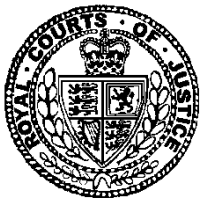

Neutral Citation Number: [2019] EWHC 946 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Claim No CL-2018-000390

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

Monday 15 April 2019

BEFORE:

MR RICHARD SALTER QC
Sitting as a Deputy Judge of the High Court

BETWEEN:

IDEMIA FRANCE SAS

Claimant

- and -

(1) DECATUR EUROPE LIMITED
(2) TIGER IT BANGLADESH LIMITED
(3) ZIAUR RAHMAN

Defendants

- -

Mr Stephen Midwinter QC
(instructed by *Cleary Gottlieb Steen & Hamilton LLP*)
appeared for the Claimant

Mr Ian Clarke QC
(instructed by *K&L Gates LLP*)
appeared for the Defendants

Hearing dates: 3, 4 April 2019

- -

.....

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

……..

MR SALTER QC:

Introduction

1. This is a dispute about jurisdiction.

2. The underlying commercial dispute between the parties concerns a claim by the First Defendant ("Decatur") and the Second Defendant ("Tiger") for additional payments from the Claimant ("Idemia"). Decatur and Tiger allege that Idemia, when making payments to them under contracts for the provision of goods and services in Bangladesh, deducted discounts ("the Discount Sums") to which, in the events which have happened, Idemia was not contractually entitled. Decatur and Tiger therefore claim that Idemia is now liable to pay them the Discount Sums which it had previously deducted.

3. The dispute about jurisdiction has arisen in this way. Decatur (which is an English company) and Tiger (which is incorporated in Bangladesh) have brought an action for the Discount Sums against Idemia in the courts of Bangladesh. Idemia (which is a French company) claims that that action ("the Bangladesh Action") has been brought in breach of the jurisdiction provisions in the underlying contracts, which confer exclusive jurisdiction upon the competent courts of Geneva, Switzerland. Decatur and Tiger disagree, claiming that the subject matter of the Bangladesh Action is not covered by the jurisdiction provisions on which Idemia relies.

4. It might be thought that the obvious forum in which that dispute as to jurisdiction should be resolved would be the courts of Switzerland or, possibly, those of Bangladesh. However, Idemia says that its contractual right to be sued in Switzerland (and nowhere else) means that it cannot be forced to litigate in Bangladesh. As for the courts of Switzerland, Idemia says that the Swiss courts do not have power to issue the anti-suit injunction which it needs to restrain the further prosecution of the Bangladesh Action.

5. Idemia has therefore brought this action before the English courts. In it, Idemia claims to be entitled indirectly to enforce the jurisdiction provisions on which it relies by enforcing guarantees which Idemia claims that Decatur and Tiger have each given for the other's obligations under the relevant contracts, and which contain English law and jurisdiction clauses.

6. The Third Defendant ("Mr Rahman") is alleged by Idemia to own and control Decatur and Tiger, and to have procured their breaches of the jurisdiction provisions of the relevant agreements and/or to have conspired with Decatur and Tiger. Idemia says that the English courts also have jurisdiction over Mr Rahman, both because he

is a proper party to Idemia's action against Decatur and Tiger, and because Mr Rahman has been served in England with these proceedings.

7. Decatur and Tiger dispute that the guarantee documents on which Idemia's claim in the present action is founded amount to enforceable contracts. Mr Rahman disputes that he has been properly served with the proceedings. All of the Defendants assert that the English courts have no jurisdiction to entertain this action and/or should stay these proceedings on *forum non conveniens* or case management grounds.

8. On 15 June 2018 Robin Knowles J gave Idemia permission under CPR 6.36 and 6.37 to serve these proceedings on Tiger in Bangladesh but refused Idemia's application for an interim injunction. Idemia has issued an application for summary judgment, which is due to be heard on 14 May 2019.

9. There are 5 applications presently before the court:

    9.1 The First Defendant's jurisdictional challenge, made by Application Notice dated 12 July 2018;

    9.2 The Third Defendant's first jurisdictional challenge, made by Application Notice dated 17 July 2018;

    9.3 The Second Defendant's jurisdictional challenge, made by Application Notice dated 28 August 2018;

    9.4 The Third Defendant's second jurisdictional challenge, made by Application Notice dated 11 September 2018; and

    9.5 The Defendants' application for permission to adduce expert evidence, made by Application Notice dated 8 March 2019.

10. Both parties have served extensive evidence in connection with these applications.

    10.1 The Defendants have relied upon:

        10.1.1 The witness statement of Mr Dariusz Kaliszewski, made on 14 June 2018. Mr Kaliszewski is a director of Decatur;

        10.1.2 The witness statement of Mr Sovan Mahmud, made on 12 July 2018. Mr Mahmud is a partner in the firm of Quader Mahmud Azam LP, which acts for Decatur and Tiger in Bangladesh

        10.1.3 The first witness statement of Mr Rahman, made on 17 July 2018;

10.1.4 The second witness statement of Mr Rahman, made on 28 August 2018;

10.1.5 The third witness statement of Mr Rahman, made on 10 September 2018;

10.1.6 The fourth witness statement of Mr Rahman made on 16 November 2018; and

10.1.7 The witness statement of Mr Syed Jawad Quader, made on 27 March 2019. Mr Quader is the managing partner of Quader Mahmud Azam LP.

10.2 The Claimants have relied upon:

10.2.1 The first witness statement of Mr Sunil Gadhia, made on 6 June 2018. Mr Gadhia is a partner in Cleary Gottlieb Steen & Hamilton LLP, the solicitors for Idemia, and this first witness statement was made in support of Idemia's application (a) for permission to serve the Claim Form, Particulars of Claim and other documents relating to these proceedings out of the jurisdiction on Tiger; and (b) for an interim injunction requiring the Defendants to discontinue the Bangladesh Action;

10.2.2 The second witness statement of Mr Gadhia, made on 12 June 2018 (also in connection with the Claimant's applications); and

10.2.3 The third witness statement of Mr Gadhia, made on 28 September 2018.

11. Both parties have also served expert evidence (which is the subject of the Defendants' application for permission referred to in paragraph 9.5 above):

11.1 In relation to the law of Bangladesh:

11.1.1 The Defendants have relied upon the expert reports of Mr Rokanuddin Mahmud dated 12 July 2018 and 15 November 2018;

11.1.2 The Claimants have relied upon the expert report of Syed Ishtiaq Ahmed & Associates dated 28 September 2018.

11.2 In relation to the law of Switzerland:

11.2.1 The Defendants have relied upon the expert reports of Professor Christoph Müller dated 10 July 2018, 28 August 2018 and 16 November 2018;

11.2.2 The Claimants have relied upon the expert report of Dr Manuel Bianchi Della Porta dated 27 September 2018.

12. CPR 35.4(1) states in terms that "No party may .. put in evidence an expert's report without the court's permission". It is apparent from the dates given above that the Defendants served their experts' reports on Idemia well before they applied for the necessary permission. Idemia could have responded by applying to the court to exclude the Defendants' evidence. However, as a matter of practicality and prudence, it chose instead to respond with its own reports. Mr Stephen Midwinter QC, who appeared before me on behalf of Idemia, submitted that the expert evidence on which the Defendants seek to rely consists largely of irrelevant and inadmissible material, and that I should therefore refuse to grant retrospective permission. The parties nevertheless agreed prior to the hearing that I should read all the expert evidence served on both sides *de bene esse*, and I have done so. Both sides also made submissions at the hearing before me in relation to the expert evidence.

13. In the circumstances, I propose to take the pragmatic course of granting retrospective permission to both sides to rely upon the expert evidence listed above. I accept Mr Midwinter's submission that much of the evidence offered by Professor Müller consists of Professor Müller expressing his own views on the proper interpretation of the Decatur Agreement and the Tiger Agreement, rather than setting out the relevant principles of Swiss law, and is therefore inadmissible. It is well-established that "the role of an expert, unless the court is concerned with special meanings, is to prove the rules of construction of the foreign law, and it is then for the court to interpret the contract in accordance with those rules"[1]. However, since parts of the evidence of Professor Müller and of Dr Della Porta do set out the relevant principles of construction under Swiss law, and since I have already read and considered all their evidence, the practical course is for me to give permission for the evidence to be adduced, but to disregard the inadmissible parts. I can deal with any costs consequences at the appropriate time.

The background facts

14. The facts which form the background to these applications are not in dispute.

[1] *King v Brandywine Reinsurance Co* [2005] EWCA Civ 235, [2005] 2 All ER (Comm) 1 at [68], per Waller LJ (giving the judgment of the Court). See also *Alhamrani v Alhamrani* [2014] UKPC 37 at [18] and [19], per Lord Clarke of Stone-cum-Ebony.

15. In April 2014, the Bangladesh Election Commission ("the BEC") invited tenders for the "Procurement, Production and Distribution of Smart NID Cards for Citizens of Bangladesh". In anticipation of that invitation to tender, Idemia (which was then called Oberthur Technologies SA) invited Tiger to be Idemia's sub-contractor, and Decatur to be Idemia's supplier. In January 2014, Idemia entered into a "teaming agreement" with Tiger and Decatur in order to prepare a response to the BEC.

16. During their negotiations, Tiger and Decatur submitted quotations to Idemia for the products and services that they were to supply, accompanied by a letter dated 23 June 2014 ("the Discount Letter"), signed by Mr Rahman, in which they agreed to grant a discount of USD 5m on the total price to Idemia "if the tender is awarded to [Idemia] and if all the quoted items are purchased without any change of BOM". The Discount Letter was countersigned on behalf of Idemia.

17. On 29 July 2014, Idemia and Decatur entered into a Solution Development, Hardware and Services Purchase Agreement ("the Decatur Agreement"). This replaced the teaming agreement, and set out the terms which were to operate between Idemia and Decatur in the event that the BEC accepted Idemia's tender. Article 2 (headed "Subject of the Agreement") stated that:

> **The scope of this Agreement is to set forth the terms and conditions governing the development of the Solution, the supply of the Product and the provision of the Services by Decatur as may be requested by [Idemia] in line with agreed deliverables of Decatur for the Project, on a both Parties exclusive basis and according to this Agreement, always subject to the award of the Tender to [Idemia].**

18. Article 19.2 of the Decatur Agreement made the laws of Switzerland the applicable law of the Decatur Agreement: and Article 19.1 provided that:

> **Any dispute arising between the parties over the construction, validity, performance or non performance, or ceasing of this agreement shall be subject to the sole competence of the competent Courts of Geneva, Switzerland**

19. Article 6.13 of the Decatur Agreement dealt with the provision of guarantees. It stated as follows:

> **Performance Guarantee. Decatur has accepted to present to [Idemia] the appropriate guarantees that shall cover discharge of its obligations and undertakings contained in this Agreement, in the form of a company guarantee. The guarantee shall remain in full force and effect until the expiry of all the Warranty Periods applicable to the Products, Services and Solution.**
>
> **(a) Company Guarantee/Comfort letter. Decatur shall provide at [Idemia's] first demand but not later than the signature of the**

contract between [the BEC] and [Idemia] a company guarantee issued by Decatur in a form as per Schedule 6

20. Schedule 6 to the Decatur Agreement was headed "Schedule 6. Company Guarantee - Template", and was in the form of a letter addressed to Idemia dated "London, Tuesday 29th, 2014" [sic]. Under the date, the words "Object: Comfort letter" appeared. The body of the letter was in the following terms:

Dear Sirs,

We refer to the [Decatur Agreement] concluded with your company .. in relation to the supply of solution, hardware and services by [Decatur] (the "Supplier"), in the context of the production and distribution of Smart NID cards for Citizens of Bangladesh.

We hereby confirm you that [Tiger] is a company incorporated under the laws of Bangladesh .. (the "Guarantor").

