Neutral Citation Number: [2020] EWHC 2214 (Comm)

Case No: CL-2019-000646

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

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

Date: 18/08/2020

Before :

MR CHRISTOPHER HANCOCK QC
SITTING AS A JUDGE OF THE HIGH COURT

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Between :

(1) KfW	**Claimants**
(a German public law institution)	
(2) KfW IPEX-BANK GmbH	
(a limited liability company incorporated in Germany)	
- and –	
SANJAY SINGAL	**Defendant**

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- -

Jonathan Davies-Jones QC (instructed by **Clifford Chance LLP**) for the **Claimants**
The Defendant did not appear and was not represented.

Hearing date: 29 July 2020

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Approved Judgment

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 18 August 2020 at 10:30 am.

Mr Christopher Hancock QC sitting as a Deputy Judge of the High Court :

Introduction and factual background.

1. The Claimants apply for summary judgment in respect of claims under three Guarantee and Indemnity Agreements ("**the Guarantees**"). Those guarantees were given by Mr Singal, who is resident in India, in respect of sums advanced by the Claimants under individual loan agreements ("**ILAs**") entered into with an Indian company called Bhushan Power & Steel Limited ("**BPSL**"). The ILAs were entered into pursuant to three Facility Agreements between the Claimants and BPSL (referred to below as "**Facility Agreements 1, 2 and 3**"). Mr Singal was, at the relevant times, the Chairman and Managing Director of BPSL.

2. The claims are for USD and EUR sums equivalent to about £150m. The application is made with the Court's permission under CPR 24.4(1)(b)(i), by order of Butcher J dated 2 June 2020. As a preliminary, the Claimants also apply for permission to amend their Particulars of Claim to correct some minor errors in the figures originally pleaded.

3. The Claimants are German, state-owned financial institutions specialising inter alia in export credit lending. The First Claimant ("KfW") was established in 1948 under the Marshall Plan. The Second Claimant ("KfW IPEX") is a subsidiary of KfW. The KfW Group comprises one of Germany's largest financial institutions.

4. Mr Singal was not present at this hearing and was not represented, although he was at earlier stages represented by Messrs Penningtons Manches Coooper LLP. In these circumstances, Mr Davies-Jones QC for the Claimants, accepted that he was under an obligation to draw to my attention any points, factual or legal, which might have assisted the defendant and been made by him had he continued to participate and file a Defence: see, for example, *Habib Bank Ltd v Central Bank of Sudan* [2006] 2 Lloyd's Rep 412 at [9].

The application for permission to amend.

5. The Claimants sought permission to amend their Particulars of Claim in the form of the draft attached to the Claimants' Application Notice, which was served with that Application Notice, as I note below. The amendments are to some of the figures which appeared in in the original Particulars of Claim. The need to make those amendments was identified during the course of preparing Mr Petersen's first statement.

6. The effect of those amendments was to reduce the claim, and to correct inaccuracies which the Claimants were under an obligation to correct. Since there was no prejudice to the Claimants (because the result of the amendment was that the claim was reduced) and since the new figures had to be included to correct errors, I gave permission at the hearing for permission to amend.

The structure of the remainder of this judgment.

7. I will deal in this judgment, as did Mr Davies-Jones, with matters in the following order:

(1) Mr Singal's participation in these proceedings;

(2) The factual background:
    (1) The Facility Agreements;
    (2) The Guarantees;
    (3) The sums advanced under the ILAs;
    (4) BPSL's failure to re-pay the sums advanced; and
    (5) The quantum of the outstanding debt;
(3) The claims under the Guarantees:
    (1) Jurisdiction of the English Court;
    (2) The terms of the Guarantees and the nature of the obligations created;
    (3) The demands served on Mr Singal;
    (4) The claims under each of Clauses 2.1, 2.2 and 2.3 of the Guarantees; and
    (5) Why summary judgment is appropriate.

Mr Singal's participation in these proceedings.

8. Mr Singal was, but is no longer, represented by English lawyers in these proceedings and he is not playing an active part in them. Whilst the detailed history of the proceedings is set out in the first witness statement of Mr Petersen, which I have read, the brief summary is as follows:

(1) Mr Singal was served with these proceedings in this jurisdiction as of right on 21 October 2019. Service was effected on Law Debenture Corporate Services Ltd, being Mr Singal's London agent for service irrevocably appointed as such by Clauses 12 of Guarantee 1 and Guarantee 2 and Clause 13 of Guarantee 3. This was good service by virtue of CPR Part 6.11.

(2) Mr Singal instructed Penningtons Manches Cooper LLP as his solicitors on the record and he filed an Acknowledgement of Service which indicated an intention to contest jurisdiction. Because the Guarantees contain exclusive jurisdiction clauses in favour of England and express waivers of any right to contest this jurisdiction, Penningtons were asked to articulate the basis for challenging jurisdiction, but did not do so. I address issues of jurisdiction below.

(3) Various extensions of time were agreed for the service of Mr Singal's application to challenge jurisdiction and/or a Defence. The last of those extensions expired on 7 January 2020. On that day, Penningtons issued an application of a different nature, which was said to arise from the fact that Mr Singal was then in custody in India, having been arrested in late 2019. The application sought either (i) an indefinite stay of these proceedings pending Mr Singal's release or (ii) a further extension of six weeks in which to file his jurisdiction challenge.

(4) In fact, no steps were taken by Penningtons to list that application or to co-operate with any steps taken by the Claimants' solicitors (Clifford Chance) to have it listed. On 31 January 2020 Penningtons came off the record.

(5) In the meantime on 24 January 2020 Mr Singal had been released from custody, as is recorded in Mr Petersen's first witness statement, and the foundation for his indefinite stay application therefore fell away. In the time since 24 January 2020,

no application to challenge jurisdiction has been filed by him either, and the 6 week extension period Penningtons sought expired many months ago. Nor has Mr Singal responded to any correspondence from Clifford Chance.

