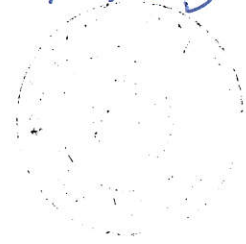


CIRCULATE

7.7.03



1 IN CHAMBERS

2  
3 IN THE GRAND COURT OF THE CAYMAN ISLANDS

4  
5 HOLDEN AT GEORGE TOWN, GRAND CAYMAN

6  
7 CAUSE NO. 577 OF 2002

8  
9 IN THE MATTER OF THE FOREIGN ARBITRAL AWARDS ENFORCEMENT LAW  
10 (1997 REVISION)

11  
12 BETWEEN:

- 13  
14 (1) WALKER INTERNATIONAL HOLDINGS LTD.  
15 (2) AF-CAP, INC

16  
17 Plaintiffs

18 AND

- 19  
20 (1) OLEARIUS, LTD  
21 (2) SOCIETE NATIONALE DES PETROLES DU CONGO  
22 (3) CAISSE CONGOLAISE D' AMORTISSEMENT  
23 (4) REPUBLIC OF CONGO

24  
25 Defendants

26 AND

27 STANDARD CHARTERED BANK

28  
29 Intervener

30 Appearances:

31 Jeremy Walton of Hunter & Hunter for the Plaintiffs

32 Mr. Mac Imrie of Maples & Calder for the First Defendant

33 Mr. Michael Todd Q.C. instructed by Mr. David McGrath of Quin & Hampson for the  
34 Intervener.

35 (2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant not appearing).

36  
37 Before: Hon. Chief Justice Anthony Smellie

38  
39 Heard on the 15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> of July 2003.



40  
41  
42  
43

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2  
3 REASONS FOR SUMMARY JUDGMENT  
4

5 On the 17<sup>th</sup> day of July 2003, I granted the Plaintiffs' application for  
6 summary judgment against the Second Defendant and made ancillary orders  
7 involving the First Defendant. These are the reasons.

8  
9 The Plaintiffs brought this enforcement action as judgment creditors  
10 respectively in the amounts of 30 million Euros and US\$10 million against  
11 the Fourth Defendant, the Republic of Congo ("ROC"), its debt  
12 management agency Caisse Congelaise D'Amortissement ("CCA") and the  
13 state owned oil company, Societe Nationale Des Petroles Du Congo  
14 ("SNPC"), the Second and Third Defendants respectively (hereinafter  
15 together "the Congolese defendants).

16 The judgments obtained in Paris, France to be enforced arise respectively  
17 out of an arbitral award and a judgment on a writ action taken in London,  
18 England. The Plaintiffs sue upon those judgment debts.

19  
20 BACKGROUND

21 The Plaintiffs as judgment creditors, have been pursuing the Second to  
22 Fourth Defendants in a number of jurisdictions around the world seeking  
23 the seizure of assets against which to enforce and satisfy their judgment  
24 debts. A number of these proceedings have involved SNPC which is a state-

1 owned company and which markets oil on behalf of the ROC. The ROC's  
2 chief national asset is said to be oil.

3

4 Proceedings were brought in Paris, France, by the First Plaintiff against  
5 bank accounts held by SNPC at certain banks there. The First Plaintiff was  
6 successful before the Paris Court of first instance on the 29<sup>th</sup> January 2002  
7 in its claim that it had a right to seize SNPC's assets in satisfaction of ROC's  
8 debts on the basis that SNPC was an *emanation d'Etat* of ROC. The  
9 Defendants appealed.

10

11 While the matter was in the French Court of Appeal, the existence of an  
12 arrangement involving this jurisdiction came to light. This is an  
13 arrangement involving the Second and Fourth Defendants established for  
14 the express purpose of providing a commercial loan to the First Defendant,  
15 Olearius Ltd. ("Olearius"). In May of 2002, a US\$210 million loan facility  
16 was granted to Olearius, a Special Purpose Vehicle ("SPV"), incorporated  
17 in the Cayman Islands. This was a four-year Pre-Payment Facility (the  
18 "Facility") and by the Summary Terms and Conditions of the Facility  
19 Olearius is said to be " the vehicle through which funds are made available  
20 to SNPC". The loan was repayable out of the proceeds of forward oil sales  
21 by SNPC as agent for Olearius. By the arrangement, ROC had assigned all  
22 its oil rights to Olearius.

1

2 The Plaintiffs brought an action before this Court in July 2002 seeking  
3 injunctive relief against Olearius. On 13<sup>th</sup> August 2002 this Court granted  
4 an injunction the effect of which was to restrain Olearius from passing back  
5 to SNPC any funds generated from the oil sales in excess of that required to  
6 service the loan. It was found that "*prima facie* there are assets in the  
7 jurisdiction which can be attached in satisfaction of the two judgments", per  
8 Graham J., ruling delivered on 13<sup>th</sup> August 2002. These two judgments  
9 referred to by Graham J are those already described as giving rise to the  
10 debt owed to the Plaintiffs and are further described below.

11

12 On the 23<sup>rd</sup> January 2003, the Court of Appeal in Paris delivered its  
13 judgment, concluding that SNPC is indeed an *emanation* of ROC such that  
14 its assets should be treated as those of ROC and upheld the attachment order  
15 against those assets known to be within the French jurisdiction.

16

17 The First Plaintiff now seeks leave to enforce the final award ("the Award")  
18 made in France by the ICC International Court of Arbitration (Case  
19 10030/AC/DB) against the Third and Fourth Defendants. Without delving  
20 unnecessarily into the details, this award is said to arise from loans  
21 advanced to those defendants to fund their oil production business which  
22 were not repaid.

1

2 The Award has also become the subject of a judgment enforcing it in the  
3 English High Court. The Award/judgment sum is in excess of 30 million  
4 Euros plus interest.

5

6 Thus the First Plaintiff sues in this jurisdiction upon the Award and the  
7 judgment both as a matter of statute - The Foreign Arbitral Awards  
8 Enforcement Law (1997 Revision) - and at common law.

9

10 The Second Plaintiff obtained an English judgment (1996 Folio No. 1309)  
11 on the 15<sup>th</sup> November 1996, in the amount of US\$10 million plus interest  
12 and costs. It sues upon that judgment at common law seeking its  
13 enforcement.

14

15 THE PRESENT APPLICATIONS BY THE PLAINTIFFS.

16 The Plaintiffs seek summary judgment against the Second, Third and Fourth  
17 Defendants. They seek a declaration that the Second Defendant (SNPC) is  
18 the alter ego of the Fourth Defendant. Alternatively, that the Second  
19 Defendant is a mere sham and façade, alternatively a bare trustee or agent,  
20 holding assets for the benefit of the Fourth Defendant; in the further  
21 alternative, that the assets of the Second Defendant are to be regarded as  
22 assets of the Fourth Defendant and that assets held by the Second Defendant

1 are available for execution in satisfaction of judgments obtained against the  
2 Fourth Defendant. The Plaintiffs argue that the Paris Court of Appeal  
3 having ruled definitively on the issue that SNPC is as a matter of fact the  
4 alter ego of ROC, that this creates a *res judicata* and an issue estoppel  
5 against SNPC and invites the Court to uphold that ruling and apply it here.

6

7 As regards the First Defendant, the Plaintiffs seek a declaration against it in  
8 the same terms as that against the Second Defendant. Having obtained  
9 enforcement of their judgments against the Congolese defendants, the  
10 Plaintiffs' next step will be to seek to get an injunction.

