Neutral Citation Number: [2005] EWHC 600 (Comm)

Case No: 2003 Folio582

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 12th April 2005

Before :
MR JUSICE AIKENS

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Between :

THE ARGO FUND LIMITED	**Claimant**
- and -	
ESSAR STEEL LIMITED	**Defendant**

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- -

Mark Howard QC and Jonathan Nash
(instructed by **Eversheds**) for the **Claimant**
Rhodri Davies QC and Matthew Cook
(instructed by **Cripps Harries Hall**) for the **Defendant**
Hearing dates: 14, 15, 16 and 17 February 2005

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Judgment

Mr Justice Aikens:

A. The Parties and the background to the Action

1. This case concerns a syndicated loan and the secondary debt market. It raises interesting questions on the rights and obligations of a borrower and those who purchase debt in that market. The Claimant, The Argo Fund Limited ("Argo"), is a mutual fund investment company incorporated in the Cayman Islands. Since its inception in 2000, it has invested in a portfolio of debt, including bonds, loans, letters of credit and promissory notes. Argo's investment aim is to obtain higher returns for private and corporate investors who are prepared to take more risks. Although it sometimes acts as an original lender, in the main it purchases debts that were originally underwritten by other institutions. These purchases take place on the "secondary debt market". Argonaftis Capital Management (Overseas) Limited, ("Argonaftis"), is the investment manager of Argo. Argo Capital Management Limited ("ACML") is the investment advisor to Argo, via Argonaftis. Mr Andreas Rialas founded Argo in 2000 and he has been the Chief Executive of ACML since then.

2. The Defendant, Essar Steel Limited ("Essar"), is part of the Essar group of companies, which is one of the largest corporate groups in India. Essar itself was incorporated in 1976 in the State of Gujarat, India. It carries on the business of

manufacturing various semi – processed steel products. It is a publicly listed company, whose shares are traded on the National Stock Exchange of India. Essar has assets of US$810 million and an annual turnover of about $545 million.

3. One of Essar's production plants is the Hazira hot rolled steel coil plant. This plant was partly financed by the issue of a Euro Convertible Bond (apparently India's first) in August 1993. The total value of the issue was US$75 million. The bonds carried a "put" option in favour of the bondholders, which, if exercised, would require Essar to redeem the bonds as of August 1996. The Hazira plant began production in March 1996. At that time the international price of steel was about US$400 per metric ton.

4. The bondholders exercised their put option and the sum repayable was US$72.33 million. Essar obtained approval from the Government of India to refinance part of the cost of redemption, up to US$40 million. As a result, Essar entered into a two year unsecured syndicated loan facility agreement with a syndicate of nine banks. The syndicate was led by Bayerische Landesbank Girozentrale, Singapore branch ("BLB"), which acted as arranger and Agent for the others.[1] The facility was for an aggregate principal sum of US$40 million. The Facility Agreement dated 7 March 1997 ("the Agreement") stated that the facility was to be used to finance the redemption of the bonds pursuant to the exercise of the put option by the holders.

5. At the time the Agreement was concluded, foreign exchange control existed in India and was exercised under the provisions of the Indian Foreign Exchange Regulation Act 1973 ("FERA"). Clause 2.3.(e) of the Agreement provided that it was a condition precedent to the Agreement becoming binding and enforceable that necessary consents of the Reserve Bank of India ("RBI") be obtained. The RBI gave its approval for the facility, principally in a letter dated 16 December 1996.

6. The facility was drawn down in a single advance on 20 March 1997. The advance became repayable on 22 March 1999.

7. After drawdown, several factors combined to produce a severe impact on Essar's business and financial performance. First, the government of India reduced customs duties on imported steel products, particularly rolled coils. At the same time, competitor companies in India expanded their capacity. There was also a downturn in world demand for steel. Essar's position was made worse by an embargo on Indian steel products by the USA following an Indian nuclear test in 1998. These events led to a dramatic drop in the price of steel from $400 per tonne to under $200 per tonne. The result was that Essar's profitability and cash – flow were much lower than had been forecast and appraised before the Agreement had been concluded. Essar's financial position was exacerbated by very high interest rates on rupee debts, which averaged over 15% per annum.

8. As a consequence, when the debt drawn down under the Agreement came to be repaid, Essar was unable to honour its commitment to the Syndicate Banks. Essar also had many other unsecured lenders, both Indian and from elsewhere, who were

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[1] They were: The Sanwa Bank Limited, Singapore branch; ANZ Grindlays Export Finance Limited; Masreqbank psc; The Sakura Bank Limited, Hong Kong branch; Indian Bank, Singapore branch; KDLC Leasing Singapore Pte Ltd; The Siam Commercial Bank Public Company Ltd, Singapore branch; TAIB Bank EC.

owed a total of about US$ 800 milllion. Essar's policy was to try and restructure its debt so as to reduce this overall level considerably.

9. To this end, Essar entered into negotiations with the Syndicate Banks. In August 2000 (ie. about 18 months after the sums drawn down under the Agreement were due to be repaid), Essar proposed to BLB (as agent for the other banks) that the $40 million facility be rolled over and repaid in instalments over five years.

10. Following negotiations with its secured creditors, Essar wrote to BLB on 6 March 2003,[2] indicating that it had agreed a comprehensive debt restructuring programme with its secured creditors and that the programme had been agreed by the Corporate Debt Restructuring Forum, which is appointed by the RBI. Unsecured lenders were offered two revised proposals for settlement of outstanding debt. The first was an immediate cash repayment of 25 cents in the dollar; the second was a "bullet" repayment in March 2018, with interest meanwhile at the rate of 0.25% per annum paid half yearly.

11. In the meantime, in November 2002 Argo had agreed to acquire a US$ 5 million tranche of the debt under the Agreement from Garban Securities Limited, to whom ANZEF Limited had sold it.[3] Argo acquired that tranche at a large discount to the nominal value of the debt. Then, on 1 April 2003, Argo wrote to BLB offering to buy the debt of the other participants in the Facility Agreement at a price equal to 25.5% of the original face value of their participation, with all accrued and unpaid interest passing to Argo at no extra cost. This offer was taken up by BLB and several other participants.[4] By June 2003 Argo had purchased debt with a nominal value of US$ 29.5 million, but for a price equal to 25.5% of that sum.

12. Argo says that all these sales and transfers to Argo were performed in accordance with the terms of the Agreement that was originally concluded between Essar and the syndicate banks. Argo relies in particular on the terms of Clause 27.2 of the Agreement, which, it says, permits transfers of debt from the original syndicate banks to transferees.

13. On 26 June 2003 Argo issued a Claim Form in the Commercial Court, claiming that it was entitled to claim on the Agreement as transferee of various tranches of the debt under the Agreement. Argo alleged that Essar was in breach of the Agreement by failing to repay the debt by the due date or at all. Argo claimed debt or damages of US$ 29.5 million plus contractual interest.[5]

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[2] **Bundle D1/267.**

[3] ANZEF was formerly ANZ Grindlays Export Finance Ltd. In its Outline Argument, Essar said that there was a potential issue as to whether Garban was a valid intermediate Transferee between ANZEF and Argo. This point was not pursued at the trial, however. Argo subsequently transferred this tranche to an associated company, Ankus Limited, in February 2003 and it was retransferred to Argo on 10 June 2003. Nothing turns on that excursion.

[4] The others were: The Sanwa Bank Ltd; Mashreqbank psc; and The Siam Commercial Bank Public Company Ltd. As noted ANZ Grindlays had already sold its tranche to Argo.

[5] Argo claims contractual interest at LIBOR plus 1% and the Default rate of LIBOR plus 3% for the appropriate periods.

