Neutral Citation Number: [2022] EWHC 2012 (Comm)

Case No: LM-2021-000124

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2022

Before :

Mr. NIGEL COOPER Q.C.
sitting as a JUDGE OF THE HIGH COURT

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Between :

CANARA BANK	**Claimant**
- and -	
(1) M.C.S INTERNATIONAL LIMITED	
(2) MACCOM SUPPLY INTERNATIONAL FRANCE S.A.S (also known as M.C.S. INTERNATIONAL FRANCE S.A.S)	**Defendants**

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Mr. KAVAN GUNARATNA (instructed by **RWK Goodman**) for the **Claimant**
Miss EMILY SAUNDERSON (instructed by **Fox Williams**) for the **Second Defendant**

Hearing date: 05 May 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 29 July 2022 at 10:30am.

Mr. Nigel Cooper Q.C.:

1. In this action, the Claimant ("Canara"), an Indian bank with a London branch, claims against the First Defendant ("MCS UK"), a company incorporated in England & Wales, under the terms of various facility agreements and facility letters pursuant to which Canara made banking facilities available to MCS UK. Canara claims that MCS UK has failed to repay sums of USD 1,670,541.56 in respect of such facilities and seeks recovery of that sum by way of debt or damages together with interest and costs. Canara has obtained judgment in default against MCS UK but MCS UK has gone into insolvent liquidation. Canara also claims the same sum from the Second Defendant ("MCS France"), a company incorporated and based in France, pursuant to the terms of a guarantee dated 22 November 2013 ("the Guarantee"), which is subject to English law and jurisdiction.

2. MCS France challenges the Court's jurisdiction to hear Canara's claim against it on the basis that MCS France was not a party to the Guarantee and on the basis that it says the Guarantee was not enforceable against it. MCS France supports its challenge on the following grounds:

    i) MCS France was not a party to the Guarantee and no liability under the Guarantee has been transferred to it. The guarantor was a different company, which has been dissolved.

    ii) Further and in any event, as Canara knew, the person who signed the guarantee on behalf of the guarantor, Mr. Philippe Maurel ("Mr. Maurel") only had express authority to enter into the Guarantee for one year. Accordingly, the Guarantee was not effective when the call under the Guarantee was made.

    iii) Entering into the Guarantee was an ultra vires act for the guarantor, as Canara knew. The Guarantee was therefore not enforceable against the guarantor or MCS France (if liability under the Guarantee was transferred to MCS France).

3. Canara say that the Guarantee was transmitted automatically to MCS France under the French Civil Code as a result of an amalgamation or merger of two French companies, namely the original guarantor and MCS France. Canara also say that MCS France is bound by the Guarantee notwithstanding any limits on the authority of the person who originally signed the Guarantee for the guarantor and that the Guarantee was not ultra vires for the guarantor. Canara also alleges that Mr. Maurel had apparent authority both to sign the Guarantee originally and to bind MCS France to the Guarantee. Further or alternatively, Canara says that MCS France are estopped from denying that they are a party to the Guarantee or have ratified the Guarantee. In support of their arguments on apparent authority, estoppel and ratification, Canara rely on the history of various facility letters and agreements between Canara and MCS UK and Mr. Maurel's signature on those agreements and letters.

Evidence

4. For the purposes of this application, MCS France relied on two witness statements of Mr. Maurel and an expert report from Professor. Denis Mouralis. Canara relied on two witness statements from Mr. Milan Kapadia ("Mr. Kapadia"), a partner with the firm of RWK Goodman and two expert reports from Mr. Stéphane Bonifassi.

5. MCS France objects to the second witness statement of Mr. Kapadia on the grounds that it was served subject to an agreement between the parties that Canara could serve additional evidence in relation to the ultra vires issue but in fact adduces evidence going to the issues raised by the application more generally. Sensibly, MCS France does not seek to exclude Mr. Kapadia's second witness statement or the evidence exhibited to it, but they do ask me to keep in mind that Canara did not have permission for this new evidence and MCS France has not had an opportunity to respond to it. While I do keep in mind the points made by MCS France, the evidence in Mr. Kapadia's second witness statement and the contemporaneous documents exhibited to it are nonetheless evidence, which are material to the issues before me and to which I should have regard. Further, although the opportunity for MCS France to respond to the second witness statement of Mr. Kapadia was limited, there was sufficient time for MCS France to at least provide instructions if there were factual matters, which they particularly disputed.

The Background

The Parties

6. Canara is an Indian bank, which provided credit facilities to MCS UK between 1999 and about 2020.

7. MCS UK is a company carrying on business in the international trade and distribution business in plastics, cosmetics and food-related products, including trading with African businesses. It carried on that business in conjunction with its French parent, MCS France.

8. Mr. Maurel, who signed the Guarantee is:

    i) The principal beneficial owner of MCS France, and through it MCS UK, holding 99.9% of MCS France's share capital;

    ii) The Chairman (Président) of MCS France having become its sole officer at some point prior to 07 April 2014;

    iii) One of the two directors of MCS UK (appointed on 14 November 1997) and the company secretary (appointed on 01 January 1999). The other director of MCS UK until 01 March 2017 was Mr. Swami Das Satsangi ("Mr. Satsangi"). From 01 March 2017, the other director was Ms. Frederique Mallet "Ms. Mallet").

9. MCS France has been the direct parent of MCS UK since 07 April 2014. Prior to that date, MCS France was a company with the name BAOBAB S.A.R.L. ("BAOBAB") and was the indirect parent of MCS UK through the original guarantor which was a French company then using the name MCS International France SAS ("MIF"). As set out further below, Baobab Sarl and MIF were merged under French law under a process known as Transmission Universelle de Patrimonie ("TUP") by which the assets and liabilities of the original guarantor were transferred to BAOBAB. BAOBAB then changed its name and legal form to take the name and legal form of the original guarantor, MCS International France SAS. In case it is unclear, the abbreviation 'MIF' is used below to refer to the original guarantor and the abbreviation 'MCS France' is used to refer to the company, which was Baobab Sarl but became MCS International France SAS and is the Second Defendant to this action.

The history of relevant events

10. The first facility letter between Canara and MCS UK was dated 20 October 1999 and was signed on behalf of MCS UK by Mr. Maurel and Mr. Satsangi. Amongst other things, the letter required security in the form of a parent guarantee. Mr. Maurel signed the required parent company guarantee on behalf of MIF on 22 October 1999. That guarantee incorporated at clause 28 a governing law and jurisdiction clause providing for English law and the jurisdiction of the English courts. On the same date, he also signed an extract of the minutes of a meeting of the board of directors of MCS UK approving that company's acceptance of credit facilities on the terms of the letter of 20 October 1999. He signed a further parent company guarantee from MIF in favour of Canara on 01 February 2000 and a third guarantee sometime in or prior to 2013. The guarantee of 01 February 2000 incorporated at clause 28 a governing law and jurisdiction clause providing for English law and the jurisdiction of the English courts. The guarantee signed in or prior to 2013 incorporated at clause 31 a governing law and jurisdiction clause providing for English law and the jurisdiction of the High Court of Justice in England.

11. In March 2013, Canara offered to renew MCS UK's credit facilities on the terms of a further facility letter subject to the terms and requirements laid down in the letter. The requirements included a requirement for a continuing parent company guarantee. On 21 March 2013, Mr. Maurel and Ms. Mallet signed the minutes of a meeting of the directors of MIF, which recorded that the guarantee entered into by the company and the facility letter dated 19 March 2013 had been produced to the directors. The minutes also recorded the unanimous resolution of the directors to authorise Mr. Maurel to sign that facility letter. Mr. Maurel signed the facility letter on behalf of MIF later the same day. Mr. Satsangi acting on behalf of MCS UK sent a copy of those minutes to Canara under cover of a letter dated 17 April 2013.

12. Between July and November 2013, Canara contemplated making further loan facilities available to MCS UK and informed that company that the bank would require the facilities to be secured by way of a parent company guarantee. For the purposes of granting these facilities, Canara involved their UK solicitor, Ms. Boulter, and from early July 2013 sought advice from a French advocat, Mr. Wilinski of Marvell Avocats. Amongst other matters, Mr. Wilinski was asked to provide an opinion confirming that the guarantor had the power to enter into the Guarantee, that the document had been executed in accordance with the relevant board or shareholder resolutions and the laws of France and that the Guarantee was enforceable under French law. To this end, Mr. Wilinski said in an email dated 27 July 2013 that he needed to see shareholders minutes authorising the issue of the Guarantee before he would issue the opinion.

13. On 08 October 2013, having reviewed the existing form of guarantee, Mr. Wilinksi recommended three changes but confirmed that otherwise the text of the existing guarantee was fine:

    i) The signature block should refer to a resolution of the shareholder(s) as opposed to a board of directors.

    ii) The reference under Mr. Maurel should read 'Chairman'.

    iii) There was no need for a second signatory.