We have agreed, in consideration of [Idemia] entering into the [Decatur Agreement] with the Supplier, that the Guarantor guarantees the due performance by the Supplier of all of its obligations under the [Decatur Agreement] (the "Guaranteed Obligations") under the following terms and conditions:

1. The Guarantor irrevocably and unconditionally guarantees and undertakes to [Idemia] to procure that the Supplier duly and punctually performs all of the Guaranteed Obligations now or hereafter due, owing or incurred by the Supplier to [Idemia].

2. If at any time the Supplier will not be able to perform any of the Guaranteed Obligations, the Guarantor, as primary obligor, irrevocably and unconditionally undertakes to [Idemia] that, upon first demand by [Idemia], the Guarantor shall, at its cost and expense:
(a) fully, punctually and specifically perform such Guaranteed Obligations as if it were itself a direct and primary obligor to [Idemia] in respect of the Guaranteed Obligations and liable as if the Guaranteed Agreement had been entered into directly by [Idemia]; and
(b) indemnify and keep [Idemia] indemnified against penalties related to non-performance of Supplier's obligations. This shall not be construed as imposing greater obligations or liabilities on the Guarantor then are purported to be imposed on the Supplier under the Guaranteed Agreement.

3. If the [Decatur Agreement] is disclaimed by a liquidator of the Supplier then the Guarantor will, at the request of [Idemia] enter into a contract with [Idemia] in terms mutatis mutandis the same as the Guaranteed Agreement and the obligations of the Guarantor under such substitute agreement shall be the same as if the Guarantor had been original obligor under the Guaranteed Agreement or under

an agreement entered into on the same terms and at the same time as the Guaranteed Agreement with [Idemia].

4. [Idemia] shall not be obliged before taking steps to enforce this letter against the Guarantor to obtain judgment against the Supplier or the Guarantor or any third party in any court, or to make or file any claim in a bankruptcy or liquidation of the Supplier or any third party, or to take any action whatsoever against the Supplier or the Guarantor or any third party.

5. This letter shall not be affected by any dissolution, amalgamation, reconstruction, reorganisation, change in status, function, control or ownership, insolvency, liquidation, administration, appointment of a receiver, voluntary arrangement or other incapacity of the Supplier, [Idemia], the Guarantor or any other person.

6. The Guarantor hereby represents and warrants to [Idemia] that the Guarantor has full power and authority to execute, deliver and perform its obligations under this letter and no limitation on the powers of the Guarantor will be exceeded as a result of the Guarantor signing this letter.

7. This letter shall be governed by and construed in all respects in accordance with English law.

8. The Guarantor irrevocably agrees for the benefit of [Idemia] that the courts of London shall have jurisdiction to hear and determine any suit, action or proceedings which may arise out of or in connection with this letter and for such purposes hereby irrevocably submit to the jurisdiction of such courts.

Yours faithfully,

Ziaur Rahman
TigerIT CEO

21. Idemia and Tiger also entered into a Solution Development, Hardware and Services Purchase Agreement ("the Tiger Agreement") on 29 July 2014. The material terms of the Tiger Agreement were very similar to those of the Decatur Agreement. In particular, Articles 19.1 and 19.2 of the Tiger Agreement also provided for Swiss law and jurisdiction.

22. Article 6.13 of the Tiger Agreement, like Article 6.13 of the Decatur Agreement, dealt with guarantees. Its terms were as follows

Performance Guarantee. [Tiger] has accepted to present to [Idemia] the appropriate guarantees that shall cover discharge of its obligations

> **and undertakings contained in this Agreement, in the form of a company guarantee. The guarantee shall remain in full force and effect until the expiry of all the Warranty Periods applicable to the Products, Services and Solution.**
>
> **(b) Company Guarantee/Comfort letter. [Tiger] shall provide at [Idemia's] first demand but not later than the signature of the contract between [the BEC] and [Idemia] a company guarantee issued by [Tiger] in a form as per Schedule 6**

23. Schedule 6 to the Tiger Agreement was in identical terms to those set out in paragraph 20 above, except that the first paragraph referred to the Tiger Agreement and identified Tiger as the "Supplier". Importantly, the second paragraph identifying Tiger as the "Guarantor" was unchanged. Read literally, therefore, Article 6.13 and Schedule 6 involved Tiger in guaranteeing Tiger's own obligations under the Tiger Agreement.

24. The Decatur Agreement and the Tiger Agreement were both signed on behalf of Idemia by Mr Didier Lamouche. Mr Rahman signed the Decatur Agreement on behalf of Decatur and signed the Tiger Agreement on behalf of Tiger. Mr Lamouche and Mr Rahman initialled all the pages of the two agreements except for the main signature page of each agreement and for the final page of Schedule 6 of each agreement. Mr Rahman signed the final page of Schedule 6 of each agreement in the space between "Yours faithfully" and his name and description as CEO of Tiger.

25. In this action, Idemia relies upon the documents at Schedule 6 of the Decatur Agreement and the Tiger Agreement, signed by Mr Rahman, as enforceable contracts. It says that the reference to Tiger as the "Guarantor" in the document at Schedule 6 of the Tiger Agreement is an obvious error that can be corrected as a matter of interpretation, and that these two documents are enforceable cross-guarantees by Decatur and Tiger of each other's obligations. Those assertions are disputed by the Defendants. I shall refer to these documents as "the Schedule 6 Documents".

26. On 7 January 2015 the BEC announced that it was accepting Idemia's tender. The contract between the BEC and Idemia was signed a week later, on 14 January 2015.

27. On 16 March 2015 the parties entered into Deeds of Variation ("the Deeds of Variation"), which amended the provisions of the Decatur Agreement and the Tiger Agreement. Both Deeds of Variation provided for Swiss law, and for the non-exclusive jurisdiction of the Swiss courts. Article 5.1 of the Deed of Variation relating to Decatur provided that:

> **Each party irrevocably agrees that the competent courts of Geneva, Switzerland shall have non-exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this deed or its subject matter or formation (including non-contractual disputes or claims).**

Article 6.1 of the Deed of Variation relating to Tiger was in identical terms.

28. The terms of each of the Deeds of Variation replaced the pricing schedules that had previously appeared at Schedule 4 of the original agreements with new arrangements set out in Annex 2 to the relevant Deed of Variation. In the Deed of Variation applicable to Tiger, clause 4 (headed "Clarification of Discount Terms") provided that:

> **The new pricing arrangement presented in Annex 2 to this deed shall replace the five (5) Million dollar discount given to [Idemia] (dated June 23rd 2014), a copy of which is attached to this deed at Annex 3.**

The Deed of Variation applicable to Decatur did not contain a similar provision.

29. On 4 August 2016, Decatur served notice on Idemia to terminate the Decatur Agreement. On 10 August 2016, Tiger served notice to terminate the Tiger Agreement.

30. On 22 June 2017, Decatur and Tiger began the Bangladesh Action. Mr Ian Clarke QC, who appeared before me for the Defendants, told me that it is Decatur and Tiger's position that the claims made by them in the Bangladesh Action arise either under the Discount Letter, which has no provisions governing jurisdiction, or under the Deeds of Variation, whose jurisdiction provisions are non-exclusive. Tiger and Decatur therefore say that they are entitled to invoke the jurisdiction of the courts of Bangladesh, as the courts of the state which has the closest connection to the dispute.

31. On 23 July 2017, the BEC terminated its agreement with Idemia.

32. On 18 February 2018, Decatur and Tiger sought and obtained an order in the Bangladesh action restraining Idemia from remitting any of its monies out of Bangladesh.

33. The claims between the BEC and Idemia were settled by agreement at a meeting in Bangladesh on 14 May 2018. The terms of settlement required the BEC to pay USD 15m to Idemia within five working days, and further sums of USD 7m, USD 10m, and USD 0.5m. The effect of the order made in the Bangladesh Action has in practice been to prevent those sums being paid to Idemia.

34. The Claim Form in the present action was issued on 6 June 2018. In this action, Idemia asserts (contrary to the position taken by Decatur and Tiger) that the pursuit

of the Bangladesh Action is in breach of the exclusive jurisdiction provisions of the Decatur Agreement and the Tiger Agreement. Idemia claims that, in causing or permitting the Bangladesh Action to be pursued, Decatur and Tiger have therefore allowed each other to breach those provisions, and are thereby in breach of the obligations which Idemia says were created by the Schedule 6 Documents. Idemia also contends that the breaches by Decatur and Tiger of the exclusive jurisdiction provisions of the Decatur Agreement and the Tiger Agreement were induced by Mr Rahman and/or by each other and/or form part of a conspiracy to injure Idemia by unlawful means to which Decatur, Tiger and Mr Rahman are parties. Idemia seeks a final anti-suit injunction restraining the further pursuit of the Bangladesh Action and requiring it to be withdrawn, and damages for the costs and losses which it says that it has incurred as a result of the Bangladesh Action.

35. Decatur, which was served at its registered office in London, acknowledged service on 14 June 2018. Tiger, which was served in Bangladesh pursuant to the permission given by Robin Knowles J, acknowledged service on 30 July 2018.

36. Idemia made two attempts to serve Mr Rahman. It first attempted to serve him at Apartment B5-1, 1 York Way, London N1G 4AT ("York Way"). Mr Rahman filed an acknowledgement of service in relation to that attempted service on 19 June 2018. Idemia then attempted to serve him at The Arts Building, 2nd Floor, Morris Place, London N4 3JG ("Morris Place"). Mr Rahman filed an acknowledgement of service in relation to that attempted service on 14 August 2018. Mr Rahman disputes that either of those attempts amounted to good service on him. I shall return to that issue later in this judgment.

Jurisdiction in relation to Decatur

37. Idemia relies upon a number of different grounds for jurisdiction in relation to each Defendant. It is convenient to take the position of each of the Defendants separately. I propose to begin with Decatur.

The competing jurisdictional gateways

38. It is not in dispute that Decatur is an English company domiciled in England. Article 4 of the Judgments Regulation (recast)[2] provides that:

> **Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State**

Other things being equal, therefore, the English courts would have jurisdiction over Decatur.

[2] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

39. Decatur, however, submits that the jurisdiction provisions of the Decatur Agreement preclude the present action, since they confer exclusive jurisdiction on the courts of Geneva, Switzerland. Switzerland is not a member state of the European Union, but is a contracting party to the Lugano Convention[3], Article 23 of which provides that:

> **If the parties, one or more of whom is domiciled in a State bound by this Convention, have agreed that a court or the courts of a State bound by this Convention are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.**

40. At first blush, this submission may seem inconsistent with the position taken by Decatur and Tiger in the Bangladesh Action, where they allege that the underlying commercial dispute between the Defendants and Idemia is one that is *not* within the scope of the jurisdiction provisions of the Decatur Agreement. However, the jurisdiction dispute between the parties as to whether the subject matter of the Bangladesh Action falls within the scope of the jurisdiction provisions of the Decatur Agreement seems to me plainly to be a "dispute arising between the parties over the construction, validity, performance or non performance, or ceasing of" the Decatur Agreement, and so itself to fall within the scope of those provisions. Applying the common-sense presumption "that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal"[4], those jurisdiction provisions also seem to me to cover the tortious claims made in this action.

41. In my judgment, that conclusion is not affected by the Deed of Variation. The purpose of the Deed of Variation relating to Decatur, as stated in recital (B), was to give effect to the wish of the parties "to clarify and, where appropriate, modify certain of" the terms of the Decatur Agreement. The principal operative provision of the Deed of Variation was Article 2, which stated that "With effect from the Variation Date the Parties agree the following amendments to" the Decatur Agreement. On its true construction, therefore, the Deed of Variation relating to Decatur varied, rather than discharged, the Decatur Agreement, and did not supersede or vary its jurisdictional provisions[5].