11 In so doing, it is also their intention to argue that Olearius is the alter ego of  
12 the Congolese defendants.

13

14 In addition to post-judgment injunctive relief, the Plaintiffs seek relief by  
15 way of the appointment of a receiver over the assets of the Second to Fourth  
16 Defendants. The *Mareva* injunction is sought in order to prevent the Second  
17 to Fourth Defendants from circumventing the whole Olearius financing  
18 structure, while the receiver is intended to recover any sums due solely in  
19 respect of Olearius and the Forward Purchase Agreement explained below.  
20 The Plaintiffs ask that the injunction granted pre-judgment is continued  
21 post-judgment, except that the Plaintiffs be released from any cross-  
22 undertakings in damages and those already in place be discharged.

1

2 Standard Chartered Bank ("SCB"), as Intervener, became concerned that the  
3 orders being sought by the Plaintiffs would, if granted, have a serious  
4 damaging effect on the syndicated Lenders of which it is one, and also upon  
5 Third parties. Effectively, any injunction against Olearius would freeze the  
6 mechanism by which the Lenders are repaid through Olearius.

7

8 For reasons explained below, I find that this is the proper forum for the  
9 presentation of the Plaintiffs' claims against the Defendants and that the  
10 proper form of relief is that which I will give.

11

## 12 THE COURT'S JURISDICTION AT COMMON LAW

13 According to Dicey and Morris on the Conflict of Laws, 13<sup>th</sup> Edition, Page  
14 474 Rule 35(1) & (2) dealing with enforcement and recognition of  
15 judgments at common law:

16

17 "Rule 35-(1) Subject to the Exceptions hereinafter mentioned and to  
18 Rule 55 (international conventions), a foreign judgment *in personam*  
19 given by the court of a foreign country with jurisdiction to give that  
20 judgment in accordance with the principles set out in Rules 36 to 39,  
21 and which is not impeachable under any of Rules 42 to 45, may be  
22 enforced by a claim or counter claim for the amount due under it if  
23 the judgment is  
24 (a) for a debt, or definite sum of money (not being a sum payable in  
25 respect of taxes or other charges of a like nature or in respect of a  
26 fine or other penalty); and  
27 (b) final and conclusive but not otherwise.

1 Provided that a foreign judgment may be final and conclusive,  
2 though it is subject to an appeal, and though an appeal against it is  
3 actually pending in the foreign country where it was given.

4 (2) A foreign judgment given by the court of a foreign country  
5 with jurisdiction to give that judgment in accordance with the  
6 principles set out in Rules 36 to 39, which is not impeachable under  
7 any of Rules 42 to 45 and which is final and conclusive on the  
8 merits, is entitled to recognition at common law and may be relied on  
9 in proceedings in England."  
10

11  
12 The First and Second Plaintiffs are by virtue of these principles of Private  
13 International Law and judicial comity, entitled to enforce the judgments at  
14 common law as the judgments are for debts or definite sums of money and  
15 are final and conclusive, albeit that they are default judgments.  
16

17  
18 THE ARBITRAL AWARD

19 The Award, was made pursuant to an Arbitration Agreement in Paris,  
20 France, which is a party to the New York Convention on the Recognition  
21 and Enforcement of Foreign Arbitral Awards (1958). As such, it qualifies  
22 for enforcement under section 5 of the Foreign Arbitral Awards  
23 Enforcement Law (1997 Revision) and section 22 of the Arbitration Law  
24 (2001 Revision).  
25

26 Section 5 Foreign Arbitral Awards Enforcement Law (1997 Revision)  
27 provides:  
28

1 " A Convention award shall, subject to this Law, be enforceable in  
2 the Grand Court in the same manner as an award under section 22 of  
3 the Arbitration Law (1996 Revision) and shall be treated as binding  
4 for all purposes on the persons between whom it was made and may  
5 accordingly be relied upon by any of those persons by way of  
6 defence, set off or otherwise in any legal proceedings in the Islands  
7 and any reference in this Law to enforcing a Convention award shall  
8 be construed as including references to relying upon such award."  
9

10 Section 22 of the Arbitration Law (2001 Revision) provides:  
11

12 "An award on an arbitration agreement may, by leave of the Court,  
13 be enforced in the same manner as a judgment or order to the same  
14 effect, and where leave is so given, judgment may be entered in  
15 terms of the award."  
16

17  
18 It is therefore clear that the Grand Court has jurisdiction to enforce the  
19 Award against the Third and Fourth Defendants.  
20

21 Having established that the Court has jurisdiction at common law and by  
22 statute to enforce the Award and judgments, the question remains whether  
23 the First and Second Defendants may be labelled "alter-egos" of the ROC  
24 such that the Plaintiffs may recover against them.

25 I have in mind of course that at this stage that enforcement is sought against  
26 the Second Defendant only, with the declaratory relief against the First  
27 Defendant Olearius to be sought later. Nonetheless, having regard to the  
28 general applicability of the principles of law to which I will refer below, I  
29 intend to reflect also upon the proposed basis for pursuing Olearius Ltd.  
30

1 THE FIRST DEFENDANT/ SPV SCHEME

2 The First Defendant, Olearius, was according to the Summary Terms and  
3 Condition Sheet (Term Sheet), expressly created as “ the vehicle through  
4 which funds are made available to SNPC”. Certain banks namely, KBC  
5 Bank NV, RMB International (Dublin) Ltd., Standard Chartered Bank and  
6 The Original Lenders have made the amount of US\$210 million available to  
7 Olearius. It is to purchase and sell crude oil and enter into financing  
8 arrangements in connection therewith, pursuant to the terms of the Facility  
9 Agreement, the Forward Purchase Agreement and the other Facility  
10 Documents.

11

12 On or about 31<sup>st</sup> May 2002, US\$150 million was drawn down by Olearius  
13 at the request of SNPC to, *inter alia*, fund the SPV Scheme and to discharge  
14 some of the liabilities of SNPC. A further US\$60 million remains to be  
15 drawn down.

16

17 In summary, the SPV Scheme operates as follows. The Banks first make the  
18 funds available to Olearius. These funds are used to buy oil from SNPC  
19 under the Forward Purchase Agreement. Some of the oil that Olearius  
20 purchases is for on sale to Vitol S.A. and other Buyers. The oil sold by  
21 SNPC to Olearius is the property of ROC. Cash proceeds of the sales under  
22 the Forward Purchase Agreement are credited directly to the Collection

1 Account from which payment on the loan facility is made to the Lenders by  
2 Olearius. Excess proceeds in that account are passed by Olearius on to or to  
3 the order of SNPC. SNPC is also responsible for the repayment of bridge  
4 financing, facility fees, expenses, hedge premise and the funding of the  
5 Debt Service Reserve Account (DSRA). An additional element of the  
6 Scheme is that ROC has guaranteed the loan on behalf of Olearius and has  
7 also assigned rights to Olearius to receive oil. The entire arrangement is  
8 known as the Hedged Crude Oil Prepayment Facility.

