FEDERAL COURT OF AUSTRALIA

CC/Devas (Mauritius) Ltd. v Republic of India (No 2) [2023] FCA 527

File number(s):	NSD 347 of 2021
Judgment of:	**JACKMAN J**
Date of judgment:	16 May 2023
Catchwords:	**PRACTICE AND PROCEDURE** – *ex parte* application for substitution of parties – power to make an order for substitution, and not merely joinder and removal – order for substitution must serve a useful purpose – valid succession to rights or liabilities is a condition precedent to substitution – substitution order made **PRIVATE INTERNATIONAL LAW** – whether assignments of quantum award of arbitral tribunal valid – applicable choice of law rules – assignments effective under whichever law governs the assignment agreements
Legislation:	*Federal Court Rules 1979* (Cth) *Federal Court Rules 2011* (Cth) rr 9.09, 9.11 *Conveyancing Act 1919* (NSW) s 12 Dutch Civil Code Arts 3:83, 3:94 Law of Property Act 1925 (UK) s 136 Transfer of Property Act 1882 (India) ss 6, 130 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 3 (entered into force 7 June 1959) India-Mauritius Bilateral Investment Treaty (entered into force 20 June 2000) Art 8 UNCITRAL Arbitration Rules 1976 Art 16 Statute of the International Court of Justice Art 38(1)(c)
Cases cited:	*Belize Social Development Ltd v Government of Belize*, 5 F. Supp. 3d 25 (D.D.C. 2013) *Daebo Shipping Co Ltd v The Ship Go Star* [2012] FCAFC 156; (2012) 207 FCR 220 *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38; [2020] 1 WLR 4117 *Global Distressed Alpha Fund I LP v Red Sea Flour Mills Co Ltd*, 725 F. Supp. 2d 198 (D.D.C. 2010) *Jennings v Credit Corp Australia Pty Ltd* (2000) 48

	NSWLR 709 *Kingdom of Spain v Infrastructure Services S.à.r.l* [2023] HCA 11 *Montedipe SpA v JTP-RP Jugotanker (The "Jordan Nicolov")* [1990] 2 Lloyd's Rep 11 *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54; (2005) 223 CLR 331 *PhotoCure ASA v Queen's University at Kingston* [2002] FCA 1079; (2002) 56 IPR 534 *Republic of Ecuador v Occidental Exploration and Production Co* [2006] QB 432; [2005] EWCA Civ 1116 *Rumput (Panama) SA v Islamic Republic of Iran Shipping Lines (The "Leage")* [1984] 2 Lloyd's Rep 259 *Socony Mobil Oil Co Inc v The West of England Ship Owners Mutual Insurance Associate (London) Ltd (The "Padre Island")* [1984] 2 Lloyd's Rep 408 *Vintage Developments Pty Limited v GHD Pty Limited (No 2)* [2006] FCA 1437 *Warrell v Westpac Banking Corporation* [1994] FCA 472; (1994) 51 FCR 304
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	International Commercial Arbitration
Number of paragraphs:	42
Date of hearing:	16 May 2023
Counsel for the Applicants:	Mr J A Hogan-Doran SC and Ms A Garsia
Solicitor for the Applicants:	Norton Rose Fulbright Australia
Counsel for the Respondent:	The Respondent did not appear.

ORDERS

NSD 347 of 2021

BETWEEN:	**CC/DEVAS (MAURITIUS) LTD.** First Applicant
	DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED Second Applicant
	TELECOM DEVAS MAURITIUS LIMITED Third Applicant
AND:	**THE REPUBLIC OF INDIA** Respondent

ORDER MADE BY: **JACKMAN J**

DATE OF ORDER: **16 MAY 2023**

THE COURT ORDERS THAT:

1. Without prejudice to any claim to immunity or objection to jurisdiction by the respondent and without affecting the right of the respondent to apply to set aside any orders made on this interlocutory application after the determination of the respondent's claim to immunity:

   (a) Pursuant to rules 9.09(2) and 9.11 of the *Federal Court Rules 2011* (Cth) (**Rules**):

      (i) CCDM Holdings, LLC be joined as applicant in these proceedings and substituted for CC/Devas (Mauritius) Limited;

      (ii) Devas Employees Fund US, LLC be joined as applicant in these proceedings and substituted for Devas Employees Mauritius Private Limited; and

      (iii) Telcom Devas, LLC be joined as applicant in these proceedings and substituted for Telecom Devas Mauritius Limited.