B. The Relevant terms of the Agreement

14. The Agreement is between Essar (described as "the Borrower"), BLB, Sanwa Bank, ANZ Grindlays Export Finance Limited, Masreqbank PSC and Sakura Finance Asia Limited (described as "Arrangers"), Indian Bank, KDLC Leasing Singapore Pte Ltd, The Siam Commercial Bank Public CompanyLimted, and TAIB Bank EC (in their capacity as the "Co – Arrangers"), BLB (in its capacity as "Agent") and the other banks that are listed in Schedule One to the Agreement. They are described as "*in their capacity as such, the "Banks" and individually a "Bank".*

15. Clause One sets out various definitions. The most important for this case are the definitions of "*Transfer Certificate"* and "*Transferee",* which state as follows:

> "Transfer Certificate" means a certificate in the form set out in Schedule Two signed by a Bank and a Transferee whereby:
>
> (i) such Bank seeks to transfer to such Transferee all or a part of such Bank's rights and obligations (as more particularly described therein) in accordance with the provisions hereof; and
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> (ii) such Transferee agrees to assume and perform the obligations it will assume as a result of the delivery of such certificate to the Agent as is contemplated by this Agreement; and
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> "Transferee" means a bank or other financial institution to which a Bank seeks to transfer all or a part of such Bank's rights and obligations hereunder in accordance with the provisions of this Agreement.

16. Clause 3 is headed "*Syndicate; Rights and Obligations".* That provides:

> "3.1 Each of the Banks shall, subject to and in accordance with the provisions of this Agreement, participate through its Lending Office in the Facility."
>
> 3.2 The rights and obligations of each of the Banks under this Agreement are several. The failure by a Bank to perform or comply with its obligations hereunder shall not:
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> (i) result in any of the Arrangers, the Co-Arrangers, the Agent or any other Bank incurring any liability whatsoever; and/or
>
> (ii) relieve the Borrower, the Arrangers, the Co-Arrangers, the Agent or any other Bank from their respective obligations under this Agreement.

> 3.3 The Outstandings of each Bank hereunder is a separate and independent debt and each Bank shall have the right to protect and enforce its rights hereunder and it shall not be necessary for any Arranger, Co-Arranger, the Agent or any Bank to be joined as an additional party in any legal proceedings relating to any such protection or enforcement of such rights.

17. Clause 9 is headed "*Repayment"*. It provides that, subject to the provisions of the Agreement which may require earlier repayment, "*the Advance shall be repaid by the Borrower in one lump sum on the Repayment Date"*.[6]

18. Clause 16 is headed "*Events of Default"*. Nineteen possible events of default are listed. The first is if the Borrower fails to pay any sum due under the Agreement at the time and in the currency and manner specified in the Agreement. That is the Event of Default that is relied on by Argo in this action.

19. The Clause that is central to this case is Clause 27, which is headed "*Benefit of Agreement"*. It provides:

> "27.1 This Agreement shall be binding upon and inure to the benefit of each party hereto and their respective successors, Transferees and assigns. The Borrower shall not be entitled to assign , transfer or otherwise deal in any way with all or any of its rights, benefits and obligations under this Agreement. Any Bank may, subject to the execution and completion of such documents as the Agent may specify and with notice to the Borrower assign all or any of its rights and benefits hereunder or, subject to the payment to the Agent of a transfer fee of $250, transfer in accordance with Clause 27.2 all or any of its rights, benefits and obligations hereunder.
>
> 27.2 If any Bank wishes to transfer all or any of its rights, benefits and/or obligations hereunder, then such transfer may be effected by the delivery to the Agent of a duly completed and duly executed Transfer Certificate in which event, on the later of the effective date of transfer (the "Transfer Date") specified in such Transfer Certificate and the third business day after the date of delivery of such Transfer Certificate to the Agent:
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> (i) to the extent that in such Transfer Certificate the Bank party thereto seeks to transfer its rights and obligations hereunder, the Borrower and such Bank shall be released from further obligations towards one another hereunder and their

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6 The "*Repayment Date"* is defined in Clause 1 as 24 months after the Drawdown date.

respective rights against one another shall be cancelled (such rights and obligations being referred to in this Clause 27.2 as "discharged rights and obligations");

(ii) the Borrower and Transferee party thereto shall assume obligations towards one another and/or acquire rights against one another which differ from the discharged rights and obligations only insofar as the Borrower and the Transferee have assumed and/or acquired the same in place of the Borrower and such Bank; and

(iii) the Agent, the Arrangers, the Co-Arrangers, the Transferee and the other Banks shall acquire the same rights and assume the same obligations between themselves as they would have acquired and assumed had the Transferee been an original party hereto as a Bank with the rights and/or obligations acquired or assumed by it as a result of such transfer.

27.3 A Bank may disclose to a potential assignee or potential Transferee or to any other person with whom it may wish to enter into contractual relations in connection with this Agreement such information about the Borrower and its subsidiaries and their respective financial conditions as shall have been made available to the Banks hereunder together with such other information as such Bank shall consider appropriate. The Borrower hereby consents to the disclosure of any and all such information subject to any applicable laws governing the disclosure of information by the Borrower."

20. Clause 32.1 states that the Agreement is to be governed by and construed according to English law. That clause also makes provision for the courts that should determine any disputes under the Agreement. By Clause 32.2, it is irrevocably agreed, "*for the exclusive benefit of…"* the lending parties that the English Courts will have non – exclusive jurisdiction to determine disputes arising out of the Agreement. By Clause 32.3 the Borrower irrevocably agrees that the courts of Singapore shall have non – exclusive jurisdiction to determine disputes which might arise out of the Agreement. When disputes about Argo's right to take transfers from original lending banks arose, Essar did start proceedings in Singapore against all the original lending banks, seeking declarations that the transfers to Argo were ineffective.[7] Essar alleged that the effect of these purported transfers was that the original lenders had repudiated the

[7] The writ was issued on 5 September 2003. When Argo started the current proceedings, Essar applied to have them stayed on the grounds of *forum non conveniens.* That application was rejected by David Steel J, in a judgment dated 26 January 2004. But at the same time the judge rejected Argo's application for summary judgment under CPR Pt 24.

Agreement. These proceedings have some relevance to one of the issues in this action. I will refer to them again below.

21. Lastly, Clause 33.1 contains some further definitions. It provides, in part:

> "In this Agreement, each reference to the following expressions shall, where the context so permits, be construed as set forth below:
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> the "Agent", any "Arranger" or any "Bank" shall be construed so as to include, without limitation, its and any subsequent successors, Transferees and assigns in accordance with their respective interests".

C. The Issues in the case

22. Although there were a great many pleaded issues, by the time of the trial, there were only five issues remaining. One of those, concerning Indian foreign exchange control, fell by the wayside as I refused permission to re – re – amend the Defence in the course of the trial. The five issues were:

(1) Does the Agreement limit the class of persons or entities to whom Syndicate Members may transfer their rights and obligations under Clause 27.2 to those that fall within the phrase "*a bank or other financial institution"?*

(2) If so, what is meant by "a bank or other financial institution"?

(3) Does Argo come within that phrase, so that, subject to (5) below, there was a valid transfer of tranches of debt to Argo?

(4) If not, has Argo taken an assignment of the rights of the original lenders from whom it purported to take Transfers in accordance with Clause 27.2 of the Agreement?

(5) Is there an implied term to the Agreement that any Transferee or assignee must be an entity to whom an Indian corporate entity is permitted to make payments of foreign currency under Indian Exchange Control laws and regulations?

D. Issue One: Does the Agreement limit the class of persons or entities to whom Syndicate Members may transfer their rights and obligations under Clause 27.2 to those within the phrase: "a bank or other financial institution".

23. Mr Mark Howard QC argued that the class of potential transferees was not limited to those that fell within the phrase "bank or other financial institution". He argued that the definition of ""*Transferee"* in Clause 1 is descriptive rather than restrictive. He submitted that there was no commercial reason to restrict the class of potential transferees to banks or other financial institutions.

24. I cannot accept that argument. The answer lies, of course, in the proper construction of the Agreement itself. Clause 27 deals with both the ability of lenders to transfer rights and obligations under the Agreement and the ability of lenders to assign rights and benefits under the Agreement. The rights of lenders to assign are dealt with in

Clause 27.1. It is clear from the wording of Clause 27.1, and was accepted by Mr Rhodri Davies QC for Essar, that there is no restriction at all on the entities to whom an original lender can assign its rights under the Agreement.

25. However, Clause 27.1 makes a distinction between the right to "*assign all or any of [the original lender's] rights and benefits hereunder"* and the right to "*transfer….in accordance with Clause 27.2 all or any of its rights, benefits and obligations hereunder".* The latter right is a right to novate the Agreement, which involves the release by Essar of the rights and obligations of the "old" lender and the creation, with Essar, of new rights and obligations on the part of the "transferee".