9  
10 The Plaintiffs argue that any distinction between ROC, SNPC and Olearius  
11 is a complete sham. They would argue that Olearius entered into the SPV  
12 scheme, executed the Facility Documents, and has enjoyed the benefit of  
13 the Facility, as an alter ego, alternatively as a mere sham and façade,  
14 alternatively as a bare trustee or agent of SNPC and /or ROC. Under  
15 Section 2 of the Facility Agreement, the stated Purpose of the loan is as  
16 follows:

17 “ The borrowings made hereunder shall be applied:

18 3.1.1 first, to pay in full all outstanding amounts under the USD 50  
19 million Bridge Finance Facility Agreement dated 18<sup>th</sup>  
20 December 2001(as amended and restated as of 25 January  
21 2002 and (if such further amendment shall occur) further  
22 amended on or after the date of this Agreement to address  
23 arrangements to permit SNPC to have access to the proceeds  
24 of the first cargo delivered under the crude oil contract  
25 referred to in such Bridge Finance Facility Agreement)  
26 between RMB International (Dublin) Limited and SNPC;

- 1  
2 3.1.2 second, to fund the Required Balance of the Debt Service  
3 Reserve Account;  
4  
5 3.1.3 third, to finance interest fees, expenses and other amounts due  
6 under any Finance Document;  
7  
8 3.1.4 fourth, to finance any premium payable under the terms of  
9 any Hedging Agreement;  
10  
11 3.1.5 fifth, to finance ( i ) expenses payable in respect of the  
12 corporate administration of the Borrower, (ii) amounts  
13 payable under the Corporate Administration Documents, (iii)  
14 legal fees payable by the Borrower in connection with the  
15 establishment of the Borrower and its entry into the Relevant  
16 Documents to which it is a party;  
17  
18 3.1.6 sixth, in the case of the Primary Syndication Lender  
19 Utilisations, to pay an amount equal to the amount set out in  
20 paragraph numbered 1 of the Syndication Notice to the credit  
21 of the Charged Account (which amount shall not be in excess  
22 of USD 60,000,000) less the amounts set forth in paragraphs  
23 1(b) and 3 (b) of the Fee Letter to the extent such amounts are  
24 deducted by the Agent from the first Primary Syndication  
25 Lender Utilisation in accordance with the terms thereof; and  
26  
27 3.1.7 seventh, to fund all payments to be made to SNPC under the  
28 Forward Purchase Agreement, including without limitation,  
29 the Forward Purchase Price due under clause 8 thereof.”  
30  
31

32 In the First Affidavit of Donald S. Schwarzkoph, paragraph 23, filed on  
33 behalf of the Plaintiffs and describing the relationship between ROC, SNPC  
34 and Olearius he stated as follows:

- 35  
36 a) “All borrowings disbursed to Olearius but for the ultimate benefit  
37 of SNPC, are unconditionally guaranteed by the ROC.  
38

- 1 b) If funds in Olearius are inadequate to repay the borrowings,  
2 SNPC must deliver sufficient additional oil, which belongs to the  
3 ROC, to do so.  
4
- 5 c) SNPC is the exclusive marketing agent for Olearius, as well as  
6 the ROC.  
7
- 8 d) Amounts already disbursed under the facility, which rightly  
9 belong to the ROC for the sale of its oil under the Forward  
10 Purchase Agreement, have largely been used by the SNPC for  
11 "General corporate purposes". There are no provisions in the  
12 Term Sheet for payment to ROC for the sale of oil.  
13
- 14 e) The additional amount to be raised in general syndication will be  
15 provided to and used by either SNPC, ROC or Olearius, without  
16 distinguishing which entity actually owns the funds.  
17
- 18 f) Olearius must obtain the approval of SNPC to make any early  
19 reimbursements of the facility.  
20
- 21 g) "Breakage costs" incurred by Olearius are the responsibility of  
22 SNPC.  
23
- 24 h) Earnings by Olearius in excess of the debt service may not be  
25 retained, but rather must be paid to SNPC.  
26
- 27 i) ROC must assign to Olearius, for no apparent consideration, its  
28 rights to receive crude oil under production-sharing and  
29 concession agreements, which in fact represent ROC'S primary  
30 source of commercial income.  
31
- 32 j) The amount of up to US\$60 million to be raised under the facility  
33 is to be used to cover potential litigation debts of SNPC/ROC."  
34  
35

36 The Plaintiffs further argue that the fundamental reason for having such an  
37 elaborate legal structure for these financings is to cloak them in a legal veil  
38 of legitimacy. They say that in reality, the oil pre-financing transactions  
39 represent a sophisticated effort to shelter the proceeds of ROC financings

1 from legitimate creditors of ROC (Paragraph 24, Schwarzkopf's First  
2 Affidavit). The Plaintiffs believe that they should be granted leave to  
3 execute the Award and judgment directly upon Olearius, as an alter ego and  
4 nominee of ROC, particularly in view of:

- 5
- 6       “(a) the unambiguous assignment of the primary income-  
7             producing commercial assets of ROC to Olearius; and  
8       (b) the central role of Olearius in selling and receiving payments  
9             for such assets under the unmistakable control and direction  
10            of ROC and SNPC.” (Paragraph 28 Schwarzkopf's First  
11            Affidavit).

12

13 In the First Affidavit of Mr. Akeem Khan of SCB filed on behalf of the  
14 First Defendant, he states that the allegations of sham are entirely  
15 inaccurate. At paragraph 5(i) he says that:

16       "The central allegations made by Mr. Schwarzkopf (on behalf of the  
17 Plaintiffs) appears to be that Olearius is an alter-ego of the Republic  
18 of Congo (“ROC”), and indeed that the whole structure of the  
19 financing is a sham representing “a sophisticated effort to shelter the  
20 proceeds of ROC financings from legitimate creditors of ROC”  
21 (paragraph 24). These allegations are entirely inaccurate. The  
22 structure of the financing is described in more detail below but, in  
23 summary, the reality is that Olearius was incorporated as a Cayman  
24 Islands special purpose vehicle at the suggestion of the Mandated  
25 Arrangers as part of a bona fide, arms' length commercial  
26 transaction relating to the financing of shipments of oil. Neither  
27 ROC nor SNPC have any direct or indirect shareholding in, nor  
28

1 representation on the board of directors of, Olearius. It is neither  
2 legally nor beneficially owned by ROC or SNPC. It is an "orphan"  
3 vehicle, with directors appointed by HSBC [(Hong Kong Shangai  
4 Banking Corp. One of the Lenders)]. The financing structure  
5 was inspired by entirely legitimate commercial concerns on the part  
6 of the Mandated Arrangers, and was absolutely not inspired (as is  
7 implied by Mr. Schwarzkopf) by a desire to defraud ROC's creditors.  
8 The facility has been arranged by three well known and respected  
9 trade finance banks, and involves the world's largest independent oil  
10 trading company (Vitol S.A.). A further ten leading international  
11 banks and banking institutions have undertaken to participate in it."  
12

13  
14 Mr. Khan then described other financing structures which were considered  
15 by SNPC and the Lenders and continues at Paragraph 10:  
16

17 “ Since SNPC wished to retain the ability to sell at least some  
18 of the oil on the spot market throughout the term of the  
19 financing, the Mandated Arrangers proposed what is known  
20 as a prepayment financing structure. The critical feature  
21 of these structures (i.e. “Basic Prepayment Structure and  
22 Prepayment Structure with SPV)- which maximises the  
23 Security of the Lenders over the cash flows receivable for  
24 crude oil deliveries made to off-takers and ensures that the  
25 structure is capable of being syndicated in the international  
26 banking market- is that there should be no collection account  
27 in the name of the producer of the commodity (here SNPC).  
28 This means that the funds flowing into that account would not  
29 be available for attachment by creditors of the producer. That  
30 is a perfectly legitimate objective for lenders who are  
31 concerned to maximise their security. In the “Basic  
32 Prepayment Structure”, the collection account is in the name  
33 of the single off-taker. Given that it was contemplated that  
34 there would be multiple off-takers under the arrangement with  
35 SNPC, the Mandated Arrangers proposed a “Prepayment  
36 Structure with SPV”, pursuant to which the Collection  
37 Account into which each of the off-takers would make their  
38 payments would be in the name of the SPV.”  
39