(6) Permission for this summary judgment application was granted by the Court on 2 June 2020, as I have noted, and the application was served on Mr Singal in the following ways: (i) by email and courier on his designated service agent in London; (ii) by email and courier on his Indian lawyers in New Delhi; and (iii) at two addresses for BPSL in New Delhi.

(7) Mr Singal has not, however, responded to the application in any way. He did not file any evidence in response and he did not provide his email address so that the link for this hearing could be provided to him. In short, he is not participating.

9. I am satisfied that there has been valid service of the application on Mr Singal by service in accordance with a contractually agreed method, pursuant to CPR 6.11. I am also satisfied that, on the balance of probabilities, the application will also have come to his notice by virtue of the service on his Indian lawyers and BPSL in New Delhi.

The factual background relating to the Facility and Loan Agreements.

10. I turn to the factual background relating to the loans. Between 2009 and 2013, the Claimants and BPSL entered into three loan facility agreements, dated 14 May 2009, 17 December 2009 and 13 August 2013 (referred to below as "**Facility Agreement 1**", "**Facility Agreement 2**" and "**Facility Agreement 3**" respectively, and together as the "Facility Agreements").

11. The Facility Agreements provided for individual loans to be advanced by the Claimants up to maximum aggregate amounts specified in each Facility Agreement. The individual loans were to be documented under a series of ILAs, the form of which was pre-determined and set out at Annex 2 of each Facility Agreement. Each of the ILAs relevant to these proceedings was exhibited to the first witness statement of Mr Petersen.

12. The loans to be advanced under the Facility Agreements and the ILAs thereunder were intended for BPSL to acquire machinery and equipment for what was known as Stage IV and Phase VI of a construction project at a BPSL facility in Orissa, India.

13. The Facility Agreements are governed by German law. Their key terms are set out at paragraphs 5, 14 and 21 of the Amended Particulars of Claim for each of Facility Agreements 1, 2 and 3 respectively. Because their operative terms were substantially similar, the key terms below from Facility Agreement 3 can be taken as broadly representative of the corresponding provisions in Facility Agreements 1 and 2, and they are as follows:

(1) Clause 2 (Amount and Purpose): "*2.1 Subject to the conclusion of individual loan agreements, each substantially in the form as set out in Annex 2 (the "**Individual Loan Agreements**") … the Finance Parties* [being KfW and KfW IPEX] a*re prepared to make available to the Borrower* [being BPSL] *Loans* [being each

amount to be made available under the facility or the principal amount outstanding for the time being under an Individual Loan Agreement] …";

(2) Clause 6 (Interest) provided for interest to be payable at the fixed or floating rates specified in Clauses 6.2 and 6.3 respectively;

(3) Clause 7 (Repayment): "*7.1 The Borrower must repay the relevant Finance Party each Loan in EUR and in up to 20 (twenty) equal semi-annual instalments – the number of such instalment is to be specified in the relevant ILA. 7.2 The repayment provisions …will be specified in the relevant Individual Loan Agreement …";*

(4) By Clause 9.6, it was provided that default interest would be paid at the rate specified therein in respect of due but unpaid principal;

(5) Clause 12 (Payment Guarantee and other Security): "*12.1 The Borrower's payment obligations under the Loan Documents* [being the Facility Agreement and the Individual Loan Agreements thereunder] *must be irrevocably and unconditionally guaranteed by the Guarantor* [being Mr Singal] *under the payment guarantee (the "**Payment Guarantee**"), a form of which is attached as ANNEX 9 hereto.*";

(6) Clause 15 (Events of Default):

(1) "*15.1 Any Finance Party may, without resorting to any legal procedure, exercise all or any of its rights under Clause 15.2 if an event constituting an important reason …under German law (**Event of Default**) occurs, such as any of the following: (a) the Borrower … fails to pay any sum due from it to the relevant Finance Party unless payment is made within 5 Frankfurt Banking Days of the due date; …*" and

(2) "*15.2 At any time after an Event of Default occurs, any Finance Party may by notice to the Borrower: … (b) declare that all or part of each of its outstanding Loans together with accrued interest and all other amounts outstanding under the Loan Documents to which it is a party are immediately due and payable. .*"

(7) Clause 17 (Costs and Expenses): "*17.2 The Borrower must pay all costs and expenses (including legal fees) incurred by the Finance Parties in connection with the enforcement of, or the preservation of any rights under, the Finance Documents* [being each of the Loan Documents, the Payment Guarantee and each Security Document (as defined in Facility Agreement 3)]."

(8) By Clause 21 (Law and Jurisdiction), German law was the applicable law of the Facility Agreement and the ILAs thereunder.

The factual background relating to the Guarantees

14. As indicated by the example from Facility Agreement 3 above, Clause 12 of each of the Facility Agreements required BPSL's obligations under the Facility Agreements

to be irrevocably and unconditionally guaranteed, in the form of the guarantee and indemnity agreement at Annex 9 of the relevant Facility Agreement. Accordingly, Mr Singal executed the following by deed (corresponding to the form at Annex 9):

(1) A guarantee and indemnity dated 18 May 2009 guaranteeing BPSL's obligations to KfW under Facility Agreement 1 ("**Guarantee 1**");

(2) A guarantee and indemnity dated 17 December 2009 guaranteeing BPSL's obligations to KfW IPEX under Facility Agreement 2 ("**Guarantee 2**");

(3) A guarantee and indemnity dated 13 August 2013 guaranteeing BPSL's separate obligations to KfW and KfW IPEX under Facility Agreement 3 ("**Guarantee 3**").

