Neutral Citation Number: **[2022] EWHC 1915 (Comm)**

Case No: **CL-2020-000729**

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

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

Date: **13 June 2022**

Before :
Mrs Justice Cockerill

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Between :

(1) BANK OF BARODA (acting by its Ras Al Khaimah branch) **(2) BANK OF INDIA (acting by its London branch)** **(3) CANARA BANK (acting by its London branch)** **(4) ICICI BANK LIMITED (acting by its Bahrain, Dubai, and OBU branches)** **(5) INDIAN OVERSEAS BANK (acting by its Large Corporate branch, India) and** **(6) AXIS BANK LIMITED**	**Claimants**
- and -	
(1) GVK COAL DEVELOPERS (SINGAPORE) PTE LTD **(2) BLACK GOLD VENTURES PTE LTD** **(3) COOL WATER VENTURES PTE LTD** **(4) HARMONY WATERS PTE LTD** **(5) GVK NATURAL RESOURCES PRIVATE LIMITED** **(6) GVK POWER AND INFRASTRUCTURE LIMITED** **(7) GVK RESOURCES (SINGAPORE) PTE LTD** **(8) GVK COAL RESOURCES (SINGAPORE) PTE LTD** **(9) GVK COAL INFRASTRUCTURE (SINGAPORE) PTE LTD** **(10) GVK COAL EXPLORATION & PRODUCTION PTE LTD**	**Defendants**

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Karishma Vora and Joe-han Ho (instructed by **Reed Smith LLP**) for the **Claimant**
Richard Power (instructed by **Norton Rose Fulbright**) for the **Defendant**

Hearing dates: **13th June 2022**

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RULING

Mrs Justice Cockerill **Monday, 13 June 2022**
(**14:08**pm)

Ruling by **MRS JUSTICE COCKERILL**

1. Three applications came before me this morning on what was scheduled to be the first day of the trial in this matter: that was the defendants' application dated 29 April 2022 and renewed on 23 May 2022 to re-amend their defence; the defendants' application dated 29 April and renewed on 23 May to adduce expert evidence as to Indian law; and the defendants' application as of 1 June 2022 to adjourn the trial.

2. As Mr Ho has pointed out in the course of his submissions, that equates to a decision as to whether the trial should proceed now or whether the trial should proceed some time late in next year, probably in October 2023.

3. As will be apparent from the course which I have taken of not calling on Mr Power in reply, for the reasons which I am going to give, I have decided to grant the applications and the trial will accordingly be adjourned.

4. The applications arise against a complex factual background and, lest there be any appeal sought, I will set out the facts in some detail. I'm not going to ask the parties to sit through that.

The Claim

5. I set out in this section a brief summary of the claim. It is not intended to be comprehensive of either the facts of the dispute or the arguments made by the parties in their submissions to date. That is a matter for judgment at the end of trial.

6. The Claimants are banks incorporated in India. The First Defendant (“the Company”) is a company incorporated in Singapore. It is part of the GVK Group, an Indian conglomerate which operates in the energy, natural resources and transportation sectors in India and elsewhere. The First Defendant

has interests in Australian coal and infrastructure projects. The Sixth Defendant is the ultimate parent company of the GVK Group.

7. The acquisition and associated costs of the First Defendant's Australian infrastructure projects were financed by loans pursuant to two facility agreements which are the subject of this dispute. One is dated 17 September 2011 ("the 2011 Facility Agreement"), the other 26 March 2014 ("the 2014 Facility Agreement").

8. Under the agreements, the First to Fifth Claimants acted variously as "Lenders" and (in the case of the Fourth Claimant) "Facility Agent". The Sixth Claimant was the "Security Agent". In the 2011 Facility Agreement, the Second to Fourth Defendants were defined as the "Singapore Parent Guarantors", the Fifth to Sixth Defendants as the "Indian Parent Guarantors" and the Seventh to Tenth Defendants as the "Original Guarantors".

9. By clause 2.1 of the 2011 Facility Agreement, the Lenders agreed to make available to the Company USD term loan facilities at that time totalling USD 1 billion (with potential for increase). By clause 8.1(a), the Company was required to repay the loans in full by 10 approximately equal semi-annual instalments, with the first repayment instalment due on the date falling 66 months after the first Utilisation Date.

10. By clause 2.1 of the 2014 Facility Agreement, the Lenders agreed to make available to the Company USD term loan facilities at that time totalling USD 44,000,000 (with potential for increase). By clause 6.1, the Company agreed to repay the loans in full by 10 approximately equal semi-annual instalments.

11. Clauses 48 and 49 of the 2011 Facility Agreement and 47 and 48 of the 2014 Facility Agreement provided for English law to govern the agreements and for the English courts to have jurisdiction to settle any dispute arising out of or in connection with the agreements.

12. Also relevant is the Equity Subscription Agreement dated 29 September 2011 between the First Defendant, the Second Defendant, the Fifth Defendant, and the Sixth Defendant (“”). Under this agreement, each Indian Parent Guarantor *inter alia* undertook to the Company to advance such funds or subscribe for such amount of shares so as to ensure that the Company received sufficient funds in order for it to meet any of its payment obligations under any Finance Document.

13. The Claimants allege breach of both facility agreements and the ESA. They seek to recover sums advanced to the First Defendant and fees payable pursuant to the two facility agreements and subject to a guarantee by the Guarantors regarding those sums under the 2011 Facility Agreement, plus interest. The principal balance alleged to be due under the 2011 Facility Agreement is USD 954,933,395.83, while the principal balance under the 2014 Facility Agreement is said to be USD 147,517,198.34. The claim is accordingly for a very significant sum.

14. The Claimants allege that the Company breached the 2011 Facility Agreement in that it:

    a. failed to obtain a mining lease in the Alpha Project as required by clause 21.28;

    b. has failed to make payment of the first Repayment Instalment which was due on 6 April 2017 pursuant to clause 8;

    c. has since failed to pay all interest due and payable pursuant to clauses 10 and 11;

    d. has failed to pay the fees due and payable pursuant to clause 33.1 and 33.5.