14. On the same day, e-mails were exchanged between MCS UK and Canara's advisers confirming that the guarantee was not intended to have a fixed termination date.

15. On 18 October 2013, there was an ordinary general meeting of MIF at which the shareholders resolved to authorise Mr. Maurel to guarantee the commitments of MCS UK with Canara Bank up to the amount of five million US dollars, for a term of one year with effect from 18 October 2013, on a renewable basis. The shareholders also conferred on Mr. Maurel all powers to sign all documents and, in general, to do what was required. The resolution was carried unanimously.

16. At the time of the ordinary general meeting of MIF, the shareholders of that company were:

    i) BAOBAB, which held 2511 shares or 51.04% of the shares;

    ii) Mr. Satsangi, who held 1 share (0.02% of the shares);

    iii) Mr. Maurel, who held 1 share (0.02% of the shares);

    iv) MCS Investissements which held 2406 shares (48.90% of the shares); and

    v) J-L Revel, who held 1 share (0.02% of the shares).

17. Following circulation of the draft Guarantee, Ms. Boulter exchanged e-mails with an MCS UK representative who confirmed that the Guarantee would be signed by Mr. Maurel. Ms. Boulter asked in reply for confirmation that Mr. Maurel would be authorised to sign the Guarantee by shareholders' resolution.

18. On 19 November 2013, a colleague of Mr. Wilinski confirmed to Ms. Boulter that the firm had been provided with the minutes of the shareholders' meeting dated 18 October 2013 by which Mr. Maurel was authorised to sign the Guarantee.

19. Mr. Maurel originally executed the Guarantee on 22 November 2013 but overlooked filling in the date. That error and an error in the name of the original guarantor were corrected on or around 27 November 2013.

20. There is an issue between the parties as to whether Canara had a copy of the resolution of 18 October 2013 and was therefore aware of the terms on which Mr. Maurel was authorised to sign the Guarantee. The evidence before me does show that Mr. Wilinski was provided with a copy of the resolution but there is no evidence that either Ms. Boulter or Canara were provided with a copy of the resolution. There is no evidence as to whether or not Canara received a copy of the resolution but in his skeleton argument, Mr. Gunaratna says that it was only on 23 September 2021 that Canara were provided with a translation of the resolution and that was in the context of this litigation.

21. MIF and MCS France merged by the process of TUP on 07 April 2014. Immediately prior to this merger, all the shares in MIF were transferred to BAOBAB (which became MCS France) on 04 April 2014. The shares in BAOBAB (MCS France) were in turn held by:

    i) Mr. Maurel (161,910 shares or 99.9%);

ii) Adrien Maurel (15 shares or 0.5%); and

iii) Mr. Mathieu Maurel (15 shares or 0.5%).

22. MIF was dissolved without liquidation on 13 May 2014 but with effect from 07 April 2014 and removed from the business register on 20 May 2014. MCS France's evidence is that MIF ceased to exist with effect from 07 April 2014.

23. Between 02 May 2014 and 19 August 2014, there had been correspondence between Canara, Mr. Maurel and Mr. Satsangi in relation to the renewal of facilities and the restructuring of the MCS Group. In that context, Mr. Maurel provided an English translation of a certificate from KPMG confirming a capital injection of €1.6 million into MCS France. On 02 May 2014, Mr. Satsangi wrote to Canara on behalf of MCS UK referring to MCS France as being the parent company of MCS UK and the guarantor for MCS UK.

24. BAOBAB changed its name to MCS France on 16 June 2014. It also changed its legal form to become a société par actions simplifée on 16 June 2014.

25. On 27 June 2014, Mr. Satsangi wrote to Canara informing the bank that MCS France had introduced €1,619,400 as a cash injection of additional capital to its accounts, making MSC France, MSC UK's parent company and guarantor, a much stronger company.

26. Canara and MCS UK agreed a further facility letter dated 10 July 2014 renewing MCS UK's credit facilities. The letter was signed on 11 July 2014 by Mr. Satsangi on behalf of MCS UK and by Mr. Maurel on behalf of the parent company. Mr. Maurel signed an extract from the minutes of the board of directors of MCS UK on 11 July 2014 in his capacity as chairman and secretary confirming acceptance of the terms and conditions of the facility letter.

27. On 19 August 2014, Mr. Satsangi wrote to Canara in the following terms:

1) CORPORATE GUARANTEE IS EXTENDED BY MCS INTERNATIONAL SAS (PARIS) TO CANARA BANK. THERE IS NO CHANGE IN NAME OF THE GUARANTOR OR THE GUARANTEE. THE GUARANTEE REMAINS VALID.

…

WHEN MR. PHILIPE MAUREL INTRODUCED THE ADDITIONAL CAPITAL OF EUROS 1.6 MILLION – HE WAS ADVISED BY KPMG FRANCE TO ROUTE IT THROUGH HIS PERSONAL HOLDING COMPANY NAMED BAOBAB SARL. BAOBAB SARL INTRODUCED THE EUROS 1.6 MILLION AS CASH INTO MCS FRANCE AND AS ADVISED BY KPMG – ABSORBED 100% MCS INTERNATIONAL SAS. … WE CHANGED THE NAME OF BAOBAB SARL TO MCS INTERNATIONAL SAS … YOU WILL SEE IN THE CHART THE WORDS "TUP' - WHICH … MEANS PATRIMOINE UNIVERSAL TRANSMISSION (TAKING OVER 100% OF THE ASSETS AND LIABILITIES UNIVERSALLY). … KPMG ADVICED [SIC] MR. MAUREL THAT SINCE BAOBAB TOOK OVER MCS INTERNATIONAL SAS AS PER TUP THERE WAS NO REQUIREMENT UNDER FRENCH LAW TO PREPARE ABS AS OF … DECEMBER 2013 …"

28. On 09 April 2015, Mr. Maurel signed minutes of a meeting of the board of directors for MCS UK approving MCS UK entering into a facility agreement with Canara for facilities having an aggregate value of up to US$4,255,000. That agreement dated 20 April 2015 required among other things security in the form of the Guarantee and contained in the definitions section a definition for the Guarantee as being *"the deed of guarantee executed by the Guarantor in favour of the Bank dated 22 November 2013"*. It also defined the Guarantor as being *"MacCom Supply International France, a Société par action simplifiée whose registered office is at Les Bureaux de la Colline de Saint Cloud, 116 bureaux de la Colline, 92213, SAINT CLOUD, and is registered with the Registry of Trade and Companies under number 577350267".* This is the company number for the original guarantor, MIF, which at the date of this facility agreement no longer existed. The facility agreement was signed by Mr. Satsangi on behalf of MCS UK.

29. A further facility letter renewing Canara's credit facilities to MCS UK dated 20 August 2015 was signed by Mr. Satsangi on behalf of MCS UK and Mr. Maurel on behalf of MCS France on the same day. On 28 August 2015, Mr. Maurel signed board minutes of MCS UK in his capacity as Chairman and company secretary approving and accepting the terms and conditions of the facility letter dated 20 August 2015.

30. The facility agreement dated 20 April 2015 was replaced by a further facility agreement dated 16 February 2016, which re-stated the material terms of the facility agreement of 20 April 2015.

31. Canara renewed MCS UK's credit facilities again on 05 July 2017 albeit for a reduced total sum of US$2,000,500. On this occasion, Canara had originally provided in the facilities letter for Mr. Maurel to provide a personal guarantee as security for the facilities, which he refused to do. He deleted all reference to the personal guarantee by handwritten amendments when he signed the facilities letter. The requirement for a guarantee from MCS France was not, however, deleted. On this occasion, Mr. Maurel signed the letter on behalf of MCS UK as chairman with Ms. Mallet also signing as managing director. Mr. Maurel signed the letter on behalf of MCS France and this time also added the company's stamp identifying the company as MCS France. Mr. Maurel signed board minutes of MCS UK dated 07 July 2017 in his capacity as chairman and company secretary approving and accepting the credit facility terms of the letter of 05 July 2017 with the exception of a term requiring the directors or members of MCS UK to give a personal guarantee.

32. MCS UK failed to pay the sums outstanding to Canara under the credit facilities and Canara served a written demand for payment on MCS UK on 29 October 2019. Subsequently, on 6 December 2019, Canara made a written demand under the Guarantee. In a response dated 23 December 2019, MCS France's French lawyers denied that anything was due from MCS France under the Guarantee because (i) the Guarantee was specifically given further to the Resolution, which limited the duration of the Guarantee to one year and (ii) liability under the Guarantee had not transferred from the original guarantor to MCS France.