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3 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters signed in Lugano on 30 October 2007 and published in the Official Journal on 21 December 2007 (L339/3). The Lugano Convention is incorporated into UK law by the Civil Jurisdiction and Judgments Regulations 2009, SI 2009 No 3131.

4 *Fili Shipping Co Ltd v Premium Nafta Products Ltd, on appeal from Fiona Trust and Holding Corpn v Privalov* [2007] UKHL 40, [2007] 2 All ER (Comm) 1053 at [13], per Lord Hoffmann.

5 The issue is one of construction and involves a consideration of whether, looked at objectively, the parties appear to have intended that the original contract should continue to exist as a matter of legal analysis but in varied form, or whether as a matter of legal analysis it was intended to be discharged and replaced: see eg *British and Benningtons Ltd v NW Cachar Tea Company Ltd* [1923] AC 48 at 67, per Lord Sumner; and *Wadlow v Samuel* [2007] EWCA (Civ) 155 at [39], per Toulson LJ.

42. It follows that, as submitted by Mr Clarke, the provisions of Article 19.1 of the Decatur Agreement would take precedence over Decatur's domicile, and would *prima facie* confer exclusive jurisdiction in relation to the jurisdiction dispute upon the Swiss courts.

43. Idemia, however, has an answer to that submission. Idemia's case is that the immediate contract which it is seeking to enforce against Decatur in this action is the contract contained in the Schedule 6 Document annexed to the Tiger Agreement, under which (according to Idemia) Decatur guaranteed to Idemia the performance by Tiger of the terms of the Tiger Agreement, including its jurisdiction provisions. In Idemia's submission, it is the jurisdiction provisions of that Schedule 6 Document which govern the present action, and which confer exclusive jurisdiction on the courts of England. In that connection, Idemia relies upon Article 25 of the Judgments Regulation (recast), which provides that:

> **If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.**

44. As indicated in paragraphs 22 and 23 above, Article 6.13 and Schedule 6 of the Tiger Agreement make no reference to Decatur but - if read literally - instead involve Tiger in guaranteeing Tiger's own obligations under the Tiger Agreement. As mentioned in paragraph 25 above, the Defendants in any event dispute that the Schedule 6 Documents are themselves enforceable contracts. In order to establish jurisdiction against Decatur on this basis, Idemia therefore faces 3 hurdles. In order to get through this jurisdictional gateway, it must show to the relevant standard:

44.1 That the Schedule 6 Document annexed to the Tiger Agreement is an immediately enforceable contract;

44.2 That the Schedule 6 Document annexed to the Tiger Agreement, on its true construction, amounts to a guarantee by Decatur of Tiger's obligations under the Tiger Agreement; and

44.3 That the jurisdiction provisions of the Schedule 6 Document annexed to the Tiger Agreement (rather than those of the Decatur Agreement or the Tiger Agreement) apply to the subject matter of the present action, and therefore confer jurisdiction in relation to it on the English court.

The relevant standard

45. The relevant standard is that of a good arguable case. The meaning of that expression, as elucidated by recent high authority, was considered by Carr J in her judgment in *Tugushev v Orlov*[6]. I gratefully adopt her summary, which was accepted by both Mr Clarke and Mr Midwinter as an accurate statement of the current law:

> **[56] The meaning of "good arguable case" has been the subject of recent judicial consideration at the highest levels: see *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80; [2018] 1 WLR 192 ("*Brownlie*") at [7], endorsed in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34 at [9] and *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV and others* [2019] EWCA Civ 10 ("*Kaefer*") at [71]. Lord Sumption in *Brownlie* at [7] described it as a "serviceable test, provided that it is correctly understood". He reformulated its effect thus: "…What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway ["limb 1"]; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so ["limb 2"]; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it ["limb 3"]."**
>
> **[57] Waller LJ in *Canada Trust Co v Stolzenberg (no 2)* [1998] 1 WLR 547 had interpreted "good arguable case" as meaning having "much" the better of the argument. Lord Sumption (again at [7] in *Brownlie*) and Green LJ in *Kaefer* (at [77]) disapproved that notion, Lord Sumption commenting that it suggested "a superior standard of conviction that is both uncertain and unwarranted in this context".**
>
> **[58] As Gross LJ pointed out in *Aspen Underwriting Ltd and others v Credit Europe Bank NV* [2018] EWCA Civ 2590 at [31], Baroness Hale in *Brownlie* at [33] emphasised that everything said about jurisdiction in *Brownlie* was *obiter dicta.* She added, however, that the correct test is "a good arguable case" and glosses should be avoided. She did not read Lord Sumption's explication as "glossing the test". Gross LJ too (at [34]) emphasised that the test remained that of a "good arguable case".**
>
> **[59] The position has been considered further in *Kaefer.* There, at [119], Nigel Davis LJ described himself as being in "something of a fog as to the difference between an "explication" and a "gloss"". Green LJ at [59] commented that a test "intended to be straightforward has become befuddled by "glosses, glosses upon glosses", "explications" and "reformulations"." He considered the analysis in *Brownlie* and**

[6] [2019] EWHC 645 (Comm) at [56] to [61].

Goldman Sachs at [60] to [71], identifying _inter alia_ the competing conceptual differences between the parties by reference to an absolute and a relative test: an absolute test being one where a claimant need only surmount a specified evidential threshold; a relative test involving the court in looking to the merits to see whose arguments are the stronger. He then turned (at [72] to [80]) "to make sense of the new, reformulated test", in summary as follows:

i) The reference to "a plausible evidential basis" in limb 1 is a reference to an evidential basis showing that the claimant has the better of the argument;

ii) Limb 2 is an instruction to the court to overcome evidential difficulties and arrive at a conclusion if it reliably can. Not every evidential lacuna or dispute is material or cannot be overcome. Judicial common sense and pragmatism should be applied, not least because the exercise is intended to be one conducted with due despatch and without hearing oral evidence;

iii) Limb 3 arises when the court finds itself simply unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument. It would be unfair for the claim to jurisdiction to fail since, on fuller analysis, it might turn out that the claimant did have the better of the argument. The solution encapsulated in limb 3 moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence. This is a more flexible test which is not necessarily conditional upon relative merits.

[60] I respectfully too would wish to emphasise that it is important not to overcomplicate what should be a straightforward test to be applied sensibly to the particular facts and issues arising in each individual case. Whatever perorations there may be along the way, the ultimate test remains one of "good arguable case". To this end a court may apply the yardstick of "having the better of the argument" which, as Nigel Davis LJ commented at [119] in _Kaefer_, confers "a desirable degree of flexibility in the evaluation of the court". The test is to be understood by reference to the new, reformulated three-limb test identified in _Brownlie_.

[61] In simple terms, and alongside any relevant additional jurisdictional hurdles, it is for [the Claimant] to show that he has a good arguable case on jurisdiction by having the better of the argument on the material available and within the confines of an interlocutory exercise, as catered for by the three-limb test in _Brownlie_ ..

46. Mr Clarke also drew my attention to the observations of the Privy Council in *Bols Distilleries (trading as Bols Royal Distilleries) v Superior Yacht Services Ltd*[7] ("Bols") and of the Court of Appeal in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV*[8] ("Kaefer") on the interrelationship between this standard and that required by the jurisprudence of the Court of Justice of the European Union in relation to Article 25 of the Judgments Regulation (recast). Mr Clarke relied, in particular, upon the observations of Green LJ (with whom Asplin and Davis LJJ agreed) in *Kaefer*[9], to the effect that:

> **.. in a case such as the present where the background legal context is Article 25 some regard must be paid to the fact that, as was held in *Bols*, the "clear and precise" test must be taken into account as a component of the domestic test and the melding of the two is necessary to ensure that domestic law remains consistent with the Regulation. As with so much of the language used in this context, that which is "clear and precise" is not easy to define with precision. But I would rely upon it as providing at least an indication of the quality of the evidence required. It supports the conclusion that the prima facie test (in limbs (i) and (ii)) is a relative one; and in so far as the court cannot resolve outstanding material disputes (limb (iii)) it affords an indication as to the sort of evidence that a Court will seek. I would not go much beyond this though.**

47. Applying those principles, I now turn to the three matters identified in paragraph 44 above. I begin with the third of them, the interrelationship between the jurisdiction provisions of the Decatur Agreement and of the Schedule 6 Document annexed to the Tiger Agreement.

The interrelationship of the jurisdiction provisions

48. As Robin Knowles J observed in *BNP Paribas SA v Trattamento Rifiuti Metropolitani SpA*[10]:

> **[27] Where, as here, there is more than one contract and the contracts contain jurisdiction clauses in favour of the courts of different countries, the court is faced with a question of construction or interpretation: see in particular *AmTrust Europe Ltd v Trust Risk Group SpA* [2015] EWCA Civ 437, [2016] 1 All ER (Comm) 325 (at**

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7 [2006] UKPC 45, [2007] 1 WLR 12 at [28]: "In the present case, as the case law of the Court of Justice emphasises, in order to establish that the usual rule in article 2(1) is ousted by article 23(1), the claimants must demonstrate "clearly and precisely" that the clause conferring jurisdiction on the court was in fact the subject of consensus between the parties. So, applying the "good arguable case" standard, the claimants must show that they have a much better argument than the defendants that, on the material available at present, the requirements of form in article 23(1) are met and that it can be established, clearly and precisely, that the clause conferring jurisdiction on the court was the subject of consensus between the parties."

8 [2019] EWCA Civ 10 at [81] to [83].

9 Ibid at [83].

10 [2018] EWHC 1670 (Comm), [2019] 1 All ER (Comm) 680 at [27] to [28].

> **[44]–[49]) per Beatson LJ, *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd (formerly MLC Emerging Markets Ltd)* [1999] 1 All ER (Comm) 237 at 250 per Rix J (as he then was) and *Deutsche Bank AG v Sebastian Holdings Inc (No 2)* [2010] EWCA Civ 998, [2011] 2 All ER (Comm) 245 (at [42]) per Thomas LJ (as he then was).**
>
> **[28] The approach to construction of a jurisdiction clause should be broad and purposive: *Deutsche Bank AG v Sebastian Holdings Inc* at [39] per Thomas LJ. When interpreting any provision of a commercial contract the court will look at the language and investigate the commercial consequences: see *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 (at [8]–[15]) per Lord Hodge SCJ.**

49. On this issue, I have no doubt that Idemia has the better of the argument. The provisions of Article 19.1 are expressed in broad terms. However, the Tiger Agreement is an agreement between Idemia and Tiger. Decatur is not a party to the Tiger Agreement, and so cannot be bound by the provisions of its Article 19.1. If, however (as Idemia contends) the Schedule 6 Document annexed to the Tiger Agreement is effective as a contractual guarantee by Decatur, then Decatur must necessarily be a party to that guarantee, and must be bound instead by its jurisdiction provisions, and entitled to enforce them.

50. Decatur is, of course, a party to the Decatur Agreement, and is bound by Article 19.1 of the Decatur Agreement. But those jurisdiction provisions are concerned with disputes "over the construction, validity, performance or non-performance, or ceasing" of the Decatur Agreement, not with "any suit, action or proceedings which may arise out of or in connection with" the Schedule 6 Document annexed to the Tiger Agreement.

51. Quite apart from any issue of privity, the English jurisdiction provisions of the Schedule 6 Documents would be redundant if claims to enforce the provisions of those documents were governed by the Swiss jurisdiction provisions in Article 19.1 of the Decatur Agreement and/or of the Tiger Agreement. In order to give effect to the provisions of the documents as a whole, it is therefore necessary to give the jurisdiction provisions of the Schedule 6 Documents a scope that is carved out from the broad jurisdictional requirements of Article 19.1.