15. The Claimants say that the Company failed to make such payments despite notice being given by the Facility Agent pursuant to the agreement on 2 November 2020. They say that this notice was an effective acceleration notice pursuant to clause 22.28 of the 2011 Facility Agreement.

16. The Claimants also allege that the Indian Parent Guarantors have breached the ESA by failing to make full or any payment of sums demanded by the Security Agent pursuant to the terms of the ESA on 2 November 2020.

17. The Claimants allege that the Company breached the 2014 Facility Agreement in that it:

    a. failed to ensure that certain security was created by no later than 45 days after the first Utilisation Date (as required by Clause 20.49(a)(iii));

    b. has failed to pay the first Repayment Instalment which was due on 5 April 2017 pursuant to clause 6;

    c. has since failed to pay all interest due and payable pursuant to clauses 8 and 9;

    d. has since failed to pay all fees due and payable pursuant to clauses 32.1 and 32.4.

18. Again, the Claimant relies on a letter dated 2 November 2020 which is said to have constituted an effective acceleration notice under clause 21.25 of the 2014 Facility Agreement.

19. The Defendants resisted these claims on various bases, including (in highly simplified and summarised form) that:

    a. The conduct of the Claimants meant that the omission to obtain a mining lease was not an event of default under the 2011 Facility Agreement, that they elected not to rely on the alleged event of default and/or it would inequitable for the Lenders now to rely on the

alleged event of default. For the same reasons, the failure to create the relevant securities was not an event of default under the 2014 Facility Agreement.

b. Five GVK Group Companies entered into an Interim Solution Undertaking ("ISU") with the Lenders in March 2017. The implied terms of that ISU included that the Lenders would not be entitled to enforce the Defendants' payment obligations under or connected to the 2011 and 2014 Facility Agreements until 29 March 2022, alternatively they would only be entitled to enforce those payment obligations on reasonable notice ("the ISU Implied Terms"). The purported acceleration notice served on 2 November 2020 was accordingly ineffective because it was served prior to 29 March 2022 and without any or any reasonable notice.

c. The same ISU Implied Terms mean that the Guarantors are not in breach of the 2011 Facility Agreement and/or that the obligation of the Guarantors is not triggered because the sum claimed is not due and owing for the same reasons. The Defendants also say that the condition for the Guarantor's liability was not met because the purported demand to the Guarantors and the purported acceleration notice to the Company were issued virtually simultaneously, meaning that the sum claimed was not due and owing by the Company.

d. Likewise, the ISU Implied Terms mean that the Indian Parent Guarantors are not in breach of the ESA because the purported Shortfall notice was served before 29 March 2022 and/or there was no current Shortfall due to the lack of liability on the part of the Company and/or the Shortfall notice was ineffective.

Background to the Applications

20. I set out in this section the background to the applications that are before me.

21. The Claim was issued in November 2020. The trial has since July 2021 been listed to begin on 13 June 2022. It is scheduled to last 6-8 Commercial Court days.

22. On 10 March 2022, the Defendants entirely changed their counsel team. Norton Rose Fulbright LLP came on record as instructing solicitors. It appears that the issues now in question were positively flagged to the incoming legal team.

23. On 8 April 2022, the Defendants served on the Claimants the First Witness Statement of Mr Sanjeev Kumar Singh in which he stated: "*I understand that GVK's new solicitors intend to apply to amend their pleadings to include legal points relating to Covid-relief in India and their application to the case.*"

24. On 22 April 2022, the Defendants sent a letter to the Court and the Claimants in which they identified the Indian law issues in relation to which they proposed to apply for permission to re-amend their Defence and adduce expert evidence. They stated as follows:

> "7. Having only recently been instructed, Norton Rose Fulbright has discussed the position with Indian co-counsel and an independent Indian law expert, and it appears that the 2011 and 2014 Facility Agreements were subject to mandatorily applicable Indian Covid-19 moratoriums on all commercial banks and all term loans issued by Indian banks (which all of the Claimants are) for the period 27 March 2020 to 31 August 2020.
>
> 8. Yet, those moratoriums and their affect are acknowledged nowhere in the Claimants' Quantum Witness Statement.
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> […]
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> 10. … in view of the foregoing, the Defendants will apply for permission: (a) to adduce expert accounting evidence as well as expert evidence of Indian law insofar as it relates to quantum issues; and (b) to make consequential amendments to their Defence. …
>
> **c. Impact on the Trial Date**
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> 11. The Defendants are alive to the fact that the trial date is not far away. The Defendants will seek to agree with the Claimants a timetable in which to achieve the above in order to ensure that all relevant issues can be considered by the

> Court within the current trial window in June. Should this not be possible, the Defendants reserve their rights to seek further relief which may include adjourning all or part of the trial to dates convenient to the Court and the Parties."

25. On 29 April 2022, the Defendants made the Indian Law Evidence Application and the Re-Amendment Application. It is common ground that the amendment could and should have been made at the CMC. They also applied to adduce expert accounting evidence to address the Claimants' quantum claim (the "Forensic Accountancy Evidence Application").

26. By their draft re-amended defence:

    a. The Defendants referred to the Reserve Bank of India ("RBI") moratoriums imposed from 27 March 2020 to 31 August 2020. The Defendants submitted that the moratoriums applied mandatorily to all commercial banks and financial institutions regulated by the RBI (whether in India or not), which included the Claimants. Further or in the alternative, they said that it was an implied term of the 2011 and 2014 Agreements that the Claimants were all regulated by and had to adhere to the Reserve Bank of India regulations for the purpose of the instant contracts. The Defendants pleaded that in breach of the moratoriums and/or the implied term, the Claimants charged default/penal/compound interest during the moratoriums and any relief to which the Claimants were entitled must take account of the moratoriums.

    b. The Defendants also referred to the Government of India's declaration of Covid-19 as a force majeure on 19 February 2020 and, on 14 March 2020, as a "notified disaster" for the purposes of express force majeure clauses, and the fact that the force majeure events have not yet been declared over. They plead that under Indian law force majeure may operate both/either as the result of an express or implied term or by operation of law, by virtue of s.56 of the Contract Act 1862, and that force majeure is consequently a free-standing concept

in India. The result, plead the Defendants, is that the Claimants' notices of default and acceleration were invalid and the claim must fail.

