Case No: 2013 FOLIO 1697

Neutral Citation Number: [2015] EWHC 1640 (Comm)

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

Rolls Building
Fetter Lane, London EC4A 1NL

Date: 09/06/2015

Before :

THE HONOURABLE MR JUSTICE FLAUX

- -

Between:

(1) STANDARD CHARTERED BANK (HONG KONG) LIMITED **(A company incorporated in Hong Kong)** **(2) STANDARD CHARTERED BANK MALAYSIA BERHAD** **(A company incorporated in Malaysia)**	**Claimants**
- and -	
(1) INDEPENDENT POWER TANZANIA LIMITED **(A company incorporated in Tanzania)** **(2) VIP ENGINEERING AND MARKETING LIMITED** **(A company incorporated in Tanzania)** **(3) PAN AFRICAN POWER SOLUTIONS (T) LIMITED** **(A company incorporated in Tanzania)**	**Defendants**

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Mr Jonathan Davies-Jones QC and Mr William Edwards (instructed by **DLA Piper**) for the **Claimants**
Mr Matthew Hardwick QC and Mr Ian Higgins (instructed by **Hugh Cartwright & Amin**) for the **1st and 3rd Defendants**
Mr Richard Coleman QC and Mr Christopher Knowles (instructed by **Charles Russell Speechlys**) for the **2nd Defendant**

Hearing dates: 21-23 and 27 April 2015

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Judgment

The Honourable Mr Justice Flaux:

Introduction

1. In these proceedings, the first claimant (to which I will refer as "SCBHK" or "the Bank") and the second claimant (to which I will refer as "SCBMB") which are both wholly owned subsidiaries of Standard Chartered Bank ("SCB") claim against the first defendant (to which I will refer as "IPTL") sums due under a Facility Agreement dated 28 June 1997 which was novated to SCBHK by the Malaysian bank which had become the lending bank under that Agreement. SCBMB had become the Facility Agent under that Agreement. SCBHK as Security Agent also claims against IPTL under an independent covenant to pay in the Security Deed entered on the same day and forming part of the same suite of finance documents as the Finance Agreement.

2. SCBHK also claims declaratory and injunctive relief against IPTL and against the second and third defendants (to which I will refer as "VIP" and "PAP" respectively). VIP was a 30 % shareholder of IPTL and had entered a Shareholder Support Deed and a Charge of Shares also dated 28 June 1997 and forming part of the same suite of finance documents, under which VIP and its fellow 70 % shareholder Mechmar Corporation (Malaysia) Berhad ("Mechmar") undertook, inter alia, to use their best endeavours to procure that IPTL complied with its obligations under the finance documents and independently covenanted not to dispose of their shares. SCBHK's case is that IPTL is in breach of its obligations under the finance documents, putting VIP in breach of the Shareholder Support Deed and that, in breach of the covenant in the Charge of Shares, VIP has purported to transfer its shareholding to PAP. The claims are discussed in more detail below in the context of the various Tanzanian proceedings.

3. All the agreements in the suite of finance documents contained non-exclusive English jurisdiction clauses with forum non conveniens ("FNC") waivers and an express acceptance of the possibility of concurrent proceedings in different jurisdictions, together with provisions for service in England. The Facility Agreement, Security Deed and Shareholder Support Deed were also expressly governed by English law. The Charge of Shares and Mortgage of land owned by IPTL were governed by Tanzanian law, no doubt because they are concerned with Tanzanian property, but otherwise contained materially identical jurisdiction clauses to the Facility Agreement.

4. Accordingly, for the purposes of the present applications, clause 33 of the Facility Agreement can be taken as an example of the jurisdiction clauses:

> *"**33 GOVERNING LAW AND JURISDICTION***
>
> ***(A) Governing law:** This Agreement shall be governed by and construed in accordance with the laws of England.*
>
> ***(B) Courts of England and Malaysia:** For the benefit of the Arranging Banks, the Facility Agent and each Bank, all parties irrevocably agree*

that the courts of England and Malaysia are to have jurisdiction to settle any disputes which may arise out of or in connection with this Agreement and that, accordingly, any legal action or proceedings arising out of or in connection with this Agreement ("Proceedings") may be brought in those courts and each party irrevocably submits to the jurisdiction of those courts.

(C) Other Competent Jurisdiction: *Nothing in this Clause 33 shall limit the right of any party to take Proceedings against any other party in any other court of competent jurisdiction nor shall the taking of Proceedings in one or more jurisdictions preclude a party from taking Proceedings in any other jurisdiction, whether concurrently or not."*

(D) Venue: *Each party irrevocably waives any objection which it may have to the laying of the venue of any Proceedings in any court referred to in this Clause 33 and any claim that any such Proceedings have been brought in an inconvenient forum.*

[…]

(G) Service of Process: *The Borrower irrevocably appoints Bank Bumiputra Malaysia Berhad, London Branch and its successors (now of 14 Cavendish Square, London W1M 0HA, England) and Mechmar and its successors (now of No.1, Jalan Perunding U1/17, Seksyen U1, Hicom-Glenmarie Industrial Park, 40150 Shah Alam, Selangor D.E., Malaysia) to receive, for it and on its behalf, service of process in any Proceedings in England and Malaysia respectively. Such service shall be deemed completed on delivery to the relevant process agent (whether or not it is forwarded to and received by the Borrower). If for any reason a process agent ceases to be able to act as such or no longer has an address in London or Malaysia, as the case may be, the Borrower irrevocably agrees to appoint a substitute process agent acceptable to the Security Agent, and to deliver to the Security Agent a copy of the new agent's acceptance of that appointment, within 30 days."*

5. IPTL and VIP were served with the proceedings in London as of right under that service of process provision. They no longer challenge the effectiveness of that service. SCBHK was granted permission by Popplewell J to serve PAP in Tanzania pursuant to CPR 6.37 and PD6B paragraph 3.1(3) on the basis that PAP is a necessary or proper party to the claim against IPTL. It is now accepted by PAP that if the claim against IPTL proceeds in England and is not stayed, then that service out was valid and the claim against PAP should also proceed in England, subject to allegations about a failure to make full and frank disclosure to which I will return at the end of this judgment. So far as the claim against VIP is concerned, during the hearing, the claimants clarified that no claim was being made against VIP by SCBMB.

6. The applications by the defendants which remained live at the end of the hearing before me were thus:

(1) An application by IPTL and PAP under CPR 11.1(1)(b) and (6)(d) for a stay of the English proceedings on the ground that Tanzania not England is clearly the most appropriate forum for the determination of the dispute between the parties, alternatively for a stay on case management grounds.

(2) An application by VIP to dismiss or set aside the English proceedings as an abuse of process, alternatively an application for a stay of the proceedings on the same grounds as put forward by IPTL and PAP.

The factual background

7. It is important that the Court should not engage in a mini-trial of the case when considering an application challenging the jurisdiction of this Court or seeking a stay of English proceedings and, in this case, to the extent that there are disputes of fact raised by the witness statements, they simply cannot be resolved at this interlocutory stage. Nonetheless, the complexity of the underlying dispute in this case requires that the factual background is set out in some detail. However, I have not set out every twist and turn in the labyrinthine sets of proceedings which have been taking place in Tanzania for the last seven years, but only those applications and judgments of particular relevance to the issues I have to decide.

8. In 1994, the Government of Tanzania invited Mechmar, a Malaysian corporation, to submit a proposal for the construction of a power plant in Tanzania and Mechmar entered a memorandum of understanding with the Tanzanian Ministry of Water, Energy and Minerals for the construction of a power plant. In September 1994, VIP and Mechmar entered into a Shareholders Agreement to establish a company to build and operate the plant, on the basis that Mechmar would provide the finance and technical know how and VIP would obtain all necessary government approvals. Under that agreement, although Mechmar was to hold 70% of the shares and VIP 30%, Mechmar contributed all the funds to pay up the share capital of U.S. $1 million. The advance by Mechmar was to be waived upon the fulfilment of various conditions, including the obtaining of all grants and licences for the construction and operation of the plant for 20 years and, until those conditions were fulfilled, VIP undertook not to sell or charge its shares. By clause 6 of the Shareholders Agreement, VIP agreed that Mechmar would have the sole right to "*manage and operate [IPTL] for the duration of the project*". Under clause 18 all disputes were to be submitted to LCIA arbitration in London. IPTL was incorporated as contemplated by the Shareholders Agreement in December 1994. In May 1995, IPTL entered into a Power Purchase Agreement ("PPA") with Tanzania Electrical Supply Co Ltd ("TANESCO"). By an Implementation Agreement, the Government of Tanzania guaranteed TANESCO's payment obligations.

9. The lending was set out in the suite of finance documents dated 28 June 1997 which I have already described. Under the Facility Agreement, the original lenders, a syndicate of Malaysian banks, agreed to lend IPTL up to U.S. $105 million and IPTL agreed to ensure that the banks had various security,

including a legal mortgage over the land it owned and a charge over its shares. As is quite usual in syndicated banking, the participation of the lending banks was freely transferable. Clause 26(C) of the Facility Agreement provided for two methods of transfer: (i) novation, which required delivery of a novation notice to the Facility Agent (originally Bank Bumiputra) or (ii) assignment of outstandings which required no formalities.

10. In April 1998, TANESCO sought to terminate the PPA with IPTL on the basis that costs had been exaggerated and the wrong generators installed. Then, on 25 November 1998, TANESCO submitted a request for ICSID arbitration. The ICSID Award was published in July 2001. The Tribunal determined that the PPA was and remained valid, but the financial model used to calculate the capacity and energy tariffs was adjusted, which resulted in a reduction of the tariff payable under the PPA. Also in July 2001, by a process of novation, Danaharta became the sole lender under the Facility Agreement. Commercial operation of the plant began in January 2002.

11. In about October 2001, IPTL requested a restructuring of the loan facility and, on 29 October 2001, Danaharta wrote offering terms for a restructuring of what was overdue under the original loan facility. This involved a restructured loan amount of U.S. $120,215,086.35, U.S. $112,215,086.35 of which was repayable with a grace period of 18 months (Term Loan 1) and U.S. $8 million (Term Loan 2) which would be waived if there was full compliance and performance of Term Loan 1, but which Danaharta could reinstate if there was an event of default under Term Loan 1. That offer of restructuring on those terms was accepted by IPTL and by Mechmar as guarantor.

12. On 24 February 2002, VIP lodged a winding up petition before the Tanzanian courts in respect of IPTL (Cause No. 49 of 2002), alleging that the board was split and unable to agree on any decision and the management of the company was dominated by the majority shareholder, Mechmar. Only a few days later, on 28 February 2002, Mechmar commenced LCIA arbitration against VIP contending that any dispute should be brought in arbitration under clause 18 of the Shareholders Agreement, not by winding up proceedings in Tanzania. VIP ignored the arbitration and did not participate. Arthur Harverd was appointed sole arbitrator by the LCIA. By his Award dated 26 August 2003, he ordered VIP to discontinue the winding up petition. VIP did not challenge the Award before the English courts, with the consequence that it is final and binding in accordance with s 58(1) of the Arbitration Act 1996. However, VIP has never complied with that Award. It issued proceedings in Tanzania to set aside the Award (Cause No 254 of 2003) and persisted with the winding up petition, as set out below. The bringing of that petition was also a breach of the covenant in clause 4.2.1 of the Shareholder Support Deed that VIP would not petition for the winding up of IPTL.

13. On 18 November 2004, Mechmar petitioned the High Court of Tanzania to enforce the LCIA Award. That petition was eventually dismissed by Oriyo J in a Ruling on 31 October 2008 (which also ordered consolidation of Cause No 49 of 2002 and Cause No 254 of 2003) on the ground that Mechmar had failed to file its written submissions in accordance with the judge's previous order of 5 February 2008. The other part of this Order of 31 October 2008 gave

directions for the filing of submissions in relation to the winding up petition in advance of a further hearing fixed for 15 December 2008. I return to this in more detail below.

14. In the meantime, by a Sale and Purchase Agreement dated 4 August 2005, Danaharta sold the loan facility and the security to SCBHK. A Deed of Assignment was entered on 17 August 2005 and, also on that date, a Novation Notice was signed by Danaharta, SCBHK and SCBMB. On 22 September 2005, the existing Facility Agent, BCBB resigned and SCBMB was appointed Facility Agent. On 9 November 2005, SCBMB wrote to IPTL informing it of the Novation Notice.

15. By 30 April 2006, IPTL was scheduled to repay U.S. $2,850,000 of the principal repayment of the restructured loan, but IPTL failed to pay U.S. $2,176,574.94 of this amount by 11 May 2006, so that on that day SCBHK wrote to IPTL stating that an Event of Default had therefore occurred under the Facility Agreement. SCBHK reinstated Term Loan 2 together with all accrued interest, which amounted to U.S. $9,847,525.28. Thereafter, IPTL stopped making payment of principal and interest under the restructured loan facility altogether, a further Event of Default. The reason for this failure to pay was apparently that TANESCO stopped making capacity payments to IPTL under the PPA in the reduced amounts determined by the 2001 ICSID Arbitration Award, although it was not until November 2006 that TANESCO stopped paying the capacity payments. The power plant ceased to be operational in July 2007.

16. On 5 July 2006, an Escrow Agreement was entered into between the Government of Tanzania and IPTL with the Bank of Tanzania as Escrow Agent, being one of the methods by which the Government could fulfil its obligations under the Implementation Agreement. An Escrow Account was set up to receive from the Government sums equivalent to whatever was due from TANESCO to IPTL under the PPA. Only the Escrow Agent was permitted to make withdrawals from the Escrow Account.

17. In the period from August 2006 to November 2008, SCBMB as Facility Agent made periodic demands upon IPTL for repayment under the loan facility. No repayments were made, but in the published audited accounts of IPTL for the year to 31 December 2007, approved by the Board of Directors of IPTL on 23 June 2008, it was acknowledged that SCBHK was a secured creditor of IPTL and that some U.S. $123 million was due to SCBHK.

18. Also in June 2008, IPTL applied for the Interpretation of the 2001 ICSID Arbitration Award ("the Interpretation Proceedings") by the ICSID Tribunal, claiming that TANESCO owed it U.S. $71.1 million. As already noted in [13] above, on 31 October 2008, Oriyo J made an Order setting directions for written submissions in relation to VIP's winding up petition and specifically, its application for the appointment of an Official Receiver over IPTL, with a view to issuing a ruling on 15 December 2008. SCBHK was not a party to that Order, but RHB Bank Berhad as Security Agent under the Facility Agreement became aware of the written submissions filed by VIP pursuant to that Order, since on 21 November 2008, RHB wrote to VIP informing it that the

institution and continuance of the winding up proceedings, including the filing of those written submissions constituted a breach of clause 4.1.3 of the Shareholders Support Deed. On the same day, 21 November 2008, SCBHK filed an application in the winding up proceedings (Cause 49 of 2002) to restrain the winding up petition and the making of a winding up Order.

19. On 15 December 2008, RHB as Security Agent appointed Martha Kaveni Renju as receiver over VIP's shares in IPTL pursuant to the Charge of Shares dated 28 June 1997. Then, on 23 January 2009, RHB as Security Agent appointed Ms Renju as receiver over the shares of Mechmar in IPTL, also pursuant to the Charge of Shares. However, the appointment of the Provisional Liquidator (referred to in the next paragraph) prevented her from controlling IPTL through the control of the entire shareholding.

20. The ruling which Oriyo J had contemplated issuing on 15 December 2008 was in fact issued on 16 December 2008. The learned judge held that VIP's application for the appointment of a Provisional Liquidator succeeded and the Administrator General/Official Receiver was appointed. Once that appointment was made, the ICSID Tribunal stayed the Interpretation proceedings. On the same day, 16 December 2008, Ms Renju as share receiver applied to the High Court of Tanzania in the consolidated proceedings (Causes Nos. 49 of 2002 and 254 of 2003) for an Order that the winding up petition and the application for the appointment of a Provisional Liquidator be withdrawn and abandoned.

21. On 22 December 2008 SCBHK wrote to the Provisional Liquidator asking him to confirm to the ICSID Tribunal that the Interpretation Proceedings should be continued. On 23 December 2008, Mechmar applied to the Court of Appeal of Tanzania ("CAT") seeking a stay of the appointment of the Provisional Liquidator.

22. On 23 January 2009, SCBHK issued an application before the High Court of Tanzania (Cause No. 5 of 2009) seeking the appointment of an Administrator over IPTL. That application was not served on the Provisional Liquidator but was heard ex parte by Mihayo J who made the Order sought on 27 January 2009. Following a complaint by the Provisional Liquidator to the Chief Justice about the fact that the Order had been made without his having had an opportunity to be heard, the matter came before the CAT on 9 April 2009. The CAT ruled that the Order of Mihayo J was a nullity, as the Provisional Liquidator should have had the opportunity to make representations. The CAT said it would not: *"countenance the fast tracking of justice delivery if this is done or achieved through trampling over peoples' rights to a fair hearing"*. It ordered a fresh hearing before another judge.

23. SCBHK did not in fact issue a fresh petition (Cause No. 112 of 2009) until 17 September 2009, apparently because it was engaged in constructive negotiations with TANESCO. By that fresh petition SCBHK not only sought the appointment of an administrator but also sought an Order removing the Provisional Liquidator and replacing him with a partner from PwC or KPMG and restraining him from acting beyond his powers pending a winding up order.

24. In October 2009, the Provisional Liquidator took control of the power plant in accordance with emergency measures aimed at dealing with a national crisis of power shortages. The power plant has been operational ever since. Also in October 2009, VIP applied in Cause No. 112 of 2009 to add the Provisional Liquidator as a party and sought security for costs from SCBHK. On 6 November 2009, there was a hearing at which the court stayed the proceedings pending the position of the parties becoming known in the winding up proceedings, although liberty was given to for them to be "restored on application". SCBHK did not make an application to lift the stay until July 2011, after the High Court of Tanzania had made a winding up Order as set out below.

25. At around the same time in November and December 2009, SCBHK replaced RHB as Security Agent. On 15 December 2009, SCBMB as Facility Agent wrote to IPTL confirming that it had instructed SCBHK as Security Agent to institute proceedings to enforce remedies under each of the security Agreements. By a Deed of Appointment dated 21 December 2009, SCBHK as Security Agent and as the beneficiary under the Security Deed appointed Ms Renju as Administrative Receiver over all the assets of IPTL. However, as in the case of her appointment as receiver over the shares in IPTL, she could not take charge of the assets of IPTL because of the presence of the Provisional Liquidator.

26. On 28 October 2010, Mechmar's Malaysian lawyers wrote to SCBHK informing it that Mechmar had purported to sell its shares in IPTL to Piper Link Investments Limited, a British Virgin Islands ("BVI") company. On 8 November 2010, on the ex parte application of Ms Renju as Administrative Receiver and Share Receiver, Bannister J in the BVI High Court made an Order requiring Piper Link within three days to deliver the share certificates for the Mechmar shareholding in IPTL to the Court, to be held pending trial or further Order. He also ordered that Piper Link should take no further steps to transfer, dispose of or otherwise deal with the shares pending trial. The share certificates are currently held by the BVI High Court pursuant to that Order. On a subsequent summary judgment application, on 11 April 2011, the BVI High Court held that Piper Link had no realistic prospect of defending the claim made by Ms Renju.