15. Thereafter, the Claimants advanced monies to BPSL under each of the Facility Agreements by reference to the ILAs thereunder. I have been shown extracts from the Claimants' book keeping system, which are then summarised in a Schedule to Mr Petersen's first statement. From the documents that I was taken through, I am quite satisfied that that Schedule accurately summarises the contents of the banking documents.

16. In summary, for present purposes there were three relevant ILAs under Facility Agreement 1, two relevant ILAs under Facility Agreement 2, and 6 relevant ILAs under Facility Agreement 3, in respect of which the sums advanced totalled as follows:

	Lender	**Total sums advanced**
Facility Agreement 1	KfW	USD 59,831,632.67
Facility Agreement 2	KfW IPEX	USD 21,536,052.25
Facility Agreement 3	KfW	EUR 29,596,451.00
Facility Agreement 3	KfW IPEX	EUR 107,134,404.91

17. On 26 July 2017 BPSL entered into a form of Indian insolvency process under the Indian Insolvency and Bankruptcy Code 2016 known as a Resolution Process. That was an Event of Default under Clause 15.1 of the Facility Agreements.

18. By 21 June 2018, the following total sums were outstanding under the Loans:

	Lender	**Total sums outstanding 21 June 2018**
Facility Agreement 1	KfW	USD 11,975,654.89
Facility Agreement 2	KfW IPEX	USD 5,534,685.22
Facility Agreement 3	KfW	EUR 30,078,743.03
Facility Agreement 3	KfW IPEX	EUR 109,085,865.09

19. Of those total sums, the following sums had fallen due for payment but had not been paid within 5 banking days of the due date or at all. Under Clause 15.1 of each of the Facility Agreements, those failures to pay constituted further Events of Default, as follows:

(1) In respect of the ILAs under Facility Agreement 1, USD 8,072,829.03 had been overdue for more than 5 banking days by 21 June 2018;

(2) In respect of the ILAs under Facility Agreement 2, USD 2,512,269.30 had been overdue for more than 5 banking days by 21 June 2018; and

(3) In respect of the ILAs under Facility Agreement 3:

(1) Of the sums due to KfW, €2,373,851.28 had been overdue for more than 5 banking days by 21 June 2018; and

(2) Of the sums due to KfW IPEX, €7,310,287.54 had been overdue for more than 5 banking days by 21 June 2018.

20. Accordingly, on 21 June 2018, by reason of the Events of Default which had by then occurred, the Claimants served a notice on BPSL under Clause 15.2 of each of the Facility Agreements declaring all the amounts outstanding immediately due and payable (the "**Notice of Acceleration**"). That notice referred to a moratorium on commencing legal proceedings against BPSL under s14 of the Indian Insolvency and Bankruptcy Code 2016 but expressly reserved the Claimants' rights to take steps under the Guarantees.

21. The Notice of Acceleration was served on BPSL by email using the BPSL email address which BPSL and the Claimants had been using for communications between them from at least October 2016 (and which they continued to use for such communications until at least May 2019). The Claimants had also attempted to serve the notice by fax using the BPSL fax number designated in the Facility Agreements but that was unsuccessful. The Claimants also served the notice directly on BPSL's Interim Resolution Professional (of the accountancy firm BDO).

22. The question of whether the Notice of Acceleration was validly served is governed by German law, since it is the law governing the Facility Agreements. In this regard, I had evidence from Mr Burkitt, from Clifford Chance, who had consulted a German lawyer from Clifford Chance, Mr Burkhard Schneider. I was taken with care through the relevant provisions of German law, and I am satisfied that the Notice of Acceleration was validly served. In particular:

(1) The notice provision at Clause 20 of the Facility Agreements was what German law would regard as a "*standard business term*": see s.305 of the German Civil Code. Such terms are terms intended for use in more than two contracts, as these were.

(2) However, such terms are capable of variation by a subsequent "*individual agreement*" (notwithstanding the provisions of Clause 20.5 in each of the Facility Agreements): see s.305(b) of the German Civil Code.

(3) The fact that BPSL and the Claimants had used the email address "*finance1@bpsl.net*" for the purposes of their legal transactions and communications between them in the 20-month period prior to June 2018 (when the Notice of Acceleration was served on that address) is sufficient to constitute an individual agreement varying Clause 20.1 and 20.5, such that service by the

email (which the parties had agreed by their course of conduct to use) was effective.

23. In any event, there is no doubt that the notice was in fact safely received by BPSL. As stated above, the same BPSL email address continued to be used by the Claimants and BPSL in the 11-month period that followed. The Claimants also served the Notice on BPSL's Interim Resolution Professional at the same time. Neither BPSL nor Mr Singal has ever suggested that the Notice of Acceleration was not received. To the contrary, a letter from Mr Singal's Indian lawyers to the Claimants dated 29 August 2018 expressly referred to the acceleration which had taken place, albeit complaining that the Claimants "*accelerated the payments only because the Insolvency and Bankruptcy Code has been invoked*".

24. However, I am satisfied that that was not the only reason why the Loans were accelerated, as the Notice of Acceleration explained: "*Several Events of Default have occurred and are continuing under each of the Facility Agreements, including but not limited to the commencement of the corporate insolvency resolution process against the Borrower*". Nor would it have mattered if it had been the only reason, because (as might be expected) Clause 15 of the Facility Agreements gave the Claimants the right to accelerate upon the happening of a number of Events of Default, which included insolvency events, and as the Loans had all been advanced there would have been nothing objectionable about accelerating on that basis alone (even if, contrary to the facts, it had been the only basis).

25. There have been no recoveries from BPSL since 21 June 2018. As a result, both the principal and contractual interest outstanding as at 21 June 2018 remain outstanding (reflected in the Table in paragraph 18 above) and default interest has continued to accrue under the terms of Clause 9.5 of Facility Agreements 1 and 2 and Clause 9.6 of Facility Agreement 3.