27. The Re-Amendment Application was supported by the First Witness Statement of Ms Sherina Petit and the First Witness Statement of Mr Kartik Nayar, Ms Petit is a partner at Norton Rose Fulbright. Mr Nayar is a partner at K.N. Legal Advocates & Solicitors of New Delhi. Mr Nayar sought to give evidence of Indian law as to the effect of the moratoriums. He referred *inter alia* to the decision of the Honourable Supreme Court of India in *Small Scale Industrial Manufacturing Manufacturers Assn v Union of Indian* (2021) 8 Supreme Court Cases 511 at paragraphs 101 and 105, where the Indian Supreme Court held that:

> "101. …By notification dated 27.03.2020, the Government has provided the deferment of the instalments due and payable during the moratorium period. Once the payment of instalment is deferred as per circular dated 27.03.2020, non-payment of the instalment during the moratorium period cannot be said to be wilful and therefore there is no justification to charge the interest on interest/compound interest/penal interest for the period during the moratorium. …
>
> […]
>
> 105. …the Circular dated 27-3-2020 shall be applicable to all banks, non-banking financial companies, housing finance companies and other financial institutions compulsorily and mandatorily."

28. He stated that he accordingly believed the default notices and notices of acceleration to be invalid because they relied on defaults within the Covid moratorium. If they were valid, he stated that they would need to be recalculated.

29. In the context of the force majeure issue, Mr Nayar also referred to the decision of the Indian Supreme Court in *Energy Watchdog v Central Electricity Regulatory Commission and Ors.* (2017) 14 Supreme Court Cases 80 at paragraph 34. The Supreme Court stated:

> "34. 'Force majeure' is governed by the Indian Contract Act, 1872. In so far as it is relatable to an express or implied clause in a contract, such as the PPAs before us, it is governed by Chapter III dealing with the contingent contracts, and more

> particularly, Section 32 thereof. In so far as a force majeure event occurs de hors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract."

30. Mr Nayar opined that this meant, as a matter of Indian law, the "frustration" (his words) of contract under clause 56 of the Indian Contract Act 1872 would apply to cases of force majeure even if there were no express or implied force majeure provisions in the contract or such provisions as did exist did not cover the relevant peril. He stated his belief that the rights and obligations under the facility agreements were accordingly suspended on 19 February 2020 until such time as the Government of India declares force majeure over.

31. Finally, Mr Nayar also argued that the effect of the RBI circulars was that any judgment of the English Court contravening the effect of those circulars would not be enforceable in India as a matter of Indian law.

32. There was no express reference to Article 9(3) of Regulation 593/2008 ("Rome I") in either of the witness statements appended to the Re-Amendment Application. It appears to be accepted however (and has subsequently been made explicit) that the significance of the alleged mandatory nature of the RBI moratoriums is that effect might be given to those moratoriums under Article 9(3) if the obligations arising out of the facility agreements have to be or have been performed in India and they render performance unlawful. Article 9(3) is in the following terms:

> "Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application."

33. After the Applications were made, there followed an exchange of correspondence between the parties as to the proposed amendments. The Defendants allege that the Claimants failed to cooperate

or engage during this period with the result that an opportunity to agree a timetable for the exchange of amended pleadings and expert evidence prior to trial was missed.

34. The Re-Amendment Application, the Indian Law Evidence Application and the Forensic Accountancy Evidence Application came before Andrew Baker J at the Pre-Trial Review ("PTR") on 13 May 2022. The Defendants allege and have pointed t passages of the transcript which certainly suggest that they had no notice that the Claimants were going to resist the Re-Amendment application until the day before the PTR.

35. The critical issue at the PTR in respect of the Re-Amendment Application appears to have been the place of performance under Article 9(3). The Defendants submitted the obligation of the borrower to seek out the lender to repay such sums as fell due was to be performed in India. By contrast, the Claimants argued (in an what I am told was a deviation from the position set out in their skeleton argument for the PTR) that that the place of performance of the obligations under the Facility Agreements was outside India as payments were made to the Facility Agent, the relevant branch of which was in Singapore, and the only other place of performance nominated by the Facility Agent was Bahrain.

36. Baker J found that the Defendants had not at that stage shown an arguable case that their obligations were to be performed in India. Ms Petits third witness statement records him as saying that:

> "I regard it as regrettable that the key point of whether there is any viable starting point by way of pleading and expert evidence has only been identified at the last minute. That key point is whether there is any arguable case about the place of performance of the payment obligations said to have not been performed to have given rise to entitlement to accelerate was India. The Facility Agreements specify all payments are to be made to the facility agent who is in Singapore. The Defendants would need to show evidence that payment was made in India. I am not satisfied that it is appropriate to grant permission to amend or adduce expert evidence on Indian law. I am prepared to give Defendants liberty, if so advised, to renew their applications for permission to re-amend so long as they do so in writing no later than 5pm on Monday 23 May. It is a matter for the Defendants, in

> the circumstances, whether they choose to support any renewed application with amongst other things a proper expert report on Indian law."

37. The parties appear to have proceeded on the basis that the Re-Amendment Application and the Indian Law Evidence Applications stood or fell together. The Court's Order of 13 May 2022 accordingly provided that both the Indian Law Evidence Application and the Re-Amendment Application be dismissed, with liberty for the Defendants to apply to renew both applications by 5pm on 23 May 2022.

38. The Forensic Accountancy Evidence Application was granted, with the Order requiring service of the Defendants' report by 5pm on Monday 23 May 2022. However, on 16 May 2022 the Defendants' forensic accountancy expert, Mr Chilakamarri was taken ill and hospitalised with Covid, with the result that he was unable to progress his report. The Defendants' application for extension of time for service of the report was refused by Baker J by an Order of 25 May 2022. The recitals to the Order stated that "*the Defendants have not shown there to be a realistic prospect of meeting their proposed deadline of 6 June 2022 and that in any event slippage beyond today … will leave insufficient time for it to be fair to the Claimants for such report to be relied on at trial.*" The Order also provided that any application for adjournment should be made by 5pm on Wednesday 1 June.

