Neutral Citation Number: [2018] EWHC 1916 (Comm)

Case No: CL-2017-000454

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2018

Before :

PETER MACDONALD EGGERS QC (Sitting as a Deputy Judge of the High Court)

- -

Between :

HARDY EXPLORATION & PRODUCTION (INDIA) INC	**Claimant**
- and -	
GOVERNMENT OF INDIA	**Defendant**
- and -	
INDIA INFRASTRUCTURE FINANCE COMPANY (UK) LIMITED	**Third Party**

Dominic Kendrick QC and Jessica Sutherland (instructed by **Volterra Fietta**) for the **Claimant**
Nehali Shah (instructed by **Arlingtons Sharmas**) for the **Defendant**

Neil Kitchener QC and Eleanor Campbell (instructed by **Cooke, Young & Keidan LLP)** for the **Third Party**

Hearing dates: 14 and 15 June 2018

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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.

Peter MacDonald Eggers QC :

Introduction

1. In 2013, the Claimant ("Hardy") obtained an arbitration award ("the Award") against the Defendant, the Government of India ("GOI").

2. On 25th July 2017, on Hardy's application, the Court made an order for the enforcement of the Award ("the Enforcement Order").

3. On 2nd February 2018, the GOI applied to set aside the Enforcement Order made by the Court in July 2017. The hearing of that application has been fixed to be heard in October 2018.

4. On 23rd February 2018, Hardy applied, without notice, for an Interim Third Party Debt Order ("the Interim Order") pursuant to CPR Part 72. The Interim Order was made on 28th February 2018 by Master Kay QC on the premise that "*there is a debt due or accruing due by the third party to the judgment creditor*". The third party to whom the Interim Order was addressed was India Infrastructure Finance Company (UK) Limited ("IIFC (UK)"). The Interim Order required IIFC (UK) not to pay a debt it was said to owe to the GOI up to a limit of £70,528,107.04 unless the Court otherwise orders. If the Interim Order is made final, IIFC (UK) will be required to pay the debt to Hardy, and not to the GOI. The Interim Order was served on IIFC (UK) on 5th March 2018.

5. On 19th April 2018, IIFC (UK) applied for an order for the discharge of the Interim Order (the "Discharge Application"), pursuant to CPR rule 72.8(6), on the following independent grounds:

   (1) Hardy did not give full and frank disclosure in its application for the Interim Order (Ground 1).

   (2) The Court lacked jurisdiction to make the Interim Order and/or should not make a final order because the debt owed by IIFC (UK) is enforceable (and therefore situated) in India, and payment by IIFC (UK) pursuant to an order of the English Court will not discharge the debt as a matter of Indian law (Ground 2).

   (3) The debt is immune from enforcement under the State Immunity Act 1978 (Ground 3).

   (4) The debt owed by IIFC (UK) to the GOI was not "*due or accruing due*" on the date the Interim Order was made or served (Ground 4).

6. On 11th May 2018, the Court ordered that the application for the discharge of the Interim Order be expedited, because of the potential prejudice to IIFC (UK).

7. As a result of the order for expedition, the hearing of the IIFC (UK)'s application to discharge the Interim Order was fixed to be heard on 14th June 2018.

8. On 8th June 2018, Hardy applied for an adjournment of the hearing of the Discharge Application, principally because earlier that week the GOI had served a certificate dated 5th June 2018 signed by the Deputy High Commissioner of India to the United Kingdom dealing with the purposes to which the moneys received by the GOI in respect

of the debt owed by IIFC (UK) to the GOI would be used. This was relevant to the question of state immunity under section 13 of the State Immunity Act 1978. I refused the application for an adjournment, but ordered that only two of the four grounds of the Discharge Application be determined at the hearing on 14th June 2018, namely Grounds 2 and 4, and that the other two grounds (Grounds 1 and 3) be deferred. Ground 3 was concerned with the issue of state immunity and Ground 1 was concerned with an alleged non-disclosure (one allegation of which related to the question of state immunity).

9. Ground 2 is concerned with the jurisdiction of the Court to make a Third Party Debt Order and the location of the situs of the relevant debt, and the circumstances which the Court should take into account in deciding whether to make the Order. Ground 4 is concerned with an additional jurisdictional requirement, under CPR rule 72.2, that the relevant debt captured by the Third Party Debt Order be a "*debt due or accruing due*" to the judgment debtor (in this case, the GOI).

10. This judgment is concerned only with Grounds 2 and 4. If either of these grounds is sustained, the Interim Third Party Debt Order must be discharged and no final order can be made.

Procedural background

11. On 2nd February 2013, Hardy obtained an arbitration award whose monetary terms are currently worth in excess of £70 million against the Defendant, the GOI, in a dispute relating to oil and gas exploration rights in Indian territorial waters.

12. On 25th July 2017, the Court made an order on Hardy's application for the enforcement of the Award against the GOI's assets in England and Wales, save for those not in use or in intended use for commercial purposes.

13. On 2nd February 2018, the GOI acknowledged service and applied to set aside the Enforcement Order. Hardy argued that the GOI's application on 2nd February 2018 was out of time. Accordingly, on 22nd February 2018, the GOI applied for an extension of time until the 2nd February 2018, for the making of the application to set aside the Enforcement Order ("the Extension Application").

14. On 23rd February 2018, Hardy applied for the Interim Third Party Debt Order pursuant to CPR Part 72. This Interim Order was made on 28th February 2018 by Master Kay QC on the premise that "*there is a debt due or accruing due by the third party to the judgment creditor*", and required IIFC (UK) not to pay a debt it owes to the GOI up to £70,528,107.04 unless the Court otherwise orders. The Interim Order required that a hearing take place on 13th April 2018 at which the Court would consider whether the Interim Order should be made final. If a final order is made, such debt owed by IIFC (UK) will have to be paid, not to the GOI, but to Hardy. The Interim Order was served on IIFC (UK) on 5th March 2018.

15. By a consent order dated 22nd March 2018, it was ordered that Hardy should not take any steps to enforce the Award pursuant to the Enforcement Order pending the determination of the Extension Application.

16. On 11th April 2018, Mr Justice Bryan ordered that the hearing fixed by the Interim Order be adjourned to a date not less than seven days after the determination of the Extension Application.

17. On 19th April 2018, IIFC (UK) applied for an order for the discharge of the Interim Order. The grounds for the application for the discharge of the Interim Order are, as explained above: (1) Hardy did not give full and frank disclosure in its application for the Interim Order (Ground 1); (2) the English Court lacked jurisdiction to make the Interim Order and/or should not make a final order because the debt owed by IIFC (UK) is enforceable (and therefore situated) in India, and payment by the Third Party pursuant to an order of the English Court will not discharge the debt as a matter of Indian law (Ground 2); (3) the debt is immune from enforcement under the State Immunity Act 1978 (Ground 3); and (4) the debt owed by IIFC (UK) to the GOI was not "*due or accruing due*" on the date the Interim Order was made (Ground 4).

18. On 1st May 2018, IIFC (UK) issued an application for a further order permitting the parties to rely on expert evidence of Indian law in relation to Ground 2 in support of its application for the discharge of the Interim Order. On 11th May 2018, I allowed this application and ordered the expedited hearing of the Discharge Application.

19. On 18th May 2018, Mrs Justice Moulder allowed the Extension Application and ordered that the enforcement of the Award be stayed pending the determination of the GOI's application to set aside the Enforcement Order.

20. The parties exchanged factual evidence, by way of witness statements, and experts' reports on Indian law in accordance with the Court's directions in respect of the Discharge Application. On 5th June 2018, the GOI served a certificate issued by the Deputy High Commissioner of India to the United Kingdom in connection with the use made by the GOI of the guarantee fees paid or to be paid by IIFC (UK) to the GOI. As a result of the service of that certificate outside the timetable laid down by the Court and the proximity of the expedited hearing of the Discharge Application, fixed to be heard on 14th June 2018, Hardy applied for an adjournment of that application. I refused the adjournment, but directed that only Grounds 2 and 4 be heard on 14th June 2018, and the hearing of Grounds 1 and 3 be deferred, if necessary.

21. I should point out that Hardy objected to the procedure whereby the third party applies to the Court for the discharge of the Interim Order before any hearing to determine whether the Interim Order should be made final, if the consequence is that the third party would be free to re-litigate the grounds of challenge to the Interim Order if that challenge fails. I did not understand IIFC (UK) or the GOI to argue the contrary. For the avoidance of doubt, I do not see any reason why a third party affected by an Interim Order cannot apply to the Court for the discharge of that Order. Further, the determination of the two grounds upon which IIFC (UK) applies to discharge the Interim Order and which are determined in this judgment will finally dispose of those grounds, whether relied on for the purpose of discharging the Interim Order or for the purpose of objecting to the making of a final order, insofar as there are two separate hearings. Accordingly, I do not see how any party could re-argue the same grounds (*i.e.* Grounds 2 and 4) which are determined by this judgment at any subsequent hearing.

The relationship between IIFC (UK) and the GOI

22. IIFC (UK) is a company incorporated in England and Wales on 7th February 2008 as a private limited company with registration number 06496661, with a registered office in King William Street, London.

23. The sole shareholder of IIFC (UK) is India Infrastructure Finance Company Ltd ("IIFCL"), a company incorporated in India on 5th January 2006, and the sole shareholder of IIFCL is the GOI. In fact, the GOI nominated two members of IIFC (UK)'s board of directors.

24. IIFCL provides long-term rupee loans to Indian companies implementing infrastructure projects in India and IIFC (UK) provides long-term loans in foreign currency to such companies for the import of capital equipment and machinery. All lending by IIFC (UK) is made pursuant to a scheme approved by the GOI. Facilities extended by IIFC (UK) are required to be in compliance with parameters set by the Reserve Bank of India.

25. These activities are financed by an equity investment of US$50 million made by IIFCL and by bonds which IIFC (UK) issued to the Reserve Bank of India pursuant to a Bond Subscription Agreement dated 6th March 2009, as amended on 27th March 2012, 5th September 2014 and 19th January 2017. Under article 1.2, IIFC (UK) is required to issue 10 year maturity US dollar denominated bonds with a minimum face value of US$1 million. The bond issues are available to IIFC (UK) until 6th March 2020. The Bond Subscription Agreement provides that it is governed by Indian law and contains an Indian arbitration agreement and a New Delhi jurisdiction agreement (articles 9.3-9.5).

26. Under article 2 of the Bond Subscription Agreement, the repayment of any bonds is to be secured by a guarantee from the GOI. The GOI executed a separate deed of guarantee in favour of the Reserve Bank of India in respect of each bond issue. Clause 4.2 of each deed of guarantee provides that the parties to the guarantee are subject to the exclusive jurisdiction of the Courts of Delhi. Each bond subscription is preceded by a guarantee agreement by the GOI in favour of the Reserve Bank of India and a Guarantee Fee Agreement between IIFC (UK) and the GOI, the first of which was dated 6th March 2009. Subsequent Guarantee Fee Agreements were concluded on 14th September 2011, 22nd February 2012, 27th March 2012, 4th March 2014, 5th March 2014, 12th September 2014, and 25th February 2015.

27. Under article 1.3 of the Bond Subscription Agreement between IIFC (UK) and the Reserve Bank of India, IIFC (UK) is required to pay interest every six months from the date of the issue of the bond. Repayment of the bonds is to be secured by the guarantee of the GOI. Under the Bond Subscription Agreement, in the event of default by IIFC (UK), the Reserve Bank of India would not be required to subscribe for bonds until the default is cured, and the Reserve Bank of India may call upon IIFC (UK) to repay the principal amount of the bonds and all accrued interest within 30 days of notice.

28. The value of the bonds currently outstanding is approximately US$2.1 billion and the first of the bonds is repayable on 19th March 2019.

29. Under the Guarantee Fee Agreements between the GOI and IIFC (UK), IIFC (UK) agreed to pay an annual guarantee fee at a specified rate (namely, 0.25% in respect of

the first tranche of US$250 million and 0.45% in respect of the remaining bonds amounting to US$1.85 billion) to the GOI in consideration for the provision of the guarantee to the Reserve Bank of India by the GOI.

30. As at 1st April 2018, the guarantee fee payable to the GOI by IIFC (UK) under the Guarantee Fee Agreements was US$8,962,371 (paragraph 40 of the first witness statement of Mr Raghav Aggarwal, who is a manager and employee of IIFC (UK)). In the event of default in payment of the relevant fee, damages equivalent to double the rate of the fee are payable (although Hardy argues that this is a penalty).

31. The first Guarantee Fee Agreement dated 6th March 2009 contained the following provisions:

> *"1. In consideration of the principal amount and normal interest accrued thereon being secured by irrevocable guarantee furnished by the Government of India, IIFC (UK) shall pay to the Government of India, an annual guarantee fee at the rate of 0.25 per cent on the amount of the said borrowing of USD 250 million and thereafter pay in advance on the 1st day of April of each year on the principal plus accumulated normal interest outstanding. Any default in the payment of the prescribed guarantee fee shall entail damages equivalent to double the rate of guarantee fee for the period of default …*
>
> *4. IIFC (UK) shall cause the proceeds of the Bonds to provide financial support to Indian companies implementing infrastructure projects in India for the purpose of meeting their capital expenditure outside India for import of capital equipment and machineries and/or to co-finance the external commercial borrowings for such viable infrastructure projects …*
>
> *6. This Agreement shall come into force and effect from the day on which the Subscription Agreement and Guarantee Agreement became effective.*
>
> *7. As and when the entire principal amount of the Bonds and all normal interest which have accrued thereon have been repaid by IIFC (UK) and the guarantee fee paid then this Agreement and all obligations of IIFC (UK) hereunder shall forth terminate.*
>
> *8. IIFC (UK) shall service the borrowings as per the schedule of payment of normal interest and principal as stated in Subscription Agreement. On receipt of a notice of default from the Lender, IIFC (UK) shall immediately inform the Guarantor as to how, in what manner and within how much time IIFC (UK) shall remedy the default and shall follow the directions, if any, of the Guarantor for timely remedial of the default …*
>
> *10. The Government of India may specify other terms and conditions in order to ensure timely repayment of the liabilities of IIFC (UK) under this Agreement and IIFC (UK) will be bound to follow such instructions as may be issued from time to time in this behalf …*

12. Miscellaneous

12.1 Subject to clause 12.2 hereof, the competent civil court in Delhi shall have the exclusive jurisdiction in respect of any matter, claim or dispute arising out of or in any way relating to this Agreement.

