Neutral Citation Number: **[2020] EWHC 1201 (Comm)**

CL-2019-000528

Case No: CL-2019-000528

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice,
Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 13 May 2020

Before :

MRS JUSTICE COCKERILL DBE

- -

Between:

VICTOR VICTOROVICH PLEKHANOV **Claimant**

- and –

ALEXEY ANDREYEVICH YANCHENKO **Defendant**

- -
- -

Mr Andrew Scott (instructed by **Macfarlanes LLP**) for the **Claimant**
The Defendant appeared in person

Hearing date: 1 May 2020

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Approved Judgment

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

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 13 May 2020 at 10:00am.

Mrs Justice Cockerill:

Introduction

1. I have heard two applications: (i) by the Defendant ("Mr Yanchenko") to challenge the Court's jurisdiction out of time (the "Jurisdiction Application"); and (ii) by the Claimant ("Mr Plekhanov"), for judgment in default of a Defence (the "Default Judgment Application").

2. As further described below, the claim is for US$786,530 due from Mr Yanchenko under a written agreement dated 13 October 2018 (the "Agreement"). The Agreement contains what Mr Plekhanov says is a clear clause providing for the English Court's jurisdiction.

3. Mr Plekhanov's position is that so far as concerns the Jurisdiction Application:

    i) It has been made out of time and in circumstances where Mr Yanchenko is deemed to have accepted the Court's jurisdiction pursuant to CPR r. 11(5).

    ii) There has been no application for an extension of time and there would be no proper basis to grant such extension having regard to the relief from sanctions principles that apply by analogy.

    iii) There is accordingly no need for the Court to examine the merits of the Jurisdiction Application. But even if that were otherwise, it is readily apparent that the challenge is baseless given the English jurisdiction clause.

4. Mr Yanchenko submits that the Jurisdiction Application was made in time and that his application should be upheld *inter alia* because the requirements of the clause were not met before proceedings were commenced.

5. So far as concerns the Default Judgment Application, Mr Plekhanov says that no Defence has been served and the deadline for it has long since passed. The conditions for judgment in default of defence are met and Mr Plekhanov is thus entitled to the relief sought in the Claim Form and Particulars of Claim.

6. Mr Yanchenko disputes the Default Judgment Application, in particular on the basis that the Certificate of Service was filed out of time and that he could not have filed a defence while contesting the jurisdiction.

Background

The Claim

7. The Claim is for US$786,530 said to be due from Mr Yanchenko under the Agreement. It is a straightforward claim for a sum due under a written agreement, which itself dealt with disputes which had arisen under an Investment Management Agreement which was governed by English Law and contained an exclusive jurisdiction clause.

8. As appears from its recitals, the background is that Mr Yanchenko had been managing an account of Mr Plekhanov at Interactive Brokers, the balance of the account fell below an agreed level, and Mr Yanchenko agreed to restore it to US$800,000, at which point the Investment Management Agreement would be terminated.

9. Pursuant to Clauses 1 and 2 of the Agreement, Mr Yanchenko was to effect that restoration by 5 May 2019, failing which Mr Plekhanov would be entitled to claim the amount by which the balance fell below US$800,000 from him. Pursuant to Clause 3, Mr Yanchenko agreed to satisfy that claim within 5 business days of receipt.

10. Clauses 8 and 9 of the Agreement provide as follows:

> "8. The parties have decided that this Agreement shall be governed by English law.
>
> 9. In the event of the emergence of any dispute, the Parties shall appoint a meeting to resolve it through negotiations. The parties have also agreed that the meeting appointed for the settlement of disputes may not be rescheduled more than 2 (Two) times and that the total duration of the rescheduling may not exceed 15 (Fifteen) calendar days. If no agreement is reached after the holding of the meeting, the Parties shall have the right to apply to a London court pursuant to the competence and/or jurisdiction of the courts."

11. As at 5 May 2018, the Interactive Brokers account was US$786,530 below the agreed level. Mr Plekhanov issued a payment request in that amount. Mr Yanchenko says he did not have that amount. Payment was not made within the five days prescribed by the Agreement.

12. By various emails and other communications in May and June 2019, Mr Plekhanov claimed that sum from Mr Yanchenko, who seems to have acknowledged that it was due. For example in correspondence on one occasion he said: *"I have violated the terms by which I am obliged to make payment".*

13. There also appear to have been repeated attempts to meet in person, with a view to resolving matters amicably. Mr Plekhanov says, and I see from the correspondence, that meetings in person were offered on May and June but that all these attempts came to nothing. There

is a dispute between the parties, which is not material for present purposes as to whether Mr Yanchenko refused to meet.