33. Canara issued the Claim Form with Particulars of Claim on 07 June 2021 claiming a debt owed by MCS UK including specifically under an invoice discounting facility (where sums fell due between 05 September 2016 and 01 September 2017), sums due under an overdraft facility (where the debt appears to have accrued since 20 June 2015)

and further to the written demand of 29 October 2019. Canara also claimed the sum, totalling US$1,670,541.56 as at 21 May 2021, against MCS France under the Guarantee.

34. Canara's notice for service out of the jurisdiction without permission was dated 07 June 2021. The proceedings were sent to MCS France under cover of a letter dated 23 July 2021 from the Court and received by MCS France on 10 August 2021.

35. The Court gave judgment in default against MCS UK on 20 August 2021 and that company went into voluntary liquidation on 11 October 2021.

36. MCS France filed its application challenging jurisdiction on 23 September 2021.

The Guarantee

37. The Guarantee provided, so far as material for the purposes of the present application:

> *"1. In consideration of continuing or giving time, credit and/or banking facilities and accommodation to [MCS UK] ("hereinafter called "the Principal") I/we the undersigned hereby unconditionally and irrevocably guarantee the payment or discharge to you and undertake that the undersigned will on demand in writing made on the undersigned pay or discharge to you all moneys and liabilities which shall for the time being be due, owing or incurred by the Principal to you, whether actually or contingently and whether solely or jointly with any other person and whether as principal or surety, including interest, commission or other lawful charges and expenses which you may in the course of your business charge in respect of any of the matters aforesaid or for keeping the Principal's account (including any further advances made by you to the Principal and any other liabilities of the Principal to you arising during the three months' period of notice hereinafter referred to) together also with:*
>
> *(i) Such further sum for interest (whether or not the same shall have been compounded) and banking charges accruing due to you from the Principal before or after the date of demand or expiration of the said notice as the case may be and not debited to the Principal's account at such date; and*
>
> *(ii) All costs and expenses recoverable by you from the Principal.*
>
> *…*
>
> *3. The Guarantee is to be a continuing security to you notwithstanding any settlement of account or other matter or thing whatsoever but may and shall be determined (save as below provided) and the liability hereunder crystalised (except as regards unascertained or contingent liabilities and the interest, charges, costs and expenses hereinbefore referred to) at the expiration of three months after the receipt by you from the undersigned notice in writing to determine it but notwithstanding determination as to one or more of the undersigned, this Guarantee is to remain a continuing security as to the other or others..*
>
> *…*

19. As a separate and independent stipulation (but without increasing the before-mentioned total amount recoverable hereon) the undersigned agree that all sums of money which may not be recoverable from the undersigned on the footing of a guarantee whether by reason of any legal limitation, disability or incapacity on or of the Principal or any other fact or circumstances and whether known to you or not shall nevertheless be recoverable from the undersigned as sole or principal debtor(s) in respect thereof and shall be repaid by the undersigned on demand in writing made by you or on your behalf.

…

31. This Guarantee and any question or dispute arising therefrom shall be construed and take effect according to the laws of England at the time any such question or dispute falls to be determined and the undersigned hereby agree that any legal action or proceedings arising out of or in connection with this Guarantee may be brought in the High Court of Justice in England irrevocably submit to the jurisdiction of that Court and agree that in the event of any such action being begun by you in respect of this Guarantee any originating process judgment or other document in such action or proceedings shall be served to the undersigned in accordance with the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (also called the Hague Service Convention of 12 January 1967) provided that this submission to the jurisdiction shall not (and shall not be construed so as to) limit your right to take proceedings in whatever jurisdiction shall seem fit to you.

…"

38. The Guarantee was executed as a deed by MIF acting by Mr. Maurel pursuant to a resolution of the Shareholders' General Meeting. Mr. Maurel signed the Guarantee over MIF's corporate stamp.

Jurisdiction and choice of law

39. The application raises legal issues at two levels:

    i) The relevant test in respect of jurisdiction;

    ii) The choice of law in respect of the issues raised by Canara and MCS France.

The test for jurisdiction

40. Canara relies on CPR 6.33(2B)(b) to establish jurisdiction, namely that the claim was made pursuant to a contract which contains a term to the effect that the court shall have jurisdiction to determine that claim (which the Guarantee does).

41. In order to bring itself within CPR 6.33(2B)(b), Canara has to establish that it has a good arguable case that MCS France is a party to and bound by the jurisdiction agreement within the Guarantee, which also means establishing a good arguable case that MCS France was a party to and bound by the Guarantee.

42. A good arguable case is a higher hurdle than "a serious issue to be tried" but it is not a "balance of probabilities" test; see AmTrust Europe Ltd v. Trust Risk Group SpA [2016] 1 All ER (Comm) 325 per Beatson LJ at [16] and [19].

43. The wording of CPR 6.33(2B)(b) was previously found at paragraph 3.1(6)(d) of PD 6B. The notes at paragraph 6.33.4 of the Supreme Court Practice 2022, volume 1 (p.363) suggest that the cases decided in respect of PD 6B paragraph 3.1 (6)(d) are likely to remain relevant in relation to CPR 6.33(2B)(b).

44. In Rimpacific Navigation Inc. v Daehan Shipbuilding Co. Ltd [2009] EWHC 2941 (Comm), a question arose as to whether letters of guarantee containing an English law and jurisdiction clause were binding on a defendant. Steele J. held that the claimant had to show that there was a good arguable case that the contract as a whole existed and that one should not consider the jurisdiction clause separately ([22] to [24]). It is not enough to establish that if there was a contract, that contract arguably contained a relevant jurisdiction clause. He went on to find that the Claimant had established jurisdiction.

45. Aikens J also considered whether a guarantee with an English law and jurisdiction clause was binding on a defendant when it was said to have been signed by someone without authority in Marubeni Hong Kong and South China Ltd v. Mongolian Government [2002] 2 All ER (Comm) 873. The judge held that the issue was whether there was a good arguable case that the guarantee was a valid contract and that one should not consider the jurisdiction clause separately ([15]). On the question of whether the guarantee was signed by an agent with appropriate authority, he held that the claimant had to show a good arguable case ([25]).

46. The meaning of 'good arguable case' has been the subject of many authorities including two recent decisions of the Supreme Court and a decision of the Court of Appeal.

47. In Brownlie v. Four Seasons Holdings Inc [2018] 1 WLR 192, Lord Sumption JSC (with whom Lord Hughes agreed) put the test in the following terms [7]:

> *"An attempt to clarify the practical implications of these principles was made by the Court of Appeal in Canada Trust Co v Stolzenberg (No 2) [1998] 1 WLR 547. Waller LJ, delivering the leading judgment observed, at p 555:*
>
> *"'Good arguable case' reflects … that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, i e of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction."*
>
> *When the case reached the House of Lords, Waller LJ's analysis was approved in general terms by Lord Steyn, with whom Lord Cooke of Thorndon and Lord Hope of Craighead agreed, but without full argument [2002] 1 AC 1, 13. The passage quoted has, however, been specifically approved twice by the Judicial Committee of the Privy Council: Bols Distilleries BV (trading as Bols Royal Distilleries) v Superior Yacht Services Ltd [2007] 1 WLR 12, para 28, and Altimo Holdings, loc cit. In my opinion it is a serviceable test, provided that it is correctly understood. The reference to "a much better argument on the material available" is not a reversion to the civil burden of*

proof which the House of Lords had rejected in Vitkovice. What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word "much", which suggests a superior standard of conviction that is both uncertain and unwarranted in this context."

48. The above formulation of the test for jurisdiction was obiter in Brownlie but was endorsed by a unanimous Supreme Court in Goldman Sachs International v. Novo Banci SA [2018] UKSC 34 at [9] and followed by the Court of Appeal in Kaefer Aislamentios SA de CV v AMS Drilling Mexico SA de CV [2019] EWCA Civ 10 at [62] to [71].

49. In summary, the test for whether a claimant has established a "good arguable case" that the court has jurisdiction has three limbs:

    i) The claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway;

    ii) If there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but

    iii) The nature of the issues and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit) contested evidential basis for it.

50. Having adopted the three limb test set out above, the Court in Kaefer Aislamentios went to give guidance as to how the test is to be applied; see per Greene LJ at [73] to [80].

    i) The reference in limb (i) to a plausible evidential basis is a reference to an evidential basis showing that the claimant has the better of argument. It is also a test which is context specific and flexible.

    ii) In expressing a view on jurisdiction, the court must be astute not to express any view on the ultimate merits of the case, even if there is a close overlap between the issues going to jurisdiction and the ultimate substantive merits.

    iii) The adjunct "much" must now be laid to rest.

    iv) Limb (ii) is an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it *reliably* can. Jurisdiction challenges are inevitably interim and will be characterised by gaps in the evidence. Limb (ii) is an instruction to use judicial common sense and pragmatism not least because the hearing is intended to be one conducted with due despatch and without hearing oral evidence.

v) Limb (iii) addresses the situation where the court finds itself simply unable to form a detailed conclusion on the evidence before it and is therefore unable to say who has the better argument. To an extent it moves away from a relative test and introduces a test combining good arguable case and plausibility of evidence. The intention is that this should be a more flexible test, which is not necessarily conditional upon relative merits.