26. Clause 27.1 expressly stipulates that "transfers" can only be undertaken in accordance with the terms of Clause 27.2. That provides that a transfer will be effected by the delivery to the Agent (ie. BLB) of a duly completed and executed "*Transfer Certificate".* That is defined in Clause 1, as I have set out above. The definition of "*Transfer Certificate"* itself refers to a "*Bank"* and a "*Transferee".* Each of those words is itself defined in the Agreement. "*Bank"* is defined in Clause 33. "*Transferee"* is defined in Clause 1, immediately after "*Transfer Certificate".*

27. The juxtaposition of the definition of "*Transfer Certificate"* and "*Transferee"* makes it plain, in my view, that the parties intended that a transfer, ie. a novation of rights and obligations as between the Borrower and a transferee lender, could only be made to those that fell within the definition of "*Transferee"* as set out in Clause 1.

28. Moreover, it makes commercial sense to restrict the class of potential transferees in some way. As I put it to Mr Howard in argument, if he was right in saying that there was no restriction, then a transfer could be made to any institution, however unsuitable it might be. The transferee undertakes obligations as well as obtaining rights. The right to transfer can be exercised at any time. This could mean that one of the original Syndicate members could transfer its rights and obligations to another institution before a drawdown by the Borrower.[8] But the Borrower would wish to ensure that the transferee institution would be able to provide its tranche of the funds required at drawdown. Therefore the Borrower would wish to ensure that any transferee was the type of institution that could produce the necessary funds. Such an entity would naturally fall within the phrase "*a bank or other financial institution".*

29. I also note that the two experts instructed by the parties on the secondary market in debt[9] agreed that restrictions on the ability to transfer syndicated loan agreements were not uncommon in 1997. They agreed that the reasons why a borrower might wish to restrict transferability were to safeguard the relationship between the borrower and the lenders, the possibility of increased costs and concerns to ensure that lenders would abide by legal and regulatory provisions.[10]

E. Issue Two: What is meant by "bank or other financial institution"?

30. This is also a matter of the proper construction of the Agreement. But here the commercial background in which the Agreement was originally signed in March 1997

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8 Drawdown can take place up to 45 days after the date of the Agreement: see definition of "*Availability Termination Date"* in Clause 1.

9 Mr Anthony Tucker for Argo; Mr Paul Rex for Essar.

10 **Joint Memorandum para 4: C2/2/163.**

is more important. As Lord Hoffmann stated in *Investors Compensation Scheme Limited v West Bromich Building Society,*[11] the "background" to an agreement means, (subject to it being reasonably available to the parties and, generally, excluding negotiations), "*absolutely everything [which is relevant]*[12] *which would have affected the way in which the language of the document would have been understood by a reasonable man".* The background in this case means the commercial world in which syndicated loans were made in 1997, and particularly the extent to which debts created by such loans were traded in a "secondary market" of debt traders. It was clear from the material I saw that this aspect of the financial markets has expanded and changed in the period from 1997 to the present.

31. Neither expert in the secondary market in debt was called at the trial to give evidence as both sides regarded it as unnecessary in the light of the experts' Joint Memorandum. The experts agreed that when the Agreement was concluded in 1997, the trading of loans in order to manage a portfolio of debt or for similar reasons was well known in the market. Many banks did trade loans, although many did not. Any borrower at the time should have anticipated the possibility of its loan being traded in the secondary market in debt.[13] In 1997 the London Market Association[14] had issued wording on "transferees", as a guide to those who were involved in drafting loan agreements.[15] In 1997 non – bank investors played a part in the secondary market for debt, although the degree of their participation at that time was notably less than it became by 2002/3.[16] The normal participants in a primary syndicated loan such as that made to Essar in 1997 would be banks or their subsidiaries or affiliates. This category would include ANZ Grindlays Export Finance Limited, one of the original lenders to Essar.[17]

32. The argument put forward on behalf of Essar by Mr Rhodri Davies QC was as follows: (i) it is recognised by the experts that there are two distinct markets which are concerned with lending. They are the "primary" lending market and the "secondary" debt market. At the time that the Agreement was concluded, banks were principally engaged in the primary lending market, whose principal characteristic was providing finance. The principal characteristic of the secondary debt market was (and is) trading in debts of various sorts. (ii) Whilst it is accepted that there must be a distinction between a "bank" and "other financial institutions", the latter phrase has to be construed so as to define that type of institution as having similar characteristics to a bank. This is because the Agreement draws a clear distinction between the ability to assign rights (to *any* potential assignee) and the ability to transfer rights and obligations. The fact that obligations (including perhaps the obligation to provide the funds to the borrower) can be transferred suggests that the parties would have intended that transferees should have common characteristics with those of the original lenders (ie. banks), who concluded the Agreement in the first place. (iii) The key characteristic of each "bank" that concluded the Agreement with Essar in the first

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11 ***[1998] 1 WLR 896 at 912 –3.***

12 In ***BCCI v Ali [2002 1 AC 251 at 269,*** Lord Hoffmann stated: "*I did not think it necessary to emphasise that I meant everything which a reasonable man would have regarded as relevant".*

13 **Joint Memorandum para 7.**

14 The Association opened to members in December 1996 and was concerned to bring consistency and standardisation to market practice in relation, amongst other things, to the terms of syndicated loan agreements.

15 **Joint Memorandum para 8.**

16 **Joint Memorandum para 10.**

17 **Joint Memorandum para 13.**

place is that it was engaged in the business of providing finance in the primary lending market, as opposed to being engaged in the secondary debt market. (iv) Therefore, in the context of this Agreement, the more natural meaning of "*other financial institution"* is that of a provider of finance in the primary lending market, as opposed to any entity which participates in or wishes to participate in the international capital markets, particularly in trading debts. (v) The vital fact to bear in mind is that this is a lending agreement and it is "Banks" who agree to lend in the first place.[18] Therefore the original parties to the Agreement must have contemplated that transferees who were "*other financial institutions"* would be akin to banks.

33. At one stage Mr Davies appeared to rely on the so - called "*eiusdem generis"* rule of construction in support of his argument. However, in the course of oral argument he accepted that this so – called "rule" of construction was not much use in this case. In the end the words have to be given the meaning that the parties intended (objectively) that they should have at the time the contract was concluded.

34. Mr Davies pointed to several terms of the Agreement which he said indicated that the parties intended that "*other financial institutions"* were in a group that was typified by banks. These terms were: (i) the use in Clause 1 and throughout the Agreement of a definition identifying a "*Lending Office"* of each Bank; (ii) the assumption in Clause 12 that, in the absence of market disruption, LIBOR will be the cost to each Bank of obtaining dollar deposits. LIBOR will be available to banks but not necessarily other financial institutions that are not akin to banks. (iii) The assumption at Clause 20.5 that each Bank will have a usual practice for maintaining accounts with a Borrower which will be *prima facie* evidence of the amounts lent by, owing to and paid to that Bank. (iv) The reference in the form of Transfer Certificate in Schedule Two of the Agreement to the "*Transferring Bank"* and the "*Transferee Bank".*

35. Mr Davies also laid emphasis on the word "*institution".* He submitted that this meant a body that was both regulated and accountable. Mr Davies referred me to the entry for "*institution"* in the Oxford English Dictionary, but that did not seem to me to advance the argument on the proper meaning of the words in this contract.

Analysis and conclusion on the meaning of "banks or other financial institution".

36. It is clear that the parties intended that the class of potential transferees should be wider than bodies that fit the definition of "*banks".* In my view "*banks"* and "*other financial institutions"* were intended by the parties to denote two different types of entity; otherwise the expression "*banks or other financial institutions"* would be a tautology. Mr Davies has to accept that, but says that the use of the word "*other"* indicates that although *"financial institutions"* will be different from banks, yet to be within the class they must share one or more characteristics with "*banks".* He says that the critical characteristic is being engaged in the business of providing finance in the primary lending market and being regulated and accountable. But Mr Davies does

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[18] On the front page of the Facility Agreement there is reference to "*The Financial Institutions listed as Banks"* as one of the contracting parties. The Agreement is stated to be between the Borrower and "*The Financial Institutions listed in Schedule One (in their capacity as such, the "Banks" and individually a "Bank").*

not explain why those characteristics are the crucial ones, although the choice of them makes it easier for him (on the facts) to argue that Argo does not have them.