14. There were however certainly telephone conversations. Indeed Mr Yanchenko positively says that an agreement compromising this claim was reached by phone on 16 May. That is his defence to the claim. His affidavit of 4 February refers to an email evidencing that agreement. That email says:

> "According to the results of our telephone conversation yesterday, I accepted for myself:
>
> 1. You have agreed that I continue to work on your brokerage account.
>
> 2. You are entitled to block my account access at any time.
>
> 3. If the balance exceeds 100,000 USD any amount from above can be withdrawn from your account by you even without notifying me
>
> 4. Trading on your account does not relieve me from liability by agreement. I for my part will also seek a solution for transferring to your bank account, but my obligations will be reduced by the amount earned in your brokerage account."

15. Mr Plekhanov replied to each point: *"According to the terms of the Agreement".* He also said: *"I am conducting the legal process and taking other measures to protect my interests".*

16. Macfarlanes for Mr Plekhanov sent a letter before action dated 11 June 2019. Mr Plekhanov says that Mr Yanchenko failed to respond to it. Mr Yanchenko says that he sent an email on 18 June asserting the existence of the compromise agreement, though the actual email was not before me.

17. Mr Plekhanov commenced these proceedings on 23 August 2019. Mr Yanchenko was put on notice of the existence of the proceedings by email at once and does not dispute that he received this informal notification.

18. The Claim Form, Particulars of Claim, Response Pack and other documents were formally served on Mr Yanchenko in Italy on 16 October 2019, as confirmed by the Certificate of Service filed with the Court. There is no dispute that such service was effective, though Mr Yanchenko relies on the fact that the Certificate of Service was filed late.

19. Pursuant to CPR rr. 6.35(3)(a) and 58.6(3), Mr Yanchenko was required to file an Acknowledgment of Service within 21 days of being served with the Claim Form, i.e. by 6 November 2019.

20. So far as the records in the Court file are concerned Mr Yanchenko failed to comply with this requirement: his Acknowledgment of Service was filed on 13 December 2019, i.e. 37 days late and more than twice the period of time afforded for such filing.

21. Mr Yanchenko's explanation in correspondence with Macfarlanes in November 2019, and before me, is that he posted the document to the Court on 29 October 2019, but it was not received.

22. He relies in this connection on what he describes as a delivery confirmation, but appears instead to be a proof of posting dated October 29. It is not clear what was posted under cover of that proof. The absence of records on the Court's file, and later enquiries made by Mr Plekhanov's solicitors, suggest that either no Acknowledgement of Service arrived or it was not accepted as a valid filing.

23. On 14 November 2019, Mr Yanchenko sent an email to Macfarlanes stating "*I responded to your lawsuit in a letter to a London court that the lawsuit was misplaced*". Macfarlanes responded by email the same day informing him that the Court file contained no such letter and drawing attention to the need to file an Acknowledgment of Service and the relevant dates for doing so, and for disputing the Court's jurisdiction. That email also advised him to instruct English solicitors immediately *"as we have previously noted"*.

24. Mr Yanchenko responded by further email dated 14 November 2019. This asserted that *"[t]he court received form N9(CC) on November 1. The copy is in attach*". The attachment was what appears to be a scan of the original Acknowledgement of Service, but nothing dealing with its receipt by the Court. It is unclear what basis Mr Yanchenko had for asserting that the Court "received" this Acknowledgment of Service.

25. On the basis of these facts I am prepared to conclude that on the balance of probabilities an Acknowledgement of Service was sent, as the proof of posting says. However that does not mean that it was received, or that as a matter of law it was deemed received. The evidence is that it was not received.

26. As for deemed receipt, I explained to Mr Yanchenko in the course of argument that there appears to be no basis for deeming an Acknowledgement of Service to be received. There is no equivalent provision to that which allows deemed service of a claim form within the jurisdiction. There is also no equivalent for service out of the jurisdiction.