(b) Pursuant to rule 9.09(2) of the Rules CC/Devas (Mauritius) Limited, Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited each be removed as an applicant in these proceedings.

(c) Costs be reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(REVISED FROM TRANSCRIPT)

JACKMAN J

1 This is an application by CCDM Holdings, LLC, Devas Employees Fund US, LLC and Telcom Devas, LLC (**Assignees**) for orders as follows:

(a) pursuant to rr 9.09(2) and 9.11 of the *Federal Court Rules 2011* (Cth) (**Rules**) that:

(i) CCDM Holdings, LLC be joined as applicant in these proceedings and substituted for CC/Devas (Mauritius) Ltd.;

(ii) Devas Employees Fund US, LLC be joined as applicant in these proceedings and substituted for Devas Employees Mauritius Private Limited; and

(iii) Telcom Devas, LLC be joined as applicant in these proceedings and substituted for Telcom Devas Mauritius Limited;

(b) pursuant to r 9.09(2) of the Rules that the assignees each be removed as an applicant in these proceedings; and

(c) that the costs be reserved.

2 The Assignees are the legal assignees from the applicants of the award of the Permanent Court of Arbitration in Case No. 2013-09 dated 13 October 2020 in favour of the applicants and against the respondent (**Quantum Award**). The applicants, which are Mauritian entities, seek recognition and enforcement of the Quantum Award by their originating application in these proceedings filed on 21 April 2021.

3 On 24 December 2021 (after the commencement of these proceedings):

(a) CC/Devas (Mauritius) Ltd., the first applicant in these proceedings, entered into an agreement to assign and transfer to CCDM Holdings, LLC, a Delaware company, the benefit of and all of its rights, title and interest in, to and under the award on jurisdiction and merits and the Quantum Award, and any related rights to claims or remedies, in consideration for the issuance of a promissory note by CCDM Holdings, LLC to CC/Devas (Mauritius) Ltd.;

(b) Devas Employees Mauritius Private Limited, the second applicant in these proceedings, entered into a materially identical assignment agreement with its parent Devas

Employees Fund US, LLC, in consideration for the issuance of a promissory note by Devas Employees Fund US, LLC; and

(c) Telcom Devas Mauritius Limited entered into a materially identical assignment agreement with Telcom Devas, LLC, a Delaware company, in consideration for the issuance of a promissory note by Telcom Devas, LLC.

Each of those assignment agreements was executed as a deed. I refer to them below as the **Assignments**.

4 The respondent was notified of the Assignments in the course of enforcement proceedings in the United States:

(a) on 4 January 2022, Gibson Dunn notified White & Case of the assignment of the award on jurisdiction and merits and the Quantum Award and provided White & Case with a copy of each of the assignment agreements; and

(b) on 6 January 2022, White & Case confirmed receipt of the assignment agreements and advised Gibson Dunn that they were conferring with their client to obtain instructions.

5 The respondent received further notice of the Assignments on 10 January 2022, when Gibson Dunn filed a substitution motion in the US enforcement proceedings, exhibiting each of the assignment agreements together with the certificate of service. The substitution motion was filed electronically, in accordance with the rules of the US District Court for the District of Columbia, and the notice of electronic filing was sent to all solicitors acting in the US enforcement proceedings, including White & Case.

6 In these proceedings, a copy of the Applicants' Substitution Application was provided to White & Case (Australia) (the solicitors for the respondent) on 14 March 2022, shortly after it was filed. Following entry of the respondent's conditional appearance, the Applicants' Substitution Application was served on India through its Australian solicitors on 19 April 2022.