27. On 15 July 2011, on the application of VIP, Kaijage J in the High Court of Tanzania made a winding up Order on VIP's petition dated 24 February 2002, notwithstanding the pendency of SCBHK's application for the appointment of an administrator over IPTL (albeit that application had been stayed since November 2009 as set out at [24] above). As the CAT subsequently held applying the English authorities on this point (see [36] below), the effect of an administration petition would be to impose a total freeze on any winding up proceedings, so that the court should have considered the administration application first, and not made the winding up Order.

28. The reaction of SCBHK to the winding up Order was to make two applications in Cause No. 112 of 2009 (its proceedings seeking an administration Order): (i) on 22 July 2011 for a permanent injunction restraining IPTL or VIP from carrying out the winding up Order of 15 July

2011 and (ii) on 28 July 2011 SCBHK then applied to lift the stay on the application for an administration order imposed in November 2009. At the same time, on 29 July 2011 SCBHK issued Civil Application No. 91 in the CAT, also seeking a stay of the winding up order over IPTL. The two applications in Cause No. 112 of 2009 came before Mwaikugile J on an urgent ex parte basis on 11 August 2011. The learned judge lifted the stay and granted an interim injunction restraining the carrying out of the winding up of IPTL pending an inter partes hearing of the application for a permanent injunction which he ordered to be heard by Kaijage J (the judge who had made the winding up order on 15 July 2011) on 24 August 2011.

29. Kaijage J heard that application on that date and subsequent dates. In the meantime, on 7 September 2011, the CAT ordered a stay of the winding up order pending the hearing of SCBHK's application in Civil Application No. 91 of 2011. However, on 21 November 2011, the CAT struck out SCBHK's application for a stay of execution of the winding up order because of technical defects in the notice of motion and notice of appeal. Kaijage J then issued his ruling on 19 January and 16 March 2012 on the applications in Cause No. 112 of 2009. He agreed with VIP's submission that to have pursued the applications in Cause No. 112 of 2009 and the CAT Civil Application No. 91 of 2011 at the same time was an abuse of process. He also held that the applications had been improperly filed in Cause 112 of 2009 when they should have been filed in Causes Nos. 49 of 2002 and 254 of 2003. On those grounds, he rejected SCBHK's application for an injunction restraining IPTL and VIP from executing the winding up order.

30. On 22 March 2012, Mr Joseph Casson, managing director of SCBHK, wrote a letter to the Chief Justice of Tanzania complaining about the various decisions of Kaijage J. Specifically, it was contended (i) that the winding up order should not have been made because SCBHK's administration petition was pending and the law is clear that no winding up Order can be made in such circumstances; and (ii) both grounds for rejecting SCBHK's application for an injunction restraining the carrying out of the winding up Order were manifestly erroneous. SCBHK asked the CAT to intervene urgently of its own motion.

31. On 5 April 2012, Juma J made a ruling in Causes Nos. 112 of 2009 and 254 of 2003 rejecting VIP's various technical objections to SCBHK's application for leave to appeal the decision of Kaijage J of 15 July 2011 granting the winding up Order. A Revision Hearing (i.e. an appeal hearing) in the CAT in respect of the various rulings of Kaijage J was commenced by the Chief Justice on 9 April 2012 (Civil Revision No. 1 of 2012).

32. On 18 May 2012, a winding up Order was made against Mechmar in the High Court of Malaysia, on the application of Alliance Investment Bank, one of its creditors, with SCBHK as a supporting creditor. Heng Ji Keng and Micael Joseph Monteiro were appointed liquidators. On 18 June 2012, the liquidators wrote to Asyla, attorneys in Tanzania who were purporting to act for Mechmar in proceedings in Tanzania, informing them of their appointment as liquidators by the Malaysian High Court.

33. On 12 October 2012, lawyers in Amsterdam for VIP wrote a letter before action to SCBHK in respect of an alleged claim for damages of U.S. $485 million, on the basis that the bank had been making ill-founded claims that it was a creditor of IPTL and that it had taken over control of the 70% Mechmar shareholding (evidently a reference to the appointment of Ms Renju as share receiver). The letter asserted that it was illegal under Tanzanian law for Mechmar to transfer its shareholding to SCBHK after the winding up proceedings had been commenced in February 2002. The letter went on to assert claims for loss of investment opportunity, totalling U.S. $485 million. In response on 22 October 2012, SCBHK's solicitors DLA Piper characterised these as: *"extraordinary and exorbitant claims"* and stated that SCBHK had acted entirely within its rights in appointing a share receiver under the charge on shares and in making claims for repayment of amounts due from IPTL under the Facility Agreement.

34. On 2 November 2012, an ICSID arbitration tribunal issued an Award in respect of a claim made by SCB against the Government of Tanzania commenced in May 2010 on the basis of the Agreement between the Governments of the United Kingdom and of Tanzania for the Promotion and Protection of Investments dated 7 January 1994 ("the BIT") and of the ICSID Convention. SCB had relied upon the fact that its subsidiary SCBHK had acquired the loan to IPTL to contend that Tanzania was taking measures (for example taking control of the power plant in October 2009) which deprived SCB of its investment in IPTL in contravention of the BIT. The ICSID tribunal dismissed this claim on jurisdictional grounds. It found at [198]-[200] of the Award that to qualify as a treaty investor, so that the loans are considered investments "of" [SCB] within the meaning of the BIT:

> *"…implicates [SCB] doing something as part of the investing process, either directly or through an agent or entity under the investor's direction. No such actions were performed…. [An] investment might be made indirectly, for example through an entity that serves to channel an investor's contribution into the host state. Special purpose vehicles have long facilitated cross-border investment. Such indirectly-made investments, however, would involve investing activity by a claimant, even if performed at the investor's direction or through an entity subject to the investor's control. Under the facts of the present case [SCB] made no contribution to any relevant loans, taking no action to constitute the making of an investment. Also [SCB] has neither exercised any control over any credit to the Tanzanian debtor nor provided any direction to [SCBHK] relating to the making of the Loans."*

The significance of this Award and the contentions being advanced by SCB, particularly in the light of the submissions made by Mr Coleman QC on behalf of VIP about SCB's arguments in the New York proceedings, with which I will deal in detail below, is that SCB was <u>not</u> contending before ICSID that it

was a party to the finance documents or that SCBHK had acted as its agent in purchasing the loan or otherwise.

35. SCB subsequently made an Application to ICSID on 5 February 2013 for Annulment of the Award. The Application was drafted by SCB's solicitors in London, Herbert Smith Freehills. Mr Coleman QC drew my attention to [8], which refers to: *"SCB's investment in Tanzania, by way of a loan made through its subsidiary, [SCBHK] to IPTL"* and to [22] which referred to SCB attempting from 2008 onwards: *"to exercise its rights under the Facility Agreement and related security arrangements"*. However I do not read the Application as a whole as seeking to put SCB's case any differently from the way in which it had previously been put before the ICSID Tribunal. Despite some loose language, particularly in [22], it was not being suggested that SCB, as opposed to SCBHK, was a party to the finance documents or that SCBHK had acted as agent for SCB. In any event, on 12 March 2013, the Application for Annulment was stayed by consent.

36. On 17 December 2012, the CAT issued its Revision Judgment in Civil Revision No. 1 of 2012. Having considered the various English authorities and textbooks, the CAT found that section 249 of the Tanzanian Companies Act had the clear effect that once a petition for an administration order was issued (as it had been in Cause No. 112 of 2009) no order could be made for the winding up of the company. The Order made by Kaijage J on 15 July 2011 completely failed to notice the requirements of the law. The CAT concluded at page 27 of its judgment:

> *"The High Court committed fatal irregularities in the conduct of the impugned proceedings. The revision inevitably dictates that all the proceedings in [Causes Nos. 49 of 2002 and 254 of 2003] as of 17/9/09 [the date the administration petition was issued by SCBHK] are a nullity. The rulings and orders made therein, including the winding up order of 15/07/2011 are accordingly revised, quashed and set aside."*

Having earlier accepted the submission of counsel for VIP that they were only dealing with legal points raised and that: *"issues such as whether [SCBHK] has locus standi or is a creditor of IPTL or not, must first and foremost be taken up and resolved by the High Court"* the CAT went on to order the hearing of the matter expeditiously before a judge of the High Court other than Kaijage J, including challenges to the competency of Cause No. 112 of 2009.

37. Following that CAT judgment, on 22 December 2012, VIP sent a memorandum to Mr Casson of SCBHK reiterating the arguments made in the letter before action that SCBHK was wrongfully representing that it was a creditor of IPTL and that it would claim U.S. $485 million damages but proposing a commercial settlement, alternatively agreement to a fast track hearing of VIP's application for security for costs and SCBHK's petition for the appointment of an administrator in Cause No. 112 of 2009, so that the rights and obligations of VIP and SCBHK in IPTL could be expeditiously determined as ordered by the CAT.

38. On 9 April 2013, Asyla the attorneys who had been purporting to act for Mechmar in Tanzania (not authorised by the Malaysian liquidators) served a petition and certificate of urgency in consolidated Causes Nos. 49 of 2002 and 254 of 2003 seeking determination of the petition for enforcement of the LCIA Award and orders that the consolidated proceedings be discontinued and that VIP comply with the arbitration clause in the Shareholders Agreement if minded to continue the dispute. On 16 April 2013, the liquidators of Mechmar applied to the Malaysian High Court for directions. The Court directed that only the liquidators had power and authority to act on behalf of Mechmar in Tanzania or anywhere else in the world.

39. The judge assigned to deal with the various Tanzanian proceedings was now Utamwa J. The consolidated Causes nos. 49 of 2002 and 254 of 2003 together with Cause 112 of 2009 came before him on 24 April 2013. Both Mr Malimi appointed by the liquidators of Mechmar and Mr Lutema of Asyla who had previously been purporting to act for Mechmar were in attendance and there was a dispute as to representation. Although it was evidently explained to the judge that the liquidators of Mechmar by whom Mr Malimi was instructed had been appointed by the Malaysian High Court and that they were now in control of the company, so that Mr Lutema's suggestion that there were two entities was incorrect, the judge ordered that the issue of representation was to be determined by a formal application to be made by the liquidators. The judge also rejected SCBHK's application for an interim administration order over IPTL.

40. The matter came back before Utamwa J on 7 May 2013 and he made orders, reflected in a written Order dated 5 June 2013 that (i) VIP's application against SCBHK for security for costs be heard before any other petitions; (ii) the issue of representation of Mechmar should also be determined before other petitions and (iii) both the provisional liquidator of IPTL and Mechmar were entitled to be heard on SCBHK's petition for the appointment of an administrator.

41. On 7 June 2013 VIP commenced proceedings in the state courts of New York against SCB. It is immediately noteworthy that these proceedings were commenced only against SCB, the parent company of SCBHK (on the basis that jurisdiction could be founded against SCB in New York) but not against SCBHK, no doubt because there would be no basis for the New York courts assuming jurisdiction over SCBHK. The reason for commencing these proceedings in New York at that time has not been vouchsafed by VIP in any of its detailed evidence filed in support of its application. However, it is tolerably clear that this was a tactical manoeuvre designed to put pressure on the SCB group as a whole elsewhere than in Tanzania. It also enabled VIP to advance arguments which could not properly have been advanced in this jurisdiction. This was essentially accepted by Mr Coleman QC, when he said that he could only settle a counterclaim in the English proceedings raising the allegations being made in New York if he had proper professional grounds to do so, the clear implication being that some of those allegations could not properly be pursued in England.

42. In its Complaint in New York, VIP asserted that SCB falsely claimed to own VIP's interest in IPTL. Various reasons were asserted as to why SCB (for whom strikingly it was alleged SCBHK had acted as agent) was not a secured creditor of IPTL. Primarily, it was asserted that the novation from Danaharta to SCB in 2005 was void as a matter of Tanzanian law because it was a disposition of the property of IPTL made after winding up proceedings had been commenced which, under section 172 of the Tanzanian Companies Ordinance, required the permission of the Tanzanian Court which had not been obtained.

43. On 9 July 2013, SCB removed the New York proceedings from the state courts to the District Court for the Southern District of New York, on the grounds that VIP's claims concerned the Shareholder Agreement which contained an arbitration clause falling within the scope of the Federal Arbitration Act. On the same day, 9 July 2013, there was a further hearing before Utamwa J in Tanzania. The learned judge: (i) gave permission to the provisional liquidator of IPTL to make submissions raising objections to SCBHK's petition for an administration order. TANESCO was making an application to be joined to the proceedings; (ii) held that the liquidators of Mechmar were not entitled to be heard on that application, because they were not yet a party to the main consolidated petition and (iii) gave permission to counsel for both Mechmar and the liquidators of Mechmar to file written submissions.

44. On 19 July 2013, SCBHK made a Revision Application (No. 130 of 2013) to the CAT to examine and revise all the Orders of Utamwa J subsequent to 24 April 2013 on the grounds of inconsistencies and irregularities which meant that despite the Order of the CAT of 17 December 2012, there were a number of live applications which were preventing the administration petition from being heard.

45. On 24 July 2013, SCB filed a Motion to Compel Arbitration and to Stay or Dismiss the Complaint before the District Court in New York. This was supported by (i) a Declaration by Mr Casson, managing director of SCBHK and (ii) a Memorandum of Law. The Memorandum of Law set out the basis upon which SCB alleged that VIP was obliged to arbitrate its dispute with SCB. This was not on the basis that SCB was party to the arbitration clause in the Shareholder Agreement or that it was a party to any of the finance documents, but rather on the basis of a theory of estoppel under New York law. The argument was that, since SCBHK had had assigned to it the rights under the Shareholder Agreement, they included the benefit of the arbitration clause so SCBHK could insist on arbitration. VIP could not avoid that consequence by suing SCBHK's parent, SCB, rather than SCBHK which was the entity which actually purchased the loan. Contrary to what was suggested on behalf of VIP, the Memorandum was careful to distinguish between SCB on the one hand and SCBHK on the other.

46. The alternative argument advanced in the Memorandum was that, if the claims by VIP were not to be arbitrated as they should be, the action in New York should be dismissed for forum non conveniens on the basis that the case had

nothing to do with New York and everything to do with Tanzania. The Memorandum stated on page 21:

> *"Here, there are two alternative fora for resolution of this matter-the arbitration to which VIP long ago agreed to resolve its shareholder disputes or, at a minimum, the Tanzanian Proceedings which VIP has vigorously prosecuted and continues to do so. It would be most disingenuous for VIP to complain that its home jurisdiction of Tanzania is inadequate to address a matter the facts of which are so integral to that country. Indeed, in earlier court filings, VIP has claimed that the Tanzanian court is "the only court" that can resolve the parties' dispute."*

47. As Mr Coleman QC rightly points out, it is striking that nowhere in the Memorandum is any mention made of the fact that all the finance documents contained non-exclusive English jurisdiction clauses with FNC waivers. Mr Davies-Jones QC for the claimants points out that SCB was not a party to any of the finance documents, so could not have relied upon any of the jurisdiction clauses. That is of course correct, but equally SCB was not a party to the Shareholders Agreement and yet relied upon it for its estoppel argument. Nonetheless, although at first blush it is somewhat surprising that SCB was not raising in New York an argument that another reason why New York was not a convenient forum was that the finance documents contained non-exclusive English jurisdiction clauses and were, in the main, governed by English law, it seems to me that, on analysis, Mr Davies-Jones QC is correct. Since SCB was not a party to any of the finance documents and it was no part of its case that SCBHK had acted as its agent in taking the novation and assignment, the presence of the jurisdiction clauses (which in any event expressly reserved and recognised the right to commence proceedings elsewhere) was strictly irrelevant to whether New York or Tanzania was the appropriate forum for the determination of VIP's claims against SCB.

48. A telephone conference was held in the District Court proceedings between counsel for VIP, counsel for SCB and the judge, Judge Marrero, on 5 August 2013. There is a dispute as to whether SCB's counsel expressly consented during that telephone conference to jurisdiction in Tanzania. However, it is not necessary to decide that issue, since as the judge himself pointed out in his subsequent ruling on 4 October 2013 referred to at [66] below, the argument proceeded on a false premise because, as he had held in his 23 September 2013 Order (also referred to at [65] below), SCB had represented to the Court both orally and in writing (in other words in the Memorandum of Law) that it viewed Tanzania as a proper forum and as an adequate alternative forum, thus representing implicitly that it would consent to Tanzanian jurisdiction.

49. As just indicated, following that telephone conference, Judge Marrero issued a Decision and Order dated 10 September 2013 in which he dismissed the case on forum non conveniens grounds. He recorded at page 2 that: "*The focus of the parties' dispute is whether VIP relinquished its 30 per cent interest in IPTL as collateral for a loan, now owned by the Standard Chartered*

subsidiary, made to IPTL". He referred to the litigation in Tanzania. Applying the relevant federal law of forum non conveniens he concluded at page 4 that: *"the Court finds that the Republic of Tanzania is an available and adequate forum for VIP's suit and that 'in the interests of justice and all other relevant concerns the action would be best brought in' the republic of Tanzania"*. He then made this Order:

> *"ORDERED that within ten days of the date of this Order defendant [SCB] shall submit to the Court a statement containing its agreement to consent to the jurisdiction of the appropriate court of the Republic of Tanzania for litigation of this matter, to accept service of process if sued by VIP in the Republic of Tanzania in connection with this action and not to assert any defense based on statute of limitation grounds that would not apply to bar the litigation if it were to proceed in this Court, and to comply with any final judgment rendered by the courts of the Republic of Tanzania with competent jurisdiction over the parties and the subject matter of this dispute."*

50. SCB was not happy with this Order since, on 19 September 2013, it wrote to the judge requesting a further conference, arguing that it would not accept the conditions and should not be compelled to litigate in Tanzania, on the grounds that VIP's complaint fell within the arbitration clause in the Shareholders Agreement and that VIP should be required to consent to submit to LCIA arbitration. It is quite obvious that the reason why SCB did not want to submit to the jurisdiction of Tanzania was because of events which had occurred in Tanzania since the date of the telephone conference and it is to those which I now turn before considering how matters developed in New York.

51. On 15 August 2013, VIP purported to sell its 30% shareholding in IPTL to the third defendant, PAP, pursuant to a Share Purchase Agreement. Of course, if the security documentation within the finance documents was valid, this purported sale was in breach of the covenants VIP had given in that documentation. On 21 August 2013, VIP wrote to the High Court of Tanzania, the Bank of Tanzania, the provisional liquidator of IPTL, TANESCO and "Standard Chartered Bank Plc" enclosing that Share Purchase Agreement.