27. So far as Acknowledgement of Service is concerned it appears that it is the responsibility of the defendant to get the document to the Court's office. Thus:

> "White Book paragraph 10.1.1": "Filing": Means delivering, by post or otherwise, to the court office. The defendant delivers the acknowledgment of service to the court office; the court office notifies the claimant..."
>
> White Book paragraph 10.4.1: "The responsibility for telling the claimant that the defendant has acknowledged service is placed on the court. The court's duty arises "on receipt of an acknowledgment of service". It is the defendant's duty to file the acknowledgment. "Filing" is defined in r.2.3 and means "delivering it, by post or otherwise, to the court office". When sent by post, the date of filing is the date on which it is received by the office (and not the date of posting or a fixed number of days after that). A defendant who sends an acknowledgment by post is unlikely to be able to call in aid the provisions of s.7 of the Interpretation Act 1978 as this refers to "service" of documents and not to "filing". The risk of loss or delay in the post lies entirely upon the defendant using this mode of acknowledging service. The duty of the court arises "on receipt"."

28. It follows that Mr Yanchenko did not comply with the requirement to file an acknowledgement of service by the due date.

29. I turn now to the jurisdiction challenge. It appears from Mr Yanchenko's evidence that he completed an Acknowledgment of Service form dated 29 October 2019.

30. As part of so doing he had signed the form and ticked the box marked "*I intend to contest jurisdiction*". Adjacent to that box appears the following: "*If you do not file an application to contest the jurisdiction within 28 days of filing the acknowledgment of service, it will be assumed that you accept the court's jurisdiction*". That reflects the requirements under CPR rr. 11(4) and 58.7(2) and the consequence of failing to comply with them under CPR r. 11(5), i.e. deemed acceptance of the Court's jurisdiction. That application was due on 6 December 2019.

31. Mr Yanchenko did not make such an application.

32. On 22 November 2019 Mr Yanchenko says he sent a document called *"Application for Contest the Court's Jurisdiction"* to the Court. Again, he relies on what he terms a delivery confirmation, but instead appears to be a proof of posting.

33. On 26 November the Court informed Macfarlanes in answer to a query that "*no documents had been received, by post or electronically, from*

[Mr Yanchenko]" and that there was no record of any telephonic communication between him and the Court regarding the filing of such documents. It appears that Macfarlanes warned the Court to expect something by post which might be defective and checked the Court had a process for dealing with such submissions.

34. Mr Yanchenko does not suggest that he made any enquiries with the Court at the time or did anything in response. In fact it appears that this document was received on the Court's file shortly thereafter and logged - in that it appears on the CE File system - but it was not accepted as an application.

35. While as regards this document it does appear that it was received, once again it was a document which required to be "filed" in the form of an application notice supported by evidence (and paying an appropriate fee). Plainly these requirements were not complied with.

36. In response, Macfarlanes wrote to Mr Yanchenko on 5 December 2019 drawing attention to his failure to file the required application with the Court. It advised him in emphatic terms to take legal advice. The letter made proposals for the resolution of the points raised in the document entitled "*Contest the Court's Jurisdiction*"; and specifically, Mr Yanchenko's argument that the Clause 9 of the Agreement required a meeting between the parties and that such meeting had not taken place. Macfarlanes proposed to conduct a further meeting with Mr Yanchenko by telephone.

37. Mr Yanchenko responded to Macfarlanes by email dated 12 December 2019. This reiterated his purported jurisdiction challenge, raised new arguments in purported reliance on the CPR Practice Directions on pre-action conduct, and proposed alternative dates for the telephone meeting that Macfarlanes had suggested. He suggested a stay of the proceedings. The email did not deal with the information that the jurisdiction challenge had not been received.

38. The next day Mr Yanchenko's Acknowledgment of Service was filed, having been sent by courier on 9 December (between the two letters).

39. The parties conducted a telephone meeting on a without prejudice basis on 16 December 2019, but no agreement was reached. Macfarlanes wrote to Mr Yanchenko the next day (17 December) repeating the invitation to drop his purported jurisdiction challenge – and suggesting if he did not that he should file his defence and take legal advice. He refused to do so, again placing purported reliance on the CPR.

40. Mindful of Mr Yanchenko's apparent status as a litigant in person, Macfarlanes wrote to the Court on 20 December 2019, copying Mr Yanchenko, enclosing the "*Contest the Court's Jurisdiction*" document, and inviting the Court to treat it as an application under

CPR Part 11 despite its formal defects and to give directions for its determination. The Court Listing Office declined that invitation by email dated 15 January 2020, noting that it would be necessary to apply for directions and *"[i]f the defendant is contesting the court's jurisdiction then he needs to make an application to do so and those applications are usually done via a hearing*".