51. MSC France correctly points out that the burden is on Canara to show that it has the better of the argument. MCS France also submits that there is little, if any, dispute as to the main facts and that the evidential difficulties, which might be addressed in limbs (ii) and (iii) of the test as described in Kaefer do not arise. It is correct that there is limited dispute between the parties as to the main facts but there are still disputes, for example, as to Canara's knowledge of the shareholders' resolution and of any want of authority on the part of Mr. Maurel. In addition, both parties have put before the court expert evidence as to French law. While I have detailed reports from both experts and copies of their curriculum vitae, this is an interlocutory application and I have not had the benefit of oral evidence from the experts; evidence, which may be critical to deciding which expert's evidence is to be preferred both in terms of credibility and in relation to the substantive issues of French law addressed by the evidence. This is particularly the case given the extent of the disagreement between the experts as to the relevant case law of the French courts and the conclusions to be reached in light of that case law.

52. Both parties have addressed the question of good arguable case on an issue-by-issue basis. I will accordingly consider the question of good arguable case in respect of each issue. Overall, however, the question is whether or not Canara has established a good arguable case that MCS France was a party to the jurisdiction agreement found in the Guarantee. The answer to this question involves looking at the respective positions of the parties in light of all the issues.

The test as to choice of law

53. The applicable law for contracts entered into after 17 December 2009 is governed by the Rome Regulation (EC Regulation 593 of 2008, art. 28), which was brought into force by the Law applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations 2009 (SI 2009/3064) ("Rome 1). Rome 1 is retained EU legislation under section 3 of the European Union (Withdrawal) Act 2018. However, pursuant to Article 1(2)(e) and (f), Rome 1 does not apply to questions governed by the law of companies or to the issue of whether or not an agent is able to bind a principal in relation to a third party. For both these issues, it is necessary to look to common law principles.

54. The approach of the courts to resolution of issues relating to choice of law at common law was summarised by Mance LJ in Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC [2001] QB 825 at [26] – [27]:

"Both parties accept that at common law, the identification of the appropriate law may be viewed as involving a three stage process: (1) characterisation of the relevant issue; (2) selection of the rule of conflicts of laws which lays down a connecting factor for that issue and (3) identification of the system of law which is tied by that connection factor to that issue; see Macmillan Inc v Bishopsgate Investment Trust plc [1996] 1

WLR 387, 391 – 392, per Staughton LJ. The process falls to be undertaken in a broad internationalist spirit in accordance with the principles of conflict of laws of the forum, here England.

While it is convenient to identify this three-stage process, it does not follow that courts, at this first stage, can or should ignore the effect at the second stage of characterising an issue in a particular way. The overall aim is to identify the most appropriate law to govern a particular issue. The classes or categories of issue which the law recognises at the first stage are man-made not natural. They have no inherent value beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were conceived. They may require redefinition or modification, or new categories may have to be recognised accompanied by new rules at stage 2, if this is necessary to achieve the overall aim of identifying the most appropriate law."

55. I will consider below, the relevant choice of law applying this test for each of the issues under consideration.

The evidence of the French law experts

56. Mr. Stéphane Bonifassi, a member of the Paris bar and partner at Bonifassi Avocats, provided two expert reports on behalf of Canara. He describes the focus of his practice as being white-collar crime and complex commercial litigation often involving criminal and quasi-criminal conduct. He says that he regularly deals with partnership and shareholder disputes. Ms. Victoire Chatelin who assisted Mr. Bonifassi with the preparation of his report is described as practising complex financial litigation and complex commercial litigation.

57. In summary, Mr. Bonafassi's evidence as to the transfer of a guarantee during the dissolution of a company was to the effect that:

    i) An independent guarantee creates a new obligation independent from the guaranteed obligation with an independent contract between the guarantor and the creditor.

    ii) An independent guarantee can be actively or passively transferred in the same way as any other debt including in the event of a merger, demerger or acquisition of a company.

    iii) Pursuant to Articles 1844 to 5 of the French Civil Code and in the context of a merger, the dissolution without liquidation of a company entails the universal transfer of the company's assets to the merged company. This would include any independent guarantee given by the company being dissolved.

    iv) The resolution granted Mr. Maurel authority to sign the Guarantee for one year.

58. In relation to the authority granted to Mr. Maurel to sign the Guarantee, Mr. Bonafassi's evidence in his first report was:

i) That the provision in the resolution from the general meeting authorising Mr. Maurel to sign the Guarantee related to the duration of the Guarantee and not to the period for which Mr. Maurel's authority to sign the Guarantee lasted.

ii) That as a matter of interpretation, the Guarantee does not include a termination date or terms for its renewal.

iii) That pursuant to article L. 227-6 of the French Commercial Code, a société par actions simplifée ("SAS") is managed by a chair who represents the company in relation to third parties. That chair is vested with the widest powers, including the power to grant sureties or guarantees on the company's assets without limitation.

iv) That in relation to third parties, an SAS is bound by the acts of its chair even if these acts do not fall within the corporate purpose of the company, unless it is demonstrated that the third party knew that the act exceeded the said purpose or couldn't have ignored it in the circumstances.

v) That Mr. Maurel was granted by law full powers which cannot be limited with regard to third parties.

vi) That Mr. Maurel signed the Guarantee on behalf of MIF.

59. MCS France relies on the evidence of Professor Denis Mouralis. He is a professor of law at Aix Marseille University and a practising member of the Paris bar. He describes himself as a specialist in arbitration law, the resolution of economic disputes, international trade law and business contracts.

60. In relation to the nature of the Guarantee, Professor Mouralis distinguishes between a surety (cautionnemnent), an autonomous guarantee (guarantie autonome) and a letter of intent (lettre d'intention). He discounts the possibility that the Guarantee was a letter of intent and considers whether it is more properly characterised under French law as an autonomous guarantee or as a surety. Professor Mouralis opines that to decide whether a promise to pay a sum of money in consideration of a principal's debt is a surety or an autonomous guarantee, one must determine whether in the parties' intent the promisor undertook to pay the debtor's debt or accepted an independent obligation to guarantee the principal's obligation. Under French law, as long as the promisor undertakes to pay the sum owed by the principal in case of default the promise is a surety even if the deed mentions that the promisor shall pay at the creditor's first demand. Professor Mouralis then analyses the terms of the Guarantee and concludes that under French law the contract is one of surety rather than being an autonomous guarantee.

61. Professor Mouralis agrees with Mr. Bonifassi that pursuant to Articles 1844-5 of the French Civil Code, the merger of a corporation with its sole shareholder entails the universal transmission to the shareholder of all assets and debts of the dissolved corporation without it being liquidated. However, Professor Mouralis doubts that sureties are transferred to the merged company through this process. In particular, he does not consider that the merged company would have any obligation under the Guarantee to pay debts originating after the merger.

62. Professor Mouralis rightly recognises that the Guarantee is subject to English law. He comments that if as a matter of English law, there was no liability on Company A (MIF) at the time of the merger, then as a matter of French law, there would be no liability to be transmitted pursuant to the merger.

63. Professor Mouralis also considered the enforceability of the Guarantee and whether it was binding on MIF. He concludes that the Guarantee does not directly relate to the purposes of MIF as laid down in its Articles of Association and can only be described as being indirectly related to the purposes of the company. However, a guarantee may be inconsistent with the company's purposes and therefore unenforceable if by its nature or amount, a guarantee would have forced the company into deficit and disrupted its activities. On this basis, Professor Mouralis doubts the Guarantee would have been enforceable since it was given for an amount of US$5 million at a time when MIF had an operating margin of €987,476 and shareholder equity was €2,922,668.

64. Professor Mouralis accepts that under article L227-6 of the French Commerce Code, an SAS can be bound by contracts concluded by its legal representative even if they do not pertain to the SAS' purposes. He suggests, however, that Canara was aware of MIF's Articles of Association, at least through its lawyers, and that Canara was also aware of MIF's financial status. In other words, Canara knew that the guaranteed amount was too high a burden for MIF. Accordingly, Professor Mouralis concludes that the Guarantee was not enforceable against MIF and therefore not enforceable against MCS France.

