Neutral Citation Number: [2025] EWHC 1262 (Comm)

Case No: CL-2024-000540

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

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

Date: 22/05/2025

Before :

THE HONOURABLE MR JUSTICE SAINI

- -

Between :

NOVA LEIPZIG SARL	**Claimant/ Respondent**
- and -	
GRAVITY FITNESS LIMITED	**Defendant/ Applicant**

- -
- -

Stephen Robins KC and **James Shaw** (instructed by **Greenberg Traurig LLP**) for the **Claimant/Respondent**
John Kimbell KC (instructed by **Irwin Mitchell LLP**) for the **Defendant/Applicant**

Hearing date: 15 May 2025

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Approved Judgment

This judgment was handed down at a remote hearing at 10am on Thursday 22 May 2025.

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THE HONOURABLE MR JUSTICE SAINI

Mr Justice Saini :

This judgment is in 7 main parts as follows:

I. Overview

1. The Claimant ("Nova") is incorporated in Luxembourg. Nova issued this claim on 23 September 2024 against the Defendant ("GFL"), a company incorporated in England and Wales. Nova's claim against GFL is made in debt and damages under a guarantee ("the Parent Guarantee") alleged to have been given by GFL to Nova in respect of the debts of its subsidiary, Gravity Fitness (Leipzig) Limited ("Gravity Leipzig"). This company was also incorporated in England and Wales but it has now been dissolved. By Application Notice dated 11 November 2024 ("the Application"), GFL seeks a stay of this claim under CPR 11(6)(d) on *forum non conveniens* ("FNC") grounds. GFL contends that the Halle Regional Court in Germany is an available forum which is clearly or distinctly more appropriate. After the proceedings before me were issued, GFL issued its own claim in that Court against Nova, although the claim has not yet been served on Nova in Luxembourg. Although not mentioned in the Application Notice, GFL also seeks a case management stay of the claim pending resolution of this German claim, in the event its FNC application does not succeed. When I use the term "Parent Guarantee" below it is merely a convenient way to refer to the signed version of Annex 9.6 and without prejudice to GFL's case that this was not a valid or binding instrument under German law.

2. Nova served the Claim Form on GFL in England (as of right) on 30 September 2024. This is therefore a 'service in' case. At the start of the hearing, the two principal questions for my decision were: (i) whether GFL has discharged the burden of showing that Germany is an *available* forum; and (ii) whether GFL has discharged the burden of satisfying the court that Germany is *clearly or distinctly more appropriate* than the English court. I will call these "the Available Forum Issue" and "the More Appropriate Forum Issue" issues, respectively. They are reflected in Rule 41(2) of *Dicey, Morris & Collins, The Conflict of Laws* (16th ed. 2025) *("Dicey")*.

3. Aside from the issue of the costs of arguing this point, the Available Forum Issue fell away at the start of the hearing because Mr John Kimbell KC, Leading Counsel for GFL, offered an undertaking by GFL (reduced at my request to a written form during the short adjournment) to take all necessary steps in accordance with Article 26 of the Brussels Recast Regulation No. 1215/2012 ("the Brussels Regulation") to unconditionally submit to the jurisdiction of any court in Germany in which Nova chooses to bring the claim it has asserted in the proceedings before me. I will call this "the Undertaking". A suggestion of such a form of undertaking first appeared in Mr Kimbell KC's skeleton argument served on Friday 9 May 2025, and it had not until that

time been mentioned, or offered to Nova, by those instructing him. That said, it is now common ground that the available forum requirement has been met: *Dicey* at §12.031. However, both parties addressed this point in some detail and I was asked by Mr Kimbell KC and Mr Robins KC, Leading Counsel for Nova, to address it because it may be relevant to costs issues. I will consider the Available Forum issue, albeit briefly, in **Section IV**.

4. The substantial dispute between the parties was in relation to the More Appropriate Forum Issue. It is common ground that German law governs all the relevant issues between the parties. The point most forcefully advanced by Mr Kimbell KC was that the relevant German law, as it applies in this case, is complex. In short, GFL's case is that under German law concerning suretyship, the Parent Guarantee is invalid, alternatively that it can be avoided under the doctrine of unilateral mistake. Mr Robins KC relied strongly on the fact that Nova has sued GFL in the place of its domicile, England and Wales, and that factor has, on the basis of recent case law, become a powerful and weighty factor in the balance in its favour. Mr Robins KC also argued that although it is common ground that German law applies, the English Court is well able to receive evidence of, and apply German law. This is however merely an overview of the main arguments, and Counsel relied in the normal way on a number of other connecting factors in support of their arguments as to whether England or Germany was the more appropriate forum.