41. Macfarlanes wrote to Mr Yanchenko the next day (16 January 2020) enclosing the communication from the Court Listing Office. Having referred to that communication, the letter stated as follows:

> "… the current position is that you have neither challenged the jurisdiction of the Court nor filed a Defence to our client's claim, and the deadline for you to take either step has expired. Our client is therefore entitled to obtain judgment against you in default of a defence.
>
> Without prejudice to our client's position, if you intend to make a valid application to contest the Court's jurisdiction, please file that application and serve a copy on this firm by close of business on 23 January 2020. If you do not do so, we will apply for judgment in default. We note that a fee will be charged by the Court to issue any application, which you will need to make arrangements to pay. If you are unsure as to any steps to be taken in these proceedings, we repeat the recommendation in our previous correspondence that you instruct English solicitors to assist you."

42. Mr Yanchenko replied as follows by email the same day: "*Thank you. I will take into account your email.*" The 23 January deadline came and went without an application under CPR Part 11 having been filed or served by Mr Yanchenko.

43. On 4 February 2020, Macfarlanes received an email from Mr Yanchenko attaching an application notice challenging jurisdiction, supporting evidence, and a draft order, stating that these had been submitted to the Court. However, the application notice bore no seal from the Court, it did not appear on the Court file, and Macfarlanes was informed by the Court Listing Office that whereas Mr Yanchenko had attempted to file an application with the Court it had been rejected. The reason for this is not known though it appears that Mr Yanchenko sought help with fees.

44. The Court file shows that the Jurisdiction Application was in fact filed on 12 February 2020.

Discussion - jurisdiction application

45. A Defendant seeking to challenge the Court's jurisdiction may do so under CPR r.11(1). Pursuant to CPR r. 11(2) "*a defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10*". CPR r. 11(4) then imposes a deadline for such an application, which is amended in this Court by CPR r. 58.7(2): *"[a]n application under rule 11(1) must be made within 28 days after filing an acknowledgment of service*". The consequence of failing to comply with that requirement is deemed acceptance of jurisdiction under CPR r. 11(5).

46. There are a number of obstacles to the Jurisdiction Challenge.

47. The first is the question of filing an Acknowledgment of Service "*in accordance with Part 10*" as required by CPR r. 11(2). The deadline for filing an Acknowledgment of Service was 6 November 2019. As I have already indicated, Mr Yanchenko did not make that filing by that date. He accordingly technically cannot challenge the Court's jurisdiction at all unless an extension of time for serving the Acknowledgement of Service is granted because the requirement under CPR r. 11(2) has not been complied with. He has made no such application.

48. The second hurdle is the question of applying to challenge jurisdiction. Assuming that the final filing of his Acknowledgment of Service on 13 December 2019 were accepted as valid, the Jurisdiction Application was not filed within the 28 days of that date. It came some 33 days later, on 12 February 2020.

49. Alternatively if, as Mr Yanchenko submits (and contrary to what I have found above), his first attempt at sending an Acknowledgement of Service should be taken as valid and thus giving the correct date, the application would have had to come by early December. Yet there was no filing by this date; there was only the lodging of the defective *"Contest the Court's Jurisdiction"* document. The actual filing comes over 70 days later.

50. *Prima facie* therefore even if one were to assume that Mr Yanchenko is to be taken as having filed an Acknowledgment of Service on either date, he failed to make a timely application under CPR Part 11. The consequence under CPR r. 11(5) applies: "*he is to be treated as having accepted that the court has jurisdiction to try the claim*".

51. Of course it is not in issue that I have the power under the CPR to grant a retrospective extension of time to enable a jurisdiction challenge to be made, where appropriate, applying by analogy principles on relief from sanctions: *Zumax Nigeria Ltd v First City Monument Bank plc* [2016] 1 CLC 953 (CA) [24]-[28].

52. But Mr Yanchenko has made no application for such an extension of time. That is so notwithstanding that Mr Plekhanov made clear in his

evidence in answer to the Jurisdiction Application (served on 27 February 2020) that his position was that it would not be open to Mr Yanchenko to pursue his Jurisdiction Application without such an extension of time being granted.

53. Again assuming that (with an eye to Mr Yanchenko's litigant in person status), I were minded to ignore the lack of any application, I accept the submission that there would in any event be no basis for an extension of time to be granted having regard to the applicable principles stated in *Zumax*.

54. I should explain this clearly to Mr Yanchenko. This Court cannot just extend time on any basis it might wish to. There are quite strict rules, which have been carefully considered and laid down by the Court. The cases laying down those rules say that I am bound to follow a three-stage approach, and to consider whether:

    i) The breach of the relevant Rule, Practice Direction, or Order was serious or significant;

    ii) There is a good reason for the breach;

    iii) Taking into account in particular the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with Rules, what justice overall requires.