52. On 26 August 2013, VIP served a Notice (in consolidated Causes Nos. 49 of 2002 and 254 of 2003) applying to the Tanzanian Court to withdraw its winding up petition in respect of IPTL (without prejudice to its right to pursue its U.S. $485 million claim for damages against SCB, SCBHK and the liquidators of Mechmar). The Notice advised the Provisional Liquidator of IPTL to hand over the affairs of IPTL, including the power plant, to PAP. It was not until 30 August 2013 that a draft Order was produced by VIP requiring the Provisional Liquidator to hand over the affairs of IPTL to PAP, though no date was provided for any hearing.

53. It is difficult to see on what basis VIP and PAP were entitled to that relief, since the Share Purchase Agreement related only to VIP's 30% minority

shareholding in IPTL. Mr Harbinder Sethi, the individual who is now the chairman of IPTL and PAP, claims in his evidence to have acquired Mechmar's 70% shareholding in IPTL by this stage from Piper Link, but this simply cannot be correct since: (i) in November 2010, Piper Link was ordered to deliver up the share certificates in Mechmar to the BVI court which is holding those certificates until further Order and (ii) pursuant to the Order of the Malaysian court, only the liquidators of Mechmar have authority to act on its behalf.

54. On 2 September 2013, IPTL's former lawyers LAA made an application, also in those consolidated causes, for an injunction seeking to restrain the release of the monies in the Escrow Account pending receipt by them of fees which were unpaid.

55. On 3 September 2013, VIP's application to withdraw its winding up petition and for an Order that the affairs of IPTL be handed over by the provisional liquidator to PAP, together with LAA's application came before Utamwa J. As at previous hearings, there was purported dual representation for Mechmar. Mr Lutema again attended ostensibly on behalf of Mechmar (thus ultimately instructed by Mr Sethi) and unsurprisingly had no objection to VIP's application. Mr Malimi again attended instructed by the Malaysian liquidators of Mechmar. He indicated that, apart from the withdrawal of the winding up petition, they did object to the application. Notwithstanding that his earlier Order of 5 June 2013 had provided that the issue of representation of Mechmar was to be resolved before other petitions and that the issue had yet to be resolved as at the date of the 3 September 2013 hearing, the judge refused to hear Mr Malimi, apparently on the basis that he had no application in the combined causes but only in Cause No. 112 of 2009. Given the significance of the Order that VIP was seeking that the affairs of IPTL be handed over to PAP, this refusal to afford the representative of the court appointed liquidators of the principal shareholder of IPTL the opportunity to be heard raising objections to the Order sought was, in my judgment, extraordinary, whatever the technicalities of Tanzanian procedure.

56. It is common ground that Mr Nyika, counsel for the share receiver and administrative receiver of IPTL, Ms Renju, who also had a holding brief for SCBHK's counsel, was present. In fact, Ms Renju and the Bank had only learnt of the hearing on the morning it took place. In an email Mr Nyika sent to DLA Piper, SCBHK's solicitors, later that day, he records that the court was not interested in hearing from any other party than VIP, Asyla for Mechmar (i.e. Mr Lutema) and IPTL, on VIP's Notice. Although the typed up note of the hearing (apparently from the judge's own handwritten notes) does not make any reference to refusing to hear other parties (other than Mr Malimi), that note is unlikely to be complete and I consider that it is more likely than not that the judge did decline to hear any party other than VIP, IPTL and Mr Lutema for Mechmar on VIP's application. This is borne out not only by Mr Nyika's email, but by the complaint made by SCBHK in its application to the CAT ten days later (referred to below) about the unfair conduct of the hearing. Again, given the significance of the Order which VIP was seeking, I consider

that the failure of the judge to hear objections from the share receiver/administrative receiver and SCBHK was quite extraordinary.

57. Utamwa J issued his ruling following that hearing on 5 September 2013. He ordered the withdrawal of the winding up petition and the termination of the appointment of the Provisional Liquidator. He also ordered the Provisional Liquidator to hand over the affairs of IPTL, including the power plant, to PAP, which had committed to pay off all legitimate creditors of IPTL. He recorded that the court had taken judicial notice of the agreement between VIP and PAP. He also found that Mr Malimi for the liquidators had no *locus standi* to address the court in objection because his client was not a party to the petition from the beginning and that although Mr Malimi tried to convince the court that he had made an intervener application, his application was in the other action, No. 112 of 2009. As I have said, whatever the vagaries of Tanzanian procedure, this refusal to hear substantive objections from counsel representing liquidators of the principal shareholder who had been appointed by the Malaysian High Court or, at least, to adjourn the hearing to enable an appropriate application to be issued by Mr Malimi, was extraordinary. To proceed to make an Order handing over the affairs of the company to a third party knowing that the liquidators and the share/administrative receiver had fundamental objections to the making of the Order, seems to me to have been both irregular and unjust. By his ruling, Utamwa J also dismissed LAA's application for an injunction.

58. On 6 September 2013, Ms Renju as administrative receiver of IPTL issued a claim against VIP and PAP in fresh proceedings in the Commercial Division of the High Court of Tanzania (Commercial Case No. 123 of 2013). This seems to be the claim which Mr Nyika talked about issuing at the end of his email to DLA Piper on 3 September. The claim stated that, as at 31 July 2013, IPTL owed SCBHK some U.S. $141 million principal and interest under the Facility Agreement and that, by reason of IPTL's default, Ms Renju had been appointed administrative receiver in December 2009 of all the assets and property of IPTL charged by the Security Deed. It was said that the effect of that appointment was that the right to control the undertaking and assets of IPTL was in the hands of Ms Renju and, in particular, the monies in the Escrow Account could not be dissipated without her consent. If VIP and PAP did dissipate monies from the Account, they would be converting monies under the control of Ms Renju. The relief sought included permanent injunctions: (i) restraining VIP and PAP from taking possession of, transferring or dealing with the monies in the Escrow Account and (ii) restraining them from interfering with the right of Ms Renju to manage and deal with the assets of IPTL charged in favour of SCBHK.

59. The administrative receiver also sought an interim injunction on an ex parte basis restraining VIP and PAP from dealing with the monies in the Escrow Account or any other assets of IPTL pending the hearing of their inter partes application. In her affidavit in support of the application, Ms Renju expressed her concern that PAP was going to seek to use the monies in the Escrow Account to pay the consideration due to VIP under the Share Purchase Agreement, since it was contemplated by the Share Purchase Agreement that

rights in the Escrow Account would be transferred to PAP and companies which were in the control of Mr Sethi.

60. On 10 September 2013, the date that Judge Marrero issued his Order in New York dismissing the New York proceedings, Ms Renju attended the IPTL power plant as administrative receiver and attempted unsuccessfully to take possession of the plant and the assets of IPTL. On the same day, her application for an interim injunction in Tanzania came before Makaramba J in the Commercial Division of the High Court. He refused to grant an interim injunction on an ex parte basis, on the grounds that there was no imminent danger to the monies in the Escrow Account and ordered that the application for an injunction be heard at an inter partes hearing on 2 October 2013.

61. Following her removal from the power plant, on 11 September 2013, Ms Renju issued a further claim in the Commercial Division of the High Court (Commercial Case No. 124 of 2013) against IPTL seeking a permanent injunction restraining IPTL from preventing the administrative receiver from entering the plant and exercising her lawful right to take possession and control of the assets. An interim injunction was sought on an ex parte basis, but Nchimbi J refused to hear the matter ex parte and ordered the parties to return inter partes the following day. On 12 September 2013, having heard counsel for the administrative receiver and IPTL, the learned judge refused to grant interim relief and gave directions for the filing of evidence and pleadings, with a mention before him on 3 October 2013.

62. On 13 September 2013, Mr Harbinder Sethi as Chairman and CEO of IPTL wrote (on letterhead of IPTL which described it as wholly owned by PAP) to TANESCO referring to the Order of Utamwa J of 5 September 2013. The letter requested that all monies in the Escrow Account be paid to IPTL, a demonstration, if one were needed, that the concerns expressed by the administrative receiver in her affidavit in support of the 6 September application for an injunction were well-founded and the judge's assumption that there was no imminent danger to the monies in the Escrow Account was misplaced.

63. On the same day, 13 September 2013, SCBHK applied to the CAT for a stay of execution of the 5 September Order of Utamwa J handing over the affairs of IPTL to PAP. The written submissions in support of that application pointed out: (i) that the Order had been made before the determination of the Bank's administration petition; (ii) that the Order was made despite the Bank, the administrative receiver and the Malaysian liquidators of Mechmar not being given an opportunity to be heard by the judge, which was manifestly unfair. However, somewhat curiously, the application to the CAT was made by SCBHK in the pending Revision Application it already had before the CAT (Civil Application No 130 of 2013 issued on 19 July 2013), rather than by way of a new Revision Application, perhaps because that earlier Revision Application concerned the earlier Orders of Utamwa J of which complaint was made.

64. This was the state of play in Tanzania when, on 19 September 2013, SCB wrote to Judge Marrero contending that it should not be compelled to litigate

in Tanzania. That letter was written in circumstances where it is tolerably clear that, in particular, the Order of Utamwa J of 5 September 2013 transferring all the affairs of IPTL to PAP without hearing the objections of the Bank, the administrative receiver/share receiver and the Malaysian liquidators of the majority shareholder of IPTL, must have caused SCB and SCBHK considerable concern as to whether they would obtain justice in Tanzania.

65. The response of Judge Marrero to the letter was a second Order dated 23 September 2013 adhering to the first Order and stating that SCB had previously represented to the Court, both orally and in writing, that it viewed Tanzania as the proper forum for the action and that the Court had relied upon those representations in reaching the decision embodied in the 10 September Order. Undeterred, on 27 September 2013, SCB wrote again to Judge Marrero raising a jurisdictional issue to the effect that he should have ruled on whether VIP's claim should be arbitrated before determining the forum non conveniens issue (in relation to which it was said to be "hotly contested" whether SCB had consented to the jurisdiction of Tanzania) and asking him to rule on that issue or, if not prepared to do so, to stay his Orders pending an appeal.

66. Judge Marrero's response in a further Order of 4 October 2013 was that SCB's argument proceeded from the faulty premise that there was a dispute as to whether it consented to jurisdiction in Tanzania. He then repeated what he said in his 23 September Order about the representations made by SCB and concluded:

> *"Because [SCB] previously informed the Court that Tanzania would be an adequate alternative forum, and thus at least implicitly that it would consent to Tanzanian jurisdiction, the doctrine of judicial estoppel bars [SCB] from withdrawing that consent. Judicial estoppel prevents a party from making a contradictory statement in a later stage of litigation based on the 'exigencies of the moment'…Permitting [SCB] to change its position on consent to Tanzanian jurisdiction after the Court had already announced its reliance on the prior representations would have an adverse impact on the integrity of the judicial process."*

67. Just to complete the course of proceedings in New York, SCB subsequently issued a motion for a stay pending an appeal against Judge Marrero's Orders and on 7 March 2014 the Court of Appeals for the Second Circuit granted the motion for a stay and denied VIP's motion to dismiss the appeal. The appeal was then heard on 15 December 2014 and on the same day the Court of Appeals made a Summary Order affirming the Orders of Judge Marrero, concluding that: *"based on the specific factual history of this case, the District Court's reliance on SCB's oral and written expressions of consent in granting SCB's motion to dismiss on FNC grounds was not clear error."* The appeal was dismissed and the stay lifted.

68. Returning to events in Tanzania, on 3 October 2013, TANESCO entered a settlement agreement with IPTL (now of course controlled by PAP) whereby

monies over and above those held in the Escrow Account were payable to IPTL. Then, on 21 October 2013, an agreement was made between the Government of Tanzania and IPTL directing the Bank of Tanzania as Escrow Agent to withdraw all the monies in the Escrow Account and pay them to a bank account of IPTL. Later, in November 2013, Mr Sethi wrote to the Bank of Tanzania asking them to pay the funds in the Escrow Account to an account of PAP at Stanbic Bank and on 28 November 2013, that payment was made. Subsequently, in February 2014, PAP paid VIP U.S. $75 million from its Stanbic Bank account, being the price of the shareholding due under the Share Purchase Agreement, a clear indication that, as the Bank had feared would happen, PAP had used the monies taken from the Escrow Account to fund the purchase of the shares. As set out below, there are now serious allegations being made in Tanzania about the circumstances in which the monies in the Escrow Account came to be taken and distributed.

69. The CAT ruled on SCBHK's application for revision in Civil Application No. 130 of 2013 in a Ruling dated 22 October 2013. The CAT ruled that the application, issued on 19 July 2013, was restricted to the proceedings before Utamwa J ending with the Order of 5 May 2013 and could not include revision of decisions of the learned judge made in September 2013, after the application was issued. Accordingly the decision of 5 September 2013 could not be the subject of revision. So far as the earlier decisions of 24 April and 3 and 5 May 2013 are concerned, the CAT upheld the preliminary objection of VIP that the application for revision in respect of those was filed outside the 60 day mandatory period from the date of the decision as prescribed by Rule 65(4) of the CAT Rules. Accordingly the CAT struck out the application.

70. The 6 and 11 September 2013 applications by the administrative receiver for injunctive relief against VIP/PAP and IPTL respectively in Commercial Cases Nos. 123 and 124 of 2013 came on for hearing on an inter partes basis before Makaramba J on 31 October 2013. Although there is evidence from Mr Makandege, the lawyer acting for the Provisional Liquidator, that this was a final hearing, it does not seem to me that it can have been, at least in the sense in which English lawyers would understand the word "final". It was clearly an interlocutory hearing for injunctive relief, albeit on an inter partes basis. Having said that, I accept that hearing was intended to be more than a mere mention.

71. At the outset of that hearing and without any prior warning, Mr Nyika on behalf of the administrative receiver told the learned judge that the applications were being withdrawn. The learned judge issued a Decree granting permission to withdraw the applications and ordered each party to bear its own costs. The evidence of the claimants' solicitor Mr Curle and of Mr Casson is that the applications were withdrawn because by this stage SCBHK had lost confidence in a fair and reliable result in the Tanzanian courts on those applications.

72. The defendants were highly critical of that explanation and pointed out that it was inconsistent with what was said by the Bank's Tanzanian lawyers later when resisting a costs order in relation to the withdrawal of the administration petition, when it was said that the reason for the withdrawal was that the

winding up petition was withdrawn. Mr Coleman QC pointed out that both explanations for the withdrawal cannot be correct. It seems to me that the suggestion that withdrawal of the administration petition was triggered by the withdrawal of the winding up petition is nonsense; after all, it was the 5 September 2013 Order which led the Bank and the administrative receiver to make the applications on 6 and 11 September 2013. It seems to me that the explanation given by Mr Curle and Mr Casson that the Bank had lost confidence in the Tanzanian system by the end of October 2013 is a much more plausible one and I see no reason not to accept it, although I suspect that there was also an element of loss of confidence in the Bank's Tanzanian lawyers.

73. On 13 November 2013, VIP commenced proceedings in Tanzania (Civil Case No. 229 of 2013) against SCB, SCBHK and SCB (Tanzania) Limited. The Plaint raised the same arguments as had been advanced against SCB in New York together with additional contentions. For the purposes of the summary of the claims set out in the following paragraphs I will refer to the defendants compendiously as "SCB". In summary it is alleged that: (i) the novation to SCBHK is void under Tanzanian law because it represented a disposition of property which required the leave of the Court once the winding up petition had been presented by virtue of the Companies Ordinance; (ii) that there were fatal defects in the novation notice which rendered it invalid, (iii) that SCB had falsely claimed that it had an interest in IPTL on the basis that it was a secured creditor when it knew that it was not a creditor at all, let alone a secured creditor; (iv) that SCB had collected substantial sums of money from IPTL to which it knew it was not entitled and had colluded with Mechmar and Wartsila in doing so; (v) that SCB had been falsely claiming to be sole shareholder of IPTL which had hindered expansion of the power plant and diminished the value of VIP's interest in IPTL; and (vi) that even if the novation was valid, SCB took the debt on an "as is, where is" basis from Danaharta and the debt was a "dirty debt" characterised by fraud, misrepresentation and collusion between the original lenders, Mechmar and Wartsila.

74. The Plaint then sets out how SCB had submitted to the New York Court that Tanzania was central to the dispute and the convenient forum as opposed to New York and how, subsequently, SCB had sought to resile from that position, but Judge Marrero had maintained his Order. This appears to have been designed to demonstrate that the dispute should be litigated in Tanzania rather than arbitrated, since the Plaint also refers to the ICSID arbitrations SCB had pursued or was pursuing against the Government of Tanzania and TANESCO. It goes on to contend that the false claims of SCB and the pendency of its ICSID arbitrations, predicated upon its misrepresentations as to its interest in IPTL has substantially impaired the value of VIP's interest in IPTL. The claim for damages amounting to U.S. $485 million is then set out. It is then alleged that the acts of SCB in dealing with matters relating to IPTL were fraudulent and amounted to corporate waste and negligence.

75. Whilst this Court is not in a position to determine what causes of action are arguable or what allegations are proper to make in Tanzania, it is quite

apparent that many of the allegations made in that Plaint are ones which are at best of dubious merit as a matter of English law, the law expressly governing the Facility Agreement. In particular, the contention that the novation or assignment of the debt owed by IPTL to Danaharta was a disposition of IPTL's property, which might be void because made after a winding up petition was presented, pursuant to the provisions of the Tanzanian Companies Ordinance, which are the equivalent of sections 127 and 129 of the Insolvency Act 1986, is one which would not be accepted by an English Court applying English law. That is not only because the suggestion that transfer of a debt owed by the company is a disposition of its property is not arguable, but because, even if it were, it would only be void where there was a winding up order by the Court. There is no such extant Order by the Tanzanian Court, the Order made by Kaijage J having been held to be a nullity by the CAT. Likewise, the contention that SCBHK had purchased a "dirty debt" is unsustainable as a matter of English law, since (i) with a novation, the Bank purchased the debt clear of equities and (ii) in any event, the Facility Agreement and other finance documents excluded the right of set off.

76. On 13 December 2013, SCB, SCBHK and SCBTZ filed a Defence to that Plaint, raising various preliminary objections, including that Tanzania was the incorrect forum for determination of the disputes, the correct forum being the English or Malaysian Courts (in accordance with the jurisdiction clauses) and/or arbitration. Then, on 23 December 2013, the present proceedings in England were commenced.

77. On 4 April 2014, IPTL and PAP issued their own Plaint in Tanzania against SCBHK, Ms Renju and TANESCO seeking a series of declarations, including that SCBHK is not a creditor of IPTL, together with a claim for damages in tort for U.S. $3.2 billion.

