CL-2020-000563

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

[2021] EWHC 2201 (Comm)

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

Friday 6th August 2021

Before :

MASTER DAVISON

- -

Between :

ROSS LEASING LIMITED (1) **WESTPARK 1 AIRCRAFT LEASING LIMITED (2)** **PEREGRINE AVIATION BRAVO LIMITED (3)**	**Claimant**
- and -	
NILE AIR	**Defendant**
-and-	
INTERNATIONAL AIR TRANSPORT ASSOCIATION	**Third Party**

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Ms Erin Hitchens (instructed by **Alius Law**) for the **Claimant**
Ms Laurentia de Bruyn (instructed by **HFW**) for the **Defendant**

Hearing date: 15 July 2021

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Approved Judgment

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

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Introduction

1. This is the claimants' application to make an interim third party debt order final.

2. As their names suggest, the claimants are aircraft leasing companies. The defendant is an Egyptian airline based in Cairo. The claimants leased three Airbus A320-200 aircraft to the defendant. The defendant did not pay the rent and other payments due under the relevant lease agreements. Proceedings were commenced in September 2020. The defendant has at no stage disputed the court's jurisdiction and has participated fully in the proceedings. On 19 February 2021 the claimants obtained summary judgment against the defendant in the total sum of US$4,387,960.72 and £13,498 (together "the judgment debt"). No part of the judgment debt has been paid. The rental payments have continued to accrue and the defendant has continued to fail to pay so that the claimants have further significant claims against them.

3. The International Air Transport Association ("IATA") is an association formed under the laws of Canada with a UK establishment and a registered office in England and Wales. Relevantly to this application, IATA operate three services. The IATA Currency Clearing Service ("ICCS") is used by airlines to centrally control and repatriate world-wide ticket sales. The IATA Clearing House ("ICH") provides a netting solution for the set-off of bills between airlines or airline-associated companies and travel partners. The Billing and Settlement Plan ("BSP") allows travel agents in a country or region to sell tickets on behalf of participating airlines without the need for the agents to have an individual relationship with each airline.

4. On 8 April 2021 the claimants applied for a third party debt order against IATA. On 14 April 2021, I granted an interim third party debt order. The ITPDO was served on IATA on 26 April 2021. On 11 May 2021, IATA wrote to the court confirming that they were "withholding all debts owed to the Judgment Debtor in the United Kingdom". They set out the amounts that were due "as of 6 May 2021". These comprised:

   i. US$430,793.06 (approximately) in the IATA Currency Clearing Service;

   ii. US$23,956 in the IATA Clearing House; and

   iii. £109.60 in the IATA Billing and Settlement Plan system.

5. The grand total was approximately US$454,901.

6. The application was listed for hearing on 14 June 2021. On 8 June 2021, HFW filed a witness statement in opposition from Mr Richard Gimblett with an exhibit running to some 800 pages. The exhibit included an expert report from a Quebecois lawyer, Mr Daniel Grodinsky. The hearing was adjourned to 15 July 2021 in order to give the claimants the opportunity to consider and respond to this evidence.

7. The evidence from Mr Gimblett objected to the application on two grounds. First, it was said that the court did not have jurisdiction to make an order because the *situs* of the debt was Quebec and the Quebec courts were not likely to recognise compliance with a third party debt order as discharging IATA's liability to Nile Air. (This ground of opposition was confined to the funds held in the IATA Currency Clearing Service.) Second, it was said that the vast majority of the sums which were the subject of the ITPDO were not "debts due or accruing due" on the dates that the order was made and served and were therefore not captured by the order.

8. The first ground has generated an exchange of expert evidence. In response to the report of Mr Grodinsky, on 5 July 2021 the claimants served and filed a report from the Honourable Pierre J. Dalphond. Both experts have since prepared supplementary reports. The second ground has prompted the claimants to apply for and obtain a second ITPDO in order to capture sums that had – or might have – fallen due after the first ITPDO. I made that second order on 28 June 2021. The final hearing date is 6 October 2021. By letter to the court dated 14 July 2021 IATA have confirmed that sums owed to Nile Air at that date and withheld pursuant to the second ITPDO were approximately US$1,509,400.

