

Case No: 2011 FOLIO 1399

Neutral Citation Number: [2012] EWHC 689 (Comm)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2012

Before :

MR JUSTICE EDER

Between :

(1) ENERCON GmbH
(2) WOBBEN PROPERTIES GmbH

Claimant

- and -

ENERCON (INDIA) LIMITED

Defendant

David Joseph QC and Joe Delaney (instructed by **Cripps Harries Hall**) for the **Claimants**
Philip Edey QC and Malcolm Jarvis (instructed by **Enyo Law**) for the **Defendant**

Hearing dates: 12 and 13 March 2012

Judgment

Mr Justice Eder:

Introduction

1. The background to these proceedings and the present applications is complicated and convoluted but in essence concerns a long running dispute between the parties, who are German and Indian interests, with regard to a wind energy joint venture in India. As referred to below, the parties have been engaged for some years in protracted litigation in India. The current dispute concerns various claims by the claimants under an alleged written agreement between the first claimant (“Enercon”) as licensor and the defendant (“EIL”) as licensee dated 29 September 2006 entitled Intellectual Property Licence Agreement (“IPLA”). The claimants say that these claims (consisting mainly of sums allegedly due by way of royalties and damages) total a minimum amount of approximately Euros 89 million. On 13 March 2008 ie over 4 years ago, the claimants referred their claims to arbitration by appointing Mr VV Veeder QC as their arbitrator pursuant to clause 18 of the IPLA. For reasons which I will briefly explain, that proposed arbitration has ground to a halt. It is now March 2012. The merits of the underlying disputes have not been resolved. Indeed, although the parties appear to have spent considerable amounts of time and money on procedural matters, the determination of the substantive merits appears somewhere in the far distance. The author of *Bleak House* would be appalled by this story. And rightly so.
2. At the heart of the current dispute is clause 18 of the IPLA which provides as follows:

“18. *DISPUTES AND ARBITRATION*

- 18.1 *All disputes, controversies or differences which may arise between the Parties in respect of this Agreement including without limitation to the validity, interpretation, construction, performance and enforcement or alleged breach of this Agreement, the Parties shall, in the first instance, attempt to resolve such dispute, controversy or difference through mutual consultation [sic]. If the dispute, controversy or difference is not resolved through mutual consultation within 30 days after commencement of discussions or such longer period as the Parties may agree in writing, any Party may refer dispute(s), controversy(ies) or difference(s) for resolution to an arbitral tribunal to consist of three (3) arbitrators, of whom one will be appointed by each of the Licensor [Enercon] and the Licensee [EIL] and the arbitrator appointed by Licensor shall also act as the presiding arbitrator.*
- 18.2 *The arbitrators shall have powers to award and/or enforce specific performance. The award of the arbitrators shall be final and binding on the Parties. In order to preserve its rights and remedies, either Party may seek preliminary injunctive relief or other temporary relief from any court of competent jurisdiction or from*

the arbitration tribunal pending the final decision or award of the arbitrator(s). Any such application to a court of competent jurisdiction for the purposes of seeking injunctive relief, shall not be deemed incompatible with this agreement to arbitrate or as a waiver of this Agreement to arbitrate.

18.3 All proceedings in such arbitration shall be conducted in English. The venue of the arbitration proceedings shall be London. The arbitrators may (but shall not be obliged to) award costs and reasonable expenses (including reasonable fees of counsel) to the Party(ies) that substantially prevail on merit. The provisions of the Indian Arbitration and Conciliation Act, 1996 shall apply.

The reference of any matter, dispute or claim or arbitration [sic] pursuant to this Section 18 or the continuance of any arbitration proceedings consequent thereto or both will in no way operate as a waiver of the obligation of the Parties to perform their respective obligations under this Agreement.”

3. In essence, EIL’s case is that the IPLA was and is not legally binding although EIL now concedes that there is a good arguable case to the contrary ie that the IPLA is legally binding. Notwithstanding such concession, it remains EIL’s case that there is equally a good arguable case that the IPLA is not binding and, in any event, that although clause 18.3 stipulates that the “venue of the arbitration proceedings” shall be London, “venue” is not synonymous with “seat” and, on the contrary, the “seat” of any arbitration under clause 18 is not London but India.
4. On 28 March 2008 ie shortly after the appointment of Mr Veeder QC, the claimants issued proceedings in this court (Claim No. 2008 Folio 296) seeking a declaration under s.32 of the Arbitration Act 1996 (the “English 1996 Act”) that EIL was bound to refer IPLA disputes to arbitration; a declaration that the seat of the arbitration was England; and an anti-suit injunction restraining certain proceedings on behalf of EIL in the Bombay High Court (“BHC”) as described further below. After the application for an anti-suit was issued but before it was heard, EIL filed its own claim in the Daman court in India seeking a declaration that the IPLA is not a concluded contract, that EIL is therefore not bound by its arbitration agreement and an anti-suit / anti-anti-suit injunction (which EIL obtained on an interim basis on 8 April 2008) from the Daman court in India restraining Enercon from pursuing the English proceedings.
5. Although it asserted that the IPLA was not legally binding EIL appointed under protest a retired Indian Judge, Mr Justice Reddy, as its arbitrator. Following certain correspondence, the arbitrators indicated that the arbitration agreement contained in Clause 18 was, in their view, unworkable. On 5 August 2008, the arbitrators informed the parties that they were unable to appoint a third arbitrator and that the parties would “doubtless take such steps as they are advised”. As appears below, the arbitration then ran into the sand as a result of the initiation and pursuit by EIL of proceedings in India.
6. Eventually, after a delay of more than 3 years, the claimants issued the current proceedings by way of an Arbitration Claim Form dated 21 November 2011 (“ACF”) claiming, in particular, (i) the appointment by the court of a third arbitrator pursuant

to s.18(a) of the English 1996 Act; and (ii) injunctions pursuant to s.44 of the English 1996 Act and/or s.37 of the Senior Courts Act 1981 in effect prohibiting EIL from commencing or prosecuting proceedings in India (a) to restrain or otherwise to interfere with the application for the appointment of a third arbitrator and (b) to pursue claims in connection with IPLA. Following an application without notice by the claimants, an order was made by Flaux J dated 25 November 2011 giving the claimants leave to serve the ACF out of the jurisdiction and granting both injunctions on an interim basis until disposal of the present proceedings or further order.

7. On 15 February 2011, the claimants made a further application without notice to this court for a freezing injunction against EIL. That application came before me. I duly granted the freezing injunction and certain ancillary relief with regard to the provision of financial information by EIL as set out in my order of that date.

The applications before the court

8. The present hearing is concerned with four main applications viz.
 - i) EIL's application to challenge the jurisdiction of this court with respect to the claims in the ACF;
 - ii) Enercon's application under s.18 of the English 1996 Act for the appointment of an arbitrator;
 - iii) EIL's application to set aside or to vary the anti-suit injunctions granted by Flaux J on 25 November 2011;
 - iv) EIL's application to set aside or to vary the freezing injunction granted by me on 15 February 2012 and Enercon's application to continue the same.

Summary of main issues

9. In summary, Mr Joseph QC on behalf of the claimants identified the following main issues which arise on these applications:

Jurisdiction for s.18 application

- (1) Do the claimants show a good arguable case as to the existence of an agreement to arbitrate in London and as to the seat of that arbitration being England?
- (2) If so, is there any good reason not to uphold the permission to serve out of the jurisdiction granted pursuant to the Order of Flaux J?

S.18 application

- (3) When considering the claimants' s18 application is the correct test a "good arguable case" or does any different test apply to the questions identified in (1) above and if so is that test satisfied?

- (4) Does clause 18.3 of the IPLA on a true application deprive the English courts of its powers under s.18 the English 1996 Act?
- (5) If the claimants satisfy the above is there any good reason not to appoint an arbitrator from the proposed list of three ie (i) Lord Hoffmann (ii) Sir Simon Tuckey (iii) Sir Gordon Langley.
- (6) Should this court whether with respect to the disposal of the s.18 claim or the question of gateway jurisdiction grant a stay of all proceedings pending the outcome of such appeals as have been or may be brought by EIL in India to the decision of the Daman District Court?
- (7) What is the correct approach of the court to the question of consideration of the designated seat? In particular is EIL correct to suggest that the question of whether or not the claimants can satisfy a good arguable case of English seat is determined in accordance with Indian law?

Anti-suit injunction

- (8) Does the English court have jurisdiction to grant an anti-suit injunction under s.37 of the Senior Courts Act 1981 and/or s.44 of the English 1996 Act?
- (9) If so, is this case in all the circumstances a proper case for the grant of anti- suit injunctive relief in the terms set out in paragraphs 1 and/or 2 of the Order of Flaux J.? In particular should any amendment to these Orders be made to permit EIL to take further steps in India and if so what amendments?

Freezing Order

- (10) Have the claimants made out a sufficient case of real risk of dissipation other than in the ordinary course of business?
 - (11) Is this a proper case for the grant of the freezing injunction obtained and sought to be continued? In particular have the claimants unduly delayed in bringing these proceedings, or failed to make fair disclosure, and if so what if anything is the impact of this on the grant or continuation of the freezing injunction?
 - (12) Alternatively is any variation of the freezing injunction or fortification of the cross undertaking required?
10. The arguments deployed in relation to these issues ranged far and wide. The evidence and exhibits adduced by the parties occupied no less than 10 lever arch files with an additional 3 volumes of authorities. The skeleton argument submitted on behalf of EIL extended to some 82 pages. The claimants' skeleton extended to 53 pages. Such documents are of a type which unfortunately seems to be becoming a norm despite what has been repeatedly stated by the court (see, for example, *Tombstone Ltd v Raja* [2009] 1 WLR 1143 and *Midgulf International v Groupe Chimique Tunisien* [2010] 2 Lloyd's Rep 543 at pp 553-554) although in deference to counsel's endeavours (for which I am grateful) I should say that some at least of the issues were of some difficulty and even seemingly intractable. In the event, it does not seem to me necessary to deal with all the issues canvassed before me. In my view, it is sufficient

to set out briefly the relevant facts; and I will then deal with those issues which are, in my view, necessary for the purpose of determining the present applications.

The facts

11. The claimants are German companies and world leaders in the field of wind energy and, on their case, are the owners and holders of important patents and trade marks in the field of wind energy. Their founder is Dr Wobben. EIL is an Indian joint venture company set up in 1994 to manufacture and to sell Wind Turbine Generators (“WTGs”) in India. It is owned as to 56% by Enercon. The other 44% shareholding is owned by two Indian individuals viz Messrs Yogesh and Ajay Mehra.