78. The events concerning the power plant, IPTL and in particular the distribution of the monies in the Escrow Account have become matters of intense public and political interest in Tanzania. On 14 November 2014, the Tanzanian Controller and Auditor General ("CAG") published a special audit report on the Escrow Account transactions and ownership of IPTL. That report was critical of the way in which the various transactions had been conducted and called for further investigations. That report was presented to the Public Accounts Committee ("PAC"). Then, only eight working days later, on 26 November 2014, the PAC published its own report which was extremely damning of the release of the monies from the Escrow Account. The key conclusions of the PAC report included:

    (1) That the monies were withdrawn without following the correct procedures and that Mr Sethi and then the Minister of Energy, the Attorney General and other high ranking government officials had incorrectly relied upon the 5 September 2013 Order.

    (2) That contrary to its assertions, PAP did not own IPTL, since it could not have purchased Mechmar's shares in the company (which remained owned by Mechmar and charged to SCBHK). The report found that Mr Sethi:

"intentionally and with the aim of receiving money cheated by submitting forged documents" in relation to the ownership of the Mechmar shares.

(3) That in September 2013 TANESCO had asked its lawyer and company secretary, Mr Godwin Ngwilimi, to go to Malaysia to carry out enquiries about PAP's purported ownership of IPTL. However, as the PAC Report records: *"During that time TANESCO Board conducted 'supersonic speed' meetings which accepted that the ESCROW money should be given to PAP without waiting for the advice of their officer"* and that when, in November 2013, Mr Ngwilimi raised concerns about PAP's alleged ownership of IPTL, *"the TANESCO Board did not agree with that advice and finally fired Mr. Godwin Ngwilimi."*

(4) That PAP was not entitled to any of the monies from the Escrow Account, that its receipt of the monies was illegal and that *"the whole process of withdrawing money from the Tegeta Escrow Account was completely shrouded in fraud, corruption and gross negligence…"*. The PAC Report found that the Minister for Energy and Minerals, Sospeter Muhongo: *"was a broker between Mr Harbinder Singh Sethi of IPTL [and PAP] and Mr Rugemalira of VIP"*; and that he *"did that brokering while he clearly knows that Mr Harbinder Singh Sethi has no legal rights to do business using the IPTL name."* The Report recommended that Mr Sethi be arrested for theft. The Report concluded that the Government should seek a review of the 5 September 2013 Order of Utamwa J in order *"to retract IPTL to its original state"*.

(5) That of the monies from the Escrow Account received by PAP, equivalent to some U.S. $125.7 million, U.S. $75 million was paid by PAP to VIP. Out of those monies, VIP made corrupt payments to a number of private individuals, including *"political leaders… judges and other government officials"*. The PAC Report identified payments of the equivalent of U.S. $990,000 each to the Attorney-General and the Minister of Housing and of the equivalent of U.S. $25,000 each to two former Ministers of Energy and Minerals, two High Court judges (although neither of them has had any involvement in the various proceedings in Tanzania involving SCB and SCBHK) and Mr Saliboko, the Provisional Liquidator of IPTL. In addition, a TANESCO board member, Dr Bukuku, received the equivalent of U.S. $100,000. The Report went on to note that cash payments equivalent to approximately U.S. $47 million were made by VIP and PAP to other individuals whose names do not appear on bank statements.

79. After the PAC Report was published, IPTL and PAP obtained an *ex parte* injunction from the Tanzanian High Court restraining the Tanzanian Parliament from debating the Report. However, Parliament did debate the Report and passed various resolutions, including that Government officials who had received payments from VIP should be dismissed, that the judges who received payments from VIP should be investigated and that the Government should consider nationalising the IPTL power plant and transferring it to TANESCO. On 18 December 2014, IPTL, PAP and Mr Sethi sought an injunction from the Tanzanian High Court against the Prime Minister, the Speaker of Parliament and others, to prevent implementation of

the parliamentary resolutions, which was not granted. They also lodged a constitutional petition challenging the resolutions on the basis that they are unconstitutional, depriving IPTL, PAP and Mr Sethi of their constitutional rights, including to a fair trial.

80. Subsequently, the Ministers of Energy and Minerals and Housing and the Attorney General either resigned or were dismissed. Five senior government officials have been charged with receiving corrupt payments from VIP, including the finance director of the Bank of Tanzania and the first Provisional Liquidator before Mr Saliboko. The two High Court judges are being investigated by a seven judge tribunal of enquiry. On 27 March 2015, Mr Saliboko was formally charged with corruptly obtaining the payment made to him by VIP which the Charge described: *"as a reward for having handled [IPTL] affairs in his capacity then as a provisional Liquidator"*.

81. Mr Coleman QC on behalf of VIP makes the perfectly valid point that it is difficult to see how the PAC Report can have been produced on the basis of the much more cautious CAG Report in only eight working days. He also submits that there is evidence that the PAC Report is politically motivated and that serious allegations are made against a number of individuals, including Mr Rugemalira, the principal of VIP, who had not even been interviewed, let alone allowed to provide their explanation of events. As Mr Coleman points out, in his evidence before this Court, Mr Rugemalira strenuously denies any wrongdoing. The highest it can and should be put is that there have been a number of ministerial resignations over the affair and there are criminal investigations and proceedings ongoing in Tanzania which may or may not eventuate in convictions which justify the conclusions of the PAC Report. I agree that, in circumstances where such criminal investigations and proceedings are ongoing, it would be quite wrong for this Court to reach any firm conclusions about the rights and wrongs of the allegations concerning the Escrow Account and the ownership of IPTL made in the PAC Report. I will return later in the judgment to the separate issue as to whether, as SCBHK contends, the allegations made demonstrate that it would not be possible for the Bank to obtain a fair trial in Tanzania.

82. Having set out the factual background to these applications in some detail, I turn to consider the various applications being made. I will consider first the applications being made for a stay on forum non conveniens grounds and the law in relation to such applications where there is an FNC waiver.

FNC waivers-the law

83. SCBHK contends that the effect of the FNC waiver when combined with the non-exclusive English jurisdiction clause in the finance documents is to preclude completely any application for a stay of these proceedings on FNC grounds. It is submitted that any other conclusion fails to give any effect to the addition to the non-exclusive jurisdiction clause of the FNC waiver since, even where the jurisdiction clause is non-exclusive, strong reasons would have to be shown for later arguing that England is not an appropriate jurisdiction and an applicant can only rely upon factors not foreseeable at the time the agreement was made: see *Highland Crusader v Deutsche Bank* [2009] EWCA Civ 725;

[2009] 2 Lloyd's Rep 617 per Toulson LJ at [50] proposition 7 and [64]. SCBHK also relies upon the judgment of Clarke LJ in *National Westminster Bank Plc v Utrecht-America Finance Co* [2001] CLC 1372 in support of the proposition that the effect of an FNC waiver is to preclude completely any application for a stay on FNC grounds.

84. Both sets of defendants submit that the correct legal analysis is that even an FNC waiver when combined with a non-exclusive jurisdiction clause does not preclude completely an application for a stay on FNC grounds, just as the existence of an exclusive jurisdiction clause will not preclude completely such an application. They accept however that the Court would only grant a stay on exceptional or at least strong grounds, where those grounds were not foreseeable at the time the agreement was made, in other words, something more than what might be described as traditional *Spiliada* convenience factors. They submit that this is the effect of decisions on non-exclusive jurisdiction clauses, taken with subsequent decisions on FNC waivers and that what was said by Clarke LJ in *Utrecht-America* was only an obiter dictum in a case where the specific issue did not arise for argument. Accordingly, what he said does not foreclose the analysis for which the defendants contend and, so it is submitted, the subsequent authorities upon which the defendants rely decline to follow the view of Clarke LJ and prefer the analysis which leaves open the argument that, if there are exceptional, unforeseen grounds for a stay, the FNC waiver will not preclude a stay.

85. These rival contentions necessitate an examination in some detail of the various authorities. An appropriate starting point is the decision of Hobhouse J in *S & W Berisford v New Hampshire Insurance* [1990] 1 Lloyd's Rep 454. That was a case where the learned judge found that the relevant clause was a non-exclusive jurisdiction clause but concluded that nonetheless it would require a strong case before the Court would say that the right given by the clause to sue in England should not be enforced. At 458 col. 2, the learned judge held:

> "Therefore I conclude that this clause is not an exclusive jurisdiction clause. As I pointed out in *Cannon Screen Entertainment Ltd. v. Handmade Films* (1989), such a conclusion does not mean that the clause ceases to be relevant in relation to an application such as that which is being made by the defendants on this summons. If the contract says that the assured is entitled to sue the underwriter in the English Court, then it requires a strong case for the Courts of this country to say that that right should not be recognised and that he must sue elsewhere."

86. Later in the judgment, when considering forum conveniens and discretion, the learned judge said at 463 col. 1:

> ". . . the fact that the parties have agreed in their contract that the English court shall have jurisdiction (albeit a non-exclusive jurisdiction) creates a strong

> prima facie case that that jurisdiction is an appropriate one; it should in principle be a jurisdiction to which neither party to the contract can object as inappropriate; they have both implicitly agreed that it is appropriate."

87. Those passages were approved by Waller J in *British Aerospace Plc v Dee Howard Co* [1993] 1 Lloyd's Rep 368 at 375. In that case the defendants had commenced proceedings in Texas notwithstanding what the learned judge found was an exclusive English jurisdiction clause and they contended that there had been an investment of time and costs in Texas and that their lawyers had developed experience in similar litigation elsewhere in the United States. Notwithstanding that he found that the clause was exclusive, at 375-377, Waller J deals with the alternative position if the clause had been non-exclusive and summarises the relevant principles in a way which has been approved many times since. Having cited *Berisford* he referred to the fact that the clause he was considering had been freely negotiated between the parties and continued at 376 col. 1:

> "I also remind myself of the language used by Mr. Justice Hobhouse in the *Cannon Screen case*:
>
> > 'Those parties have agreed to submit to English jurisdiction; they cannot object to its accepting that jurisdiction.'
>
> It seems to me on the language of the clause that I am considering here, it simply should not be open to DHC to start arguing about the relative merits of fighting an action in Texas as compared with fighting an action in London, where the factors relied on would have been eminently foreseeable at the time that they entered into the contract. Furthermore, to rely before the English Court on the factor that they have commenced proceedings in Texas and therefore that there will be two sets of proceedings unless the English Court stops the English action, should as I see it simply be impermissible, at least where jurisdiction in those proceedings has been immediately challenged. If the clause means what I suggest it means that they are not entitled to resist the English jurisdiction if an action is commenced in England, it is DHC who have brought upon themselves the risk of two sets of proceedings if as is likely to happen, BAe commence proceedings in England. Surely they must point to some factor which they could not have foreseen on which they can rely for displacing the bargain which they made i.e. that they would not object to the jurisdiction of the English Court.
>
> Adopting that approach it seems to me that the inconvenience for witnesses, the location of documents,

> the timing of a trial, and all such like matters, are aspects which they are simply precluded from raising. Furthermore, commencing an action in Texas, albeit that may not be a breach of the clause, cannot give them a factor on which they can rely, unless of course that action has continued without protest from BAe. One can well imagine that if BAe had taken part in the proceedings in Texas without protest and if the proceedings had reached the stage at which enormous expenditure had been incurred by both sides and the matter was accordingly nearly ready for trial in Texas, that such factors would obviously lead the English Court to exercise its discretion in favour of setting aside service of proceedings. That is very far from being the situation in relation to the Texas proceedings so far commenced.
>
> …
>
> It is thus clear to me that the proper approach to a case of the sort that I am considering is to consider it as equivalent to proceedings commenced as of right, to apply the passage in Lord Goff's judgment in *The Spiliada* dealing with such actions, but to add the consideration which he did not have in mind as pointed out by Mr. Justice Hobhouse in *Berisford*, that there is a clause under which DHC had agreed not to object to the jurisdiction. That being the proper approach, and additionally, it being (as in my judgment it is) right only to consider the matters which would not have been foreseeable when that bargain was struck, I would dismiss both summonses of the defendants."

88. That case was not one where there was an FNC waiver but it sets out the principle that, even where the English jurisdictional clause is non-exclusive, a defendant will not be able to obtain a stay of proceedings on the grounds that England is not a convenient forum without showing strong grounds to that effect which were not foreseeable when the agreement was made.

89. The position where the jurisdiction clause is exclusive is authoritatively stated by Lord Bingham of Cornhill (with whom the rest of the House of Lords agreed) in *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 Lloyd's Rep 425 at [24]:

> "If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by

> restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word "ordinarily" to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case."

90. One of the earliest cases to consider the effect of an FNC waiver with a non-exclusive jurisdiction clause is the decision of Rimer J in *UBS AG v Omni Holding AG* [2000] 1 WLR 916. He concluded at 924-5 that, contrary to the submissions of counsel for the claimant, the FNC waiver did not have the effect of depriving the court of any jurisdiction or discretion to stay the proceedings on FNC grounds and whilst he did not find it necessary to decide whether the circumstances in which the Court might grant a stay were as narrowly circumscribed as Waller J indicated in the *British Aerospace* case, he considered the defendant must: *"at least show strong reasons for claiming to be released from its bargain."*

91. *National Westminster Bank v Utrecht-America* [2001] EWCA Civ 658; [2001] CLC 1372 was a case where the contract contained a non-exclusive English jurisdiction clause with an FNC waiver. Utrecht-America commenced proceedings in California to obtain rescission of the contract. The Bank commenced proceedings in England seeking declarations that the Californian proceedings were begun in breach of contract and a permanent injunction to restrain Utrecht-America from continuing with those proceedings. The Bank did not seek an interlocutory injunction, but issued an application for summary judgment which Utrecht-America sought to resist, issuing its own application for a stay of the proceedings until after the conclusion of the Californian proceedings. The judge at first instance (Mr Peter Gross QC sitting as a Deputy High Court Judge) considered first the application for a stay which he rejected before going on to give summary judgment against Utrecht-America and to grant the permanent injunction which the Bank sought.

92. On Utrecht-America's appeal against the learned judge's decision to give summary judgment and grant the injunction, Clarke LJ recorded that Utrecht-America was not formally challenging the judge's refusal of a stay on the appeal, but he concluded that nonetheless logically the Court of Appeal had to

consider first the question whether a stay should be granted. He gave the reasons for that conclusion at [11] of his judgment:

> "It is clear from Utrecht's skeleton argument and indeed from Mr Brindle's oral submissions that the principal object of this appeal is to remove the injunction in order to enable Utrecht to continue its proceedings against NWB in California. The judge considered first Utrecht's application for a stay of this action before considering whether he should give summary judgment for NWB. He was in my judgment right to do so because, if it were appropriate to grant a stay, it would be wrong to consider the application for summary judgment since no question of giving judgment for NWB (whether summary or otherwise) would then arise. As already stated, the judge refused a stay. I do not understand Utrecht to be formally challenging that refusal on this appeal, but since the purpose of the appeal is to allow the Californian proceedings to continue to judgment ahead of the English action, it seems to me that logically the first question for consideration is indeed whether a stay should be granted or whether the English action should be allowed to proceed to judgment."

93. At [22] Clarke LJ noted that before the learned judge, there were two alternative bases in theory for a stay: one on the principle of forum non conveniens and the other on principles of case management. Clarke LJ continued at [23]:

> "The judge said that Mr Brindle did not press Utrecht's application for a stay on the ground of *forum non conveniens* because he recognised the force of the argument based on clauses 22.1 to 22.3 of the TOA. Mr Brindle did not seek a stay on that ground in this court either. He was in my judgment right not to do so because those clauses are fatal to any such case. Their effect is that each party submitted to the jurisdiction of the English courts, waived any objection it might otherwise have to the English courts on the ground of *forum non conveniens* or otherwise and agreed that any judgment or order of the English court in connection with the TOA would be conclusive and binding on it. Those clauses make any application for a stay on the ground of *forum non conveniens* unarguable."

94. Clarke LJ went on at [24]-[25] to reject the basis for a stay on which Mr Brindle QC had relied before the learned judge, namely case management grounds as recognised in the decision of the Court of Appeal in *Reichhold Norway ASA v Goldman Sachs International* [2000] CLC 11. He concluded that the judge had been right to conclude that whilst there was a jurisdiction to stay on case management grounds, the scheme of the non-exclusive

jurisdiction clause with FNC waiver told overwhelmingly against such a stay. Clarke LJ considered that it was no doubt because of the undoubted force of the learned judge's conclusions that Mr Brindle QC had not sought to argue before the Court of Appeal that the learned judge should have stayed the action. Rather, his submission was that the judge had been wrong to entertain the application for summary judgment.

95. Clarke LJ rejected that submission. In doing so, he summarised the position at [37]-[38] of his judgment, expanding on the point he had made at [23] quoted above:

> "37 The position as I see it may be summarised in this way. Utrecht cannot obtain a stay of these proceedings because of its promise in clause 22.3 to waive objection to the English courts on grounds of *forum non conveniens* or otherwise. Further, given that clause, Utrecht cannot rely upon such grounds to resist the granting a permanent injunction once it is held that the foreign proceedings are being pursued in breach of contract, especially in the light of clause 22.3(b). It would no doubt have been inappropriate to grant an interlocutory injunction to restrain the Californian proceedings at a time when it was no more than arguable that they were brought in breach of contract because it could not be said that they were vexatious or oppressive, especially in the light of the many factors connecting the case with California and having regard to clause 22.4 of the TOA, which expressly permits a party to bring proceedings in connection with the TOA in any court other than England.
>
> 38 However, for the reasons I have given, the position is radically different once it is held that Utrecht are in breach of contract in pursuing their claim in California. It follows that the question whether the judge was right to hold that Utrecht were in breach of the TOA in that regard is crucial to the outcome of this appeal and that the judge was entirely justified in embarking on NWB's summary judgment application."

96. There is no doubt from these passages in the judgment of Clarke LJ (with whose judgment the other members of the Court of Appeal agreed) that he was firmly of the view that the combination of a non-exclusive English jurisdiction clause and an FNC waiver was to preclude completely any application for a stay on FNC grounds. The real question for present purposes is whether, as Mr Davies-Jones QC for the Bank contends, that conclusion formed a necessary part of Clarke LJ's reasoning so that it can be said it formed part of the ratio of the decision and, therefore, is binding on this Court. I am unable to accept that contention. Quite apart from the fact that I should be reluctant to conclude that a point which had not in fact been argued on appeal (and it is quite apparent that before the Court of Appeal, extremely experienced commercial counsel

Mr Brindle QC did not argue for a stay at all) formed part of the ratio, it seems to me that, although Clarke LJ considered that logically he should consider the issue of stay first, his conclusion on the issue did not have a decisive impact on the actual ratio of his decision, that the Bank was entitled to the declarations and permanent injunctions it sought. In that context, it is also striking that, in none of the later cases where Clarke LJ's judgment has been considered did any court, appellate or first instance, consider itself bound by his view, on the basis that it formed part of the ratio of his decision.