CPR Part 72

9. CPR Part 72, so far as relevant to the present case, provides as follows:

> "Scope of this Part and interpretation
> 72. 1(1) This Part contains rules which provide for a judgment creditor to obtain an order for the payment to him of money which a third party who is within the jurisdiction owes to the judgment debtor.
> . . .
> Third party debt order
> 72. 2(1) Upon the application of a judgment creditor, the court may make an order (a 'final third party debt order') requiring a third party to pay to the judgment creditor -
> (a) the amount of any debt due or accruing due to the judgment debtor from the third party; or
> (b) so much of that debt as is sufficient to satisfy the judgment debt and the judgment creditor's costs of the application.
> (2) The court will not make an order under paragraph 1 without first making an order (an 'interim third party debt order') as provided by rule 72.4(2).
> Interim third party debt order
> 72. 4(1) An application for a third party debt order will initially be dealt with by a judge without a hearing.
> (2) The judge may make an interim third party debt order -
> (a) fixing a hearing to consider whether to make a final third party debt order; and
> (b) directing that until that hearing the third party must not make any payment which reduces the amount he owes the judgment debtor to less than the amount specified in the order.
> (3) An interim third party debt order will specify the amount of money which the third party must retain, which will be the total of -
> (a) the amount of money remaining due to the judgment creditor under the judgment or order; and
> (b) an amount for the judgment creditor's fixed costs of the application, as specified in the relevant practice direction.
> (4) An interim third party debt order becomes binding on a third party when it is served on him.
> (5) The date of the hearing to consider the application shall be not less than 28 days after the interim third party debt order is made.
> 72. 9(1) A final third party debt order shall be enforceable as an order to pay money.
> (2) If -
> (a) the third party pays money to the judgment creditor in compliance with a third party debt order; or
> (b) the order is enforced against him,
> the third party shall, to the extent of the amount paid by him or realised by enforcement against him, be discharged from his debt to the judgment debtor.
> (3) Paragraph (2) applies even if the third party debt order, or the original judgment or order against the judgment debtor, is later set aside."

10. The rule has been given considerable judicial attention. It has been considered by the House of Lords and the Supreme Court in, respectively, *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260 and *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil Iraq* [2018] UKSC AC 690. The first of those cases comprehensively reviewed the history and juridical basis of the third party debt order. Recently, in *Hardy Exploration & Production (India) Inc v Government of India* EWHC [2018] 1916 (Comm) Peter MacDonald Eggers QC sitting as a Deputy High Court Judge examined the question whether a TPDO could be made in circumstances where the debt was situated abroad in India.

11. From the rule and from the authorities I derive the following steps or "route map" I must follow in order to be satisfied that I should make a final TPDO:

    i. Is the third party "within the jurisdiction"?

ii. Is there a debt "due or accruing due to the judgment debtor from the third party"?

iii. Is that debt situated within the jurisdiction?

iv. If the debt is situated outside the jurisdiction would the foreign court regard the debt as automatically discharged by the order of the English court?

v. If not, is there a "real and substantial risk" that the third party might be called upon to pay the debt twice over?

vi. Taking the foregoing and all other relevant circumstances into account, should the court, exercising a judicial discretion, make a final third party debt order?

Is the third party within the jurisdiction?

12. The answer is, Yes. It is common ground that IATA is within the jurisdiction. It is an association formed under the laws of Canada and it is headquartered in Montreal. But it has a UK establishment and registered office at IATA UK, The Metro Building, 1 Butterwick, Hammersmith, London W6 8DL.

Is there a debt "due or accruing due to the judgment debtor from the third party"?

13. Because it offers a more comprehensible route to my overall conclusion, it is convenient to address the detail of this question later on in this judgment. For present purposes, it is enough to note that as of 6 May 2021 some US$455,000 was owing to the defendant, all of it held in accounts in England and Wales; (see paragraph 4 above and see also the first statement of Richard Gimblett at paragraph 11). But, of that sum, only some US£6,688 (in the ICCS) was accepted to be a debt due and owing at the relevant date.