The Shareholding Agreement

12. Apart from the Articles of Association and Indian law generally, the relationship between these two groups of shareholders is governed by a Shareholding Agreement dated 12 January 1994 as subsequently amended (“SHA”). The SHA is governed by Indian Law (Art.13.1) and provides in effect for all disputes to be determined by arbitration by the Indo-German Chamber of Commerce in Bombay (Art 16.2).

The TKHA (and STKHA)

13. On the same date ie 12 January 1994, Enercon and EIL entered into another agreement, the Technical Know-How Agreement (“TKHA”). Mr Edey QC on behalf of EIL made detailed submissions on the scope and effect of the TKHA. However, I do not think it is necessary to set out the many provisions of the TKHA at length. For present purposes, it is sufficient to note that, in summary, it is EIL’s case that (a) the effect of the TKHA is that Enercon initially agreed to transfer the technical know-how relating to three types of WTGs to EIL to enable it to manufacture for itself in India the entire WTG, save only for the electrical control components which EIL was to buy from Enercon and which Enercon was obliged to continue to supply to EIL even after the expiry of the TKHA; (b) in addition to the cost of parts supplied by Enercon to EIL (on which Enercon would have made a profit), royalties were payable but only up to DM2.5m: once that was reached, no matter when it was reached (it was in fact reached in 2002), no further royalties were payable, although of course as majority shareholder in EIL, Enercon continued to benefit from all sales of WTGs; (c) Cl.5.5 and Cl.9.2 plainly therefore reflect the fact that even after the expiry of the TKHA, EIL retained the right to manufacture the WTGs using the Enercon technology; and (d) that its rights were therefore what Mr Edey QC described as “evergreen”.
14. The TKHA was duly performed and subsequently amended by a supplementary agreement (“STKHA”) dated 19 May 2000. It is EIL’s case that the STKHA made certain important changes to the TKHA which are, it is said by Mr Edey QC, vital for a proper understanding of the present case viz it amended and extended the definition of “Products” in the TKHA and deleted clauses 5.3 and 5.4 of the TKHA. On this basis, it is, in summary, EIL’s case that:
 - a) The former agreement in the TKHA that indigenisation was not to include the electronic control components was deleted: indigenisation was thereafter to include even those components.

- b) Related to that, Enercon was no longer to be the exclusive manufacturer of the electronic control components and EIL was no longer obliged to purchase even the special components from Enercon (though it remained entitled, even after expiry of the TKHA, to do so – See Cl.5.5, which the STKHA did not amend).
15. In short, it is EIL's case that under the TKHA as amended by the STKHA:
- i) Enercon was committed to a transfer to EIL of all the technical know-how relating to every element of at least 5 types of WTG so that they could be wholly manufactured by EIL in India for all time (i.e. even after expiry of the TKHA), though if EIL wanted Enercon to supply the electronic control components, Enercon was also obliged to do so at list price.
 - ii) In return, Enercon was entitled to receive: a maximum of DM2.5m by way of royalties; list price (no doubt including a suitable profit for Enercon) for any items which EIL chose to purchase from Enercon rather than manufacture itself; and an increasingly valuable 56% shareholding in EIL. Financially therefore:
 - a) Enercon invested around €615,000 in 1994 for its stake in EIL. Its stake (on the basis of assets at book value less liabilities) is now worth tens of millions.
 - b) Enercon has received €2m in dividends; DM2.5m (equivalent to €1.28m) royalties under the TKHA; and around €97m in profits in respect of parts.
16. The TKHA (as amended) expired (naturally) in 2004. However, consistent with what EIL submits is the “evergreen” regime as set out above, EIL continued to manufacture and to sell the WTGs in India thereafter; it continued to purchase certain parts from Enercon; and it paid no royalties to Enercon, the limit of DM2.5m having been reached in 2002 (after which no further royalties were sought or paid until after the dispute about the IPLA arose). EIL complains that none of that was explained to Flaux J or me and submits that the foregoing is important because it casts Enercon's case in a completely different light: it is (submits EIL) simply wrong for Enercon to suggest that everything that happened after expiry of the TKHA is explicable only on the basis that the IPLA was a binding agreement, since it must at least be common ground that everything which happened between 2004 and 2006 cannot be on the basis of the IPLA; and there is therefore no intrinsic reason to suppose that the IPLA must be the explanation for what happened after 2006 either. EIL further submits that whether it in fact was so, depends entirely on a consideration of the circumstances surrounding the signature of the IPLA, without any preconceptions as to what must have been agreed in order to explain what has happened, in terms of manufacturing of WTGs and purchase of parts from Enercon, since 2006. Put differently, on EIL's case, EIL's ongoing right, since 2006, to continue to manufacture and to sell WTGs in India, to use the Enercon name, and to purchase parts from Enercon as required is entirely consistent with the TKHA/STKHA.

17. After the expiry of the TKHA, there were discussions about the possibility of a further agreement which would cover future technologies developed by Enercon. There was also discussion about the possibility of royalties once again becoming payable. Those discussions led, in 2006, to successive Heads of Agreement.
18. It is common ground that on 29/30 September 2006, Dr Wobben on behalf of the claimants and Mr. Yogesh Mehra on behalf of EIL initialled every page of and signed the IPLA. However, at the same time, it is EIL's case that Dr Wobben on behalf of Enercon and Mr Yogesh Mehra "for the Mehra family" also initialled every page of/signed a separate document entitled the Agreed Principles, to which the IPLA was attached, and certain other documents which were also attached to the Agreed Principles. The first paragraph of the Agreed Principles provides as follows:

"The following binding principles are agreed between the parties being shareholders and Joint venture partners of Enercon India Limited ("Company"). It is agreed that all definitive Agreements between the parties shall be prepared and finally executed on the basis of the binding principles agreed herein."

The second page of the Agreed Principles provides as follows:

*"The Agreed Principles as mentioned above, in their form and substance would be the basis of all the final agreements which shall be finally executed.
The agreed Principles shall be finally incorporated into the
A IPLA "Draft enclosed"
B Successive Technology Transfer Agreement
C. Name Use Licence Agreement
D. Amendment to Existing Share Holding Agreement.
The above agreements will be made to the satisfaction of all parties, And then shall be legally finally executed" (emphasis added)*

19. In light of the above, it is EIL's case that the IPLA is not a binding agreement: it is no more than a "draft" which was required to be brought into line with the Agreed Principles before being finally executed.

The start of the breakdown

20. Thereafter, it appears that the relationship between the parties started to break down. It is unnecessary to try to identify the precise reason for such break down. For present purposes it is sufficient to note that it is Enercon's case that EIL failed to pay royalties due under the IPLA, nor has it paid for approximately \$19m worth of power cabinets, parts and raw materials supplied in or prior to 2007, nor has it accounted for royalties in accordance with the terms of the IPLA (Art 5), nor has it given access to its books and records in accordance with the terms of the IPLA (Art 6). On the basis of these alleged breaches and the totality of EIL's conduct, the claimants terminated the IPLA in December 2008. As I have summarised above, the claimants say that their claims total a minimum sum of €89m. On the other side, EIL denies any breaches. Moreover, it is EIL's case that in the course of 2007 Enercon wrongfully stopped certain supplies of WTG parts causing serious disruption to EIL's business and substantial losses

which EIL says total approximately €75m and that it is entitled in effect to set off this sum against any amounts otherwise due to Enercon. I should make plain that Enercon denies any breach or wrongdoing and in any event says that the quantum of such alleged claim is grossly exaggerated. Be that as it may, the interruptions in supply and resulting losses prompted the Mehras to commence litigation under the TKHA before the BHC in September 2007 (as referred to below).

The Indian proceedings

The Company Law Board

21. The first legal proceedings in India were commenced on 14 August 2007 by Enercon before the Company Law Board (“CLB”) in Delhi, against the Mehras, EIL and all its subsidiaries, alleging oppression and mismanagement of EIL. In those proceedings:
 - i) Interim relief sought by Enercon includes what amounts to very similar relief to the freezing relief injunction obtained by it here. The CLB has not granted that relief.
 - ii) Enercon alleges that the Mehras have “recklessly” denied the existence of the IPLA as a binding agreement. In response, the Mehras/EIL have set out their position as regards the Agreed Principles, draft IPLA and TKHA.
22. Just over a year later, on 16 October 2008, the Mehras filed their own claim before the CLB against in particular Enercon and Dr. Wobben alleging oppression by them, in particular in the form of Enercon seeking to prejudice EIL’s relations with its banks.
23. Although the IPLA is or at least may be very much in issue in the CLB proceedings, it is common ground that none of the claims in the CLB proceedings arises under the IPLA or are within the scope of the putative IPLA arbitration agreement. I do not read the injunctions granted by Flaux J as affecting such proceedings but for the avoidance of any doubt Mr Joseph QC does not object to the insertion of appropriate wording to reflect this position if the freezing injunction is otherwise continued.

The BHC proceedings

24. Meanwhile, on 11 September 2007, the Mehras had started a derivative action, in their name, against Enercon before the BHC seeking specific performance of Enercon’s alleged obligation under the provisions of the TKHA (and as a result of post expiry correspondence) to continue to supply parts to EIL. On 31 October 2007, the BHC made an interim (“holding the ring” type) order that the supply of parts and components by Enercon to EIL should be resumed but that in return EIL should pay royalties to Enercon on sales of WTGs based on a stipulated formula in accordance with the Agreed Principles, not the IPLA. EIL duly paid the royalties on that basis until Enercon finally stopped supplying WTG parts. EIL has subsequently brought claims before the BHC seeking to recover its alleged substantial losses (around €75m) resulting from Enercon’s alleged breach of the TKHA evergreen supply obligations and contending that Enercon’s breach of the BHC’s Order of 31 October 2007 is a contempt of court.

25. Enercon has filed petitions under the Indian Arbitration and Conciliation Act 1996 (the “Indian 1996 Act”) seeking orders that the BHC disputes be referred to arbitration pursuant to the IPLA, alternatively the TKHA. That application has not yet been heard and the substantive claims are stayed until it has been.