26. The Claimants have calculated the total of default interest that was outstanding as at 29 July 2020 assuming no recoveries in the interim (save that for four of the ILAs under Facility Agreement 3 default interest could only be calculated up to 30 June 2020). I set out the relevant totals below. In addition to the sums there set out:

    (1) The Claimants are also entitled to their enforcement costs under Clause 10.3 of Facility Agreements 1 and 2 and Clause 17.2 of Facility Agreement 3. The Claimants have provided the up-to-date total for those enforcement costs being €67,409.11 and they have exhibited the supporting invoices, which I have examined. For the avoidance of doubt, that total does not include the costs incurred in these proceedings, which costs will be the subject of this Court's normal costs jurisdiction; and

    (2) KfW IPEX is also entitled to an unpaid commitment fee under Clause 5.2 of Facility Agreement 3 of €10,021.02.

	Lender	**Principal Outstanding**	**Contractual Interest Outstanding**	**Default Interest Outstanding**	**Total as at 29 July 2020 (save where indicated)**
Facility Agt 1	KfW	USD 11,218,292.65	USD 448,929.38	1,813,073.24	**USD 13,480,295.27**
Facility Agt 2	KfW IPEX	USD 5,251,715.39	USD 206,822.58	835,722.21	**USD 6,294,260.18**
Facility Agt 3	KfW	EUR 29,214,827.00	EUR 826,241.31	2,746,100.19	**EUR 32,787,168.50**
Facility Agt 3	KfW IPEX	EUR 107,134,404.91	EUR 1,836,424.17	6,990,579.23	**EUR 115,988,408.31 (to 30 June 2020)**

The claim against Mr Singal: Jurisdiction.

27. I turn to consider the claim against Mr Singal, commencing with jurisdiction.

28. The first point to make is that Mr Singal is now out of time for challenging jurisdiction.

29. However, I am satisfied that any such challenge could not have succeeded, because each of the Guarantees contained a valid and binding exclusive English jurisdiction agreement.

30. Taking Guarantee 3 by way of example, Clause 12 provided:

    (1) Clause 12.1: "*The English courts have exclusive jurisdiction to settle any dispute in connection with this Guarantee and Indemnity (a Dispute)*"; and

    (2) Clause 12.2: "*The English courts are the most appropriate and convenient courts to settle Disputes.* [The Defendant] *agrees not to argue to the contrary and waives objection to those courts on the grounds of inconvenient forum or otherwise in relation to proceedings in connection herewith*".

31. The corresponding provisions in Guarantees 1 and 2 were Clauses 11.1 and 11.2.

32. The claims now brought under the Guarantees against Mr Singal arise "*in connection with*" the legal relationship created by the Guarantees. The claims are, accordingly, within the exclusive jurisdiction of the English Court. By his contract, Mr Singal submitted to the jurisdiction of the English Courts, he has no right to require the Claimants to sue him anywhere else, and it would be a breach of contract by him to do so.

33. Furthermore, the jurisdiction agreement in each the Guarantees is a jurisdiction agreement within the scope of Art 25 of the Brussels Regulation Recast[1]. That Article

[1] Although the clause is an assymetric one, in that KfW have the right to sue elsewhere, this does not prevent the clause from being an exclusive jurisdiction clause within Article 25 where that option is not exercised and where

precludes the possibility of a challenge to the jurisdiction on *forum non conveniens* or other common law grounds. As Popplewell J said in IMS SA v Capital Oil and Gas Industries Ltd [2016] 3 WLR 163 at [44]: "*Where article 25 applies, the court is left with no discretion to exercise on forum non conveniens or other grounds; it must give effect to the relevant agreement*." See also *UCP v Nectrus* [2018] 2 All ER (Comm) 418 at [33], [39] and [44].

34. Yet further, even if Art 25 of the Recast had not shut out the possibility of a forum challenge, by Clause 11.2 of Guarantees 1 and 2 and Clause 12.2 of Guarantee 3 Mr Singal contractually confirmed that the English Courts were the most convenient forum, he agreed he would not to argue the contrary and he waived the right to do so. Although clauses of this nature do not preclude challenges where unforeseen circumstances occur, there are no such circumstances here.

The claim against Mr Singal: the test for summary judgment.

35. Turning from questions of jurisdiction, to the merits of the claim for summary judgment, I start by reminding myself of the relevant principles, which have been authoritatively laid down by Lewison J (as he then was) in the case of *Easyair v Opal* [2009] EWHC 339.

> *"15. As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:*
>
> *i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*
>
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
>
> *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*
>
> *v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal*

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the counterparty (here Mr Singal) is obliged to accept the English Court's jurisdiction: see for example *Etihad Airways v Flother* [2020] 2 WLR 333.

> *Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*
>
> *vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*
>
> *vii)On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."*

The claim against Mr Singal: the merits.

36. I turn to consider the facts of this case, bearing this approach in mind. The key terms of the guarantees are as follows:

(1) Clause 2.1: "[Mr Singal] *irrevocably and unconditionally ... guarantees to* [KfW/KfW IPEX] *punctual performance by* [BPSL] *of all its obligations under the Finance Documents* [which include the Facility Agreements and the Loans thereunder];"

(2) Clause 2.2: "[Mr Singal] *irrevocably and unconditionally ... undertakes with* [KfW/KfW IPEX] *that, whenever* [BPSL] *does not pay any amount when due under or in connection with any Finance Document,* [Mr Singal] *must*

immediately on demand by [KfW/KfW IPEX] *pay that amount as if it were the principal obligor in respect of that amount;*"