7 The joinder and substitution orders sought in this application by the Assignees mirror the orders sought by the applicants in an application filed on 11 March 2022 (**Applicants' Substitution Application**). On 29 April 2022, this Court indicated that it was prepared to make the substitution orders immediately but acceded to the applicants' request to make further submissions. At the request of the applicants and of the respondent as to protective orders, the Court ordered in order 6:

> Without prejudice to any claim to immunity or objection to jurisdiction by the respondent and without affecting the right of the respondent to apply to set aside any orders made on the applicants' interlocutory application after the determination of the respondent's claim to immunity:
>
> (a) the applicants file and serve on or before 6 May 2022 submissions in support of their application; and
>
> (b) the applicants' interlocutory application be determined ex parte, and be determined on the papers.

8 The orders for joinder and substitution sought in the present substitution application by the Assignees contain the same protective language of preservation of right. The hearing of this application has proceeded *ex parte* in the absence of the respondent. The Assignees have relied upon the earlier evidence filed by the applicants, being affidavits of Ms Tamlyn Mills of 11 March 2022 and 6 May 2022, together with a further affidavit of Ms Mills of 11 May 2023. On 21 July 2022, the Applicants' Substitution Application was deferred, pending notice that it should proceed.

9 Proceedings are on foot in The Hague by the respondent to set aside the Quantum Award, in which the validity or effect of the Assignments will be one of the issues to be determined. A final hearing is scheduled for 25 May 2023. Until any substitution takes place, each of the assignors has an obligation to their respective assignees to commence and pursue in their own names, for the Assignees' ultimate benefit, any proceedings in connection with the enforcement of the awards, including the Quantum Award. However, recent events in Mauritius have thrown into doubt the ability of the applicants to ensure the continuation of these proceedings as required by court orders and their assignment agreements. As matters presently stand, the global business licence of each of the applicants is suspended. The parties in Mauritius returned to court on 15 May 2023, but no update has yet been received by the legal representatives of the Assignees as to what occurred yesterday in Mauritius.

10 Directions in this Court currently require the applicants to file further submissions by 5 June 2023 in relation to the effect of the High Court's judgment in *Kingdom of Spain v Infrastructure Services S.à.r.l* [2023] HCA 11 on these proceedings. This will include a response to rejoinder submissions recently filed by the respondent on 8 May 2023, which addresses that case. There may also be an application for leave to adduce further evidence or seek orders for a timely conclave of the experts on Indian law matters. The evidence is that the Assignees are able to take over the conduct of the proceedings, comply with directions and maintain the hearing date for later this year.

11 For the reasons which follow, the applicants have no real interest in the proceedings and the Assignees are entitled to seek orders for joinder and substitution. In my opinion, the efficient conduct of these proceedings is best served by the timely making of such orders which have long been anticipated.

12 Rules 9.09 and 9.11 of the Rules provide relevantly as follows:

> **Rule 9.09**
>
> …
>
> (2) If the interest or liability of a party passes to another person during a proceeding, by assignment, transmission, devolution or by any other means, the party or the person may apply to the Court for an order for the joinder of the person as a party or for the removal of the party.
>
> (3) If a person is joined as a party under this rule, the start date of the proceeding for the person is the date on which the order is made.
>
> **Rule 9.11**
>
> If a party (the new party) is substituted for another party (the old party):
>
> (a) anything done, or action taken, in the proceeding before the substitution has the same effect in relation to the new party as it had in relation to the old party; and
>
> (b) the new party must file a notice of address for service.

Those rules are conditioned upon "the interest or liability of a party [passing] to another person during a proceeding, by assignment …". There is therefore a threshold condition for the Court ordering substitution under those rules, which I will deal with later in the judgment.