39. The Defendants add that the Claimants were also strongly encouraged at the PTR to produce as soon as possible further information regarding their quantum calculations. Such calculations were provided on 20 May 2022, before being revised due to an error and provided in different form on 25 May 2022. A supplemental witness statement on quantum issues was also served by the Defendants on 30 May 2022.

40. The Defendants also say that the Claimants agreed at the PTR that they would submit a report on whether the sums they say the Bank of India received from the Defendants is complete and re-

amend the Particulars of Claim to plead in the alternative the sums that would otherwise have been payable at the date of trial (if the acceleration notices were invalid). They say that the Claimants have not taken either step.

Evidence and Submissions

Re-Amendment/Indian Law Evidence Application

41. On 23 May 2022, the Defendants renewed the Re-Amendment Application and Indian Law Evidence Application. In support of the renewed application, they submitted the expert report of Mr Justice Vikramajit Sen, former Judge of the Supreme Court of India. They also submitted a second witness statement from Mr Kartik Nayar on the same date.

42. In his expert report, Mr Justice Sen opined *inter alia* that:

    a. Decisions of the RBI are mandatory for banks incorporated in India, as are the banks in question;

    b. The RBI has issued Circulars dated 27 March 2020 and 23 May 2020 imposing a moratorium qua defaults by the borrowers and had altered/moderated the repayment schedule with respect to the period from 27 March 2020 till 31 August 2020 for all such loan transaction;

    c. The RBI circulars and rules "*have the force of law and as such are mandatory on the Claimants herein and therefore any such RBI circulars are very much part of the public policy of India.*"

    d. The freestanding concept of force majeure is a "*vital element of mandatory Indian law which would apply to the Claimants and Defendants*" for the same reasons as the RBI circulars.

e. The Government of India stated on 19 February 2020 itself that the disruption of supply chains due to outbreak of the COVID-19 pandemic would constitute a force majeure event which was then formally announced as a "notified disaster" under the Disaster Management Act, 2005 on 14 March 2020 and as such a force majeure event/ circumstances occurred under the terms of the directives of the Government of India.

f. The demand and acceleration notices dated 2 November 2020 would not be considered valid under Indian law in the event that those notices sought to allege non-payment of sums for periods falling within the moratoriums.

g. Any claim calculated on the basis of penal and default interest rates despite the onset of Covid would also be in contravention of Section 3(1)(a) and 3(2) of the Usurious Loans Act 1918.

h. In the circumstances, a failure to recognise relevant provisions of English law would render the judgment unenforceable in India.

43. In his Second Witness Statement, Mr Nayar stated that he acknowledged that the "place of performance" for the purposes of Article 9(3) of Rome I was to be determined by English conflict of laws principle but wished to make several factual observations that "*reveal that at the very least a significant part of the transaction and the obligations between the Claimants and Defendants took place in India and during the course of the transaction the Parties performed several obligations in India*". The observations he made included the following:

a. On 23 November 2013, the Singapore branch of the Fourth Claimant transferred its exposure under the 2011 Facility Agreement to the Offshore Banking Unit of ICICI Bank ("ICICI OBU"), which is based out of Mumbai, India. Accordingly, while ICICI Singapore remained

as Facility Agent, ICICI OBU assumed the former's exposure for USD 150 million of the alleged debt.

b. In a letter of the same date, the Defendants accepted this transfer of exposure.

c. On 22 March 2016, ICICI OBU identified as part of its audit due diligence that GVK allegedly owed ICICI OBU the sum of USD 132,587,067.96. That letter gave an account number and the footer identified ICICI OBU's branch as based in Mumbai.

d. The First Defendant paid some sums to ICICI OBU in Mumbai pursuant to the letter of 22 March 2016.

e. A remittance voucher of 22 March 2017 shows that an amount equivalent to Rs. 31,14,00,000 (approximately USD 4 million) was debited from the Indian account of the Sixth Defendant. The Sixth Defendant is an Indian entity and the ultimate beneficiary of the same was ICICI OBU.

f. A receipt voucher of 9 October 2011 also shows that a sum of USD 120,000,000 was also disbursed by ICIC OBU, Mumbai.

g. Bank of Baroda in an annexure to a letter of 4 August 2014 identified ICICI OBU as a lender under the Facility Agreements.

h. The Fifth Claimant also requested via an email of 19 October 2016 to shift exposure to India.

i. The governing law of the ISU is Indian law.

j. The 2011 Facility Agreement required the execution of various security documents. Those documents have been entered into by Indian entities and their governing law is Indian law.

k. The Lenders insisted on compliance with RBI guidelines and RBI approvals were a *sine qua non* for the entire transaction.

l. Meetings and correspondence took place in India.

44. Mr Nayar also referred to an RBI Circular of 1 December 2008 which he said supported the proposition that the fact that a foreign branch is located overseas does not mean it is outside the purview of the Indian regulatory system.

45. This evidence formed the basis of the Defendants' submissions on the Re-Amendment Application before me. In particular the point made is that not all payments were to be or were to be made or were made outside India – at least from 2016 when payments were made from disbursements or being made by the borrower to the banks directly.

46. The Defendants referred to the evidence of Mr Singh in his witness statement of 8 April 2022. In that statement, Mr Singh explained that from 2016 payments under the Facility Agreements were made directly to the banks in question at their branches in India, rather than passing through the Facility Agent such that at least $150 million is payable within India at ICICI OBU in Mumbai as explained in Nayar 2. The issue of whether the Defendants were obliged to make that payment and if not whether that suffices, is, they say, a question for trial and the question of obligation is arguable.

47. Counsel for the Defendants submitted that the Claimants' case as to place of performance as advanced at the PTR was accordingly wrong, and that the Court was led to proceed on a false basis. It is, say the Defendants, at the very least arguable that the English Court can have regard to the mandatory laws of India notwithstanding the express choice of English law under the facility agreements, pursuant to Article 9(3) of Rome I.

