounds derived from the applicable substantive law."
23. On the narrow approach for which the Claimants contend, Mr Thanki submitted that consensus was established because all the external indicia of consensus are in place in the present case: the contract was signed by Mr Wang on behalf of the First Defendant with the relevant corporate and personal chops, there were similarly signed board minutes of the First Defendant approving the transaction, the presence of which was a condition precedent to the Credit Agreement and detailed representations were made in the Credit Agreement as to the authority of Mr Wang to enter the transaction. Mr Thanki submitted that these were compelling factors pointing to consensus. The Defendants could only challenge that analysis by resort to national law on the circumstances in which a contract would be void for want of authority. This was precisely what was not permitted by the jurisprudence of the European Court of Justice, specifically the last sentence of paragraph 29 of the judgment in *Benincasa*.
24. Mr Thanki had a number of fall back arguments if his primary argument did not find favour with the Court. He submitted that the Defendants' pleaded case did not go so far as to establish that, even if Mr Wang had no authority to enter the Credit Agreement, he did not have authority to enter a jurisdiction agreement. Alternatively, he submitted that even if the Court had no jurisdiction over the misrepresentation claim (because it was predicated upon the whole Credit Agreement being void, including the jurisdiction clause), the same was not true of the restitution claim. That claim might well succeed not just where the Credit Agreement was void for want of authority but where it was said not to be in the best interests of the Defendants, an alternative line of defence which has nothing to do with consent to the jurisdiction clause.
25. Mr Butcher on behalf of the Defendants submitted that the issue as to consensus between the parties to the jurisdiction clause could not be viewed in isolation from the claims and disputes for which the clause was being prayed in aid. He submitted that the Court could and should make no assumptions as to whether the test derived from paragraph 28 of *Bols Distilleries* would have been satisfied in relation to the primary claim in contract as that issue was not and never had been before the Court.
26. Even if the Court were minded to look at that issue, he submitted that on the material before the Court now (including the Defence and Response to the Request for Further Information) the Claimants could not show that they had much the better of the argument that there was consensus to the jurisdiction clause. He emphasised the strictness of the approach of the European Court of Justice to Article 23, in circumstances where Article 23 involved a derogation from the general rule of jurisdiction. He referred to the fact that what was required was that the defendant had *"really consented to the clause"* (paragraph 9 of the judgment in *Salotti* [1976] ECR 1831). He also relied upon the reference to Article 23 being recognition of the *"independent will of the parties"* in paragraph 14 of the judgment in *Coreck Maritime* [2000] ECR I-9337. He submitted that *"real consent"* or *"independent will"* could not be clearly and precisely demonstrated where the Defendants' whole case was that the Credit Agreement was unauthorised and part of a wide scale fraud on the companies.
27. Mr Butcher submitted in the alternative that, even if the Claimants could show a good arguable case as to the validity of the jurisdiction clause in relation to their primary contractual claim, they could not use that to found jurisdiction for an alternative claim which was predicated upon the whole Credit Agreement being void. He challenged the suggestion that the Defendants had not pleaded that there was no authority to enter into the jurisdiction clause where the pleaded case was that the whole transaction was unauthorised. The fact that Mr Wang might have had authority to enter a jurisdiction agreement in a contract within the normal business of the

First Defendant of the rental of mobile phones was nothing to the point. The issue was whether the Claimants could demonstrate that he had authority to enter this jurisdiction clause in the Credit Agreement the purpose of which clause was to resolve any disputes in connection with that Agreement. The Claimants simply had no material at all from which they could demonstrate that this jurisdiction clause was somehow authorised.