Is that debt situated within the jurisdiction?

14. CPR r 72.1 does not say that the debt to be attached must be situate within the jurisdiction. But it is well-established that this is a requirement. In *Taurus Petroleum Ltd* (see above) Lord Clark said at paragraph 64:

> "It is common ground that all property, whether tangible or intangible, has a *situs* for legal purposes. It is further common ground that … a third party debt order is a proprietary remedy, which, when complied with, operates to discharge the debt and to release the debtor from his obligation. Since it involves dealing with property, the English courts do not have jurisdiction to make such an order in respect of debts situated outside the jurisdiction, unless by the law applicable in that place an English order would be recognised as discharging the liability of the third party to the judgment debtor."

15. The defendant submits that the *situs* of the debt under the ICCS agreement is Quebec. This is by virtue of clause 12 which is in these terms:

> "12 Governing Law and Jurisdiction
> 12.1 This Agreement will be construed and interpreted in accordance with the laws of the province of Quebec and the applicable laws of Canada, excluding conflict of law provisions.
> 12.2 The parties agree to submit any dispute or claim arising hereunder to the exclusive jurisdiction of the courts of the province of Quebec, Canada."

16. Rule 129(1) of Dicey states that "choses in action generally are situate in the country where they are properly recoverable or can be enforced." So far as debts are concerned, Dicey states that, subject to certain exceptions, "a debt is situate in the country where the debtor resides. The reason usually given is that the country of the debtor's residence is normally the place where the creditor can enforce payment". Thus, the *prima facie* position is that the debts owed by IATA to Nile Air are situated in England.

17. But the effect of a provision conferring exclusive jurisdiction on the courts of another state was specifically considered by the Commercial Court in *Hardy Exploration & Production (India) Inc v Government of India* EWHC [2018] 1916 (Comm) (see above). The Deputy Judge found that the general rule set out in Rule 129 of Dicey was displaced where there was a jurisdiction clause in favour of a foreign state. At paragraph 82 he stated:

> "(5) The general rule or presumption is that the debt or chose in action is properly recoverable or enforceable in the place of residence, or domicile, of the debtor (*New York Life Insurance Co v Public Trustee* [1924] 2 Ch 101, 115, 119-120); *Chaturbhuj Piramal v Chunilal Oomkarmal* (1933) 60 LR Ind App 211, 220-222; *Kwok Chi Leung Karl v Commissioner of Estate Duty* [1988] 1 WLR 1035 , 1040-1041; *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260 , paragraph 72; *Hillside (New Media) Ltd v Baasland* [2010] EWHC 3336 (Comm); [2010] 2 CLC 986 , paragraph 33; *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2017] UKSC 64; [2017] 3 WLR 1170 , paragraph 30). It is possible to interpret the authorities as suggesting that the debtor's residence is the determinant of the *situs* of a debt, on the basis that that is the place where the debt is generally recoverable or enforceable (Dicey, Morris & Collins on The Conflict of Laws , (15th ed., 2014), para. 22-026, 22-029); however, I think that would be at odds with the purpose of identifying the *situs* as the place where the governing law will determine whether or not the debt has been discharged and where the existence or extent of the debt may be determined by the law of a jurisdiction other than the place of the debtor's residence or domicile. It would also add little to the express provision in CPR rule 72.1(1) that the debtor must be within the jurisdiction.
>
> (6) That general rule or presumption is open to displacement if it can be demonstrated that the relevant debt is properly recoverable or enforceable in a jurisdiction other than the debtor's residence or domicile, for example if suit must be brought against the debtor in that other jurisdiction, such as by a "special agreement" or an "exclusive right of suit" agreed between the parties in question; if the position were otherwise, the anomalous situation may arise where a Third Party Debt Order is made in respect of a debt which a foreign court with exclusive jurisdiction holds to be non-existent (*New York Life Insurance Co v Public Trustee* [1924] 2 Ch 101, 111-112, 115, 119-120); *Chaturbhuj Piramal v Chunilal Oomkarmal* (1933) 60 LR Ind App 211, 220-222; *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260 , paragraphs 72-74). Having identified this principle, I make the following additional observations:
>
> (a) Mr Kendrick QC argued that "properly recoverable " meant enforceable in the sense of execution of a judgment debt. However, I do not see how that can be where the relevant debt has not yet been established by a judgment or award; the reference in the authorities to the bringing of suit suggests that the *situs* is concerned with the determination of rights, as opposed to enforcement against assets, where the debt has not yet been established by the judgment of a court.
>
> (b) I am encouraged in this conclusion by reason of the fact that a central consideration of the Court's jurisdiction or discretion in making a Third Party Debt Order is whether compliance with the Order will discharge the third party debtor's liability for the debt, which is integrally concerned with the determination of the right underlying the debt.
>
> (c) This conclusion is at odds with the decision of the First Tier Tribunal (Tax Chamber) in *Perrin v Commissioners for Her Majesty's Revenue & Customs* [2014] UKFTT 223 (TC) . However, with respect to the learned judge in that case, I do not consider that the distinction between "jurisdiction" and "enforcement" can be lightly dismissed; nor do I consider that it was necessarily elided in the authorities considered by the Tribunal.
>
> (d) It is possible that the place where the debt is "properly recoverable " originally was intended to refer to the place where the obligation to pay the debt had to be performed, i.e. where the debt was payable, but such a possibility has been extinguished by the Supreme Court's decision in *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2017] UKSC 64; [2017] 3 WLR 1170."