12.2 In the event of any dispute or difference between the parties hereto, such dispute or difference shall be resolved amicably by mutual consultation or through the good offices of empowered agencies of the Government. If such resolution is not possible, then, the unresolved dispute or difference shall be referred to arbitration of an arbitrator to be nominated by Secretary, Department of Legal Affairs ("Law Secretary") … The Arbitration and Conciliation Act, 1996 (No. 26 of 1996) shall not be applicable to the arbitration under this clause. The award of the Arbitrator shall be binding upon parties to the dispute, provided, however, any party aggrieved by such award may make a further reference for setting aside or revision of the award to Law Secretary whose decision shall bind the parties finally and conclusively …"

32. Each of the subsequent Guarantee Fee Agreements contained substantially similar terms.

33. Under articles 7.1 and 7.2 of the Bond Subscription Agreement, IIFC (UK) would be obliged to notify the Reserve Bank of India in the event of its failure to pay the guarantee fee under the Guarantee Fee Agreements, whereupon the Reserve Bank of India may call upon IIFC (UK) to repay the principal amounts of the bonds and interest.

CPR Part 72

34. The making of Third Party Debt Orders, formerly garnishee orders, is regulated by CPR Part 72.

35. CPR rule 72.1(1) provides that "*This Part contains rules which provide for a judgment creditor to obtain an order for the payment to him of money which a third party who is within the jurisdiction owes to the judgment debtor*".

36. CPR rule 72.2(1) provides:

"*Upon the application of a judgment creditor, the court may make an order (a 'final third party debt order') requiring a third party to pay to the judgment creditor –*

(a) the amount of any debt due or accruing due to the judgment debtor from the third party; or

(b) so much of that debt as is sufficient to satisfy the judgment debt and the judgment creditor's costs of the application."

37. These provisions identify two requirements which must be satisfied before a Third Party Debt Order can be made by the Court, namely that (1) the third party, in this case IIFC (UK) must be within the jurisdiction, and (2) the debt must be "*due or accruing*

due" to the judgment debtor (the GOI) from the third party (IIFC (UK)). In order that the third party be within the jurisdiction, it is sufficient if the third party is temporarily present within the jurisdiction at the relevant time, which is likely to be the date on which the Interim Third Party Debt Order is made, or if the third party has submitted to the jurisdiction even before the Interim Order is made (*SCF Finance Co Ltd v Masri (No. 3)* [1987] QB 1028; *Dicey, Morris & Collins on The Conflict of Laws*, (15th ed., 2014), para. 24-082 - 24-083). A company may be present within the jurisdiction if it is incorporated within the jurisdiction or if it carries on business within the jurisdiction; this is very similar, if not identical, to the residence of the company (*New York Life Insurance Co v Public Trustee* [1924] 2 Ch 101, 114-115, 119-120; *Dicey, Morris & Collins on The Conflict of Laws*, (15th ed., 2014), para. 22-027).

38. A further rule of CPR Part 72 should also be considered, namely CPR rule 72.9, which provides that:

> "*(1) A final third party debt order shall be enforceable as an order to pay money.*
>
> *(2) If –*
>
> *(a) the third party pays money to the judgment creditor in compliance with a third party debt order; or*
>
> *(b) the order is enforced against him,*
>
> *the third party shall, to the extent of the amount paid by him or realised by enforcement against him, be discharged from his debt to the judgment debtor*."

39. The significance of this provision is that the third party should itself not be prejudiced by complying with the Third Party Debt Order, nor for that matter should the judgment debtor. Thus, if the Third Party Debt Order is made final, IIFC (UK) will be required to pay the moneys owing to the GOI under the Guarantee Fee Agreements to Hardy and, in so doing, as far as CPR Part 72 is concerned, IIFC (UK)'s debt to the GOI is discharged and the GOI's liability to Hardy for the relevant judgment debt is accordingly reduced.

40. A Third Party Debt Order operates to provide the judgment creditor (in this case, Hardy) with a proprietorial interest in the debt owed by the third party (IIFC (UK)) to the judgment debtor (the GOI). When an Interim Order (or as it was an order nisi) is made, the third party is not permitted to pay the debt which is due to the judgment debtor; the order operates as an equitable charge (*Galbraith v Galbraith* [1910] 1 KB 339, 343; *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260, paragraph 87); in other words, the order operates to freeze the sum to be paid to the judgment debtor in the hands of the third party (*Choice Investments Ltd v Jeromnimon* [1981] QB 149, 153). When a final order is made, the right to payment of the debt no longer belongs to the judgment debtor, but to the judgment creditor. Such rights are subject to the financial limits imposed by the Court in making the Third Party Debt Order. Thus, in *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260, at paragraph 24, Lord Bingham described the nature of the relief in the following terms: "*A garnishee or third party*

debt order is a proprietary remedy which operates by way of attachment against the property of the judgment debtor. The property of the judgment debtor so attached is the chose in action represented by the debt of the third party or garnishee to the judgment debtor. On the making of the interim or nisi order that chose in action is (as it has been variously put) bound, frozen, attached or charged in the hands of the third party or garnishee. Subject to any monetary limit which may be specified in the order, the third party is not entitled to deal with that chose in action by making payment to the judgment debtor or any other party at his request. When a final or absolute order is made the third party or garnishee is obliged (subject to any specified monetary limit) to make payment to the judgment creditor and not to the judgment debtor, but the debt of the third party to the judgment debtor is discharged pro tanto". The Third Party Debt Order operates as a species of enforcement of the relevant judgment debt.

Ground 2: the situs of the debt and the Court's discretion

41. In addition to the above jurisdictional requirements for the making of a Third Party Debt Order, it has been established that the situs of the relevant Third Party Debt must be within the jurisdiction, *i.e.* within England and Wales.

42. The second ground (Ground 2) of IIFC (UK)'s Discharge Application is that:

    (1) The Court has no jurisdiction to make a Third Party Debt Order because the situs of the relevant debt (owing by IIFC (UK) to the GOI) is India, not England.

    (2) Even if the Court has jurisdiction, the Court should not make such an order because there is a real or substantial risk that IIFC (UK)'s compliance with the Third Party Debt Order will not discharge IIFC (UK)'s liability to the GOI under the Guarantee Fee Agreements.

(1) Jurisdiction

(a) The situs of the debt

43. It was common ground between the parties that the Court has no jurisdiction to make a Third Party Debt Order in circumstances where the relevant debt to be attached is situated outside England and Wales. There is an exception, namely that the Court has jurisdiction to make an Order even if the situs of the debt is outside England and Wales, if by the law applicable in the situs of the debt an English order would be recognised as discharging the liability of the third party to the judgment debtor.

44. Therefore, subject to that exception, the situs of the debt within the jurisdiction is an essential requirement of the Court being able to make such an order. The matter is put as follows in *Dicey, Morris & Collins on The Conflict of Laws*, (15th ed., 2014), rule 136: "*Subject to the effect (if any) of Council Regulation (EC) 44/2001, the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, the court has jurisdiction to make a third party debt order if both the debtor and the debt to be attached are within England, but not otherwise*".

45. This was authoritatively established in *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260, where the relevant third party debt was owed by a Hong Kong bank with a branch in London. It was

common ground that the debt was situated in Hong Kong and that Hong Kong law would not recognise the English Third Party Debt Order as discharging that debt. At paragraphs 26-27, Lord Bingham said:

> *"It is not in my opinion open to the court to make an order in a case, such as the present, where it is clear or appears that the making of the order will not discharge the debt of the third party or garnishee to the judgment debtor according to the law which governs that debt. In practical terms it does not matter very much whether the House rules that the court has no jurisdiction to make an order in such a case or that the court has a discretion which should always be exercised against the making of an order in such a case. But the former seems to me the preferable analysis, since I would not accept that the court has power to make an order which, if made, would lack what has been legislatively stipulated to be a necessary consequence of such an order …*
>
> *It is of course true, as the judgment creditor argued and as was accepted in SCF Finance Co Ltd v Masri (No 3) [1987] QB 1028, 1044, that the legislation has from the beginning stipulated that the third party or garnishee should be within the jurisdiction but not that the debt to be attached should be within the jurisdiction. This seems to me a point of very little weight. The language used in 1854 has, until very recently, been reproduced with remarkably little change, and I think it rather unlikely that Parliament in 1854 was directing its mind to garnishees served within the jurisdiction but owing debts to the judgment debtor abroad. Since no order attaching a foreign chose in action has been made in any reported case, there can have been no pressing need for the Rules Committee to clarify any suggested ambiguity in the rules."*

46. This view of the matter as affecting the Court's jurisdiction, rather than its discretion, was echoed by Lord Hoffmann at paragraph 59 ("*there are strong reasons of principle for not making a third party debt order in respect of a foreign debt*") and Lord Millett at paragraph 108. Adopting Lord Bingham's analysis, in *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2017] UKSC 64; [2017] 3 WLR 1170, being the most recent decision of the Supreme Court on this jurisdiction, Lord Clarke, said at paragraph 29, that:

> "*It is common ground that all property, whether tangible or intangible, has a situs for legal purposes. It is further common ground that … a third party debt order is a proprietary remedy, which, when complied with, operates to discharge the debt and to release the debtor from his obligation. Since it involves dealing with property, the English courts do not have jurisdiction to make such an* order *in respect of debts situated outside the jurisdiction, unless by the law applicable in that place an English order would be recognised as discharging the liability of the third party to the judgment debtor.*"

47. If the debt is not situated in England and Wales, difficulties may arise about a foreign court's recognition of the proprietary effect of the Third Party Debt Order, with the result that the third party's debt to the judgment debtor may not be treated as discharged if the Order is complied with. In *Martin v Nadel* [1906] 2 KB 26, at page 29, Vaughan Williams, LJ said that in respect of a third party debt owed by a German bank, with a branch in London:

> "*… a garnishee order is of the nature of an execution, and is governed by the lex fori; and by international law an execution which has been carried into effect in a foreign country under foreign law, and has taken away part of a man's property, is not recognized as binding. There can be no doubt that under the rules of international law the Dresdner Bank could not set up, in an action in Berlin, the execution levied in this country in respect to this debt. If we consider the converse case it is clear, to my mind, that we should take that view of a similar transaction occurring abroad. That being the case, we must consider whether the Court should refuse to permit this execution on the ground that the effect might be that the bank might be called on to pay the debt a second time in Germany.*"

48. Accordingly, the Court should not make a Third Party Debt Order in respect of a debt which is properly within the province of another legal system. In *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260, as explained by Lord Hoffmann at paragraph 32, the question was whether the Court could make a Third Party Debt Order in respect of a "*foreign debt*", which was defined to mean "*a debt which is payable in a foreign country and governed by the foreign law*". At paragraph 54, Lord Hoffmann said that*: "The execution of a judgment is an exercise of sovereign authority. It is a seizure by the state of an asset of the judgment debtor to satisfy the creditor's claim. And it is a general principle of international law that one sovereign state should not trespass upon the authority of another, by attempting to seize assets situated within the jurisdiction of the foreign state or compelling its citizens to do acts within its boundaries*".

(b) Locating the situs of the debt: the parties' submissions

49. The issue which divided the parties was what was the appropriate test for the situs of the relevant third party debt. The parties were agreed that it is a matter of English law whether the situs of the debt is in England and Wales, in determining the jurisdiction of the Court to make a Third Party Debt Order. That is not to say that the approach of a foreign court, in this case the Indian Court, in determining the situs might not be relevant to the exercise of the Court's discretion.

50. Mr Dominic Kendrick QC, with Ms Jessica Sutherland, on behalf of Hardy contended that the situs of the debt was determined by the residence (or domicile) of the third party, in this case IIFC (UK). IIFC (UK) is an English company, with a registered office in England, which carries on business in England and maintains six bank accounts with funds in England. The location of IIFC (UK)'s bank accounts in England demonstrates that it has assets within the jurisdiction against which the relevant debt might be enforced. Mr Kendrick QC relied on the fact that the relevant consideration in determining the situs of the debt is the place of the enforcement of the debt, meaning the execution of any judgment determining the debt; the principal place where the relevant third party debt would be enforced is the place of residence of the third party debtor, because that is the place where in general the third party will have its assets. Hardy dismissed the notion that the situs of the debt is concerned with the choice of jurisdiction or choice of law provisions of the contract giving rise to the debt. That the situs of the debt is determined by the third party's residence, and not the governing contract, is consistent with the fact that the situs of movable property governs the transfer of title to such property, even if there were a contract for the sale of that property whose governing law is different from the law of the situs. To this end, Mr

Kendrick QC referred to the decision of Moore-Bick, J in *Glencore International AG v Metro Trading International Inc (No. 2)* [2001] 1 Lloyd's Rep 284.