II. Factual background

5. My narrative in this section is based on what I understood to be agreed by Counsel for the purposes of the Application and, in particular, for the purpose of identifying and characterising the issues in dispute. I have also taken the dates from Mr Kimbell KC's very helpful chronology.

6. GFL is an English company. Its registered office address is in Wakefield in West Yorkshire. Its directors are English. Two of its directors are Mr Paul Harvey Jenkinson ("Mr Jenkinson") (also the CEO) and Mr Michael Harrison ("Mr Harrison"), and they are both based in Yorkshire. GFL's parent company is also an English company. GFL was originally founded in 2014 as a trampoline park business but has broadened its activities to include go-karting tracks, mini-golf and arcade games in the UK and elsewhere.

7. During 2019, GFL incorporated an English subsidiary company, Gravity Leipzig (Mr Jenkinson and Mr Harrison also became directors of this company). The plan was for Gravity Leipzig as a SPV to lease premises in Leipzig and to either itself (or through franchising arrangements) run a trampoline park in Leipzig, Germany. Nova owns a shopping centre in Leipzig (the "Shopping Centre"). In or around September 2019, Nova agreed in principle to lease a large unit at the Shopping Centre to Gravity Leipzig. Heads of Terms dated 25 September 2019 were agreed between Nova and GFL before Gravity Leipzig was incorporated.

8. From the outset, Nova made clear that GFL would have to provide a guarantee of the proposed subsidiary SPV's obligations. So, the Heads of Terms recorded: "*The Parent Company will provide a Parent Guarantee for 4 years from the date of the Lease*". Nova and GFL each retained German lawyers to draw up their agreement. Nova instructed Wencke Bäsler ("Ms Bäsler") of Greenberg Traurig Germany LLP, and GFL

instructed Dr Klaus Jankowski of SKW Scharwz ("Dr Jankowski"). Ms Bäsler and Dr Jankowski are fluent in English, and the emails I was taken to show that they generally communicated with each other in English (in particular when copying the emails to their respective clients from whom they took instructions). They also however communicated from time to time in German. They have each provided a number of witness statements in relation to the Application.

9. Pradera Limited ("Pradera") is an international retail property investment fund and asset management business which was involved in the transaction. Barry Cox ("Mr Cox") of Pradera, who liaised with GFL on behalf of Nova, explained to Ms Bäsler and Dr Jankowski on 20 February 2020: "*To reiterate, the intention is to review and negotiate the commercial terms in English…*".

10. Ms Bäsler and Dr Jankowski drew up the lease ("the Lease"), which expressly required Gravity Leipzig to provide a guarantee from GFL. So, Clause 9.6 of Lease was in the following terms:

> "In addition, the Tenant shall procure that Gravity Fitness Limited, Colorado Way, Castleford, England WF10 4TA, Company number 08880970 ('Parent'), which is the sole ultimate shareholder of the Tenant, provides a guarantee (Bürgschaft) limited in time for the first 7 years of the Fixed Lease Term of the lease according to the sample attached as Annex 9.6 according to which the Parent shall be liable for all obligations of the Tenant under the Lease Agreement".

11. The Lease is expressly governed by German law. Ms Bäsler and Dr Jankowski also drew up the form of the Parent Guarantee, which was to be annexed to the Lease, as Annex 9.6. By 29 July 2020 this was in its final approved form (as Dr Jankowski confirmed to Ms Bäsler in an email of that date). The Parent Guarantee is expressly governed by German law but it does not include any jurisdiction clause (whether exclusive or non-exclusive).

12. On 26 August 2020, Ms Bäsler sent the electronic execution copy of the Lease to Dr Jankowski. She explained in her email that she was also sending (among other things) the final version of Annex 9.6 (the Parent Guarantee). She copied her email to various individuals including Mr Jenkinson and Mr Cox.

13. On 27 August 2020, Ms Bäsler told Dr Jankowski that her firm had prepared hard copy execution versions. Dr Jankowski asked for the hard copies to be sent to the home address of Mr Jenkinson in Pocklington, East Yorkshire. Again the email exchanges were copied to various people including Mr Jenkinson and Mr Cox. Ms Bäsler complied with Dr Jankowski's request and, in due course, the hard copies arrived at Mr Jenkinson's home in England.