37. It is possible to argue that "*other financial institutions"* must share either many common characteristics with banks or only a few characteristics with banks. Is there any indication in the Agreement that points to an intention of the parties that the key common characteristic is that of providing finance in the primary lending market and being regulated and accountable? In my view there is not and Mr Davies could not point to anything specifically in support of his preferred construction.

38. What characteristics must "*other financial institutions"* share with banks to fall within the phrase in the Agreement? First, and obviously, they must be lenders of money. But institutions who buy debt in the secondary market thereby become lenders, by definition. They step into the shoes of the original lenders. Secondly, they should have a "Lending Office" although the Agreement does not prescribe any particular form for that office. Indeed, banks are free to identify any office that they may from time to time select as their "Lending Office". Thirdly, they must maintain accounts which will be evidence of the money lent to the Borrower,[19] and the amounts due by way of interest and capital by the Borrower. But, again, the institution is free to maintain the account or accounts "*in accordance with its usual practice".*[20] So the accounts do not have to be kept in the same way as those in a bank. Fourthly, because a transfer is permitted before drawdown, any entity that became a transferee must have the capabilities, financial, technical and legal, of lending money during the drawdown period, as "quasi - primary lenders", in accordance with the terms of the Agreement.[21] Lastly, the transferee must be a "*financial institution",* which in my view means no more than having a legally recognised form or being, which carries on its business in accordance with the laws of its place of creation and business and whose business concerns commercial finance.

39. Provided the "*other financial institutions"* have these characteristics, which they would share with banks, that is, in my view, sufficient to bring them within the definition. The original parties to the Agreement were well aware that debt could be traded; indeed that must be the underlying rationale for permitting a transfer of rights *and* obligations. The parties knew of the existence of a secondary debt market in which entities specialised in the purchase of distressed debt. The parties must have contemplated that if a potential transferee was an "*other financial institution"* that had the characteristics I have identified, then it could legitimately take a transfer, even though it did not engage substantially in the business of providing finance in the primary lending market.

40. Mr Davies also relied on the fact that the form of Transfer Certificate referred to a "*Transferring Bank"* and a "*Transferee Bank".* He said that gave an indication of the type of entity that could be a transferee, although he accepted that the entity did not have to be a bank as such. However Clause 1 of the Transfer Certificate says that the words "*Transferee Bank"* are defined in "*The Schedule"* to the Transfer Certificate. The Schedule identifies various parties and sets out other facts, such as: the

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19 Having bought the debt.

20 See Clause 20.5 of the Agreement.

21 As I read Clauses 7.2 and 12, there is no assumption that lenders can obtain LIBOR for sums they lend to the Borrower. LIBOR is referred to only in order to calculate the interest payable on the sums drawn down.

Transferring Bank, the Transferee Bank, the Transfer Date, the Transferring Bank's participation and the Amount Transferred. So any kind of entity could be identified as the "*Transferee Bank"* . Therefore that term does not, in my view, assist in determining the meaning of "*other financial institution".*

41. In the course of argument I suggested to Mr Davies that, so far as the Borrower was concerned, the most important quality of a transferee that is an "*other financial institution"* must be its ability to lend the money (or "stump up the money" as I put it) in accordance with the terms of the Agreement. Mr Davies agreed with that. But Mr Davies also suggested that the Borrower would be concerned to ensure that any transferee would be an institution that was used to dealing with primary lending and all the problems that might arise concerning a large syndicated loan.

42. If that was a concern, then it is not something that is reflected in the wording used to define a "*Transferee".* If the parties had intended to restrict the type of potential transferee to such an entity, then it would have been easy to define "*Transferee"* as "*a bank or other financial institution whose principal activity is the provision of finance in the primary lending market".* But no such qualifying wording has been used and, in its absence, I think that there is no warrant for construing the words "*other financial institution"* expansively so as to include them.

F. Issue Three: Does Argo come within the required parameters so as to qualify as an "other financial institution"?

43. Mr Andreas Rialas, the Chief Executive of ACML, gave evidence at the trial. He explained that the Argo Fund was established in October 2000 as a Cayman Islands investment vehicle to provide high returns to investors, although at higher risk. Mr Rialas, a qualified barrister, had followed a career in the London financial markets, where he specialised in debt and the "emerging market" sector. Prior to setting up the Argo Fund he had worked for Morgan Grenfell[22] in their Emerging Market Proprietary Division Trade Finance and Loan Trading desk. Morgan Grenfell would participate in loans and then sell its primary loan exposure to other investors once its initial short term holding period had elapsed.

44. Argo is incorporated in the Cayman Islands and registered with the Cayman Islands Monetary Authority as a mutual fund. The Authority requires the fund to make an annual return that has been audited by an approved accountancy firm.[23] Argo is listed as an investment fund on the Irish Stock Exchange and so has to fulfil the listing requirements of that exchange. Argo itself has no executive directors or employees.

45. Argonaftis (Argo's investment managing company) is regulated by the Securities and Exchange Commission of Cyprus. ACML is regulated by the Financial Services Authority of the United Kingdom insofar as ACML carries on investment business by giving investment advice to Argo in the UK. Neither ACML nor Argo is regulated as an approved fund to be sold to UK retail investors.[24]

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22 A subsidiary of Deutsche Bank of Germany.

23 In Argo's case the firm is Price Waterhouse Coopers.

24 **Rialas XX: Day 2 page 46 lines 14 – 25.**

46. The Argo fund invests money for different types of investors. They include insurance companies, pension funds, banks, other funds and rich individual investors. The principal activity of Argo is trading investments in debt securities and lending to emerging market governments and corporations in either the primary or secondary market. The Articles and Memorandum of Association of Argo permit it to make and participate in loans (including syndicated loans) and their proceeds.

47. In a statement made for the purposes of the Pt 24 hearing before David Steel J, Mr Rialas had stated that it was part of the business of Argo to make loans to borrowers either bilaterally or by participating as primary lenders in syndicated loans.[25] He identified three examples. He expanded his evidence on those in his second witness statement.[26] He was cross – examined about those by Mr Davies at the trial before me. I do not need to go into the circumstances of those loans in detail. I am satisfied that only one was an example of straightforward primary lending.[27] I therefore accept Mr Davies' submission that Argo is not an entity that is principally engaged as a provider of finance in the primary lending market.

48. I have concluded that Argo is and was, at the time the transfers were made, an "*other financial institution"* within the meaning of the phrase that I have held the parties intended to give to it. Thus: (i) Argo is a lender of money. It lends money principally by buying debt on the secondary debt market, but in stepping into the shoes of primary lenders it always thereby becomes a lender itself. At the same time, Argo does (and did, albeit as a minor part of its business in 2002/3), engage in some primary lending. (ii) Mr Davies did not suggest, nor could he, that Argo would be unable to identify a "Lending Office" or produce accounts as evidence of money lent to the Borrower and so forth. (iii) Argo is and was, financially, technically and legally capable of lending money on the scale required to be a participant in this syndicated loan. (iv) Argo is an entity that is properly constituted in accordance with the laws of the Cayman Islands and it carries on its business there under the Cayman Islands Monetary Authority. Its manager and investment adviser are both properly constituted and carry on business in accordance with the regulatory authorities in, respectively, Cyprus and the UK.

The mechanism of the Transfers pursuant to the terms of Clause 27.2

49. I set out this analysis here because it is relevant to both the "assignment" point and "implied term" point. Clause 27.2 (i), (ii) and (iii) set out the effect of a valid transfer, assuming that there is no implied term as Essar had suggested. First, the old contract between Essar, as Borrower and a Transferor who had originally participated in the loan, is terminated: Clause 27.2.(i). Secondly, a new contract as between Essar, as borrower and Argo as transferee, is created: Clause 27.2.(ii). Clause 27.2.(iii) confirms that the remaining lenders have the same rights and obligations as against the new Transferee as they had against the Transferor.