Daman Court Proceedings and Writ Petitions before the BHC

26. I have already referred to the proceedings initiated by EIL in the Daman court and the anti-suit/anti-anti-suit injunction which EIL obtained from that court on an interim basis on 8 April 2008. Thereafter, the key events in relation to these proceedings were in summary as follows:
27. The claimants issued an application under s.45 of the Indian 1996 Act for EIL’s claims to be referred to arbitration and for the Indian anti-suit injunction to be lifted. So far as the former application is concerned, s.45 of the Indian 1996 Act is contained in Part II of that Act under the heading “Enforcement of Certain Foreign Awards, Chapter 1, New York Convention Awards”. The Act then sets out the following sections which provide in material part as follows:

“44. Definition - In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960-

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

45. Power of judicial authority to refer parties to arbitration.- Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

On behalf of the claimants, Mr Joseph QC submitted that Part II s.45 is to be contrasted with Part I s.8 of the same Indian 1996 Act which is, submitted Mr Joseph QC, concerned with the parallel discrete power of the courts to refer disputes to arbitration pursuant to an arbitration agreement where the place of arbitration is in

India. It was Mr Joseph QC's submission that this must be the case both because of the terms of s.8 itself and because that section appears in Part I of the Indian 1996 Act which provides by s.2(2) under the heading "General Provisions, Scope" as follows: "This Part shall apply where the place of the arbitration is in India." In addition, Part I s.20 of the Indian 1996 Act provides as follows:

"20. Place of arbitration – (1) The parties are free to agree on the place of arbitration. (2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties."

The effect of the statutory wording contained in, in particular, s.2 of the Indian 1996 Act is, I was told, a matter of controversy as a matter of Indian Law. This was addressed in the evidence before me and I was also referred to the important decision of the Supreme Court of India in *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105 and a number of other subsequent Supreme Court of India cases including *Centrotrade Minerals & Metals Inc. v Hindustan Copper Ltd* (2006) 11 SCC 245; *National Agricultural Coop v Gains Trading* (2007) SCC 692; *Yograj Infrastructure Ltd v Ssang Yong Engineering & Construction Ltd* (2011); and *Videocon Industries v Union of India* AIR 2011 SC 2040. I was also informed that the decision in *Bhatia* is presently being examined by a 5 judge bench in the Supreme Court of India in another case *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc.*. The hearing in that case apparently commenced in January 2012. It is not clear whether the hearing has been completed. In any event, the Judgment of the Supreme Court in *Bharat* is still awaited. There was much debate before me as to what is the effect of *Bhatia*; whether it is distinguishable; and whether it will survive after *Bharat*. On this hearing, it does not seem to me possible to resolve these interesting and difficult issues. For present purposes, it seems to me sufficient to note what I understood to be common ground viz that whatever the scope of Part I of the Indian 1996 Act, Part II s.45 is only concerned with agreements referred to in s.44 ie an agreement in writing for arbitration to which the New York Convention set forth in the First Schedule applies; that to be caught by the New York Convention, an agreement must be non-domestic under the law of the contracting state; that the only basis for a party seeking and the Indian court making an order under s.45 is that the seat of arbitration must be in a place other than India.

28. In the event, the Civil Judge (D.S. Shinde) in the Daman court refused the claimants' s.45 application by Order dated 5 January 2009 and the anti-suit injunction by Order dated 9 January 2009.
29. The claimants then appealed against those orders to the Daman District Court ("DDC") where Judge Purohit allowed the appeals by his judgment of 27 August 2009. The Order made was in the following terms:

"ORDER

- i) All the four miscellaneous appeals stand allowed.
- ii) Both the impugned orders of the trial court challenged in these appeals are set aside.

- iii) The injunction application of the plaintiffs before the Trial Court stands rejected.
 - iv) The application of the defendants under section 45 of the Arbitration Act filed before the Court stands allowed in terms of prayer clause 28(a) thereof.
 - v) The Trial Court to first decide the jurisdiction point before proceeding with the suit.
 - vi) R & P sent back to the Trial Court.”
- 30. By order dated 27 August 2009 Judge Purohit then agreed to a temporary stay of the reference under s.45 to give EIL the opportunity to “approach” the BHC but refused to maintain the anti-suit injunction pro tem.
- 31. Shortly thereafter, EIL then filed what it has described as its “appeals” (separately in relation to the anti-suit and s.45 relief) before the BHC. There is no evidence before me as to the precise nature of such proceedings but on their face they do not appear to be “appeals” as such term would normally be understood as a matter of English Law. Rather those proceedings would seem on their face to be Writ Petitions by EIL to the BHC issued pursuant to Article 227 of the Indian Constitution for the issuance by the BHC of what is described as a “Writ of Certorari” and thereafter for the BHC to “quash” the order of Purohit J. I shall refer to these proceedings as the “Writ Petitions”. On 4 September 2009 the BHC reinstated the anti-suit pro tem and on 9 September 2009 maintained the stay of the s.45 relief. The latter (ie the stay of the s.45 relief) is common ground as is the fact that such stay remains in force. However, there is a dispute before me as to whether the anti-suit injunction was thereafter discharged and as to whether Enercon is therefore in breach of it and in contempt of the Indian court by having started the current proceedings in this court. Enercon says the anti-suit injunction was discharged on 12 October 2009 when an Order was made by the BHC as follows: “By consent, stand over to 19th November 2009. Ad-interim relief granted on 9th September 2009 shall continue to operate till the next date.” On the other hand, EIL says that the anti-suit injunction reinstated on 4 September was unaffected by this order and continued to remain in force; alternatively, if it was (inadvertently) discharged on 12 October 2009, it was again reinstated on 25 January 2010 when the BHC made a further order which provided in material part as follows: “...If the Writ Petition is ready for final disposal, the same shall be added to the final hearing board on 15th February 2010 as per its turn. Ad-interim relief granted earlier to continue till further orders.”.
- 32. Although the Writ Petitions were issued before the BHC as long ago as September 2009 ie some 2 and a half years ago, it appears that they remain pending and awaiting a hearing. Paragraph 32 (1) and (m) of the affidavit of Mr Allen (sworn on behalf of EIL) summarised the current position as follows:

“(1) On 25 January 2010, there was a further hearing. I understand from Thriyambak Kannan (who attended the hearing) that, again, it lasted only a short period of time. At that hearing, an oral application was made by the Claimants’ junior counsel to expedite the hearing of EIL’s Writ Petitions in order

to resolve the appeal as swiftly as possible. EIL's legal team did not resist this application. Mr Justice Oka then directed in his order that: "*If the Writ Petition is ready for final disposal, the same shall be added to the final hearing board on 15th February, 2010 as per its turn*"......I am informed that this meant that the hearing of the Writ Petitions, which ordinarily would have had to await their turn, would come before the Court on 15 February 2010 if Court time permitted. With regard to the ad-interim relief, the order, in relation to both petitions, provided that: "*Ad-interim relief granted earlier to continue till further orders*". At no stage during this hearing was it suggested that the Anti-Arbitration Injunction had come to an end.

(m) On 15 February 2010, no hearing took place since there was insufficient Court time with the result that the hearing of the Writ Petitions are awaiting their turn. However, it was and is open to the Claimants to seek to "mention" the Writ Petitions before the designated Bombay High Court Judge to seek expedition in the same manner as was directed by Mr Justice Oka on 25 January 2010. However, the Claimants have taken no steps to do so. Therefore, EIL and the Mehras are not frustrating the progress of the appeal as Mr Böhm suggests at paragraph 58 of his witness statement and which has been repeated elsewhere in the Claimants' evidence and submissions made to Flaux J and Eder J. EIL and the Mehras are waiting for the matter to come on in the ordinary course but, in the meantime, it is open to the Claimants to seek to expedite the appeal. With regard to the appeal process, I understand that the determination of the Writ Petitions will be by a single judge sitting in the Bombay High Court and, subject to being granted leave to appeal, the final tier of appeal is the Supreme Court of India."

33. With regard to the above assertion that the Mehras are waiting for "the matter to come on in the ordinary course", the likely timescale going forward was summarised in paragraph 61 of the third affidavit of Mr Ashford (on behalf of the claimants) as follows:

"..there is a considerable backlog of cases in the Bombay High Court and the Writ Petitions may take approximately 2-3 years from now (on a conservative basis) to come on for a final hearing. Pertinently, certain Writ Petitions filed prior to 2001 are presently pending final hearing before the Bombay High Court. Any decision in the Writ Petitions would most likely entail filing of a Special Leave Petition/Civil Appeal to the Hon'ble Supreme Court. Should the Special Leave Petition be converted to a Civil Appeal and posted for final hearing, the final hearing would entail approximately another 2-5 years (again on a conservative basis). This is not taking into consideration a remand by the Supreme Court to the High Court for reconsideration of its decision. Whilst there are several things that EIL could do to expedite its appeal, it has chosen not to [do] any of them."

34. This led to some further debate before me in particular whether, as Mr Edey QC submitted, the fact that EIL did not seek any expedition is of little, if any, relevance given that the claimants could themselves have applied for expedition. Mr Joseph QC submitted that the claimants could not be criticised for failing to take (further) steps to expedite matters and that Mr Edey QC's submission to the contrary was "bizarre". Be that as it may, the present position is that, in effect, there has been no real progress with the Writ Petitions for some 2 and a half years. I deal with this aspect further in the context of the parties' respective submissions although I should perhaps note at this stage that Mr Edey QC indicated that EIL was willing to give an appropriate undertaking to seek expedition of the Writ Petitions. At this stage, it is not clear to me what the future timescale would be if an application for expedition was now made jointly by the parties before the BHC.

Revocation of Patent proceedings

35. EIL has applied to the Indian Intellectual Property Appellate Board to have 19 of Dr Wobben's patents revoked. It has so far succeeded as regards 12 out of 19; the application as regards the other 7 patents is to be heard in due course. Dr. Wobben appealed in respect of the revocation of the 12 patents but his petition that the revocation be quashed has recently (2 March 2012) been rejected.

Patent and trade mark infringement proceedings

36. Dr. Wobben has filed these proceedings against EIL and the Mehras objecting to the use of his technology and the name Enercon. The validity and effect of the IPLA is squarely in issue in those proceedings (in a nutshell, Dr. Wobben says that because the IPLA is terminated there is a breach of his patent rights and the Enercon trademark; EIL and the Mehras say that they are contractually entitled to use both as a result of the TKHA and its evergreen provisions and further agreements made in correspondence and meetings).

Jurisdiction for s.18 application

37. Against that brief summary of the facts and the history of the proceedings in England and India, I turn to consider the present applications in these proceedings.
38. The original application by the claimants for leave to serve the ACF out of the jurisdiction was made under CPR 62.5 (1) (b) and (c) which provides in material part as follows:-

"62.5 - (1) The court may give permission to serve an arbitration claim form out of the jurisdiction if –

(b) the claim is for an order under section 44 of the 1996 Act;
or

(c) the claimant –

(i) seeks some other remedy or requires a question to be decided by the court affecting an arbitration (whether started or not), an arbitration agreement or an arbitration award; and

(ii) the seat of the arbitration is or will be within the jurisdiction or the conditions in section 2(4) of the 1996 Act are satisfied.”