Discussion and decision on first issue

28. I reject Mr Thanki's submission that the principle of the severability of a jurisdiction clause from the contract in which it is contained, as developed in the jurisprudence of the European Court of Justice, requires this Court to consider the jurisdiction clause in isolation from the disputes or claims in relation to which the clause is sought to be invoked. It seems to me that this Court has to consider the claims or disputes in relation to which the clause is sought to be invoked, as part of the "material available at present" to the Court, against which the Court judges whether the Claimants have made out a sufficiently arguable case for jurisdiction, pursuant to the approach set out by the Privy Council in *Bols Distilleries*.
29. Furthermore, this is no more than commercial common sense: a jurisdiction clause is always sought to be invoked in relation to a particular dispute and in my judgment the Court will have regard to the nature of the dispute not only in deciding whether the dispute falls within the scope of the jurisdiction clause but, where appropriate, whether the claimant has demonstrated clearly and precisely that the clause was the subject of consensus between the parties.
30. In the present case, as Mr Butcher submits, the alternative claims now put forward are ones which are both predicated upon the defence succeeding that the Credit Agreement was made without authority and void. If the defence does not succeed, these claims are wholly unnecessary, since the Claimants' principal existing contractual claim will succeed. In those circumstances, it seems to me that Mr Butcher is right that the Claimants face insuperable difficulties in seeking to demonstrate "clearly and precisely" consent by the Defendants to the jurisdiction clause to the requisite standard of "much the better of the argument", in circumstances where the claims in respect of which the jurisdiction clause is sought to be invoked are ones predicated upon the Credit Agreement being unauthorised and void.
31. The Claimants cannot save themselves from those insuperable difficulties by arguing that it is enough that they have a good arguable case of consent to the jurisdiction clause in relation to their primary contractual claim. Quite apart from the fact that that is not an issue currently before the Court (because, for whatever reason, the Defendants did not challenge the jurisdiction in relation to the primary claim), even if the Claimants were correct, that is beside the point. The Court is concerned with whether the Claimants have clearly and precisely demonstrated that there was consensus between the parties as to the jurisdiction clause, in the context of the alternative claims.
32. The Claimants cannot be in any better position in that regard merely because they are seeking to add these claims to an existing claim, in relation to which the Court has jurisdiction, than they would be if they sought to advance these alternative claims in a separate Claim Form. If these claims were the subject of a new Claim Form, I do not see how it could be said in that Claim Form (as it was in the present Claim Form) that the Court had jurisdiction because the Defendants were parties to a jurisdiction agreement to which Article 23 applies. The short answer to that would be that the claims contained in that new Claim Form were predicated upon the Agreement containing the jurisdiction clause being void.
33. Following the hearing, Mr Thanki made additional submissions on this point in a letter to the Court urging the Court to look at the position in "real time" by which he meant that there was a good arguable case that the Chairman had authority, irrespective of whether the alternative claims were made in the existing Claim Form or had been set out in a new Claim Form. However, the only material upon which the Claimants can rely in that regard is what Mr Thanki described as the outward indicia of consensus, that is the signature and chops on the Credit Agreement, the board minute which was a condition precedent to the Credit Agreement and the representations contained in that Agreement as to authority.
34. In my judgment, consensus is not demonstrated here merely by showing those outward indicia. Although the European Court of Justice does not give much if any assistance as to what will amount to "consensus", it seems to me that the mere fact that the relevant jurisdiction clause is in writing forming part of an agreement ostensibly signed by both parties is not sufficient in a case such as the present, where the relevant alternative claims are predicated upon the agreement containing the jurisdiction clause being unauthorised and void. The use by the European Court of concepts such as "real consent" and "the independent will of the parties" suggests very strongly that in a case such as the present the European Court would not consider that consensus was established simply by showing an agreement signed by an agent whose authority to do so was denied: see also Briggs & Rees: Civil Jurisdiction and Judgments 4th edition paragraph 2-105.
35. As for Mr Thanki's point in his letter that if the Defendants' contentions were correct, then the Court would never have jurisdiction pursuant to Article 23 in a misrepresentation or restitution claim, where the Defendants had alleged want of authority to enter the agreement as a whole, I find nothing startling in such a consequence. That consequence is not peculiar to cases of jurisdiction clauses subject to Article 23. The same consequence would follow at common law, even with the broad purposive approach to arbitration and jurisdiction clauses advocated by the appellate judgments in *Fiona Trust*. Where the effect of the defences raised is to constitute an attack on the validity not only of the main agreement but of the arbitration agreement or jurisdiction agreement contained in it,

then the arbitration agreement or jurisdiction agreement may well not be effective to confer jurisdiction on the relevant Court or tribunal in respect of particular claims: see per Lord Hoffmann at paragraph 17 of his judgment, quoted below.