65. Professor Mouralis agrees with Mr. Bonifassi that the temporal limit of one year in the shareholders' resolution related to the duration of the Guarantee. He accepts that the resolution contemplated a renewal of the Guarantee but the Guarantee should have expired on 17 October 2014.

66. Professor Mouralis also opines that if Canara was aware of a temporal limit on the duration of the Guarantee and also that the Guarantee exceeded the scope of Mr. Maurel's authority, then the Guarantee would not be enforceable against MIF (or MCS France). Finally, Professor Mouralis suggests that as a matter of French law, the terms of the shareholders' resolution would have been incorporated into the terms of the Guarantee because it was expressly referenced in the Guarantee.

67. In his second report, Mr. Bonifassi responded to Professor Mouralis' report. In summary, Mr. Bonifassi opines:

    i) A judge's interpretation of the corporate purpose is flexible not strictly limited to the terms of a company's articles of association;

    ii) The corporate purpose of MIF as set out in Article 4 of its Articles of Association is very broad.

    iii) If the president of an SAS takes commitments exceeding the limits of its corporate purpose, the SAS remains bound by said commitments. It is only by way of exception, strictly assessed considering the circumstances, that an act exceeding the corporate purpose shall not be enforced against a company when the third party was unaware that said act exceeded this purpose or could not have been aware of it.

iv) Case law establishes that companies with corporate purposes similar to the purpose of the guarantor do not exceed their corporate purposes by guaranteeing the debts of an affiliated company, as these acts indirectly fall within their corporate purpose because of the common interest existing with the subsidiary they guarantee.

v) The disputed Guarantee is a financial operation direction directly linked to the participation of the guarantor in MCS UK. The Guarantee falls within the scope of guarantor's corporate purpose as defined by its Articles of Association. It is right to note that in his report Mr. Bonifassi refers to MCS France as being the parent of MCS UK but at the time the Guarantee was signed, it was MIF.

vi) If there is a benefit to or consideration for the guaranteeing company in giving a guarantee, then neither the amount nor nature of the guarantee makes the guarantee inconsistent with the corporate interest of the guaranteeing company.

vii) If an act has been done by the president of an SAS which exceeds the company's purpose, it will still be binding on the company as the law considers that it is not sufficient for the third party to have been aware of the company's purpose but requires that this party should have known that the disputed act exceeded that purpose. In any event, the exception to the general principle that acts will still be binding is one which will be strictly assessed by the courts, the principle being the protection of third parties acting in good faith.

viii) Looking at what he understands to be MIF's financial position, Mr. Bonifassi does not agree with Professor Mouralis that if the Guarantee had been called for its maximum amount it would have disrupted the MIF's activity or caused its insolvency.

ix) The appearance of conformity with MIF's corporate purpose is reinforced by (i) the resolution of the general shareholders' meeting and (ii) the fact that MIF had previously provided guarantees for MCS UK to Canara.

68. As already noted, both Mr. Bonifassi and Professor Mouralis support their opinions by reference to decisions of the French courts and also seek to distinguish the decisions relied on by the other expert in relation to those matters where there is disagreement between the experts.

69. MCS France suggests that where there are areas of dispute between the experts, the court should in the absence of other considerations prefer the evidence of Professor Mouralis because his practice and areas of expertise appear on the basis of the experts' CVs and experience to more closely aligned to the issues in this case. It is also suggested that his analysis is significantly more detailed and thorough. I will address the impact of the expert evidence further below but so far as their relative experience is concerned, the information available from the experts' C.Vs and as to their experience is not a basis to prefer the evidence of one expert over the other for the purposes of this application. Neither expert purports to have a primary expertise in French company law. Both experts claim to have expertise in commercial litigation albeit for Mr. Bonifassi it is alongside his expertise in white collar crime and for Professor Mouralis it is alongside his expertise in arbitration law. In circumstances where both experts support their conclusions by reasoned opinion and by reference to apparently relevant case law, I am

not prepared to prefer the evidence of one expert over the other based on their qualifications and experience as summarised in their reports alone.

Discussion

General

70. When considering the different issues arising in relation to whether or not this court has jurisdiction over Canara's claim, it is important to have regard to the commercial context surrounding the financial relationship between the parties.

71. In this regard, it is relevant that:

    i) Mr. Maurel was at all material times an officer of both MCS UK and MCS France.

    ii) Mr. Maurel was the majority shareholder of BAOBAB, which was in turn the majority shareholder of MIF and subsequently became MCS France upon the dissolution of MIF.

    iii) Mr. Maurel was and is the majority shareholder of MCS France.

    iv) Between 1999 and March 2013, Canara on the one hand and MCS UK and MIF entered into a series of contracts for credit facilities contained in or evidenced by facility letters, each of which was subject to English law and the jurisdiction of the High Court of England and Wales and each of which required a parent company guarantee as security for the facilities granted. Each of these letters was signed by Mr. Maurel on behalf of MIF.

    v) Between 1999 and March 2013, Canara on the one hand and MIF entered into three guarantees, each of which was subject to English law and the jurisdiction of the High Court of England and Wales. Each of these agreements and letters was signed by Mr. Maurel on behalf of MIF.

    vi) The majority shareholder at the shareholders general meeting on 18 October 2013 was Baobab Sarl, a company controlled and essentially owned by Mr. Maurel.

    vii) Between 2014 and 2020, Canara on the one hand and MCS UK and MCS France on the other entered into a further series contracts for credit facilities contained in or evidenced by facility agreements and facility letters, each of which was subject to English law and the jurisdiction of the High Court of England and Wales. Each of the letters was signed by Mr. Maurel on behalf of MCS France.

    viii) From 2014 until about December 2019, MCS France did not contest the validity of the Guarantee. On the contrary, the facility agreement dated 20 April 2015 expressly refers to the Guarantee as providing continuing security for MCS UK's obligations under that agreement.

72. In short, the evidence before me establishes for the purposes of the present application a financing relationship spanning some ten years during which Canara, MCS UK, MIF and then MCS France contracted on the basis that the credit facilities granted by Canara

to MCS UK would be secured by a guarantee given by MCS UK's parent company. Further, on the evidence before me, it appears that from about 22 November 2013 and for the period following the dissolution of MIF and the transfer of its assets and liabilities to MCS France, the parties continued to contract on the basis that the relevant parent company guarantee was the Guarantee. Throughout the relationship, Mr. Maurel was directly or indirectly in control of MCS UK, MIF and MCS France being the ultimate majority beneficial owner of MCS France (and its predecessor, BAOBAB) as well as a director and officer of MCS UK, MIF and MCS France.

73. Mr. Maurel suggested in his evidence that he knew at the time of signing the Guarantee that he only had authority to sign the guarantee for one year and had no authority to sign for a longer basis. For the purposes of this application and on the evidence before me, I do not accept his evidence in this regard. First, the authority granted to him by the shareholders' resolution was in fact to sign a guarantee for a one year period on a renewable basis. Second, if Mr. Maurel believed that he only had authority to sign a guarantee limited in duration to one year, this begs the question as to why he then did sign the Guarantee, which (like the earlier guarantees he had signed) provided in terms that it was to be a continuing security terminable upon three months' notice. There is no evidence to suggest that he did not understand the terms of the Guarantee he was signing nor is there any evidence to suggest that at any time prior to Canara advancing the claims now made in this action that he believed he had acted without authority in signing the Guarantee.

74. Second, Mr. Maurel suggested that the provision at the end of the Guarantee that the Guarantee was executed as a deed by MIF 'pursuant to a resolution of the Shareholders' General Meeting' was sufficient to incorporate into the Guarantee the terms of the resolution including any limitation on his authority to sign the Guarantee. I do not accept this suggestion. The reference to the resolution was to confirm that Mr. Maurel had the authority of the shareholders' meeting to sign the resolution. It did not have the effect of incorporating into the terms of the Guarantee any temporal limitation on the duration of the Guarantee particularly in circumstances where that limitation would be inconsistent with the express provisions of clause 3 of the Guarantee.

75. Third, Mr. Maurel suggested in his evidence that his purpose in signing the facility letters was simply to indicate that MIF and subsequently MCS France knew and approved of MCS UK entering into the facility arrangements found in the facility letters and facility agreements. Again, for the purposes of this application and on the evidence before me, I do not accept Mr. Maurel's evidence. The facility letters are clear in their terms that Canara required as security a corporate guarantee from MCS UK's parent company. The signature block at the end of each letter expressly provided "accepted for and on behalf of MCS International SA Paris". In other words, it was clear that MIF and subsequently MCS France was being asked to sign in order to acknowledge their acceptance of the obligation to provide a parent company guarantee.