52. Taking all these matters into account, it seems to me that the parties should be taken to have intended that claims such as those made in this action to enforce the Schedule 6 Documents should be subject to the jurisdiction provisions of those documents, which confer jurisdiction on the English courts.

A guarantee by Decatur of Tiger's obligations under the Tiger Agreement?

53. For simplicity's sake, I have hitherto referred to the obligations provided for in the Schedule 6 Documents as a "guarantee": and clause 1 of those documents is in the standard form of a "see to it" guarantee[11]. However, although clause 2 of those documents bears some of the hallmarks of a "conditional obligation" guarantee, the obligations which it creates are expressed to arise on "first demand" and to be "as primary obligor". It also includes an express indemnity. In the circumstances, Mr Clarke has accepted (at least for the purposes of these applications) that those obligations are not subject to the particular rules applicable to contracts of guarantee, properly so called. In particular, he has expressly disavowed any reliance upon the Statute of Frauds 1677, even though the Schedule 6 Document annexed to the Tiger Agreement does not purport to bear any signature on behalf of Decatur.

54. Whatever the true nature of the obligations created by the Schedule 6 Document annexed to the Tiger Agreement, it is a necessary part of Idemia's case that those obligations bind Decatur, despite the definition of "Guarantor" referring to Tiger. Mr Midwinter submits that, reading the two Schedule 6 Documents in the context of the various contractual documents as a whole, it is obvious that the intention was for there to be cross-guarantees, and that the mis-naming of the "Guarantor" in the Schedule 6 Document annexed to the Tiger Agreement is a simple drafting error that can readily be corrected as a matter of construction under the principles discussed in *Chartbrook v Persimmon Homes*[12].

55. Mr Clarke, by contrast, submitted that what was required by Article 6.13 of the Tiger Agreement was that Tiger should provide "a company guarantee issued by [Tiger]". The Schedule 6 Document annexed to the Tiger Agreement reflected that requirement, in that it was a guarantee by Tiger of its own obligations. In that connection, Mr Clarke relied upon the provisions of Articles 1.2 and 18.7 of the Tiger Agreement, which give priority to the provisions of the Tiger Agreement itself over those of its Schedules in the event of any inconsistency.

56. Mr Clarke also relied upon the evidence of Professor Müller to the effect that the concept of a self-or performance guarantee is one that is known to Swiss law[13]:

> **Under Swiss law, a performance guarantee is neither nonsensical nor worthless. .. Such a self-guarantee is usually linked to a sales contract .. or a contract for works and services .. It is true that [third-party] company letters of responsibility and comfort letters are more frequent in Swiss practice than self-guarantees. However, this does not mean that, as a matter of Swiss law, self-guarantees would be**

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11 For the distinction between 'conditional obligation' and "see to it" guarantees, see *Moschi v Lep Air Services Ltd* [1973] AC 331 (HL) at 344, per Lord Reid; and *Norwich and Peterborough Building Society v McGuinness* [2011] EWCA Civ 1286, [2012] 2 All ER (Comm) 265 (CA) at [7], per Patten LJ.

12 [2009] UKHL 38, [2009] AC 1101at [22] to [25], per Lord Hoffmann.

13 Müller (2) at [44] to [48].

> **nonsensical or worthless. Depending on the extent of the guarantee, such self-guarantees can (a) Either simply confirm the statutory regime which would also apply in the absence of any self-guarantee. Such a guarantee would ensure that the seller or contractor is aware of its statutory duties in case of bad performance. (b) Or go beyond the statutory minimum standard and give the buyer or the customer more rights than the statutory ones in case of the seller's or the contractor's poor performance**

57. I bear in mind that the applicable law of the Decatur Agreement and the Tiger Agreement is Swiss, not English, and that those agreements are therefore to be interpreted in accordance with Swiss law principles. However, Mr Clarke was unable to identify any specific interpretative principle of Swiss law that was materially at variance with the approach which English law would take to commercial contracts such as this, other than that Swiss law takes a more subjective approach.

58. Professor Müller[14] and Dr Della Porta[15] both cite Article 18(1) of the Swiss Code of Obligations, to the effect that:

> **When assessing the form and terms of the contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement**

According to Professor Müller, where "the words used by the parties and their contract express a certain meaning that is the primary means of interpretation (literal interpretation)"[16].

59. Nevertheless, both Professor Müller and Dr Della Porta agree that, unlike English law, in Swiss law "the subjective interpretation prevails over the objective interpretation"[17]. Accordingly, Professor Müller notes that[18]:

> **When interpreting expressions of intent and contracts under Swiss law, all relevant circumstances must be taken into account. One of the most important factors is the context in which the words to be interpreted are used (contextual interpretation). The words must thus be understood in particular by having regard to the structure of the document and the relationship of this document with other documents.**

60. Similarly, in Dr Della Porta's view[19]:

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14 Müller (2) at [30]; Müller (3) at [26].
15 Della Porta at [9]
16 Müller (2) at [32].
17 Müller (2) at [66].
18 Müller (2) at [34].
19 Della Porta at [11]

> **Applying the so-called "subjective interpretation", the Court will give due regard to all evidence adduced by the parties that could contribute to assessing the actual intent of the parties, starting with the contract itself in the way the parties expressed their intention through words and expressions, but also other elements, such as the circumstances surrounding the conclusion of the contract, the parties' behaviour, the negotiation process, the purpose of the contract and the interest pursued by the parties; the commercial uses and practices are also clues when assessing the actual intention of the parties.**

61. Applying these principles, Mr Clarke's submissions are not, in my judgment, persuasive. It seems to me that Mr Clarke's reliance upon the wording of Article 6.13 of the Tiger Agreement is undermined by the comparison with the equivalent provisions in the Decatur Agreement. Article 6.13 of the Decatur Agreement requires Decatur to provide "a company guarantee issued by Decatur". Yet Schedule 6 to the Decatur Agreement names Tiger, not Decatur, as the "Guarantor".

62. Mr Clarke's answer to this point is to say that the error is in Schedule 6 to the Decatur Agreement, which should have named Decatur, not Tiger, as the "Guarantor", since that is what Article 6.13 (which has primacy) requires. What was intended in both cases, according to Mr Clarke, was a self-guarantee.

63. As Mr Midwinter points out, that submission would not really help Decatur (or Tiger) in relation to jurisdiction (at least in the long run) since, on that basis, both companies would still be a party to a Schedule 6 Document guarantee containing an English jurisdiction provision - albeit a different guarantee to the one on which Idemia now relies.

64. But in any event, Decatur's case on this point seems to me to be inconsistent with the contractual context and to be contrary to commercial common sense. I, of course, accept Professor Müller's evidence that self-guarantees are not inherently nonsensical or worthless under Swiss law. The papers in the present case also contain examples of self-guarantees governed by English law issued on 23 March 2015 by Idemia in favour of Decatur and Tiger. However, as Dr Della Porta notes, those documents and the Swiss law examples which Professor Müller cites are very different to the Schedule 6 Documents, both in their commercial context and in the terms of the relevant guarantees.

65. In the present case, the wording of the Schedule 6 Documents in both the Decatur and the Tiger Agreements is - except for the misnaming of Tiger as the "Guarantor" in that annexed to the Tiger Agreement - plainly that of a cross-guarantee. To take just one example, the wording of clause 3, which requires the "Guarantor" to enter into a replacement agreement if the liquidator of the "Supplier" disclaims the

"Guaranteed Agreement", would make no practical or legal sense whatsoever if the "Guarantor" and the "Supplier" were one and the same.

66. As for Mr Clarke's point that Article 6.13 has primacy, it is necessary to interpret what Article 6.13 means in its commercial and legal context - in the words of Professor Müller "by having regard to the structure of the document and the relationship of this document with other documents". The drafting of Article 6.13 appears somewhat repetitive and confused, something which may perhaps partly be explained by the fact (recorded in an email dated 25 July 2014 from Mr Rahman to Idemia) that Article 6.13 was originally drafted so as to require the contracting party to provide a bank guarantee. In context, however, it seems to me to be plain what these commercial parties ultimately intended to achieve by these provisions.

67. On this issue also, I therefore conclude that Idemia has the better of the argument.

An enforceable contract?

68. That brings me to the final hurdle facing Idemia, which is to establish to the relevant standard that the Schedule 6 Document annexed to the Tiger Agreement is in itself an enforceable contract, even though it is only to be found as a Schedule to the Tiger Agreement under the heading "Template".

69. It is, of course, correct that Article 25 of the Judgments Regulation (recast) requires the existence of a consensus in fact, rather than a legally binding agreement, and that the issue of whether the parties "have agreed that a court or the courts of a Member State are to have jurisdiction" for the purposes of Article 25 is to be regarded as involving an independent concept of EU law[20]. Furthermore, Article 25(5) requires that "An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract".

70. However, on the facts of this case, it seems to me that the jurisdiction provisions of the Schedule 6 Documents can have no legal effect, either as the manifestation of a "consensus in fact" or as "an agreement independent of the other terms of the contract" unless and until the Schedule 6 Document which contains those provisions itself has legal effect as a binding contract. First of all, the Schedule 6 Documents do not, on their face, purport to be contracts, but rather "templates" for the contracts which Article 6.13 requires to be delivered. While they remain simply schedules to the Decatur Agreement and the Tiger Agreement, they form part of those agreements, and are subject to the jurisdiction provisions of those agreements.

[20] See *BAT Caribbean SA v PHP Tobacco Carib SARL* [2017] EWCA Civ 1131, [2017] 2 CLC 166 at [28], per Beatson LJ, where the principles are summarised.

71. Secondly, it is not Idemia's case that Tiger is a party to the Decatur Agreement, or Decatur a party to the Tiger Agreement, otherwise than in relation to the Schedule 6 Documents. What Idemia says is that Mr Rahman, by signing the Schedule 6 Documents, turned them into binding contracts between Idemia and the "Guarantors" separate from the underlying agreements. It is no part of Idemia's case that Mr Rahman's signature simply evidenced some non-contractual consensus between the relevant Guarantor and Idemia as to jurisdiction.

72. It follows that it can only be when the Schedule 6 Documents take independent life as contracts in their own right that the separate and different jurisdiction provisions which they contain can then come into effect. The issue which I have to decide is therefore whether Idemia has established to the required standard that the Schedule 6 Documents have taken effect as contracts in their own right. The putative applicable law of the Schedule 6 Documents as contracts is English law, and that is therefore the law which I must apply in order to determine their existence and validity[21].

73. The relevant principles of English law, which were not in dispute, are to be found in the judgment of the Supreme Court in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [22]:

> **Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement ..**
> **.. The court should not impose binding contracts on the parties which they have not reached. All will depend upon the circumstances.**

74. As Aikens LJ observed in *Barbudev v Eurocom Cable Management*[23]:

> **.. The court has to consider the objective conduct of the parties as a whole. It does not consider their subjective states of mind. In a commercial context, the onus of demonstrating that there was a lack of intention to create legal relations lies on the party asserting it and it is a heavy one ..**

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21 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Article 10(1).

22 [2010] UKSC 14, [2010] 1 WLR 753 at [45] tp [47], per Lord Clarke of Stone-cum-Ebony JSC, giving the judgment of the court.

23 [2012] EWCA Civ 548; [2012] 2 All ER Comm 963 at [30].

75. On behalf of Idemia Mr Midwinter submits that, on this issue also, Idemia has the better of the argument. In Mr Midwinter's submission, any reasonable objective observer would conclude that the Schedule 6 Documents (or, more precisely, the jurisdiction agreements at clause 8) were intended by the parties to be legally binding and not merely to be templates of something that might be agreed at a later date. In support of that submission, Mr Midwinter points out that the Schedule 6 Documents are complete in themselves, are written in terms of immediate enforceability, and are dated "London, Tuesday 29th [July] 2014", the same date as the Decatur Agreement and the Tiger Agreement. He submits that there is no sensible reason why they should have been signed and dated if they were not intended to be immediately binding.