40 This financing arrangement will be returned to later in these reasons for  
41 judgment.  
42  
43

1  
2  
3 THE SECOND DEFENDANT

4 SNPC was created by the Republic of Congo ("ROC") as a public industrial  
5 and commercial company whose capital is held entirely by the ROC. The  
6 Republic of Congo is a former French Colony, whose chief national asset is  
7 said to be oil. Those assets are marketed through SNPC and used to obtain  
8 finance in the international market. The Plaintiffs argue that SNPC is an  
9 "emanation" of the Republic of Congo; an expression which is not a term of  
10 art in English or Cayman law. They say that the company has no  
11 operational autonomy and no activities separate from the Congolese State,  
12 was established to manage the rights, holdings and assets of the State in the  
13 field of hydrocarbons, whose capital is wholly owned by the State,  
14 completely administered by it, whose role is to serve it, having no  
15 independent assets, the merger of assets being patent, serving to finance the  
16 State and its officials, to make loans to the State, without transparent  
17 accounting.

18  
19 As already referred to, in October 2001 attachment proceedings were  
20 brought in France against bank accounts held in the name of SNPC at BNP-  
21 Paribas and Societe Generale. In January 2002 in those proceedings, the  
22 Plaintiffs were successful at first instance in establishing their right to seize

1 SNPC assets in satisfaction of ROC's debts, on the ground that SNPC is an  
2 *emanation d'Etat*.

3  
4 SNPC appealed against the decision to the Court of Appeal in Paris. On 3  
5 July 2003, the Court of Appeal delivered its judgment, concluding that  
6 SNPC is an *emanation* of ROC such that its assets should be treated as  
7 those of ROC, and upholding the attachments against it.

8  
9 After a review of the principal documents establishing and governing the  
10 operations of SNPC, the Court in Appeal No. 2002/03185, summarised as  
11 follows:

12  
13 *"The status of Societe nationale des petroles du Congo with respect*  
14 *to the Republic of Congo*

15  
16 *Whereas S.N.P.C., established by the law of 23 April 1998, is*  
17 *defined as a public industrial and commercial establishment taking*  
18 *the form of a company with legal personality and financial*  
19 *autonomy, with its entire capital being held by the Government,*  
20 *according to its articles/bylaws dated 9 April 1999, this company:*

- 21 - *Has as its purpose action on behalf of the Government, directly,*  
22 *through its subsidiaries, or in partnership with foreign partners, in any*  
23 *operation relative to the production, processing, transformation,*  
24 *exploitation, and transporting of liquid or gas hydrocarbons on*  
25 *Congolese territory or in other countries; in particular, to undertake or*  
26 *participate in any operation relating to the above-mentioned mission, to*  
27 *undertake the necessary investment operations, to sell products, hold*  
28 *and manage on behalf of the Government the assets and rights*  
29 *belonging to it directly or through an intermediate company and in*  
30 *general to perform the public-service mission of valorizing, exploiting*  
31 *and selling Congolese hydrocarbons;*  
32 *-Has stock capital of 900,000,000 FCFA, consisting chiefly in mining*  
33 *deeds and rights and assets initially held by the Government, directly or*

1 through Hydro-Congo, in all activities relative to the search for,  
2 exploitation of, processing of, and transformation of hydrocarbons and  
3 derivative or related substances;

4 -Has resources consisting chiefly of Government subsidies, proceeds  
5 from the activities of the company itself, and proceeds from borrowings,  
6 repayment of advances, and income from interests in other companies;

7 -Has an operating budget and an investment budget, and maintains its  
8 own accounting records under the supervision of an accountant, with  
9 fiscal -year balance-sheet, operating statement, and statement of profit  
10 and loss, according to the accounting plan in effect, under the  
11 supervision of auditor;

12 -Is managed by a Board of Directors that establishes the general policy  
13 of the company , resolves on important matters, particularly budget  
14 matters, by majority vote, and approves the financial statements, and by  
15 a general manager in charge of day-to-day management of the  
16 company;

17 -Formalized its relations with the Government in an agreement dated  
18 June 2001 (I.e., prior to the attachments in question), which establishes  
19 among other matters the compensation payable to the company in  
20 consideration for the mandate received, namely, 1.6% of the gross price  
21 of each cargo paid for by purchasers of commercialized hydrocarbons,  
22 which said compensation it deducts directly from the proceeds of sale  
23 prior to remittance of said proceeds to the Government (Article 6);

24  
25 *But whereas by reason of its public service mission:*

26  
27 - The Members of the Board of Directors are chiefly representatives of  
28 the Government agencies involved in this mission, and are appointed by  
29 decree issued in Council of Ministers;

30 - The company is supervised by the Ministry in charge of hydrocarbons,  
31 which has "permanent power of orientation and supervision of the  
32 enterprise," in particular to ensure application of government guidelines  
33 and the laws and regulations, approve investment program and monitor  
34 their execution, supervise the allocation of profits and supervise  
35 personnel policy, which is governed by the hydrocarbons collective  
36 bargaining agreement, as well as investments in other companies and  
37 the establishment of agencies and branches;

38 - The company is under the economic and financial supervision of the  
39 Government and the Government Accounting Office;

40  
41 *Whereas the outcome of this close supervision is that S.N.P.C. does*  
42 *not have sufficient statutory operating independence to make*  
43 *autonomous decisions in its own interest and to be considered as*

1 *enjoying de jure and de facto autonomy with respect to the*  
2 *Congolese Government; it is not even master of its future through an*  
3 *individual investment policy, or of its organizational structure ; its*  
4 *accounting does not clearly show the existence and scope of a*  
5 *company sales activity apart from its public-service mission;*  
6 *according to its financial statements for the year 2000, the company*  
7 *had a theoretical net profit of \$58.5 million, but it is noted that*  
8 *"taking into account repayments of Government commitments to*  
9 *certain operators by deduction of output equivalent to SNPC oil*  
10 *profit, representing a claim by the company upon the Government,*  
11 *leads to total absorption of the entire profit"; therefore, lacking true*  
12 *autonomy, the company can merely invoke a claim upon the*  
13 *government, it cannot truly create a development policy based on*  
14 *self financing;*

15  
16 *Whereas while ordinarily Government supervision or even control of*  
17 *a legal entity, exercised through its managers, and the public-service*  
18 *mission devolved upon it do not suffice to warrant considering it an*  
19 *emanation of the State implying its equating with the Government, in*  
20 *the instant situation the Congolese Government has reserved for*  
21 *itself, with respect to the S.N.P.C., not a simple supervisory power*  
22 *but rather a genuine power of orientation and approval constituting*  
23 *a genuine intervention that totally nullifies any reality of an*  
24 *autonomy of the S.N.P.C. that could arise out of its status as a*  
25 *company registered in the register of economic performers; S.N.P.C.*  
26 *constitutes a legal entity that is fictitious and, consequently, an*  
27 *emanation of the Republic of Congo;"*  
28  
29