14. Mr Jenkinson and Mr Harrison signed the Lease. They also signed the Parent Guarantee in Annex 9.6 of the Lease. Mr Jenkinson sent the signed documents to Nova. Annex 9.6 provided (insofar as presently material) as follows:

Anlage 9.6 zum Mietvertrag zwischen Nova Leipzig S.à r.l. and Gravity Fitness (Leipzig) Limited – Muster Patronatserklärung

MIETBÜRGSCHAFT	LEASE GUARANTEE
Nova Leipzig S.à r.l.	Nova Leipzig S.à r.l.
– nachstehend **"Vermieter"** genannt –	– hereinafter referred to as **"Landlord"** –
hat mit	concluded a lease agreement with
Gravity Fitness (Leipzig) Limited	**Gravity Fitness (Leipzig) Limited**
– nachstehend **"Mieter"** genannt –	– hereinafter referred to as **"Tenant"** –
am [*Datum*] einen Mietvertrag über Mieträume im Objekt [●] abgeschlossen (nachstehend **"Mietvertrag"** genannt).	on [*date*] regarding leased premises at [●] (hereinafter referred to as **"Lease Agreement"**).
Gemäß Ziffer 9.6 des Mietvertrages ist der Mieter verpflichtet, dem Vermieter als Sicherheit für die Erfüllung aller Verpflichtungen aus dem gesamten Mietvertrag eine selbstschuldnerische, unwiderrufliche und unbefristete Bürgschaft zu stellen.	Pursuant to section 9.6 of the Lease Agreement, the Tenant is obliged to grant the Landlord an absolute, irrevocable and indefinite guarantee as security for the fulfilment of all obligations arising from the Lease Agreement.
Dies vorausgeschickt, übernehmen wir,	Now, therefore, we
Gravity Fitness Limited, Colorado Way, Castleford, England, WF10 4TA, Registernummer 08880970	**Gravity Fitness Limited**, Colorado Way, Castleford, England, WF10 4TA, Registernummer 08880970
als alleinige Gesellschafterin des Mieters gegenüber dem Vermieter die unbefristete, unbedingte, unwiderrufliche selbstschuldnerische Bürgschaft für die Erfüllung aller Verpflichtungen des Mieters aus dem vorgenannten Mietvertrag in unbegrenzter Höhe.	as sole shareholder of the Tenant herewith assume towards the Landlord the indefinite, unconditional, irrevocable and absolute guarantee in an unlimited amount for the fulfilment of all obligations of the Tenant under the aforementioned Lease Agreement.
Wir verzichten auf die Einreden der Anfechtbarkeit, Aufrechenbarkeit sowie der Vorausklage und Vorausbefriedigung (§§ 770 Abs. 2, 771, 772 BGB).	We hereby waive the defences of voidability (*Einrede der Anfechtbarkeit*), set-off (*Einrede der Aufrechenbarkeit*) as well as of failure to pursue remedies (*Vorausklage*) and advance payments (*Vorausbefriedigung*) (sections 770, para. 2, 771, 772 of the German Civil Code (*BGB*)).

15. The trampoline park business (called *Gravity Leipzig)* in the Shopping Centre opened in June 2021 but was not a success. Gravity Leipzig failed to pay sums due under the Lease, and Nova sent a letter of demand under the Parent Guarantee to GFL on 28 February 2023. Thereafter, GFL made a series of part-payments to Nova on 8 March 2023, 4 April 2023, 9 May 2023 and 14 June 2023. Payments then stopped. In January 2024, *Gravity Leipzig* closed and Gravity Leipzig entered an insolvency process.

16. GFL again engaged Dr Jankowski. He sent a letter to Ms. Bäsler stating that he was not aware of any guarantee being issued by GFL. Ms. Bäsler responded by saying that the Parent Guarantee had been signed within and formed part of the Lease itself. In response, Dr Jankowski sent an email saying that the signatures to the Annex 9.6 applied by Mr Harrison and Mr Jenkinson were obviously applied in error and not on behalf of GFL. He formally invoked the German law doctrine of avoidance for error

(*Anfechtung wegen eines Irrtum*) under section 119the BGB (German Civil Code), and the lack of intention to be bound (*keine rechtsgeshäftliche Erklärungswille*). Mr Jenkinson says in his witness statement that he did not mean to sign the Parent Guarantee and did so accidentally. There is no evidence from Mr Harrison as to what was in his mind when he signed.