13 I deal initially with the question of power to make an order for substitution, and not merely joinder and removal. Rules 9.09(2) and 9.11 of the Rules permit the making of orders for joinder and removal but also provide for circumstances in which there is a substitution. In my view, the combined operation of those rules permits an order being made for the substitution of a new party for an old party. Rule 9.09(2) empowers the Court to order joinder of a new party and the removal of an existing party, and r 9.11 assumes the Court's power to substitute one party for another party. Other than the addition of a party and the removal of another, and perhaps the finding or notation that the new party is in substitution of the old party, the rules do not explicitly identify when a substitution has taken place within the meaning of r 9.11. In my view, when read together, those rules confer power to make orders under r 9.09(2) that effect a substitution, with the consequences of that substitution being provided for in r 9.11.

That conclusion is consistent with the reasoning of the Full Court in *Daebo Shipping Co Ltd v The Ship Go Star* [2012] FCAFC 156; (2012) 207 FCR 220 at [114] (Keane CJ, Rares and Besanko JJ), a decision made under the *Federal Court Rules 1979* (Cth).

14 The power to order substitution under rr 9.02(2) and 9.11 of the Rules is a discretionary power, and a critical factor in the exercise of the discretion is that the order made must serve a useful purpose. In circumstances where there has been a valid assignment of the interests or rights pursued in the proceedings, which I deal with below, resulting in an assignee with the legal title to sue and the assignor without either the legal or beneficial title to sue, the substitution orders serve a useful purpose, to indicate the genuine interest of the assignees in pursuing the recognition and enforcement of the Quantum Award and to ensure that the parties with the real interest in the litigation are before the Court.

15 In some cases, it may be more appropriate to exercise the Court's discretion in favour of ordering joinder and removal rather than substitution, or even merely to order joinder of an assignee whilst declining to remove the assignor as party. In the present case, substitution is the more appropriate form of order, because, by reason of the assignments, the Assignees have succeeded to the claim already represented in the action. The Assignees' rights substitute for the rights of the applicants, and the applicants' rights extend back to the date on which the proceedings were commenced.

16 In *Worrell v Westpac Banking Corporation* [1994] FCA 472; (1994) 51 FCR 304 at 305-7, following the annulment of their bankruptcies, three former bankrupts applied to be substituted for their former trustee in bankruptcy, the applicant in an existing proceeding against Westpac. Westpac contended that there should merely be joinder and removal. The key difference between substitution and joinder, as the Court noted, was that if the former bankrupts were substituted as applicants, the result would be same as if they themselves had validly commenced proceedings at the outset. In contrast, if joinder and removal were ordered, the former bankrupts would be treated as having commenced proceedings against Westpac on the date of their addition as parties, giving the respondent "the benefit of much more extensive time bars to the action against it than it would have if substitution were ordered" (at 305, per Drummond J). The Court found that in circumstances where annulment of bankruptcy operated retrospectively, that is, to remove the incapacity as bankrupts to sue on the cause of action, substitution rather than addition was appropriate (see 305-7).

17 However, the circumstances in which it is appropriate to order substitution rather than joinder are not confined to the circumstances in *Worrell*, and it is not necessary that the interests or rights of the party proposed to be substituted extend retrospectively back to the date on which proceedings were commenced.

18 In *Vintage Developments Pty Limited v GHD Pty Limited (No 2)* [2006] FCA 1437 (also decided under the *Federal Court Rules 1979*), Errol Investments sought to be substituted as second applicant by Errol Nominees upon the assignment from Errol Investments to Errol Nominees of the former's interest as trustee in a unit trust (see [34]-[36]). An argument raised by the respondent, GHD, against the substitution was that, where Errol Nominees, being the assignee, had not existed before 2006 and therefore did not exist when the cause of action arose or when proceedings were commenced, and where the application for substitution was based on "internal commercial imperatives of the applicant", the appropriate order was not for substitution but for addition or joinder as a party (see [42]-[43]). The Court rejected that submission.

19 Bennett J acknowledged that the right to Errol Nominees did not extend back to the date on which proceedings were commenced (and cited *Worrell* by way of contrast at [44]). However, as her Honour noted, what was proposed was that the rights of the assignee would substitute for the rights of the existing party, being the assignor, and the rights of the assignor do extend back to the date on which proceedings were commenced. Her Honour referred at [46]-[47] to English authority indicating that:

> [a] new party is substituted because he or she has succeeded to a claim or liability already represented in the action and sues or is sued in respect of the existing cause of action.