30 Counsel on behalf of the Second Defendant contends that:

31  
32 "SNPC was created as a public commercial and industrial entity  
33 endowed with financial autonomy and the status of a legal person;

34  
35 SNPC undertakes its own commercial activity: it owns and sells oil  
36 to third parties on its own account;

37  
38 SNPC has accounts which are independent from the accounts of  
39 ROC;

40  
41 SNPC pays taxes to ROC;

42  
43 SNPC is the parent company of several commercial entities, in the

1 Republic of Congo and elsewhere;

2  
3 In addition to its own commercial activity, and pursuant to its by-  
4 laws and to the Convention, SNPC sells oil belonging to ROC; and

5  
6 SNPC's day to day business is not controlled by ROC;”

7  
8  
9 **SHOULD THIS COURT FOLLOW THE FRENCH COURT AND**  
10 **DECLARE SNPC A MERE FAÇADE AS THE BASIS FOR**  
11 **GRANTING THE PLAINTIFFS' APPLICATION FOR SUMMARY**  
12 **JUDGMENT AGAINST IT?**

13  
14 I am cognisant of the principle that the corporate veil is only very rarely  
15 lifted.

16 In Adams v Cape [1991] All ER 929, at Page1022; their Lordships  
17 confirmed that '*quite apart from cases where statute or contract permits a*  
18 *broad interpretation to be given to references to members of a group of*  
19 *companies, there is one well-recognised exception to the rule prohibiting*  
20 *the piercing of 'the corporate veil'.* So that only in exceptional cases is the  
21 corporate veil ever lifted.

22  
23 Referring to the opinion of Lord Keith in Woolfson v Strathclyde Regional  
24 Council [1978] SLT 159 at 161, they pointed out that that exception is "*only*  
25 *where special circumstances exist indicating that it is a mere façade*  
26 *concealing the true facts.*"

27  
28 The facts as found by the Paris Court of Appeal are summarised below:  
29

1 (1) The entire capital of SNPC is held by ROC. It was responsible  
2 for the marketing of ROC's oil production.

3  
4 (2) Members of the Board of Directors are chiefly representatives of  
5 the Government and are appointed by decree issued in Council of  
6 Ministers.

7  
8 (3) The Company is under the economic and financial supervision of  
9 the Government Accounting Office.

10  
11 (4) The Ministry has permanent power of orientation and supervision  
12 of the enterprise.

13  
14 (5) The Company's mission is to undertake any necessary investment  
15 operation on behalf of the ROC and to hold and manage on behalf of  
16 the Government the assets and rights belonging to the Government.

17  
18  
19 The Paris Court of Appeal ultimately came to the conclusion that because  
20 the Congolese Government had reserved to itself "not a simple supervisory  
21 power but a rather genuine power of orientation" that that had nullified any  
22 reality that SNPC was an autonomous company.

23  
24 I am unable to agree that the close supervisory nature of the relationship  
25 between SNPC and ROC is enough to declare SNPC to be a sham or façade.

26 I am not persuaded that SNPC should be regarded as the alter ego of ROC  
27 or as a mere fiction, façade or sham, although I take no issue with the five  
28 findings of fact upon which the Paris Court decided the case.

29  
30 What gives this Court pause is the need to take the leap from finding that  
31 SNPC is closely supervised to the conclusion that it therefore is an

1 “emanation” of ROC to the extent as a matter of English common law; that  
2 that connotes a fiction, a mere sham or façade. Even if this Court accepts all  
3 five of the French Court's findings of fact, that does not lead ipso facto to  
4 the conclusion that SNPC is fictional. Again that conclusion may be a  
5 matter of French law, having no corresponding basis in English Law.

6

7 The approach taken by the French Court may be criticized as flawed, to the  
8 extent it implies a fiction or mere sham; in that every State is at liberty to  
9 set up Government bodies and agencies which are lawful under their  
10 Governmental systems for perfectly legitimate purposes such as those  
11 expressly forming the *raison d'être* of SNPC.

12 Moreover, there are obvious and troubling concerns of international comity  
13 which arise from arriving too readily at such conclusions.

14

15 As to Olearius, the only allegation of a façade or sham in the Plaintiffs'  
16 pleadings was that the formation and use of Olearius in the alternative  
17 marketing arrangement was a device or sham to ostensibly retain the  
18 Congolese Defendants' assets by structuring their affairs in such a way as to  
19 prevent execution against them. The Plaintiffs point out that the Facility  
20 was so structured that there would be no collection account in the name of  
21 the producer of the commodity, that being SNPC. As a result of this that  
22 account would be unavailable for attachment by creditors of the producer.

1 I have already described from the Lenders point of view, the raison d'être of  
2 Olearius; which by its name, conveys the metaphoric derivatives of its oil  
3 bearing purpose.

4 In Adams v Cape Industries (supra), their Lordships addressed the question  
5 whether motive was a necessary element of a finding of sham. Quoting  
6 Scott J. at page 967 where he stated:

7

8 *" If and so far as the judge intended to say that the motive behind the*  
9 *new arrangements was irrelevant as a matter of law, we would*  
10 *respectfully differ from him. In our judgment, as Mr. Morrison*  
11 *submitted, whenever a device or sham or cloak is alleged in cases*  
12 *such as this, the motive of the alleged perpetrator must be legally*  
13 *relevant, and indeed this no doubt is the reason why the question of*  
14 *motive was examined extensively at the trial. The decision in Jones v*  
15 *Lipman [1962] 1 All ER 442, [1962] 1 WLR 832 referred to below*  
16 *was one case where the proven motive of the individual defendant*  
17 *clearly had a significant effect on the decision of Russell J.*

18

19 *The judge's finding of fact quoted above as to the motives of Cape*  
20 *behind the new arrangements is accepted (no doubt welcomed) by the*  
21 *plaintiffs, so far as it goes. They submit rightly in our judgment, that*  
22 *any such motives are relevant to the 'corporate veil' point.*

23

24 At page 1024g, further reference was made to Lipman (supra). Lord Justice  
25 Slade said:

26

27

28 *" In that case the first defendant had agreed to sell to the plaintiffs*  
29 *some land. Pending completion the first defendant sold and*  
30 *transferred the land to the defendant company. The evidence showed*  
31 *that this company was at all material times under the complete*  
32 *control of the first defendant. It also showed that the acquisition by*  
33 *him of the company and the transfer of the land to the company had*  
34 *been carried through solely for the purpose of defeating the*  
35 *plaintiff's right to specific performance. Russell J. made an order for*  
36 *specific performance against both defendants. He held that specific*

1        *performance cannot be resisted by a vendor who, by his absolute*  
2        *ownership and control of a limited company in which the property is*  
3        *vested, is in a position to cause the contract to be completed. As to*  
4        *the defendant company, he described it as being 'the creature of the*  
5        *first defendant, a device and a sham, a mask which he holds before*  
6        *his face in an attempt to avoid recognition by the eye of equity':*  
7        *see [1962] 1 All ER 442 at 445, [1962] WLR 832 at 836. Following*  
8        *Jones v. Lipman, we agree with Mr. Morrison that, contrary to the*  
9        *judge's view, where a façade is alleged, the motive of the perpetrator*  
10       *may be highly material."*

11  
12  
13       The issue of law becomes whether the question of motive behind the  
14       financial arrangement between Olearius/SNPC and ROC is enough to  
15       justify the lifting of the corporate veil such that the assets of the First and  
16       Second Defendants are to be regarded as the assets of ROC and therefore  
17       available to satisfy the Plaintiffs' debts.