55. Taking these three considerations in turn - was there a serious or significant breach? I conclude that there was. The cases are clear that delay does not have to run into months to be serious and significant. Here the 28 day period that applies in this Court for applications under CPR 11 is more generous to Defendants than that which applies elsewhere High Court. Essentially a Defendant gets an extra 14 days. But not only did Mr Yanchenko fail to comply with that more generous period, he failed by a considerable distance: on the most charitable construction the lateness was 33 days. Further Mr Yanchenko was informed at the time that any attempt he had made to comply had been ineffective. He had therefore a chance to comply or at least to seek an extension promptly. He did not do so. I conclude therefore that there was a breach that was serious and significant.

56. Was there a good reason for the breach? There can be only one answer: no. Mr Yanchenko has provided no adequate explanation for his breaches. Good reasons for breach are not easy to find on the authorities. There is no sign of one here. None is offered in his evidence in support of the Jurisdiction Application. Nor is any good reason even possible to hypothesise, particularly where the relevant deadlines were brought to Mr Yanchenko’s attention and he was repeatedly advised - in line with the Law Society's Guidelines - to take legal advice. The only explanation for the breach is Mr Yanchenko’s

own conduct in failing to make the relevant filings with the Court on time, despite warnings, which is not a good reason.

57. Even on the basis that Mr Yanchenko did send his documents to the Court and one went missing and the other was not accepted, it is no excuse. That is because filing is the litigant's responsibility, and there is nothing about the circumstances of this case which should provide an excuse. It was fairly quickly made clear to Mr Yanchenko what had gone wrong. In relation to the jurisdiction challenge he was notified on 5 December. And by 16 January 2020 he had clear information that the Court had refused to treat his informal jurisdiction challenge as a valid application. Yet it was not until almost 4 weeks later that the Jurisdiction Application was filed on 12 February 2020.

58. As for the third question, it is important to understand that this does not reintroduce an unfettered discretion. Once the answers to the first two questions have gone against the applicant, as they have here, there is a presumption that an extension will not be granted, and the factors going in the other direction need therefore to have some considerable weight. The authorities are clear that in the modern world this court must remember to place weight on the importance of the efficient conduct of litigation at proportionate cost.

59. Further, questions of prejudice can feed into this. If (as is submitted) Mr Plekhanov is entitled to judgment in default of a Defence essentially because of the failure of the jurisdiction challenge he would be prejudiced by an extension.

60. There is also the question of the merits - that may be a factor if the merits are either very strong or very weak. Certainly they do not appear to be very strong in Mr Yanchenko's favour so as to assist him. I will come on to look at the merits later.

61. What Mr Yanchenko really says is that it is unfair to expect him, as a litigant in person, whose first language is not English, to comply with the rules. I understand why he says this, and thinks it. However I am again bound by authority on this point. This is an issue which has been considered by this country's highest court in: *Barton v Wright Hassall llp* [2018] 1 WLR 1119 (SC), [18] per Lord Sumption.

> “Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR r 1.1(1)(f) . The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications under CPR 3.9 for relief from sanctions, it is now well established that the fact that the applicant was

> unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him: R (Hysaj) v Secretary of State for the Home Department [2015] 1 WLR 2472 , para 44 (Moore-Bick LJ); Nata Lee Ltd v Abid [2015] 2 P & CR 3 . At best, it may affect the issue "at the margin", as Briggs LJ observed (para 53) in the latter case, which I take to mean that it may increase the weight to be given to some other, more directly relevant factor.... The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights, under the Limitation Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take."

62. Lord Briggs, though disagreeing on the result in that case, did not differ significantly on the approach to be adopted to litigants in person.

63. As Mr Scott submitted, the rules as to the lodging of a jurisdiction challenge are not particularly impenetrable rules which should call for some accommodation to be granted to Mr Yanchenko as a litigant in person.

64. Mr Yanchenko's difficulty in this regard is again increased by the fact that Macfarlanes have indicated to him where documents have not been lodged and gone some way to try to accommodate Mr Yanchenko. So over the course of correspondence Macfarlanes not only advised him to take legal advice but also reiterated the need to file an Acknowledgment of Service, challenge and Defence by the relevant date and explained the defects (procedural and substantive) of his objections to jurisdiction. Even if there were an initial confusion, Mr Yanchenko was given a very clear "heads up".