51. Mr Neil Kitchener QC, with Ms Eleanor Campbell, on behalf of IIFC (UK), contended that the situs of the debt was located in the State where the debt is properly recoverable or can be enforced, meaning the State whose courts have jurisdiction to declare and decide upon the existence and quantum of the debt. This is important having regard to the consideration in making Third Party Debt Orders which the Court has taken into account, namely protecting the third party against the possibility that the debt may not be treated as discharged by a Third Party Debt Order. It is said that it is not sufficient, albeit necessary, that the English Court has personal jurisdiction over the third party. Indeed, the requirement that the third party be within the jurisdiction is expressly stipulated by CPR rule 72.1(1). Although IIFC (UK) initially argued that the law governing the contract giving rise to the debt was determinative of the situs of the debt, I understood IIFC (UK)'s argument to have developed to identifying the location of the situs as the place whose courts have jurisdiction to determine the existence and quantum of the debt (in many cases this may be determined in accordance with the *lex contractus*). Ms Nehali Shah, on behalf of the GOI, supported IIFC (UK)'s application to discharge the Interim Order and adopted its submissions.

52. The difficulty in resolving this dispute between the parties arises from the language in which the Court has in the past explained the reach of the Court's jurisdiction by reference to the situs of the debt; reference is made to the place where the debtor resides or where the debt is "*recoverable*", "*enforceable*" or "*payable*", each of which may or may not have its own distinct meaning. For this purpose, it is necessary to refer to the principal authorities concerned with the jurisdictional requirement of a garnishee order or Third Party Debt Order.

(c) Locating the situs of the debt: the authorities

53. The importance of identifying the situs of a debt resides, at least in part, in deciding whether or not the debt will be discharged by compliance with the Third Party Debt Order and that question is generally determined by the laws of the country in which the debt is situated. In *Ellis v M'Henry* (1871) LR 6 CP 228, the Court had to decide whether an English deed of composition was an answer to a Canadian debt adjudged as due by the Canadian Court in an action on the judgment before the English Court. Under English bankruptcy law then in force, the deed of composition operated to discharge the debtor from the debt. At page 234, Bovill, CJ said:

> "*In the first place, there is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries … Secondly, as a general proposition, it is also true that the discharge of a debt or liability by the law of a country other than that in which the debt arises, does not relieve the debtor in any other country …*"

54. The reasoning was therefore that the law governing the debt, being the law of the country in which the debt arises, determines whether the debt is discharged and that is recognised as a rule of private international law adopted in other countries; by contrast, if another legal system recognises the debt as discharged, that may not operate to discharge the relevant debt. This reasoning applies to Third Party Debt Orders, because when such a debt is made final and the debt is paid by the third party to the judgment creditor, the third party's liability to the judgment debtor is discharged and should, in theory, be recognised as discharged by other systems of law. However, this is the effect only if the debt is situated in England and Wales (where the Third Party Debt Order is made). This consideration is important in understanding the location of the situs of the debt.

55. In *Martin v Nadel* [1906] 2 KB 26, a garnishee order was made, under what was then RSC Ord. 45, rule 7, against the London branch of a German bank (Dresdner Bank), in respect of moneys owing by that bank to the judgment debtor. At page 29, Vaughan Williams, LJ referred to the nature of a garnishee order and its recognition under rules of private international law. At page 31, Stirling, LJ said:

> "*Mr. Dicey, at p. 318 of his treatise on the Conflict of Laws, points out the rule of law that debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced. On the facts of this case the debt of the bank to Nadel would be properly recoverable in Germany. That being so, it must be taken that the order of this Court would not protect the bank from being called on to pay the debt a second time. That is a good reason why the order should not be made, for to make it would be inequitable and contrary to natural justice … Order XLV., r. 7, provides, that payment by a garnishee is to be a valid discharge as against the debtor, liable under a judgment or order, to the amount paid or levied, although such proceeding may be set aside or the judgment or order reversed, but that provision cannot affect the rights of a person who is not within the jurisdiction of the Court and is not subject to its jurisdiction.*"

56. In *Swiss Bank Corp v Boehmische Industrial Bank* [1923] 1 KB 673, the debt which was the subject of a garnishee order was the balance of an account held with a London bank. Bankes, LJ explained the basis of this jurisdiction as follows (at pages 678-679):

> "*The decision of that question depends upon where the debt sought to be attached is situate. If the debt is situate, or in other words if it is properly recoverable, in this country, then it would be discharged by payment under an order of our Courts and the garnishee need have no fear of being required to pay it a second time; but if the debt is situate, that is properly recoverable, in a foreign country, then it is not discharged by payment in this country under an order of the Courts of this country, and the debtor may be called upon to pay it over again in the foreign country. There is no doubt as to the effect of payment made under a garnishee order here. It is clearly a discharge pro tanto of the debt … Now when a debt payable in this country is discharged by a Court of competent jurisdiction in this country what is the result? It is clearly expressed by Bovill C.J. in Ellis v. M'Henry …*"

57. At page 684, Atkin, LJ qualified the judgment given by Vaughan Williams, LJ in *Martin v Nadel* (quoted above) in the following terms:

> "*The plaintiffs sued a foreigner who though resident out of the jurisdiction appeared in the proceedings. The plaintiffs having got judgment by an order of the Court now seek to get execution by attaching a debt which to my mind clearly "arises" and "is situate" within the territorial limits of the jurisdiction of the English Courts, if there is any difference between the two expressions. Those Courts have statutory power to order execution to issue against such property, and by our law, and by the principles of private international law, such process when executed has the effect of discharging the person who owes the debt thus attached from further liability to pay it. It follows that the Court would rightly exercise its statutory jurisdiction and discretion by allowing this execution to issue, inasmuch as the effect of the execution will be to discharge the London Merchant Bank, the garnishees, of their debt to the Böhmische Industrial Bank, the judgment debtors. Martin v. Nadel is plainly distinguishable, and its only claim to be considered in this case is by reason of a sentence in the judgment of Vaughan Williams L.J. as reported in the Law Reports, which appears in much the same terms in the three other reports of the case. The sentence in the Law Reports runs thus: "By international law an execution which has been carried into effect in a foreign country under foreign law, and has taken away part of a man's property, is not recognized as binding." That sentence taken by itself appears to me so plainly too wide that I feel satisfied that the very learned judge to whom it was ascribed cannot have intended the wide meaning now attributed to the words used. In their widest meaning they would indicate that if a judgment were recovered in a Court of competent jurisdiction in this country against a foreigner, the owner of a foreign ship, and the ship having arrived in this country were taken in execution and sold under the judgment, the former owner of that ship could, when she returned to a foreign jurisdiction, claim that he had never been divested of his property in her. That seems to me to be wrong. I think, when he used the words "execution which has been carried into effect in a foreign country under foreign law," the learned Lord Justice intended to exclude that foreign country in which the property happened to be situate. So read, it may be that the sentence is not open to criticism. But where a competent Court issues execution upon property situate within its jurisdiction I think its jurisdiction would be recognized by any foreign Court which applies the ordinary rules of international law.*"

58. In *Richardson v Richardson* [1927] P 228, the relevant third party debt was the balance owing on an account at branches in Mombasa and Dar es Salaam of the National Bank of India, whose head office was in London. Hill, J said at pages 235-236:

> "*The bank is no doubt indebted to the judgment debtor and the bank is within the jurisdiction. The Order deals with the case where "any other person is indebted to the judgment debtor and is within the jurisdiction." But both in principle and upon authority, that means "is indebted within the jurisdiction and is within the jurisdiction." The debt must be properly recoverable within the jurisdiction. In principle, attachment of debts is a form of execution, and the general power of execution extends only to property within the jurisdiction of the Court which orders it. A debt is not property within the jurisdiction if it cannot be recovered*

here. As a matter of authority, the case of Martin v. Nadel, as explained by Swiss Bank Corporation v. Boehmische Industrial Bank, and the decision and judgments in that case show that the Order does not apply unless the debt is properly recoverable within the jurisdiction … In the result, I am of opinion that moneys held by the bank to the credit of the judgment debtor at the African branches cannot be made the subject of a garnishee order, for they are not a debt recoverable within the jurisdiction. I add this: If the judgment creditor is right, then upon service of the order nisi, the bank became custodian for the Court of the whole of the funds attached, i.e., for all amounts to credit of the judgment debtor at all its branches, and could not, except at its peril, part with any of those funds in any part of the world (Rogers v. Whiteley), and the burden would be imposed upon the bank of communicating with all its branches in all parts of the world."

59. In *Chaturbhuj Piramal v Chunilal Oomkarmal* (1933) 60 LR Ind App 211, the plaintiffs were judgment creditors of Mr Shankarrao and argued that they had attached a debt owed to Mr Shankarrao by the defendant. However, the defendant alleged that that debt had already been seized by the State of Indore. The defendant had dealt with Mr Shankarrao through the defendant's head office in Indore for 2-3 years and through the defendant's office in Bombay for 1½ years. At the relevant date, there was a credit owing on Mr Shankarrao's account with the defendant in the Bombay office, but the account in the Indore office was about even. The State of Indore served a notice requiring the defendant to pay the sum owing to Mr Shankarrao on the Bombay account. It was common ground that, if the State of Indore was not entitled to seize the debt, the plaintiffs were entitled to succeed in the action. The principal question considered by the Privy Council on appeal from the High Court at Bombay was whether the debt was property situate within the territory of Indore. The plaintiffs conceded that the general rule is that the situs of a debt is the residence of the debtor, but argued that there is either a "*parallel rule of equal validity or at any rate an exception to the general rule*" in situating the debt in the place where it is "*properly payable*", meaning either the sole place fixed by the contract for payment, or possibly the place primarily fixed for payment by the contract, with the necessity to prove default in that place before the debtor can be sued elsewhere for either debt or damage for default. The Privy Council held that the situs of the debt was Indore, but declined to define exhaustively the rules which will determine the situs of the debt. Lord Atkin said (at pages 220-222):

"*In the present case they have debtor and creditor both resident in and (if for this purpose it is relevant) nationals of Indore. Unless it can be shown that the contract expressly or impliedly provided for payment in Bombay, either solely or it may be primarily, or, which is not suggested, made the debt enforceable only in the Bombay Courts, there is no test of situs which can be suggested, whether in India or elsewhere, which could make the debt not situate in Indore …*

It appears to their Lordships that there was no evidence to displace the ordinary obligations that would arise in the ordinary course of a business such as this, that on the balance of account Shankarrao was bound to pay Oomkarmal was bound to pay Shankarrao in Indore. That there was not a right to sue Shankarrao in Indore could hardly be contended. It is difficult to think that he could only be sued in Bombay, where he did not reside and had no place of business. In these circumstances, there being no sole or primary obligation to pay in Bombay, and

no exclusive right of suit in Bombay and both parties being resident in Indore, it is impossible to displace the decision of the Appellate Court that the debt was situate in Indore."

60. In *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260, the judgment creditor obtained a judgment against the judgment debtor in France and registered the judgment in England and then obtained a garnishee order against a Hong Kong bank, with a registered branch in London. The judgment debtor had funds standing to its credit with the bank. The House of Lords considered the nature of the garnishee order and its effect. The evidence before the Court was that Hong Kong law would not recognise a garnishee order as discharging a Hong Kong debt. This reflected "*general international practice*" (paragraphs 8, 16). The House of Lords held that the order should be discharged, because the debt was situated in Hong Kong. At paragraphs 17 and 26, Lord Bingham said:

"*The House was referred to no reported case in which the English court has made a final third party debt order or garnishee order absolute in relation to a foreign debt, although (with one exception) the refusal has been put on discretionary grounds; and discretion has been exercised against the making of an order even where the debt to be attached is situated in this country where it has appeared that the third party, despite the discharge of its debt to the judgment debtor as a matter of English law, may be at risk elsewhere of compulsion to pay a second time …*

It is not in my opinion open to the court to make an order in a case, such as the present, where it is clear or appears that the making of the order will not discharge the debt of the third party or garnishee to the judgment debtor according to the law which governs that debt … I find myself in close agreement with the opinion of Hill J in Richardson v Richardson [1927] P 228, subject only to the qualification (of little or no practical importance) that an order may be made relating to a chose in action sited abroad if it appears that by the law applicable in that situs the English order would be recognised as discharging pro tanto the liability of the third party to the judgment debtor."

61. Lord Hoffmann said at paragraphs 32 and 59 that the Court should not grant Third Party Debt Orders, as a matter of principle, in respect of foreign debts, which Lord Hoffmann defined as "*a debt which is payable in a foreign country and governed by the foreign law*". At paragraphs 53-54, Lord Hoffmann referred to Lord Goff's judgment in *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Ras Al-Khaimah National Oil Co* [1990] 1 AC 295, stating:

"*In analysing the authorities, Lord Goff of Chieveley said that the question was always whether it would be inequitable to make the garnishee order absolute. It would generally be inequitable to do so if the garnishee would have to pay the debt twice over. In deciding whether this might happen, the normal assumption was that any foreign court, in accordance with general principles of private international law, would treat the debt as discharged if three conditions were satisfied: (1) the English court had international jurisdiction to enter judgment against the debtor; (2) the situs of the debt was England and (3) the effect of payment under the garnishee order in English law was to discharge the debt.*

Lord Goff then considered whether this assumption should be made in every case: was compliance with the three criteria both necessary and sufficient? Lord Goff did not express a view as to whether compliance was necessary, although he noted the court in Martin v Nadel [1906] 2 KB 26 had not simply applied the three criteria as a matter of private international law but had considered whether in fact a payment under the garnishee order would be recognised by a court in Berlin as discharging the local debt. This suggests that if the evidence of foreign law had shown that, contrary the general principles of private international law, the foreign court would have treated the debt as discharged, it would have been acceptable to make the garnishee order absolute. But the real issue in the case was whether compliance was sufficient. Lord Goff said, at p 355, that it was not …"

62. Lord Hobhouse began his discussion of the garnishee order at paragraphs 72-74 by referring to *Dicey & Morris on the Conflict of Laws* (13th ed., 2000):

"Rule 112 states that "choses in action generally are situate in the country where they are properly recoverable or can be enforced". The text amplifies this in relation to debts, saying, "a debt is [generally] situate in the country where the debtor resides ... It may not, however, be the only place: English courts may take jurisdiction against non-residents on the basis of temporary presence", or under the CPR or the Brussels or Lugano Conventions. Nevertheless, this possibility does not make the debt situate in England if the debtor is not resident here. But, generally speaking, "for the purpose of determining situs, a corporation is resident wherever it carries on business" …

The third party debtor, garnishee, is a corporation. It is incorporated in Hong Kong where it presumably has its head management. But it has places of business in England and is registered as an overseas company under Part XXIII of the Companies Act 1985. The English courts accordingly have jurisdiction. The company can be served within the jurisdiction and has one or more places of business here. If the company were an ordinary trading company and the debt it owed to the judgment debtor an ordinary commercial debt, say, payment for a service rendered or goods supplied, the judgment debtor could have sued the company and recovered the debt in England and could have argued that the company had sufficient residence here to make England the or a situs of the debt. But, with banks and the debts of banks to their customers, the debt is, absent some special agreement, repayable at the branch where the customer's account is kept and the situs of the debt is in that country. This has a double significance. It is part of and defines the substantive obligation of the bank to its customer and it identifies the situs of the debt for the purposes of Private International Law … The recognition of what is the substantive obligation of the bank is an essential part of the analysis.