36. In my judgment, nothing in this approach of considering the nature of the claims in respect of which the clause is sought to be invoked, in determining whether the Claimants have shown a sufficiently arguable case of consensus to the jurisdiction clause, infringes or undermines the jurisprudence of the European Court of Justice on the application of Article 23. In particular, this approach does not entail using the principles of national law to subvert the autonomous issue of European law, in a manner contrary to paragraph 29 of the judgment in *Benincasa*. The approach does not involve the application of principles of English law as Mr Thanki suggested, but rather an examination of the factual background to the proposed alternative claims on the materials before the Court, the approach advocated by the Privy Council in *Bols Distilleries*.
37. Although Mr Thanki sought to characterise *Benincasa* as the key decision of the European Court for the purposes of this application, on analysis it is of limited assistance. It is distinguishable from the present case on what seems to me to be the fundamental ground that (in stark contrast to the present case) the defendant was not actually challenging the validity of the jurisdiction clause, which he had in fact signed separately from the franchise agreement. He was merely claiming that the franchise agreement was void because it was effectively illegal under various provisions of German law. That the validity of the jurisdiction clause itself was not being challenged either on substantive or formal grounds emerges very clearly from paragraph 79 of the Opinion of the Advocate General. Paragraph 29 of the judgment has to be read against that background and it simply does not follow that the European Court would have reached the same decision if the defendant had been challenging the validity of the jurisdiction agreement by contending that there had been no "consensus".
38. As for Mr Thanki's contention that even if the Credit Agreement was void, the Defendants had not put forward a case of absence of authority of Mr Wang to enter a jurisdiction agreement, quite apart from the fact that the burden of showing a good arguable case rests upon the Claimants, I agree with Mr Butcher that this involves the somewhat extraordinary proposition that Mr Wang had authority to enter the jurisdiction agreement but not the Credit Agreement itself. This can hardly be so when the subject matter of the jurisdiction agreement is disputes in connection with the Credit Agreement. The fact that he might have had authority, in other circumstances, to enter into jurisdiction agreements in relation to the normal business of the First Defendant of the renting out of mobile telephones is irrelevant to the issue whether he had authority to enter this particular jurisdiction agreement. In my judgment the Claimants have not shown a good arguable case that he had such authority or that the jurisdiction agreement was valid.
39. At one stage of the hearing, it seemed to me that Mr Thanki's fall back argument that the restitution claim might be covered by a valid jurisdiction clause even if the misrepresentation claim was not, had some force. However, on analysis, I consider the argument misconceived. Both the defence that the Credit Agreement was not the subject of a valid board resolution and the defence that it was not in the best interests of the Defendants (upon which the restitution claim is predicated) lead to the conclusion that there never was any binding agreement and that the Credit Agreement was void. Those defences involve a challenge to the jurisdiction clause as well as the Credit Agreement.
40. Before leaving the first issue, I should deal briefly with two further matters upon which the Claimants relied in support of their case that the jurisdiction clause was valid. First, although at one stage of his argument Mr Thanki was inclined to accept that the reasoning of the appellate courts in *Fiona Trust* was irrelevant to the first issue, he nonetheless referred me to passages in the judgments of Longmore LJ in the Court of Appeal and Lord Hoffmann in the House of Lords, in general support of his submissions on severability. In my judgment, the reasoning in that case is of no assistance to the Claimants in relation to the first issue for several reasons:
 - i) The ratio of the case concerns the separability and construction of arbitration clauses in English law. Of particular relevance to the reasoning of the Courts on the issue of separability was section 7 of the Arbitration Act 1996 (see paragraph 22 of Longmore LJ's judgment and paragraph 12 of Lord Hoffmann's judgment). That section provides:

"Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

There is no equivalent statutory provision applicable to jurisdiction clauses under English law. Nor is there any equivalent principle of European law applicable to Article 23, despite the interpretation the Claimants seek to put upon *Benincasa*.
 - ii) Although there are obiter passages in the judgments in *Fiona Trust* which suggest that the same broad purposive approach should be adopted in relation to jurisdiction clauses as in relation to arbitration clauses, that is in the context of construction of the clause. As I see it, nothing in any of the judgments touches upon the issue of the validity of jurisdiction clauses under Article 23 or the strict approach to that issue of European law laid down by the European Court of Justice, another reason why this Court should be cautious in transposing the reasoning of *Fiona Trust* to a case such as the present, at least as regards this first issue.

- iii) The common law position in relation to the issue of separability of jurisdiction clauses has been developed in cases other than *Fiona Trust*, specifically the decision of the Court of Appeal in *Mackender v Feldia* [1967] 2 QB 590. Both Lord Denning MR (at p 598C-D) and Diplock LJ (at p 603A-B) recognise that where the defence is that the defendant never agreed to the contract containing the jurisdiction clause at all, in other words an issue as to whether there was consensus ad idem (per Diplock LJ at p 603A), then the jurisdiction clause will not apply to that dispute. To like effect is a passage in the decision of Colman J in *IFR Limited v Federal Trade SpA* (2001) unreported, BA111: [2001] EWHC 519 (Comm), referring to defences of absence of consensus (albeit in fact in the context of arbitration clauses). Nothing in the appellate judgments in *Fiona Trust* casts doubt upon the correctness of that analysis.
- iv) Even if the judgments in *Fiona Trust* were relevant to this first issue, I do not consider that there is anything in them inconsistent with the principle in play in the present case that consent to the relevant jurisdiction clause must be clearly demonstrated. In particular Lord Hoffmann's judgment at paragraph 17 supports the Defendants' case rather than the Claimants' case:

"The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a "distinct agreement", was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement."