The dissolved guarantor issue

76. The existence or dissolution of a foreign corporation duly created or dissolved under the law of a foreign country is recognised in England; *Dicey & Morris on the Conflicts of Law*, 15th ed at Rule 174. Whether a corporation has been amalgamated with another corporation is to be determined by the law of its place of incorporation; see *Dicey &*

Morris, 15th ed. This would suggest that French law is the relevant law for the dissolved guarantor issue and indeed, this was common ground between the parties.

77. It also appears to be common ground between the parties that a guarantee is an asset or liability which can be transferred as part of the process of dissolution of a company without liquidation during a merger. The difference between the parties is as to whether or not the nature of the Guarantee was such that any transfer would apply only to liabilities which had crystallised before the merger rather than to any future liabilities under the Guarantee.

78. Mr. Bonifassi suggests that the Guarantee was transferred as part of the process of merger and relies in support of this view on articles 2321 and 1844-5 of the French Civil Code. Professor Mouralis, on the other hand, says that it is necessary to determine the nature of the Guarantee under French law and only then can one determine whether or not future liabilities under the Guarantee were transferred to MCS France as part of the merger with MIF. Professor Mouralis analyses the nature of the Guarantee and concludes that as a matter of French law, the Guarantee is a contract of suretyship within article 2288 of the French Civil Code rather than being an autonomous guarantee and that accordingly, it is only actual liabilities under the Guarantee existing at the date of the merger which were transferred.

79. Miss Saunderson is correct to say in her skeleton argument that Professor Mouralis has produced a more detailed analysis of the nature of the Guarantee and the consequent effect on the transfer of liabilities under the Guarantee following the merger than Mr. Bonifassi. She is also correct to say that Mr. Bonifassi has not responded in his supplementary report in any detail to the points made by Professor Mouralis.

80. Nevertheless, for the purposes of assessing whether or not Canara has met the jurisdictional gateway that MCS France was a party to a jurisdiction agreement providing for the jurisdiction of the English Court, I consider that Canara has satisfied limb (i) of the test in relation to the dissolved guarantor issue, namely that it has a plausible evidential basis that the Guarantee was a contractual obligation transferred to MCS France.

81. In this regard, and as already set out above, it appears to be accepted by MCS France that if the Guarantee is an autonomous guarantee, then the contractual obligations it imposes on MCS France are transferred in the course of the merger including in respect of future liabilities.

82. Mr. Bonifassi considers that the Guarantee is an autonomous guarantee. In this regard, Article 2321 of the French Civil Code describes an autonomous guarantee as being ‘an undertaking by which the guarantor binds himself, in consideration of a debt subscribed by a third party to pay a sum either on first demand or subject to terms agreed upon. Article 2288 of the French Civil Code describes a surety as being someone who binds himself to the creditor to perform that obligation, if the debtor does not perform it himself.

83. On the face of the Guarantee and construed as a matter of English law, the governing law of the Guarantee, the Guarantee does establish an independent obligation on MCS France to pay the debts owed by MCS UK. There is no requirement that a previous demand should have been made on MCS UK. Nor does the Guarantee make MCS

France's obligation to pay contingent on a default by MCS UK. On the contrary, clause 19 imposes an obligation on MCS France to pay as a principal debtor. In other words, the nature of the Guarantee under its governing law would appear to be that of an autonomous guarantee rather than that of a contract of suretyship as defined in the French Civil Code.

84. In addition, although not relevant to the construction of the terms of Guarantee, I note that:

i) First, the evidence before the Court is that MCS France and MCS UK continued to contract with Canara after the date of the merger on the basis that the Guarantee was an existing parent company guarantee binding on MCS France. I refer, for example, to the letter from Mr. Satsangi to Canara on behalf of MCS UK dated 19 August 2014 and the Facility Agreement dated 20 April 2015.

ii) In their response of 23 December 2019 to the original demand notice from Canara dated 06 December 2019, the French lawyers, BG2V, then acting for MCS France, described the Guarantee as an autonomous guarantee.

85. I have considered carefully the report of Professor Mouralis as to the reasons why the Guarantee should be considered a contract of surety rather than an autonomous guarantee and in particular the matters set out in paragraphs 15 to 25 of the report. It does not seem to me, however, that the points are so clearly right that it cannot be said that Canara have a plausible evidential basis for their case that the Guarantee was transferred to MCS France following the merger between BAOBAB and MIF. The arguments raised by Professor Mouralis are ones which raise doubt as to whether or not the Guarantee was transferred but:

i) They depend on a detailed analysis of French case law, as to the effect of which there are disputes between the experts. Reconciling that dispute is an exercise which goes beyond what is appropriate on a challenge to jurisdiction and one which ultimately requires the expert evidence to be tested in cross-examination.

ii) They proceed from the premise that French law is the law of the Guarantee. Professor Mouralis fairly acknowledges that the law of the Guarantee is English law and addresses briefly the question of what liabilities arising under the Guarantee as a matter of English law would be treated by French law as being transferred pursuant to the merger. However, he does not address the question of what effect the fact that English law is the governing law of the Contract has on the question of whether the Guarantee is to be treated as a contract of autonomous guarantee or a contract of suretyship for the purposes of determining whether the contractual obligations were transferred in the merger.

iii) Overall, despite the arguments advanced by Professor Mouralis, I am not persuaded at this stage that the Guarantee is properly to be considered a contract of suretyship and hence not transferred during the merger rather than being an autonomous guarantee which was transferred. On the face of it, the Guarantee would appear to be more akin to an autonomous guarantee as defined by Article 2321 of the French Civil Code rather than a contract of suretyship as defined by Article 2228.

86. In light of the matters raised in the previous paragraph, I consider that the dispute between the parties as to the nature of the Guarantee is not one which can be reliably assessed at this stage. The dispute is one which is material and the differences between the experts are not ones which be overcome at this stage. Nevertheless, there is a plausible (albeit contested) evidential basis for Canara's case that the Guarantee was transferred to MCS France.

87. Accordingly, I find that Canara does have a good arguable case that the Guarantee was transferred to MCS France following the dissolution without liquidation of MIF.

The Authority Issue

88. The issue of whether an agent is able to bind a principal in relation to a third party is excluded from Rome 1 further to article 1(2)(g). The common law rules as to conflicts therefore apply. Rule 243 in *Dicey & Morris* provides that where an agent acts or purports to act on behalf of a principal, their rights and liabilities in relation to each other are in general governed by the law applicable to the relationship or contract between them. Rule 244(1) in *Dicey & Morris* provides that:

> *"The issue whether the agent is liable to bind the principal to a contract with a third party, or a term of that contract, is governed by the law which would govern that contract or term, if the agent's authority were established."*

89. In light of the foregoing, it was common ground between the parties, and rightly so, that Mr. Maurel's actual authority on behalf of MIF fell to be determined under French law and the question of whether and to what extent Mr. Maurel was able to bind MIF in respect of the Guarantee given Canara's knowledge of the resolution is a matter of English law. This includes any question as to Mr. Maurel's apparent authority.

90. Article 14 of MIF's Articles of Association provided that the president could not grant securities on the company's assets without shareholders' authorisation but that this limitation could not be invoked against third parties. It is presumably for this reason that Mr. Wilinski, the French lawyer advising Canara, advised Canara to require a copy of the resolution from MIF before the Guarantee was finalised.

91. Both Mr. Bonifassi and Professor Mouralis agree that the phrase in the resolution 'for a term of one year with effect from today' meant that Mr. Maurel had authority from MIF to sign a guarantee that would not last more than one year from 18 October 2013. Neither expert, however, considers in any detail the effect of the words 'on a renewable basis' or the general wording conferring on Mr. Maurel 'to sign all documents and, in general, to do what is required'. Nor do they consider the effect of the termination provisions within the Guarantee, which enabled either party to terminate the Guarantee on three months' notice, on the question of whether or not the Guarantee was in a form which Mr. Maurel was authorised to sign by the resolution.

92. It is also common ground between the experts that pursuant to L.227-6 of the French Commercial Code, the chairman of a sociétée par actions simplifiée (SAS) can grant sureties or guarantees on the company's assets without limitation. In relation to third parties, the company is bound by the acts of its chairman even if the acts do not fall within the corporate purpose of the company unless it is demonstrated that the third party knew that the act exceeded the purpose or that the third party could not have

ignored the fact that the act exceeded the corporate purpose in all the circumstances. Knowledge on the part of a third party of a company's articles of association is not enough on its own to impute sufficient knowledge to a third party.

93. Professor. Mouralis makes the point separately that the limitation on Mr. Maurel's authority in this case was contained in the resolution not in the articles of association. He goes on to say that as a matter of French law when an agent makes a contract, which exceeds the authority given to it by its principal, the principal can have the contract avoided by the French courts. He also appears to suggest that the excess of authority can be separately relied on as a defence to a claim on the contract. But, when he applies this principle to the Guarantee, he concludes that Canara being aware of the resolution and its content, MCS France could have asked a court to avoid it (which it did not).