In the present case (and in the UBS AG case), the third party debtor is a bank and the debt (or alleged debt) is one owing by the bank to its customer (the judgment debtor) at a branch in another country. This is an important fact because to make a garnishee or third party debt order requiring payment of the debt in this country (probably also translating it into sterling) is to impose on the bank an obligation which it has never assumed. It is not an obligation which the

customer (the judgment debtor) could have asserted let alone enforced against the bank … There may be a whole number of practical reasons why the bank's contract must be respected: local law, local regulation, currencies, tax, exchange control, insolvency rules, confidentiality and so on. One can also ask why is it that the judgment creditor is so reluctant to enforce his judgment in the country where the debt is payable which in the present case it is accepted that it could have easily done. But the most important point is that the order would purport to enforce a supposed right which did not exist and the judgment debtor did not possess. This is unprincipled and in the true sense exorbitant. Another way of stating the same point is that the application for the third party debt (garnishee) order lacked subject matter."

63. At paragraph 107, Lord Millett said that:

"The judgments were directed to the territorial reach of the court's jurisdiction, and were founded on the rule of international law that a debt can be discharged only by the law of the place where it is recoverable … Just as the English court would not regard a foreign court as being a court of competent jurisdiction to discharge a debt recoverable here, so a foreign court would not regard our court as competent to discharge a debt recoverable there; and that was sufficient in itself to preclude the making of the order in respect of a foreign debt".

64. *In Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2017] UKSC 64; [2017] 3 WLR 1170, the claimant had obtained an arbitration award against the defendant and the claimant obtained a Third Party Debt Order in respect of moneys due under letters of credit issued by the London branch of a French bank in favour of the defendant; the letters of credit provided for payment to be made into an account at a New York bank. The Supreme Court discharged the Order. The focus of this case was on the application of the Court of Appeal's decision in *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 1 WLR 1233 which held that the situs of a debt represented by a letter of credit was to be found in the country of the place of payment (against documents) under the letter of credit. Lords Clarke and Neuberger (at paragraphs 35-36 and 124) preferred the analysis of the dissenting member of the Court of Appeal in *Power Curber*, who said at page 1244 that "*The more difficult issue for me has been that relating to the lex situs of the debt. A debt is generally to be looked upon as situate in the country where it is properly recoverable or can be enforced*".

65. At paragraph 30, Lord Clarke held that:

"*Taurus' argument is that in the case of debts the rule chosen and applied by English law is that the situs of a debt is the debtor's residence, the place where the debt is recoverable. This is a long standing rule which goes back at least to the beginning of the last century. As Mr Pollock correctly put it, its nature and application were explained in detail by Lord Hobhouse in Société Eram Shipping Co Ltd v Cie Internationale de Navigation [2004] 1 AC 260, 287–288.*"

66. There are additional authorities where the Court has considered the situs of a chose in action, not in the context of a garnishee or Third Party Debt Order, but for other purposes. In some cases, the situs is influenced by the relevant legislation, but in other cases, the Court is determining the situs for jurisdictional purposes.

67. In *New York Life Insurance Co v Public Trustee* [1924] 2 Ch 101, the question arose whether the rights of German nationals to moneys payable under life insurance policies were situated in London for the purposes of the application of a charge under the Treaty of Peace Order 1919. The policies had been issued by the London branch of the plaintiff company, which was incorporated, had its central office and the bulk of its assets in New York. At pages 111-112, Pollock MR said that where, as in this case, the plaintiff had two residences, one in New York and one in London, it was permissible "*to look at the terms of the contract, and to determine from them what, for this purpose, is to be the place in which, and at which, the debt would be recoverable. Following out that principle it seems to me clear that primarily the debt is recoverable in London*". Pollock, MR went on to say that the terms of the policies had localised the place where the debt was to be paid in London, and even if the plaintiff was sued in New York, tender would have to be made in London. The Master of the Rolls concluded that the debt was part of the property, rights and interests of a German national within the jurisdiction.

68. At page 114, Warrington, LJ stated the general rule in respect of simple contract debts as follows: "*The rule of law with regard to the locality of simple contract debts is that it is determined by the residence of the debtor at the material moment. That has been well settled for a long time, and I think the reason for that is that it is the residence of the debtor which determines the place where he may be sued, prima facie at all events, and is in general the place where the means of satisfying any judgment may be discovered, but whatever the reason is, there is no doubt that that is the rule*". However, that rule was simply applied to a natural person, but to a corporation, the position was more complex, because the corporation might be resident in more than one place at one time. In such cases, Warrington, LJ said (at page 115) that the Court can then look to the terms of the relevant contract to determine whether the parties have themselves selected which of the residences would identify the situs of the debt; in so doing, the Court was not altering the rule of law which locates the debt in the place of residence of the debtor, but was using the terms of the contract to identify which of the residences was relevant in this respect:

> "*The real problem, I think, is not that the rule of law is altered, the rule of law still remains the same and the criterion is the residence of the debtor; but in the peculiar case to which I am referring it is necessary to say which of several residences is for this purpose to be treated as the residence of the debtor. The only way of settling that question that I can see is to take the contract which creates the debt and look at that and see whether, having regard to its terms, the parties have themselves selected for this purpose one of the several residences in question; and if you can find that, then I think that that place which they have selected will be the residence for the purpose of determining the locality of the debt*."

69. At pages 119-120, Atkin, LJ said:

> "*The question as to the locality, the situation of a debt, or a chose in action is obviously difficult, because it* involves *consideration of what must be considered to be legal fictions. A debt, or a chose in action, as a matter of fact, is not a matter of which you can predicate position; nevertheless, for a great many purposes it has to be ascertained where a debt or chose in action is situated … the test in*

respect of simple contracts was: Where was the debtor residing? Now, one knows that, ordinarily speaking, according to our law, a debtor has to seek out his creditor and pay him; but it seems plain that the reason why the residence of the debtor was adopted as that which determined where the debt was situate was because it was in that place where the debtor was that the creditor could, in fact, enforce payment of the debt. I think that is a very material consideration. The result is that in the case of an ordinary individual by that rule for a long time the situation of a simple contract debt under ordinary circumstances has been held to be where the debtor resides; that being the place where under ordinary circumstances the debt is enforceable, because it is only by bringing suit against the debtor that the amount can be recovered."

70. Atkin, LJ then proceeded to consider the position of corporations, holding that a company may reside in a number of jurisdictions where it carries on business and where the "*obligation is an ordinary personal obligation which follows the person, you have in each jurisdiction a right to sue the corporation there; the corporation is resident there, and the obligation is enforceable there*". However, Atkin, LJ also referred to the more difficult cases, which did not concern the matter before the Court, namely where the debtor resides in one jurisdiction but where the debt may be enforced in another jurisdiction:

"*There are complications because, at any rate, according to our law, it is possible in some cases to bring suits against the debtor in a territory where he is not residing by reason of the processes by which we have given our Courts jurisdiction in respect of certain matters to be performed within the jurisdiction, by serving the debtor, resident out of the jurisdiction, with notice of the proceedings, and, therefore, cases do arise where a debt may be enforced in one jurisdiction, and the debtor, being an ordinary living person, resides elsewhere. In respect to those matters, I do not propose to say anything, because that question does not arise here; but the ordinary rule in respect of a debtor is that the debt is situate where the debtor resides, because there the debt can be enforced against him by process of law.*"

71. In *Kwok Chi Leung Karl v Commissioner of Estate Duty* [1988] 1 WLR 1035, the question for consideration by the Privy Council, on appeal from the Court of Appeal of Hong Kong, was whether a debt owed by a Liberian company to a testator, who was resident in Hong Kong, was situate outside of Hong Kong within the meaning of section 10(b) of the Estate Duty Ordinance so as to be exempt from estate duty. Although registered in Liberia, the company's management and control were in Hong Kong, where all the directors resided. The relevant debt was created by a promissory note by which the company promised to pay the testator, on demand, approximately HK$12.3 million in Liberia plus interest. The promissory note provided that "*Principal and interest shall be payable at the City of Monrovia, Republic of Liberia, and in case suit is instituted to collect this note or any portion thereof, we promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit*". The judge at first instance held that the situs of the debt was where the sum represented by the note was recoverable and held that the debt was situate outside Hong Kong. The Hong Kong Court of Appeal took a different view, holding that there was no recoverable debt at the date of the testator's death and that the only property of the testator was the present right to assign the future right to present the note and to receive

payment. The Hong Kong Court of Appeal held that the situs of the relevant right was Hong Kong. The Privy Council allowed the appeal and restored the decision of the judge at first instance. Lord Oliver said (at pages 1040-1041):

> "*A chose in action is no less a chose in action because it is not immediately recoverable by action and their Lordships know of no authority for the view that the situs of a chose in action recoverable in futuro is to be determined either by the residence of the person to whom the obligation is owed or by the physical whereabouts of the document evidencing the right (not being a speciality debt). Indeed, the commissioner has not sought to uphold the Court of Appeal's decision on the ground upon which that court rested it. The matter falls, in their Lordships' opinion, to be determined by reference to first principles. In the first place, the notion that a debt or other chose in action, because incorporeal, can have no situs was laid to rest by the House of Lords in English, Scottish and Australian Bank Ltd. v. Inland Revenue Commissioners [1932] A.C. 238. It is clearly established that a simple contract debt is locally situate where the debtor resides - the reason being that that is, prima facie, the place where he can be sued: New York Life Insurance Co. v. Public Trustee [1924] 2 Ch. 101, 114, per Warrington L.J. A debt which is payable in futuro is no less a debt and there is no logical reason why it should, as regard its locality, be subject to any different rule. It is simply a chose in action and like any chose in action is subject to the general rule which is conveniently stated in rule 115 in Dicey and Morris on The Conflict of Laws, 11th ed. (1987), vol. 2, p. 907 as follows: "(1) Choses in action generally are situate in the country where they are properly recoverable or can be enforced." That will normally be where the debtor resides, although there are exceptions. For instance, a speciality debt is situate where the deed is physically situate. Similarly a negotiable instrument will be situate where the instrument is, at any rate where there is an available market for its negotiation. In the instant case, however, where the instrument evidencing or creating the obligation is non-negotiable and where it is in any event payable only on presentment abroad, there can be no reason for departing from the general rule that the chose is situate where it can be enforced, and that can only be in the place in which the debtor resides and can be sued. There is, of course, an obvious difficulty in establishing the situs of a debt due from a corporation, because a corporation may have a presence in several different places.*"

72. After considering where the company could be said to be resident or found for the purposes of service of proceedings, and assuming that the company could be served with process in Hong Kong, Lord Oliver continued (at pages 1041-1042):

> "*In that situation it is clearly established that the locality of the chose in action falls to be determined by reference to the place - assuming it to be also a place where the company is resident - where, under the contract creating the chose in action, the primary obligation is expressed to be performed: see New York Life Insurance Co. v. Public Trustee [1924] 2 Ch. 101* already *referred to; In re Russo-Asiatic Bank [1934] Ch. 720, 738; and F. & K. Jabbour v. Custodian of Israeli Absentee Property [1954] 1 W.L.R. 139, 146. In the instant case the expressed contractual obligation is to pay after 60 days in Liberia and upon presentation in the city of Monrovia. Their Lordships accordingly see no escape from the conclusion that at the date of the testator's death the chose in action*

represented by the promissory note was situate in Monrovia and accordingly was property outside the colony."

73. In *Hillside (New Media) Ltd v Baasland* [2010] EWHC 3336 (Comm); [2010] 2 CLC 986, the claimant, an English company which provided facilities for online gambling through a website, applied for a declaration that it was not liable to the defendant, a Norwegian national, in tort or otherwise for any loss which the defendant suffered by reason of his activities as a customer of the claimant and/or placing bets or wagers with the claimant or on the website. The defendant transferred funds for bets and wagers through the website to a "*wallet*", from which the stakes were paid. One of the issues which the Court considered was the question of the applicable law under article 4 of the Rome II Regulation (Regulation (EC) No 864/2007), which provides that the law applicable to a non-contractual obligation is "*the law of the country in which the damage occurs*". In considering this provision, Andrew Smith, J posed and answered the question where the debt created by the deposit of the funds in the wallet was situated. The Court considered that when the defendant's funds were deposited in the wallet, the defendant became a creditor in respect of the funds deposited. At that point, there was no loss or damage suffered by the defendant; the defendant suffered a loss which the funds so deposited were used to place bets, represented by the reduction in the value of the chose in action and of the funds held in the wallet. At paragraph 33, Andrew Smith, J said:

> "*The general rule stated in Dicey, Morris & Collins on The Conflict of Laws (14th edn), vol. 2, Rule 120 is that 'Choses in action are generally situate in the country where they are properly recoverable and enforceable'. Although at common law this principle led to the general rule that (with some exceptions that are irrelevant for present purposes) debts are situate where the debtor resides (see Dicey, Morris & Collins, loc cit, at para. 22-026), its application in a case such as this, where the debtor is a corporation and the case is covered by the Lugano Convention, depends, as I see it, upon the debtor's domicile. That is the primary ground on which a court takes jurisdiction under article 2 of the Lugano Convention. The domicile of a corporation is determined in accordance with section 42 of the Civil Jurisdiction and Judgments Act 1982. It depends upon where it has its 'seat', and this in turn depends upon where it was incorporated and has its registered or other official address or where its central management and control is exercised*."