97. However, the question remains whether, even if his view as to the FNC waiver being fatal to any stay on FNC grounds was obiter, it nonetheless represents the correct legal analysis, so that this Court should follow and apply it. I will return to this question when I have considered in more detail the subsequent authorities. In relation to some of these Mr Davies-Jones QC on behalf of SCBHK pointed out that they concerned applications for an anti-suit injunction rather than for a stay of English proceedings, so that different considerations applied to whether to grant the application. It is certainly correct that different considerations may apply to the two types of application. In particular, where the clause is non-exclusive and expressly contemplates the possibility of parallel proceedings in another jurisdiction, the Court will be unlikely to grant an injunction. However, it seems to me, having examined all the authorities carefully, that the analysis by the Curts of the effect of jurisdiction clauses with FNC waivers does not vary depending upon the nature of the application. Indeed in some of the cases there were cross-applications for an injunction and for a stay.

98. For example, the next case in terms of the chronology to which I was referred was the decision of the Court of Appeal in *Sabah Shipyard v Government of Pakistan* [2002] EWCA Civ 1643; [2003] 2 Lloyd's Rep 571, where there was a non-exclusive jurisdiction clause with an FNC waiver. The claimant sought an anti-suit injunction to restrain the Government of Pakistan from continuing proceedings in Pakistan and the Government sought a stay of the English proceedings. The Court of Appeal upheld the decision of David Steel J granting the injunction and refusing a stay. The main issue in the case was one of sovereign immunity, but the Court of Appeal also considered the effect of the jurisdiction clause and FNC waiver. Although *Utrecht-America* is not referred to in the judgment, Waller LJ does not seem to have thought that the existence of the FNC waiver precluded any argument that, in an exceptional case, another forum is a more convenient forum than England. At [37] he said:

> "In the instant case, on any view, the GOP agreed to submit to the jurisdiction of the English court. Furthermore, it appointed agents for the purpose of service in England, and it agreed to waive any objection that any action brought in England was being brought in an inconvenient forum. It seems to me that it cannot have been the intention of the parties that if proceedings were commenced in England, parallel proceedings could be pursued elsewhere unless there was some exceptional reason for doing so. It certainly cannot have

> been contemplated that convenience could count as a reason for pursuing proceedings in a country other than England. In particular, where England has been chosen as a neutral jurisdiction by an entity, Sabah a Pakistan company with Malaysian shareholders, and the State of Pakistan, it cannot have been contemplated that parallel proceedings would be pursued in the courts of Pakistan simply on the basis that that forum is a convenient forum."

99. *Royal Bank of Canada v Centrale Raiffeisen Boerenleenbank* [2004] EWCA Civ 7; [2004] 1 Lloyd's Rep 471 was a case where the claimant sought an anti-suit injunction in a case of a non-exclusive jurisdiction clause and an FNC waiver where the defendant had commenced proceedings in New York before the English proceedings. The injunction to restrain the New York proceedings was refused by Andrew Smith J and the Court of Appeal. In giving the first judgment in the Court of Appeal, Evans-Lombe J recognised in terms that one of the consequences of having non-exclusive jurisdiction clauses with an FNC waiver but an express reservation of the right to bring proceedings in another jurisdiction (such as the contracts provided in that case and in the present case) was that the clause:

> "4 …gives express sanction to the determination of those issues in proceedings in a court other than the English court and also expressly contemplates that proceedings to determine those issues might be run in parallel and simultaneously in a number of jurisdictions in addition to that of the English court. It does not expressly deal with what should happen should parallel proceedings throw up the possibility of simultaneous trials in different jurisdictions where the issues to be tried were substantially the same.
>
> 21 I agree with the judge. I would only add that it seems to me that by entering into an agreement containing a jurisdiction clause with provisions similar to the final paragraph of the jurisdiction clause in issue in this case, the parties must have had in contemplation the possibility of virtually simultaneous trials with all the additional burdens which the judge describes since such is an obvious possible consequence of permitting parallel proceedings in the absence of provision in the jurisdiction clause, or elsewhere in the agreement, for the means of avoiding those consequences."

100. This point about the express contemplation by such a clause of parallel proceedings with the potential for inconsistent findings is of relevance to the submission by the defendants that the existence of the proceedings they have all commenced in Tanzania should be a strong reason for a stay on FNC grounds, to which the short answer is that it cannot be, because as the analysis by Evans-Lombe J recognises, the possibility of parallel proceedings is

expressly contemplated by the contract and so cannot be unforeseen. That is a matter to which I return below.

101. For the purposes of the present issue as to whether the FNC waiver precludes any application for a stay on FNC grounds, the Bank relies in particular on [49] of the judgment of Mance LJ:

> "On 3 July 2002 RBC moved for dismissal of the New York suit on the merits, at the same time as moving to stay on grounds of *forum non conveniens*. Extensive evidence and argument took place on the motion to dismiss, including evidence of English law from Professor Ewan McKendrick and Mr Robin Potts QC. The motions were denied on 31st January 2003 and RBC's appeal was dismissed on 26th June 2003. When the present English action was before Moore-Bick J in January 2003 on Rabobank's unsuccessful application for a stay (which was carefully put on the basis of case management, not *forum conveniens*, having regard to clause 13(b)), RBC also expressly contemplated during submissions that, unless the New York judge ordered a stay, the New York suit might go first to trial and give rise to "estoppel consequences" (Core C2 p.424F-G))."

102. The Bank relied upon the last part of that passage as recognition by another Court of Appeal judge that the effect of the FNC waiver (clause 13(b) in that case) was to preclude any application for a stay on FNC grounds. However, in my judgment, Mance LJ was simply recording why the defendant had put its case in the way in which it had. He was not in any sense deciding that the FNC waiver did have that effect, not least because, as is clear from his judgment, the point was simply not argued.

103. *UBS v HSH Nordbank* [2009] EWCA Civ 585; [2009] 2 Lloyd's Rep 272 was concerned with an application for a stay of English proceedings on grounds of *forum non conveniens* where the contract contained an FNC waiver combined with an exclusive English jurisdiction clause so that it is not directly in point since the clauses in the finance documents in the present case are agreed to be non-exclusive. However, the judgment of Lord Collins (whose knowledge and experience of this area of the law might be thought to be unparalleled) at [99]-[101] in the Court of Appeal contains a useful analysis of how difficult it is to obtain a stay in the face of an English jurisdiction clause, let alone an FNC waiver:

> "99 There are a number of formidable difficulties arising from the jurisdiction agreement, which on this part of the appeal must be taken to apply to part of the dispute, in the way of HSH establishing its case for a stay. It is true that HSH would have a very good prospect of showing that there is another court with competent jurisdiction (the New York court) which is clearly or distinctly more appropriate than England for

> the trial of the action: *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460…
>
> 100 But against that, it is most unusual for an English court to stay proceedings brought in England pursuant to an English jurisdiction agreement. In *British Aerospace v Dee Howard* [1993] 1 Lloyd's Rep. 368, at 376, Waller J. said (in the context of an exclusive English jurisdiction clause) that it should not be open to a party to start arguing about the relative merits of fighting an action in the foreign jurisdiction as compared with fighting an action in London, where the factors relied on would have been foreseeable at the time that they entered into the contract. That case involved an application to set aside service out of the jurisdiction. It has been approved in this court in the context of an application to stay English proceedings (*Ace Insurance SA-NV* v *Zurich Insurance Co* [2001] EWCA Civ 173, [2001] 1 Lloyd's Rep 618, at [62], per Rix LJ) and of an application to restrain foreign proceedings in which the foreign court was asked to prevent a party suing in England pursuant to an English jurisdiction clause (*Sabah Shipyard (Pakistan) Ltd. v Islamic Republic of Pakistan* [2002] EWCA Civ 1643, [2003] 2 Lloyd's Rep 571, at [36], per Waller LJ) and it has been applied in many decisions in the Commercial Court.
>
> 101 The next difficulty is that there is an express agreement in the jurisdiction clause the effect of which is that HSH irrevocably waived any claim that proceedings had been brought in an inconvenient forum. In *National Westminster Bank v Utrecht-America Finance Co* [2001] EWCA Civ 658, [2001] CLC 1372, at [23], Clarke LJ thought it was "fatal" to any forum non conveniens case, whereas in *Sabah Shipyard (Pakistan) Ltd. v Islamic Republic of Pakistan*, ante, at [36] Waller LJ did not treat such an agreement as decisive, but thought that it underlined the point that the jurisdiction agreement would be overridden only in exceptional circumstances."

104. Lord Collins does not express a view as to which of these approaches is correct. However, in subsequent decisions in the Commercial Court, judges have tended to the view that the correct approach is that the existence of an FNC waiver with the jurisdiction clause does not mean that a stay on grounds of *forum non conveniens* is completely precluded, but that it will only be where there are particularly strong or exceptional grounds that such a stay will be granted. Thus, in *Bank of New York Mellon v GV Films* [2009] EWHC 2338 (Comm); [2010] 1 Lloyd's Rep 365, the clause was held by Field J to be

an exclusive jurisdiction clause and there was an FNC waiver. At [18] of his judgment, Field J dealt with the effect of an FNC waiver:

> "In my judgment, where a party has expressly agreed not to rely on convenience arguments in resisting the jurisdiction of the nominated court, that is a matter of very considerable significance, and in such a case especially strong grounds will be required before the exclusive jurisdiction clause can be departed from on grounds founded on convenience. The strong reasons relied on by Mr. Gruder are essentially three." [The judge then dealt with those reasons and held that they were not strong reasons for not enforcing the clause and refused the application for a stay.]

105. In *Deutsche Bank AG v Sebastian Holdings Inc* [2009] EWHC 3069 (Comm); [2009] 2 CLC 949, Burton J considered an application by the defendants to stay English proceedings on the ground that New York was a more convenient forum. The relevant contracts were subject to English law and contained exclusive or non-exclusive English jurisdiction clauses with FNC waivers. From [15] onwards of his judgment, the learned judge analysed what he described as the "hierarchy" of different types of jurisdiction clause:

> 15 As to the 'hierarchy', it is clear that the most 'stringent' form of jurisdiction clause is the exclusive jurisdiction clause. This has a positive and a negative impact. It prescribes one jurisdiction (or sometimes one of two, dependent upon specified circumstances), in which the parties must then litigate, often providing for methods of service and even for specific courts within the jurisdiction. As to the negative impact, it renders it a breach of contract for a party to issue proceedings against the other in any other jurisdiction than the agreed exclusive jurisdiction.
>
> 16 The next most stringent clause is a non-exclusive jurisdiction clause with a waiver of FNC. This will normally provide for one (or possibly more than one) jurisdiction in which a party may be sued by the other party, and there is a waiver of FNC, which means that the non-exclusive jurisdiction so chosen is elevated above others, because, with regard to that jurisdiction, but not as to any others, the parties agree not to assert that to be sued there would be inconvenient, oppressive or expensive. If a party then issues proceedings in the chosen, but non-exclusive, jurisdiction, and the other party then asserts *forum non conveniens*, that party is in breach of contract in doing so.
>
> 17 The lowest in the hierarchy is the non-exclusive jurisdiction. This may be accompanied by an

> *other jurisdiction acceptance* clause. This addition would seem only to make explicit what would, in any event, be implicit from the very fact that the chosen jurisdiction is not exclusive (and there is no FNC waiver), namely that (i) proceedings may be issued by a party without being in breach of contract in another jurisdiction (ii) there may thus even be parallel proceedings, inconvenient, expensive and burdensome though that may be, and giving rise to a risk of inconsistent judgments. Bingham LJ in *Du Pont v Agnew* [1987] 2 Lloyd's Rep 585 at 589 emphasised that the policy of the law must be to favour the litigation of issues once only. In *The El Amria* [1981] 2 Lloyd's Rep 119 at 128-9, Brandon LJ referred to the need to keep in mind the "*potential disaster*" of the risk of inconsistent decisions on the same issues inherent in a multiplicity of proceedings. However, in *Royal Bank of Canada v Coöperative Centrale Raiffeisen Boerenleenbank BA* [2004] 2 AER (Comm) 847 at paragraph 21, Evans Lombe J, with whom Thorpe LJ agreed, referred to an *other jurisdiction acceptance* clause, as, in his view, showing that the parties "*must have had in contemplation the possibility of virtually simultaneous trials, with all the additional burdens which the judge describes, since such is an obvious possible consequence of permitting parallel proceedings in the absence of provision in the jurisdiction clause, or elsewhere in the agreement, for the means of avoiding those consequences*". In *Highland Crusader Offshore Partners LP and others v Deutsche Bank AG* [2009] EWCA Civ 725 when overturning my grant of an injunction in the Commercial Court ([2009] 2 Lloyd's Rep 61), Toulson LJ, with whom Carnwath and Goldring LJJ agreed, stated, in terms, in paragraph 64 of his judgment, that "*a non-exclusive jurisdiction clause self-evidently leaves open the possibility that there may be another appropriate jurisdiction*". Gross J in *Import Export Metro Ltd v CSAV* [2003] 1 Lloyd's Rep 405 at 412 stated that "*while a multiplicity of proceedings is, in general, undesirable and very likely to some extent inconvenient, the gravity of the risks to which it gives rise and the weight to be given to this factor will turn on the facts of the individual case*".

106. At [18] Burton J goes on to cite the passage in Lord Bingham's speech in *Donohue*, which I cited above, for the proposition that even in the case of an exclusive jurisdiction clause, there may be strong reasons in the interests of justice for not giving effect to the clause. He then makes the point at [19] that: *"If even an exclusive jurisdiction clause will not trump a stay application, then at least a similar approach must follow in respect of a stay application*

brought on forum non conveniens grounds in breach of an FNC waiver clause." He goes on to cite Lord Collins' judgment in *UBS* and Field J in *Bank of New York Mellon*.

107. His conclusion on this issue is at [24] of the judgment:

> "It seems to me plain that, if there is to be an *exceptional* case, where *forum non conveniens* arguments are to prevail, *a fortiori* in an exclusive jurisdiction or FNC waiver case, but even in the case of non-exclusive jurisdiction, the burden on the applicant to establish such a case must be a heavier, perhaps, in exclusive jurisdiction cases, a much heavier, one than if there were no jurisdiction clause at all. If the matters were unforeseeable at the time of the contract, then the burden may be the more easily satisfied. If however the matters were foreseeable, for example if, as here, the parties entered into a series of interlinked agreements with different jurisdiction clauses, then it would not be possible to suggest – nor is it suggested here – that it was not foreseeable that a clash or contest of jurisdictions might not arise. In the absence of unforeseeability, and in this case in the absence of any impact on the parties, or on the issue of jurisdiction, of any third parties (such as featured considerably in *Donohue*), then the strong or very strong or exceptional grounds, said to engage the interests of justice and satisfy the necessary burden, must be all the more compelling."

108. Nothing in the Court of Appeal in that case affects that analysis. Mr Davies-Jones QC was critical of the analysis of Burton J on the ground that it fails to give any particular force to an FNC waiver, particularly where it is combined with an exclusive jurisdiction clause. Although I can see there is some force in this criticism, the counter to it is that Mr Davies-Jones QC's own principal contention (that the effect of an FNC waiver even where the jurisdiction clause is non-exclusive is to preclude any application for a stay) fails to address the point Burton J makes in [19] of his judgment, that if an exclusive jurisdiction clause fails to trump completely a stay application (as Lord Bingham held in *Donohoe*), how can an FNC waiver with a non-exclusive clause.

109. I consider that Burton J's analysis is correct and that, even where there is an FNC waiver with a non-exclusive jurisdiction clause, if very strong or exceptional grounds for granting a stay are demonstrated, the Court may in an appropriate case grant a stay, provided that the grounds in question can properly be described as unforeseen and unforeseeable at the time the agreement was made. In other words, the bargain which the defendant makes in entering a contract with an FNC waiver is that he will not seek to argue that England is not an appropriate forum in relation to *forum non conveniens* grounds which were foreseeable at the time that the relevant agreement was made.

110. What was clearly foreseeable at the time the finance documents were entered into was that there might well be parallel proceedings in another jurisdiction than England, here Tanzania, including that those proceedings might lead to inconsistent findings from those made in the English proceedings. This is clear not only from the judgments of Waller J in *Dee Howard* and of Evans-Lombe J in the Court of Appeal in *Royal Bank of Canada* but from the judgment of Moore-Bick J in *Mercury Communications v Communications Telesystems International* [1999] 2 All ER (Comm) 33. The judgments of Waller J and Moore-Bick J were recently cited with approval and applied by Stuart-Smith J in *Cuccolini SRL v Elcan Industries Inc* [2013] EWHC 2994 (QB), which was a case where there was an English jurisdiction clause, but express reservation of the right to institute proceedings elsewhere. Having set out the statements of principle in those cases and of Gloster J in *Amtec International Ltd v Biosafety USA Inc* [2006] EWHC 47 (Comm), at [22], the learned judge said:

> "Without limiting or paraphrasing these statements of principle, I note three points. First, while recognising that both "overwhelming" and "very strong" are elastic terms, I respectfully agree with and adopt Gloster J's use of those words in formulating the test that Elcan must satisfy. Second, I respectfully agree with and adopt Moore-Bick J's clear explanation why "particular weight should … attach to the fact that the defendant has freely agreed as part of his bargain to submit to the jurisdiction", which justifies the principled conclusion that he should be held to his bargain unless there are overwhelming reasons to the contrary. Third, I respectfully agree with and adopt the observations of Waller J and Moore-Bick J about the weight to be attached to the existence of proceedings brought in another jurisdiction. For the reasons they gave it seems to me that, where a party has freely agreed that the English Courts shall have jurisdiction, the fact that there are proceedings in another jurisdiction should of itself be afforded little weight since that state of affairs must have been within the reasonable contemplation of the contracting parties when they entered into their agreement, particularly where the agreement was that the English courts should have non-exclusive jurisdiction."

111. At [24] the learned judge stated that:

> "…in practice there seems to be little difference between an agreement such as the present which expressly recognises the right of the parties to bring proceedings in other courts having jurisdiction and an agreement which merely vests the English courts with non-exclusive jurisdiction. In either event, the possibility of proceedings in other jurisdictions must

> have been in the parties' reasonable contemplation when making their agreement, and they have vested the English courts with jurisdiction in that knowledge and contemplation."

112. Later in the judgment when applying those principles to the facts of the case, the learned judge dealt with a submission that because the proceedings in New York involved two other parties (Peters and Mr Ramsay), their involvement could not reasonably have been foreseen, the actual dispute in New York could not have been in the reasonable contemplation of the parties at the time of making of the contract. He rejected that submission in these terms at [31]:

> "It follows that it was foreseeable that an acrimonious termination might lead to disputes involving third parties and the making of allegations of conspiracy of the type that are now made by Elcan in the New York proceedings against Cuccolini, Peters and Mr Ramsay. I reject the submission that any greater level of specificity was required in what was foreseeable as being quite unrealistic; but I am satisfied that the facts alleged against Cuccolini, Peters and Mr Ramsay fall within the limits of what was foreseeable at the time of the conclusion of the contract."

113. That conclusion and his overall approach that only grounds which were not foreseeable at the time the contract was made could be relied upon in support of a stay are particularly pertinent in dealing with some of the arguments raised by the defendants in the present case, to which I turn in the next section of the judgment.