(3) Clause 2.3 "[Mr Singal] *irrevocably and unconditionally ... agrees with* [KfW/KfW IPEX] *that if, for any reason, any amount claimed by* [KfW/KfW IPEX] *hereunder is not recoverable from* [Mr Singal] *on the basis of a guarantee then* [Mr Singal] *will be liable as a principal debtor and primary obligor to indemnify* [KfW/KfW IPEX] *in respect of any loss it incurs as a result of* [BPSL] *failing to pay any amount expressed to be payable by it under a Finance Document on the date when it ought to have been paid. ..."*

(4) Clause 5 (Waiver of defences): "*The obligations of* [Mr Singal] *hereunder will not be affected by any act, omission or thing (whether or not known to it or any Finance Party) which, but for this provision, would reduce, release or prejudice any of its obligations hereunder. This includes:*

5.1. any time or waiver granted to, or composition with, any person;

5.2. any release of any person under the terms of any composition or arrangement;

5.3. the taking, variation, compromise, exchange, renewal or release of, or refusal or neglect to perfect, take up or enforce, any rights against, or security over assets of, any person;

5.4. any non-presentation or non-observance of any formality or other requirement in respect of any instrument or any failure to realise the full value of any security;

5.5. any incapacity or lack of power, authority or legal personality of or dissolution or change in the members or status of any person;

5.6. any amendment of a Finance Document or any other document or security;

5.7. any unenforceability, illegality, invalidity or non-provability of any obligation of any person under any Finance Document or any other document or security; or

5.8. any insolvency or similar proceedings."

(5) Clause 6 (Immediate Recourse): "[Mr Singal] *waives any right it may have of first requiring* [KfW/KfW IPEX] *... to proceed against or enforce any other right or security or claim payment from any person before claiming from* [Mr Singal] *hereunder*".

(6) Clause 8 (Non-competition): "*Unless: 8.1 all amounts which may be or become payable by the Borrower under or on connection with the Finance Documents have been irrevocably paid in full; or 8.2 the Finance Parties otherwise direct,* [Mr Singal] *will not, after a claim has been made or by virtue of any payment or*

performance by it hereunder:

i be subrogated to any rights, security or moneys held, received or receivable by [KfW/KfW IPEX]*…;*

ii be entitled to any right of contribution or indemnity in respect of any payment made or moneys received on account of [Mr Singal's] *liability hereunder;*

iii claim, rank, prove or vote as a creditor of [BPSL] *or its estate in competeiom with* [KfW/KfW IPEX]…; or

iv receive, claim or have the benefit of any payment, distribution or security from or an account of [BPSL]*, or exercise any right of set-off as against* [BPSL]."

37. It is important to focus on the particular obligations each of the Guarantees created. As regards the approach the Court should take to such an exercise, I was reminded of *Vossloh Aktiengesellschaft (VAG) v Alpha Trains* [2011] 2 All ER (Comm) 307 at [19]-[28] and [34], from which the following principles emerge:

(1) Each case depends upon the actual words used. The Court approaches the task of characterisation without any preconceptions as to what the instrument creates ([20]);

(2) It is not necessary to shoe-horn a surety contract into the category of either pure guarantee or pure indemnity if it is in truth a mixture of primary and secondary elements - "*Whether a particular contract of suretyship is of the one kind or the other or indeed a combination of the two turns on its true construction*" ([27]).

(3) The spectrum of contractual possibilities has pure guarantees at one end and performance bonds (a particularly strict form of indemnity contract) at the other ([34]). The space in between is occupied by modified guarantees, hybrid contracts (i.e. those which are a combination of guarantee and indemnity obligations) and pure contracts of indemnity (albeit short of performance bonds).

38. The authorities also recognise different surety obligations work in different ways: see, for example, *McGuinness v Norwich and Peterborough Building Soc* [2012] 2 All ER (Comm) 265 at [7]-[8] per Patten LJ:

> *"[7] It is common ground that a guarantee of a loan may impose one or more of the following types of liability on the guarantor. These are: (1) a 'see to it' obligation, ie an undertaking by the guarantor that the principal debtor will perform his own contract with the creditor; (2) a conditional payment obligation, ie a promise by the guarantor to pay the instalments of principal and interest which fall due if the principal debtor fails to make those payments; (3) an indemnity; and (4) a concurrent liability with the debtor for what is due under the contract of loan.*
>
> *"[8] The obligations in classes (2) and (4) create a liability in debt. But it is well established that an indemnity is enforceable by way of action for unliquidated damages …. The liability arises from the failure of the indemnifier to prevent the person*

> *indemnified from suffering the type of loss specified in the contract. A guarantee of the 'see to it' type has also been held by the House of Lords to create a liability in damages. The obligation undertaken by the guarantor is not one to pay the debt but consists of a promise that the debt will be paid by the principal debtor: see Moschi's case…."*

39. Turning to the terms of the Guarantees in this case:

(1) In my judgment, Clause 2.1 was breached the moment breach of BPSL's obligations occurred and without the need to serve a demand: see *Moschi v Lep Air Services Ltd* [1972] AC 331 at 344-345. Accordingly, breach of Clause 2.1 sounds in damages – the measure of loss is "*the loss suffered by the creditor due to the principal having failed to do what the surety undertook that he would do*": *Vossloh* at [23].

(2) In my judgment, Clause 2.2 is a conditional payment obligation, sounding in debt. A demand is required to crystallise a cause of action under Clause 2.2 because of the express reference to the need for a demand in Clause 2.2.

(3) Clause 2.3 is an indemnity and a primary obligation sounding in damages. Unlike Clause 2.2, a demand is <u>not</u> required to crystallise a cause of action under Clause 2.3. Clause 2.3 contains no reference to a demand being required and the reference to Mr Singal's liability "*as a principal debtor and primary obligor*" negatives the need for a demand in any event: see *MS Fashions Ltd v BCCI* [1993] Ch 425. However, clause 2.3 is <u>only</u> available in the event that amounts are not available from the Guarantor on the basis of a guarantee.