74. Andrew Smith, J then concluded that the relevant debt was situated in England insofar as the claimant was the party with whom the defendant dealt or Gibraltar or the Netherlands Antilles insofar as associated companies were the relevant principal.

75. In *Perrin v Commissioners for Her Majesty's Revenue & Customs* [2014] UKFTT 223 (TC), the question arose whether the obligation of Mr Perrin (who was resident in England) to pay interest under a loan agreement arose in the United Kingdom so as to attract a tax deduction. The loan agreement contained a jurisdiction agreement in favour of the Courts of Isle of Man. The First Tier Tribunal (Tax Chamber) concluded that the Isle of Man Courts would take jurisdiction over any dispute in connection with the loan agreement and that the UK Courts would decline jurisdiction (paragraph 32). Judge Hellier considered the situs of the debt under the loan agreement. Judge Hellier distinguished the residence of the debtor, the place of jurisdiction being the "*State in*

which a person may be sued in order to determine the extent of his liabilities under the contract", and the place of enforcement being the "*State where the courts of a State permit or require the debtor's assets to be applied to satisfy the obligations decreed by that judgment (whether or not a judgment of the courts of that State)*" (paragraphs 27-28). Referring to rule 129(1) of *Dicey, Morris & Collins on the Conflict of Laws*, namely that "*Choses in action generally are situate in the country where they are properly recoverable or can be enforced*", and noted the "*use of "recoverable" and "enforceable" as alternatives in this passage*" (paragraph 35). After considering the decisions in *New York Life Insurance Co v Public Trustee* [1924] 2 Ch 101, *Kwok Chi Leung Karl v Commissioner of Estate Duty* [1988] 1 WLR 1035, and *Hillside (New Media) Ltd v Baasland* [2010] EWHC 3336 (Comm); [2010] 2 CLC 986, the judge noted Mr Perrin's argument that these authorities applied "*jurisdiction*", rather than residence, to determine the situs of the debt. Judge Hellier concluded (at paragraphs 44-45) that:

> "*In none of these cases has the tension been addressed between the place of expected enforcement of the debt and the place in which a court would have jurisdiction to declare the debt due. The language used by Dicey, "recovery" and "enforcement" was said by Pollock MR to be carefully chosen; Warrington LJ spoke of the place where the means of satisfying judgement was found, and Atkins LJ, the place of enforcement. There is to my mind in all these statements some elision of the concepts I have called jurisdiction and enforcement; and that is because, although judgement must precede enforcement, the distinction was not in question in the particular cases. There is no suggestion in any of them that obtaining judgement in a particular country would not lead to the satisfaction of judgement in that country, rather the reverse.*
>
> *In the case of Mr Perrin's debt, the "normal" residence rule coincides with the reason for the rule. Mr Perrin's assets were principally in England and it would be in England that the trustee would be likely to recover and enforce the debt if the occasion arose. It seems to me that there is no reason to displace that normal rule because of the jurisdiction given to the Isle of Man Courts. I would, if it were necessary, distinguish Hillside on the basis that Hillside was an English company with premises and staff in England, and that no consideration of the difference between the place of jurisdiction and the place of enforcement was made or was relevant to the decision. I conclude that the situs of Mr Perrin's obligations was in England.*"

(d) Locating the situs of the debt: discussion

76. Lord Clarke's statement in *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2017] UKSC 64; [2017] 3 WLR 1170 at paragraph 30, that "*the debtor's residence, the place where the debt is recoverable*", at least superficially, supports either party's argument.

77. The above authorities point to either the residence of the debtor or the place where the debt is recoverable or enforceable, as the key to deciphering the situs of the debt. The determination of the residence of the debtor is not difficult, but the concept of the recoverability or enforceability of a debt is more difficult to gauge. A debt represents a chose in action, a cause of action for the recovery of money by the creditor from the

debtor recognised by the applicable law. The debt might be admitted or disputed by the debtor, but the debt might not yet be adjudged; or the debt may be established by a judgment. In the case of a debt admitted by the debtor, the debt may be recoverable from the debtor at its place of residence or otherwise in accordance with the contract which created the debt, for example at the place where payment must be made, although unless the debtor willingly pays the debt, the debt must be encompassed in a judgment in order for it to be compulsorily paid; in the case of a debt which has been disputed but not yet to be adjudged as due, the debt may be recoverable in the place where the court of competent jurisdiction adjudges the debt as due (for which purpose the location of the court who has jurisdiction over the contract dispute may be relevant); and in the case of a judgment debt, the place where the judgment debt may be executed or enforced may be relevant.

78. The above-mentioned authorities do not appear to focus on these distinctions, save for the decision in *Perrin v Commissioners for Her Majesty's Revenue & Customs* [2014] UKFTT 223 (TC). Indeed, when the editors of *Dicey, Morris & Collins on The Conflict of Laws*, (15th ed., 2014), summarise the general rule (as rule 129), they say that "*Choses in action generally are situate in the country where they are properly recoverable or can be enforced*", but when they explain the rule (at para. 22-026), they say that "*Subject to the exceptions set out below, a debt is situate in the country where the debtor resides. The reason usually given is that the country of the debtor's residence is normally the place where the creditor can enforce payment. It may not, however, be the only place …*".

79. On the one hand, it is the residence (or domicile) of the debtor where a debt, or chose in action, will be enforced, because the debtor is likely to have assets in that jurisdiction of residence. This would suggest that the situs would be determined by the place of enforcement of a debt. However, on the other hand, the language of recoverability might well include enforcement of a debt, in the sense of enforcing a judgment against the assets of a debtor, and in addition might well include the place where a court of competent jurisdiction would determine whether or not there is a debt to be enforced. Thus, the concept of enforcement would embrace both the State whose courts would determine whether and to what extent a debt was properly recoverable and the State where the adjudged debt would be executed or enforced.

80. Each of the parties' arguments entails its own challenges. The concept of enforcement, in the sense of the execution of a judgment debt, is not usually a process limited to the place of the debtor's residence; the debtor may have assets in any number of jurisdictions. Locating the situs by reference to those States whose courts have the competent jurisdiction to determine whether the debt is properly recoverable restricts the situs to a single or a few States. The notions of recoverability and execution are both concerned with translating a debt into currency which may be the principal concern for the concept of the situs of the debt, being the realisable form of the value of the debt.

81. I do not consider that the principles established for determining the situs of real property or personal property are necessarily indicative of the principles for determining the situs of a chose in action (including a debt). Although the procedure for the attachment of a third party debt by a garnishee order or a Third Party Debt Order may have been modelled on the procedure for the attachment of land or other tangible property (*Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260, paragraphs 86-87), the fact that a chose in action is by its nature a right whose

value is realised by means of a court process means that no direct analogy can necessarily be drawn between the situs of tangible property and the situs of intangible property. Indeed, even amongst the variety of choses of action, different rules for determining situs have been developed, depending on the nature of that chose in action. For example, the situs of a chose of action represented by a negotiable instrument is determined by the physical location of that instrument (*Kwok Chi Leung Karl v Commissioner of Estate Duty* [1988] 1 WLR 1035, 1040-1041) and the situs of a chose of action represented by a registered security or share is determined by the location of the register (*Dicey, Morris & Collins on The Conflict of Laws*, (15th ed., 2014), paragraphs 22-043 - 22-044).

82. Considering the above authorities, the following principles emerge:

(1) The Court may make a Third Party Debt Order only where the third party debtor is present within the jurisdiction and (a) the debt is situated in the jurisdiction, or (b) the debt is situated in another jurisdiction, provided that it appears that by the law applicable in that foreign situs the English Order would be recognised as discharging the liability of the third party to the judgment debtor (*Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260, paragraphs 17, 26; *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2017] UKSC 64; [2017] 3 WLR 1170, paragraph 29*).*

(2) The exercise of the Court's jurisdiction in respect of a debt is an exercise of sovereign authority and it is a generally recognised principle of international law that the courts of one State shall "*not trespass upon the authority of another, by attempting to seize assets situated within the jurisdiction of the foreign state …*" (*Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260, paragraphs 53-54).

(3) The situs of the debt is necessarily linked to the law governing debts as recognised by generally accepted principles of private international law (*Ellis v M'Henry* (1871) LR 6 CP 228; *Martin v Nadel* [1906] 2 KB 26, 29; *Swiss Bank Corp v Boehmische Industrial Bank* [1923] 1 KB 673, 684; *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260, paragraphs 26, 32, 59, 107). The application of the law governing the debt determines whether or not the relevant debt has been discharged, whether by a Third Party Debt Order or otherwise, not only for the purposes of that legal system but also other legal systems, thus ensuring that the relevant debtor (including a third party debtor) will not be compelled to pay the same debt more than once (*Martin v Nadel* [1906] 2 KB 26, 29, 31; *Swiss Bank Corp v Boehmische Industrial Bank* [1923] 1 KB 673, 684; *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260, paragraph 107).

(4) The principle determining the situs of the debt or other chose in action is "*that debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced*" (*Martin v Nadel* [1906] 2 KB 26, 31; see also *Swiss Bank Corp v Boehmische Industrial Bank* [1923] 1 KB 673, 678-679; *Richardson v Richardson* [1927] P 228, 235-236; *Kwok Chi Leung Karl v Commissioner of Estate Duty* [1988] 1 WLR 1035,

1040-1041; *Hillside (New Media) Ltd v Baasland* [2010] EWHC 3336 (Comm); [2010] 2 CLC 986, paragraph 33; *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2017] UKSC 64; [2017] 3 WLR 1170, paragraphs 30, 35-36, 124; *Dicey, Morris & Collins on The Conflict of Laws*, (15th ed., 2014), paragraph 22R-023). That is, the debt or chose in action is situated in the country where it is properly recoverable and "*can be discharged only by the law of the place where it is recoverable"* (*Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260, paragraph 107). If the debt cannot be recovered or enforced within the jurisdiction, it is not situated in that jurisdiction (*Richardson v Richardson* [1927] P 228, 235-236).

(5) The general rule or presumption is that the debt or chose in action is properly recoverable or enforceable in the place of residence, or domicile, of the debtor (*New York Life Insurance Co v Public Trustee* [1924] 2 Ch 101, 115, 119-120); *Chaturbhuj Piramal v Chunilal Oomkarmal* (1933) 60 LR Ind App 211, 220-222; *Kwok Chi Leung Karl v Commissioner of Estate Duty* [1988] 1 WLR 1035, 1040-1041; *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260, paragraph 72; *Hillside (New Media) Ltd v Baasland* [2010] EWHC 3336 (Comm); [2010] 2 CLC 986, paragraph 33; *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2017] UKSC 64; [2017] 3 WLR 1170, paragraph 30). It is possible to interpret the authorities as suggesting that the debtor's residence is the determinant of the situs of a debt, on the basis that that is the place where the debt is generally recoverable or enforceable (*Dicey, Morris & Collins on The Conflict of Laws*, (15th ed., 2014), para. 22-026, 22-029); however, I think that would be at odds with the purpose of identifying the situs as the place where the governing law will determine whether or not the debt has been discharged and where the existence or extent of the debt may be determined by the law of a jurisdiction other than the place of the debtor's residence or domicile. It would also add little to the express provision in CPR rule 72.1(1) that the debtor must be within the jurisdiction.

(6) That general rule or presumption is open to displacement if it can be demonstrated that the relevant debt is properly recoverable or enforceable in a jurisdiction other than the debtor's residence or domicile, for example if suit must be brought against the debtor in that other jurisdiction, such as by a "*special agreement*" or an "*exclusive right of suit*" agreed between the parties in question; if the position were otherwise, the anomalous situation may arise where a Third Party Debt Order is made in respect of a debt which a foreign court with exclusive jurisdiction holds to be non-existent (*New York Life Insurance Co v Public Trustee* [1924] 2 Ch 101, 111-112, 115, 119-120); *Chaturbhuj Piramal v Chunilal Oomkarmal* (1933) 60 LR Ind App 211, 220-222; *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260, paragraphs 72-74). Having identified this principle, I make the following additional observations:

(a) Mr Kendrick QC argued that "*properly recoverable*" meant enforceable in the sense of execution of a judgment debt. However, I do not see how that can be where the relevant debt has not yet been established by a

judgment or award; the reference in the authorities to the bringing of suit suggests that the situs is concerned with the determination of rights, as opposed to enforcement against assets, where the debt has not yet been established by the judgment of a court.

(b) I am encouraged in this conclusion by reason of the fact that a central consideration of the Court's jurisdiction or discretion in making a Third Party Debt Order is whether compliance with the Order will discharge the third party debtor's liability for the debt, which is integrally concerned with the determination of the right underlying the debt.

(c) This conclusion is at odds with the decision of the First Tier Tribunal (Tax Chamber) in *Perrin v Commissioners for Her Majesty's Revenue & Customs* [2014] UKFTT 223 (TC). However, with respect to the learned judge in that case, I do not consider that the distinction between "*jurisdiction*" and "*enforcement*" can be lightly dismissed; nor do I consider that it was necessarily elided in the authorities considered by the Tribunal.