18  
19       The financial relationship between Olearius /SNPC and ROC has already  
20       been summarised above. The inferences which I draw from all the evidence  
21       is that the Special Purpose Vehicle was to be used strictly as a pre-payment  
22       facility. The ultimate beneficiary of the Facility as stated in the Summary  
23       Terms and Conditions is, nonetheless, SNPC.

24  
25  
26       Their Lordships in Adams v Cape (supra) ultimately decided that while an  
27       arrangement might not attract moral approval, there was nothing illegal in  
28       the arrangement made. At page 1026, their Lordships said:

29

1           *" We do not accept as a matter of law that the court is entitled to lift*  
2           *the corporate veil as against a defendant company which is a*  
3           *member of a corporate group merely because the corporate*  
4           *structure has been used so as to ensure that the legal liability (if any)*  
5           *in respect of particular future activities of the group (and*  
6           *correspondingly the risk of enforcement of that liability) will fall on*  
7           *another member of the group rather than the defendant company.*  
8           *Whether or not this is desirable, the right to use a corporate*  
9           *structure in this manner is inherent in our corporate law"*

10  
11  
12   The same can be said for the use of the SPV Scheme. There is nothing  
13   inherently exceptionable in the use of SPVs as financial vehicles. SPVs are  
14   used extensively throughout the world for the structuring of financial  
15   transactions for many different reasons. Olearius, as a Cayman Islands SPV,  
16   is by no means unique in that regard.

17  
18   The Lenders contend that the Facility negotiated with SNPC was for the  
19   legitimate commercial purpose of the provision of a commercial loan to be  
20   repaid from and secured by the production of oil and the sale of oil.

21  
22   I accept without reservation, that the transaction evidenced by the Facility  
23   Documents is a legitimate structured finance arrangement which enables the  
24   Mandated Arrangers to seek to obtain better security by lending to an SPV  
25   rather than lending to the producer of the oil.

1 Based on all the foregoing, this Court declines the Plaintiffs' invitation to  
2 declare SNPC the alter ego of ROC or a mere sham or facade. The Court  
3 also expresses reservations about the propriety of any such relief against  
4 Olearius.

5

6 JURISDICTION TO ATTACH A PARTY WHOSE ASSETS ARE  
7 BENEFICIALLY OWNED BY THE DEFENDANT

8

9 Notwithstanding the foregoing, I am however satisfied that SNPC is a  
10 necessary and proper party whose assets because of the nature of its  
11 relationship with ROC, should be made available to satisfy ROC's judgment  
12 debts.

13

14 In T.S.B. Bank International v Chabra [1992] 1 WLR 231, a *Mareva*  
15 injunction was granted for the purposes of restraining the first defendant,  
16 who had given a guarantee to the plaintiff, from removing its assets from  
17 the jurisdiction. A second defendant was added by the Court of its own  
18 motion and an injunction in similar terms was granted against it, the Court  
19 having found that the second defendant held assets beneficially owned by  
20 the first defendant; in particular the ownership of 5 Beverley Drive. On an  
21 application by the second defendant to have the injunction discharged on  
22 the ground that no cause of action was disclosed, the Court found that since  
23 the second defendant was a necessary party to ensure that all matters in

1 dispute were effectively dealt with (and its position fell within RSC, Ord.  
2 15, r. 6(2)(b)(ii) – (similar in terms to GCR O15, r 6 (2)(b)(ii)) - , it  
3 followed that the second defendant was a proper party to the proceedings  
4 even though there was no cause of action against it on the guarantee and  
5 therefore it should not be struck off the writ.

6  
7 The Court went on to say at Page 238 at C:

8  
9 *"In this state of uncertainty about the ownership of 5 Beverley*  
10 *Drive, I am of the view that I should not strike out the*  
11 *company as a party to these proceedings. As I have said, I*  
12 *made the order for its joinder of my own motion pursuant to*  
13 *R.S.C., Ord. 15, r.6. I considered that the presence of that*  
14 *company before the court was necessary to ensure that all*  
15 *matters in dispute in the cause or matter might be effectually*  
16 *and completely determined and adjudicated upon by adding*  
17 *the company as a party. I also considered that the position of*  
18 *the company fell within the broad provisions of Ord. 15, r.*  
19 *6(2)(b)(ii), namely that there could be joined as a party:*

20  
21 “any person between whom and any party to the cause  
22 or matter there may exist a question or issue arising out  
23 of or relating to or connected with any relief or remedy  
24 claimed in the cause or matter which in the opinion of  
25 the court it would be just and convenient to determine  
26 as between him and that party as well as between the  
27 parties to the cause or matter.”  
28  
29

30 These very same considerations give this Court the jurisdiction to consider  
31 SNPC and Olearius proper parties to these proceedings. However, the Court  
32 is not of the view that an injunction against Olearius would serve a proper  
33 purpose at this time because of the nature of the financial structure.

34

1 There simply would be nothing to bite upon if the flow of oil from ROC  
2 were to be cut off and even if the injunction were continued would serve  
3 unjustifiably to prevent the Lenders from recovering what is due to them.

4  
5 CAN THE COURT GRANT AN INJUNCTION AGAINST SNPC?  
6

7 In Chabra (supra), the Court said at Page 240B:  
8

9 *"If the Court has power to make an order against the company, the*  
10 *available evidence points strongly, in my view, to the need for an*  
11 *injunction against it. There is a good arguable case that some of the*  
12 *assets held in its name are the beneficial assets of Mr. Chabra either*  
13 *for him, or on the basis that the company is nothing more than a*  
14 *convenient repository for Mr. Chabra's assets."*  
15

16 On the question whether or not the Court had jurisdiction to make an  
17 injunction against the company as the plaintiff had no cause of action  
18 against it, the Court said at Page 241B-D:

19  
20 *"In considering this submission I bear in mind four preliminary but*  
21 *important points. I first take note of the wide terms of section*  
22 *37(1) of the Supreme Court Act 1981 which empowers the Court to*  
23 *grant an injunction in all cases where it appears to the Court to be*  
24 *just and convenient to do so. Secondly, the whole basis of the*  
25 *Mareva jurisdiction is that, where a plaintiff has shown a good*  
26 *arguable case, the Court, in order to protect the plaintiff's interests,*  
27 *has jurisdiction in a proper case to grant an interlocutory injunction*  
28 *restraining a defendant from disposing of or dissipating his assets,*  
29 *where the refusal of such an injunction would involve a real risk that*  
30 *a judgment obtained by the plaintiff would be stultified and remain*  
31 *unsatisfied.*  
32

33 *Thirdly, the jurisdiction of the Court should be exercised with*  
34 *caution and great care should be taken not to be oppressive to the*  
35 *persons restrained, either in the carrying on of a business or in the*  
36 *conduct of everyday life.*

1  
2 *Fourthly, the practice of the Court on the grant of Mareva*  
3 *injunctions is an evolving one which has to remain flexible and*  
4 *adaptable to meet new situations as and when they arise.*

5  
6 In order to bolster their argument that an injunction can only be granted  
7 against a defendant against whom the plaintiff has a cause of action, the  
8 defence in Chabra (supra) quoted from the decision of the House of Lords  
9 in Siskina (Owners of cargo lately laden on board) v. Distos Compania  
10 Naviera S.A. [1979] A.C. 210, where Lord Diplock said in his speech:

11  
12 *"A right to obtain an interlocutory injunction is not a cause of*  
13 *action. It cannot stand on its own. It is dependent upon there being a*  
14 *pre-existing cause of action against the defendant arising out of an*  
15 *invasion, actual or threatened by him, of a legal or equitable right of*  
16 *the plaintiff for the enforcement of which the defendant is amenable*  
17 *to the jurisdiction of the Court. The right to obtain an interlocutory*  
18 *injunction is merely ancillary and incidental to the pre-existing*  
19 *cause of action."*

20  
21  
22 But the Court in Chabra (supra) went on to point out at Page 241G that:

23  
24 *"[I]n that case there was only one defendant and it was held that as*  
25 *there was no cause of action against the sole defendant which was*  
26 *justiciable in the High Court and enforceable by final judgment, the*  
27 *Court had no jurisdiction to make an interlocutory injunction*  
28 *against the defendant restraining the removal of assets in England:*  
29 *see also Steamship Mutual Underwriting Association (Bermuda) Ltd.*  
30 *v. Thakur Shipping Co. Ltd. (Note) [1986] 2 Lloyd's Rep.439."*

31  
32  
33 And at Page 241 H:

34  
35 *"In the present case there are two defendants. There is one*  
36 *defendant, Mr. Chabra, against whom the plaintiff undoubtedly has*  
37 *a good arguable cause of action: the claim on the guarantee. This is*

1        *justiciable in the English Court; Mr. Chabra is amenable to*  
2        *the jurisdiction of the English Court to make a final judgment*  
3        *against him on the guarantee. The claim for an injunction to restrain*  
4        *disposal of assets by Mr. Chabra is ancillary and incidental to that*  
5        *cause of action. In my judgment, the claim to a similar injunction*  
6        *against the company is also ancillary and incidental to the claim*  
7        *against Mr. Chabra and the Court has the power to grant such an*  
8        *injunction in an appropriate case. It does not follow that, because*  
9        *the Court has no jurisdiction to grant a Mareva injunction against*  
10       *the company, if it were a sole defendant, the court has no*  
11       *jurisdiction to grant an injunction against the company as ancillary*  
12       *or incidental, to the cause of action against Mr. Chabra: see for*  
13       *example, Vereker v. Choi [1985] 4 N.S.W.L.R. 277, 283. I agree*  
14       *that such a course is an exceptional one, but I do not accept that it is*  
15       *one that the Court has no jurisdiction to make." (Emphasis added)*

16  
17  
18       There can be no argument in this case that the Second, Third and Fourth  
19       defendants are amenable to the jurisdiction of this Court and that judgment  
20       has already been entered against ROC for sums owed to the First and  
21       Second Plaintiffs. Following the principle laid down in Chabra (supra) and  
22       most recently followed in Yukon Line Ltd. v. Rendsburg Investments  
23       Corporation and Others [2001] 2 Lloyd's Reports 113; the claim for an  
24       injunction against SNPC is ancillary and incidental to the enforcement of  
25       the debt owing to the Plaintiffs.

26  
27       Without the need to declare SNPC anything other than what it is as a matter  
28       of Congolese Law; there is evidence that assets belonging to or which might  
29       come into the possession of SNPC are in fact or will in fact be assets of  
30       ROC. It is therefore appropriate to grant this injunction in support of the  
31       Plaintiffs' legal right to collect their debt owing to them by ROC.

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APPOINTMENT OF A RECEIVER

With respect to the Plaintiffs' application to appoint a receiver in respect of the Congolese Defendants' interests in the Forward Purchase Agreement, it appears that the only benefit that would be collected would be any Additional Purchase Price Payment which is payable by Olearius to SNPC pursuant to Clause 12 of the Forward Purchase Price. However, as made clear in the Third Affidavit of Mr. Aleem Khan of SCB, there may possibly be no monies to collect.

By letter dated 13 August 2002, SCB in its capacity as Agent bank notified SCB in its capacity as Account Bank, that an Event of Default had occurred and was continuing as a result of the Order for a *Mareva* injunction made by Graham J. against Olearius on that same date. SCB also stated that with immediate effect it was exercising its right pursuant to Clause 9.8.1 of the Facility Agreement to become sole signatory on the Project Accounts. By letter of the same date, Olearius was advised by SCB that the Order had caused an Event of Default which was continuing. By letter dated 15<sup>th</sup> August 2002, Olearius informed SCB and SNPC that an Event of Default had occurred. Clause 9.8.2 of the Facility Agreement provides that:

“ After delivery of a notice under paragraph 9.8.1 above (and until the Account Bank is notified by the Agent that such

1 Event of Default has been remedied or waived by the  
2 Majority Lenders), no amount will be payable to the  
3 Borrower [Olearius] or may be withdrawn by the Borrower  
4 [Olearius], with respect to the Project Accounts.”  
5  
6

7 By Clause 6.2 “Withdrawals by Borrower from Collection Account” after  
8 stating priority in terms of withdrawals, the Clause continues:

9  
10 “ ...[T]he Borrower shall not be entitled to make any such  
11 withdrawal under paragraphs 6.2.7, 6.2.8 or 6.2.10 above if a  
12 potential Event of Default is continuing which, in the absolute  
13 discretion of the Agent might be expected to have a Material  
14 Adverse Effect...”  
15

16 Importantly, it is Clause 6.2.10 that provides for payment to SNPC. It is  
17 clear that with the Event of Default arising out of the *Mareva* injunction of  
18 August 13, 2002; SNPC would have no further entitlement to any additional  
19 Price Payments from Olearius. Additionally, the Lenders by letter dated 14<sup>th</sup>  
20 August 2002, informed Olearius that the entire Loan under the Facility  
21 Agreement fell to be repayable by Olearius on demand. The Lenders have  
22 thus far demanded payment from Olearius of all the proceeds of the sale of  
23 oil which Olearius has received (less a buffer which has been left in the  
24 DSRA to cover future interest payments and costs) and intend to do so until  
25 fully repaid.

26  
27 It is of course possible that if the Lenders revoke their declaration of an  
28 Event of Default, there eventually may be a surplus for payment by Olearius  
29 to SNPC. However, this would be a decision requiring the unanimous

1 support of the Lenders and is unlikely. The Interveners argue that a  
2 Proposed Receivership Order would not therefore fulfil the expectations of  
3 the Plaintiffs but instead would prejudice the Lenders in that as Third  
4 Parties, they have no meaningful degree of protection by way of security for  
5 the Plaintiffs' cross-undertaking in damages. They therefore argue that the  
6 possibility of the Plaintiffs obtaining any surplus could be maintained by an  
7 Order freezing it in the hands of Olearius or alternatively directing Olearius  
8 to pay it into an account in the name of the Plaintiffs.