18. Although not strictly binding upon me, this decision is highly persuasive. The context was the same. Indeed, Ms de Bruyn, for the defendant, submitted, not unreasonably, that the case was "on all fours". The Deputy Judge carried out an exhaustive analysis of the authorities and his conclusions are not open to any obvious challenge. He considered the case of *Perrin*, which had reached a different conclusion. But the context of *Perrin* was different. It was a tax case. The judge there was considering the question whether interest paid to a person outside the UK had arisen in the UK. The Deputy Judge did not find the reasoning in *Perrin* attractive. *Hardy* is both the later case and a decision of the High Court. I consider that I should follow it. Because clause 12 of the ICCS agreement confers exclusive jurisdiction on the courts of Quebec I would hold that that is where the debt is situated.

19. The *situs* of a debt for the purposes of TPDO proceedings in England is a matter of English law; see *Hardy* at paragraph 49. But it appears from the Canadian Supreme Court decision of *IATA v Instrubel NV* 2019 SCC 61, which was referred to by both Mr Grodinsky and Hon Pierre Dalphond and which was on somewhat similar facts to the present case, that Canadian law would also locate the debt in Canada. This decision stands as further encouragement to me to follow *Hardy* rather than *Perrin*.

Would the foreign court regard the debt as automatically discharged by the order of the English court?

20. This question derives from the judgment of Lord Millett in the *Société Eram* case. As he pointed out, it would be very unusual for a foreign court to recognise a debt situated within that court's jurisdiction as automatically discharged by an order of the English court. Such unusual circumstances arose in *Balengani v Sharifpoor* [2020] EWHC 3888 (QB). Master Cook held that a debt situated in the British Virgin Islands would be regarded by the BVI courts as automatically discharged by the order he made. That was because of two factors.

21. The first factor was that no party had adduced evidence of BVI law and therefore Rule 25 of Dicey applied, namely that:

> "(1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.
> (2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case."

The second factor was that the BVI were a UK Overseas Territory with a legal system closely modelled on that of England and Wales and which would be highly likely to regard a TPDO made by an English court as apt to discharge the debt owed to the judgment debtor by the third party. (Master Cook's order was indeed subsequently recognised and approved by the BVI court.)