76. In Mr Midwinter's submission, it also makes commercial and logical sense that the Schedule 6 Documents should have been signed and become binding at the same time as the underlying obligations the performance of which they guaranteed. There is, conversely, no sensible reason why those documents should not have been immediately binding, or why the conclusion of those contracts should have been delayed to a later date. In that connection he relies (inter alia) on the matters set out in paragraphs 13 to 18 of Mr Gadhia's third witness statement. Mr Midwinter also submitted that the short period between the date when the BEC accepted Idemia's tender, and the date when the contract between the BEC and Idemia was signed, shows that it would not have been sensible for the parties to wait for that acceptance to happen before executing the Schedule 6 Documents as guarantees. Conversely, since the obligations which they guaranteed remained conditional until the BEC contract was signed, there was no detriment to the "Guarantors" in executing them straightaway.

77. On behalf of Decatur, Mr Clarke submits that these arguments are misconceived. Mr Clarke submits that, when read together with Article 6.13, the Schedule 6 Documents were plainly not intended to be immediately binding contracts. Article 6.13 is expressed in terms which are both future ("shall provide") and conditional ("at [Idemia's] first demand but not later than the signature of the contract between [the BEC] and [Idemia]"): and Schedule 6 is itself headed "Template". Moreover, there is no separate and independent document of guarantee. The document relied upon by Idemia was never separated from the Tiger Agreement, but remained as a schedule.

78. Mr Clarke also relies on two pieces of evidence. The first is the explanation given by Mr Rahman in his second witness statement for why his signature appears on the Schedule 6 Documents:

> **[W]hen presented with the versions of the 2014 Agreements for execution on behalf of Decatur and Tiger respectively, I executed the 2014 Agreements in my capacity as director of those companies. I was turning the pages of the 2014 Agreements and schedules thereto and**

> **sought instances of my name as an indication of where I should sign or initial each page in order to give effect to the terms of the 2014 Agreements as concluded. When I turned to the second page of Schedules 6 of the 2014 Agreements there was my name printed and a place above it from my signature. I saw my name and signed above it. At the time that I applied those signatures, it was not my intention to issue the guarantee letters that were required by Article 6.13 of the 2014 Agreements and/or as set out in Schedule 6 by the application of that signature which was applied as part of the act of execution of the 2014 Agreements. I can say this with confidence since the act I was performing was that of simply executing the 2014 Agreements (and no more), which 2014 Agreements gave rise to no practical commitments by Decatur or Tiger unless and until [Idemia] won the BEC Contract so at that time there was nothing to be guaranteed (hence the assumption of an obligation to issue the guarantees in the future pursuant to Article 6.13 of the 2014 Agreements). Further, [Idemia] had not, at that stage, called for the issue of the guarantee letters. Accordingly, my signature, where applied, was simply in execution of the obligations under the 2014 Agreements and not (where it appears on Schedule 6) to give effect to any guarantee.**

79. The second is an exchange of correspondence between the parties in 2015, in which Idemia calls for the issue of the guarantees provided for by Article 6.13.

79.1 The exchange begins with an email from Idemia to Decatur dated 10 June 2015 which includes the following passage: "2. Decatur comfort guarantee letter. Vincent B[ernard] [of Idemia] met [Mr Rahman] on Monday and told me that this comfort letter should be signed. May I kindly ask you to go through it and get back to me?".

79.2 On 25 August 2015, Mr Bernard sent an email to Mr Rahman and Mr Kaliszewski, saying "We need convey to PD a consistent message regarding future deliveries. In parallel and in order to smooth the internal tension derivate from the late deliveries of Optaglio, I would very much appreciate your support in getting the pending documents signed: Comfort letters ..".

79.3 On 6 November 2015, Mr Bernard sent an email to Mr Rahman, saying "Following our meeting, I do forward you the references of the articles of the [Decatur Agreement]". The email then set out the provisions of Article 6.13 of the Tiger Agreement and of the Decatur Agreement, before continuing "I'm also attaching again the comfort letters related to it. Our Audit and Finance Group Director is constantly pressing us to get them from you. As it is due as per contract, and without having them, I seriously doubt that payments can be released smoothly among our two companies .. Thank you for confirming me when these documents signed and executable will be

sent". Attached to that email were versions of the Schedule 6 Documents. These versions were headed "On TigerIT Letterhead", and "On Decatur Europe Limited Letterhead", and were each dated London, March 17, 2015. In the version intended to be reproduced on Decatur letterhead (equivalent to the Schedule 6 Document annexed to the Tiger Agreement), the "Guarantor" was identified as Decatur (rather than Tiger).

79.4 Mr Rahman replied later the same day, saying "Thank you for mentioning the reason for non-payment. Though we don't agree with the logic but we like to provide the comfort letters as mentioned in the agreement. I understand that you made typing mistakes in your draft letters. According to your mail below and according to the contract – [Tiger] is providing the comfort letter for the [Tiger Agreement} and Decatur is providing the comfort letter for the [Decatur Agreement] from where you copied the clause. But your drafts switched the company names mistakenly. We are sending the correct comfort letters to you".

79.5 Mr Bernard responded on 9 November 2015, to say "There were no typing mistakes in the documents that were sent. It's just the reflect [sic] of our signed agreements as we have talked and agreed long time ago already; it doesn't make any sense to have [Tiger] "covering" [Tiger] and same for [Decatur] "covering" [Decatur]. Therefore, I do thank you to sign and send us back the comfort letters based on the model I've sent you".

80. On this issue, I have come to the conclusion that Idemia does *not* have the better of the argument. My reasons are as follows:

80.1 First, the plain meaning of Article 6.13 is that the Schedule 6 Documents are not themselves intended to be immediately binding contracts, but instead to be "templates" of documents which are to be delivered, pursuant to Article 6.13, on demand at a future date.

80.2 The commercial common sense and practicality of the matter is at best neutral. If anything, it is adverse to Idemia's case. The Tiger Agreement was conditional upon the BEC's acceptance of Idemia's tender. That was not expected to happen straightaway. In fact it did not happen until January 2015, almost 6 months later. In the circumstances, there is nothing obviously impractical or uncommercial about a provision requiring the delivery of these third-party guarantees at some future date, no later than the execution of the eventual contract between the BEC and Idemia. Idemia's argument by reference to the commercial context is nowhere near strong enough to persuade me to disregard the plain meaning of Article 6.13.

80.3 Idemia therefore has to argue that the conduct of the parties was such as to vary those terms, and to turn what the Tiger Agreement contemplated would be a template for a future guarantee into an immediately binding guarantee.

80.4 However, the only conduct on which Idemia can rely in support of that argument is the fact that Mr Rahman signed the Schedule 6 Document. Idemia has put forward no evidence about the circumstances in which the Tiger Agreement came to be signed. It has relied entirely on the evidence of Mr Gadhia, who was not there, and whose witness statements consist (on this issue) mainly of argument rather than evidence. In particular, Idemia has put forward no evidence of any request by it at the time that the Tiger Agreement was signed for the Schedule 6 Documents to be signed and delivered there and then.

80.5 I must, of course, disregard Mr Rahman's evidence as to his subjective intention in signing the Schedule 6 Documents. The test which I have to apply is an objective one. However, I can take into account the fact that Mr Rahman signed expressly on behalf of Tiger the Schedule 6 Documents which were annexed to both the Decatur Agreement and the Tiger Agreement. On any showing, one or other of those "Tiger" signatures must have been put there by mistake. Neither side has suggested that the parties intended that Tiger should both guarantee its own obligations (as a self-guarantee) and should guarantee those of Decatur (as a third-party guarantor). That mistake is consistent with a lack of care. It is also consistent with the idea that Mr Rahman's signature on Schedule 6 was simply part of the routine of executing the Tiger Agreement, and would not have appeared to an objective observer as something intended to turn Schedule 6 into an independent and immediately binding contract.

80.6 I can also take into account the 2015 exchange of emails noted in paragraph 79 above, since this is not solely an issue of interpretation. Those emails make it plain that, as late as November 2015, neither party believed that the guarantees required by Article 6.13 had yet been given.

80.7 The Schedule 6 Documents do not appear to have been separated from the Tiger Agreement or the Decatur Agreement, but (although signed) remained simply as schedules to those agreements. Had it been intended that the Schedule 6 Documents should have contractual effect independent of the underlying agreements, it might have been expected that either separate documents would have been signed in the same form, or that the schedules would have been taken out of the main agreements.

81. Given the importance of this conclusion, I have given anxious consideration to the question of whether I can reliably take a view on the material available at this preliminary stage, or whether that material is insufficient for me to form a decided conclusion, and it would therefore be unfair for the claim to jurisdiction to fail since, on fuller analysis, it might turn out that the Idemia did have the better of the argument. I have, however, concluded that the available material is sufficient to enable me to form a view as to the relative merits of the parties' cases which is sufficiently reliable for present purposes. The clear view which I have formed is that, on this issue, it is Decatur not Idemia which has the better of the argument.

82. For these reasons, Idemia has in my judgment failed to make out a good arguable case that the English court has jurisdiction over Decatur either on the basis of its domicile or on the basis of the jurisdiction provisions in the Schedule 6 Document annexed to the Tiger Agreement.

Jurisdiction in relation to Tiger

83. Idemia was granted permission by Robin Knowles J on 15 June 2018 to serve Tiger out of the jurisdiction in Bangladesh.

84. To the extent that that permission was based upon Idemia's case that the English court has jurisdiction over Tiger by virtue of the jurisdiction provisions in the Schedule 6 Documents, it stands or falls, in my judgment, with Idemia's case in relation to Decatur.

85. Idemia's case in relation to Tiger does not face the hurdle of any mis-identification of the "Guarantor". However, on that issue, I have found in favour of Idemia. On the issue on which Idemia has lost - whether the Schedule 6 Documents themselves constitute independently enforceable contracts - there are no material differences between the position with regard to Decatur and that with regard to Tiger.

86. In my judgment, therefore Idemia has failed to make out a good arguable case that the English court has jurisdiction over Tiger on the basis of the jurisdiction provisions in the Schedule 6 Document annexed to the Decatur Agreement. For similar reasons, Idemia has failed to make out a good arguable case that the English court has jurisdiction over Tiger because the claim is made in respect of a contract governed by English law under CPR 6BPD 3.1(6).

87. Since, as I have found, the English court does not have jurisdiction over Decatur in relation to this action, Decatur cannot be an "anchor defendant" for Tiger (or Mr Rahman) so as to found jurisdiction on the basis that Tiger and/or Mr Rahman is "a necessary or proper party" within CPR 6BPD 3.1(3)(b).

Jurisdiction in relation to Mr Rahman

88. Idemia's case for jurisdiction over Mr Rahman was originally based upon the assertion that he was domiciled in England. Mr Rahman accepts that he moved to London with his then wife and son of the start of 2014, and rented and lived at York Way. His evidence is that he subsequently acquired the long leasehold interest in two apartments at the Plimsoll Building, 1 Handyside Street London, and that he and his family moved into the larger of these two properties (F9-02) in about November 2015.

89. However, according to Mr Rahman, his marriage broke down in 2016 and there were divorce proceedings. His ex-wife returned to Bangladesh in about March 2017, leaving their son with him in London. At the start of 2018, his mother was diagnosed with motor neurone disease. Mr Rahman says that, because of these personal considerations, and the fact that his European business had not proved as successful as he had hoped, in January 2018 he ceased to live in London and returned to live in Bangladesh permanently. Mr Rahman therefore asserts that, since January 2018, he has been resident and domiciled in Bangladesh.