(d) It is possible that the place where the debt is "*properly recoverable*" originally was intended to refer to the place where the obligation to pay the debt had to be performed, *i.e.* where the debt was payable, but such a possibility has been extinguished by the Supreme Court's decision in *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2017] UKSC 64; [2017] 3 WLR 1170.

(7) The approach to determining the situs of the debt will differ if the relevant debt has not yet been established by a judgment or arbitral award or has been so adjudged.

(a) Before the relevant judgment or award establishing the right to the debt, the debt may be determined as properly recoverable only by a court of a competent jurisdiction to determine whether the relevant debt is properly recoverable or has been discharged (*Swiss Bank Corp v Boehmische Industrial Bank* [1923] 1 KB 673, 678-679). That may well be the court of the State where the debtor resides or is domiciled, especially as that court will have jurisdiction in respect of claims against persons within its own territorial jurisdiction, unless it is excluded by agreement - such as an exclusive jurisdiction agreement - between the creditor and the debtor (*i.e.* the third party) or by statute. It may be that the court of another State will have the relevant jurisdiction, by reason of contract or statute. The reason why the debt must be situated within England and Wales is that the Courts of England and Wales must have the internationally recognised jurisdiction to determine whether the debt is properly recoverable (*Richardson v Richardson* [1927] P 228, 235-236).

(b) After the debt has been established by a judgment or award, that judgment or award may be executed or enforced by means of the various mechanisms available within each jurisdiction. In many cases, that jurisdiction will be the place of the debtor's residence or domicile.

(e) Locating the situs of the debt: the facts and the evidence

83. Clause 12 of the Guarantee Fee Agreements provides that:

(1) By clause 12.1, the competent civil court in Delhi has exclusive jurisdiction, subject to clause 12.2.

(2) By clause 12.2, in the event of a dispute, it shall be resolved by (a) mutual consultation or through the good offices of the empowered agencies of the GOI, or (b) if such resolution is not possible, arbitration. In the case of arbitration, the Arbitration and Conciliation Act, 1996 shall not be applicable but any award shall be binding.

84. There is no express choice of law provision in the Guarantee Fee Agreements. Mr Kitchener QC argued that by article 3 of the Rome Convention on the Law applicable to Contractual Obligations incorporated by the Contracts (Applicable Law) Act 1990 (in respect of the first Guarantee Fee Agreement) and by article 3 of the Rome I Regulation (Regulation (EC) 593/2008) (in respect of the later Guarantee Fee Agreements), clause 12 - being both a jurisdiction agreement and an arbitration agreement - demonstrated a choice by the parties that the Guarantee Fee Agreements were governed by Indian law (relying on the Giuliano-Lagarde Report on the Rome Convention, page 17, and recital (12) of the Rome I Regulation). This is further underlined by (a) the disapplication of the Arbitration and Conciliation Act, 1996, an Indian statute, by clause 12, (b) the fact that the Guarantee Fee Agreements are related to the Bond Subscription Agreement and the Guarantee Agreements, which themselves contain Indian jurisdiction agreements and the fact that Bond Subscription Agreement is expressed to be governed by Indian law, and (c) payment of the guarantee fees under the Guarantee Fee Agreements was made to the GOI in India (paragraph 37 of Mr Aggarwal's first witness statement). Mr Kendrick QC did not actively quarrel with this submission, but did not formally concede it. In my judgment, the Guarantee Fee Agreements were governed by Indian law.

85. As to the effect of these provisions in clause 12 under Indian law, the parties relied on the expert evidence of Justice Bellur Narayanaswamy Srikrishna (IIFC (UK)'s expert, whose evidence was also relied on by the GOI) and Mr Gopal Subramanium SA (Hardy's expert). I consider the evidence of these experts in more depth below. According to the expert evidence of Mr Subramanium SA (relied on by Hardy), at paragraphs 48-49 of his report, as the arbitration is outside the framework of Indian law governing arbitration (by excluding the Arbitration and Conciliation Act, 1996), the arbitration agreement is unenforceable as a matter of Indian law (relying on the decision in *Northern Coalfields Limited v Heavy Engineering Corporation Limited* (2016) 8 Supreme Court Cases 685). Indeed, Mr Subramanium SA also expressed the opinion that the jurisdiction agreement in clause 12.1 is not valid and binding. The expert evidence of Justice Srikrishna (whose evidence was relied on by IIFC (UK) and the GOI) is that, without accepting that the arbitration agreement is invalid, the jurisdiction agreement in favour of the Civil Courts of Delhi is valid (paragraphs 12-15 of his reply report). As explained below, I preferred Justice Srikrishna's evidence on the validity of the jurisdiction agreement in clause 12.1.

86. As to the interpretation of the jurisdiction agreement in clause 12.1, that provision plainly provides that the civil courts of Delhi have exclusive jurisdiction in respect of

disputes under the Guarantee Fee Agreements. I did not understand that the principles of interpretation to be applied to such jurisdiction agreements differ under English law and Indian law (Justice Srikrisha's reply report, paragraph 12-13). If the arbitration agreement is valid, the arbitral tribunal - subject to the jurisdiction of the Delhi Courts - has the jurisdiction to determine whether or not the debt is recoverable. If the arbitration agreement is invalid, the Delhi Courts have exclusive jurisdiction to determine the recoverability of the debt under the Guarantee Fee Agreements. In either case, the debt arising under the Guarantee Fee Agreements would be recoverable in India.

87. Mr Kendrick QC submitted that the relevant debt in this case is admitted by IIFC (UK). However, the debt cannot be enforced without a judgment or award to that effect, and such a judgment or award can be obtained only in India. Of course, if the judgment or award is obtained, it can then be executed or enforced by the procedures available in England and Wales, where IIFC (UK) is resident or domiciled. However, pending such a judgment or award, the debt is recoverable not in England and Wales, but in India. In those circumstances, the debt under the Guarantee Fee Agreements is situated in India, not England and Wales.

88. There is an exception to this jurisdictional requirement, for the making of a Third Party Debt Order, that the debt be situated in England and Wales, namely where by the law of the place where the debt is situated the English Third Party Debt Order would be recognised as discharging IIFC (UK)'s liability to the GOI (*Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260, paragraphs 17, 26; *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2017] UKSC 64; [2017] 3 WLR 1170, paragraph 29).

89. This is a matter of Indian law. It was the evidence of Mr Subramanium SA that, by the Code of Civil Procedure 1908, the English Third Party Debt Order is a foreign judgment entitled to recognition and enforcement in India (paragraphs 41-47, 53(d)), with the result that IIFC (UK) will be discharged of its debt to the GOI, once it complies with the Third Party Debt Order (paragraph 53(e)). By contrast, Justice Srikrishna's evidence was that section 13(a) of the Code of Civil Procedure bars the recognition and enforcement of foreign judgments "*where it has not been pronounced by a Court of competent jurisdiction*"; given the valid jurisdiction agreement in clause 12.1, the only court of competent jurisdiction would be the Civil Court of Delhi (paragraph 19 of his reply report).

90. The parties' experts do not agree whether the jurisdiction agreement in favour of the Delhi Courts is valid, according to Indian law. As I explain below, I am not convinced that the jurisdiction agreement is invalid under Indian law, because, although it may well be that the arbitration agreement is invalid as Mr Subramanium SA stated (and as to which Justice Srikrishna expressed no opinion), I did not understand how the invalidity of the arbitration agreement in clause 12.2 would invalidate clause 12.1. In those circumstances, the Third Party Debt Order, even if it is a foreign judgment, would not be entitled to recognition and enforcement.

91. Accordingly, the English Court does not have jurisdiction to make a Third Party Debt Order in respect of the debt arising under the Guarantee Fee Agreements, because the debt is situated in India and because it has not been established that the Indian Court

would recognise IIFC (UK)'s debt as being discharged by its compliance with the Third Party Debt Order.

(2) The Court's discretion

(a) The risk that the Third Party Debt Order would not discharge the debt

92. If I am wrong in my conclusion above and the Court does have jurisdiction to make the Third Party Debt Order, the question arises whether the Order should be made. If the relevant third party is within the jurisdiction of the Court and if the relevant debt has its situs within the jurisdiction, the Court has jurisdiction to make a Third Party Debt Order. However, whether an Order will be made depends on the exercise of the Court's discretion.

93. IIFC (UK) contends that the Court should exercise its discretion against making a final Third Party Debt Order, that is to discharge the Interim Order, because there is a real or substantial risk that if the Order were made final, the payment of the relevant debt by IIFC (UK) to Hardy would not discharge IIFC (UK)'s liability to the GOI.

94. The operation of this consideration in the exercise of this Court's discretion has been considered by the Court on a number of occasions.

95. In *Swiss Bank Corp v Boehmische Industrial Bank* [1923] 1 KB 673, Scrutton, LJ said (at pages 680-681):

> "*The Divisional Court have refused to make the order absolute, holding that the facts of this case bring it within the decision in Martin v. Nadel, that the Court will not make absolute a garnishee order where it will not operate to discharge the garnishee in whole or pro tanto from the debt; it will not expose him to the risk of having to pay the debt or part of it twice over. That is well established as a principle of discretion on which the Court acts. The question therefore may be stated thus: Is there here any evidence that the London Merchant Bank, if they pay this 9000l. to the Swiss Bank Corporation, will run any substantial risk of being compelled to pay it over again to the Böhmische Industrial Bank by action in Czecho-Slovakia?*"

96. In *Employers Liability Assurance Corp Ltd v Sedgwick Collins & Co Ltd* [1927] AC 95, Lord Sumner said at pages 111-112:

> "*Thereupon the Court made the order now appealed from, and it is contended that in so doing they exercised their discretion wrongly, for, in the circumstances, such an order was inequitable, since it exposed the appellants to the risk of being compelled to pay a second time whatever they might pay to the judgment creditors here under the order of the Court of Appeal …*
>
> *To these objections I think that two answers may be made. The first is that, so far as Russia is concerned, the risk would be self-sought; the second is that, for any practical purpose, it cannot be estimated and may well be non-existent … As for the view, that foreign Courts generally cannot be expected to recognize judgments obtained here under specific legislation and particular circumstances, that raise an arguable doubt as to their validity, I do not think that this is a ground*

for a discretionary refusal to make the garnishee order absolute, when once it has been decided here that such judgments have been regularly obtained after an effective submission to the jurisdiction on the part of the defendants. In that case foreign Courts ought to recognize the judgments, and we must presume that they will do so. It is not justice to the garnishor to deny him his regular remedy for fear that, somehow or other, the garnishee, having passed beyond the jurisdiction of the Courts of this country and the protection which the garnishee order will always here afford him, might find himself caught in some foreign Court or country less willing than should be the case to recognize those obligations which arise under the so-called comity of nations. The risk to the garnishee, which it is inequitable to expose him to under a garnishee order absolute, must be a real risk: Sea Insurance Co. v. Rossia Insurance Co. of Petrograd. A mere speculative or theoretical hazard will not do."

97. In *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Ras Al-Khaimah National Oil Co* [1990] 1 AC 295, Lord Goff considered the nature of the Court's discretion (at page 353):

"*… it is necessary to identify the applicable principles. I turn therefore to the authorities for guidance. In considering the authorities it is, I think, important to bear in mind that the question at issue is whether it would be inequitable in the circumstances to make a garnishee order absolute, and that it is generally considered inequitable so to do if the garnishee would, in the circumstances, be compelled to pay the relevant debt twice over. So we can see, in the cases, the question being posed whether there was any real or substantial risk that the garnishee, having paid the judgment creditor under a garnishee order absolute in this country, would be required to pay the amount over again in proceedings in a foreign country: see, e.g., Swiss Bank Corporation v. Boehmische Industrial Bank [1923] 1 K.B. 673 , 678, per Bankes L.J. and, at p. 681, per Scrutton L.J.; and Employers' Liability Assurance Corporation Ltd. v. Sedgwick, Collins and Co. Ltd. [1927] A.C. 95 , 112, per Lord Sumner.*"

98. Lord Goff then proceeded to consider that the general rule, in respect of debts whose situs is in England and Wales, that the payment made by the third party to the judgment creditor will operate to discharge the liability of the third party to the judgment debtor, not only as a matter of English law, but also as a matter of private international law. Therefore, this gives rise to an expectation on the part of the English Court that a final Third Party Debt Order would be recognised as discharging the third party's liability to the judgment creditor by any interested foreign court. At pages 353-355, Lord Goff continued:

"*That principle appears to lead to the conclusion that the English courts should act on the basis of an assumption as to how the foreign court will proceed. That this is indeed so is stated perhaps most clearly in the speech of Lord Sumner in the Sedgwick, Collins case when he said [1927] A.C. 95, 106:*

"The main question is whether the judgment is one to which, according to the current of English decisions, foreign courts of justice may be expected to give effect. The expectation is not one of fact depending on the probable conduct of the courts of this or that country, but is one of law, based upon

the consideration for the judicial proceedings of other countries, which legal administration, wherever situated, ought to adopt and observe in the interest of justice generally."