22. Neither of those factors applies in this case. And it appeared to be common ground between the experts that there was no provision of Canadian law providing that a debt situated in Canada would be regarded as automatically discharged by an English TPDO. The experts referred to more general provisions, principally Article 3155 of the Civil Code of Quebec, which provided for decisions rendered outside Quebec to be capable of recognition and enforcement. It is in the context of this evidence that I turn to the next question.

Is there a "real and substantial risk" that the third party might be called upon to pay the debt twice over?

23. This is the critical question, requiring an evaluation of the prospect that a court in Quebec would not recognise and give effect to the English TPDO. The older authorities (see for example *Zoneheath Associates Ltd v China Tianjin International Economic and Technical Co-operative Corpn* [1994] CLC 348) place the burden of proving that there is such a "real risk" on the third party or the judgment debtor. This is because the procedure under the old RSC Order 49 provided for the making of a garnishee order *nisi* (the equivalent of the interim third party debt order) and then for that order to be made final unless the garnishee (now the third party)

"showed cause" why it should not be. That wording has not been reproduced in CPR Part 72 and, for my part, I would not regard the third party or judgment debtor as bearing any burden save, perhaps, and depending on the circumstances of the individual case, an evidential burden. I would regard the legal burden of establishing that the requirements of the rule are made out as resting on the judgment creditor throughout. That said, I agree with the commentary at 73.4.5 of the White Book that "generally today it is not helpful to decide the issue by reference to a burden of proof" and I have not done so in this case.

24. The difficulty facing these claimants is that the expert witnesses are sharply divided and the differences between them are in each case cogent and well-reasoned. It is hard to conclude that one or the other clearly has the better side of the argument and therefore hard to conclude that there is no real risk of IATA being called upon to pay the debt twice over.

25. Ms Hitchens, for the claimants, offered two routes whereby she said that compliance with the TPDO (if it were made final) would be recognised in Canada as leading to the valid discharge of IATA's obligations to the defendant.

26. The first route was Article 3168 of the Civil Code of Quebec ("CCQ"). Article 3155 conferring what I might call a general power to recognise and enforce foreign judgments was conditioned upon the court of the State where the decision was rendered having jurisdiction under this Part of the CCQ. Article 3168 in turn afforded recognition to the jurisdiction of foreign courts "in personal actions of a patrimonial nature" in circumstances where, relevantly, the defendant was domiciled in the State where the decision was rendered or had submitted to that jurisdiction. The difficulty with this, as Mr Grodinksy pointed out, was that English law characterises a TPDO as a proprietary claim and <u>not</u> a personal action. Hon Pierre Dalphond countered this by saying that the law of Quebec would characterise a TPDO as an *in personam* claim and under Article 3078 of the CCQ it would be Quebec law, not English law, that applied to the characterization. Article 3078 provided:

> "Characterization is made according to the legal system of the court seized of the matter; however, characterization of property as moveable or immovable is made according to the law of the place where it is situated.
>
> Where a legal institution is unknown to the court or known to it under a different designation or with a different content, foreign law may be taken into account."

27. Hon Pierre Dalphond cited Claude Emanuelli's textbook *Droit international privé québécois*, 3rd ed for the proposition that the *lex fori* would be the law of Quebec. But this was directly contrary to the views of Mr Grodinsky, whose view was that the court "seized of the matter" (the *forum*) was the English court whose characterization was therefore relevant. Although not in his supplementary report (which preceded that of Hon Pierre Dalphond) Ms de Bruyn, for the defendant, told me on instructions derived from Mr Grodinsky that the views of Emanuelli were controversial. On a plain reading of Article 3078, I can see force in that – particularly because if Emanuelli was correct, it would seem to render the second part of the Article redundant. At any rate, the point is not one that I could determine either way on paper.