90. Mr Midwinter, on behalf of Idemia, has made it clear that Idemia does not accept the truthfulness of Mr Rahman's assertions about his domicile and residence. Nevertheless, Mr Midwinter realistically accepts that he cannot effectively challenge Mr Rahman's evidence for the purposes of these applications. I must therefore proceed on the basis that what Mr Rahman has said about those matters is true. It follows that Idemia cannot base its claim that the English courts have jurisdiction over Mr Rahman on his domicile or his usual place of residence.

91. Idemia, however, also bases its claim that the English courts have jurisdiction over Mr Rahman on its assertion that he has been validly served within the jurisdiction, either at York Way or at Morris Place[24].

92. Under Article 6(1) of the Judgments Regulation (recast):

> **If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.**

At common law, jurisdiction can be founded by serving a defendant within the jurisdiction. It is for Idemia to establish that Mr Rahman has been properly served

[24] See paragraph 36 above.

within the jurisdiction. If Idemia can do that, it will then be for Mr Rahman to show that the court ought to stay the proceedings on *forum non conveniens* grounds[25].

Last known residence

93. Idemia's case that service at York Way was good and effective service on Mr Rahman is based on its assertion that York Way was, as at the date of service, Mr Rahman's "last known residence", even though he was not actually resident there, either at the date when proceedings were commenced or at the date of service.

94. CPR 6.3(1) provides that:

> **A claim form may .. be served by any of the following methods –**
> **..**
> **(c) leaving it at a place specified in rule .. 6.9**

95. CPR 6.9(2) then provides that, where that rule applies:

> **Subject to paragraphs (3) to (6), the claim form must be served on the defendant at the place shown in the following table.**

Nature of defendant to be served	Place of service
1. Individual	Usual or last known residence.

96. Paragraphs (3) to (6) of CPR 6.9 then specify what is to happen if the claimant has reason to believe that the defendant no longer resides at his last known address.

> **(3) Where a claimant has reason to believe that the address of the defendant referred to in entries 1, 2 or 3 in the table in paragraph (2) is an address at which the defendant no longer resides or carries on business, the claimant must take reasonable steps to ascertain the address of the defendant's current residence or place of business ('current address').**
>
> **(4) Where, having taken the reasonable steps required by paragraph (3), the claimant -**
> **(a) ascertains the defendant's current address, the claim form must be served at that address; or**
> **(b) is unable to ascertain the defendant's current address, the claimant must consider whether there is –**
> **(i) an alternative place where; or**
> **(ii) an alternative method by which,**
> **service may be effected.**

[25] See eg *Shulman v Kolomoisky* [2018] EWHC 160 (Ch) at [80], per Barling J; *Tugushev v Orlov* (n 6 above) at [45], per Carr J; A Briggs, *Civil Jurisdiction and Judgments* (6th edn, Informa Law 2015) at [4.02] to [4.03] and [4.16].

> **(5) If, under paragraph (4)(b), there is such a place where or a method by which service may be effected, the claimant must make an application under rule 6.15.**
>
> **(6) Where paragraph (3) applies, the claimant may serve on the defendant's usual or last known address in accordance with the table in paragraph (2) where the claimant –**
> **(a) cannot ascertain the defendant's current residence or place of business; and**
> **(b) cannot ascertain an alternative place or an alternative method under paragraph (4)(b).**

97. The meaning of the phrase "last known residence" in the predecessor to the present CPR 6.9[26] was considered by the Court of Appeal in *Collier v Williams*[27]. Dyson LJ, giving the judgment of the court, gave the following guidance[28]:

> **What state of mind in the server is connoted by the words "last known"? As we have said, there is an important distinction between belief and knowledge. It is a distinction particularly well understood in the criminal law, but elsewhere too. The draughtsman of the rules deliberately chose the word "known". In our view, knowledge in this context refers to the serving party's actual knowledge or what might be called his constructive knowledge, i.e. knowledge which he could have acquired exercising reasonable diligence.**

However, the provisions considered by the Court of Appeal in *Collier v Williams*[29] did not include any equivalent to the present CPR 6.9(3) which expressly refers to "reason to *believe*". More recently, in *Varsani v Relfo*[30], the Court of Appeal has noted that there remain "a number of difficulties and obscurities in the wording of CPR r 6.9".

98. In Mr Midwinter's submission, to the best of Idemia's actual or constructive knowledge at the material time, York Way was still Mr Rahman's residence. He relies upon the evidence in Mr Gadhia's first witness statement that York Way appeared in the Companies House records for Decatur as Mr Rahman's "Service Address" and that, before serving Mr Rahman, Mr Gadhia's firm had on 25 May 2018 sent a pre-action letter by courier to Mr Rahman at the York Way address:

> **The Pre-Action Letter was delivered by courier and the delivery receipt was signed by a person named Abrahim, who is described by the delivery notes as "the porter who is going to take the package over**

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26 CPR 6.5, as it was prior to the substitution of a new Part 6 referred to in n 29 below.
27 [2006] EWCA Civ 23, [2006] 1 WLR 1945 at [63] to [71].
28 Ibid, at [71].
29 The Civil Procedure (Amendments) Rules 2008 (SI 2008 No 2178) substituted a new CPR Pt 6 with effect from 1 October 2008.
30 [2010] EWCA Civ 560, [2011] 1 WLR 1402 at

> **to addresse"** [sic]**. I infer that a person at that address would not have signed a letter for Mr Rahman if Mr Rahman did not reside there ..**[31]

However, that pre-action letter was also sent by courier to Decatur at Morris Place and to Tiger at its registered office in Bangladesh. It was also sent by email to all 3 Defendants. In the circumstances, it is not possible to be confident that it was the particular copy of the pre-action letter delivered at York Way that actually came to the notice of Mr Rahman, and which produced a response on his behalf.

99. On behalf of Mr Rahman, Mr Clarke submits that Idemia already had reason to believe that Mr Rahman no longer resided at York Way by the time that it purported to serve him there. In those circumstances, according to Mr Clarke, Idemia was obliged by CPR 6.9(3) to "take reasonable steps to ascertain the address of the defendant's current residence", and could no longer rely upon its belief that York Way was Mr Rahman's residence.

100. Mr Clarke relies upon the evidence given by Mr Gadhia in his second witness statement[32] to the effect that, when on 6 June 2018, the courier attempted to deliver the claim documents at York Way:

> **.. the concierge of the building called the apartment and was told that Mr Rahman does not live there, and that the concierge said that Mr Rahman was not on the list of people who live in the building. The claim documents were therefore returned to my firm.**

101. Mr Clarke also relies on two letters sent on behalf of Mr Rahman to Idemia's solicitors by a Polish lawyer, Ms Magdalena Selwa, of Sadkowski i Wspolnicy sp k legal office ("Sadkowski"). The first letter, dated 4 June 2018, stated:

> **Please note that my Client, to whom you are addressing your letters, is neither a citizen nor a resident of the United Kingdom.**

The second letter, dated 7 June 2018, stated:

> **Contrary to your allegations, my client [Mr Rahman] does not appear to be domiciled in England (or in any other part of the United Kingdom), and in my previous letter of 4 June 2018 I have already clearly stated that [Mr Rahman] is not a resident of the United Kingdom - meaning is not domiciled in the United Kingdom, and in particular he is not domiciled in England. For the record, the address stated in your letter 25 May 2018 as my Clients address is incorrect. The apartment under that address [York Way] had been rented by my client, but the rental agreement expired in October 2015 ..**
> **.. [Mr Rahman] is living in Bangladesh and he has the intention to stay there permanently in the foreseeable future. [Mr Rahman] is therefore domiciled in Bangladesh.**

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31 Gadhia (1) at [5.4]
32 Gadhia (2) at [1.3], [1.4].

Mr Gadhia's evidence confirms that both of these letters were received by his firm before the proceedings were left by Idemia's process server at York Way later on 7 June 2018 (and again on 8 June 2018) by way of intended service.

102. The issue which I have to decide is whether, in those circumstances, Idemia could still properly serve these proceedings on Mr Rahman at York Way as his "last known" residence. In my judgment, that was not a course which was open to Idemia. It seems to me that, by the time that the service on which Idemia now relies was effected, Idemia had sufficient reason to believe that Mr Rahman no longer lived at York Way. It had been told by the concierge at York Way that Mr Rahman was not on the list of people who lived there and had been told by Sadkowski that Mr Rahman was now living in Bangladesh. In those circumstances, Idemia was no longer entitled to effect service there, but was required by CPR 6.9(3) to take reasonable steps to ascertain the address of the defendant's current residence, and thereafter to follow the procedure set out in sub-paragraphs (4), (5) and (6) of the rule.

103. The intention behind these substituted provisions of the CPR is plain. It is to provide a simple, clear and straightforward code relating to service, balancing the interests of claimants against the:

> **.. fundamental principle of our law that no one is to be found guilty or made liable by an order of any tribunal unless he has been given fair notice of the proceedings so as to enable him to appear and defend them ..**[33]

104. Under that code, a claimant is entitled to serve a defendant at his "usual or last-known residence" within the jurisdiction. However, the claimant can only rely upon "last-known" if it he has no reason to believe that that is not still the defendant's usual residence. If the claimant does have reason to believe that the defendant is no longer usually resident at that address, the claimant cannot validly serve the defendant at that address, but must take reasonable steps to find out where the defendant does now live, or a place and/or method by which the proceedings may effectively be brought to the defendant's attention. If the claimant can ascertain the current address or a way in which the proceedings can effectively be brought to the defendant's attention, the claimant must apply to the court under CPR 6.15 for an order permitting service by an alternative method or at an alternative place. Only in the exceptional case where, having taken the required reasonable steps, the claimant cannot discover the defendant's current address or any alternative means of bringing the proceedings effectively to the defendant's attention, can the claimant revert to service at the "last-known" address of the defendant.

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[33] *R v London County Quarter Sessions Appeals Committee, Ex p Rossi* [1956] 1 QB 682 at 691, per Denning LJ; cited by Brooke LJ in *Akram v Adam* [2004] EWCA Civ 1601, [2005] 1 WLR 2762, a case concerning the former CPR 6.5.

105. The scheme of this code gives rise to 2 subsidiary questions: first, what is the date by reference to which the claimant's knowledge and belief is to be assessed; and, secondly, what standard of "reason to believe" is required in order to trigger the procedure required by CPR6.9(3)?

106. With regard to the relevant date, questions of jurisdiction are normally to be determined by reference to the date of the commencement of proceedings, here 6 June 2018[34]. The reason for that is to enable the claimant to know at the time proceedings are commenced that they have been commenced on the right court. In accordance with that principle, in her recent judgment in the case of *Tugushev v Orlov*[35], Carr J held that:

> **The time for determination of [the defendant's] domicile or usual residence is the date of issue of the claim form.**

107. The use of the date of the commencement of proceedings, however, makes much less practical sense in the context of the code which I have just described. In the present case, Idemia properly wrote pre-action letters. However, the position can better be tested by considering a claimant who has failed to take that sensible course, has issued proceedings believing that the defendant is usually resident at a particular address within the jurisdiction, but has thereafter expressly been told that the defendant has moved to a different address within the jurisdiction (which is supplied). Could it be right that that claimant could still validly serve at the original address as the "last-known" address, while actually knowing that it was no longer a valid address for the defendant? It seems to me that that is unlikely to have been what the framers of the code intended.