94. The above analysis considers the position under French law, but as Miss Saunderson correctly points out, the issue of whether or not any excess of authority on the part of Mr. Maurel known to Canara enabled MCS France to escape any liability under the Guarantee is a question of English law.

95. As to this, the position was set out by Lord Atkinson in Russo-Chinese Bank v. Li Yau Sam [2010] AC 174 at p. 184:

> *"It is undoubted that a person who deals with an agent, whose authority he knows to be limited, as the plaintiff knew in this case does so at his peril, in this sense, that should the agent be found to have exceeded his authority, the principal cannot be made responsible. … In other words, if the agent be held out as having a limited authority to do on behalf of his principal acts of a particular class, then the principal is not bound by an act done outside that authority, even though it be an act of that particular class, because the authority being thus represented to be limited, the party prejudiced has notice, and should ascertain whether or not the act is authorised.*

96. Turning first to the question of actual authority, for the purposes of the present application, there is clearly a difference of opinion between the French law experts as to whether or not the Guarantee was in terms which Mr. Maurel did not have authority to sign. If this were the only issue between the parties, then the position would be more finely balanced. The Guarantee is clearly capable of continuing indefinitely. On the other hand, it was also capable of being terminated within one year and at any subsequent anniversary provided appropriate notice was given. Further, Canara relies on the more general authority of the chairman of an SAS to sign a guarantee even if it was one for an indefinite period. I am not satisfied that present evidence allows me to reach any reliable conclusion as to which party has the better of the argument as to whether or not the Guarantee was within the actual authority of Mr. Maurel at the time he signed it (although presumably he considered that it was). Canara does, however, have at least a plausible case that it was within Mr. Maurel's authority to sign the Guarantee.

97. However, the principal question in relation to this issue is the question of Canara's knowledge, since if Canara did not know of the terms of the resolution and its effect on the authority of Mr. Maurel, then as a matter of either English law or French law, the want of authority would not enable MCS France to deny that they were a party to the Guarantee. In this regard, Canara submitted that if Mr. Maurel did not have actual

authority to sign the Guarantee, as a matter of English law, he at least had apparent authority.

98. On this issue, I consider that Canara does have not only a plausible case but also the better of the argument whether the issue of authority is addressed as one of actual authority or as one of apparent authority.

i) The Guarantee was materially in the same form, which had been signed by Mr. Maurel as chairman on behalf of MIF on previous occasions.

ii) Mr. Maurel, who was not only chairman of MIF but also the majority shareholder, signed the Guarantee confirming that he did so pursuant to the shareholders' resolution.

iii) Mr. Wilinski, received a copy of the resolution on or about 19 November 2013 and did not apparently raise any objections to Mr. Maurel's authority to sign the Guarantee or to Canara accepting the signed Guarantee.

iv) There is no evidence to suggest that Canara, itself, rather than Mr. Wilinski were aware of the terms of the resolution.

v) Mr. Maurel's evidence is that he would not have signed a Guarantee exceeding his authority. There is no evidence suggesting at the time that he considered the terms of the Guarantee to be such that they fell outside the scope of the authority given to him by the resolution.

99. Of course, Mr. Maurel would not have apparent authority to sign the Guarantee if Canara knew that he did not have authority to sign the Guarantee.

100. MCS France say that Canara must have known of the limitation on Mr. Maurel's authority and point to the fact that Canara was an international bank and had solicitors acting for it when the Guarantee was agreed and took French law advice. They also point to the fact that Canara have not disclosed the opinion of Mr. Wilinksi regarding the validity of the Guarantee. I would add to this criticism that there is no clear statement in the witness evidence filed on behalf of Canara as to what knowledge Canara had of the terms of the resolution.

101. As to these points, the fact that Canara was being advised by Mr. Wilinski is a double-edged sword for MCS France. While it is clear that Mr. Wilinksi knew of the terms of the resolution, he was also apparently content that Canara could accept the Guarantee signed by Mr. Maurel. Although Mr. Wilinski might be regarded as Canara's agent for certain purposes, no authority was cited to me to suggest that if Mr. Wilinski advised Canara that Mr. Maurel had authority to sign the Guarantee as a matter of French law when in fact he did not because of the terms of the shareholders' resolution, Canara were to be treated as being bound by Mr. Wilinski's knowledge of the resolution.

102. So far as the failure to disclose Mr. Wilinski's opinion is concerned, that opinion is privileged and Canara are entitled not to disclose it. The fact that Canara's witness evidence does not state clearly that the relevant employees within the bank did not know of the terms of the resolution at the time of signing the Guarantee is more troubling. But I accept Mr. Gunaratna's submission that there is no evidence to show that either

Ms. Boulter, the English solicitor acting for Canara, or Canara itself had a copy of the resolution or were aware of its terms.

103. Accordingly, in relation to Mr. Maurel's authority, I am satisfied that Canara have a good arguable case that Mr. Maurel had actual or alternatively apparent authority to sign the Guarantee. They have a plausible evidential basis that the Guarantee was within the scope of Mr. Maurel's authority to sign it or that, if was not, then Canara was not aware of the limitation on his authority. I am also satisfied that this is a conclusion, which on the evidence before me, is one which I can reliably reach. However, if I were to be wrong about this, there is any event, a sufficiently plausible evidential basis for Canara's case notwithstanding that it is contested.

The Ultra Vires Issue

104. Rule 175 in *Dicey & Morris* provides that the capacity of a corporation to enter any legal transaction is governed both by the constitution of the corporation and the law of the country that governs the transaction in question. Matters concerning the constitution of a company are governed by the place of incorporation. It was common ground, and again rightly so, that this issue is therefore governed by French law.

105. This issue arises because Professor Mouralis looks to Article 4 of MIF's Articles of Association as being the provision which sets out the company's purpose. Article 4 provides:

> "*The purpose of the company is, directly or indirectly, in France or abroad:*
>
> *- the marketing, import and export of all objects and raw materials and, in general, all operations of any kind, economic or legal, that may be related to the same, related or complementary object,*
>
> *the exploitation and development of trademarks, models, patents, utility certificates related to these articles, and, in general, all technical and commercial studies and the development of existing industries or the creation of new companies,*
>
> *All of the above, directly or indirectly through the creation of new companies and groupings, contributions, limited partnerships, subscriptions, purchases of securities or corporate rights, mergers, alliances, joint ventures, or the leasing or lease management of all assets and other rights,*
>
> *And generally any industrial, commercial, financial, civil, movable or immovable operations that may be directly or indirectly related to one of the above-mentioned purposes or to any similar or related purposes"*

106. Professor Mouralis goes on to say that while the Guarantee would perhaps fall under MIF's purpose indirectly, in order to be consistent with that purpose it must not be such that would make it impossible for MIF to carry out its activities. Professor Mouralis considers that on the information available to him and given the maximum liability under the Guarantee was US$ 5 million, a call under the Guarantee would probably have disrupted MIF's activity and might have resulted in its insolvency. Professor Mouralis then suggests that because of Canara's knowledge of both MIF's Articles of

Association and also its financial position, MIF (and therefore MCS France) were not bound by the Guarantee.

107. Mr. Bonifassi disagrees. He concludes that the Guarantee falls within the purposes defined in Article 4 because it falls within the specific purpose relating to the marketing, import and export of all objects and raw materials and all operations related to these objects. He also points out the Guarantee would remain valid under French law even if executed in excess of MIF's purpose unless proven that Canara knew that the act exceeded that purpose or could not have been unaware of it in view of the circumstances (Art. L227-7(2) of the French Civil Code); the application of that exception being strictly assessed.

108. More generally Canara make a number of points at paragraph 9 of the second witness statement of Mr. Kapadia refuting the suggestion that the amount of the Guarantee was disproportionate to MIF's financial position. In summary, they submit that the evidence establishes that MIF and MCS UK had either themselves or through other members of the MCS group access to assets and other banking facilities which exceeded the maximum liability of the Guarantee. They also point to the fact that Mr. Maurel had ultimate control of MCS UK and could therefore control what use MCS UK made of the facilities guaranteed by MIF. They also rightly say that there is no evidence at this stage giving a complete financial picture of MIF or the MCS Group as at the date of the Guarantee or before. MCS France point to the facility letter of 19 March 2013 in which Canara refer to MIF as having a net worth of €2.65 million but that alone is not sufficient evidence to justify concluding that overall the maximum level of Guarantee was disproportionate in comparison to MIF's available assets.

109. More generally, it is worth noting that there is no evidence before me to suggest that at the time of signing the Guarantee, MIF or MCS UK was in financial difficulties or had any concerns about the financial commitments being undertaken in the Guarantee or the underlying facility letters or agreements.