But the question arises whether cases of this kind are to be solved by exclusive reference to this assumption. The point may arise in two ways. First, let it be supposed that one or other of the two criteria is not fulfilled, i.e. that the English court is not, by accepted principles of international law, competent with regard to the underlying judgment against the judgment debtor, or alternatively that the situs of the attached debt is not England. Will the English court in such circumstances automatically decline to make the garnishee order absolute, on the ground that there is a real risk that a foreign court may, despite payment by the garnishee pursuant to such a garnishee order absolute, nevertheless enforce the attached debt against the garnishee overseas? Second, let it be supposed that both criteria are fulfilled. Will an English court, in such circumstances, make a garnishee order absolute in accordance with the assumption, and exclude as irrelevant and inadmissible any evidence that a foreign court will nevertheless not recognise payment under the English order as effective to discharge the attached debt? … I have come to the conclusion that they favour the second solution which I have mentioned, i.e. that which favours the garnishee and so does not require an automatic application of the assumption. I say this for, in particular, two reasons. First, the test has been authoritatively stated as being whether there is a real (or substantial) risk that the garnishee will be compelled to pay the attached debt twice over: see, e.g. the Swiss Bank Corporation case [1923] 1 K.B. 673, 681, per Scrutton L.J., and the Sedgwick, Collins case [1927] A.C. 95, 112, per Lord Sumner. A test so stated is essentially one of fact, not susceptible of being satisfied by a conclusive assumption of law. Second, there are instances in the cases of judges considering factual evidence as bearing on the question whether there is such a real risk: see, e.g., the Swiss Bank Corporation case [1923] 1 K.B. 673, 683, per Scrutton L.J.; Sea Insurance Co. v. Rossia Insurance Co. of Petrograd (1924) 20 Ll.L.Rep. 308, 309, per Bankes L.J.; and the Sedgwick, Collins case [1927] A.C. 95, 111-112, per Lord Sumner. The propositions which I derive from the authorities are these. First, if it appears that there is a real risk that the garnishee will be compelled by some other court to pay the attached debt a second time, it will generally be inequitable to expose him to that risk by making the garnishee order absolute. But, second, in the absence of evidence establishing such a real risk, the assumption I have referred to will be applied."

99. At pages 357-358, Lord Goff added:

"*I cannot accept that the mere fact that the exercise of jurisdiction by the foreign court is regarded as exorbitant, or even as very exorbitant, can of itself affect the exercise of the English court's discretion to make a garnishee order absolute. I find myself in agreement with the view expressed by Hobhouse J. that, if the garnishee shows that he is in fact exposed to a real risk of being required by a foreign court to pay the debt a second time, it does not of itself matter that the risk which the garnishee shows to exist is one of being so required by a foreign court which does not have, by English law, or by generally accepted rules of international law, jurisdiction to make such an order. This is because the crucial*

feature is the reality of the risk. It seems to me, as it did to Hobhouse J., that this is implicit in the speech of Lord Sumner in the Sedgwick, Collins case. I am not of course saying that the absence of such jurisdiction in the foreign court is necessarily irrelevant; because it may go to the reality of the risk in the sense that it may, for example, reduce the likelihood of such a judgment being executed upon assets of the garnishee …

But if, for example, there is a real risk that the foreign court will enter judgment against the garnishee in respect of the same debt, and there are assets of the garnishee available for execution of this judgment, that would constitute good grounds for declining to make a garnishee order absolute, notwithstanding that the jurisdiction of the foreign court to enter the judgment was exorbitant in the sense that it did not accord with English ideas, or ideas generally accepted in private international law, or indeed that it was, to English eyes, erroneous in point of law."

100. In *Zoneheath Associates Ltd v China Tianjin International Economic and Technical Cooperative Corp* [1994] CLC 348, the third party, the Bank of China, had a branch in London. Mr Patrick Bennett QC, sitting as a deputy judge of the High Court, said (at page 351):

"*It is thus settled law that if the garnishee can satisfy the court on evidence that there is a real risk that discharge of the garnishee order would not relieve it of its liability to the judgment debtor then a court ought not to make an order nisi absolute. There is a substantial amount of evidence here which I do not propose to read or indeed summarise other than by saying on that evidence I am quite satisfied there is a real risk that the People's Court in China may not discharge the liability of the bank to the judgment debtor if the garnishor obtains satisfaction in respect of the debt owed by the bank to the judgment debtor, in other words the bank runs a real risk of double jeopardy. If one wants to look at the evidence in support of that view that I have formed it can; be found in the affidavits of Mr Gao and Mr Chang. In my judgment the evidence is sufficient for me to say there is a real risk. For that reason also, because of the possibility of double jeopardy so as to require the bank to pay the same sum twice, I do not propose to make this order absolute.*"

101. The existence of a "*real or substantial risk*" of the third party being required to pay twice is now well entrenched (*Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Ras Al-Khaimah National Oil Co* [1990] 1 AC 295, 353-355; *Camdex International Ltd v Bank of Zambia (No. 3)* [1997] CLC 714, 716-727). In *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260, Lord Hobhouse referred to the decision in *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Ras Al-Khaimah National Oil Co* and said (at paragraph 75):

"The debt was a commercial debt with an admitted situs in England. It was properly recoverable in England and the order made by the English court would discharge the *debt. The question which arose was the exceptional one whether there was a real and substantial risk that the garnishee, Shell, would nevertheless, in a foreign country, be compelled to pay the debt again. This did not raise a question of jurisdiction or lack of subject matter but more simply the, in that case,*

difficult question whether it was equitable in the discretion *of the court to make the garnishee order. Lord Goff was not expressing a view about the question which the present appeal raises.*"

102. Although Lord Hobhouse referred to a "*real and substantial risk*", rather than a "*real or substantial risk*", I do not see any meaningful difference between the two expressions. In *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2017] UKSC 64; [2017] 3 WLR 1170, at paragraph 71, Lord Sumption said that "*I would agree with Lord Neuberger and Lord Mance DPSC that a third party debt order ought not to be made unless compliance with it would discharge the third party debtor*".

(b) The evidence

103. The burden is on IIFC (UK), as the third party, to establish that there was a real or substantial risk that compliance with the Third Party Debt Order will not discharge IIFC (UK)'s liability to the GOI. Whether or not the making of a Third Party Debt Order would discharge IIFC (UK) from liability under the Guarantee Fee Agreements under Indian law was the subject of evidence presented by the parties' experts, namely Justice Bellur Narayanaswamy Srikrishna (IIFC (UK)'s expert, whose evidence was also relied on by the GOI) and Mr Gopal Subramanium SA (Hardy's expert) in their respective reports.

104. Justice Srikrishna's evidence as contained in his first report was that:

(1) The Guarantee Fee Agreements are governed by Indian law (paragraphs 12-13 of his first report).

(2) Clause 12 confers exclusive jurisdiction on the Delhi Civil Courts (paragraphs 22-23). The validity or operation of clause 12.2 (the arbitration agreement) does not affect the situs of the debt (paragraph 14).

(3) The situs of a contractual debt is ordinarily where the debtor resides, this being the place where under ordinary circumstances an action against the debtor for recovery of the debt can lie (paragraph 15).

(4) If under the contract the debt is payable at a particular place notwithstanding that the debtor resides elsewhere, the situs of the debt is also at the place where the debt is recoverable; in other words, the situs of the debt is where it is properly recoverable or can be enforced (paragraph 15).

(5) The fees under the Guarantee Fee Agreements are recoverable by filing a civil action only before a competent court in Delhi, India, and thereafter are capable of execution in IIFC (UK)'s residence; accordingly, the situs of the debt under the Guarantee Fee Agreements is India (paragraph 15).

(6) An Indian Court would not regard payment pursuant to an English Court order as competent to discharge a debt recoverable in India, because the situs of the debt is in India; the debt is not sited in England because IIFC (UK) had explicitly ceded jurisdiction to the Delhi Civil Courts (paragraphs 17-19).

105. Mr Subramanium SA's evidence set out in his report was that:

(1) The general rule is that the situs of a debt is the residence of the debtor unless (i) the debt is payable in a specified jurisdiction, or (ii) the debt is enforceable in an exclusive, identified jurisdiction, in which event the situs of the debt would be that of the latter jurisdiction (paragraphs 26 and 48(i)).

(2) The Guarantee Fee Agreements are silent on where the debt is payable and so the first exception does not apply (paragraph 48(iv)).

(3) Clause 12 deals with the determination of rights and claims under the Guarantee Fee Agreements, but not the enforcement of an award in a jurisdiction where the judgment debtor has its assets; clause 12.1 confers jurisdiction only if there is an award; as the arbitration is outside the framework of Indian law governing arbitration (by excluding the Arbitration and Conciliation Act, 1996), it is unenforceable as a matter of Indian law (*Northern Coalfields Limited v Heavy Engineering Corporation Limited* (2016) 8 Supreme Court Cases 685); the inoperability of clause 12.2 "*attaches infirmity to the operation of clause 12.1 as well*"; it follows that the exclusive jurisdiction conferred on the Delhi Courts is not valid and binding; accordingly, the second exception does not apply (paragraphs 48 and 49).

(4) A significant number of obligations on the part of IIFC (UK) in the Guarantee Fee Agreements - including provisions requiring IIFC (UK) to pay damages in the event of default, to indemnify the GOI, to comply with the obligations under the Bond Subscription Agreement, to use the proceeds of the bonds to provide financial support to Indian companies' capital expenditure outside India, and the maintenance of books of account in the United Kingdom - are to be performed in the United Kingdom (paragraphs 32-33).

(5) There is no express choice of Indian law in the Guarantee Fee Agreements, which was an intentional omission (paragraph 34).

(6) It could certainly be argued that the proper law of the Guarantee Fee Agreements is English law (paragraphs 35, 49 and 50(b)).

(7) The Supreme Court of India has noted that the test of "*location of res*" as the sole jurisdictional fact vesting executory jurisdiction in a court, irrespective of the judgment debtor not residing within its jurisdiction or the subject matter of the dispute not having any connection with the Court (paragraphs 36 and 39).

(8) The situs of the debt under the Guarantee Fee Agreements is in the United Kingdom (paragraphs 50 and 53(a), (c)).

(9) By the Code of Civil Procedure 1908, a foreign Garnishee Order (such as an English Third Party Debt Order) is a foreign judgment entitled to recognition and enforcement in India (paragraphs 41-47, 53(d)). Consequently, IIFC (UK) will be discharged of its debt to the GOI, once it complies with the Third Party Debt Order (paragraph 53(e)); there is no real or substantial risk of IIFC (UK) being compelled to pay the debt twice (paragraphs 53(f) and 55).

106. In his reply evidence, Justice Srikrishna accepted that the situs of the debt is determined by the place of the debtor's residence (which is accepted to be England), unless the debt is enforceable in an identified exclusive jurisdiction (paragraph 5). Justice Srikrishna, however, seems to take issue whether the "*payability*" of the debt as being a test of situs (paragraphs 7-8). Justice Srikrishna did not express an opinion on the validity of clause 12.2, but stated that it is not an inevitable conclusion that clause 12.2 will be incapable of enforcement (paragraph 12), but even if it was invalid, it was severable from clause 12.1 (paragraphs 13-15). Justice Srikrishna observed that Mr Subramanium SA did not impugn the validity of clause 12.1, other than via clause 12.2 (paragraph 16). In his reply report, Justice Srikrishna observed that section 13(a) of the Code of Civil Procedure bars the recognition and enforcement of foreign judgments "*where it has not been pronounced by a Court of competent jurisdiction*"; given the valid jurisdiction agreement in clause 12.1, the only court of competent jurisdiction would be the Civil Court of Delhi (paragraph 19); further, section 13(c) of the Code bars recognition and enforcement where it appears on the face of the proceedings to be founded on a refusal to recognise the law of India in cases in which such law is applicable; therefore a Third Party Debt Order which seeks to enforce a debt situated in India would "*arguably*" amount to a refusal to recognise Indian law (paragraph 20). Justice Srikrishna concluded his report by stating that a contractual obligation must be performed in the manner prescribed by the promise (section 50 of the Indian Contract Act 1872) and that the debt could not be discharged by means of compliance with a Third Party Debt Order (paragraph 21). I am conscious, however, that Mr Subramanium SA did not express an opinion on section 50.

107. As a matter of Indian law, I find that:

(1) The Delhi Court or arbitral tribunal is likely to hold that the Guarantee Fee Agreements are governed by Indian law. Mr Subramanian SA did not express an opinion to the contrary, merely stating that it was arguable that the Agreements were governed by English law.

(2) It is likely that the Delhi Courts or an arbitral tribunal would find that they have jurisdiction in respect of any claim relating to the debt under the Guarantee Fee Agreements.

(3) There is at the very least a real or substantial risk that the Delhi Court or arbitral tribunal will regard the debt arising under the Guarantee Fee Agreements as situated in India.

(4) If the debt is situated in India, the Delhi Courts would not recognise the Third Party Debt Order as discharging the debt under the Guarantee Fee Agreements. Mr Subramanian SA disputed this, because he considered that the Third Party Debt Order would be recognised by the Indian Courts, but to reach this conclusion, he expressed the opinion that the jurisdiction agreement in clause 12.1 was invalid. However, I consider that the jurisdiction agreement in clause 12.1 is valid, because (a) on its own, there is no reason to conclude that the jurisdiction agreement is invalid, (b) even if the arbitration agreement in clause 12.2 is invalid, it is difficult to understand how that could undermine the jurisdiction agreement, and (c) the words "*Subject to clause 12.2 …*" at the beginning of clause 12.1 can still be given effect, notwithstanding the possible invalidity of the arbitration agreement, not least because of the other methods

of dispute resolution referred to in clause 12.2 which are not suggested to be invalid.

108. That is the position as a matter of Indian law. However, Mr Kendrick QC argued that as the GOI is an indirect parent of IIFC (UK) it is inconceivable that the GOI would not regard the debt as discharged if IIFC (UK) complied with the Third Party Debt Order, with the result that the GOI's liability to Hardy would be reduced to the extent that the Third Party Debt Order is complied with. The benefit gained by the GOI from the activities of IIFC (UK) and its parent are set out in the ninth witness statement of Mr Graham Coop of Volterra Fietta, Hardy's solicitors. There is no evidence that the GOI has taken or would take or has ever taken action against IIFC (UK); indeed, given that payment of the guarantee fee was payable on 1st April 2018, the GOI has not taken any action against IIFC (UK) yet. Further, it appears from Mr Aggarwal's second witness statement, at paragraphs 16-17, that the GOI has not yet taken any action against IIFC (UK) and, it is said, that IIFC (UK) has not served a notice of default on the Reserve Bank of India in accordance with article 7.2 of the Bond Subscription Agreement.