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25 Statement of 15 December 2003, para 2: **B/Tab 2 page 11.**

26 **B/Tab 4 page 13.**

27 The advance of US$ 1 million to Naoussa Spinning Mills SA in 2001. There was controversy on whether this was a loan for US$ 1 or 2 million. I do not need to decide which it was, but there was only evidence of one promissory note for $1 million.

50. Mr Howard and Mr Davies agree that the legal effect of Clause 27.2 (i) and (ii) is to novate the contract between Essar and the original participant to Essar and Argo.[28] But Clause 27 permits the original participant to transfer its rights and obligations to a transferee by delivering to the Agent, ie. BLB, a completed Transfer Certificate. The delivery of that Certificate effects the transfer; nothing more has to be done. The Borrower in particular has no role to play. On the face of the terms of the Agreement, the Borrower cannot refuse the transfer, provided that the Transferee is within the definition of a "*Bank or other financial institution".*

51. So, if Essar takes no positive part in the mechanics of the transfer, how does the novation come about, as a matter of legal analysis of "offer", "acceptance" and "consideration"? In particular, how does Essar agree to the termination of the contract with the original participant and agree to the new contract with the transferee? Once again, counsel agreed that both contracts were unilateral contracts.[29] In each case there is a "standing offer" by Essar, which is contained in Clause 27 of the Agreement. The offer to terminate the old contract is made to each original participant. The offer to conclude a new contract is made to all those who are eligible, ie. are within the definition of "*bank or other financial institution".* In the case of the old contract, the offer of Essar is accepted by the original participant by the delivery of the Transfer Certificate. In that case there is mutual consideration, because each side agrees to give up all its rights and obligations as against the other.

52. In the case of the new contract, Essar's standing offer to all those eligible has to be accepted by a Transferee. The act of acceptance by the Transferee is not spelt out in Clause 27. It must be the fact that the Transferee agrees to the transfer with the Transferor on the terms of the Agreement (as set out in the Transfer Certificate)[30] and agrees to the Transferor sending the Transfer Certificate to the Agent, thus permitting the Transferor to send it to the Agent on behalf of both Transferor and Transferee "Bank". This seems clear from Clause 3 of the Transfer Certificate, which states that the Transferee "Bank" *"...requests the Agent to accept this Transfer Certificate"* under the terms of the Agreement so as to take effect in accordance with its terms.

53. Clause 27.2 does not require that the Borrower be notified of the transfer, although in fact it is accepted that Essar did have notice of each transfer. However a party can waive the right to be notified of an acceptance and perhaps that is the correct analysis of the position under this Agreement.

Issues Two and Three: Conclusion on the Transfer argument

54. These conclusions mean that Argo must succeed on its primary case that it was a valid and effective Transferee of those tranches of the syndicated loan that are identified in the Re – Re – Amended Particulars of Claim at paragraph 8. Essar did not press any of its other points on the technicalities of the transfers other than the implied term argument which it tried to introduce by amendment during the trial. As I ruled that this would not be permitted, this means that Argo succeeds in its claim against Essar for payment of the sum of US$ 29.5 million together with interest. I did not hear any

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[28] It will be recalled that Clause 3.2 provides that the rights and obligations of each of the Banks under the Agreement are several. The debt owed to each bank is a separate and independent debt: Clause 3.3.

[29] ***Cf: Carlill v Carbolic Smoke Ball Co [1892] 2 QB 484; New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd: The Eurymedon [1975] AC 154***

[30] See Clause 2 of the Transfer Certificate.

submissions on the issue of interest and I will do so if there are any questions that arise on it.

55. This conclusion makes it unnecessary to decide whether, if the transfers from the five original participants in the syndicated loan were ineffective as such, they operated so that Argo took an assignment of their rights under the Agreement, including the rights to claim the principal sum and interest. However I shall express my view on the point in case it becomes relevant hereafter.

G. Issue Four: If the Transfers were ineffective as such, did they operate as an assignment of the rights of the banks?

Argo's pleaded case.

56. The plea on assignment is set out at paragraph 8A of the Re – Re – amended Particulars of Claim. That states that if the Transfers were not effective because Argo is not an "*other financial institution",* then the purported "*Transfers"* were "*effective to assign the Relevant Banks' rights to Argo."* In the second sentence of paragraph 8A, the pleading runs as follows:

> "Further Essar has had notice of such assignment by reason of its notice of such purported Transfers and/or by reason of the averment made by the Relevant Banks in the proceedings numbered S913/2003/K brought by Essar in the High Court of Singapore that the Transfers were effective to assign each Bank's rights under the Agreement".

57. It is clear, therefore, that Argo is alleging that if the Transfers were ineffective as such, then they took effect as assignments of rights of the original bank lenders and Essar had notice of those assignments by virtue of two matters. First, by getting notice of the purported Transfers; secondly, by virtue of allegations made in the Defence that was served on Essar in the Singapore proceedings. So Argo's case is that the purported transfers were legal assignments within *section 136* of the *Law of Property Act 1925.*

58. Mr Howard argued that paragraph 8A of the Re – re – amended Particulars of Claim pleaded a case that the allegations made by the "Relevant Banks" in the Singapore proceedings constituted a new notice to Essar that if the purported transfers were ineffective as such, because at the time there was no intention to create an assignment (as opposed to a Transfer), then the Singapore pleading operated as notice that the original lenders now intended that the purported transfers should act as an *existing* assignment. Mr Davies submitted that paragraph 8A could not be read as a plea that the effect of the pleadings in Singapore was to give a new notice of a change of intent with regard to the transfers, turning the purported transfers into assignments. I agree. The key word in the second sentence is the first "*such".* That word refers back to "*the Transfers"* in the previous sentence where it had been alleged that "…*the Transfers were effective to assign the Relevant Banks' rights to Argo".* There is no allegation on the pleadings of any independent change of intent (from transfer to assignment).

Moreover, having read the Singapore pleadings,[31] it is clear to me that they did not purport to give notice that there had now been a change of intent with regard to the transfers, so as to make them assignments. Mr Howard did not ask for leave to amend his pleading. I must deal with the argument as they appear on the pleadings.

59. Essar has several answers to paragraph 8A of the Re – re – amended Particulars of Claim in its Re – Amended Defence. First, Essar denies that an ineffective transfer automatically takes effect as an assignment.[32] Secondly, it is denied that any notices of ineffective transfers can act as good notices of assignments.[33] Thirdly, it is denied that any statement made in the Singapore proceedings constituted a notice of an assignment. Fourthly, any notice given by virtue of statements in the Singapore proceedings was given after the start of the English proceedings, so would be ineffective to create a legal assignment for the purposes of these proceedings, because the cause of action was not complete before the proceedings were begun. Lastly, on the true construction of Clause 27.1 of the Agreement, an assignor bank has to give notice to Essar, as the Borrower, before there can be any valid assignment of an assignor bank's rights and no such notice was given to Essar.[34]

60. On my analysis of Argo's pleaded cases, the first question is whether "the Transfers", on the assumption that they were ineffective as such, could also act as assignments. Unless Mr Howard succeeds on that issue, all the other points raised by Essar are irrelevant. Mr Davies submitted that a "*Transfer",* as defined in the Agreement, is a novation and that is significantly different in legal substance from an assignment. If an original lending bank and Argo intended that there should be a *transfer* of rights and obligations from one to the other and purported to do just that, then the same actions could not serve as an *assignment* of rights only if it were subsequently held that the transfer was ineffective.

61. Mr Davies emphasised the differences between a novation and an assignment. As he rightly pointed out there are four main differences. First, a novation requires the consent of all three parties involved; (here the original creditor; the new creditor and the debtor). But (in the absence of restrictions) an assignor can assign without the consent of either assignee or the debtor. Secondly, a novation involves the termination of one contract and the creation of a new one in its place. In the case of an assignment the assignor's existing contractual rights are transferred to the assignee, but the contract remains the same and the assignor remains a party to it so far as obligations are concerned. Thirdly a novation involves the transfer of both rights and obligations to the new party, whereas an assignment concerns only the transfer of rights, although the transferred rights are always "subject to equities". Lastly a novation, involving the termination of a contract and the creation of a new one, requires consideration in relation to both those acts; but a legal assignment (at least), can be completed without the need for consideration.