9  
10 The latter suggestion seems to me to be the most pragmatic. In S.C.F.  
11 Financing Co. Ltd. v. Masri [1985] 1 W.L.R. 876 a case where Third Party  
12 interests were affected by a *Mareva* injunction, and a dispute arose as to  
13 whether the third party assets were in fact, the property of the defendant  
14 against whom an injunction had been made, Lloyd L.J.said:

15  
16 *"(i) Where a plaintiff invites the court to include within the*  
17 *scope of a Mareva injunction assets which appear on their*  
18 *face to belong to a third party, e.g. a bank account in the*  
19 *name of a third party, the court should not accede to the*  
20 *invitation without good reason for supposing that the assets*  
21 *are in truth the assets of the defendant. (ii) where the*  
22 *defendant asserts that the assets belong to a third party, the*  
23 *court is not obliged to accept that assertion without inquiry,*  
24 *but may do so depending on the circumstances. The same*  
25 *applies where it is the third party who makes the assertion, on*  
26 *an application to intervene. (iii) In deciding whether to accept*  
27 *the assertion of a defendant or a third party, without further*  
28 *enquiry, the court will be guided by what is just and*  
29 *convenient, not only between the plaintiff and the defendant*  
30 *and the third party."*

1  
2  
3 While the Court has been guided by the above procedure and it is a fact that  
4 Olearius holds funds or might come into funds that are the property of  
5 SNPC; I must ultimately be guided by what is just and convenient. I do not  
6 accept the proposition that the *Mareva* injunction against the First  
7 Defendant granted by Graham J. remains proper; nor am I of the view that it  
8 is necessary to appoint a Receiver. Even if the injunction were proper, as  
9 the Interveners have pointed out, the Plaintiffs will have nothing to collect if  
10 the injunction is continued or a Receiver appointed.

11  
12 SCB has already informed the Borrower that an Event of Default has  
13 occurred and has already become the Sole Signatory to the Facility as per  
14 Clause 9.8.1. Clause 9.8.1 reads as follows:

15  
16 “If the Agent notifies the Account Bank that an Event of  
17 Default has occurred and is continuing and in such notice  
18 invokes this Clause, the Agent shall be entitled (but not  
19 obliged) without prior notice to, or the consent of, the  
20 Borrower to:

21  
22 (A) be the sole signatory on the Project Accounts; and

23  
24 (B) apply all amounts in the relevant Project Accounts in  
25 or towards reduction (as and when they fall due) of  
26 amounts outstanding under the Finance Documents and  
27 such other payments and obligations as the Agent  
28 may agree (in such order and from such Project  
29 Accounts as the Agent reasonably thinks fit).  
30  
31

1 So any relief granted to the Plaintiffs here will only make sense if the  
2 Parties can come to some kind of agreement regarding the excess funds held  
3 by Olearius and payable to SNPC or to its order. I am reminded of the third  
4 point made by Mummery J. in Chabra (supra) at page 241 C, where the  
5 Court in referring to its jurisdiction to grant a *Mareva* injunction said:

6

7 *"...the jurisdiction of the court should be exercised with caution and*  
8 *great care should be taken not to be oppressive to the persons*  
9 *restrained, either in the carrying on of business or in the conduct of*  
10 *everyday life."*

11

12

13 The Intervener, SCB, has here represented to this Court that in the event the  
14 *Mareva* injunction is discharged; that it will not exercise such discretion as  
15 it has under clause 9.8.1(B) of the Facility Agreement dated 17<sup>th</sup> May 2002  
16 or otherwise under the Relevant Documents to make payments to SNPC or  
17 at its direction; except for those payments to be made to a relevant  
18 designated account. I will accept their representation by way of undertaking  
19 another pragmatic way of ensuring that any surplus funds to be paid to  
20 SNPC are available to satisfy the judgment debts of the Plaintiffs. The  
21 details of the above are to be agreed between the parties and presented to  
22 the Court.

23

24 As far as the First Defendant is concerned, the injunction granted by  
25 Graham J. dated 13<sup>th</sup> August 2002 is hereby discharged and the Plaintiffs

1 are released from the undertakings and the guarantee and charge for the  
2 cross-undertakings be released and returned. The Plaintiffs also have leave  
3 to discontinue this action against the First Defendant.

4  
5 No order as to costs between the Plaintiffs, the First Defendant and the  
6 Intervener.

7  
8 SUMMARY OF ORDERS MADE

9  
10  
11 As against the Third and Fourth Defendants:

12  
13 Pursuant to section 5 of the Foreign Arbitral Awards Enforcement Law  
14 (1997 Revision) and section 22 of the Arbitration Law (2001 Revision) and  
15 the judgment of the International Court of Arbitration (Case  
16 10030/AC/DB); the First Plaintiff is to be paid all sums owing in the  
17 amount of 30,645,655.38 Euros inclusive of interest as of the judgment  
18 date. Additional interest due at a rate of 5 3/4% pursuant to s.34 of the  
19 Judicature Law (2002 Revision) until payment is made.

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21  
22 As Against the Fourth Defendant:

23  
24 The Fourth Defendant is to pay the Second Plaintiff all sums owing together  
25 with interest in the amount of US\$15,910,413.52 as of the date of judgment.  
26 Additional interest due at a rate of 4 1/2 % pursuant to s.34 of the Judicature  
27 Law (2002 Revision).

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As against the Second Defendant:

A Declaration is granted that having regard to the true nature of the relationship between the Second and Fourth defendant; that the Second Defendant is beneficially owned and controlled by the Fourth Defendant and that the Second Defendant is properly joined in these proceedings against the Fourth Defendant. As such the assets of the Second Defendant are to be regarded as the assets of the Fourth Defendant and are available for execution in satisfaction of judgments obtained against the Fourth Defendant.

The Second Defendant is to pay all sums found due from the Fourth Defendant to the Plaintiffs as of the judgment date. Additional interest due under s.34 of the Judicature Law until payment is made.

The appointment of a Receiver over the assets of the Second Defendant is denied. Instead, an irrevocable designation by the Second Defendant of the General Account of the Grand Court for the purposes of Clause 9.9 of the Facility Agreement of 17<sup>th</sup> May 2002 between the First Defendant, KBC Bank NV, RMB International (Dublin) Limited, the Intervener and the Original Lenders is required. Monies so received are to be held to the benefit of the Plaintiffs to the extent that the Judgment of this Court on the 16<sup>th</sup> July 2003 remains unsatisfied. Any dealings with such funds to await

1 further order of this Court. Any excess is to be for the benefit of the Second  
2 to Fourth Defendants. Liberty to apply in relation to the implementation of  
3 this Order.

4  
5 As against the Second to Fourth Defendants:

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7 A *Mareva* injunction is hereby granted against the Second to Fourth  
8 Defendants prohibiting the Defendants from dealing with their assets up to  
9 the amount of US\$51,000,000. Uncharged free assets in cash owned  
10 beneficially by the Defendants and held by the First Defendant in the  
11 amount of US\$51,000,000 must not be assigned charged, pledged,  
12 mortgaged or assigned.

13  
14 The Plaintiffs are at liberty to seek further relief against the Second to  
15 Fourth Defendants.

16  
17 Costs of this action granted against the Defendants to be taxed if not agreed.

18  
19 As to the First Defendant:

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21 The action against the First Defendant is to be discontinued. The 13<sup>th</sup>  
22 August 2002 *Mareva* injunction against the First Defendant is discharged.  
23 The Plaintiffs are released from the undertakings given to the Court and the  
24 guarantee and charges executed and served in connection with their cross-  
25 undertakings in damages are to be released and returned.

1  
2 I record that the Plaintiffs agree not to pursue either the First Defendant or  
3 the Intervener and vice versa, in relation to any costs orders made in these  
4 proceedings.

5  
6 There is no order as to costs of this action as between the Plaintiffs, the First  
7 Defendant and the Intervener.

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9 I record that Formal Orders were presented to the Court and approved in  
10 final settlement of the action on the 17<sup>th</sup> July 2003.

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16 Anthony Smellie  
17 Chief Justice



18  
19 Dated 14<sup>th</sup> October 2003.