65. I would add that it also strikes me as not irrelevant that Mr Yanchenko is plainly not at the most vulnerable end of the spectrum of litigants in person. He is an intelligent businessman. He has had no difficulty understanding the rules, and indeed accessing and evaluating them, including locating and assessing the details of the Pre-Action Protocols and the status of the Commercial Court Guide. He has made submissions on both in some detail both orally and in writing. He is therefore the kind of litigant in person who is not particularly apt to receive special consideration running contrary to the powerful indications given in *Barton v Wright Hassall*.

66. In these circumstances, even ignoring any weight (which might assist Mr Plekhanov rather than Mr Yanchenko) deriving from the merits, I would conclude that this is not a suitable case in which to grant an extension of time. It follows that Mr Yanchenko is deemed to have submitted to the jurisdiction and cannot now challenge the jurisdiction of the court. The jurisdiction application falls to be dismissed.

Merits of the Jurisdiction Challenge

67. However given the rather odd circumstances of this case and the fact that Mr Yanchenko is a litigant in person, I will go on to consider the merits of his jurisdiction challenge, so that he may know what would have been the result if his challenge had been made in time.

68. When I do so I have no difficulty in concluding that even if the jurisdiction challenge had been brought in time, it would have failed.

69. The starting point is that the Agreement contains in Clause 9 an English jurisdiction clause and the Claim which has been brought plainly falls within its scope. In the circumstances, the Court has jurisdiction over Mr Yanchenko pursuant to Article 25(1) of the Brussels I Recast Regulation.

70. Article 25(1) of the Regulation, which may not be familiar to Mr Yanchenko says this:

> "If the parties, regardless of their domicile, 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, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise."

71. That, on its face, is a complete answer to the Jurisdiction Challenge. There is nothing in Clause 9 which could give rise to an argument that it is null and void as a matter of English Law.

72. Indeed, that was not really Mr Yanchenko's argument. He took no issue with the drafting of the clause as a jurisdiction agreement. In his evidence and correspondence Mr Yanchenko submitted that:

    i) The requirement for a meeting under Clause 9 of the Agreement was not complied with;

    ii) The dispute was settled on a 16 May 2019 telephone call;

    iii) Mr Plekhanov failed to comply with the Court's requirements on pre-action correspondence.

73. I would not have been persuaded by these arguments.

74. Although the Court takes seriously the requirements of informal dispute resolution - as is plain from the judgment of O'Farrell J in *Ohpen v Invesco* [2019] EWHC 2246 (TCC) (to which Mr Scott very properly drew my attention) - there are questions over whether this clause is clear enough to be enforced, and whether the content is sufficient to derogate from the Article 25 choice.

75. Those arguments actually resonate with what O'Farrell J had to say at [32] of that judgment.

> "...where a party seeks to enforce an alternative dispute resolution provision by means of an order staying proceedings:
>
> i) The agreement must create an enforceable obligation requiring the parties to engage in alternative dispute resolution.
>
> ii) The obligation must be expressed clearly as a condition precedent to court proceedings or arbitration.
>
> iii) The dispute resolution process to be followed does not have to be formal but must be sufficiently clear and certain by reference to objective criteria, including machinery to appoint a mediator or determine any other necessary step in the procedure without the requirement for any further agreement by the parties.
>
> iv) The court has a discretion to stay proceedings commenced in breach of an enforceable dispute resolution agreement. In exercising its discretion, the Court will have regard to the public policy interest in upholding the parties' commercial agreement and furthering the overriding objective in assisting the parties to resolve their disputes."

76. Based on this analysis I would be inclined to consider that the obligation in Clause 9 is insufficiently clear to be enforced as a condition precedent. But even assuming it were clear enough and not effectively subsumed by Article 25, it seems quite clear to me that such clauses have to be read in a constructive and practical way and not be operated over-technically.

77. Here it is clear that there were attempts to meet physically, but also that there were telephone conversations. Indeed, it is the central part of Mr Yanchencko's case that the discussions were so substantive that they resulted in an agreement. Thus, even if it were enforceable, the requirements of Clause 9 would in my judgment have been satisfied, and it was open to Mr Plekhanov to commence proceedings (subject to the question of the appropriate pre-action protocol).