28. The second route offered by Ms Hitchens was via the qualification to Article 1557 of the CCQ. This Article stipulated that payment was to be made by the debtor to the creditor but that payment to a third party was nevertheless valid "to the extent of the benefit that the creditor derives from it". It was submitted that the defendant would clearly benefit from the payment made by IATA to the claimants under the TPDO because that payment would reduce a judgment debt which the defendant would otherwise owe. Mr Grodinsky took a more cautious line. He characterized a payment by IATA to the claimants as an "unsolicited interference in the management of [the defendant's] cashflow" and "with other apportionment arrangements it may have amongst its other creditors". Thus, he opined that it was "difficult to conclude that [the defendant] clearly benefited should IATA comply with [the TPDO]".

29. I find Mr Grodinsky's reasoning on this aspect somewhat unconvincing, not least because the defendant has deployed no evidence at all concerning cashflow difficulties or arrangements with other creditors. But that would not prevent the defendant from deploying such evidence in

any actual proceedings it chose to bring in Canada against IATA. And Hon Pierre Dalphond did not entirely dismiss IATA's risk of double jeopardy. He said that there was "*only a very limited risk* that, pursuant to Art 1557 CCQ, a Quebec court would consider that any payment made by IATA pursuant to the TPDO was not to the benefit of the defendant". Self-evidently, a "very limited risk" is not the same as "no real risk", which is the applicable standard. It is perhaps relevant to mention that it cannot be said that the defendant has not given fair warning that it does not regard payment under the TPDO as discharging the debt owed to it by IATA. Whether or not the defendant's arguments were ultimately to prevail in Canada, it cannot, in my view (and from an English law perspective), be said to be unconscionable for them to raise them.

30. The discussion set out above does not attempt to do more than summarise the expert evidence and the arguments that arose on it. But I should not leave this part of the case without reminding myself of the cautionary observations of the House of Lords in the *Société Eram* decision. The House of Lords observed that there was, at that time, no reported case of an English court making a TPDO in respect of a debt situated abroad. Since then, I am aware of only one, which is the decision of Master Cook in the *Balengani* case. But that case was resolved on rather special facts and might be described as in the nature of the exception which proves the rule.

Debt due or accruing?

31. I return to the question whether there is a debt "due or accruing". As a result of the findings I have made above (and the claimants' concession that the funds held by IATA in the BSP were not a debt due or accruing due), this only has relevance to the funds held by IATA in the IATA Clearing House – the "ICH". These funds total US$23,956. The contractual terms governing the ICH do not include a jurisdiction clause in favour of Quebec and therefore the grounds of opposition based upon *situs* of the debt etc do not arise. The only question is whether these funds comprise a debt which is "due or accruing due".

32. I do not feel enormous enthusiasm for the task of deciding this issue because, as Ms Hitchens pointed out, it is at best a rear-guard action pending the final hearing of the second ITPDO. However, the defendant was entitled to take the point that the ICH debt was not due or owing due under this ITPDO – even if that point had more legal than intrinsic merit.

33. A debt due or owing due is "one for which the creditor could immediately and effectually sue"; see *Taurus* at paragraph 88. Under the Regulations of the ICH there were submitted to be two candidates for the date at which this state of affairs arose: Advice Day (23 April 2021) or first business day after Call Day; (Call Day was 30 April 2021 and the first business day after that was 3 May 2021). If the relevant date was Call Day or the first business date after Call Day, then both those dates fell after the date that the ITPDO was served on IATA, which was 26 April 2021. This was the date when, according to CPR r 72.4(4), the ITPDO became "binding on the third party". Debts due or accruing due after that date would not be captured and would require a fresh ITPDO (as indeed happened in this case).

34. As touched upon in paragraph 3 above, the ICH is a clearing house enabling members to net off liabilities between each other. It is governed by a Manual of Regulations and Procedures. Members of the ICH swop rights of action against each other for rights of action against the Clearing House "for balances in their favour resulting from a Clearance and collected by the Clearing House from debtor Members"; see Regulation 9. In order to carry out that function, the Regulations establish a "Clearance Calendar" containing 4 cycles per calendar month. Each cycle contains a date upon which clearance is commenced: "Clearance initialization". That date is then followed by (relevantly) "Closure Day", "Advice Day", "Protest Deadline" and "Call Day".