Are there very strong or exceptional grounds for granting a stay?

114. In support of their case that a stay should be granted notwithstanding the non-exclusive jurisdictional clause and FNC waiver, IPTL and VIP relied upon a number of what might be described as conventional *Spiliada* factors: (i) the defendants are all located in Tanzania; (ii) most of the witnesses are in Tanzania, including SCBHK's administrative receiver; (iii) the property said to be the subject of the security, the land and power plant, are situated in Tanzania; (iv) the issues on liability and quantum will necessitate factual investigations in Tanzania; (v) the Tanzanian lawyers and judges involved have developed a body of accumulated expertise and knowledge of this large scale and complex dispute; (vi) the Mortgage and Charge of Shares are governed by Tanzanian law and the English proceedings raise issues of Tanzanian insolvency and company law and (vii) there are two sets of parallel proceedings in Tanzania which raise the same core issue (as to the validity of the novation and whether SCBHK is a secured creditor) as in the English proceedings.

115. If the relevant contracts did not contain non-exclusive jurisdiction clauses and FNC waivers, those factors might well have considerable force in pointing to Tanzania as the most convenient forum for the determination of the dispute.

However, where there is a non-exclusive jurisdiction clause and an FNC waiver, they have little if any force as factors. With the possible exception of the point about the supposed expertise of the Tanzanian lawyers, all the factors relied upon were readily foreseeable at the time the contracts were entered into. In particular, it was foreseeable that if IPTL or its shareholders were to challenge the novation or the validity of the security, SCBHK might become involved in proceedings in Tanzania to enforce the security (even though SCBHK may have wished to litigate any substantive dispute in England or Malaysia). As Stuart-Smith J said in *Cuccolini* no greater level of specificity about the proceedings in terms of foreseeability is required. In other words, it does not matter for present purposes if the labyrinthine course the various proceedings in Tanzania have taken or the involvement of VIP and PAP were not specifically foreseeable, in circumstances where it was foreseeable that there would be proceedings in Tanzania.

116. Furthermore, the fact that the contracts contained a provision that any party had the right to take proceedings in another jurisdiction and that the taking of proceedings in one jurisdiction would not preclude a party from taking proceedings in another jurisdiction meant that it was expressly contemplated that there might be parallel proceedings continuing and moving towards trial in two or more jurisdictions at once, with the possibility of inconsistent findings, the point made by Evans-Lombe J in *Royal Bank of Canada*. In the circumstances, it is no answer for the defendants to point to the proceedings they have commenced in Tanzania, given that the contracts contemplated the possibility of such parallel proceedings. In any event, both sets of proceedings in Tanzania are at an early stage and nowhere near trial.

117. That brings me on to the one factor which might be said to be unforeseeable, that lawyers and judges in Tanzania would build up a body of experience and knowledge. This is an attempt by the defendants in this case to rely upon a *Cambridgeshire* factor. That is a reference to the decisive factor which led the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 to conclude that England was the most appropriate forum: that the issues as to carriage of sulphur on ships had been the subject of detailed consideration in the earlier case in the Commercial Court of *The Cambridgeshire* involving the same shipper in British Columbia and the lawyers, witnesses and experts had built up knowledge and experience from that earlier case about the carriage of sulphur.

118. In considering this point, it is instructive to see how the *Cambridgeshire* factor was described and analysed in the leading speech of Lord Goff of Chieveley in *Spiliada*:

> "But the crucial point, in the judge's view, was the *Cambridgeshire* factor. This was regarded, certainly by Neill L.J., as relevant; and in this I find myself to be in agreement. The criticism of the judge's view of this factor goes, therefore, to its weight, as Neill L.J. indicated when he said that it seemed to him that the judge attached far too much importance to this factor. With all respect, however, when I read the judgments of

> both the Lords Justices, I consider that they underrated it. I believe that anyone who has been involved, as counsel, in very heavy litigation of this kind, with a number of experts on both sides and difficult scientific questions involved, knows only too well what the learning curve is like; how much information and knowledge has to be, and is, absorbed, not only by the lawyers but really by the whole team, including both lawyers and experts, as they learn about the interrelation of law, fact and scientific knowledge, having regard to the contentions advanced by both sides in the case, and identify in their minds the crucial matters on which attention has to be focussed, why these are the crucial matters, and how they are to be assessed. The judge in the present case has considerable experience of litigation of this kind, and is well aware of what is involved. He was, in my judgment, entitled to take the view (as he did) that this matter was not merely of advantage to the shipowners, but also constituted an advantage which was not balanced by a countervailing equal disadvantage to Cansulex; and (more pertinently) further to take the view that having experienced teams of lawyers and experts available on both sides of the litigation, who had prepared for and fought a substantial part of the *Cambridgeshire* action for Cansulex (among others) on one side and the relevant owners on the other, would contribute to efficiency, expedition and economy - and he could have added, in my opinion, both to assisting the court to reach a just resolution, and to promoting a possibility of settlement, in the present case. This is not simply a matter, as Oliver L.J. suggested, of financial advantage to the shipowners; it is a matter which can, and should, properly be taken into account, in a case of this kind, in the objective interests of justice."

119. There is simply no equivalent to the *Cambridgeshire* factor in the present case, where none of the issues raised in the English proceedings (or for that matter the Tanzanian proceedings) has yet to be determined by the Courts in Tanzania. Of course it is true that the parties have been embroiled in proceedings in Tanzania for some six or seven years, but those have essentially been concerned with interlocutory matters. Even accepting that at the heart of all three sets of proceedings now extant is the same issue as to whether SCBHK is a secured creditor, that issue has yet to be decided by any Court. The proposition that the Tanzanian Courts have built up a body of knowledge and expertise which makes them better suited than the English Courts to decide issues which in large measure are ones of English law, only has to be stated to be rejected.

120. To the extent that the proceedings raise discrete issues of Tanzanian company or insolvency law, such as whether the novation was a "disposition of property" for the purposes of section 172 of the Tanzanian Companies Ordinance, the relevant Tanzanian legislation is based on and follows the wording of the English companies legislation. It is not suggested that the legislation is to be interpreted differently under Tanzanian law, other than possibly in one respect. This concerns the issue of the non-registration of the mortgage over the real property owned by IPTL. The case for the defendants is that the Security Deed (under which Ms Renju was appointed) was not registered and so is invalid or void as a matter of Tanzanian law. The defendants rely upon the decision of the CAT in *Shinyanga Regional Trading v National Bank of Commerce* [1997] TLR 78 in support of the proposition that want of registration makes the Security Deed and the mortgage of land and charge of shares void generally. However, as the Bank's Tanzanian law expert, Mr Zervos points out, that decision is not only per incuriam, because it was decided without reference to pre-1922 English authorities which are binding in Tanzania but it appears to ignore the express wording of section 79 of the Companies Ordinance, which makes it clear that lack of registration makes the charge void as against the liquidator and any creditor, not against the chargor himself.

121. The correct position on the basis of those pre-1922 decisions (*In re Ehrmann* [1906] 2 Ch 697 and *In re Monolithic* [1915] 1 Ch 643, 667-668 approved by the House of Lords in *Smith v Bridgend County BC* [2002] 1 AC 336 at [21]) is that failure to register does not make any charge void against VIP as chargor. Furthermore, in any event: (i) the Security Deed creates security interests governed by English law which cannot be discharged by any want of registration in Tanzania; (ii) there is documentary evidence before the Court from 1997 which strongly suggests that the charge over the shares was registered in Tanzania; (iii) even if VIP were right in its argument that want of registration rendered the charge void, that would constitute a breach by VIP of its obligations under clause 4.2.2 of the Shareholder Support Deed giving rise to a claim in damages; and (iv) even if the mortgage over the land was not registered, the promise in the Security Deed to grant security by way of a legal mortgage over the land amounted to an English law governed equitable mortgage, even over foreign land: see *Fisher & Lightwood's Law of Mortgage* 14th edition [3.1]; *Re Anchor Line (Henderson Bros) Ltd* [1937] 1 Ch 483. In all the circumstances, I consider that the Court best able to determine the issues of law which may arise, whether English or Tanzanian, is the English Court, the neutral forum selected in the jurisdiction clauses. Certainly there is no strong or exceptional reason why such issues of Tanzanian law as do arise on a proper analysis should be determined by the Tanzanian Courts rather than the English Court, especially since the relevant Tanzanian company and insolvency law is the same as or based on English law.

122. The defendants seek to make much of the fact that, for five years until it abruptly abandoned its applications at the end of October 2013, the Bank had been engaged actively and at times aggressively in the Tanzanian proceedings. It had never suggested that it was going to suddenly abandon those proceedings and, on the contrary, when the winding up petition was

withdrawn by Order of Utamwa J on 5 September 2013, the Bank engaged more actively than ever, by issuing its applications for injunctions on 6 and 11 September 2013, which would have been the subject of a final inter partes hearing on 31 October 2013.

123. Accordingly, submitted Mr Hardwick QC, the point had been reached which was contemplated by Waller J in *Dee Howard* : *"One can well imagine that if BAe had taken part in the proceedings in Texas without protest and if the proceedings had reached the stage at which enormous expenditure had been incurred by both sides and the matter was accordingly nearly ready for trial in Texas, that such factors would obviously lead the English Court to exercise its discretion in favour of setting aside service of proceedings."*

124. It seems to me that there are two answers to that submission. First, as a matter of fact, although both sides may well have incurred enormous expenditure in Tanzania, they have done so essentially on interlocutory battles, not in preparing for trial and the case is nowhere near ready for trial in any jurisdiction. In both jurisdictions the proceedings are still in their preliminary stages. The fact that the Bank abandoned the Tanzanian proceedings when it did does not strengthen the defendants' position if, as I have held, the proceedings had not at that point reached the stage Waller J was contemplating.

125. Second, Waller J was not concerned with a case of an FNC waiver and an express entitlement to pursue parallel proceedings elsewhere, such as the Court of Appeal had to consider in *Royal Bank of Canada* and such as applies here. In circumstances where parallel proceedings are contemplated and permitted, it cannot be an answer to the FNC waiver to point to the advanced stage that those parallel proceedings have reached. That is something which was foreseeable and cannot be said to be a very strong or exceptional reason for granting a stay in the face of the FNC waiver.

126. VIP also relied upon the fact that SCB had represented to the New York court that Tanzania was the appropriate forum and consented in the New York proceedings to the jurisdiction of Tanzania as a free-standing very strong or exceptional reason for the grant of a stay. I deal below with VIP's alternative case that those matters make the pursuit of the English proceedings an abuse of process. However, since in that context, as set out later in the judgment, I have concluded: (i) that there was no privity of interest between SCB and SCBHK in the New York proceedings; (ii) that the decision of the New York court does not give rise to an issue estoppel against SCBHK and (iii) that in any event, the pursuit of these proceedings is not an abuse of process, it necessarily follows that the conduct of the New York proceedings by SCB is incapable of amounting to a reason, let alone a very strong or exceptional reason, for allowing VIP to go behind its contractual bargain and obtain a stay.

127. It follows that none of the defendants can show a very strong or exceptional reason for the grant of a stay and that the applications for a stay on forum non conveniens grounds must be dismissed.

Stay on case management grounds

128. In *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173 at 186C-D, Lord Bingham CJ stated that stays on case management grounds would only be ordered in *"rare and compelling cases"*. In that case, the plaintiffs commenced proceedings against the defendant bank alleging negligent misstatement when the bank was acting for the sellers to the plaintiffs of a subsidiary company. After the bank applied for a stay of the proceedings, the plaintiffs commenced arbitration in Norway against the sellers pursuant to the arbitration clause in the sale agreement. The judge at first instance, Moore-Bick J, stayed the proceedings until after the determination of the arbitration, on case management grounds and the Court of Appeal upheld that decision. As that case demonstrates, the jurisdiction to order such a stay is concerned with the order in which decisions should be made and it was obviously sensible that the dispute with the seller there was determined first.

129. In *National Westminster Bank v Utrecht-America Finance* [2001] CLC 442, there was a non exclusive English jurisdiction clause and a FNC waiver providing that each party *"waives objection to the English courts on grounds of inconvenient forum or otherwise"* together with a provision expressly permitting a party to bring proceedings in any other court of competent jurisdiction and to bring proceedings concurrently in more than one jurisdiction. The defendants applied for a stay on case management grounds on the basis of the *Reichhold Norway* case. The judge at first instance Mr Peter Gross QC sitting as a Deputy High Court Judge rejected that application at [18] in these terms:

> "Granting the general desirability of guarding against the risk of conflicting judgments from courts in different jurisdictions, such considerations are decisively outweighed in this case by the scheme of the TOA which points overwhelmingly against the grant of a stay. Accordingly, while accepting that the court has in general the inherent jurisdiction to order a stay of proceedings and assuming that that jurisdiction has not been displaced by the terms of the TOA, in my discretion I dismiss the application."

130. That reasoning was approved and the decision upheld in the Court of Appeal ([2001] CLC 1,372) where Clarke LJ said at [24]-[25]:

> "The judge accepted that there was jurisdiction to grant a stay on that basis but rejected the submission that the action should be stayed, essentially because of the express terms of cl. 22 of the TOA. He said that, looked at overall, the scheme of cl. 22 tells overwhelmingly against a stay of the English proceedings so as to await the outcome of and effectively to grant precedence to proceedings elsewhere. In short, he said, such a stay would not reflect the bargain made by the parties.

> 25 I entirely agree with the conclusions of the judge in this regard and it was no doubt because of their undoubted force that Mr Brindle did not submit before us that the judge should have stayed the action."

131. In the present case, the terms of the FNC waiver provide that *"Each party irrevocably waives <u>any objection</u> which it may <u>at any time</u> have to the laying of venue of any Proceedings in any court referred to in this Clause 33"*(emphasis added). Mr Davies-Jones QC submits that the underlined words are intended to achieve the same result as the words *"or otherwise"* in the *Utrecht-America* case and that the same analysis should apply here. I agree with that submission. I also consider that, where as in the present case, the Court has concluded that there is no very strong or exceptional reason for granting a stay on FNC grounds, so that the defendants should be held to their contractual bargain, it would be quite wrong for the Court to then exercise its discretion to stay the proceedings on case management grounds, with the effect that key issues are decided elsewhere, in this case in Tanzania. It was no doubt in recognition of the force of these sorts of argument that neither Mr Hardwick QC nor Mr Coleman QC pressed the alternative case for a stay on case management grounds in their oral submissions. The applications for a stay on case management grounds are also dismissed.

Abuse of process

132. Although none of the defendants can therefore establish a basis for a stay on FNC or case management grounds, VIP has an alternative argument not available to IPTL and PAP. This is that SCBHK's conduct in commencing and pursuing the present proceedings is an abuse of process. Mr Coleman QC relied upon the well-known passage at the beginning of the speech of Lord Diplock in *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 at 536 to demonstrate that there are no fixed categories of abuse of process and that, if the Court finds there has been abuse, then it has a duty to strike out or stay the proceedings:

> "This is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

133. The case for VIP that there was an abuse of process by SCBHK was summarised by Mr Coleman QC in nine propositions, although for present purposes they can be telescoped into five propositions. First, as set out above in my summary of the factual background, the District Court in New York found that SCB had represented that Tanzania was the appropriate forum for the determination of the dispute with VIP and that judicial estoppel precluded SCB from contending that it did not consent to the jurisdiction of the Tanzanian Courts. That decision was upheld by the Court of Appeals.

134. Second, it is submitted by VIP that there is privity of interest between SCB and SCBHK as regards the representations made to the New York court and as regards the issue of the appropriate forum for the determination of the claims made by VIP in New York. As a consequence of that privity of interest, SCBHK is to be taken to have consented to those claims being determined in Tanzania and is bound by the decision of the New York court as to the appropriate forum for the trial of those claims.

135. Third, the evidence of VIP's solicitor, Mr Novak, is that VIP commenced its proceedings in Tanzania against SCB and SCBHK in reliance on that consent of SCB and SCBHK to the jurisdiction of the Tanzanian courts and in reliance on the decision of the New York court that SCB had consented. VIP has incurred substantial cost in pursuing those proceedings. Those proceedings raise the same key issues, specifically whether SCBHK is a secured creditor of IPTL, as the New York proceedings and the proceedings before this Court.

136. Fourth, there has been no material change of circumstances since the original decision of Judge Marrero such as would justify a collateral attack by SCBHK on that decision. The bringing of the present proceedings is a collateral attack on that decision that Tanzania was the appropriate forum for the determination of the key issues.

137. Fifth, SCBHK is issue estopped from disputing that Tanzania is the appropriate forum for the determination of those key issues and, since SCBHK cannot prove by cogent evidence that there is a real risk that it cannot get a fair trial in Tanzania, its commencement and continuation of these proceedings in England is an abuse of process.

138. I will deal later in the judgment with the issue of a fair trial in Tanzania, but leaving that issue to one side, SCBHK challenges each of these propositions, at least in so far as they are said to affect the position of SCBHK. Although, as I have already said in setting out the factual background, SCBHK's formal position is that SCB did not make the representations alleged and did not consent to Tanzania as the appropriate forum, the position is clear: the finding of the District Court that SCB had made the representations and was to be taken to have consented to the jurisdiction of Tanzania was upheld on appeal and it would not be open to SCB itself to go behind that finding, so that SCBHK also cannot challenge before this Court the finding made against SCB. As I see it, however, there are two critical issues for consideration in assessing whether the present proceedings are an abuse of process: (i) whether there was privity of interest between SCB and SCBHK as regards the matters decided by the New York court and (ii) if there was privity, what issue was

decided which can be said to give rise to an issue estoppel against SCB and, thus, against SCBHK or can be said to make the pursuit of these proceedings an abuse of process. For present purposes, I assume in VIP's favour that it can establish that it commenced the Tanzanian proceedings in reliance on SCB's representations and that there has been no material change of circumstances since the various Orders made by Judge Marrero.

139. The test of what constitutes privity of interest was stated by Megarry V-C in *Gleeson v J Wippell & Co* [1977] 1 WLR 510 at 515, where having considered earlier authorities including the decision of the House of Lords in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 2)* [1967] 1 AC 853, the Vice-Chancellor said:

> "Privity for this purpose is not established merely by having "some interest in the outcome of litigation." So far as they go, I think these authorities go some way towards supporting the contention of Mr. Jacob that the doctrine of privity for these purposes is somewhat narrow, and has to be considered in relation to the fundamental principle nemo debet bis vexari pro eadem causa.
>
> I turn from the negative to the positive. In *Zeiss No. 2* [1967] 1 A.C. 853, 911, 912, Lord Reid suggested that if a plaintiff sued X and established some right in that action, a servant or third party employed by X to infringe the right and so raise the whole question again should be regarded as being a privy of X's in subsequent proceedings, for it would be X who would be "the real defendant." Lord Reid agreed with a statement which applied the rules of res judicata to subsequent proceedings brought or defended "by another on his account," that is, on X's account.
>
> This is difficult territory: but I have to do the best I can in the absence of any clear statement of principle. First, I do not think that in the phrase "privity of interest" the word "interest" can be used in the sense of mere curiosity or concern. Many matters that are litigated are of concern to many other persons than the parties to the litigation, in that the result of a case will at least suggest that the position of others in like case is as good or as bad as, or better or worse than, they believed it to be. Furthermore, it is a commonplace for litigation to require decisions to be made about the propriety or otherwise of acts done by those who are not litigants. Many a witness feels aggrieved by a decision in a case to which he is not party without it being suggested that the decision is binding upon him.

> Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase "privity of interest." Thus in relation to trust property I think there will normally be a sufficient privity between the trustees and their beneficiaries to make a decision that is binding on the trustees also binding on the beneficiaries, and vice versa.
>
> Third, in the present case, I think that the matter may be tested by a question that I put to Mr. Skone James in opening. Suppose that in the Denne action the plaintiff, Miss Gleeson, had succeeded, instead of failing. Would the decision in that action that Wippell had indirectly copied the Gleeson drawings be binding on Wippell, so that if sued by Miss Gleeson, Wippell would be estopped by the Denne decision from denying liability? Mr. Skone James felt constrained to answer Yes to that question. I say "constrained" because it appears that for privity with a party to the proceedings to take effect, it must take effect whether that party wins or loses. As was said by Buckley J. in Zeiss No. 3 [1970] Ch. 506, 541 (where the question was rather different) 'The relationship cannot be conditional upon the character of the decision.'"

140. This formulation of the test for privity of interest was approved by Lord Bingham of Cornhill in *Johnson v Gore Wood* [2002] 1 AC 1 at 32. The earlier authorities were also considered and usefully summarised by Arnold J in *Resolution Chemicals v Lundbeck A/S* [2013] EWHC 739 (Pat) at [100]:

> "The conclusions which I draw from this survey of the authorities are as follows:
>
> i) The test for privity of interest is whether, having due regard to the subject of the matter of the dispute, there is

> a sufficient degree of identification between the relevant persons to make it just to hold that the decision to which one is party should be binding in the proceedings to which the other is party: *Gleeson v Wippell* approved in *Johnson v Gore Wood*.
>
> ii) Where someone who has knowledge of the earlier proceedings and a legal interest in their outcome sits backs and allows another person with the same legal interest in the outcome to fight his battle, he will be a privy with the other person: *House of Spring Gardens*. But this is a narrow exception to the general rule that a person will not be bound by the outcome of proceedings to which he is not a party: *Skyparks v Marks, Powell v Wiltshire, Seven Arts v Content*.
>
> iii) A direct commercial interest in the outcome of the litigation is insufficient to make someone a privy: *Kirin-Amgen v Boehringer Mannheim*.
>
> iv) Whether members of the same group of companies are privies or not depends on the facts: *Special Effects*."

141. That decision was upheld in the Court of Appeal ([2013] EWCA Civ 924; [2014] RPC 5) where, having reviewed the earlier authorities, Floyd LJ at [31]-[32] formulated the test in a more general way, but one which still suggests that a mere commercial interest in the outcome of the litigation will not suffice to make someone a privy:

> "31 It is not necessary for the purposes of this appeal to seek to define precisely what interest in the subject matter of the previous litigation is required. The sort of interest dismissed by Sir Robert Megarry in Gleeson in his first principle is clearly inadequate. There are passages in the judgment of Aldous L.J. in *Kirin-Amgen Inc v Boehringer Mannheim GmbH* [1997] FSR 289 which suggest that a legal interest may be necessary in the subject matter of the previous action as opposed to a commercial interest: see pp.307–309. I have not found that a particularly helpful criterion in the present case which is solely concerned with successive revocation actions. At one level Arrow and Resolution had the same legal interest in the revocation of the Patent, but that was a legal interest which they shared with all the world. If Resolution is to be bound, it must I think be possible to identify some more concrete consequence for its business which revocation of the Patent would have achieved. Unless that is so, although it can be said that Resolution could have joined the 2005 proceedings, there is no reason to hold that they should.

> 32 Drawing this together, in my judgment a court which has the task of assessing whether there is privity of interest between a new party and a party to previous proceedings needs to examine (a) the extent to which the new party had an interest in the subject matter of the previous action; (b) the extent to which the new party can be said to be, in reality, the party to the original proceedings by reason of his relationship with that party, and (c) against this background to ask whether it is just that the new party should be bound by the outcome of the previous litigation."

142. In support of VIP's case that there was privity of interest between SCB and SCBHK, Mr Coleman QC relied upon a number of matters: (i) that the Memorandum of Law filed by SCB in the District Court proceeded on the basis that there was no material distinction between SCB and SCBHK and on the basis that they had a common interest; (ii) that SCBHK through Mr Casson was aware of and approved the stance of SCB because (a) he made a Declaration in support of SCB's motion and (b) VIP had asserted such awareness and approval in its evidence in support of its present application, which had not been denied by SCBHK and (iii) the corporate relationship between SCB and SCBHK was such that both had a financial interest in the New York claims and the recoverability of the loans.

143. In my judgment, none of these matters establishes a sufficient privity of interest so as to bind SCBHK to the decision of the New York court. First, so far as the assertion that the Memorandum of Law drew no distinction between parent and subsidiary is concerned, as I have already noted in considering the Memorandum in the Factual Background section of the judgment, this is simply not correct. In the critical passages of the Memorandum, care was taken to draw a distinction between SCB and SCBHK and the legal theory of New York law upon which the application to stay the New York proceedings in favour of arbitration recognises expressly that SCB is not a party to the relevant finance documents and that SCBHK was not its agent. Whilst, as Mr Davies-Jones QC accepted, in other places the language of the Memorandum is a little sloppy, overall it seems to me that the only fair characterisation of the document is that it was seeking to maintain the distinction between SCB (which was subject to the jurisdiction of the New York court because it carries on business in New York) and SCBHK (which has no place of business in New York and is thus not subject to the jurisdiction of those courts).

144. Second, awareness and approval of the course being taken by SCB in New York is not sufficient to establish the necessary privity of interest so as to bind SCBHK to the decision of the New York court. As the passages I have cited from *Gleeson v Wippell* and *Resolute Chemicals* demonstrate, merely having some commercial interest in the litigation and assisting as Mr Casson did by providing a witness statement is insufficient to establish the necessary privity of interest: see also *Phipson on Evidence* 18th edition [43-29]. VIP originally sought to argue that SCBHK had "authorised" the stance taken by SCB as opposed to merely approving. That argument was not pursued and, in any

event, to the extent that it depended upon establishing that SCB in some way acted as agent for SCBHK, the point was hopeless. It is correct that VIP alleged in New York that SCBHK was SCB's agent, but even if that allegation had any basis, which it does not, it is completely inconsistent with the reverse allegation that SCB was SCBHK's agent.

145. Third, the corporate relationship and financial interest alleged cannot on any view be sufficient to establish privity of interest. The contrary conclusion would effectively drive a coach and horses through the doctrine of separate corporate personality and lead to piercing of the corporate veil, something which is not to be encouraged given the limited scope ascribed to the doctrine of piercing the corporate veil by the Supreme Court in *Prest v Prest* [2013] UKSC 34; [2013] 2 AC 415. Furthermore, as *Resolute Chemicals* demonstrates, a mere commercial interest in the outcome of litigation against SCB is insufficient to establish privity of interest. Applying Floyd LJ's test, even though in one sense SCBHK could be said to have a commercial interest in its parent company not being sued in New York, by no stretch of the imagination could it be said that SCBHK was in reality the party to the New York proceedings, not least because there was no jurisdiction there to join SCBHK as a defendant.

146. Furthermore, other matters point strongly against any conclusion that there was privity of interest. It is of some significance that SCB was a defendant in New York in proceedings where there was no jurisdiction against SCBHK. Where SCB's involvement was involuntary and it had to employ whatever tactics it thought expedient to stave off proceedings in New York, it would be an odd conclusion that its subsidiary company, which was not a party to those proceedings and could not have been made a party to those proceedings without its express consent, should be held to be bound by those tactics through the doctrine of privity of interest.

147. In his speech in *Johnson v Gore Wood* [2002] 2 AC 1 at 60C-D Lord Millett emphasised the importance of caution where the claimant in the second action is a different party from the claimant in the first action:

> "Particular care, however, needs to be taken where the plaintiff in the second action is not the same as the plaintiff in the first, but his privy. Such situations are many and various, and it would be unwise to lay down any general rule. The principle is, no doubt, capable in theory of applying to a privy; but it is likely in practice to be easier for him to rebut the charge that his proceedings are oppressive or constitute an abuse of process than it would be for the original plaintiff to do so."

In my judgment, that need for caution is all the greater where the claimant in the second action, here SCBHK, is not only a different party to SCB but SCB was involuntarily involved in the first action in New York as a defendant, not as a claimant. Furthermore, if that caution needs to be exercised even where the claimant in the second action is the privy of the party in the first action, the

need for caution is all the greater where there is no question of privity of interest.

148. Furthermore, I agree with Mr Davies-Jones QC that one of the points made by Sir Robert Megarry V-C in *Gleeson v Wippell* which is illuminating in testing whether there is privity of interest here is his citation from Buckley J in *Carl Zeiss No 3*: *"The relationship cannot be conditional upon the character of the decision."* In other words, one of the ways of testing whether there is privity of interest between SCB and SCBHK is to ask what would have happened if SCB's motion to stay the New York proceedings had completely failed and VIP's proceedings against SCB had gone ahead in New York. Since SCBHK was not a defendant in New York and there was no jurisdiction to make it a defendant, it is difficult to see how it could in any sense have been "bound" by that decision of the New York court or how that decision could have prevented SCBHK from exercising its contractual right to sue VIP in England. If the result of the litigation cannot determine whether there is privity of interest, then it seems to me that it must follow that there was no privity of interest between SCB and SCBHK and SCBHK was not bound by the decision of the New York court, whatever that decision might have been.

149. Accordingly, in my judgment, there was no privity of interest between SCB and SCBHK, from which it must follow that no question arises of the decision of the New York court giving rise to an issue estoppel against SCBHK or of the pursuit by SCBHK of the present proceedings being an abuse of process and VIP's alternative application fails on that ground alone.

150. However, even if I had held that there was privity of interest, I would not have concluded that there was an issue estoppel against SCBHK or that the present proceedings were an abuse of process. So far as issue estoppel is concerned, Mr Davies-Jones QC referred me to [14-032] of *Dicey, Morris & Collins: The Conflict of Laws* 15th edition where the requirements for issue estoppel arising from a decision of a foreign court are set out:

> "It was established by a majority of the House of Lords in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)*http://login.westlaw.co.uk/maf/wluk/app/document?&srguid=ia744d0640000014db36704216c02b052&docguid=IEE0F368056C611DC9088AD3B8D6ED6B4&rank=1&spos=1&epos=1&td=1&crumb-action=append&context=2&resolvein=true - v1_14-032.fn132#v1_14-032.fn132 [1967] 1 AC 853, 917, 925, 967, that a foreign judgment could give rise to an issue estoppel, *i.e.* prevent a party from denying any matter of fact or law necessarily decided by the foreign court. For there to be such an issue estoppel, three requirements must be satisfied: first, the judgment of the foreign court must be (a) of a court of competent jurisdiction in relation to the party who is to be estopped, (b) final and conclusive and (c) on the merits; secondly, the parties to the English litigation must be the same parties (or their privies) as in the foreign

> litigation; and, thirdly, the issues raised must be identical."

151. It seems to me that VIP's argument that the decision of the New York court gives rise to an issue estoppel fails because the third of those requirements is not satisfied. The issue before the English court is not the same issue as was before the New York court. It is important to focus on what the relevant "issue" decided in New York was. Mr Coleman QC submitted that the issue in both sets of proceedings was the same issue, whether the claim was made in contract or in tort, in essence whether SCBHK was a valid secured creditor of IPTL or not. Whilst he is no doubt right that both the proceedings brought by VIP in Tanzania and the present proceedings in England would in due course involve determination of that core "issue", that is not the issue decided by the New York court.

152. The "issue" which the New York court has decided is that, as between New York and Tanzania, the appropriate forum for the determination of VIP's claim in tort is Tanzania. What the New York court has not decided, because it was not asked to consider, let alone decide, the point, is which forum would be the appropriate forum for the determination of a claim by SCBHK in contract against VIP under the Shareholder Support Deed and Charge of Shares, contracts containing non-exclusive English jurisdiction clauses with FNC waivers. That is the issue currently before this Court and, for the reasons I have already set out in dismissing the defendants' stay applications, the sort of conventional forum conveniens factors which the New York court had to determine in relation to the tort claim simply do not arise and are of no relevance where there is a jurisdiction clause and a FNC waiver. Only factors which were unforeseeable at the time the contract was made are of any relevance and it will only be if they amount to a very strong or exceptional reason for a stay that the jurisdiction clause and the FNC waiver will be overridden. Accordingly, the only issue decided by the New York court, that Tanzania rather than New York was the appropriate forum for the determination of the tort claim, is a different issue from the issue now before the English Court and, as I have said, the substantive issues raised in the Tanzanian and English proceedings have yet to be decided anywhere. On this ground alone the argument that there is an issue estoppel fails.

153. In support of his case that that there could be no issue estoppel against SCBHK, Mr Davies-Jones QC also submitted that part (a) of the first requirement set out in *Dicey* could not be satisfied because, vis-à-vis SCBHK, the New York court had no jurisdiction and thus could not be a court of competent jurisdiction. He accepted that the authorities cited in the footnotes to [14-32] of *Dicey* do not specifically support the proposition in the text that the foreign court must be a court of competent jurisdiction "in relation to the party who is to be estopped" and, with great fairness, he referred me to the speech of Lord Brandon of Oakbrook in *The Sennar (No.2)*[1985] 1 WLR 490 at 499 where his Lordship stated the requirements for issue estoppel in these terms:

> "…in order to create an estoppel of that kind, three requirements have to be satisfied. The first requirement

> is that the judgment in the earlier action relied on as creating an estoppel must be (a) of a court of competent Jurisdiction, (b) final and conclusive and (c) on the merits. The second requirement is that the parties (or privies) in the earlier action relied on as creating an estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same. The third requirement is that the issue in the later action, in which the estoppel is raised as a bar, must be the same issue as that decided by the judgment in the earlier action."

154. Nonetheless, Mr Davies-Jones QC submitted that the additional words: "in relation to the party who is to be estopped" evidently reflected the views of Lord Collins and were obviously correct since, if the foreign court had no jurisdiction over the party sought to be estopped, as in the present case, then there could and should be no issue estoppel arising from the foreign judgment. Mr Coleman QC on the other hand submitted that the additional words were an impermissible gloss. He referred me to the passage at [1.02] of *Spencer Bower and Handley: Res Judicata* 4th edition setting out the constituent elements for what they describe as *res judicata* estoppel, which encompasses both issue estoppel and cause of action estoppel (see [1.05]):

> "(i) the decision, whether domestic or foreign, was judicial in the relevant sense;
>
> (ii) it was in fact pronounced;
>
> (iii) the tribunal had jurisdiction over the parties and the subject matter;
>
> (iv) the decision was –
>
> final;
>
> on the merits;
>
> (v) it determined a question raised in the later litigation; and
>
> (vi) the parties are the same or their privies, or the earlier decision was in rem."

155. As Mr Coleman QC points out, that passage has well in mind the distinction between parties and their privies and, whilst it is a requirement that the foreign court had jurisdiction over the parties, Spencer Bower does not suggest some further requirement that the court would have had jurisdiction over a privy. He relied upon the fact that this formulation of the requirements for establishing an issue estoppel was approved by Lord Clarke in *R (Coke-Wallis) v Institute of Chartered Accountants* [2011] UKSC 1; [2011] 2 AC 146 at [34] in the context of cause of action estoppel and by Eder J in *Sinha v Secretary of State*

for the Home Department [2013] EWHC 711 (Admin) at [5]-[12] in the context of issue estoppel.

156. Neither of those authorities considers the specific question whether the foreign court has to have been a court of competent jurisdiction in relation to the party sought to be estopped where that party is the privy of someone who was a party to the relevant foreign proceedings over whom the foreign court had jurisdiction. Like Mr Davies-Jones QC, Mr Coleman QC was not able to identify any case in which this specific issue had been decided. However, he submitted that the argument that to found an issue estoppel the foreign court must have had jurisdiction over the privy who is sought to be estopped cannot be reconciled with the reasoning of the majority of the House of Lords in *Carl Zeiss (No. 2)* [1967] 1 AC 853.

157. In that case, the appellants Carl Zeiss sought an injunction against the respondents who in turn sought to stay or dismiss the action on the grounds that it was commenced without the appellants' authority. The Federal Supreme Court of West Germany had found that the Council of Gera (which was instructing the appellants' solicitors in England) had no authority to represent the appellants. The respondents argued that that finding gave rise to an issue estoppel on the issue whether the appellants' solicitors were acting without authority. The majority of the House of Lords considered that in reality the issue estoppel was being asserted against the solicitors, against whom an order for costs was being sought: see per Lord Reid at 910C-E; Lord Hodson at 928E; Lord Guest at 936E-F and Lord Upjohn at 944B-D. There is no suggestion that the English solicitors had been subject to the jurisdiction of the German court. On the contrary, as Lord Reid found at 911E, the judgment had nothing to do with them and, as Lord Guest found at 937C, they had no knowledge of the judgment.

158. The House of Lords did not, however, reject the argument that there was an issue estoppel against the solicitors on the ground that the German court had had no jurisdiction against them, but on the ground that they were not the privies of the Council of Gera. It is evident from the reasoning that, if their Lordships had considered there was privity between the solicitors and the Council of Gera, they would have held that there was an issue estoppel. For example at 912G Lord Reid said:

> "…if these solicitors were bringing this action on account of or for the benefit of the council of Gera, I would hold that res judicata could be pleaded against them."

159. I agree that the reasoning of the House of Lords does not suggest that if privity had been established, it would have been an answer to there being an issue estoppel that the German court had no jurisdiction over the solicitors. Although it is not strictly necessary to decide the point because I have held that there is no privity and, in any event, the issue is not the same, it seems to me that the better view is that where someone is the privy of a party against whom the foreign court had jurisdiction, there is no additional requirement in order to establish issue estoppel, that the privy would have been subject to the

jurisdiction of the foreign court. Rather, it seems to me that the absence of jurisdiction of the foreign court goes to the question of whether someone is a privy of a party, but once privity is established, the question of the jurisdiction of the foreign court over the privy is irrelevant. Accordingly, I do not consider that Mr Davies-Jones QC's alternative ground for alleging that there is no issue estoppel would succeed, but since I have concluded that there was no privity of interest and that the issue before the New York court was not identical to the issue before this Court, no question of any issue estoppel arises in any event.