40. Turning to other relevant clauses:

(1) Clause 5 achieves, in my view, a wide-ranging modification and disapplication of the co-extensiveness principle. That principle would not have had any application to Clause 2.3 (as an indemnity and a primary obligation) in any event. But, absent Clause 5, it could have impinged upon the scope of Clause 2.1 and 2.2.

(2) Clause 6 (Immediate Recourse) and Clause 8 (Non-Competition) reinforce the primary nature of the obligations in Clause 2, alternatively the disapplication of the co-extensiveness principle in any event. KfW and KFW IPEX are free to proceed against Mr Singal without having to proceed against BPSL and until Mr Singal has paid them in full any rights he might otherwise have against BPSL are subordinated.

41. At paragraph 36 of the Amended Particulars of Claim, the Claimants claim under each of Clause 2.1, 2.2 and 2.3 of each of the Guarantees in respect of the following sums unpaid by BPSL (see para 26 above):

(1) The total of principal, contractual interest and default interest unpaid by BPSL, for which the latest totals are USD 13,480,295.27 and EUR 32,787,168.50 due to KfW and USD 6,294,260.18 and EUR 115,988,408.31[2] due to KfW IPEX;

(2) The enforcement costs of EUR 67,409.11 which are due to KfW IPEX; [3] and

(3) The commitment fee of EUR10,021.02 unpaid by BPSL under Facility Agreement 3 which is due to KfW IPEX.

Why Summary Judgment is Appropriate

Liability under Clause 2.1 of each of the Guarantees.

42. Clause 2.1 in each of the Guarantees was, as I have indicated, a see to it provision. Accordingly, in my judgment, it was breached when BPSL failed to pay sums due, most significantly following the Notice of Acceleration on 21 June 2018. The damages payable as a result of those breaches of Clause 2.1 represent the sums which BPSL would have paid had it done what Mr Singal guaranteed by Clause 2.1 that it would do – viz perform its payment obligations.

Liability under Clause 2.2.

43. Since I have found that Mr Singal is liable under Clause 2.1, it is not strictly necessary for me to make a finding on liability under Clause 2.2. However, it was argued that liability on each of the Guarantees was triggered on the service of various demands, as set out below. That is a liability in debt. It was submitted that Mr Singal undertook to pay the Claimants on demand when BPSL failed to pay. He has not done so and is liable in debt for what he should have paid.

44. Four separate demands addressed to Mr Singal were made across the period from 22 June 2018 to 7 October 2019. In short:

(1) The first demand was served on Mr Singal on 22 June 2018. It was addressed to him, headed "*Payment Demand*" and unambiguously demanded payment. This first demand was served on Mr Singal by fax and by post at BPSL's then address. Clause 10.4 of Guarantees 1 and 2 and Clause 10.3 of Guarantee 3 gave BPSL's offices as Mr Singal's contact address. At the time the Guarantees were executed BPSL's offices were at Tolstoy House, Tolstoy Marg, New Delhi. But by (at least) 2016 BPSL's offices had moved to Nehru Place, New Delhi. So, the first demand was served on Mr Singal at BPSL's new offices in Nehru Place. It was argued that that was effective service (even though not served at Tolstoy House) for two reasons:

(1) First, because Clause 10.4 of Guarantees 1 and 2 and Clause 10.3 of Guarantee 3 are as a matter of language simply permissive, and not mandatory. They provide contact details. Whilst, therefore, service at the contractually-designated address would be good service, the Clauses do not constitute an exclusive code for service, as the provision for service on Mr Singal "*in person*" demonstrates. See also *United*

[2] This is the figure to 30 June 2020 only.
[3] This total excludes the costs of these proceedings, which fall to be dealt with separately.

Trust v Dohil [2012] 2 All ER (Comm) 765 at [20]-[42] and *Andrews & Millett* at para 7-007 (specifically p320-321).

(2) Secondly, there is no doubt that Mr Singal in fact safely received the demand because, on 29 August 2018, his Indian lawyers responded to the demand by a letter which referred to it in its title and began: "*…our Client Shri Sanjay Singal of Bhusan Power & Steel Ltd, resident of 53, Jor Bagh, New Delhi … has handed over to us your above Letter to give a suitable reply.*".

(2) In any event, to remove any scope for argument on the question of the address for service, a second demand dated 19 July 2019 was served (by courier). This was addressed to and served on Mr Singal at both BPSL's new and old addresses (i.e at Tolstoy House and Nehru Place). It was also served on Mr Singal's Indian lawyers and on Mr Singal's contractually-designated service agent in London. The demand was headed "*Payment Demand*" and it unambiguously demanded payment under the Guarantees. It was expressly without prejudice to the validity of the first demand. However, after service of the second demand, minor errors in the figures in the second demand were identified. The errors were of an order of magnitude of less than 1% of the totals. It was argued that that error did not invalidate the second demand. In support of this contention, it was submitted that, as a matter of the general law, it is not a requirement of a demand that it contain any figure, and, if it does and demands more than is due, it will remain a valid demand nevertheless: see *Bank Negara Indonesia 1946 v Taylor* [1995] CLC 255; and *Arab Banking Corp v Saad Trading and Financial Services* [2010] EWHC 509 (Comm) at [34]-[35]. Nor as a matter of the language of Clauses 2.2 and 10 of the Guarantees did these particular Guarantees require anything more of a demand than the general law does – all those clauses required was a "*demand*" and that it be made in writing.