The last sentence of that paragraph is essentially the present case. Equally, the reasoning there echoes that of the Court of Appeal in *Mackender v Feldia*.

41. The second matter is the contention by the Claimants that the Defendants have waived any objection to the validity of the jurisdiction clause because they did not raise any objection to jurisdiction when the original Claim Form containing only the primary contractual claim was served. This argument is misconceived. The Defendants may have chosen not to contest jurisdiction in relation to the contractual claims for all sorts of reasons, including a commercial assessment that they would be better served fighting that dispute in England than in Taiwan. However, no question of waiver of any objection to the jurisdiction or of any objection to the validity of the jurisdiction clause in the future could arise, absent some agreement or promise or representation to that effect. It is completely impossible to spell out any such agreement, promise or representation from the bare fact that the Defendants did not challenge the validity of the clause when served with the original Claim Form.
42. It follows that, in my judgment, in relation to the proposed alternative claims, the Claimants have not shown a good arguable case to the requisite standard of much the better of the argument, that the jurisdiction clause was the subject of real consensus between the parties within the meaning of Article 23. The Court does not have jurisdiction over those claims.

The construction issue

43. In the light of my conclusion on the first issue, the second construction issue does not arise, although since the issue was argued I will deal with it, albeit briefly. Here the Claimants can legitimately rely upon the appellate judgments in *Fiona Trust* as advocating a fresh start to the construction of not only arbitration clauses but jurisdiction clauses, which are to be liberally and broadly construed. The fine distinctions drawn between different wordings in clauses such as "arising out of" or "arising under" or "in connection with" in numerous earlier decisions of the English Courts have been swept away. As Lord Hoffmann put the matter in paragraph 12 of his judgment:
- "I do not propose to analyse these and other such cases any further because in my opinion the distinctions which they make reflect no credit upon English commercial law. It may be a great disappointment to the judges who explained so carefully the effects of the various linguistic nuances if they could learn that the draftsman of so widely used a standard form as Shelltime 4 obviously regarded the expressions "arising under this charter" in clause 41(b) and "arisen out of this charter" in clause 41(c)(1)(a)(i) as mutually interchangeable. So I applaud the opinion expressed by Longmore LJ in the Court of Appeal (at paragraph 17) that the time has come to draw a line under the authorities to date and make a fresh start."*
44. Mr Butcher realistically recognised the inevitability of that approach but submitted that nonetheless, the line had to be drawn somewhere and that the present proposed claims fell the wrong side of the line. I disagree. Adopting the purposive approach to the jurisdiction clause required after *Fiona Trust*, it seems to me quite impossible to say that both the misrepresentation and the restitution claims are not "in connection with" the Credit Agreement.
45. In any event, to the extent that it remains permissible to look at the older authorities on that phrase following *Fiona Trust*, which must be doubtful, both alternative claims would be claims "in connection with" the Credit Agreement, even on the law as it stood before *Fiona Trust*. The claim in misrepresentation is clearly in connection with the Credit Agreement a point so obvious that it was not even argued in *Donohue v Armco* [2002] 1 Lloyd's Rep 425, per Lord Bingham of Cornhill at paragraph 14. To like effect is the judgment of Peter Gibson LJ in *DSM Anti-Infectives BV v SmithKline Beecham* [2004] EWCA Civ 1199 at paragraph 33.

46. Equally, in relation to the restitution claim, despite the Defendants' attempt to distinguish the decision of Cooke J in *Caterpillar Financial Services v SNC Passion* [2004] EWHC 569 (Comm); [2004] 2 Lloyd's Rep 99, I consider that the reasoning in that case is compelling. Faced with a plea by the defendant that the loan agreement sued upon was illegal, unenforceable or void, the claimants pleaded an alternative case that they were entitled in restitution to repayment of monies paid under the agreement. The judge concluded that the proposed claim fell within the relevant jurisdiction clause because it "*arose out of or in connection with the Loan Agreement, since without that agreement no sum would have been advanced at all*" (paragraph 16 of the judgment). By parity of reasoning, the restitution claim in the present case is in connection with the Credit Agreement because without it the Claimants would not have advanced any monies to the Defendants.

Conclusion

47. However, although the Claimants do have a good arguable case that the proposed alternative claims would fall within the scope of the jurisdiction clause, in my judgment they have not established a good arguable case as to the validity of the jurisdiction clause and accordingly, the application to amend to add the alternative claims must be dismissed.

Mr Bankim Thanki QC and Mr Derrick Dale (instructed by Allen & Overy LLP) for the Claimants
Mr Christopher Butcher QC and Mr Paul Stanley (instructed by Davis & Co) for the Defendants