78. As regards the Pre-Action protocol point, this does not go to jurisdiction. It might be said to have gone to costs or have resulted in an order that money be paid into Court (CPR 3.1 and 44.2(5)). But in any event the point - that the Debt Pre-Action Protocol should have been, but was not, used - is misconceived. The Debt protocol applies only when the Claimant is a business. Mr Plekhanov, of course, is an individual. As such there was no applicable pre-action protocol, and the Letter before Action was adequate to comply with the requirements of the CPR and the Commercial Court Guide as to pre-action conduct. The latter makes clear at B3.2-3.3 that:

> "... the parties to proceedings in the Commercial Court are not required, or generally expected, to engage in elaborate or expensive pre-action procedures, and restraint is encouraged ...
>
> Thus the letter of claim should be concise, and it is usually sufficient to explain the proposed claim(s), identifying key dates, so as to enable the potential defendant to understand and to investigate the allegations."

79. As to the supposed settlement (which also underpins the arguments on the merits of the case) this is not a question for the jurisdiction stage and could not assist Mr Yanchenko's challenge.

The Default Judgment application

80. Mr Plekhanov then seeks judgment on the Claim against Mr Yanchenko in default of a defence pursuant to CPR r. 12.3(2). This application would not be available to Mr Plekhanov if Mr Yanchenko had succeeded in establishing that his jurisdiction challenge was brought within time, or gaining an extension, so that the application was live. That is because a Defendant who brings an application under CPR Part 11 is not required to file a defence until that application is determined (CPR r.11(9)(a)).

81. However, I have just determined that the application to extend time fails and that Mr Yanchenko is deemed to have submitted to the jurisdiction. The question therefore arises whether the requirements for judgment in default of a defence are met.

82. Mr Plekhanov made the Default Judgment Application by notice dated 28 February 2020 and it was sent by email on 2 March 2020 and formally served on Mr Yanchenko in Italy on 3 April 2020. It being an ordinary application, Mr Yanchenko had 14 days to file and serve evidence in answer (CPR PD 58 §13.1(2)), i.e. until 17 April 2020. He indicated that his understanding was that he could not serve such evidence pending the determination of the Court's jurisdiction and that the claimant did not have to serve particulars of claim until that time.

83. On 20 March 2020, Macfarlanes in correspondence noted that Mr Yanchenko's evidence in answer to the Default Judgment Application needed to be in the form of a witness statement signed with a statement of truth. Macfarlanes emailed again on 1 and 3 April 2020 to ascertain whether this would be forthcoming. The latter email corrected his assertion that he could not serve such evidence pending determination of the Court's jurisdiction and against suggested that he retain English solicitors to assist him.

84. On 17 April 2020, in response to an enquiry about the bundles for the hearing, Mr Yanchenko sent an email to Macfarlanes attaching his correspondence with the Court and stated that *"[i]n a few days I'll send you my comments and extra documents necessary for inclusion in the bundle*" . Macfarlanes replied by email dated 20 April drawing attention to the need for correspondence with the Court to be copied to them, reiterating that any evidence in relation to the Applications needed to be in the form of a witness statement, explaining that the deadline for this had passed, and reserving Mr Plekhanov's right to object to any late-served evidence.

85. By email in response, on 21 April 2020, Mr Yanchenko stated *"[w]e have a misunderstanding. I did not plan send evidence of your application as I explain you before*".

86. On 27 April 2020, Mr Yanchenko emailed Macfarlanes enclosing a letter to the Court of the same date. The letter was in substance the evidence in answer to the Default Judgment Application. Though filed late I have considered this evidence.

Discussion - default judgment

87. Pursuant to CPR r. 12.1, "'*default judgment' means judgment without trial where a defendant – (a) has failed to file an acknowledgment of service; or (b) has failed to file a defence*".

88. Although Mr Yanchenko failed to file an Acknowledgment of Service within the time prescribed by CPR r. 6.35(3)(a) and r.58.6(3), he has done so subsequently, and (in the light of *Smith v Berrymans Lace Mawer Service Co* [2019] EWHC 1904 and new CPR r.12.3(1), (added by SI 2020/32, which entered into force on 6 April 2020) which makes clear that a default judgment may only be obtained where, at the time judgment is entered, no acknowledgment of service or defence had been filed and the time for acknowledging service had expired) the Default Judgment Application was advanced solely on the ground of his failure to file a defence.

89. CPR r. 12.3 sets out the conditions a claimant must satisfy to obtain default judgment.

90. One of these is (at least by implication and by reference to PD12) that the claim has been served on the defendant. Mr Yanchenko in his

connection submits that this is not satisfied because the certificate of service on the Court file was filed late, pointing (in an example of the sophisticated points he has been capable of making) to CPR 6.1 and the requirement for such a certificate to be filed within 21 days of service. However, I am satisfied that late filing of the certificate of service cannot render an application invalid, so long as service is proved. Mr Scott referred me to the case of *Henriksen v Pires* [2011] EWCA Civ 1720 where a failure to file such a certificate at all was held not to render the application for default judgment invalid or the judgment itself irregular.