35. Each cycle begins by Members submitting items for Clearance. Clearance is then applied to all transactions received by the Clearing House up to and including Closure Day; see Regulation 26. That Clearance procedure includes provision for "Protests of Improper Billings". These have to be received by the Clearing House by the relevant Protest Deadline Date (in this case that date was 28 April 2021) and are then "acted upon by the Clearing House"; see Regulation 22. Regulations 27, 28(a), 30 and 39 are in these terms:

> "27. Final balances due to or by Members resulting from a Clearance will be made available to Members following Closure Day as set out in the Clearance Calendar (Advice Day) and as more fully set out in the Procedures.
>
> 28. (a) Debtor Members shall remit their balances without beneficiary deductions by electronic wire transfer direct to the bank designated from time to time by the Director General, to be available for the account of the Clearing House in useable funds within the period following Closure Day as set out in the Clearance Calendar, the end of such period being Call Day. Transfers should be pre-ordered by debtor Members by close of business on the Protest Deadline for good value on Call Day. In the case of failure to comply on more than two occasions during the previous twelve Clearances, the Clearing House Manager may require a security deposit from such Member, such security deposit to be built up in instalments or otherwise, equal to three times the average prior debtor balances of such Member as recorded over the previous twelve Clearances. Any Airline Member or Associate Member who is unable to effect payment by Call Day shall so advise the Clearing House Manager in advance, giving the reason for the delay. The Call Day dates as set out in the Clearance Calendar take account of applicable banking holidays.
>
> 30. Forthwith after completion of debtor settlements, or on the first business day after Call Day (whichever is the earlier), the Clearing House shall remit balances to creditor Members of the Clearing House by electronic wire transfer to the bank accounts designated by the Members as set out in the Clearance Calendar. Remittances to Associate Members shall be on the day specified in the Clearance Calendar following receipt of remittance from the debtor Members.
>
> 39. The liability of the Clearing House to any Member arising from any Clearance is subject to payment of the balances due by debtor Members in any such Clearance and is limited to any balance in favour of creditor Members as the result of any such Clearance together with the net balance of any sum standing to the credit of such Member on Standing Deposit Account after deducting all amounts due from such Member to the Clearing House under these Regulations."

36. What is tolerably clear from these provisions is that IATA's liability is to pay over to Members the balances in their favour which have been collected in each Clearance cycle. As Ms de Bruyn submitted, ICH being a "netting off" service, it would be odd if IATA could be liable to make a payment to a Member before the deadline for making a Protest had expired and before the money to make that payment had hit its bank account. That, it seems to me, is why Regulation 28(a) stipulates that debtor Members should pre-order their transfers by close of business on the Protest Deadline for good value (i.e. payment) on Call Day. Call Day is the deadline for payment of the balances due by debtor Members and therefore the earliest date for remission of balances due to creditor members. Given the procedure for Protests, IATA could not possibly be liable to pay a creditor Member before the Protest Deadline had expired because until then it would not know how much it was obliged to pay.

37. I would therefore hold that the earliest date upon which the debt of US$23,956 was "due or accruing due" was 28 April 2021. It follows that the debt was not caught by the first ITPDO.

Taking the foregoing and all other relevant circumstances into account, should the court, exercising a judicial discretion, make a final third party debt order?

38. I have determined that there is a real risk of the third party having to pay the debt twice over and it is therefore clear that I should not make the order. In such circumstances, if this is a matter of discretion at all then the discretion can only be exercised one way. However, in case this matter should go further I will say that if I had considered that the debt was situate in this jurisdiction or if I had considered that there was no real risk of the third party having to pay twice then I would have made the TPDO final in respect of that sum of money in the ICCS which was accepted to be due and owing. Although this was a lot less than the total amount in the ICCS of US$430,793, subject to the issues of *situs* etc all those sums would be captured by one or other of the two TPDOs and I would have seen no reason not to exercise my discretion in favour of the claimants.

39. I invite counsel to agree an order reflecting the above.