(3) In any event, to avoid any argument about the validity of the second demand, a third demand dated 7 October 2019 was served with corrected figures. It was served expressly without prejudice to the validity of the first and second demands. Like the previous demands, it was addressed to Mr Singal, it was headed "*Payment Demand*" and it unambiguously demanded payment under the Guarantees. It was served by courier on Mr Singal at BPSL's current address (Nehru Place). Service was also attempted on Mr Singal at BPSL's previous address (being the Tolstoy House address given in the Guarantees) but could not be effected because BPSL was "*not known at that address*". The courier then called the phone number on the relevant Waybill (which appears to be a number for Mr Singal) and was told to serve at 53, Jor Bagh, New Delhi, which he did. It is clear from the letter from Mr Singal's Indian lawyers in sub-para (2)(b) above that 53, Jor Bagh is Mr Singal's personal residence. So there can be no doubt that Mr Singal received the third demand too.

(4) In addition to the above demands, it was submitted that the Letter before Action served on 5 June 2019, also constituted a demand on Mr Singal.

45. It was further submitted that it has never been suggested by Mr Singal that he did not receive any of the demands, nor that the terms of these demands were not a "*clear*

intimation that payment is required". That is all that is required to constitute a good demand: see *Andrews & Millett* at 7-007.

46. In relation to this question of service, I have concluded that:

(1) The first demand was a valid demand. I accept that the language of clause 12 as to the mechanism of service in the guarantee is not mandatory; and I further accept that the general principle should be, as Mr Picken QC (as he then was) said in *Dohil*, (quoting Wootten J in *Spectra Pty Ltd v Pindari Pty Ltd* [1974] 2 NSWLR 617) that notice given by any expeditious means that does in fact result in the actual receipt of the notice is good service. Here the notice was in fact received, and thus the notice was validly given.

(2) The second demand was also a valid demand, in my judgment. Here, the objection which might have been taken is that the amounts claimed in the demand were inaccurate, although not by a great deal. However, it is clear from the cases cited above that this does not invalidate the demand.

(3) It is not necessary for me to reach any finding in relation to the third demand.

47. It follows from the above that a valid demand was made on Mr Singal – indeed two valid demands at least were made. In these circumstances, it was submitted that, contrary to Clause 2.2 of the Guarantees, Mr Singal has not paid following a demand having been made on him and he is liable under Clause 2.2 in debt as a result. I accept that submission.

Liability under Clause 2.3 of each of the Guarantees

48. If the sums being claimed are not recoverable on the basis of Clauses 2.1 and 2.2, it was contended that they are recoverable by the Claimants under Clause 2.3 and as primary obligations because in Clause 2.3 of each of the Guarantees Mr Singal undertook to indemnify the Claimants against any loss arising as a result of BPSL failing to pay "*any amount expressed to be payable*". Since I have found that Mr Singal is liable under clauses 2.1 and 2.2, this issue does not arise.

Potential defences that Mr Singal might have raised.

49. The only 'defences' Mr Singal has attempted to advance appear to be (i) to deny liability on the basis of the Indian insolvency process to which BPSL is subject and in which the Claimants are BPSL creditors, and on the basis of provisions of Indian insolvency law (at least s238 of the Indian Insolvency and Bankruptcy Code 2016 ("**IBC**")) and (ii) to complain about the grounds of acceleration. The latter point has already been addressed.

50. As to the former point, as a matter of English law, the Claimants, having pointed out the existence of this alleged defence, argued that I could be satisfied that it was not well founded, both as a matter of fact and as a matter of law.

51. As a matter of law, it was contended that the BPSL insolvency cannot provide Mr Singal with a defence to the claims under the Guarantees or alter or discharge his obligations thereunder (whether directly or indirectly) for the following reasons:

(1) A creditor may pursue its debtor and its surety at the same time or in any order it chooses: *Andrews & Millett*: para 13-002. The claims in this action are not claims against BPSL and BPSL is not a party to them. Further, by Clause 6 of the Guarantees Mr Singal waived any objection to the Claimants proceeding against him first.

(2) Clause 5 of the Guarantees makes clear that the obligations of Mr Singal under the Guarantees will not be affected "*by any act, omission or thing (whether or not known to it or any Finance Party) which, but for this provision, would reduce, release or prejudice any of its obligations hereunder. This includes …*" and there then follows a non-exhaustive list. The wording is clear and the law recognises such wording to be effective: *Andrews & Millett* at 9-010. It means that the principle of co-extensiveness does not apply to the obligations under Clause 2.1 and 2.2 of the Guarantees as a result. Nor does it apply to the indemnity in Clause 2.3 of the Guarantees either but that is because Clause 2.3 is expressly a primary obligation. So by their contract the parties agreed that Mr Singal's liabilities were not to be dependent upon any continuing enforceability of BPSL's obligations in any event.

(3) The non-exhaustive list of examples in Clauses 5.1-5.8 of matters that will not affect Mr Singal's liability under the Guarantees includes inter alia (i) any release of BPSL's obligations (Clause 5.2), (ii) "*any alteration of those obligations"* (Clause 5.6); (iii)"a*ny unenforceability, illegality, invalidity or non-provability*" of those obligations (Clause 5.7) and (iv) any "*insolvency or similar proceedings*" (clause 5.8).

(4) It follows that no release of BPSL's obligations in the BPSL insolvency could make any difference to Mr Singal's liability under the Guarantees. That is because by their contract the parties agreed that Mr Singal's liability was not to be "*affected*" or "*…reduced, released or prejudiced*" by any alteration or release of or want of enforceability in BPSL's obligations. And under Clause 2.3 the Claimants have an independent and primary obligation enforceable against Mr Singal in any event, regardless of the position of BPSL.

(5) Of course, if there had been recoveries by the Claimants from BPSL in the BPSL insolvency proceedings, the Claimants would have had to say so and, subject to Clause 7 of the Guarantees, given credit. But there have been no recoveries.

52. I have also indicated by conclusion that Clause 2.3 is irrelevant in this case, because it is subordinate to Clauses 2.1 and 2.2, and the Claimants are entitled to recover under those clauses. As regards Clauses 2.1 and 2.2, I accept the submission that no action taken against BPSL could affect the Claimants' rights against Mr Singal, in view of the language of the Guarantees set out above.