39. S.2 of the English 1996 Act provides in material part as follows:

“Scope of application of provisions.

(1) The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland.

(2) ...

(3) The powers conferred by the following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined—

(a).....

(b) section 44 (court powers exercisable in support of arbitral proceedings);

but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so.

(4) The court may exercise a power conferred by any provision of this Part not mentioned in subsection (2) or (3) for the purpose of supporting the arbitral process where—

(a) no seat of the arbitration has been designated or determined, and

(b) by reason of a connection with England and Wales or Northern Ireland the court is satisfied that it is appropriate to do so.”

40. S.18 of the English 1996 Act provides as follows:

“Failure of appointment procedure.

(1) The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal.

(2) There is no failure if an appointment is duly made under section 17 (power in case of default to appoint sole arbitrator), unless that appointment is set aside.(2)If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to

the other parties) apply to the court to exercise its powers under this section.

- (3) Those powers are—
 - (a) to give directions as to the making of any necessary appointments;
 - (b) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;
 - (c) to revoke any appointments already made;
 - (d) to make any necessary appointments itself.
- (4) An appointment made by the court under this section has effect as if made with the agreement of the parties.
- (5) The leave of the court is required for any appeal from a decision of the court under this section.”

41. As I have already indicated and notwithstanding the concession that there was a good arguable case that the IPLA was a binding agreement, it is EIL’s case that the “seat” of the arbitration is not within the jurisdiction but in India and on this basis it is EIL’s case that the requirement in CPR 62.5 (c) (ii) is not satisfied. I deal with this argument below. But EIL advanced another separate argument which is linked but logically anterior to any determination of the “seat” of the arbitration and I must deal with that argument first of all.

Should the English court leave the question of seat to the Indian courts ?

42. The language of CPR Part 62.5(1) (ie “may give permission”) is, of course, permissive and not mandatory. Mr Edey QC submitted that the issue of seat is already pending before the BHC in the context of the Writ Petitions. On this basis, Mr Edey QC submitted that it must be wrong to wrest that issue from the BHC. In particular, he submitted as follows:

- I. The starting point is that there can be no basis at all for this court to restrain (as it currently does) the pursuit by EIL of its “appeal” before the BHC:
 - a) In order to justify restraint of that appeal, the claimants would need to show that pursuit of that appeal was vexatious and oppressive and that England was the natural forum for determination of the issue of seat: see *Tonicstar v American Home Ins.* [2005] Lloyds Rep. I&R 32.
 - b) In particular, the vexatious and oppressive test is, on this issue, the relevant one because on any view (whether the IPLA was agreed or not) there is no contractual agreement that the question of seat should

be determined in any particular forum, be that the Indian courts, the English courts or arbitration (with whatever seat).

- c) As to vexatious and oppressive:
 - i) It is hard to see how EIL's pursuit of an appeal in respect of a judgment obtained on an application by Enercon could ever be considered as being vexatious or oppressive.
 - ii) Ignoring everything else and even assuming that the issue of seat is finely balanced (which is unduly favourable to Enercon), EIL's wish to have that issue determined by the Indian courts can hardly, in those circumstances, be said to be vexatious or oppressive.
 - iii) But that is even more so when regard is had to the factors connecting the dispute to India, and the absence of any factors connecting it to England (see below).
- d) As to the natural forum for determination of the issue of seat, it is manifestly India; certainly it is not England (which is not even a natural forum):
 - i) With the exception of the fact that the claimants are German and the reference to London in the putative arbitration clause, every single factor here connects the dispute to India. Perhaps most importantly, the issue of seat is a matter for Indian not English law: as further set out below it is thought to be common ground (but is in any event the case) that the arbitration agreement, and therefore its proper construction, is governed by Indian, not English law.
 - ii) The single factor that might be said to connect the dispute to England is the reference to London in the putative arbitration clause of the IPLA. But for the purposes of deciding where the issue as to the true meaning of that reference to London should be determined, the claimants obviously cannot pray that reference in their aid as being a choice of English seat: that would be bootstraps. The reference to London therefore has to be ignored for present purposes. That leaves India as the only possibility.
- e) The anti-suit, in so far as it currently precludes the pursuit of the "appeal" from Judge Purohit must, on any view, therefore be set aside or varied so as to permit EIL to pursue that appeal and argue the issue of seat before the BHC.

II. If, as is therefore the case, there is no basis on which the English court can or should restrain EIL's "appeal" and therefore the determination of the seat issue before the Indian courts, it would be equally inappropriate for this court to seek to go on to determine that issue in parallel to the BHC or to seek to beat

the BHC to the punch in deciding that issue: comity requires the English court in these circumstances to leave the issue to the Indian courts and to stay any consideration by it of that issue in the meantime: see Merkin and Flannery, The Arbitration Act 1996 at p.26; and Jurisdiction and Arbitration Agreements at p.423, fn.260. Otherwise there is a real risk of inconsistent judgments and a resulting battle between the English and Indian courts as to which of them has control over the arbitration. That must be avoided. In short, England is not the appropriate forum for determination of the seat issue; India is.

III. If consideration of the issue of seat is therefore to be left to the Indian courts:

- (a) The English court cannot determine the s.18 relief at this stage and the sensible course is therefore also to leave over even the prior question of its own jurisdiction over EIL (which, for the reasons given above, necessarily is here dependent on the issue of seat) for the time being, until the seat has been determined by the Indian courts.
- (b) In the meantime:
 - i) It would obviously be wrong for the English court to maintain the anti-suit or freezing injunctions both of which assume (see above) that the English court has jurisdiction because the seat of the arbitration is England (though there are myriad other reasons why they should be discharged in any event).
 - ii) If the claimants want interim relief in the meantime, there is nothing to stop them from applying for such to the Indian courts. As a matter of Indian law, any such application is not dependent on them accepting that the seat of the arbitration is India.
- (c) If the Indian courts finally determine that the seat of the arbitration is England, then the Claimants can return here and in so far as there remains, in those circumstances any jurisdictional challenge or s.18 issue, there will at least no longer be an issue about seat because that issue will have become *res judicata* between the parties.
- (d) But if the Indian courts finally determine that the seat of the arbitration is India, the English courts will necessarily have no further basis on which to be involved (at least absent some presently unforeseeable basis for seeking s.44 relief in relation to an arbitration the seat of which is India).

43. As to these submissions, Mr Joseph QC raised three main points. First, he submitted that there are important differences between *Tonicstar* and the present case. In particular as noted by Morison J at paragraph 4 and 5 of his judgment in that case, the arbitration clause in that case had no express provision for the seat of the arbitration and thus for its curial law. By contrast, in the present case, Mr Joseph QC emphasised that clause 18.3 in the IPLA specified that the venue of the arbitration was London and that accordingly the court in England not India was the appropriate forum for determining the issue of “seat”.

44. Second, Mr Joseph QC submitted that the question of seat was first raised in this court over 4 years ago when the claimants issued their original arbitration claim form on 27 March 2008. It was as a result of the subsequent proceedings issued in India by EIL that the issue as to the “seat” of the arbitration was, in effect, “wrested” from the English court. Moreover, those Indian proceedings were, submitted Mr Joseph QC, oppressive and vexatious because in particular they in effect sought to prohibit the claimants from pursuing their claims in any arbitration proceedings whether in England or India and therefore *Tonicstar* was distinguishable.
45. Third, Mr Joseph QC submitted that the matters determined in the DCC by the Judgment of Judge Purohit were res judicata or at least gave rise to one or more issue estoppels in particular (a) that EIL was bound to refer disputes to arbitration in accordance with the IPLA and (b) that the parties had designated England as the seat of the arbitration. In support, Mr Joseph QC submitted that Judge Purohit in his judgment expressly found that the seat of the arbitration in the IPLA was London and that EIL could not complain of the expense of having to arbitrate in London when it agreed this as the seat – see [63]; that the learned judge rejected EIL’s submission as to application of the Indian 1996 Act as the governing procedural law in view of his finding that the seat of the arbitration was London, England - see [26]; that the learned judge also concluded that there was nothing in error in the claimants filing arbitration proceedings in London, which was the place of the seat- see [66]. In view of the terms of the anti-arbitration injunction granted by the learned Judge, Mr Joseph QC submitted that this must have been a reference to the original English court proceedings; and that there are similar findings as to EIL being bound by the terms of a London arbitration provision in the summary paragraph at the end of the judgment – see [70]. Further, Mr Joseph QC submitted that it was necessary for that court to make determinations in that regard in order to decide the claimants’ application for a stay under s.45 of the Indian Act; that, as referred to above, Part II in which s.45 appears applies to foreign arbitrations (i.e. arbitrations with a foreign seat) rather than s.8 which appears in Part I (and applies to domestic arbitrations); that Judge Purohit referred to that distinction at paragraph [58]; that the learned Judge held that England was the seat (see paragraph [21] and also paragraphs [26], [63] and [66]) and it was on that basis that he allowed the s.45 application. Finally, Mr Joseph QC submitted that such res judicata/issue estoppel was unaffected by any actual or potential challenge to or appeal of the decision of the DCC or any stay imposed by the BHC. In that context Mr Joseph QC relied upon the statement of the law in Res Judicata, Spencer Bower and Handley, 4th Edition, para 5.19 and the cases there cited including *Nouvion v Freeman* (1889) 15 App Cas 1, 10-11, 15 and *Colt Industries Inc v Sarlie* (No.2) [1996] 1 WLR 1287 CA.
46. I accept some at least of these submissions advanced by Mr Joseph QC. In particular, I accept that there are differences between both the terms of the arbitration clauses and the circumstances in *Tonicstar* and the present case. Further, I am prepared to assume in Mr Joseph QC’s favour that if such matters had been raised by the claimants before this court in 2008 shortly after EIL commenced their own anti-suit proceedings in India, they might well have persuaded this court to grant some at least of the relief that the claimants now seek. In circumstances where the court is faced with an arbitration clause which, at least arguably, identifies London as the seat, it seems to me that there are strong reasons why the supervisory jurisdiction of the English court is thereby engaged. Mr Edey QC submitted that this is a circular

“bootstraps” argument in particular because such supervisory jurisdiction can only arise where the seat is in fact in England. In the event, it does not seem necessary at least at this stage to determine that issue.