108. As is pointed out in the notes at paragraph 12.3.2 of Civil Procedure, a default judgment obtained after valid service under CPR 6.9 at the defendant's last-known address cannot be set aside as of right simply because the proceedings have not come to the attention of the defendant. Such a defendant must comply with CPR 13.3(1), and must satisfy the court that they have applied promptly and that their defence has a real prospect of success or that there is some other compelling reason why a trial should be conducted. That all suggests that the rules should be interpreted in a way which limits the circumstances in which valid service can be effected at an address

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34 See *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547 at 566 (CA), affmd [2002] 1 AC 1*; Petrotrade v Smith* [1999] 1 WLR 457 at 464 (QB); *Freeport v Arnoldsson* C-98/06 [2008] QB 634 (ECJ) at [54]; *Per Linuzs v Latmar Holdings* [2013] EWCA Civ 4 at [30] ("the relevant time for determining whether the court has jurisdiction .. is the time at which the jurisdiction was invoked i.e. the issue of the claim form"); and *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34, [2018] 1 WLR 3683 at [9], per Lord Sumption JSC (with whom Lord Hodge, Lady Black, Lord Lloyd-Jones JJSC and Lord Mance agreed): "It is common ground that the [good arguable case] test must be satisfied on the evidence relating to the position as at the date when the proceedings were commenced".

35 N 6 above, at [46]

which the claimant has reason to believe at the moment of service is no longer current.

109. As for what amounts to "reason to believe", it would not be helpful for me to attempt to gloss the words of the CPR. However, the fact that Idemia persisted in serving the present action at York Way, despite having been expressly told that Mr Rahman no longer lived there, may perhaps indicate their belief that claimants are entitled under CPR 6.9 to disregard what they are told by defendants about where they actually live, on the basis that defendants have an incentive to lie about such matters in order to evade service.

110. In my judgment, the wording and structure of the new code means that any such belief would be misconceived. There may, perhaps, be cases in which a claimant would be entitled to continue to believe (for the purposes of relying on an address as the "last-known" address) that a defendant continued to live at a particular address, despite that defendant's protestations to the contrary. But, in my judgment, such cases will be rare. The requirement under CPR 6.9(3) to "take reasonable steps to ascertain the address of the defendant's current residence" is not an onerous one. If, as in the present case, the defendant can be contacted, a simple first step would be to ask the defendant for their address. Claimants who choose not to take such reasonable steps, in the face of protestations by a defendant that the address which the claimant has for them is wrong, do so at their own risk.

111. Fortunately, I am not required finally to decide either of these questions for the purposes of these applications. Mr Midwinter and Mr Clarke both argued the applications before me on the basis that the relevant date was the date of purported service: and I am, in any event, satisfied that at both dates Idemia had sufficient "reason to believe" that Mr Rahman no longer lived at York Way to prevent that address from being his "last-known" address unless and until Idemia had followed the procedure laid down in CPR 6.9(3).

112. Mr Rahman's challenge to the purported service of this action on him at York Way therefore succeeds.

Companies Act 2006 s 1140

113. Idemia, however, has a second basis for its argument that Mr Rahman has validly been served within the jurisdiction. It relies upon the Companies Act 2006 s 1140. This states that:

> **Service of documents on directors, secretaries and others**
>
> **(1) A document may be served on a person to whom this section applies by leaving it at, or sending it by post to, the person's registered address.**

> **(2) This section applies to—**
> **(a) a director or secretary of a company;**
> **(b) in the case of an overseas company whose particulars are registered under section 1046, a person holding any such position as may be specified for the purposes of this section by regulations under that section;**
> **..**
> **(3) This section applies whatever the purpose of the document in question. It is not restricted to service for purposes arising out of or in connection with the appointment or position mentioned in subsection (2) or in connection with the company concerned.**
>
> **(4) For the purposes of this section a person's "registered address" means any address for the time being shown as a current address in relation to that person in the part of the register available for public inspection.**
>
> **(5) If notice of a change of that address is given to the registrar, a person may validly serve a document at the address previously registered until the end of the period of 14 days beginning with the date on which notice of the change is registered.**
>
> **(6) Service may not be effected by virtue of this section at an address—**
> **(a) if notice has been registered of the termination of the appointment in relation to which the address was registered and the address is not a registered address of the person concerned in relation to any other appointment;**
> **(b) in the case of a person holding any such position as is mentioned in subsection (2)(b), if the overseas company has ceased to have any connection with the United Kingdom by virtue of which it is required to register particulars under section 1046.**
>
> **(7) Further provision as to service and other matters is made in the company communications provisions (see section 1143).**
>
> **(8) Nothing in this section shall be read as affecting any enactment or rule of law under which permission is required for service out of the jurisdiction.**

114. It is common ground that, both at the date when this action was commenced and at the time of service, Mr Rahman was a director of various UK companies (including Decatur) and that Morris Place was his "registered address" in relation to those companies for the purposes of s 1140.

115. The scope of s 1140 was considered by Master Marsh (before his appointment as Chief Master) in *Key Homes Bradford Ltd v Patel*[36]. Master Marsh held that the effect of s 1140 is that, when a company director gives an address for service in England and Wales, he can validly be served at that address, even if he is domiciled and resident overseas. Master Marsh's decision was recently followed and applied by ICC Judge Jones in *Brouwer v Anstey*[37].

116. It is also common ground that, if the decision in *Key Homes* is correct, Mr Rahman has been validly served at Morris Place, and that the English court therefore has jurisdiction over him. What Mr Clarke submits on behalf of Mr Rahman is that *Key Homes* was wrongly decided, and should not be followed. In Mr Clarke's submission (and contrary to the view taken by Master Marsh), the fundamental principles of the common law have not been abrogated by this statutory provision. Service under s 1140(1) at a registered address within the jurisdiction will therefore only be valid if the person to be served is within the jurisdiction of the time of service. That that is the case is shown, in Mr Clarke's submission, by s 1140(8) which expressly preserves "any .. rule of law under which permission is required for service out of the jurisdiction".

117. This fundamental principle of the common law was considered by Master Marsh in his judgment in *Key Homes*[38]. He began by citing the well-known statement of the principle by Lawrence Collins J (as he then was) in *Chellaram v Chellaram (No 2)*[39] that:

> **.. [I]t has always been, and remains, a fundamental rule of English procedure and jurisdiction that a defendant may be served with originating process within the jurisdiction only if he is present in the jurisdiction at the time of service, or deemed service.**

118. After examining the consideration of this principle by the Court of Appeal in the cases of *Rolph v Zolan*[40]; *City & Country Properties Limited v Kamali*[41]; and *SSL International Plc v TTK LIG Ltd*[42], Master Marsh concluded that that principle did not preclude service under s 1140 on a registered address within the jurisdiction from being effective, even if the person to be served was not in fact resident or physically present within the jurisdiction at the time of service:

> **Section 1140 in my judgment provides a basis for serving a director which is entirely outside the provisions for service in the CPR. It is a parallel code. The disapproval by the Court of Appeal in *Kamali* of the**

36 [2015] 1 BCLC 402.
37 [2019] EWHC 144 (Ch).
38 N 36 above, at [18] to [26].
39 [2002] EWHC 632 (Ch), [2002] 3 All ER 17.
40 [1993] 1 WLR 1308.
41 [2006] EWCA Civ 1879, [2007] 1 WLR 1219.
42 [2011] EWCA Civ 1170, [2012] 1 WLR 1842.

> **general principle enunciated by Lawrence Collins J in *Chellaram* was expressed in broad terms. It seems to me it is inherently unlikely that in passing s 1140 of the 2006 Act, Parliament can have intended what was clearly designed to be a new manner in which company directors could be served should be subject to a common-law principle which is directly contrary to the clear terms of the section. Nothing in s 1140 suggests that its provisions are limited such as to prevent service upon a director who is not resident within the jurisdiction. A new regime for service of documents on directors was introduced and was intended to have a wide effect. It is not prima facie unfair that a director of an English company who resides abroad, but who gives an address for service in England, should be vulnerable to being served at that address as a choice, or a deemed choice, has been made. And the solution is simple because the director can opt to provide an address abroad in appropriate circumstances.**

119. In Mr Clarke's submission, this reasoning it is not consistent with the analysis of the authorities by Warren J in *Clavis Liberty Fun I LP v Revenue & Customs Commissioners*[43], which was adopted by Teare J in *Libyan Investment Authority v SGA Société Général*[44]. In those two cases, both of which were concerned with witness summonses, Warren J and Teare J accepted as authoritative the following statement of principle by Stanley Burnton LJ in *SSL International*[45]:

> **It is a general principle of the common law that, absent a specific provision, as in the rules for service out of the jurisdiction, the courts only exercise jurisdiction against those subject to, i.e. within the jurisdiction.**

and noted the approval by Stanley Burnton LJ of Lawrence Collins J's dictum in *Chellaram*, "if read with that qualification" – that is, if the reference to persons "present in the jurisdiction" is read as meaning persons "subject to, ie within, the jurisdiction".

120. In Mr Clarke's submission, the analysis of the authorities by Warren J in Clavis[46] shows that Master Marsh fell into error in relying on "the disapproval by the Court of Appeal in *Kamali* of the general principle enunciated by Lawrence Collins J in *Chellaram*". Mr Clarke relies upon Warren J's statement that he (like Master Marsh) was "clearly bound by" the explanation of *Kamali* given by the Court of Appeal in the later *SSL International* case, "even though there might be perceived a tension between the reasoning of May LJ (adopted by Wilson LJ) in [*Kamali*] and the reinstatement, if I can put it that way, [in *SSL International*] of the fundamental principle stated in *Chellaram*".

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43 [2015] UKUT 72 (TCC), [2015] 1 WLR 2949.
44 [2017] EWHC 781 (Comm).
45 See n 42 above at [57]
46 See n 43 above at [26] to [32].

121. Like Master Marsh, Warren J and Teare J, I too am bound by the decision and reasoning of the Court of Appeal in *SSL International*. It seems to me that Mr Clarke is therefore right to say that Master Marsh should not have relied on the view expressed in *Kamali* by May LJ that "there is not, or at least no longer is, the fundamental principles such as Lawrence Collins J supposed"[47]. In my judgment, however, there is no tension between the actual decision in *Key Homes* and the common law principle that was re-stated by the Court of Appeal in *SSL International*.

122. First of all, the re-statement of the principle by the Court of Appeal in *SSL International* expressly recognises that it can only apply "absent a specific provision". Section 1140 is such a "specific provision", and must be applied in accordance with its terms in order to give effect to its statutory purpose.

123. Secondly, and perhaps more importantly, the Court of Appeal's re-statement of the principle (unlike the earlier formulation by Lawrence Collins J in *Chellaram*) makes it clear that what is required is that the person served should be "subject to" the jurisdiction. Actual physical presence at the moment of service is not necessary. As Teare J pointed out in his judgment in the *Libyan Investment Authority* case[48],

> **.. temporary absence while on holiday is no bar to service by first class post. It is also why the resident of North Cumbria whose trip across the border to Scotland for lunch has so engaged the attention of judges can also be served by first class post, notwithstanding that he is temporarily out of the jurisdiction ..**

124. Teare J was there speaking of persons who are subject to the jurisdiction of the court because they are resident within the jurisdiction, even though temporarily absent. However, there are many other ways in which persons can make themselves subject to the jurisdiction of the court, though not physically present here. One such way, provided for by s 1140, is to register a "service address" that is within the jurisdiction.