53. That disposes of any argument that Indian insolvency law or the BPSL insolvency could have discharged Mr Singal's obligations indirectly via the discharge of BPSL's obligations. *A fortiori*, they could not have done so directly. By participating as creditors in BPSL's insolvency, the Claimants did not submit their claims against anyone else (eg Mr Singal) to the jurisdiction of the Indian Courts. Nor has there been any order in the BPSL insolvency purporting to affect those claims. On the contrary, the BPSL Resolution Plan expressly makes clear that the rights of BPSL's creditors to

sue under guarantees of BPSL debts are unaffected: see Schedule B to the Resolution Plan at 1.8(f).

54. Crucially, however, even if there had been an order purporting to alter or discharge the Guarantees, or even if there were some provision of Indian insolvency law purporting to have such an effect, as a matter of English law that would be ineffective in any event:

(1) That is because, pursuant to the Rome Convention (applicable to Guarantees 1 and 2) and Rome I (applicable to Guarantee 3), the alteration or discharge of a contractual obligation is a matter for the applicable law of that obligation.

(2) It follows that the English-law obligations under the Guarantees could only be altered or discharged by operation of English law. And it is well-established (aside from the EU Insolvency Regulation, which has no application to this case) that English law will not give effect to a foreign insolvency law that purports to alter or discharge English law obligations: see *Dicey & Morris* 31-092 to -098 (Rule 219); *Antony Gibbs v La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399, 405-406; *National Bank of Greece v Metliss* [1958] AC 509, 523A-E, 526D-F; *Adams v National Bank of Greece* [1961] AC 255, 273C-D, 274G-H, 279G-280A, 287D-F; and *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34, [2018] 4 All ER 1026, [2018] 1 WLR 3683 at [12].

(3) This point of principle has arisen and been decided against guarantors under English law guarantees both in *Metliss/Adams* and in two more recent cases - *Global Distressed Alpha Fund 1 Ltd v PT Bakrie Investindo* [2011] EWHC 256 (Comm) at [11]-[27] and in *Korea Shipbuilding & Offshore Engineering v F Whale Corp* [2020] EWHC 631 (Comm) at [34], [54], [89], [102].

(4) In the *Global Distressed* case, unlike the case here, the guarantor was also the insolvent debtor in the foreign (Indonesian) insolvency process. But the guarantee was governed by English law, and relying on the *Gibbs* line of authority, the Court rejected the argument that a discharge of the guarantee obligations in the Indonesian insolvency could operate as a defence to any claim under the guarantees before the English Court. As a matter of English law there had been no discharge or alteration.

(5) In the *Korea Shipbuilding* case, the result was the same relying upon the same line of authority. But, the position was a *fortiori* in the *Korea Shipbuilding* case because (like this case) the guarantor was not even the insolvent debtor in the foreign (US) insolvency process. US insolvency law did not, in fact, purport to discharge the guarantor's liabilities anyway. But, relying on *Global Distressed* and the *Gibbs* line of authority, the Court held that, even if it had purported to do so, that would still have been of no effect on the guarantor's liability under the English law guarantees in any event (see [34]).

(6) So, for all those reasons, nothing about the BPSL insolvency process could have altered or discharged Mr Singal's English law liabilities in any way.

55. Turning to other potential defences which Mr Singal might have raised:

(1) Limitation could not be an issue in this case because the Guarantees were executed by deeds and the limitation period for claims under deeds is 12 years. Nor, for the avoidance of doubt, could limitation be an issue by reference to limitation in respect of BPSL's obligations either because: (i) as a matter of general principle, a guarantor will not be released by the expiry of time for the creditor's claims against the debtor (see *Andrews & Millett 7th* Ed 6-026); (ii) even if a guarantor could be released in that way in principle, Clause 5 of the Guarantees here would have operated to preserve Mr Singal's liability in any event; (iii) Clause 2.3 of the Guarantees creates a primary obligation of Mr Singal's with a 12 year limitation period in any event; and (iv) the earliest breach was on 16 June 2017, which was less than 6 years before the commencement of this action.

(2) Mr Singal can gain no assistance from the provisions of UCTA 1977, not least because none of the provisions of the Guarantees upon which the Claimants rely purport to exclude or limit any liability on their part for negligence or breach (such as to be within the purview of s2 and s3 UCTA 1977) or entitle the Claimants to render a performance substantially different from that which was reasonably expected of them (such as to be within the purview of s3 UCTA 1977). On the contrary, the provisions of the Guarantees upon which the Claimants rely are all about Mr Singal's performance obligations, not about the Claimants' performance obligations.

(3) Nor is this a case where Mr Singal could gain any assistance from the Unfair Terms in Consumer Contracts Regulations 1999 (**"UTCCR 1999"**). Those would be the applicable regulations if the consumer protection regime could otherwise apply because the Guarantees were entered into prior to 1 October 2015: see Chitty on Contracts, 33rd ed, Vol 2 paragraph 38-216. But the UTCCR 1999 do not apply because, where (as in this case) an individual guarantees the debts of a company of which he is a director, the law says he cannot be acting as a consumer: see *Harvey v Dunbar Assets plc* [2017] EWCA Civ 60 at [68]-[72] and Chitty 38-226.

Conclusion and quantum.

56. I have concluded that it is clear that Mr Singal has no real prospect of successfully defending this claim, and that accordingly the Claimants are entitled to summary judgment.

57. I am, further, satisfied, having been taken through the Schedule in which the quantum of the Claimants' loss is particularised, and the documents supporting that schedule, that the Claimants are entitled to the sums claimed. Those are the sums set out in paragraph 26 above.

58. It follows that the Claimants are entitled to summary judgment in those sums. I would be grateful if I could be provided with a draft order giving effect to this judgment.