Further, Bennett J noted at [48] that in *Jennings v Credit Corp Australia Pty Ltd* (2000) 48 NSWLR 709 (Santow J), an assignment of the legal ownership of a debt was made after the expiry of the limitation period, and the Court permitted the substitution of the new legal owner.

20 In light of these considerations, the Court in *Vintage Developments* held that the orders sought were best characterised as a substitution and not as a mere addition or joinder (at [49]). However, on the facts of the case, there had not, in fact, been a passing of interest by assignment or otherwise, and the condition giving rise to the substitution under the *Federal Court Rules 1979* had, therefore, not yet been satisfied, rendering the application premature (at [50]).

21 Here, in contrast to *Vintage Developments*, there has been a passing of the interest by assignment or otherwise, as I conclude below, and in those circumstances, substitution rather than addition or joinder is appropriate.

22 First, adapting Bennett J's language in *Vintage Developments* to this case, under the assignment agreements, the rights of the Assignees "substitute" for the rights of the applicants, and the Assignees have "succeeded to a claim or liability already represented" in the present action.

23 Second, as to any argument that the applicants should remain parties, it is accepted that, in some circumstances, an assignor may remain a proper party. In *PhotoCure ASA v Queen's University at Kingston* [2002] FCA 1079; (2002) 56 IPR 534, at [1]-[5] (Merkel J), the assignee of a patent (DUSA) applied to be joined as a respondent to the proceedings and sought that the assignor (Queens) be removed as a respondent. The Court joined the assignee to the proceedings but declined to exercise its discretion to remove the assignor. However, that was in circumstances where the assignor had not appeared as a respondent in the proceedings, had not been served with notice of the joinder and removal application, and had not had the opportunity to present any view in favour or against its removal (see [8]-[10]).

24 In each respect, this case is different. The original substitution application was brought by the applicants with the knowledge and consent of the Assignees, so the existing applicants are plainly aware of the present application. Further, in *PhotoCure*, the Court considered that the applicant might have good reason for wishing to ensure that the assignor (the respondent) was bound by the result of the proceeding because discovery was a real issue in the proceedings, and the applicant might have lesser discovery rights against the assignor if it were removed as a party (see [8]-[10]). It followed that the Court was not satisfied that the removal of the assignor could not cause any prejudice to the applicant or the conduct of its case. On the other hand, no prejudice of any kind had been demonstrated by the assignee (seeking the joinder and removal) if the assignor were removed as party (see [10]). In the present case, the respondent will not suffer any prejudice through the substitution orders. It was served with the Applicants' Substitution Application after being served with the originating process, and was aware of that application before entering its conditional appearance. Discovery is unlikely to be an issue in these proceedings.

25 Further, under the assignment agreements the applicants undertake to give to the Assignees "all reasonable cooperation and assistance" that the assignees may require "in making or proceeding with any claim" under the assignments. Costs have been reserved to date, and by

virtue of r 9.11 of the Rules, "anything done, or action taken, in the proceeding before this substitution has the same effect in relation to the new party as it had in relation to the old party".

26 I turn, now, to the question of the assignments themselves and the issue as to whether they appear to be valid assignments on the evidence before me within the meaning of rr 9.09 and 9.11 of the Rules, so as to satisfy the condition precedent in r 9.09 which was not satisfied in *Vintage Developments*.

27 In the first place, under any applicable choice of law rules, the monetary parts of the Quantum Award (at least) were property capable of assignment. Further, the assignment of those rights was effective under any applicable law since the assignment agreements were executed as deeds, provided for absolute assignments, and notice was given to the respondent ideally in turn with those issues.

28 As to whether the property was capable of assignment, the evidence is that the applicants have assigned to the Assignees the benefit of and all of their rights, title and interest (including any legal title) to and under the award on jurisdiction and merits and, pertinently for these proceedings, the Quantum Award, and any related rights to claims or remedies. These choses in action are property capable of assignment. The question of the assignability of a debt or other chose in action is probably governed by the proper law of the contract between the creditor and the debtor, being the law under which the right was created.