160. Given my conclusion that there was no privity of interest between SCB and SCBHK in the New York proceedings, there can be no question of the commencement or continuation of the present proceedings being an abuse of the process of this Court by SCBHK. However, even if there was a privity of interest, I do not consider that there can be any question of abuse of process for a number of reasons. First, as I have already held, the issue before the New York court was a different issue to the issue before the English Court. The New York court was concerned with the appropriate forum for the determination of the tort claims by VIP against SCB. The question of what the effect was of the jurisdiction clauses and FNC waivers as between VIP and SCBHK was simply not an issue before the New York court, so that there can be no question of the raising of that question before the English Court being a collateral attack on the decision of the New York court.

161. Second, it is quite clear that in the absence of privity of interest and issue estoppel, the scope for any argument that the present proceedings are an abuse of process, is extremely limited. Mr Coleman QC relied upon a passage in the judgment of Sir Andrew Morritt V-C in the Court of Appeal in *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321; [2004] Ch 1 at [38], where having reviewed the earlier authorities on abuse of process from *Hunter* onwards, the Vice-Chancellor said:

> "If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute."

162. In my judgment, that passage does not assist Mr Coleman QC here because there is no question of any issues being "relitigated" in England: the relevant issues have yet to be litigated anywhere and in any case there is no question of manifest unfairness to VIP if they are held to their contractual bargain as regards jurisdiction. Nor, in any sense, does the continuation of these proceedings bring the administration of justice into disrepute in England as a consequence of what was said by SCB in New York.

163. That brings me on to the third reason why there is no abuse of process. There is an obvious question mark as to whether, in the absence of an issue estoppel, it can be said that a collateral attack on the decision of a foreign court (even if the current proceedings were such a collateral attack, which they are not) is an abuse of process of this Court or can be said to bring the administration of justice in this jurisdiction into disrepute. The only authority which Mr Coleman QC was able to cite which supported any such wide ranging proposition was the decision of Mr Jeremy Cousins QC sitting as a Deputy High Court Judge in the Chancery Division in *Polegoshko v Ibragimov* [2014] EWHC 1535 (Ch). That case concerned an application by the defendants to restrain the claimants from taking proceedings against them abroad. The application was unsuccessful and one of the grounds relied upon by the claimants in resisting the application which seemed to find favour with the Deputy High Court Judge at [35] was that the Lithuanian courts had already pronounced upon the particular issue, so that the application was a collateral attack on the judgments of those courts.

164. It seems to me that that was a conclusion which depended on the particular facts of that case and was not laying down any general principle that, absent issue estoppel, the raising of an issue in English proceedings which had been decided or considered by a foreign court where contentions were being advanced in England contrary to the conclusions of the foreign court could amount to an abuse of the process of this Court. Any such general principle would be far reaching and would extend the conclusory effect of decisions of foreign courts beyond the scope of the principles of res judicata estoppel in an impermissible manner. In my judgment, unless an issue estoppel can be established (which it cannot in the present case) the pursuit of proceedings in England, even if they involve some form of collateral attack on the decision of a foreign court, cannot amount to an abuse of the process of this Court.

Is there a real risk of injustice if the proceedings go ahead in Tanzania?

165. In the circumstances, given my conclusions that (i) there are no very strong or exceptional reasons for a stay of the English proceedings, in the face of the jurisdiction clauses and FNC waivers and (ii) there are no grounds for concluding that these proceedings are precluded by issue estoppel or otherwise an abuse of process, it is not strictly necessary to decide whether the Bank's alternative basis for contending that the case should proceed in England, that there is a real risk that justice would not be obtained by the Bank in proceedings in Tanzania, is correct. Nonetheless, I will deal with the point in case this matter goes further, without thereby suggesting that I consider that the case raises any issues which require determination by the Court of Appeal.

166. The relevant test as to what a party needs to establish in relation to whether it will obtain justice in a foreign jurisdiction is that formulated by Lord Collins in giving the judgment of the Privy Council in *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804. Having considered the earlier English authorities, which to an extent conflicted with one another, Lord Collins stated the applicable test at [95] in these terms:

> "The better view is that, depending on the circumstances as a whole, the burden can be satisfied by showing that there is a real risk that justice will not be obtained in the foreign court by reason of incompetence or lack of independence or corruption. Of course, if it can be shown that justice "will not" be obtained that will weigh more heavily in the exercise of the discretion in the light of all other circumstances."

167. Lord Collins went on to point out at [97] that:

> "Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required."

168. Although the Bank did not rely specifically on the various decisions of the Tanzanian courts in the proceedings which have occupied the last seven years in support of its case that there was a real risk that justice could not be obtained, no doubt because a number of those decisions have gone in favour of the Bank, it is an important starting point to consider those decisions in assessing whether there is a real risk of injustice. Whilst it is true that, as I have said above, some of the first instance decisions appear irregular and unjust to an English lawyer's eyes, it seems that the CAT is well able to rectify any shortcomings in first instance decisions. Thus, the decision to make a winding up order and the subsequent rulings notwithstanding the presentation of the Bank's administration petition were overturned by the CAT in a forcefully expressed judgment of 17 December 2012, which was very much in the Bank's favour and hardly indicative that justice cannot be obtained.

169. So far as the decisions of Utamwa J in April and May 2013 are concerned, the Bank sought to appeal those by its Revision Application of 19 July 2013, but the problem was that that Application was issued outside the strict 60 day time limit under the CAT Rules, which meant that the CAT dismissed that Application on that technical ground, evidently with some reluctance. The fact that a legal system has strict time limits which have to be complied with is hardly indicative that justice cannot be obtained, as can be seen by analogy with the strict regime in respect of relief against sanctions now in place under the CPR. If the Bank was out of time, that was not attributable to injustice in the Tanzanian system but to the fault of the Bank's Tanzanian lawyers in missing the deadline.

170. Equally, whilst, as I have held, the decision of Utamwa J on 5 September 2013 to transfer the affairs of IPTL to PAP notwithstanding the objections of Mechmar's liquidators and of the administrative receiver without giving them any opportunity to be heard, does appear irregular and unjust, there is no reason to suppose any injustice would not have been rectified by the CAT if a proper application had been made to it. Instead, what the Bank's lawyers did was seek to appeal that decision by tacking it on to the earlier Revision Application. Perhaps unsurprisingly, the CAT said a decision of the High Court post-dating the Revision Application could not be included in that

Application. There is no evidence that the Bank's Tanzanian lawyers sought to issue a regular Revision Application in respect of the 5 September decision within the 60 day limit under the CAT Rules or that the CAT refused to entertain such an application, so that once again, the fault would seem to lie with the Bank's lawyers not the CAT. Given the correct and robust analysis of the CAT in its judgment of 17 December 2012 in the Bank's favour, I consider there is no basis for any suggestion that, if an appeal against the various decisions of Utamwa J had been properly before the CAT, they would not have dealt with the Bank's appeal justly.

171. In support of its case that there is a real risk of injustice in Tanzania, SCBHK relied upon three specific matters; (i) general evidence and reports of judicial corruption in Tanzania; (ii) evidence of "threats" by Mr Sethi, including boasts that he could make corrupt payments to the judiciary to procure a decision adverse to SCBHK and (iii) the evidence from the PAC Report of corrupt payments having been made, including to two High Court judges and also of state interest in the outcome of the Tanzanian proceedings.

172. Taking those matters in turn, Mr Davies-Jones QC referred the Court to a Report of Transparency International dated 7 March 2014 headed: "Tanzania: Overview of corruption and anti-corruption". Page 8 of that Report contains a section on the judiciary in these terms:

> "Judiciary
>
> Observations on the independence of the judiciary are mixed. While the Bertelsmann Foundation (2014) notes that the judiciary generally functions relatively independently, Freedom House (2013) views it as under political influence. Many experts do perceive the judiciary to be largely inefficient, underfunded and susceptible to corruption (Bertelsmann Foundation 2014, Freedom House 2013, Business Anti-Corruption Portal 2013). In line with this assessment, executives surveyed in the Global Competitiveness Report gave judicial independence in Tanzania a 3.2 in a score of 1 (judiciary is heavily influenced) to 7 (judiciary is entirely independent), and an average of 3.9 of all measured countries (World Economic Forum 2013).
>
> As a result, corrupt officeholders are reportedly not adequately prosecuted (Legal and Human Rights Centre 2013). Officeholders may be asked to resign or may be dismissed but beyond that, officials rarely suffer other punishment (Bertelsmann Foundation 2014). In particular, any potential wealth accrued from the alleged activities is retained by the corrupt officeholder (Bertelsmann Foundation 2014).
>
> GCB data confirms that citizens perceive the judiciary as one of the most corrupt institutions. Of respondents

> in the GCB 2013, 86% state that the judiciary is corrupt, with 52% also reporting having paid a bribe when accessing judicial services (Transparency International 2013b). Through its Legal Sector Reform Programme, the government of Tanzania aims to strengthen the capacity of its legal staff. In 2006-2008, with the support of USAID, the government initiated an anti-corruption training programme that would strengthen the judiciary's ability to investigate and prosecute corruption cases".

173. Mr Davies-Jones QC also relied upon a 2012 Human Rights Report on Tanzania from the U.S. State Department. On page 10 there appeared the following:

> "e. Denial of Fair Public Trial
>
> The constitution provides for an independent judiciary, but the judiciary remained underfunded, corrupt (see section 4), inefficient (especially in the lower courts), and subject to executive influence. Court clerks reportedly continued to take bribes to decide whether to open cases and to hide or misdirect the files of those accused of crimes. According to news reports, magistrates of lower courts occasionally accepted bribes to determine the outcome of cases."

174. Section 4 of the Report was headed "Corruption and Lack of Transparency in Government" but, as Mr Davies-Jones QC accepted, contained nothing specific about the judiciary. As I indicated during the course of argument, it seems to me that generalised reports of corruption of this kind, which are no doubt produced in relation to many countries and which in any event seem to be directed at the lower echelons of the judiciary are not cogent evidence of a real risk of SCBHK being unable to obtain a fair trial in Tanzania: see further on this issue the decision of Andrew Smith J in *Ferrexpo AG v Gilson Investments Ltd* [2012] EWHC 721 (Comm); [2012] 1 CLC 645 and my judgment in *Erste Group Bank v Red October* [2013] EWHC 2926 (Comm) at [199]-[230] which was not challenged in the Court of Appeal on this point ([2015] EWCA Civ 379 at [24]).

175. Mr Davies-Jones QC next relied upon evidence from Mr Casson of threats from Mr Sethi. The first of these was said to have been a threat by Mr Sethi on 14 November 2012 to have Mr Casson arrested when next he came to Tanzania. In his evidence Mr Sethi denied making that threat but Mr Casson produced an email he sent to SCBHK's lawyers on that day headed "Sethi threat" which states: "*The Bank is concerned about the Sethi threat to Kieran that I would be arrested on arrival*". It appears therefore that a threat was made, but Mr Casson does not seem to have taken it seriously, since he continued to travel to Tanzania and in any event the threat must have been an idle one, since he has never been arrested.

176. Next, SCBHK relied upon evidence from Mr Casson of a conversation which he said took place in a coffee shop at a hotel in Dar es Salaam on 20 December 2012, when he contended Mr Sethi said he and VIP were working together to find a way to have SCBHK's debt rejected which Mr Casson interpreted as working to procure that result improperly. This allegation collapsed when Mr Sethi was able to show he had left Tanzania two days earlier and gone to Malaysia. In a second witness statement Mr Casson accepted that he must have been mistaken as to the date and venue of the conversation but maintained it had taken place at about that time, possibly on the telephone.

177. SCBHK also relied upon evidence from Mr Casson of a conversation after the 5 September 2013 order of Utamwa J when Mr Sethi said he had: *"lined up events"* to ensure SCBHK's claim to be a creditor was rejected and another conversation on 1 November 2013 when Mr Sethi stated he had: *"had the judges wired"* to reject SCBHK's claim. Mr Casson says the same threat that he could arrange for the claim to be rejected was made by Mr Sethi in another four way conversation also involving Mr Makandege and the General Manager of IPTL.

178. The problem with all this evidence from Mr Casson is that, in his witness statements, Mr Sethi vehemently denies making the alleged statements or threats, so that the Court is placed in an impossible position. It would be quite wrong, on an interlocutory application, to seek to determine a contested issue which turns on oral evidence, especially given the seriousness of the allegations and I decline to make any findings about this. However, even if the allegations were made out, I do not consider that, whether on their own or in conjunction with the other matters relied upon by SCBHK, they amount to cogent evidence of a real risk that SCBHK could not obtain a fair trial in Tanzania.

179. Finally, SCBHK relied upon the PAC Report. In his oral submissions Mr Davies-Jones QC put this point as one of reliance on the corrupt payments out of the Escrow Account to government ministers and officials and to judges and the cash payments of some U.S. $47 million to other unidentified individuals. However, as I have already held, the highest it can be put is that there is some evidence of corrupt payments and that the matter is the subject of criminal and other investigations in Tanzania and, in any event, there is simply no suggestion anywhere in the Report that judges who have heard the various applications and appeals in Tanzania have received corrupt payments. In my judgment, this all falls a long way short of cogent evidence of a real risk that there could not be a fair trial.

180. Mr Davies-Jones QC suggested in his submissions that the Government of Tanzania had a vested interest in SCBHK losing the litigation, in the sense that it would want the court in Tanzania to make findings which would ensure that government officials were not criticised for having paid secured assets to someone else. However, I do not consider that there is any basis for that suggestion. The PAC Report itself and the subsequent developments point to the Government taking the allegations of corruption and wrongdoing extremely seriously.

181. Furthermore it seems to me that Mr Coleman QC was correct in his submission that whichever judge tried this case in Tanzania would be subject to intense public and media scrutiny both nationally and internationally so that the concept of the trial being tainted by corruption seems to me to be a fanciful one. Overall, I consider that there is no cogent evidence of a real risk that SCBHK would not obtain a fair trial in Tanzania so that I would decide this point against SCBHK.

182. Finally on this issue, there was some suggestion from Mr Davies-Jones QC that, even if I did come to the conclusion that there was cogent evidence of a risk of injustice, I should nonetheless regard the evidence, for example about the corrupt payments detailed in the PAC Report, as highly relevant to the issue whether the neutral forum in the non-exclusive English jurisdiction clause should be displaced. I agree with Mr Hardwick QC that this would be a dangerous course which would, in effect, enable SCBHK to achieve the same result without complying with the requirement of cogent evidence. Had the point been relevant, I would have rejected it, but as it is, the point is academic, since I have concluded that none of the defendants shows any very strong or exceptional reason for a stay.

Alleged failure in the duty of disclosure

183. The applications also contend that, on the *ex parte* application for permission to serve out of the jurisdiction, SCBHK failed in its duty of full and frank disclosure to the Court. Since it is now accepted that SCBHK was entitled to serve IPTL and VIP as of right in England, this point can only now be relevant to the application for permission to serve out against PAP. The point was not pressed hard in oral submissions by any of the defendants, but I will deal with it briefly.

184. Four matters are relied upon in the second witness statement of Mr Novak, VIP's solicitor. First it is contended that the circumstances in which SCB had made representations to the New York court about the appropriateness of Tanzania were not fully and frankly disclosed. It is said that there was a welter of unnecessary detail in the 118 page witness statement of Mr Curle of DLA Piper, the claimants' solicitor, with eight lever arch files of exhibits. It is certainly true that Popplewell J is unlikely to have read those exhibits extensively, save to the extent his attention was drawn to specific documents, but unless it was being said that the witness statement was deliberately obfuscatory, which it was not, I would not regard this in itself as non-disclosure. Also, despite Mr Coleman QC's submissions to the contrary, I do not consider that section 41 of the Schedule to Mr Curle's witness statement is anything other than a fair summary of what had happened in the New York proceedings.

185. Second, it is contended that the claimants had failed to disclose that, pursuant to the order of the CAT of 17 December 2012, one of the points to be determined in the administration proceedings was whether or not SCBHK was a creditor of IPTL, what is said to be the core issue in the present proceedings. I do not consider there is anything in this point. [262] in section 34 of Mr Curle's Schedule referred to the CAT decision and exhibited it. It was also

stated that the CAT had ordered the matter to be remitted to the High Court for the Administration Petition to be heard expeditiously before another judge. It does not seem to me that the duty of full and frank disclosure required any greater level of detail about the issues.

186. Third, it is contended that Mr Curle's statement is calculated to give the impression that SCBHK has not been treated fairly in the Tanzanian proceedings, when there was no proper basis for that assertion. Whilst it is true that some of what Mr Curle says cannot be justified, for example the suggestion that the appointment of the administrative receiver has been ignored by the Tanzanian judiciary, I consider that the critical point is that the Bank and the administrative receiver were not heard by the Court when Utamwa J made the 5 September Order. This ties in with the fourth point, which is the suggestion that the Bank had been duly notified of the 5 September 2013 hearing and did not avail itself of the opportunity to oppose the Order made by Utamwa J. That suggestion is simply incorrect. As I have already found at [55]-[57] above, the Bank and the administrative receiver only found out about the hearing on the morning it took place and the judge made it quite clear that he was not prepared to hear their counsel or counsel for the Mechmar liquidators. Whilst it may be that some of what Mr Curle says about how the Bank was treated in the Tanzanian proceedings is somewhat hyperbolic, the points made about the unfairness to the Bank of what happened in the proceedings in September 2013 seem to me to be entirely justified.

187. In his oral submissions, Mr Hardwick QC also suggested that the explanation given by Mr Curle for the decision to withdraw the administration petition, that the Bank had lost confidence in the Tanzanian judicial system was not full and frank. I have already dealt with this point at [71]-[72] above and concluded that I accept that explanation, so there is nothing in this suggestion.

188. Overall I do not consider that there was any failure to make full and frank disclosure, but even if I had considered there was, I am quite satisfied that it was not deliberate. Where there has been non-disclosure at the *ex parte* stage, the Court still has a discretion to continue the Order made. As I said in *Congentra AG v Sixteen Thirteen Marine SA ("The Nicholas M")* [2008] EWHC 1615 (Comm); [2008] 2 Lloyd's Rep 602 at [63]:

> "In exercising that discretion, the overriding question for the Court is what is in the interests of justice. This is very clear from all three judgments in the Court of Appeal in *Brink's Mat*. Ralph Gibson LJ was prepared to continue the order on the basis that he had no doubt that even if the additional information had been disclosed, the judge at the ex parte hearing would have made the same order on the same terms. Balcombe LJ at 1358E said this:
>
> > "Nevertheless, this judge made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the

> court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original ex parte injunction was obtained.""

189. In the present case, it seems to me that, even if there had been a failure to make full and frank disclosure, the interests of justice are overwhelmingly in favour of maintaining the order granting permission to serve out.

Conclusion

190. In all the circumstances, both the applications by the defendants for a stay of these proceedings on *forum non conveniens* or case management grounds and by VIP for a stay or strike out of the proceedings against it on the grounds of issue estoppel or abuse of process must fail and be dismissed.