48. In response to the renewed applications, on 26 May 2022 the Claimants submitted a witness statement by Mr Gautam Bhattacharyya, a partner at Reed Smith (their legal representatives). In addition to much English law legal submission (which should form no part of such a witness statement), Mr Bhattacharyya made the following relevant points:

    a. The letter of 22 March 2016 referred to by Mr Nayar did not nominate an Indian bank account as a place for payment. It was written at the behest of a Lender's auditors and asked for response directly to those auditors.

    b. The remittance voucher of 22 March 2017 shows only payment by the Sixth Defendant to the First Defendant. It does not show that the ultimate beneficiary was a Lender.

    c. The receipt voucher of 9 October 2011 does not show that the funds originated from an Indian bank account.

    d. The security documents referred to by Mr Nayar are "Conditions Precedent Documents", not contractual obligations under the Facility Agreements.

49. Mr Bhattacharyya also stated that the Claimants had consulted with Mr Vikram Nankani, a Senior Advocate practising before the Bombay High Court. He summarised Mr Nankani's views and observations on Mr Justice Sen's report as follows:

    a. Banking companies under India's Banking Regulation Act 1949 are, by the Defendants' own logic, companies which transact banking business *in India*. The moratorium circulars, issued under that Act, are accordingly not applicable to transactions in foreign exchange.

    b. India's Foreign Exchange Management Act 1999 is the applicable act. The Defendants have not made any reference to FEMA and therefore have not proved how the RBI's circulars apply to the foreign branches/subsidiaries of Indian banks.

c. Wherever the RBI desires that its circulars regulate foreign branches/subsidiaries, its circulars specifically say so on their face. The RBI's Covid-19 moratorium circulars do not say so.

d. The RBI would in any event only be desirous of providing reliefs to Indian borrowers. The borrower in this instance is not Indian.

e. Insofar as the circulars apply to Indian borrowers, they do not apply if default has occurred before the Covid-19 moratorium was imposed. The Indian Supreme Court decision of *Small Scale Industries* does not apply.

f. There are several decisions of superior courts in India that specifically say that India's force majeure provisions do not apply to contractual obligations unless Covid has genuinely impacted the business.

g. Mr Justice Sen's report is right not to suggest that the Indian law provisions render contractual performance unlawful. *PASL Wind Solutions Pvt Ltd v GE Power Conversion India Pvt Ltd,* AIR 2021 SC 2517, a case cited by Mr Justice Sen, concerned contracts to which all parties were Indian. Where some parties are Indian and some are not the parties are free to contract out of Indian law and nevertheless have their contract enforced in India.

h. India's Usurious Loans Act 1918 does not apply. It was concerned with loans where the interest being charged was at around 30-40% per annum. Penal interest may not be unlawful in respect of contractual transactions based on commercial considerations between two equally placed parties.

50. In their skeleton argument, the Claimants submit that the Indian Law Application should be dismissed for two reasons: (i) the proposed amendments do not have a real prospect of success; (ii)

in the alternative, on a balancing of the relevant factors, the Court should not exercise its discretion to allow it. It cuts across the overriding objective to do so.

51. On the question of whether the proposed amendments have a real prospect of success, the Claimants say that there are three threshold matters for Article 9(3) of Rome I to be engaged:

    a. India must be the place where "*the obligations arising out of the contract have to be or have been performed*";

    b. The Indian law provisions in question must "*render the performance of the contract unlawful*";

    c. If these two conditions are satisfied, the Court must exercise its discretion to give effect to the Indian law provisions.

52. On the place of performance, the Claimants say that the Defendants have had every opportunity to adduce relevant evidence and have failed to do so. Insofar as the court disagrees and considers that India was the place of performance, this should be disregarded if it was due to the Defendants' election rather than a contractual obligation. Article 9(3) is concerned with where performance is *contractually obliged* to take place: Dicey (15th edn) at 32-096. Likewise, if the obligations performed in India were a fraction of the contractual obligations as a whole this should not lead to the application of Article 9(3): the CJEU confirmed in *Greece v Nikiforidis* [2017] CEC 658 that Article 9 is an exhaustive list of the "overriding mandatory provisions" to which the forum may give effect and must be restrictively interpreted.

53. The Claimants say that the second threshold matter is a short point of law which the Court should determine. They say that "unlawful" is a term of art:

a. It is insufficient that the contract is unenforceable or regarded as invalid if made in the country where it is to be performed: *Dicey* (15th edn) at 32-096.

b. It appears insufficient that performance of the obligations under the contract has been excused, e.g. by force majeure: *Chitty* (34th edn) at 33-295.

54. In the Claimants' Submission, the Indian law provisions relied upon by the Defendants do not meet this standard of unlawfulness. Doctrines such as force majeure and a Covid moratorium may render performance suspensory or excusable, but it does not follow that performance is rendered unlawful. The Defendants have moreover failed to discharge their burden to adduce expert evidence as to Indian law to show that the Indian law provisions render performance of the contract unlawful.

55. On the question of discretion under Article 9(3), the Claimants make five points. First, there is a strong interest for English law to uphold the parties' bargain and endorse legal certainty. Second, there is a strong interest to respect the intentions of the parties where there is no evidence that they intended Indian law to apply. Third, the lateness of the application is relevant. Fourth, to the extent India was the place of performance, this comprised only a fraction of the total obligations. Fifth, as set out above, Mr Justice Sen's analysis is not correct in respect of foreign exchange loans.

56. The Claimants further submit that even if the amendments have a real prospect of success, the Re-Amendment Application should not be granted. That is because: (i) the application is very late and no good explanation has been provided for that lateness; (ii) the court should be slow to grant indulgence in the context of a high-value claim where the Defendants have been represented by first-class solicitors and counsel at all times; (iii) in the absence of an explanation for the delay, the Court should infer that this is an ambush to derail the trial; (iv) it is unjust to the Claimants for the trial to be delayed for potentially a year, particularly given the value of the claim and the Claimants' exposure to the risk of the Defendants' insolvency; (v) the renewed Indian Law Application is a

stealth attempt at "scope creep": the proposed amendments on 23 May 2022 included for the first time an amendment to the Defendants' case that there is an implied term in the English law governed contracts that the Claimants would comply with RBI regulations.