110. Again, I am satisfied on the evidence before me that Canara have a good arguable case that the Guarantee was not ultra vires MIF. It seems to me that there is considerable force to Mr. Bonifassi's opinion that the Guarantee did fall within the specific purposes laid down in MIF's Articles of Association. More generally, there is no sufficient evidence before me to suggest that the borrowing being guaranteed by MIF under the Guarantee was disproportionate to that company's assets or that, if it were, Canara had such knowledge of MIF's financial position that it would be aware that the nature and amount of Guarantee was such that it would have disrupted MIF's activities or prevented MIF performing those activities. Overall, I am satisfied that on this issue Canara has a good arguable case. Canara have a plausible evidential basis that entering into the Guarantee was a step that was within MIF's corporate purposes and that in any event they did not have sufficient knowledge of MIF's financial position to enable MIF (or subsequently MCS France) to avoid enforcement of the Guarantee if it did fall outside MIF's corporate purposes. I am also satisfied that this is a conclusion, which on the evidence before me, is one which I can reliably reach. However, if I were to be wrong about this, then there is any event, a sufficiently plausible evidential basis for Canara's case notwithstanding that it is contested.

Estoppel and ratification (the facility signatures issue)

111. Canara say that even if the Guarantee were otherwise unenforceable for the reasons raised by MCS France in this application, Canara is still entitled to rely on the Guarantee pursuant to the principles of estoppel, ratification and apparent authority.

112. It was common ground that English law is the applicable law for any question as to estoppel, ratification or apparent authority and I agree.

113. Canara rightly identify that the principles are closely connected because ultimately all apparent authority is based on estoppel; see The Jin Pu [2010] 2 All ER 814 at [35] and Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480, CA. per Diplock LJ at 503. Further, it is said that 'ratification merges almost imperceptibly into estoppel', *Bowstead & Reynolds on Agency*, 22nd ed, para. 2-080.

Estoppel

114. A company said to be bound by an agreement may on ordinary principles be estopped from denying that it is bound by an agreement said to have been made without authority including where that company's actions objectively considered have led the other party to suppose that the company regarded itself as bound by the contract; see Janred v. ENIT (No. 2) [1989] 2 All ER 444 and Spiro v Lintern [1973] 1 WLR 1002.

115. Canara relies on a number of matters to submit that MCS France is estopped from denying that it is bound by the Guarantee:

    i) That at all times it was known to Mr. Maurel and his co-directors and through them MCS France as well as MCS UK that Canara required a continuing parent company guarantee as a condition of MCS UK's renewed or continuing facilities.

    ii) That Mr. Maurel signed no fewer than three facility letters after the date of the Guarantee and the merger acknowledging and accepting a continuing liability as guarantor for MCS UK.

    iii) Mr. Maurel and MCS France knew that Canara and MCS UK were continuing to operate on the basis that the Guarantee was valid and remained in effect, as reflected by the Facility Agreement of 20 April 2015 which Mr. Maurel signed.

    iv) It was on the above basis that Canara continued providing facilities to MCS UK exposing itself to unpaid debts in excess of US$ 1.6 million.

    v) By the facility letter dated 05 July 2017, Mr. Maurel and MCS France acknowledged and agreed to the subsistence of the parent company guarantee but were not agreeable to any personal guarantee from Mr. Maurel.

116. In response to Canara's case on estoppel, MCS France has asserted through Mr. Maurel, first that the guarantee referred to in the facility letters and agreements was a guarantee from MCS Paris not MCS France. Second, he has asserted that he was signing to acknowledge that MCS France was aware of the terms and conditions of the facility letters. As already stated above, I do not accept Mr. Maurel's evidence in this regard. It is clear from the evidence that the intention in the facility letters and agreements was that the guarantee to be provided was a guarantee from MCS UK's parent, namely MCS

France. It is also clear from the terms of the facility letters that Mr. Maurel was signing to accept MCS France's obligation to provide a parent company guarantee not merely to acknowledge awareness of the terms and conditions of the facility letters.

117. I accept the submissions made by Miss Saunderson that the facility letters do not themselves give rise to any separate agreement between Canara and MCS France, which includes a jurisdiction agreement in favour of the English High Court. However, that is not Canara's case and I do find that the conduct of Mr. Maurel and MCS France in signing the facility letters and continuing to do business with Canara on the basis that the Guarantee was the relevant parent company guarantee for the purposes of those letters and for the purposes of the facility agreements is conduct capable of giving rise to an estoppel preventing MCS France from denying that it was a party to the Guarantee.

118. Miss Saunderson also submitted both in relation to estoppel, rectification and the issue of Mr. Maurel's apparent authority that the only representations made were representations by Mr. Maurel and that this was not sufficient for Canara's purposes. A qualifying representation cannot be a representation made by the agent itself but must be a representation made by the principal or by another agent authorised to act for the principal; see *Bowstead & Reynolds* at paragraph 8-019 and 8-020.

119. While I see the force in this argument, it seems to me that the course of business described above between Canara, MCS UK and MIF and then between Canara, MCS UK and MCS France was such that MIF and then MCS France were holding out Mr. Maurel as the individual with authority to contract on their behalf. This conclusion is reinforced by the fact that his co-directors in MCS UK were apparently also content that he had authority to act for MCS France. It is also reinforced by the fact that he was the individual authorised by the resolution of the shareholders' meeting to sign the Guarantee originally and there is no evidence to suggest that following the merger, MCS France queried his authority either to sign that guarantee or to sign the facility letters and agreements, which relied on the Guarantee as being a continuing parent company guarantee. Indeed, bearing in mind that Mr. Maurel was the controlling shareholder in MCS France as well as being its chairman, the position that he was not being held out by MCS France as having authority to act on its behalf might be thought to be artificial.

120. I accept Canara's evidence that it operated on the basis that the Guarantee was valid and remained in effect and that it was on this premise that the Bank continued to provide facilities to MCS UK.

Ratification

121. A principal can adopt as valid and binding an act done by an agent or supposed agent without authority at the outset; see Suncorp Insurance and Finance v. Milano Assicurazioni SpA [1993] 2 Lloyd's Rep. 225 at 234 and Britannia Steamship v. Ausonia Assicurazioni [1984] 2 Lloyd's Rep. 98. Ratification may be implied from any act showing an intention to adopt the transaction, objectively ascertained and no action or reliance is required of the counterparty; see *Chitty on Contracts,* 34th ed at para. 21-031.

122. Unsurprisingly, Canara relied on the same matters as are set out in paragraph 115 above in support of their argument on rectification. For the same reasons given above in

relation to the issue of estoppel, I consider that those matters do support, and plainly support, a plea of ratification. None of the matters raised by MCS France as outlined in paragraphs 116 to 119 above undermine that finding.

123. For the reasons outlined above, I find that Canara has a good arguable case on estoppel and ratification that MCS France is bound by the Guarantee and the jurisdiction agreement contained within it. Canara have a plausible evidential basis that the conduct of Mr. Maurel and MCS France following the merger was such as to estop MCS France from denying that it was bound by the Guarantee or was such as to ratify the Guarantee if it had otherwise been signed by Mr. Maurel without authority. I am also satisfied that this is a conclusion, which on the evidence before me, is one which I can reliably reach. However, were I to be wrong about this, then there is any event, a sufficiently plausible evidential basis for Canara's case notwithstanding that it is contested.

124. Canara had a further case based on the signature of the facility letter dated 05 July 2017 by the parties, which Canara submitted led to the Guarantee being renewed by novation or adopted. However, this submission was not the focus of any oral submissions before me and in light of my conclusions above is not an issue, which requires me to consider it any further.

Overall

125. Having considered the issue of good arguable case by reference to each of the issues raised by the parties in relation to the question of whether MCS France was a party to the Guarantee and therefore the jurisdiction agreement contained within it, it seems to me to appropriate to step back and consider whether overall Canara has a good arguable case on whether or not MCS France was a party to that jurisdiction agreement. In this regard, I consider that it does. Even were I to be wrong on one of the issues considered above, the balance of the evidence supports the conclusion that MCS France is a party to the Guarantee and to the jurisdiction agreement contained within it. In circumstances, where the evidence establishes that Canara, MCS France and MCS UK have done business since 2014 on the basis that the Guarantee was binding on MCS France, it would be a surprising conclusion that there was no good arguable case that MCS France was a party to the jurisdiction agreement.

Conclusion

126. For all the reasons set out above, I dismiss the application of MCS France (the Second Defendant) to challenge the jurisdiction of this court.

127. I would be grateful for the assistance of Counsel in drawing up an appropriate order and in relation to any consequential matters arising from this judgment.