29 The Quantum Award arises out of the arbitration agreement between the applicants and the respondent. That agreement was formed by an offer made by the respondent under Art 8 of the *India-Mauritius Bilateral Investment Treaty* (entered into force 20 June 2000) (**BIT**), which was accepted by the applicants on 4 July 2012 when the applicants served on the respondent their notice of arbitration in accordance with the *UNCITRAL Arbitration Rules 1976*.

30 Subsequently, on 15 May 2013, the first procedural meeting was held at the Peace Palace in The Hague, the Netherlands, in which the parties agreed to and signed Terms of Appointment. By Art 10(a) of those Terms the parties agreed that for the purposes of Art 16 of the *UNCITRAL Arbitration Rules 1976*, the place, ie the seat, of the arbitration would be The Hague. The law governing the arbitration agreement is the law chosen by the parties or, in the absence of express or implied choice, the law with the closest and most real connection to the arbitration agreement: *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38; [2020] 1 WLR 4117 (***Enka v Chubb***) at [170(ii)].

31 However, in *Republic of Ecuador v Occidental Exploration and Production Co* [2006] QB 432; [2005] EWCA Civ 1116, which was not considered in *Enka v Chubb*, which concerned an investor-state arbitration conducted under the *UNCITRAL Arbitration Rules*, where the tribunal had set the place of arbitration as London, the Court of Appeal reasoned that the agreement was governed by international law rather than Ecuadorian law (English law was not argued for):

> Although [the arbitration agreement] is a consensual agreement, it is closely connected with the international Treaty which contemplated its making, and which contains the provisions defining the scope of the arbitrators' jurisdiction. Further, the protection of investors at which the whole scheme is aimed is likely to be better served if the agreement to arbitrate is subject to international law, rather than to the law of the State against which an investor is arbitrating.

32 The India-Mauritius BIT does not contain any express choice of law clause for any arbitration formed with investors. However, it is trite that the governing law of the BIT itself and the *lex causae* of the applicants in their claims against the respondent under the BIT is international law. The Terms of Appointment do not specify a governing law for any arbitration agreement, but the choice of The Hague (and the Permanent Court of Arbitration) to administer the arbitration suggests strongly that the parties chose that place as a neutral venue. The likely law governing the arbitration agreement is therefore either international law or Dutch law, and as explained below, under either system of law choses in action such as those at issue in this case are property capable of assignment. However, if that is wrong and Indian law applies, the same result ensues.

33 Under international law, an award to which the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 330 UNTS 3 (entered into force 7 June 1959) (**New York Convention**) applies, such as the Quantum Award (and the rights thereunder), is assignable. First, there is no prohibition on assignment in the India-Mauritius BIT, in the *UNCITRAL Arbitration Rules 1976* or in the Terms of Appointment. Second, there is no international law rule prohibiting the assignment of an award between a private party and a state: *Global Distressed Alpha Fund I LP v Red Sea Flour Mills Co Ltd*, 725 F. Supp. 2d 198 (D.D.C. 2010); *Belize Social Development Ltd v Government of Belize*, 5 F. Supp. 3d 25 (D.D.C. 2013). Third, there are no rules of international law on the assignability or assignment of awards or other choses in action; it is the role of municipal law to fill this gap as a general principal of law widely accepted across different municipal systems: see *Statute of the International Court of Justice*, Art 38(1)(c). Absent any rule, the Court must apply the law of the forum.

34 As to Dutch law, on a matter of general law such as the assignability of property, it is presumed that Dutch law is the same as Australian law in the absence of evidence as to Dutch law: *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54; (2005) 223 CLR 331 at [116] and [125] (Gummow and Hayne JJ), [267] (Heydon J). Choses in action such as the Quantum Award are generally assignable under Australian law. In any event, it appears that, under Dutch law, the general rule is that a chose in action (such as a claim) is capable of assignment unless assignment is precluded by law or the nature of the right: Art 3:83(1) of the *Dutch Civil Code*. Here, nothing in the India-Mauritius BIT or any subsequent arrangements between the parties prohibits the assignment of the debt created by the Quantum Award.