47. This is because it seems to me that the court has to consider the circumstances as they now exist in the light of the relevant general principles as summarised by Hobhouse J in *Pathe Screen Entertainment Limited & Others v Handmade Films (Distributors) Ltd* (11 July 1989) and quoted by Morison J in paragraph 15 of *Tonicstar*:

“15. I therefore conclude that the law is that I should grant the injunction if I am satisfied that in the interests of doing justice between the parties it should be granted in all the circumstances. What is the relevant natural forum is a factor to be taken into account as are the elements of vexation and oppression that are or may be involved. The discretion has to be exercised having regard to the principles of comity. It has to be exercised with caution and, as has been pointed out by Parker LJ in *M&R v ACLI* [1984] 1 Lloyd's Law Reports at page 613, may call for a higher standard of proof than in the case of an application for a stay. I do not consider myself ... obliged to disregard what Lord Brandon said in *Abidin v Daver* at page 423:

" In this connection it is right to point out that, if concurrent actions in respect of the same subject matter proceed together in two different countries, as seems likely if a stay is refused in the present case, one or other of the two undesirable consequences may follow: first, there may be two conflicting judgments of the two courts concerned; or secondly, there may be an ugly rush to get one action decided ahead of the other in order to create a situation of res judicata or issue estoppel in the latter."

Lord Diplock said in the same case (at page 412) "comity demands that such a situation should not be permitted to occur as between courts of two civilised and friendly states"; it would be, he said, "a recipe for confusion and injustice". As Bingham LJ said in *Dupont No 1* the policy of the law must be to favour the litigation of issues only once in the most appropriate forum. The interests of justice require that one should take into account as a factor the risks of injustice and oppression that arise from concurrent proceedings in different jurisdictions in relation to the same subject matter."

48. Bearing these general principles in mind and recognising the permissive nature of CPR Part 62.5, the important point, in my view, is that the claimants did not pursue their applications in the original proceedings that they issued in this court in March 2008. On the contrary, they engaged fully (albeit perhaps reluctantly) in the Indian proceedings before the Daman court. When they lost at first instance before Judge Shinde, they appealed to the DCC with the result indicated above. That is the choice they made. Having made that choice and now some years down the line, it seems to me that the English court should at least be extremely cautious to intervene at this stage and, in Mr Edey QC's words, to "wrest" back the proceedings to England. To do so at this stage when those proceedings are, in effect, still pending would give rise to the "recipe for confusion and injustice" which Lord Diplock specifically warned against in *The Abidin Daver* as referred to in the passage of the judgment of Hobhouse J which I have quoted above. For that reason alone, I have decided

somewhat reluctantly that I should follow the course suggested by Mr Edey QC ie that these proceedings should be stayed at least for the time being pending resolution of the Writ Petitions currently before the BHC. As to the form of order, I would want to hear Counsel for the parties. However, any such stay would have to be on terms including (i) that EIL undertakes to take all necessary steps to expedite those proceedings; and (ii) that the stay is for a limited period only. I am willing to hear Counsel further as to the length of such period of time (and any other terms which might be imposed) but my present view is that it should be for the shortest time reasonably necessary to enable a renewed application for expedition to be made to the BHC. I very much hope that the BHC will accede to such application. I recognise the time pressures on all courts in all jurisdictions but I hope that the BHC will perhaps bear in mind that the decision I have reached is largely in respect of the comity between our two countries and the general desirability of avoiding the recipe for confusion and injustice to which I have already referred. In reaching this conclusion, I should make plain that if, after hearing further argument, the terms which I would seek to impose are unacceptable to EIL, I would have to reconsider alternative options. Equally, it would be necessary and important for the court to reconsider the position after the expiry of the period of stay in the light of the circumstances existing at that stage.

49. As I say, I have reached this conclusion somewhat reluctantly in particular because it seems to me that the historic and potential delays in relation to the Daman proceedings and the Writ Petitions are significant and give rise to the risk of real injustice. There is much attraction in Mr Joseph QC's submission that the English court should in effect now grasp the nettle, take control and move things on so that the arbitration on the merits can proceed simply on the basis that the arbitration clause provides that London shall be the "venue of the arbitration proceedings" and that this court can and should decide for itself that the "seat" is therefore London as part of this court's supervisory jurisdiction and exercise its powers under s.18 of the English 1996 Act. However, for good or ill, the claimants have actively engaged in the Daman proceedings. Although Mr Joseph QC hotly disputed that there was any "obligation" on the claimants to seek to renew their application for expedition before the BHC, there is no evidence before me to suggest that that was not a course open to them. However, it appears that they did nothing after February 2010. This is not a case where it might be said that the Writ Petitions were in any sense "improper"; or that such proceedings have in any sense lapsed. If that had been the case or if, perhaps, some particular event had occurred after February 2010 which would suggest that the continued pursuit of such proceedings had become improper, then the position might be otherwise. But that is not this case.

Res judicata/issue estoppel ?

50. The present position might also have been otherwise if Mr Joseph QC had been correct in his submission that the Judgment and Order of the DDC (Judge Purohit) gave rise to some *res judicata*/issue estoppel. But in my view that is not so. I have already summarised above Mr Joseph QC's submissions in this regard. Mr Edey QC's submissions were, in summary as follows:
- i) It is far from clear that the issues here and before Judge Purohit are exactly the same. The Claimants originally put in no Indian law evidence (as opposed to assertion in their Skeleton Argument before Flaux J) as to what needed to be

decided for the purposes of their s.45 application; and said nothing about what was required for their application to discharge the Indian anti-suit injunction. On the former, the determination of seat was in fact unnecessary; on the latter, the anti-suit could have been discharged for reasons other than seat.

- ii) The decision of Judge Purohit was not a decision on the merits in the sense used by Lord Brandon in *The Sennar (No.2)* [1985] 1 WLR 490 or at least the English court should be very wary of treating it as such given the uncertainties (as recognised by Flaux J) about what it in fact decides. EIL does not accept that the findings which the claimants contend can be found in the judgment are in fact findings at all as opposed to recitation of the arguments made by the claimants. In particular, EIL does not accept that Judge Purohit made any finding about seat (necessary or otherwise).
- iii) Whatever it decides, the decision is not final and conclusive on those points:
 - a) For a decision to be final and conclusive for the purposes of the English concept of issue estoppel, it must be final and conclusive (and establish an issue estoppel) under the law of the place where the decision was made: *Carl Zeiss v Rayer* [1967] AC 853 at p.919 and p.969. It is notable that the Claimants originally failed to put in any evidence to the effect that Judge Purohit's judgment was final and conclusive as a matter of Indian law, as is required (see *Carl Zeiss* again at p.919) but rather simply asserted that it was so.
 - b) As a matter of Indian law (in contrast to the position as it would be as a matter of English law), the mere fact of an appeal does mean that (i) the appealed decision is not final and conclusive and (ii) it does not establish an issue estoppel binding on any other Indian court. In that context, reliance was placed on the evidence of Indian law contained in paragraph 33(h) of the statement of Mr Allen and in particular the two Indian authorities there cited viz. *Sheodan Singh v Smt Daryao Kunwar* (1966) 3 SCR 300 and *Jal Narani v L Bulaqi Das* (1969) AIR 504.
 - c) Even if one completely ignores the Indian law position, the fact that there is a stay of Judge Purohit's order pending the appeal would, even as a matter of English law, be enough to deprive his judgment of any finality and conclusiveness it might otherwise have: *Colt Industries v Sarlie (No.2)* [1966] 1 WLR 1287 at p.1293; *Berliner Industriebank v Jost* [1971] 2 QB 463 at p.470-471. Here it is common ground that the s.45 relief has been stayed and it is the claimants' case (albeit wrongly) that the determination of the seat arose in the context of its s.45 application. On that basis too, Judge Purohit's decision is not final and conclusive.
 - d) In any event, it cannot possibly be right that a party can pray the concept of issue estoppel in aid of an application for an anti-suit injunction designed to stop, amongst other things, an appeal in respect of the very foreign judgment said to render the particular issue res judicata: that is bootstraps. It would be contrary to the fundamental or overriding principle that issue estoppel should only be applied to avoid

doing injustice (*Carl Zeiss* per Lord Upjohn at p.947). Reliance here on the appealed Purohit judgment would be an injustice; not avoid one.

51. For present purposes, I am prepared to assume in favour of the claimants that, contrary to these submissions, the Judgment and Order of Judge Purohit, viewed in isolation, did give rise to res judicata/issue estoppel as submitted by Mr Joseph QC. I am also prepared to assume again in favour of the claimants that the Writ Petitions are not, in truth, to be treated as appeals; that, even if that is wrong, as a matter of English law the fact that such judgment and order are being appealed is irrelevant; and that the position as a matter of Indian law is the same regardless of the two Indian authorities relied upon by Mr Edey QC as cited above. However, it seems to me that Mr Edey QC is, at the very least, right when he says that the fact that there is a stay of Judge Purohit's order pending the hearing of the Writ Petitions is, as a matter of English law, enough to denude his judgment of any finality and conclusiveness it might otherwise have on the basis of the cases cited above. In that context I should mention that I reach that conclusion on the basis of the stay of the Order in relation to s.45 of the Indian 1996 Act. However, insofar as may be necessary it seems to me that EIL is also right to rely on what it says is the stay in relation to the anti-suit because (i) although the position is not perhaps clear-cut, it seems to me, on balance, that EIL is right about the existence of a stay; alternatively (ii) there is sufficient doubt so as to preclude any possible reliance on res judicata/issue estoppel.
52. For these reasons, I do not accept Mr Joseph QC's submission that there is any relevant res judicata/ issue estoppel.

Good arguable case ?

53. In the alternative, Mr Joseph QC submitted that the judgment and order of Judge Purohit show that the claimants have, at the very least, a good arguable case that the seat of any arbitration under Clause 18 of the IPLA is London. Whether or not that is the relevant test for the purposes of CPR Part 62.5 (c) (ii) was a matter of considerable debate before me. However, even if it is, it seems to me that this does not of itself get the claimants home. As I have already stated, the power to give leave to serve out under CPR Part 62.5 is permissive. Even on the assumption that the claimants have a good arguable case that the seat of any arbitration is London and that this satisfies the requirement of subparagraph (c) (ii) it seems to me that this is of no real assistance in the particular circumstances of the present case where the parties have been engaged in litigation in India where that issue arises and, as would appear, remains to be determined. (In that context, Mr Joseph QC submitted that although EIL has certainly raised the issue in the Daman proceedings as to whether the IPLA and the arbitration agreement contained therein were binding, it had not (or at least not properly) raised specifically the issue as to whether (if the IPLA/arbitration was binding) the seat was other than London. That may be correct but there is in my view no doubt that such issue has been raised in the context of at least the Writ Petitions relating to the anti-suit.)