125. As for Mr Clarke's reliance upon s 1140(8), the answer to that submission was cogently provided by Master Marsh in his judgment[49]:

> **Section 1140(8) is explicable for the very reason that a director may opt to provide a service address which is outside the jurisdiction. Subsection (8) is designed to make clear that by providing a foreign address, a director is not agreeing that the English court will have jurisdiction to deal with any dispute concerning him. As the**

47 See n 41 at [12].
48 See n 44 above at [64].
49 N 36 above, at [25].

> **subsection makes clear, the general rule relating to permission for service outside the jurisdiction will still apply.**

126. Section 1140 was a new provision in company legislation, and was brought fully into force on 1 October 2009. In paragraph [13] of his judgment, Master Marsh quoted the DTI's consultation paper on Company Law Reform dated March 2005 which, at paragraph 5.3, stated under the heading "Directors' Home addresses":

> **.. [I]t is important that the service address functions effectively, and the law will be tightened to increase the obligation on directors to keep the records up-to-date, and ensure that the address on the public record is fully effective for the service of documents ..**

Master Marsh also quoted the commentary on clause 747 of the Bill (which eventually became s 1140 of the Act) as it was going through Parliament:

> **This clause is a new provision. It ensures that the address on the public record for any director or secretary is effective for the service of documents on that person. Sub-section (3) provides that the address is effective even if the document has no bearing on the person's responsibilities as director or secretary.**

127. Master Marsh might also have referred to the following further provisions of the Companies Act 2006:

127.1 Section 163(1)(b), which requires that a company's register of directors must contain (inter-alia) a "service address" for each director (and s167, which requires those particulars to be notified to the registrar);

127.2 Section 1142, which provides that:

> **Any obligation under the Companies Act to give a person's address is, unless otherwise expressly provided, to give a service address for that person**

127.3 Section 1141(1), which states that:

> **In the Companies Acts a "service address" in relation to a person means an address at which documents may be effectively served on that person**

and to the Companies 2006 (Annual Return and Service Addresses) Regulations 2008[50], which specify that a "service address":

> **.. Must be a place where (a) the service of documents can be affected by physical delivery; and (b) the delivery of documents is capable of being recorded by the obtaining of an acknowledgement of delivery.**

[50] SI 2008 No 3000 (as amended by SI 2011 No 1487)

128. These materials, and the ordinary and natural meaning of the words used in s 1140 itself, all show that the statutory intention was to have a definitive public record of the address at which the persons within this section could validly and effectively be served. That purpose would entirely be defeated if the validity of the address on the register depended upon the accident of whether the person concerned was physically present within the jurisdiction at the moment of service.

129. A company director or secretary resident abroad is under no obligation to register an address for service that is within the jurisdiction. Mr Rahman could (and should, if he wished to avoid the jurisdiction of the English courts over him) have changed his registered address to his new address in Bangladesh when he ceased to be resident in England. He did not do so. His omission to do so meant that he remained subject to the jurisdiction of the English court, by virtue of having a registered service address that was within the jurisdiction.

130. In my judgment, therefore, Mr Rahman was validly served at Morris Place, and his challenge to that service and to the exercise by the English court of jurisdiction over him on that basis must be dismissed.

Mr Rahman's application for a stay

131. In the event that I determine (as I have) that Mr Rahman has validly been served at Morris Place, Mr Rahman's Application Notice dated 11 September 2018 nevertheless seeks to have the proceedings against him stayed "because the Swiss courts and/or the Bangladeshi courts are the proper place in which to bring the claims and so the Court should make the order sought on the grounds of *forum non conveniens*".

132. As Lord Briggs noted in *Vedanta Resources PLC v Lungowe*[51] (a decision handed down after argument in the present applications had concluded):

> **.. The best known fleshed-out description of the concept [of *forum non conveniens*] is to be found in Lord Goff of Chieveley's famous speech in the *Spiliada* case[52], summarised much more recently by Lord Collins in the *Altimo* case[53] at para 88 as follows:**
>
> **"The task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice; …"**
>
> **That concept generally requires a summary examination of connecting factors between the case and one or more jurisdictions in which it could be litigated. Those include matters of practical convenience such**

[51] [2019] UKSC 20 at [66].
[52] *Spiliada Maritime Corp v Cansulex Ltd* (The Spiliada) [1987] AC 460 at p 475- 484.
[53] *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804.

> **as accessibility to courts for parties and witnesses and the availability of a common language so as to minimise the expense and potential for distortion involved in translation of evidence. Although they are important, they are not necessarily conclusive. Connecting factors also include matters such as the system of law which will be applied to decide the issues, the place where the wrongful act or omission occurred and the place where the harm occurred ..**

133. In support of his application for a stay, Mr Rahman states in his second witness statement (at paragraph 8.1) that:

> **As to the factual issues the English court will have to decide in relation to the alleged breach in bringing the [Bangladesh Action] there is no connection with England and Wales. There are no relevant witnesses within England and Wales. I am resident in Bangladesh, Dariusz Kaliszewski is resident in Poland, and none of the people I dealt with at [Idemia] are, as far as I am aware, resident in England and Wales.**

134. In opposition to that application, Mr Gadhia's third witness statement relies (inter alia) upon what he says are the following factors:

134.1 Mr Rahman is not subject to the jurisdiction of the Swiss courts, and has not volunteered to submit to that jurisdiction. The choice is therefore, in effect, between England and Wales and Bangladesh.

134.2 The Bangladesh Action constitutes a plain breach of the jurisdiction provisions of the Decatur Agreement and the Tiger Agreement.

134.3 The courts of Bangladesh may disregard those exclusive jurisdiction provisions.

134.4 The Bangladesh Action has been brought for the collateral purpose of exerting pressure on Idemia by interfering with the payments due from the BEC;

134.5 There have been repeated instances of steps being taken in the Bangladesh Action without documents having been served on Idemia or affording Idemia the opportunity to respond;

134.6 These matters give rise to concerns by Idemia about the integrity of the Bangladesh Action and about its ability, as a foreign company with no presence in Bangladesh, to have a proper opportunity to put its case;

134.7 The pace of justice in Bangladesh is slow.

135. This last point is acknowledged by Mr Mahmud on behalf of the Defendants. Mr Mahmud, states in paragraph 5.6 of his second expert report that:

> **It is true that the judiciary is overburdened in Bangladesh due to many factors including for the lack of sufficient judges and courts. As such, the pace of justice in Bangladesh is generally viewed as being slow in relation to first world countries. However, it is not uncommon to see proactive litigants who are not invested in dilatory tactics to obtain justice from the courts in much shorter timeframes.**

136. In my judgment, Idemia is right to submit that the choice is one between England and Bangladesh. So far as I can tell from the Particulars of Claim and the evidence before me, the central issues in the tortious claims made against Mr Rahman involve the interpretation of the Discount Letter, the Decatur Agreement and the Tiger Agreement (both governed by Swiss law) and the Deeds of Variation (also governed by Swiss law). The fact of the Bangladesh Action is not in dispute. What is in issue is whether the bringing of that action amounted to a breach of the jurisdiction provisions of these various agreement - and, perhaps, whether Mr Rahman personally procured or conspired to effect any such breach. On the material presently before me, the natural home for such a claim would seem to be the Swiss courts.

137. However, Mr Rahman is not party to any jurisdiction agreement conferring jurisdiction on the Swiss courts, is not domiciled or resident in Switzerland, and has not otherwise submitted to the jurisdiction of the Swiss courts. There are no proceedings currently afoot in Switzerland involving Decatur and/or Tiger to which Mr Rahman could be joined as a necessary or proper party and no suggestion in the evidence that any such proceedings are contemplated. In the circumstances, it is impossible for me to say at this point that the courts of Geneva are the forum in which the action against Mr Rahman could most suitably be tried in the interests of the parties and for the ends of justice. It is simply not an available forum for these claims.

138. As between England and Wales and Bangladesh, the evidence before me at present fails to establish any relevant factor connecting the tortious claims against Mr Rahman with England. The evidence does not indicate that England is the place where the wrongful acts occurred or the place where the harm occurred. In those circumstances, English law is unlikely to be the system of law which will be applied to decide the issues. On the view which I have taken of the Schedule 6 Documents, the relevant contracts are governed by Swiss law, not English law. Decatur is an English company. However, there is no evidence that any relevant witnesses are in England, or any relevant documents. By contrast, Tiger is a Bangladeshi company and Mr Rahman himself is resident in Bangladesh. The commercial background to the dispute is the contract with and subsequent supply to the BEC in Bangladesh.

139. As for the points made in Mr Gadhia's third witness statement, there is no rule that the English court will not examine the question of whether there is a risk that justice will not be done in a foreign court: but there is a heavy burden on a claimant seeking to rely upon such matters to resist an application for a stay. As Lord Bingham noted in *Lubbe v Cape plc*[54] (citing Lord Goff in the *Spiliada* and *Connelly*[55] cases):

> **It is only if the plaintiff can establish that substantial justice will not be done in the appropriate forum that a stay will be refused**

As Lord Diplock said in *The Abidin Daver*[56], a claimant seeking to resist a stay on that ground

> **.. Must assert this candidly and support his allegations with positive and cogent evidence ..**

Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required[57].

140. In my judgment, the evidence relied upon by Idemia is wholly insufficient to discharge that burden.

141. Mr Midwinter submits that, if I were to stay this action in favour of Bangladesh, I would defeat the whole object, which is to bring the Bangladesh Action to an end. However, on the view which I have taken of the Schedule 6 Documents, the right which Idemia is entitled to protect is a right not to have its disputes with Decatur and Tiger litigated (except by agreement) anywhere other than in the courts of Geneva. Geneva, however, is simply not an available forum for Idemia's claims against Mr Rahman: and the fact that the English court would have jurisdiction to grant an anti-suit injunction against Mr Rahman cannot of itself make England the most appropriate forum for the trial of claims against him which otherwise have no material connection with this jurisdiction.

142. Not without some reluctance, I therefore conclude that Mr Rahman has made out the grounds for a stay of this action against him.

Summary

143. For the reasons which I have given above:

143.1 Decatur's challenge to the jurisdiction succeeds. Idemia's claim to found jurisdiction upon Decatur's domicile in England fails, because Decatur has

54 [2000] 1 WLR 1545 at 1554.
55 *Connelly v RTZ Corpn plc* [1998] AC 854
56 [1984] AC 398
57 *Altimo Holdings* (n 53 above) at [97] and [101], per Lord Collins of Mapesbury, giving the judgment of the Board.

the better of the argument that jurisdiction on that basis (in relation both to the contractual and the tortious claims asserted in the present action) has been prorogued to the courts of Geneva by the jurisdiction provisions of the Decatur Agreement. Idemia has failed to establish a good arguable case that it can found jurisdiction against Decatur on the jurisdiction provisions of the Schedule 6 Document annexed to the Tiger Agreement.

143.2 Tiger's challenge to the jurisdiction succeeds. Idemia has failed to establish a good arguable case that it can found jurisdiction against Tiger on the jurisdiction provisions of the Schedule 6 Document annexed to the Decatur Agreement. Idemia has also failed to establish a good arguable case that it can rely upon Decatur as an "anchor defendant", so as to establish jurisdiction over Tiger as a necessary or proper party.

143.3 Mr Rahman's challenge to the purported service on him at York Way succeeds. York Way was not his "last known residence" within the meaning of CPR 6.9 at the material time, since Idemia had been told that he no longer lived there.

143.4 Mr Rahman's challenge to the service on him at Morris Place fails. He was validly and effectively served there at his registered "service address", pursuant to the Companies Act 2006 s 1140, even though he was not at the material time present, domiciled or resident within the jurisdiction. Idemia has therefore succeeded in establishing that the English court has jurisdiction over Mr Rahman on the basis of that service.

143.5 Mr Rahman's application for a stay of this action against him on *forum non conveniens* grounds succeeds. No sufficient factors link the claims made against Mr Rahman in the present action to England. There are, however, substantial connections with Bangladesh. Bangladesh is therefore the forum in which Idemia's claims against Mr Rahman can most suitably be tried for the interests of all the parties and for the ends of justice.

144. I invite the parties to seek to agree the terms of a Minute of Order giving effect to this judgment, and dealing with all consequential issues. In the event that agreement cannot be reached, I will give directions for any points of disagreement to be resolved on the basis of written submissions. Pursuant to CPR PD 52A 4.1(a), I adjourn all applications for permission to appeal together with all other consequential applications to be determined in that way, and extend time under CPR 52.12(2)(a) until 21 days after that determination. In the circumstances, there is no need for the parties to attend the formal handing down of this judgment. I am grateful to both counsel and to the teams behind them for their assistance.