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31 The paradigm example is at para 20 of the Re – amended Defence and Counterclaim of the 1st, 2nd, 3rd and 4th Defendants in Suit No 913/2003/K: **Bundle F/page 191: "***Further or in the alternative, the transfers to the Transferee were valid and effective, under Clause 27.1 of the Facility Agreement and/or general law, as separate assignments of the respective transferor's rights under the Facility Agreement".*

32 **Para 7A.1**

33 **Para 7A.3.**

34 The third, fourth and final points are all pleaded at **para 7A.3 of the Re – amended Defence.**

62. Mr Howard submitted that Clause 27.1 of the Agreement did not require that there be any particular procedure in order to effect a legal assignment, apart from the assignor bank having to give notice to Essar that the assignment had taken place. Essar's consent is not needed. The allegations in the Singapore proceedings are clear evidence that the banks who sold their tranches of debt to Argo now regarded their transactions as assignments and were also giving Essar notice of that fact. Therefore the requirement of notice in Clause 27.1 of the Agreement had been fulfilled and, at the same time, the allegations in the Singapore proceedings constituted notice for the purposes of *section* 136 of the *Law of Property Act 1925,* thus making these legal assignments.

63. To create a legal assignment for the purposes of *section 136* of the *Law of Property Act,* there must be an "*absolute assignment by writing under the hand of the assignor…of any debt or other legal thing in action of which express notice is given to the debtor….".* Similar principles govern whether an assignment at law or in equity has been effected, subject to the need for notice and writing in the case of a legal assignment. No particular form is needed in either case. "*Equity has always looked to the intent rather than the form and all that is needed is a sufficient expression of an intention to assign".*[35]

64. So, in this case the key question is: what did the banks and Argo intend to do when the "*Transfers"* were made by giving the Transfer Certificates to the Agent? It is clear that they intended that there should be valid novations of the contracts between the various banks concerned, Argo and Essar, so that those banks were replaced by Argo as lender and the banks ceased to be involved. None of the parties involved at the time intended there to be simply an assignment of the banks' existing rights to Argo, but leaving the banks with any obligations that might still remain.[36] As Mr Davies correctly pointed out, the legal arrangements involved in a novation and an assignment are so different that an intention to undertake a novation is incompatible with a simultaneous intention to make an assignment of rights.

65. Even if I had accepted Mr Howard's analysis of the effect of the Re – amended Defence and Counterclaim in the Singapore pleadings, I find difficulty with the notion that the banks could assert, by their pleadings in the Singapore proceedings, that they had changed their intentions retrospectively; so that whereas they had intended to make a transfer of rights and obligations by the Transfer Certificates, now they had a new intention, but only if it were held that the Transfer Certificates were not effective as transfers. The new intention would be (it seems) that the certificates should act as assignments if they are held to be ineffective as novations. I cannot accept that there could be an effective retrospective and also contingent change of intention in relation to the effect of existing documents.

66. So, even if I had accepted Mr Howard's construction of the effect of paragraph 8A of the Re – re - amended Particulars of Claim and of the pleadings in the Singapore action, it would not have altered my view on the assignment issue overall. Argo would have failed on its alternative case of assignment.

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35 ***Snell's Equity: 31st Ed. para 3 – 13 page 34.***

36 For instance under Clause 24: "Redistribution and Set – Off".

H. Issue Five: The Implied Term: Reasons for refusing permission to amend to plead a new case.

67. Essar had pleaded in its original Defence that there was an implied term to the Agreement. The plea, as set out in paragraph 5, stated:

> "It is an implied term of the Agreement (such a term to be implied in order to give the Agreement business efficacy) that any Transferee must be capable of receiving payments of foreign currency from an Indian corporate entity".

In Essar's Outline Argument it was suggested that such an implied term would support an argument that a transfer of rights and obligations could not be made without Indian Exchange Control approval of the proposed Transferee. The argument was that because repayments to a Transferee (either directly or through the Agent) would need Exchange Control approval from the RBI, the original parties to the Agreement must have intended that any proposed Transferee would have to be approved by the RBI. Hence the plea that there was an implied term that "*any Transferee must be capable of receiving payments in foreign currency from an Indian corporate entity*".

68. During the early stages of the trial I pointed out that the plea as drafted did not raise any issues concerning Indian Exchange Control permission; it only raised a question of the capacity of the recipient of funds from Essar. Mr Davies agreed that the draft did not deal with the point he intended to raise on Exchange Control permission and he agreed that if he wished to raise that point then it must be recast.[37]

69. Mr Davies' junior, Mr Cook, produced a proposed Re – re – Amended Defence after the midday adjournment on the second day of the trial. Paragraph 5 of that draft was in the following terms:

> "It is an implied term of the Agreement (such a term to be implied in order to give the Agreement business efficacy) that any Transferee or assignee must be an entity to whom an Indian corporate entity is permitted to make payments in foreign currency under Indian Exchange Control laws and regulations ~~must be capable of receiving payments of foreign currency from an Indian corporate entity".~~

70. The original pleading had set out, in paragraphs 7.5 and 7.7, the alleged consequences of the purported transfers or assignments to Argo. The paragraphs (which remained unaltered in the new draft, apart from additions so as to include assignment), stated:

> "7.5 Furthermore, Essar avers that under Indian Exchange Control regulations it is not permitted to pay the sums claimed or any sums to Argo. In the premises, to the extent to which parties with valid interests in the Agreement have purported to transfer (or assign) those interests to Essar, it is averred that

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37 **Day 2 pages 5 – 7; 28.**

> those purported transfers (or assignments) were in breach of the implied term referred to in paragraph 5 above and accordingly were void and of no effective (sic). Further or alternatively, the purported transfers (or assignments) are void and of no effect since they would require Essar to perform an unlawful act (ie. pay money to Argo).
>
> ……..
>
> 7.7 Alternatively, to the extent to which parties with valid interests in the Agreement have purported to transfer (or assign) those interests to Argo, it is averred that such purported transfers (or assignments) were in breach of the implied term referred to in paragraph 5 above. It is averred that such breaches were repudiatory and/or evinced an intention on the part of the transferors not to be bound by the terms of the Agreement. In the premises, no further obligations, in particular as to contractual interest, can arise under the Agreement".

71. Mr Howard said that he opposed permission to make the proposed amendment on the ground that it put forward a hopeless argument, so that it would be a waste of time to permit it and to hear evidence[38] on the topic. I heard argument on the question of permission and announced at the start of the third day of the trial that the proposed amendment would not be allowed. I said that I would give reasons for this in the judgment and that I would adjourn any application for permission to appeal from that ruling until I had handed down my judgment in the case.

72. I now set out my reasons for concluding that the proposed amendment raised an argument that had no serious prospect of success and so should not be permitted.

73. The draft pleading asserts that the implied term is necessary to give the Agreement business efficacy, in other words, the contract could not work without it. So the question is whether that is so, or (as this was an application for permission to amend) is arguably so.

74. If there is an implied term as suggested then it must be present at the time that the Agreement was concluded. As drafted, it is unclear whether it is suggested that the relevant Indian Exchange Control laws and regulations are those in force at the time of the Agreement's conclusion, or those in force at the time a Transferor Bank wishes to make a transfer. I assume that it was intended to refer to the laws and regulations in force at the time a purported transfer or assignment was made because, by definition, any transfer or assignment would occur after the conclusion of the Agreement. That must be the point at which permission under Exchange Control would be relevant to the issue of a right to transfer.