Seat of the arbitration

54. Another reason why I have reached my conclusion somewhat reluctantly is that I would have reached the conclusion that the "seat" of the arbitration is London which is, of course, the conclusion which the claimants say Judge Purohit reached. Given my

conclusion that these proceedings be stayed, my views on this issue are *obiter*. However, this issue was addressed at some length and in the event that this matter goes further or otherwise comes back before the court, it may be convenient to set out my brief reasons for such conclusion. It may also be of assistance to the BHC if and when it comes to hear the Writ Petitions although, as I say, my views are strictly *obiter*.

55. At the outset, I should mention that the question of “seat” in the context of the present proceedings potentially gives rise to a number of difficult sub-issues. In particular;
- i) What is the proper law to be applied to that question? It was common ground that the relevant proper law was the proper law of the putative arbitration agreement. However, the parties disagreed as to what was the proper law. Was it Indian law or English law?
 - ii) Who is to determine that question? Is it for the court to determine or for the arbitrators to determine subject possibly to the supervisory jurisdiction of the court?
 - iii) If the court is to determine that question, what is the relevant standard of proof? Is it (per Mr Joseph QC relying, in particular on *Noble Denton Middle East v Noble Denton International Limited* [2010] 1 Lloyd’s Rep 387) “good arguable case”? Or (per Mr Edey QC) a conclusion on a balance of probability. (One possible conclusion might be that on the application to serve out under CPR 62.5, the test is one of “good arguable case” but on the exercise of the court’s substantive powers under s.18 the court must be satisfied on a balance of probability that the “seat” is in England).

These are difficult issues. However, for present purposes I propose to address the question of “seat” on assumption that it is to be determined on a balance of probability as a matter of English law by the court although I recognise that those assumptions are not necessarily correct.

56. In my view the starting point is the language of clause 18 itself which I have already quoted above. The essential task must be to give effect to the (objective) intention of the parties as expressed in the wording of the parties’ agreement. Here, the arbitration agreement expressly provides: “*The venue of the arbitration proceedings shall be London*”. As to the proper construction of these words, Mr Joseph QC referred me to numerous authorities in which provisions, for example, for “arbitration in London” have been treated by the English courts as a binding provision with London as the designated seat. In particular, I respectfully agree with the approach of Cooke J in *Shashoua v Sharma* [2009] EWHC 957, [2009] 2 Lloyd’s Rep 376 at paragraphs [26] to [32]. That case was concerned with an arbitration agreement which provided that “the venue of arbitration shall be London, United Kingdom” whilst also providing that the arbitration proceedings should be conducted in English in accordance with ICC Rules and that the governing law of the shareholders agreement itself would be the laws of India. In particular, Cooke J stated at paras 26-27:

“26..... It is accepted by both parties that the concept of the seat is one which is fundamental to the operation of the Arbitration Act and that the seat can be different from the venue in which

arbitration hearings take place. It is certainly not unknown for hearings to take place in an arbitration in more than one jurisdiction for reasons of convenience of the parties or witnesses. The claimants submitted that in the ordinary way, however, if the arbitration agreement provided for a venue, that would constitute the seat. If a venue was named but there was to be a different juridical seat, it would be expected that the seat would also be specifically named. Notwithstanding the authorities cited by the defendant, I consider that there is great force in this. The defendant submits however that as "venue" is not synonymous with "seat", there is no designation of the seat of the arbitration by clause 14.4 and, in the absence of any designation, when regard is had to the parties' agreement and all the relevant circumstances, the juridical seat must be in India and the curial law must be Indian law.

"27. In my judgment, in an arbitration clause which provides for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that the venue of the arbitration shall be London, United Kingdom does amount to the designation of a juridical seat. The parties have not simply provided for the location of hearings to be in London for the sake of convenience and there is indeed no suggestion that London would be convenient in itself, in the light of the governing law of the Shareholders Agreement, the nature and terms of that agreement and the nature of the disputes which were likely to arise and which did in fact arise (although the first claimant is resident in the UK)."

57. Cooke J summarised his conclusion in paragraph 30:

"30. "London arbitration" is a well known phenomenon which is often chosen by foreign nationals with a different law, such as the law of New York, governing the substantive rights of the parties. This is because of the legislative framework and supervisory powers of the courts here which many parties are keen to adopt. When therefore there is an express designation of the arbitration venue as London and no designation of any alternative place as the seat, combined with a supranational body of rules governing the arbitration and no other significant contrary indicia, the inexorable conclusion is, to my mind, that London is the juridical seat and English law the curial law. In my judgment it is clear that either London has been designated by the parties to the arbitration agreement as the seat of the arbitration or, having regard to the parties' agreement and all the relevant circumstances, it is the seat to be determined in accordance with the final fall back provision of section 3 of the Arbitration Act."

58. Moreover, as Cooke J. noted, this conclusion is consistent with the views expressed in *The Conflict of Laws*, Dicey, Morris & Collins, 14th Edition at ¶16-035 where the authors state that the seat "*is in most cases sufficiently indicated by the country chosen as the place of the arbitration. For such a choice of place not to be given effect as a choice of seat, there will need to be clear evidence that the parties ... agreed to choose another seat for the arbitration and that such a choice will be effective to endow the courts of that country with jurisdiction to supervise and support the arbitration*".
59. Apart from the last sentence in clause 18.3 (ie "The provisions of the Indian Arbitration and Conciliation Act 1996 shall apply"), it seems to me that the conclusion that London is the "seat" of any arbitration thereunder is beyond any possible doubt. Thus the main issue is whether this last sentence is to be regarded as "significant contrary indicia" (using the language of Cooke J.) so as to place the "seat" of the arbitration in India. A similar issue was considered by Saville J in *Union v of India v McDonnell* [1993] 2 Lloyd's Rep 48 which, of course, pre-dates the English 1996 Act. The arbitration agreement in that case provided as follows: "In the event of a dispute arising out of or in connection with this agreement...the same shall be referred to an Arbitration Tribunal...The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940 or any enactment or modification thereof. The arbitration shall be conducted in the English language...The seat of the arbitration proceedings shall be London, United Kingdom." Saville J expressed the view that the arguments on both sides were "finely balanced" but in effect concluded that the reference to the Indian Arbitration Act 1940 did not have the effect of changing the "seat" of the arbitration designated by the parties. Rather, the phrase referring to the 1940 Act was to be reconciled with the rest of the clause by reading it as referring to the internal conduct of the arbitration as opposed to the external supervision of the arbitration by the Courts.
60. With regard to this decision of Saville J, Mr Edey QC made a number of detailed submissions. In particular:
- i) First, unlike the clause in this case, the clause there specifically referred to the "seat" of the arbitration being London. That very particular use of a legal term of art formed the central plank of the arguments put forward in favour of English law being the chosen procedural law of the arbitration: see p.50. In *ABB v Keppel* [1999] 2 Lloyd's Rep.24, Clarke J rightly interpreted the decision in *Union of India* as turning on the use of the word "seat" (see p.33rhc). In that context, the conclusion is perhaps unsurprising. But here, the much more ambiguous term "venue" (which appears neither in the English or Indian Act) has been used.
 - ii) Second, the fact that the clause there referred to the arbitration being "conducted in accordance with the procedure" provided in the old Indian Act (emphasis added), made it much easier for Saville J to give the reference to the old Indian Act the narrow scope which he did: indeed that and the use of the word "seat" were the linguistic linchpins of his reasoning (see p.51). That is not a route open on the language here: Cl.18.3 simply states that the provisions (not just some of them) of the Indian Act "shall apply".

- iii) Third, in this case, unlike that, the choice of law clause (here Cl.17, there Cl.11) not only provides that the contract itself is governed by and to be construed in accordance with Indian law, but that also that “any disputes” are governed by Indian law. In *The Bay Hotel v Cavalier Construction* [2001] UKPC 34, the Privy Council held that an agreement that disputes were to be resolved by the laws of Turks & Caicos Islands, was a choice of those laws as the procedural laws of the arbitration.
- iv) Fourth, Saville J’s analysis (p.50-51) as regards the ability of the parties to agree that the seat of the arbitration is England but under procedural law of another country, needs to be taken with caution in light of the provisions of the subsequently enacted English 1996 Act. In particular, under that Act, unlike its predecessors, it is expressly provided that where the parties have agreed that a foreign law should govern any matters within the non-mandatory parts of the Act, that agreement shall be taken as ousting those non-mandatory parts: s.4.
- v) Fifth, it is not at all clear which provisions of the Indian Act Saville J accepted would, on his basis, be relevant to the internal conduct of the arbitration. For their part, here, the claimants have also (understandably) shied away from identifying (and EIL cannot identify) which provisions of the Indian 1996 Act might apply on this limited basis and what, if anything, they would materially add to an arbitration under a clause without the final sentence of Cl.18.3.
- vi) Sixth, by contrast, the more recent case of *Braes of Doune v Alfred McAlpine* [2008] 1 Lloyd’s Rep.608 points in favour of EIL: in that case Akenhead J decided that even the express reference to Glasgow as the “seat” of the arbitration did not, in context, amount to a choice of Glasgow as the juridical seat of the arbitration but only of the place where hearings would physically take place, holding that “where in substance the parties agree that the laws of one country will govern and control a given arbitration, the place where the arbitration is to be heard will not dictate what the governing or controlling law will be” (para.17(e)).
- vii) Finally the following matters all further support EIL’s case on this:
 - a) First, Clause 18.1 refers to the third arbitrator being “the presiding arbitrator”. That is, of course, not a term used by the English 1996 Act which refers to an umpire or chairman (ss.16 and 20-22). By contrast, the Indian 1996 Act uses the concept of “presiding arbitrator” in s.11.3. That is a clear pointer towards the parties envisaging Indian arbitration.
 - b) Second, if the claimants are right and EIL is wrong about this, the consequence is that there is no right of appeal under the English 1996 Act, since the IPLA is governed by Indian law and a decision on foreign law is a finding of fact which is not appealable under s.69 of the English 1996 Act no matter how obviously wrong it may be. Of course the parties may exclude the right of appeal under s.69, but it would be a little surprising to find that they had done so by this back-door.