Adjournment Application

57. The question of adjournment if the Indian Law Evidence Application is successful was already on the table at the PTR. The Defendant then made its application by a notice of 1 June 2022, supported by a witness statement of Ms Petit.

58. In their skeleton argument, the Defendants' submissions in support of adjournment were essentially that:

    a. This is very substantial litigation and the Re-Amendment points give rise to a complete defence to the claim, or provide a defence to very substantial sums. It would be unjust to preclude the Defendants from running these points.

    b. While there are serious factors against the adjournment (including delay and wasted costs), they do not outweigh the desirability of ensuring that the Defendants' case is properly put. The delay is in any event only likely to be a matter of months and wasted costs can be addressed by costs orders.

    c. The illness of Mr Chilakamarri means that the Defendants are now unable to adduce quantum expert evidence as a result of factors beyond their control. It would consequently be unjust and procedurally unfair for the Court to determine those issues at trial.

    d. The difficulties with addressing the quantum case have been compounded by the Claimants' failure to provide further information as to their quantum calculations in a timely manner. The relevant calculations having only been provided on 25 May 2022 and a further witness

statement submitted on 30 May 2022, the Defendants do not have the time to properly consider and respond to that evidence before trial (particularly in the absence of their expert).

e. The Claimants have also failed to comply with Baker J's requests that they (a) itemise each Facility Agent communication to the Borrower which is relied upon as a determination within the meaning of the Facility Agreements and (b) explain their position on the sums received by the Bank of India or to amend their pleaded case.

59. In their skeleton argument, the Claimants refer to the guidance provided regarding adjournment in *Original Beauty Technology Company Ltd and Ors v G4K Fashion Limited and Ors* [2021] EWHC 2632 (Ch) at [10]. The adjournment of a trial whose date has already been fixed is a last resort. For a very late application, the Court has specific regard to: the parties' conduct and the reason for the delays; the extent to which the consequences of the delays can be overcome before trial; the extent to which a fair trial may have been jeopardised by the delays, and; the consequences of an adjournment for the parties and the Court.

60. As regards Mr Chilakamarri's illness, the Claimants submit that the circumstances do not come close to justifying an adjournment and are not "exceptional" as required by paragraph 7.4 of Practice Direction 29 in order for a failure to comply with directions to lead to the postponement of the trial.

61. Concerning the quantum calculations, the Claimants say that paragraph 4 of the PTR Order strongly encouraged the Claimants to produce a CPR 18 pleading regarding their quantum calculations, including alternative calculations on the basis that the notices of demand and accelerations served by the Claimants in November 2020 were invalid. It is perverse to suggest that, by so doing, the Claimants "*amended their case on quantum*". They did no such thing. Even if it were taken as such, it was not objected to by the Defendants nor was it a significant change of the Claimants case.

Moreover the witness statement submitted on 30 May 2022 was a short statement which (a) briefly clarified the Claimants' previous calculations and (b) sought to further narrow the issues. Again, these circumstances do not come close to justifying an amendment.

62. Finally, in respect of the alleged "directions" given by Baker J as to itemisation and sums received by the Bank of India, the Claimants say that there were no such directions and that in any event the Claimants have provided all necessary particularisation and explanation by amending their CPR Part 18 pleading and providing a supplemental witness statement on 30 May 2022.

Discussion

63. I accept that the adjournment of a trial is a last resort. The court will always look very closely and very sceptically at such an application. It is no longer the case, as Mr Ho rightly pointed out, that late applications to adjourn will succeed as long so they can be compensated in costs.

64. In this case the starting point, and the main point which was pursued in argument before me, is the re-amendment application.

65. The Indian law evidence/re-amendment application and the adjournment application are interwoven. It is common ground that if the Indian law evidence/re-amendment application is granted then adjournment of at least some of the issues is necessary. But whether or not adjournment should be granted is also a factor to be taken into account in deciding that application. I therefore take the applications that are before me together and the parties have appeared to accept this mode of proceeding.

66. As was essentially common ground, in relation to Article 9(3) of the Rome I, there are three stages for it to be engaged. The first is the question of whether India is the place where "*the obligations arising out of the contract had to be or have been performed*". The second is whether the Indian

law provisions "*render the performance of the contract unlawful*". And the third threshold matter is one which only arises if the other two are satisfied, whether the court should exercise its discretion to give effect to these Indian law provisions.

67. I note in relation to this point the CJEU has held that the provision is to be restrictively interpreted, as explained in *Greece v Nikiforidis* [2017] CEC 658 at paragraphs 40 to 50, to which I was referred during the course of argument.

68. I consider that the case pleaded by the amendments sought in the re-amendment application does have a real prospect of success. The defendants have adduced evidence, some of which is *prima facie* compelling, to the effect that at least some of the obligations under the facility agreements were performed in India, and were to be performed in India. If that is so, the first threshold matter is cleared.

69. I have now at least some evidence that from 2016 the defendants were required to make payment under the Facility Agreements directly to the banks in question rather than to the Facility Agent, that 150 million US Dollars of the 2011 facility was required to be or was paid to ICICI OBU Bank in Mumbai. It appears that the defendants consented to this change in procedure by a letter of 23 November 2013, even if there was no formal request for consent.

70. Payments were then made to India in July 2015 and March 2017. No dispute was ever raised by the bank or the facility agent.

71. Whilst the remainder of the funds may have to be paid to branches outside of India there is some evidence that each of the banks to whom payment is to be made is incorporated in India, and is regulated by the Reserve Bank of India. $120 million was disbursed to the first defendant under the facility agreements from an Indian account and various security agreements granted under the

facility agreements were provided in India and were governed by Indian law. Those security agreements were, as the claimants have admitted, conditions precedent to lending. Further, there has been compliance throughout with RBI regulations.

72. As I have said, there is a certain amount of evidence which goes to raise a *prima facie* case in relation to those points. I consider this is relevant evidence. There are certainly arguments which can be raised in relation to that evidence, for example as to whether there was indeed an obligation to pay or not, and as to details of the payment or the date when ICICI became involved. But these are pre-eminently matters for trial.