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[38] Essar wished to call oral evidence of fact on the point. Both parties had instructed experts in Indian law to deal with points on Indian Exchange Control laws and regulations if need be and the experts had exchanged reports and produced a Joint Memorandum: **Bundle C3.**

75. Mr Davies submitted: (i) Indian Exchange Control regulations were in force in 1997 when the Agreement was made.[39](ii) Under Indian law in place in 2002/3, the permission of the RBI would be required to enable Essar lawfully to make a payment to Argo, as a Transferee, through the Agent, BLB. (iii) In 1997 both Essar and the lenders who were party to the Agreement would have been aware that the Indian Exchange Control laws were draconian and feared. (iv) In these circumstances the question is: would the original parties to the Agreement have contemplated that lenders would have been entitled to make Transfers or assignments pursuant to Clause 27 of the Agreement which would have put Essar in the position where it could not pay to the Transferee/assignee without breaching Indian Control legislation? The answer must be: no, and hence the term suggested has to be implied to give the Agreement business efficacy. (v) Reliance was placed on two cases: *Aktielselskabet Olivebank v Dansk Svolsyre Fabrik;*[40] and *Eurico SpA v Philipp Brothers.*[41]

76. In relation to the question of consents, Indian Exchange Control, and payments, the scheme of the Agreement is as follows: first, the Borrower cannot issue and the lenders need not accept any request for an advance under the Agreement, until the Agent has received a number of documents and other matters which are to the Agent's satisfaction.[42] Amongst those documents are various "*Consents",* including consents from the RBI: see Clause 2.3 (e). That provides:

> "(e) Consents
>
> A copy, certified a true copy by or on behalf of the Borrower, of each law, decree, consent including, without limitation, any consent required from the Reserve Bank of India, The Ministry of Finance of India or any other agency of India), licence, approval, registration or declaration as is, in the opinion of counsel to the Banks, necessary to render this Agreement legal, valid, binding and enforceable, to make this Agreement admissible in evidence in India, England and Singapore and to enable the Borrower to exercise its rights and perform its obligations hereunder".

77. In my view, that means that Essar, as Borrower, has to obtain the consent of the RBI insofar as, in the opinion of counsel, that consent is needed to render the Agreement legal, valid, binding and enforceable. So if consent is needed in order that Clause 27, permitting transfers and assignments, is legal and valid, then Essar has to obtain it. In fact Essar had obtained the RBI's approval for the proposed syndicated loan, as set out in the letter from the RBI dated 16 December 1996.[43] It was no part of either side's case that the Consent required by Clause 2.3 (e) had not been obtained.

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39 The statute was the Foreign Exchange Regulation Act 1973. It was replaced in 1999 by the Foreign Exchange Management Act 1999, which moderated some of the draconian, penal provisions of the earlier statute. **Experts Joint Memorandum: para 2: C3/page 432.**

40 ***[1919] 2 KB 162***

41 ***[1987] 2 Lloyd's Rep 215***

42 Clause 2.3.

43 **D 1/page 31.** The approval was for 2 months and was extended for a further 30 days by the RBI on 21 Feb 1997: **D1/page 46.** The Agreement was concluded on 7 March 1997.

78. Secondly, in Clause 13 of the Agreement the Borrower makes various representations and warranties to the other parties to the Agreement. The relevant parts of that provision are:

> "13.1 Matters of Law
>
> The Borrower acknowledges that each of the Arrangers, the Co-Arrangers, the Agent and each of the Banks enters into this Agreement and participates in the Facility in full reliance upon the representations made by the Borrower below and accordingly, the Borrower represents and warrants to and for the benefit of each other person from time to time party to this Agreement that:
>
> …
>
> (viii) except for the approval of the Reserve Bank of India which is required to be obtained by the Borrower in order for the Borrower to effect payment of amounts which may from time to time be or become payable to the Agent, the Arrangers, the Co-Arrangers and the Banks or any of them under or in accordance with this Agreement in respect of which in principle approval has been obtained, and the approval of the Government of India, Ministry of Finance for exemption from payment of tax under the provisions of Section 10(15)(iv) (c) of the Income Tax Act, 1961, all action conditions and things required to be taken, fulfilled and performed (including, without limitation, the obtaining of any necessary consents, licences, appeals or exemptions) in order (a) to enable it lawfully to enter into exercise its rights under and confirm and comply with the obligations expressed to be assumed by it in this Agreement, (b) to ensure that the obligations expressed to be assumed by it in this Agreement are legal, valid, binding and enforceable and (c) to make this Agreement admissible in evidence in India, England and Singapore have been done, fulfilled and performed".

Therefore, under this Clause, the Borrower warrants that it has obtained, "*in principle",* the consent of the RBI to enable the Borrower to effect payment of amounts which may from time to time become payable to the Agent. The Borrower also warrants that it has obtained all other necessary consents to ensure that obligations that it has assumed under the Agreement are legal, valid, binding and enforceable. That must include the obligation to accept, under the terms of Clause 27, both transfers and assignments. Clause 13.3 provides that the representations and warranties set out in Clause 13.1 and 13.2[44] shall survive the execution of the Agreement and the making of the Advance and thereafter; in other words, they are continuing warranties.

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[44] Clause 13.2 deals with representations and warranties as to matters of fact.

79. Thirdly, in Clause 15 the Borrower agrees with the other parties to the Agreement to do various things. Clause 15.1 provides:

> "15.1 Positive Undertakings
>
> The Borrower undertakes and agrees with the Agent, the Arranger, the Co-Arrangers and each of the Banks that so long as any amount remains to be advanced and/or remains payable and/or any person is under any actual or contingent liability hereunder, it shall:
>
> (i) obtain, comply with each of the terms and conditions of, renew and do all that is necessary to maintain in full force and effect all authorizations, approvals, licences, consents, exemptions, registrations, recordings, filings or notorisations (and where possible, promptly deliver certified true copies thereof to the Agent) required under or by the laws and regulations of India to enable it lawfully to enter into, exercise its rights and perform the obligations expressed to be assumed by it under this Agreement (including without limitation, the delivery to the Reserve Bank of India within the time limited for such delivery of a copy of this Agreement and such information as to the amounts of the Advance and the Drawdown Date relating thereto) or to ensure the legality, validity, enforceability or admissibility in evidence in India, England and Singapore of this Agreement or to ensure the validity or priority of the liabilities and obligations of the Borrower and the rights of the Agent, the Arrangers, the Co-Arrangers and the Banks hereunder";

That clause places an absolute obligation on the Borrower to obtain and continue all approvals and consents, (including any needed from the RBI) to ensure the legality, validity and enforceability of the Agreement. That must include the ability to make transfers or assignments.

80. Fourthly, by Clause 16 (iii), it is an Event of Default if the Borrower fails to perform or comply with any of the obligations set out in Clauses 14 and 15.

81. Fifthly, Clause 20 deals with payments. Payments by and to the Borrower have to be made through the Agent. Clause 20.1 and 2 provide as follows:

> "20.1 On each date on which this Agreement requires an amount to be paid by the Borrowers or any of the Banks hereunder, the Borrower or, as the case may be, such Bank shall make the same available to the Agent by payment in such funds as is for the time being customary for the settlement of international banking transactions in the currency so payable to such account or bank as the Agent may from time to time specify for this purpose.

> 20.2 Subject to Clause 20.4, each payment received by the Agent for the account of another person pursuant to Clause 20.1 shall:
>
> (i) in the case of a payment received for the account of the Borrower, be made available by the Agent to the Borrower by application:
>
> ……..
>
> (ii) in the case of any other payment be made available by the Agent to the person for whose account such payment was received (in the case of a Bank, for the account of its Lending Office) for value the same day by transfer to such account of such person with such bank as such person shall have previously notified to the Agent.

Thus, all payments that are due to lenders are to be made by the Borrower to the Agent; and it is the Agent who specifies which account or bank to which the payment must be made. It is important to note that there is nothing in Clause 20 to indicate that any payment by the Borrower must be made from funds situated in India or to any bank or account situated in India.

82. Sixthly, the powers and duties of the Agent are dealt with in Clause 26. Clause 26.1 stipulates that the lending parties authorise the Agent

> "…to take such action and exercise such rights, powers, authorities and discretions as are specifically delegated to the Agent by the terms hereof together with the right to take such action and to exercise all such rights, powers, authorities and discretions as are reasonably incidental thereto…."

83. Lastly, Clause 32.1 states that the Agreement is governed by English law.

84. Certain other points must be noted. Mr Davies accepted that any payment to a Transferee had to be made through the Agent, (ie. BLB) and that BLB could nominate the place and account to which any payment due to a Transferee should be made. The relevant branch of BLB is the Singapore Branch,[45] so that, in my view, if there were no orders to the contrary, any payment to a Transferee would be made to an account at BLB, Singapore Branch. Mr Davies accepted that performance of the Borrower's obligation to repay any outstanding amount would not have to be made in India and did not have to be made using funds that originated in India. However, it was agreed by both counsel, for the purposes of this argument, that it is arguable that if Essar made any payment to Argo through the Agent, then Essar would be in breach of the Foreign Exchange laws and regulations of India.