- c) Third, stepping back from things, India as the seat / Indian law as the procedural law of the arbitration makes complete sense in the context of the relationship between these parties, the focus of which was exclusively India. Any suggestion that it is inherently unlikely that the German parties would agree to Indian procedural law to govern any arbitration is belied by the fact that they clearly so agreed in the SHA and TKHA and they agreed for Indian law to govern all the contracts between the parties.
- d) Fourth, if the seat is India/the procedural law Indian, the consequence is that the contract as a whole is governed by Indian law; the arbitration agreement is governed by Indian law; on the Claimants' case the internal conduct of the arbitration is governed by some parts of the Indian Act; but the remaining procedural law is English law. While possible (and the result in the *Union of India* case is an example of that possibility), it is not an attractive result. On the language here, as distinct from that in *Union of India*, it is not a result to which the court is driven.

61. These are forceful submissions and like Saville J in *Union of India*, I find the arguments in the present case finely balanced. For example, I accept that the reference to "presiding arbitrator" in clause 18.1 is a pointer in favour of EIL's construction. I also recognise that there are potentially important differences of language between the arbitration clause in that case and in the present case: in particular, the point emphasised by Mr Edey QC viz that the parties have not chosen the word "seat" but "venue" which are not, at least necessarily, synonymous. However, in the present context, it seems to me that a focus of the potential linguistic nuances of these two words may well not be appropriate for reasons similar to those expressed in the context of the scope of arbitration clauses by the House of Lords in *Fiona Trust v Privalov* [2008] 1 Lloyd's Rep 254. Moreover, given the approach as stated by Cooke J in *Shashoua v Sharma* (with which, as I have stated, I respectfully agree), I do not read the last sentence of clause 18.3 as, in effect, constituting India as the seat of any potential arbitration for the following main reasons.
62. First, although the word "venue" is, of course, not necessarily synonymous with "seat", it seems to me that in the context of this particular clause, the parties' agreement that the venue shall be London is and can properly only be a reference to London as the "seat". I do not accept Mr Edey QC's suggestion that London was chosen simply as a convenient geographical venue for the parties. London was not a convenient geographical venue for disputes concerning an Indian joint venture; intellectual property in India; an Indian and German company; where the evidence would be located in India and possibly to some extent in Germany. In my judgment, the designation of London therefore had to have some other function for it to be explicable. EIL argues that maybe London was chosen because it was a neutral venue. However, as submitted by Mr Joseph QC, neutrality in this sense is to be understood in terms of a neutral place to anchor the proceedings. In other words a place which is neutral and will not favour either side. A designated room for the hearing of evidence is not the meaning of the words used but in any event is rarely anything other than neutral.

63. Second, the language in clause 18.3 refers to the “arbitration proceedings”. That is an expression which includes not just one or more individual or particular hearings but the arbitration proceedings as a whole including the making of an award. In other words the parties were anchoring the whole arbitration process in London right up to and including the making of an award. The place designated for the making of an award is a designation of seat. Moreover the language in clause 18.3 does not refer to the venue of all hearings “taking place” in London. Clause 18.3 instead provides that the venue of the arbitration proceedings “shall be” London. This again suggests the parties intended to anchor the arbitration proceedings to and in London rather than simply physically locating the arbitration hearings in London. Indeed in a case where evidence might need to be taken or perhaps more likely inspected in India it would make no commercial sense to construe the provision as mandating all hearings to take place in a physical place as opposed to anchoring the arbitral process to and in a designated place. All agreements including an arbitration agreement should be construed to accord with business common sense. In my view, there is no business common sense to construe the arbitration agreement (as contended for by EIL) in a manner which would simply deprive the arbitrators of an important discretion that they possess to hear evidence in a convenient geographical location.
64. Third, Mr Joseph QC submitted that the last sentence of clause 18.3 can be reconciled with the choice of London as the seat. First, he submitted that it can be read as referring simply to Part II of the Indian 1996 Act ie the enforcement provisions. Mr Edey QC’s response was that if that is all the last sentence meant, then it would be superfluous. However, I do not consider that any such superfluity carries much, if any, weight. Alternatively, Mr Joseph QC submitted that it can be read as referring only to those provisions of the Indian 1996 Act which were not inconsistent with the English 1996 Act. As to the latter, Mr Edey QC submitted that there were few, if any, provisions of the Indian 1996 Act which fell into such category and that, in any event, the attempt to carry out some kind of reconciliation process was difficult, if not impossible, and would lead to uncertainty and confusion. It is not necessary for me to carry out such reconciliation process although some such issue may well arise in the future. For present purposes, it seems to me sufficient that on either ground the last sentence of clause 18.3 either is or may not be entirely meaningless.
65. Further, Mr Joseph QC also relied upon the fact that the parties previously under the TKHA and SHA had made provision for Indian arbitration to take place at the Indo-German Chambers of Commerce in Bombay. I am uncertain as to whether reference to these earlier agreements is legitimate as an aid to the construction of the arbitration agreement in the IPLA. But, on the assumption that such reference is permissible, it seems to me that there is at least some force in Mr Joseph QC’s argument that this change from India to England must be taken to have some real and effective purpose and that the most credible explanation for this change of place or seat outside of India is to render an award enforceable in India under the provisions of the New York Convention (i.e. Part II of the Indian Arbitration Act). If the provisions of clause 18.3 were construed as rendering the place of arbitration as India, then it would give rise to a domestic award and not be enforceable in India under the Indian 1996 Act’s enactment of New York Convention. In an international contract of this type (with parties of different nationality) the desirability of enforceability of an award under the provisions of the New York Convention as enacted in India and elsewhere is a legitimate commercial reason to construe the agreement as the claimants contend.

66. For all these reasons, it would have been my conclusion that, whether applying the test of “good arguable case” or on a balance of probability, the effect of clause 18.3 is that London would be the “seat” of any arbitration thereunder. It would also follow from that conclusion that the English 1996 Act would apply and that the English court’s “supervisory jurisdiction” would be engaged including, of course, the court’s power to give the necessary leave to serve relevant proceedings out of the jurisdiction and its power under s.18 of the English 1996 Act to appoint an arbitrator.

The Injunctions

67. Given my conclusion with regard to the stay and my reasons for such conclusion, it seems to me to follow inevitably that I should also set aside paragraphs 1 and 2 of the Order of Flaux J. at least so far as the existing Writ Petitions are concerned. I should mention that Mr Edey QC advanced a number of independent arguments why those parts of that Order (indeed the whole Order) should be discharged – in particular because of the claimants’ alleged inexcusable delay, alleged contempt of the Indian proceedings and failure to comply with their duties of full and frank disclosure at the without notice hearing. In the event, it is unnecessary to deal with these arguments.
68. As to the freezing injunction which I granted, the position is perhaps more complicated. As stated above, I granted the freezing injunction at the without notice hearing on 15 February 2012. The injunction was granted in the proceedings commenced by the AFC for which Flaux J. granted leave to serve out as I have already described. Given my earlier conclusion that the proceedings should be stayed and although I suppose it is arguable that I still have jurisdiction to continue the freezing injunction, one possible view is that it follows that I must (or at least should as a matter of discretion) decline to do so. However, on the assumption that (i) there is at least a good arguable case that the IPLA is binding and that the seat of any arbitration is London and (ii) “good arguable case” is the relevant test, there is a counter-argument that s.44 of the English 1996 Act and/or s.37 of the Senior Courts Act 1981 continue to apply and that, on that basis, I can and should continue the freezing injunction. In the circumstances, it is not necessary to decide that issue. I am prepared to assume in favour of the claimants that my jurisdiction to continue the freezing remains extant. Further, I do not consider that it is necessary to consider the separate arguments advanced by Mr Edey QC that the freezing injunction should be discharged including (again) the claimants’ alleged failure to comply with their duties of full and frank disclosure at the without notice hearing. However, it seems to me that, as submitted by Mr Edey QC, there is both a short and a long answer to the continuation of the freezing injunction. The short answer is that, even on the assumption that s.44 of the English 1996 Act applies, the claimants cannot satisfy the requirements of “urgency” and s.37 of the Senior Courts Act 1981 (again assuming it applies) cannot be used to circumvent the restrictions in s.44. The long answer is that I do not consider that there is sufficient evidence of “risk of dissipation” to justify the continuation of the freezing injunctions. These two answers overlap to some extent. I deal with both answers shortly below.
69. In support of the continuation of the freezing injunction, Mr Joseph QC relied upon a number of matters under two broad headings.

A. EIL’s conduct to the claimants

70. First, Mr Joseph QC relied upon what he described as “EIL’s conduct to the Claimants”. This was dealt with in paragraphs 151-154 of Mr Joseph’s QC skeleton argument as elaborated in the course of his oral argument. I do not propose to set out these submissions in any detail. The two main sub-points were these. First, Mr Joseph QC identified a number of matters in relation to EIL’s conduct which were, he submitted, in flagrant breach of the IPLA. That may be. However, it seems to me that that this ignores the dispute between the parties as to whether the IPLA is binding. If, as EIL contends, the IPLA is not binding then the claimants’ complaints of breach – let alone flagrant breach – fall to the ground. For present purposes, I proceed on the basis (as EIL has now conceded) that the claimants have a good arguable case. However, it seems to me that this is of little, if any, significance. Of course, in order to obtain a freezing injunction, it is trite law that a claimant must show a “good arguable case”. However, that is a prerequisite but not, at least of itself, a sufficient justification of the grant of a freezing injunction. There must, in addition, generally be “solid evidence” of the risk of dissipation. In circumstances where the court is satisfied that the claimants have an unarguable or even a very strong case, such fact can no doubt be taken into account by the court in considering whether or not to grant the freezing injunction. However, it does not seem to me that this is a case where I can or should go further than the concession made by EIL ie that the claimants have a “good arguable case”. The claimants seek to rely on the fact that this concession came very late; but, in my view, this provides the claimants with little, if any assistance. Moreover, this is not a dispute which has suddenly arisen. On the contrary, it appears that it goes back some 5 years or more and has been at the heart of most if not all of the Indian proceedings that I have described above. Mr Joseph QC then submitted that even if the IPLA is not binding, EIL has failed to pay some Euros 19 million for which there is no real defence and, again, that is something which I can and should take into account. However, in that context, it is EIL’s case that it has a cross-claim of approximately Euros 75 million which it is, in effect, entitled to set-off against such claim. In response, Mr Joseph QC took me through the detailed summary of such cross-claim and submitted that, in truth, it was obviously “paper thin” and, in any event, grossly exaggerated. As to the former (ie paper thin), I am unable to express a view on the material before me; and as to the latter (ie grossly exaggerated), I am equally unable to express a view although even if Mr Joseph QC is right (as he may well be), there is no basis upon which I could say it could not overtop the claimant’s claim of Euros 19 million.