91. The relevant considerations in the present case are those set out in CPR r. 12.3(2): "*Judgment in default of defence may be obtained only – (a) where an acknowledgment of service has been filed but a defence has not been filed; … and … the relevant time limit for doing so has expired*".

92. Mr Yanchenko has (or is to be taken as having) filed an Acknowledgment of Service but has not filed a Defence. The key question is whether the relevant time limit for doing so has expired.

93. Pursuant to CPR rr.6.35(3)(b)(ii) and 58.10(2), Mr Yanchenko was required to file a Defence within 35 days after service of the Particulars of Claim, (which were served with the Claim Form). That would make the Defence due by 20 November 2019 (ie. 14 days after the Acknowledgement of Service was due) and before the deadline for applying to dispute jurisdiction. It is also in this case nearly a month before the Acknowledgement of Service was filed.

94. That the Defence should have been due before the application had to be lodged is perhaps a counterintuitive position - and one can to an extent understand why Mr Yanchenko's original approach was to try to read the rules in a way which did not arrive at that result.

95. But that this is the correct analysis is indicated by the case of *Flame SA v Primera Maritime (Hellas) Ltd* [2009] EWHC 1973 (Comm) at [16-18]:

> "the rules are clear. Where a defendant in the commercial list has expressed a wish to challenge the jurisdiction it enjoys the protection afforded by CPR r.58.7(2). If the challenge is not pursued, the protection ceases.
>
> … The clear consequence of the use of the full 28 day period in which to make a challenge to the jurisdiction in conjunction with the 21 days allowed for filing an acknowledgement of service is that the 35 days allowed for service of the defence after service of the particulars of claim will have expired…

> Faced with the imminent requirement to serve a defence and the need to have time to do so, whether by agreement or order, a defendant should seek an extension of time."

96. That authority has not been subsequently disapproved. Even if that were not (as it seems to be) the law, this is not a case where an alternative approach would assist Mr Yanchenko. In normal circumstances, a Defendant has 35 days from service of the Particulars of Claim in which to serve a Defence and the Defence is notionally due 14 days after the date when the Acknowledgement of Service is due. Even if (without any justification from the rules) one applied that period on a *mutatis mutandis* basis to the date when submission in effect took place, the Defence would still not have been served in time. On this approach Mr Yanchenko would have had 14 days after the submission (which is deemed to have occurred 28 days after the Acknowledgement of Service, when an application to dispute the jurisdiction was not made). That would mean that on any analysis the Defence would have been due by 26 January. We are now in late April and no Defence has been served and no application made to extend time.

97. So even applying the most generous (and heterodox) approach to the timing issue, the defence was not served when due, and Mr Plekhanov is *prima facie* entitled to judgment in default. I should add that subsequent to my circulating this judgment to the parties for corrections Mr Yanchenko has submitted that the conclusion that default judgment was available is erroneous by reference to *Cunico Resources NV v Daskalakis* [2018] EWHC 3382 (Comm). However that is a case which deals with the question of default judgment when the relevant step has been taken by the time judgment is entered - and that is not the case here: judgment is sought in default of defence, not acknowledgement of service, and no defence has been filed.

98. The only question which remains is whether, even though no application to extend time was made, I should nonetheless grant one.

99. On reflection I have concluded that I should not, essentially for the same reasons which I have given in relation to the extension of time for making the application to dispute the jurisdiction. Again, this is a serious and significant breach. Again, there is no good reason given. There was a confusion, but that was explained by Macfarlanes. Mr Yanchenko's status as a litigant in person can assist only at the margins in the third stage of the consideration. And against this lies the prejudice to Mr Plekhanov.

100. Nor can the merits of the claim assist Mr Yanchenko. While his point on the merits may be capable of argument, the correspondence which embodies what he claims as a settlement agreement appears on its face to contradict any suggestion that Mr Plekhanov's right to claim under the Agreement was compromised. Even if the Agreement

was given an extra layer, there is absolutely no sign that the core obligation to pay was in any way altered. Further Mr Yanchenko's own admission has been that the sum is due.

101. The appropriate relief for the cause of action Mr Plekhanov asserts against Mr Yanchenko is the sum claimed, i.e. $786,530, plus statutory interest, as set out in the Claim Form and the Particulars of Claim, and I give judgment accordingly.