35 Even if Indian law applied, s 6 of the *Transfer of Property Act 1882* (India) provides that:

> Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force.

The exclusions in s 6(a)–(e) have no application (the award debt is not a mere right to sue). The means for assignment of choses in action is dealt with in s 130 of the *Transfer of Property Act 1882* (India), as discussed below.

36 The property is also capable of assignment under Australian law (which may be relevant as the law of the forum or under the presumption that foreign law is the same as the law of the forum). Even the benefit of a contractual arbitration provision is a chose in action which is assignable under Australian law: *Rumput (Panama) SA v Islamic Republic of Iran Shipping Lines (The "Leage")* [1984] 2 Lloyd's Rep 259; *Socony Mobil Oil Co Inc v The West of England Ship Owners Mutual Insurance Associate (London) Ltd (The "Padre Island")* [1984] 2 Lloyd's Rep 408; *Montedipe SpA v JTP-RP Jugotanker (The "Jordan Nicolov")* [1990] 2 Lloyd's Rep 11.

37 Turning then to the question whether the assignments in the present case were valid and effective, that question is probably governed by the proper law of the assignment. Irrespective of whether Australian law, foreign law or international law governs the effectiveness of the assignments, the assignments are valid and effective, and the Assignees are, therefore, now the proper applicants in these proceedings, being the parties with the real interest in the action. My reasons for that conclusion are as follows.

38 First, the assignments are effective under Australian law. Under the law of New South Wales (as the law of the forum) an existing debt or chose in action is assignable, provided that the assignment is absolute, in writing, and express notice has been given to the person liable on the

debt or other chose in action: *Conveyancing Act 1919* (NSW), s 12. The assignments in this case satisfy those three requirements.

39 Second, foreign law may be presumed to be the same as the law of the forum unless proven otherwise, and the Court can therefore proceed on the basis that because the assignments satisfy the requirements under the law of the forum, the assignments are effective.

40 In any event, the assignments satisfy the requirements for effectiveness under all other legal systems which might be considered to constitute the governing law of the transfer of these interests, namely:

(a) English law as the proper law of the assignment agreements, and so of the assignments, being the law expressly chosen by the parties to govern the assignment. As with Australian law, under English law, the assignment must be absolute, in writing, and express notice must be given to the other person liable on the debt or other chose in action: *Law of Property Act 1925* (UK), s 136;

(b) Dutch law, as the law of the seat of the arbitration. As with Australian and English law, under Dutch law, an assignment of a chose in action is effective if made by a deed, with notice to the debtor or other person against whom the right can be exercised, *Dutch Civil Code*, Art 3:94(1);

(c) to the extent that Indian law might be relevant, an assignment of a chose in action is effective under Indian law if executed in writing and signed by the assignor or their agent: *Transfer of Property Act 1882* (India), s 130. I note that Indian law may be relevant only because it is the law of the debtor and the *situs* of the debt; and

(d) international law has no express requirements of form in respect of assignment, although general principles of law widely accepted across different municipal legal systems would apply to fill any potential gap, as indicated above. Drawing upon the municipal principles outlined above, international law would likely require an assignment to be in writing with notice.

41 Accordingly, as the assignment agreements were executed as deeds and provide for an absolute assignment, and as notice of the assignments has been given to India, the assignments satisfy the requirements for effectiveness under all potentially applicable legal systems.

42 I will therefore make the order sought by the Assignees, such that the Assignees are substituted for the applicants and the steps taken in the proceeding to date, including service of process on

India, will have the same effect in relation to the Assignees as they did in relation to the applicants. In my opinion, on the evidence before me, there is no legal or discretionary reason not to make such an order.

I certify that the preceding forty-two (42) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackman.

Associate:

Dated: 24 May 2023