B. EIL’s financial profile and dealings with affiliates and subsidiaries controlled by Mr Mehra

71. This aspect was addressed in paragraphs 155-160 of Mr Joseph QC’s skeleton argument as elaborated in oral argument. In particular, Mr Joseph QC took me through a detailed letter (in effect, an expert’s report) from KPMG dated 6 March 2012 which Mr Joseph QC submitted demonstrated a real risk of dissipation. Indeed, it was, Mr Joseph QC’s submission that this letter showed that there had already been a significant dissipation of current net assets. The letter shows on p5 a comparison of data from the 2009, 2010, and 2011 draft accounts prepared by the Indian firm of Deloitte Haskins & Sells (“Deloitte”). In particular KPMG highlight the decline in net current assets (p8), the limited provision in the accounts for royalties under the IPLA (p10), the material increase of investments in and loans to subsidiaries and associates (pp11-12), what is said to be certain inconsistencies between the draft accounts as

regards inter-company trading balances (pp13-14), and the material movements in the balances to loans to subsidiaries including a very large trading balance of €67m to one subsidiary (pp15-17). The summary conclusions are at pp18-19.

72. In addition, Mr Joseph QC relied upon the network of companies associated with EIL which he submitted was “particularly troubling” for the reasons Mr Ashford gives in his first witness statement paragraphs 40-44 and in his third witness statement paragraphs 80-83 which Mr Joseph QC submitted had not been answered satisfactorily. In summary, it was Mr Joseph QC’s submission that it is perfectly clear that EIL is loaning substantial sums of money, without the consent or knowledge of Enercon to vehicles wholly owned by the Mehra family; that Mr Mehra’s protestations that every subsidiary was established with the full knowledge of Enercon, is a wholly owned subsidiary or has direct ownership by Enercon and the EIL, is, as Mr Ashford points out, simply untrue; and that, as Mr Mehra himself notes at in his own witness statement, “[Enercon] are not actively engaged in the business of these subsidiaries” in any event. Further, it was Mr Joseph QC’s submission that Mr Mehra’s evidence generally on the role and purpose of these subsidiaries is dubious at best. By way of example, Mr Joseph QC relied in particular on the following:
- a) Mr Mehra’s figure for the “long term loans” does not appear in the Deloitte 2010 report. In fact, the figure in the DHS report appears to be double the sum Mr Mehra gives.
 - b) Mr Mehra also states that he and his family own companies that were incorporated to acquire land “*for the potential use as wind farm sites*” because he says that that is necessary due to “*limitations on how much land each company can acquire.*” As Mr Ashford points out however, this apparent citation of India law cannot be right, because it would imply EIL was seeking to establish wind farms in urban locations on plots of between 500 – 2000 square metres, which would plainly be ridiculous. In any event, Enercon has not seen any evidence that such companies have sold land to EIL as Mr Mehra envisages. If indeed they have, it is difficult to see how that could be done lawfully due to the self-dealing rules, Enercon not being involved in management and the CLB directing that no board meetings should take place.
 - c) In response to Mr Ashford’s contentions that EIL’s net worth reduced from 2009 to 2010, Mr Mehra merely asserts that EIL’s turnover and net profit have all increased without revealing the source of those figures. He does not attempt to explain why the figures Mr Ashford was looking at are not correct.
73. Finally, Mr Joseph QC submitted that EIL’s continued activities are also very troubling in view of the *status quo* orders from the CLB. In particular, Mr Joseph QC submitted that, on the one hand, Mr Mehra suggests that Enercon should take some comfort from the fact that EIL’s business is subject to the CLB proceedings and from the fact that orders have been made to preserve the status quo; but on the other hand, Mr Allen says that the status quo order has “*fallen away*”. Mr Joseph QC relied upon certain other particular parts of the evidence in support of a general submission that the overall “impression” is that that the Mehra’s have little concern for the proper

running of EIL or compliance with court orders and that the running of EIL since Enercon was excluded smacks of the Mehra family treating it as their own personal fiefdom.

74. I am prepared to accept that there may well be a strong and genuine suspicion on the part of the claimants that EIL has dissipated its assets and that there is a risk of future dissipation of assets on the part of EIL. However, I am not satisfied that there is “solid evidence” to such effect; nor that this is a case where it would be appropriate to make any inferences that would justify such a conclusion. In particular, it does not seem to me that the KPMG letter shows any such actual or future risk of dissipation. I agree that it raises certain queries. I also agree that it shows a very substantial reduction in what are described as “net current assets” (ie Rs 4,685 m in 2007 to only Rs 439 m in 2011) during a period of dramatic growth in profits in the same period (ie from Rs 217 in 2007 to Rs 1,837 m). This was, indeed, Mr Joseph QC’s main point in his oral submissions. However, it does not seem to me that this is necessarily evidence of dissipation of assets. Certainly, there is nothing in the KPMG letter to that effect. On the contrary, it seems to me that, as explained in Mr Mehra’s witness statement and as submitted by Mr Edey QC, this picture is entirely consistent with EIL using its profit and net current assets to fund the growth of EIL’s corporate interests. The fact that this may be done through subsidiaries or even third party companies owned and controlled by the Mehra family does not seem to me sufficient to warrant the conclusion that EIL’s assets are being dissipated. The main thrust of Mr Joseph QC’s complaints is that the reduction in EIL’s net current assets means that there is or will be a reduction in the cash (or cash equivalent) within EIL to pay the claimants’ claims. However, to my mind, the flaw in such complaints is the failure to recognise that the purpose of a freezing injunction is not to give the claimants security over any particular asset or money.
75. Of all the arguments advanced by Mr Joseph QC in this context, the one which did initially impress me most was the submission that many of the investments which had apparently been executed (in particular to third party companies owned or controlled by the Mehra family) were made in breach of the SHA ie without the consent of Enercon. However, Mr Edey QC complained that this was an entirely new allegation which he would, if necessary, need further time to address. However, it seems to me that, as submitted by Mr Edey QC, these are matters which are, in effect, within the purview of the proceedings before the CLB.
76. In any event, there are a number of matters which, in my judgment, undermine the continuation of the freezing injunction. First, EIL is not some one-ship company or fly-by-night outfit incorporated in an off-shore jurisdiction. On the contrary, it is a substantial and growing company. As at 31 March 2011, it had a turnover of Euros 560 million and profits of Euros 26.3m. It had (book value) assets (including factories in Daman, Karnataka and Tamilnadu) exceeding liabilities by Euros 111m. It employs around 4,300 employees in India. Its operations are subject to Indian law. Second, EIL is audited annually by Deloitte. Enercon has been provided with the annual accounts. Any dissipation of assets would be expected to come to light in that context. There is absolutely no evidence in those accounts of dissipation of assets – and, as I have indicated above, the matters relied upon by Mr Joseph QC (in particular, the reduction in net current assets) do not, in my view, of themselves indicate any such “dissipation”. Third, EIL has substantial and ongoing relationships with its banks. Mr

Mehra has personally guaranteed capital loans by banks to EIL of around Euros 100m. As submitted by Mr Edey QC, EIL must provide monthly reports to the banks as a result of which any sign of dissipation would be expected to come to light.

77. Fourth, it seems to me relevant to take into account that there is no proper explanation for the delay in applying to the court for a freezing injunction. In that context, Mr Joseph QC referred me to *Madoff Securities International & Others v Raven & Others* [2011] EWHC 3102 (Comm) where after citing certain passages from two recent decisions in the Commercial Court viz *Fiona Trust v Privalov* [2007] EWHC 1217 (Comm) and *Antonio Gramsci Shipping Corp v Recoletas Ltd* [2011] EWHC 2242 (Comm), Flaux J. summarised the applicable principles in paragraph 156 of his Judgment as follows:

“ It seems to me that the following principles relevant to the present application can be discerned from those two cases:

(1) The mere fact of delay in bringing an application for a freezing injunction or that it has first been heard *inter partes*, does not, without more, mean there is no risk of dissipation. If the court is satisfied on other evidence that there is a risk of dissipation, the court should grant the order, despite the delay, even if only limited assets are ultimately frozen by it;

(2) The rationale for a freezing injunction is the risk that a judgment will remain unsatisfied or be difficult to enforce by virtue of dissipation or disposal of assets (see further the citation from *Congentra AG v Sixteen Thirteen Marine SA* ("The Nicholas M") [2008] 2 Lloyd's Rep 602; [2008] EWHC 1615 (Comm) below). In that context, the order for disclosure of assets normally made as an adjunct to a freezing injunction is an important aspect of the relief sought, in determining whether assets have been dissipated, and, if so, what has become of them, aiding subsequent enforcement of any judgment;

(3) Even if delay in bringing the application demonstrates that the claimant does not consider there is a risk of dissipation, that is only one factor to be weighed in the balance in considering whether or not to grant the injunction sought.”

78. I respectfully agree with and am content to adopt those principles. However, it does not seem to me that they are of any assistance to Mr Joseph QC. Delay in bringing the application is at least one factor to be weighed in the balance in considering whether or not to continue the freezing injunction. As submitted by Mr Edey QC, it is not simply the fact of delay that is so important but what it tells the court about the risk of dissipation. Absent some proper explanation, the fact that the claimants here waited for almost 2 and a half years before seeking a freezing injunction raises, at the very least, a large question mark as to whether there is indeed a real risk of dissipation particularly against the background of the many and varied Indian proceedings in which the parties have been engaged since 2007. This was a point which troubled me at the without notice hearing on 15 February; and I raised it specifically with Mr Joseph QC. In broad terms, Mr Joseph's answer was that when the anti-suit injunction was in place, the claimants could not apply to this court for a freezing injunction and

thereafter (ie after September 2009) they were otherwise occupied because of what Mr Joseph QC described as a “deluge of Indian litigation”, in particular the various patent suits. As I said then, I find that difficult to accept. The other main reason given for the delay is that the information with regard to risk of dissipation has only emerged in stages. That explanation has perhaps more force but Mr Joseph QC was unable to point to any particular information which has only recently become available and which is somehow of critical importance. In the event, I do not consider that the delay and the lack of proper explanation of itself justifies the discharge of the freezing injunction. However, it is a factor which I can and do take into account.

79. In all the circumstances and for the reasons stated above, I am not persuaded that that this is a case in which the freezing injunction should be continued.

Conclusions

80. For all these reasons, it is my conclusion that, in principle and subject to any further submissions in the light of my comments in paragraph 48 above, paragraphs 1 and 2 of the Order of Flaux J should be set aside; the freezing injunction should be set aside; and the present proceedings should be stayed on terms which I hope can be agreed. Counsel are requested to prepare a draft order for my approval failing which I will hear further argument and determine any outstanding issues.