109. In answer to this contention, Mr Kitchener QC, on behalf of IIFC (UK), and Ms Shah, on behalf of the GOI, argued, based on the evidence of Mr Aggarwal and Ms Sonya Chandarana of Arlingtons Sharmas (the GOI's solicitors), that IIFC (UK) has in the past paid the guarantee fees to the GOI on time (paragraph 37 of Mr Aggarwal's first witness statement), the GOI has not indicated that it would waive its rights under the Guarantee Fee Agreements (paragraph 13 of Mr Aggarwal's second witness statement), that the GOI cannot waive its entitlement to such fees (paragraph 27 of Ms Chandarana's seventh witness statement), and the GOI has made it clear that it would not issue guarantees if IIFC (UK) has defaulted in the past (paragraph 11 of Mr Aggarwal's second witness statement, referring to a letter dated 5th May 2016 sent by the GOI to IIFCL stating that "*No guarantee would be allowed if IIFC (UK) has defaulted in past on extended guarantee or guarantee fee payment*"). Mr Aggarwal also disputed that the relationship between the GOI and IIFC (UK) would be conducted on any basis other than in accordance with the terms of the Guarantee Fee Agreements (paragraphs 6-14 of his second witness statement).

110. I consider that Mr Kendrick QC's submissions carry a great deal of force. However, in circumstances where there is a real or substantial risk that the Delhi Courts, or an arbitral tribunal, would consider the debt as being situated in India with the result that compliance with the Third Party Debt Order would not discharge IIFC (UK)'s liability, I cannot discount the real or substantial possibility that the GOI would seek to recover or enforce the debt legally due to it under the Guarantee Fee Agreements. Given the fact that there are related contracts for very considerable investments, and that those agreements have been complied with in the past, I cannot accept that the GOI would necessarily abstain from pursuing those rights.

111. In addition, Mr Kendrick QC argued that, as IIFC (UK)'s assets are in England and Wales, it would not be possible for the GOI to enforce any judgment or award against IIFC (UK) in England and Wales given CPR rule 72.9. However, this ignores the fact that there may be other repercussions in India under the Bond Subscription Agreement and is irrelevant to the question whether or not the competent court in India would recognise compliance with the Third Party Debt Order as discharging IIFC (UK)'s liability under the Guarantee Fee Agreements.

112. Therefore, if the Court had jurisdiction to make the Third Party Debt Order, I would have declined to make the Order because of the real or substantial risk that the Indian Courts would not recognise that IIFC (UK)'s debt under the Guarantee Fee Agreements would be discharged by its compliance with the Third Party Debt Order.

Ground 4: is the debt "*due or accruing due*"?

113. CPR rule 72.2 provides for the making of a Third Party Debt Order "*requiring a third party to pay to the judgment creditor … the amount of any debt due or accruing due to the judgment debtor from the third party or … so much of that debt as is sufficient to satisfy the judgment debt and the judgment creditor's costs of the application*".

114. Accordingly, it is a jurisdictional requirement that the relevant debt must be "*due or accruing due*". It was common ground that the debt must be due or accruing due when the Interim Third Party Debt Order was made (on 28th February 2018) or was served on IIFC (UK) (on 5th March 2018); it is not sufficient if the debt was due or accruing due when the final Third Party Debt Order is made or at the time of the hearing of any application for such an order (*Heppenstall v Jackson* [1939] 1 KB 585, 591-592).

115. Clause 1 of the Guarantee Fee Agreements provided for the payment of the guarantee fee by IIFC (UK) to the GOI. The first such agreement dated 6th March 2009 provided that "*… IIFC (UK) shall pay to the Government of India, an annual guarantee fee at the rate of 0.25 per cent on the amount of the said borrowing of USD 250 million and thereafter pay in advance on the 1st day of April of each year on the principal plus accumulated normal interest outstanding*".

116. In *O'Driscoll v Manchester Insurance Committee* [1915] 3 KB 499, the plaintiffs obtained a judgment against a doctor, who was owed sums by an insurance committee acting under the National Insurance Acts 1911 and 1913. A garnishee order was obtained by the plaintiffs in respect of the sums owed by the insurance committee to the doctor. That debt was presently owing but the amount to be paid had not yet been ascertained. The Court of Appeal held that a garnishee order could be made final. At pages 516-517, Bankes, LJ said that:

> *"It is well established that "debts owing or accruing" include debts debita in praesenti solvenda in futuro. The matter is well put in the Annual Practice, 1915, p. 808: "But the distinction must be borne in mind between the case where there is an existing debt, payment whereof is deferred, and the case where both the debt and its payment rest in the future. In the former case there is an attachable debt, in the latter case there is not." If, for instance, a sum of money is payable on the happening of a contingency, there is no debt owing or accruing. But the mere fact that the amount is not ascertained does not show that there is no debt. In the present case there was on April 9, 1914, a debt debitum in praesenti but solvendum in futuro. It is not necessary to say exactly at what moment of time the debt was created. In 1913 Dr. Sweeny acted as panel doctor under three agreements with the Insurance Committee. The method of remuneration was based upon the system of payment by attendance, and in the agreement for 1914 there was a scale of payment for each attendance. It is not necessary to decide whether a debt arose in respect of each attendance, but it is clear that a doctor cannot say that a debt has arisen unless he has performed his part of the agreement. Dr. Sweeny fulfilled that condition, and a debt arose though the*

amount of it was not ascertained on April 9, 1914, and was not then payable. Still there was none the less a subsisting debt on that date …"

117. This decision was applied in *Dawson v Preston* [1955] 1 WLR 1219 and in *Dunlop & Ranken v Hendall Steel Structures Pitchers (Garnishees)* [1957] 1 WLR 1102. In the latter case, it was held that there was no debt arising under a building contract which could be the subject of a garnishee order where there was no "*cause of action*" (page 1107 *per* Lord Goddard, CJ) and no debt "*owing or accruing*" (page 1108 *per* Havers, J) unless and until an architect's certificate had been issued.

118. Accordingly, there must be an "*immediate and unconditional obligation*" to pay the relevant sum in order to constitute a debt "*due or accruing due*", using the phrase adopted by Davis, LJ in *Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniia Naftogaz Ukrainy* [2014] EWCA Civ 1603; [2015] 1 CLC 1, at paragraph 49. Further, Davis, LJ said (at paragraphs 28-29):

> "*It is well established for this purpose that the debt must either be due (in the sense of instantly payable) or accruing due (in the sense of being payable in the future but by reason of an existing obligation). As stated by Lindley LJ in Webb v Stenton (1883) 11 QBD 518 at p. 527:*
>
> > *'I should say, apart from any authority, that a debt legal or equitable can be attached whether it be a debt owing or accruing; but it must be a debt, and a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, debitum in presenti, solvendum in futuro. An accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation.'*
>
> *… Further, and as a reflection of that principle, there ordinarily can be no attachment of a debt under Part 72 if the sum is only payable subject first to satisfaction of a condition precedent. This is demonstrated by Dunlop & Ranken Ltd v Hendall Steel Structures Ltd [1957] 3 All ER 344 …*"

119. In *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2017] UKSC 64; [2017] 3 WLR 1170, Lord Mance said (at paragraph 88) that

> "*The concept of a debt for the purposes of a third party debt order, or its predecessor the garnishee order, is particularly well-settled by authority. First, "The test of 'debt due' is whether it is one for which the creditor could immediately and effectually sue": Paget's Law of Banking 14th ed (2014), para 31.8; see also Allinson's Enforcement of a Judgment 12th ed (2016), para 8-03. The test goes back at least to Webb v Stenton (1883) 11 QBD 518.*"

120. Accordingly, it follows that the Court may make a Third Party Debt Order in respect of a debt which is payable by reason of an existing obligation at the date of the making or service of the Interim Third Party Debt Order, whether payment is required instantly or in the future. An existing obligation is one which is a cause of action which may be the subject of an immediate suit before the Court. For this purpose, it does not matter if the amount to be paid is not yet quantifiable, provided that there is an existing obligation in respect of the debt. If, however, there is no existing obligation, for example because

a contingency or condition precedent has not yet been satisfied at the relevant date, that will not be a debt which is amenable to a Third Party Debt Order.

121. Therefore, against this background, the question arises whether the debt arising under the Guarantee Fee Agreements constituted an existing obligation on 28th February 2018 or 5th March 2018.

122. Mr Kitchener QC on behalf of IIFC (UK) argued that the guarantee fees fell due on 1st April each year calculated by reference to the principal and interest then owed by IIFC (UK) to the Reserve Bank of India under the Bond Subscription Agreement; that under the Bond Subscription Agreement (articles 1.1.7 and 1.5), the bonds could be redeemed at any time, before the due dates, by IIFC (UK) with no penalty for early repayment; accordingly, whether any guarantee fees fell due on 1st April 2018 depended on whether IIFC (UK) owed the Reserve Bank of India any monies under the Bond Subscription Agreement at that date; this was a contingency which was unsatisfied at the date of the making or service of the Interim Third Party Debt Order.

123. Mr Kendrick QC on behalf of Hardy argued that the GOI provided eight guarantees to the Reserve Bank of India in connection with the bond subscriptions, each of which is for a long duration; each Guarantee Fee Agreement came into force on the day that the relevant Guarantee Agreements became effective (clause 6 of the Guarantee Fee Agreements); the annual guarantee fee is levied on the principal and accumulated interest, and is payable on 1st April each year; there is no contingency for the GOI to satisfy to be entitled to payment; the debt is due for the life of the Guarantee Agreements; therefore, from the date on which each Guarantee Agreement becomes effective an existing obligation to pay the guarantee fee for the life of the contract, even though the fee is only payable annually and even though quantification of the precise amount only occurs annually.

124. Clause 1 of the Guarantee Fee Agreements contemplates that, as consideration for the provision of a guarantee by the GOI in respect of a particular bond, IIFC (UK) shall pay an annual guarantee fee at a specified rate on the amount of the borrowing (*i.e.* the borrowing by IIFC (UK) from the Reserve Bank of India) and "*thereafter pay in advance on the 1st day of April of each year on the principal plus accumulated normal interest outstanding*". It is obvious that, in respect of the debt concerned, the requirement to pay the relevant fee did not arise until 1st April 2018. However, the question is whether there was an immediate and unconditional obligation, or a cause of action, on the part of IIFC (UK) towards the GOI in respect of the guarantee fee on 28th February 2018 or 5th March 2018.

125. Clause 1 contemplates an immediate payment of the guarantee fee calculated by reference to the borrowing (*i.e.* the principal) and thereafter on 1st April each year the payment "*in advance*" of a fee calculated on the principal "*plus accumulated normal interest outstanding*". On the facts of this case, the fee which became payable on 1st April 2018 was to be paid "*in advance*" and the fee which had been paid the previous year on 1st April 2017 had been paid in advance for the guarantee services provided by the GOI up to 1st April 2018. On its face, this suggests that the cause of action for the guarantee fee accrued on 1st April each year; otherwise the entitlement to the entire fees due under each Guarantee Fee Agreement would have accrued at the beginning of the Guarantee Fee Agreement, albeit only requiring to be paid on 1st April each year. That does not reflect the language of the Guarantee Fee Agreements. In assessing when

the relevant entitlement to a guarantee fee accrued, it is not a question of determining the certainty or likelihood that the debt will be payable on 1st April 2018, but whether there was an actionable entitlement to the fee before 1st April 2018. In my judgment, there was no such entitlement, and therefore no due or accruing due debt in respect of the guarantee fee to be paid on 1st April 2018 before that date.

126. Furthermore, the entitlement to the fee does, in my judgment, depend on a contingency, namely that the principal amount of the borrowing must remain outstanding and that there is outstanding accumulated interest on 1st April 2018. The borrowing may be reduced or extinguished by early repayment, even though this may be unlikely; the existence of outstanding interest depends on the extent to which such interest is outstanding, meaning that it has not been paid on the dates required by the Bond Subscription Agreement. I could see some merit in the argument that the fee payable on outstanding interest must relate to interest which has accrued or accumulated in the past, rather than in the future, especially as the fee could not be calculated with respect to future outstanding interest, but I consider that the meaning of the provision in the Guarantee Fee Agreements is clear in imposing an obligation to pay the fee only on 1st April each year.

127. In those circumstances, I do not consider that the entitlement to the guarantee fee which accrued on 1st April 2018 is a debt "*due or accruing due*" on 28th February 2018 or 5th March 2018 when the Interim Order was made and served.

Conclusion

128. For the reasons explained above, I find that:

(1) The situs of the debt under the Guarantee Fee Agreements was India, not England and Wales.

(2) The Indian Courts would not recognise compliance with the Third Party Debt Order as discharging IIFC (UK)'s liability.

(3) The debt under the Guarantee Fee Agreements was not "*due or accruing due*" on 28th February 2018 and 5th March 2018 when the Interim Order was made and served.

(4) The Court did not have jurisdiction to make a Third Party Debt Order in respect of the fees due under the Guarantee Fee Agreements.

(5) If (contrary to my conclusion) the Court did have such jurisdiction, the Court should not make a Third Party Debt Order because there is a real or substantial risk that compliance with the Order would not discharge IIFC (UK)'s liability under the Guarantee Fee Agreements as a matter of Indian law.

129. Accordingly, I allow IIFC (UK)'s application to discharge the Interim Third Party Debt Order.

130. I would like to thank counsel for all three parties for the quality and care displayed in their submissions. I await to discuss the orders to be made consequent on this decision.