73. The objections raised by the claimants do not undermine that *prima facie* case and the disputes of fact or law engaged in by the parties in relation to the re-amended application strengthen my views these are matters most appropriate to be determined at trial.

74. I accordingly find the submission that the court should apply Article 9(3) of Rome I, with the result that the RBI moratoria either invalidate relevant notices or affect the quantum of the claim, to be more than merely arguable.

75. While the case regarding the effect of the Government of India's force majeure declarations is rather more difficult and troubling, I consider that in relation to that there is also an underpinning which clears the arguability threshold.

76. As to the second threshold matter, I am satisfied that it is more than merely arguable that the Indian law provisions render the performance of the contract unlawful and not merely ineffective. I do not think that the word that has been used “invalid” in the pleading and in the report of Mr Justice Sen is determinative, although I entirely understands why Mr Ho placed so much stress on the use of that word. The word by itself tends to suggest ineffectiveness.

77. However, on the content of the evidence before me there is clearly an argument on this. Mr Justice Sen explains that the relevant provisions do not simply mean that the contract is invalid or unenforceable. Instead they provide that (a) claiming default interest and/or compound interest for the moratorium period is "*contrary to Indian law and violative of the public policy of India*" and (b) the rule there should be no declarations of default and that obligations are to be suspended during the force majeure is to be "mandatorily applied" between Indian parties.

78. That appears to me to equate to a conclusion that payment would be unlawful. That conclusion appears to be supported by Mr Justice Sen's reference during the course of his report to authorities which themselves cite the *Ralli Brothers* principle, which of course pertains to unlawfulness, as well as by the position on enforcement, which via CPC 13(f) suggests the reason why an English judgment upholding the notices would be unenforceable would be that that judgment would be perceived as upholding a breach of Indian law. Again, that correlates to an argument as to unlawfulness.

79. Even if I were not so satisfied, the fact that that it raises closely related issues to the RBI moratorium submission would weigh in favour of granting permission.

80. There is no requirement in order to have regard to mandatory provisions all of the contractual obligations need to be performed in the country. It's sufficient that obligations have been performed or are required to be performed in the country. The extent to which obligations need to be performed in a country in which performance is unlawful is a matter which goes to discretion as to whether to apply the mandatory provisions.

81. It is therefore certainly in my view well arguable that Article 9(3) would be applicable. When one turns to the question of discretion at the third stage I see there are powerful ties to this court. I see there are indeed powerful international aspects. However, the matters in question are not, despite

the submissions made to me this morning, minor or marginal matters in the context of the mandatory foreign law rules.

82. Further, the claim is one brought by claimants, at least many of whom are incorporated in India and regulated by the RBI, against an Indian group of companies, the parent companies of which are incorporated in India with, as I have noted, security obligations being performed in India, with the transaction governed by RBI guidelines. The claimants' main witness is based in India.

83. Dicey at paragraph 32-096 tends to suggest this would be a case for the exercise of the discretion, even if this is not a case where there appears to have been an intent to evade Indian law.

84. I should also touch briefly on the implied term argument which, given my conclusion on the arguability of Article 9(3), is of marginal relevance. To the extent it is necessary to do so, I would agree that it, just, had some prospect of success.

85. The fact I consider that the amended case in total meets the real prospect of success threshold is not the end of the matter, however. If I were dealing with the Re-Amendment application on its own I would then need to consider whether the amendment should be permitted in view of the late hour at which it has been made, the lack of good explanation for delay, and the prejudice that will be caused to the claimants by the adjournment.

86. Were I faced only with the Re-Amendment application I might well have concluded - by a narrow margin - that despite the merits of case which I have just discussed and the prejudice to the defendants if they were not allowed to pursue these points, on balance the factors weighing against the grant of permission were at least equal to and possibly heavier than those weighing in favour. The result might well be that the amendments should not be permitted, even though they have, as I have noted, a real prospect of success.

87. As set out in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) at paragraph 38, it is incumbent upon the parties to implore the indulgence of the court to be allowed to raise a late claim, to provide a good explanation for the delay.

88. The defendants have failed throughout this episode to explain frankly why they were unable to identify this new element of their case at any earlier stage. It was effectively conceded that the new amendments could have been raised at the time of the CMC and should have been so raised. But to attribute the failure to a change of counsel team or the late raising of the case to a change of counsel team is no explanation at all. This is not a situation where new evidence has come to light. There is clear authority that what is sometimes referred to as "*the second pair of eyes argument*" does not constitute a good reason. That is seen very clearly in the case of *Donovan and Naled v Grainmarket* [2019] EWHC 1023 (QB) at paragraph 28.

> "So far as the explanation for the lateness of the application is concerned, it is not a very good one. The explanation given for the change is the 'fresh eyes' brought to the case by recently instructed junior Counsel. However, 'a fresh examination of possible arguments by fresh counsel' was said by Carr J to be 'precisely the sort of reason, that does not find favour with the courts': Quah Su-Ling v Goldman Sachs International ... paragraph 47, citing Worldwide Corporation Limited v GPT Limited [CA Transcript no. 1835], 2 December 1998. Similarly, in Wani LLP v Royal Bank of Scotland plc, [2015] EWHC 1181 (Ch) Henderson J said at paragraph 45, '... the Bank submitted, and Mr Hardwick did not dispute, that the instruction of new counsel is not in itself a good explanation for a late amendment.'"

89. One would therefore, were this matter being considered alone, be in a position where there is plainly no good reason for the delay where there is a very significant claim which has been some time outstanding and where the claimants will suffer prejudice in further delay. While the defendants would suffer prejudice in not being able to pursue their arguable Indian law arguments which go at least to a considerable part of the claim, it might be said that they do have other avenues of recourse in circumstances where the argument could and should have been raised earlier.

90. There is also, as the defendants rightly acknowledge, the waste of valuable court resources. Although the defendants have suggested that the matter could come back within months, that is not the case. That could only be done if this case were expedited ahead of other court users, which cannot be appropriate.