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45 As stated in the preamble to the Agreement.

85. It was accepted by both sides that it is well established in English law that if a contract is governed by English law, then a party is not excused performance of an obligation under it on the ground that performance of that obligation would be unlawful in another country where the party wishes to perform part (or the whole) of that obligation. A party is only excused from performing the obligation if it is unlawful to do so by the law of the country in which, according to the express or implied terms of the contract, the obligation *has to be* done. (My emphasis).[46]

86. In these circumstances, is the suggested implied term reasonable and necessary to make the Agreement work if there is a transfer in accordance with Clause 27? In my view the answer is obviously "no", for several reasons. First, the contract has to work according to English law; on the principle of English law I have just set out, the Borrower can legally perform the obligation of paying a transferee via the Agent, because there is no necessity for the payment to be made in India and there is no need for the funds to come from India. Therefore it is neither reasonable nor necessary to imply the term suggested.

87. Secondly, the express terms of the Agreement provide that the Borrower, Essar, has obtained all the necessary consents and approvals to make the contract valid, binding and enforceable. That must mean (at least) in accordance with its proper law, ie. English law. But the Borrower also expressly warrants that it has obtained all necessary consents to ensure that the obligations expressed to be assumed by the Borrower in the Agreement are legal, valid, binding and enforceable.[47] That must mean that the Borrower warrants that it has obtained the consents that are needed under Indian law so that it can make the standing offer to all the existing lenders to terminate their contracts and to make the standing offer to all potential transferees to enter into new contracts – ie. to novate the Agreement. It must mean also that it has obtained whatever consents are needed to enable an assignment of rights to be effective. There is therefore no need to have an implied term that any potential transferee or assignee must be one for which the Borrower has permission to make payments. Indeed such an implied term is contrary to the express terms of the Agreement to the effect that all necessary consents have been obtained by the Borrower.

88. Thirdly, Clause 13 (viii) states that the Borrower has obtained the approval of the RBI (in principle) for the Borrower to effect payment to the Agent of amounts due to banks under the Agreement. Clause 27.2 and the Transfer Certificate set out in detail how a transfer of the rights and obligations of a lender can be transferred to a Transferee. In my view, provided that the Transferee is a "*bank or other financial institution",* it is clear that the approval in principle must also apply to payment to an Agent on behalf of a Transferee. The suggested implied term would impose a further restriction on who could be a Transferee which is inconsistent with the provisions of Clause 13 (viii) and Clause 27.2.

89. Fourthly, if, as is suggested, the implied term also affected an assignment, it would mean that the facility to assign rights which is granted by Clause 27.1 was subject to a heavy, but implied restriction. That would be completely inconsistent with the express

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46 See: ***Dicey & Morris: The Conflicts of Laws 13th Ed: para 32 – 17; Kleinwort Sons & Co v Ungarishe Baumwolle Industrie Aktiengesellschaft [1939] 2KB 678.***

47 Clause 13 (viii).

terms of Clause 27.1, which permits the assignment of rights of lenders to any entity. I note that Mr Davies did not attempt to draw any distinction between Transfers and assignments so far as the suggested implied term is concerned.

90. Fifthly, I find it difficult to see how the restriction created by the implied term would work in practice and yet be consistent with the terms of Clause 27.2 and the Transfer Certificate. Under those terms the Borrower has to do nothing when a transfer is to be effected. If the Transfer Certificate is lodged with the Agent in accordance with the provisions of the Agreement, then the novation is completed, provided that the Transferee comes within the class of potential Transferees. But if a transfer depends on ascertaining whether the potential Transferee is an entity to whom an Indian corporate entity is permitted to make payments to a foreign currency, then, presumably, until that fact has been ascertained, the transfer would not be effective. That, to my mind, utterly subverts the expressly agreed mechanism for transfers. The same is true in relation to assignments.

91. Mr Davies submitted that he obtained support for the implication of the suggested term from the *Olivebank case.*[48] In that case a ship was chartered to deliver a cargo of nitrate at one port out of a range of ports in the UK and four named ports in Denmark, arrest or restraint of princes mutually excluded. The bill of lading incorporated the terms of the charter. The bill of lading holders ordered the ship to one of the named Danish ports. But (it being the First World War) the British government had prohibited the importation of nitrates into Danish ports unless specific permission was given. The bill of lading holders knew that at the time and no permission was given. Therefore the shipowners delivered the nitrate at a UK port. The bill of lading holders refused to pay the freight and the shipowners sued for it. They succeeded. The Court of Appeal held that where there was a range of potential discharge ports from which one must be nominated by the bill of lading holder, a term is to be implied in the Bill of Lading contract that the bill of lading holder must nominate a port where, at the time of nomination, it was possible to the ship to go and discharge the cargo and so earn her freight. Therefore it was a breach of that implied term to nominate a port which the vessel could not reach except by performing an unlawful act.

92. That case is very different from the present. First, the bill of lading contract was an English law contract and the unlawful act (ie. discharging nitrates at a Danish port) would have been unlawful according to the proper law of the contract. That is not so in this case. Secondly, it was known by all parties concerned that permission to discharge nitrates in Denmark was needed from the British government and was unlikely to be obtained.[49] But in the present case the Borrower warranted that the relevant consents had been made. Thirdly, a range of possible discharge ports was stipulated in the contract and the parties knew at the time the contract was concluded that delivery at some of them was likely to be unlawful. In those circumstances it is obvious that there would be an implied term that the port nominated must be a "possible" port, because that was the only way that the contract could work. But in this case the contract provided for possible transfers in circumstances where one party has warranted that it has obtained the necessary consents as to the validity of the contract terms.

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48 ***[1919] 2KB 162***

49 Judgment of Warrington LJ at page 168.

93. Mr Davies also referred to *Eurico SpA v Philipp Brothers.*[50] In that case there was a sale contract for rice, to be shipped at Kandla for "*one main Italian port to be declared on vessel passing through Suez…per vessel Epaphus".* The buyers nominated Ravenna, but the vessel *Epaphus* could not enter that port because she had excessive draft. That meant she had to discharge some cargo at Ancona before returning to Ravenna. The sellers claimed against the buyers for the additional demurrage that they had had to pay to the shipowners, saying that the buyers should not have nominated Ravenna because it was impossible for *Epaphus* and her cargo to get there. The buyers riposted that Ravenna was a "*main Italian port"* so that their nomination was good; therefore they were not liable to pay the extra demurrage. The Court of Appeal accepted the buyers' argument by a majority.[51] The Court held that the parties had expressly agreed that the buyers could nominate any "*main Italian port",* and Ravenna was within that description. Therefore an implied term to the effect that the buyers must only nominate a port where the named vessel could get into the port to discharge was contrary to the express terms of the contract. As Stephen Brown LJ put it (agreeing with the judge)[52]: "*…by the terms of the contract, they [ie. the sellers] undertook that the ship was capable of entering all main Italian ports".*[53]

94. This case is also very far from the present case. But it is of no help to Mr Davies. The Court of Appeal held that there could not be an implied term which would contradict the express terms of the sale contract, which permitted the buyers to nominate Ravenna. In my view that principle is applicable in this case. For the reasons that I have set out above, I have concluded that the proposed implied term is contrary to the express terms of the Agreement, so that it is neither reasonable nor necessary to imply it to enable the contract to work.

95. As I concluded that the argument on an implied term had no reasonable prospect of success, I did not hear any argument on the pleas set out in paragraphs 7.5 and 7.7 of the Defence. Those paragraphs would only have been relevant if I had held that there was an implied term as suggested by Essar.

I. Conclusions

96. The transfers to Argo were valid and effective. No other defences were pursued at the trial against Argo's claims for the outstanding sums due in respect of those tranches of the loan that were transferred to it. Therefore Argo is entitled to judgment in the sum of US$29.5 million together with interest. I will hear argument on the question of interest if need be.

97. I am most grateful to counsel for their helpful and interesting submissions.

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50 ***[1987] 2 Lloyd's Rep 215***
51 Sir John Donaldson MR and Stephen Brown LJ; Croom – Johnson LJ dissented on this point.
52 Staughton J.
53 **At page 221.**