91. As a two-week trial, the first date for the re-listing will be either at this point next year or, Mr Ho informs me as of this morning's information, October of next year.

92. In all those circumstances, as I have indicated, were the Re-Amendment applications standing alone, I would say that it was very marginal it might well fall on the wrong side for the defendants. I say that despite, firstly, the enforcement issue which follows on from the Indian law arguments, i.e. that the correlate might well be that if the Indian law arguments are good, the position on enforcement would be that the trial would be nugatory because the judgment would be unenforceable.

93. Secondly, there is the fact that these are plainly very significant points where I do not regard the amendments as being weak or just scraping over the merits hurdle.

94. Thirdly, the claimants may not have been as clear or as constructive as they could have been in relation to their early response to the application, such that there was an impression that there was no issue and as such their behaviour certainly do not ease the timeline issues and may indeed have transformed this from being what is technically referred to as late application to amend into a very late application to amend, the latter being the sort of application where adjournment is the necessary result.

95. As I say, were it simply a question of the one strand of the application this would be a very marginal application indeed. I am not considering the Re-Amendment/Adjournment application in a vacuum, however. The Adjournment application has more than one strand. In particular, permission was

given at the PTR for the defendants to adduce forensic accountancy expert evidence but they have now been unable to do so by reason of the hospitalisation of their expert with COVID. The position is that at the time of PTR the defendants' expert was about halfway through drafting his report. He became ill very shortly thereafter. He has certainly, as Mr Nayar's statement makes clear, been very unwell indeed with COVID. He has been hospitalised and he is going to need it take time to recover.

96. While it was anticipated at the PTR and stated in terms to the court that he could make the deadline, he has been unable to progress his report since then effectively. He has not been working with a team, but alone, so it is not a case where a colleague could effectively take over the report. It would mean a new expert starting effectively from scratch.

97. This is a matter effectively outside the defendants' control and the tightness of the timetable at that point meant that their alternatives were necessarily limited. It does not appear that it was realistic for an alternative to be found, given that nobody else had been working on the report with the expert. It was not realistic for them to do all the necessary work from a standing start. The tightness of the timetable, which was imposed at the PTR, with the very late order for the admission of expert evidence, did not permit of extension - as indicated by the decision of Mr Justice Andrew Baker, both the PTR judge and the judge considering the application to extend. He refused the application for extension of time on the basis that, even with the fairly short extension being contemplated, it was now too late for any report served, at that point late, to be considered at trial.

98. I consider this factor militates in favour of adjournment, as indeed Mr Justice Andrew Baker's decision on extension of time somewhat hints. He said:

> "In any event, slippage beyond today, 25 May 2022, in the provision by the defendants of any expert accountant's report pursuant to paragraph 6 of the PTR order will leave insufficient time for it to be fair to the claimants for such report to be relied on at trial."

99. So too does the recital of the PTR order itself, which states that: "*Any further slippage may put at risk the trial starting on 13 June 2022."*

100. The factor in favour of adjournment in relation to the expert evidence is the more powerful in circumstances where there appears to have been a lack of complete clarity as to the claimants' case on quantum until very recently, as demonstrated by the fact that at the PTR the claimants were "*strongly encouraged to produce as soon as possible*" further information regarding their quantum calculations by the late amendments to their case, and the submission of supplemental witness statements on 30 May 2022.

101. It is also demonstrated by the fact that that evidence and clarification did not come quite as soon as it might, though the claimants now accepts that a number of the calculations are incorrect, for example as to the date of the acceleration.

102. There is also some fairly complex detail regarding what is referred to as the "*BOI Singapore alleged under-crediting*" issue. These are points which I would not regard as a separate basis for adjournment and they were not really urged on me as such. However, they do form part of the backdrop against which the relevant factors which do form part of the balancing exercise must take place. And they do, to that extent, add a small amount of weight into that decision.

103. The relevant factors in the Re-Amendment application and the illness of the defendants' expert witness go further than prejudice. They call into question the ability for there to be a fair trial if the matter were to proceed. It seems to me that it cannot be fair for the defendants to be forced to address the later, albeit alternative, case in quantum at this late stage without the benefit of expert evidence and for the court to resolve it without giving the defendants a proper opportunity respond with their case.

104. Although I note that Mr Justice Andrew Baker was not enthusiastic about originally allowing this expert evidence, the fact that at that very late stage in the trial timetable and that with that doubt he made ultimately an order for that expert evidence, indicates to me that he was ultimately persuaded, against the backdrop of the rules on expert evidence which are that we should not order expert evidence unless it is necessary, he was persuaded that expert evidence was necessary on this point.

105. Even though, as Mr Ho points out, it only goes to a relatively small proportion of the quantum, the amount which it is conceded to be relevant to is still multiple millions of dollars.

106. Therefore, taking the illness of the defendants' expert, together with the real prospect of success of the case based on the proposed re-amendments and the discretionary factors which are relevant to that, I consider that the balance tilts ultimately in this case in favour of adjourning this trial.

107. A greater injustice would be done to the defendants if I were to refuse to adjourn the trial than will be done to the claimants and to the court if I do adjourn. The balance is not very large but it is clear.

108. I note that I do not consider the solution proposed by the claimants of splitting the trial to be one that is consistent with the overriding objective.

109. If the defendants are correct in their new case, then the claimants are not entitled to seek repayment of the facility agreements at this juncture at all since the obligations have been suspended. It would be pointless therefore to now engage in a debate about whether you but for these provisions the acceleration notices would be valid or the payments that would be owed if the obligations are not suspended.

110. Moreover, the issue of the under-crediting of payments made by the defendants should be tried with the benefit of expert evidence at the adjourned trial. There are also questions inevitably whenever one contemplates splitting a trial for the duplication of costs and evidence.

111. This case will be most efficiently dealt with if all elements are tried together, with all the relevant evidence put in place comfortably in advance of trial, which may permit for certain issues to be narrowed and may even permit for the trial estimate to come down. I add that it is not clear to me in any event at this late stage how an effective split could be drawn.

112. I therefore grant the Indian Law Evidence/Re-Amendment application and the adjournment application.