17. Dr Jankowski's evidence is that he was surprised to discover what he calls "the alleged guarantee" had been signed. He explains that by the time the Lease was signed, it was his belief that his clients would come back to him in due course and ask him to assist with the preparation of the "parent guarantee". He says that the preparations for the taking-over of the premises and the commencement of the construction and outfitting works brought new challenges and distracted him from the guarantee issue. His evidence is that Annex 9.6 was prepared as a "specimen document" and it was intended that the text of Annex 9.6 was to be copied into a separate document to be completed with the following details: the date of the Lease (which would be known only after the return of the Lease with the signing date set by Nova); details of the Nova shopping centre (which Annex 9.6 left blank); the place and date of signing; and the names of the signatories in block letters.

18. GFL's case is essentially that the obligation to provide a guarantee had been overlooked and that Annexes 9.1 and 9.6 which were signed by Mr Jenkinson and Mr Harrison should not have been signed because they were merely "templates" to be used in the later preparation of a future binding guarantee. I emphasise however that there is no issue that Gravity Leipzig was under German law obliged to procure guarantee.

19. There was correspondence between the parties which failed to reach a resolution and the present claim was issued by Nova in the Commercial Court on 23 September 2024. GFL issued the Application seeking a stay of this claim on 11 November 2024.

20. On 20 December 2024, GFL issued a German Claim Form at the Halle Regional Court (the court local to the Shopping Centre) seeking a declaration that Annex 9.6 of the Lease does not give Nova any rights against GFL. It asked, through its lawyers, that Nova accept electronic service. It refused. At the hearing, Mr Kimbell KC informed me that GFL are in the process of serving Nova in Luxembourg.

III. German law

21. At this stage it is convenient to summarise why GFL says the Parent Guarantee is invalid as a matter of German law. The Application is supported by an expert report dated 20 November 2024 ("the Report") from Professor Stefan Vogenauer M.Jur (Oxon) FBA ("Prof. Vogenauer"). Prof. Vogenauer is a distinguished academic and a former Professor of Comparative Law at Oxford University. He is now a Professor at the Max Plank Institute in Frankfurt. Prof. Vogenauer is also a fully trained German lawyer (*Befähigung zum Richteramt*) with qualifications to sit as a judge (*Befähigung zum Richteramt*).

22. Prof. Vogenauer describes the approach of German law to issues of contract formation, suretyship and mistake. I will consider the Report in more detail below but for present purposes, and by way of high level summary, his evidence is that it is "highly likely" that a German Court would find that Annex 9.6 does not constitute a valid contract of suretyship because GFL did not intend to be legally bound and even if it was, GFL can

successfully have it declared void on the basis of unilateral mistake**.** His opinion is also that the dispute raises a number of difficult issues of German law, and a number of follow up questions of substantive law might arise during trial, depending on what the evidence reveals. Prof Vogenauer explains that the German doctrine of mistake in particular, differs from the position under English law; and the German courts would admit evidence that would not normally be admissible in the courts of England and Wales.

23. Nova has not served its own evidence of German law, and Mr Kimbell KC submitted that it has not challenged the conclusions or analysis of Prof Vogenauer in any material respect. For his part, Mr Robins KC agreed that there does not appear to be any real dispute in respect of the applicable principles of German law.

IV. Legal principles

24. Although a substantial number of cases were referred to in the written submissions, and the authorities bundle contained more than 1000 pages of case law and other materials, I consider I do not need to venture further than relying on the authoritative statement of the governing principles as set out by Popplewell LJ in Limbu v Dyson Technology Ltd [2024] EWCA Civ 1564 ("Limbu"). The Master of the Rolls and Warby LJ agreed with Popplewell LJ's judgment.

25. There are two key questions. First, GFL has to discharge the burden on the Available Forum Issue. This is a condition precedent. Absent satisfaction of it the second question does not arise. But, as I have recorded above, the issue has fallen away following the provision of the Undertaking. Second, GFL must discharge the burden on the More Appropriate Forum Issue. The "more appropriate" forum is the forum "in which the case may be tried more suitably for the interests of all the parties and the ends of justice": see Limbu at [22]. Under well-established principles, in determining the appropriateness of the forum, the court will look at "connecting factors" to determine with which forum the action has the most real and substantial connection. I note for completeness that this is not a case where it was argued that if Germany is more appropriate than England, justice none the less requires the issues are tried in England: see Limbu at [23].

26. Before turning to the two issues, I should record that in relation to characterisation of the dispute which arises, it is common ground that the issue is whether the signed version of Annex 9.6 in the Lease constitutes a valid contract of suretyship under German law and, if it was valid, can it nevertheless be avoided for mistake under German law.

V. The Available Forum Issue

27. I will consider this issue briefly because it has become academic. Before the Undertaking was produced, Mr Kimbell KC's case, relying only on Dr Jankowski's evidence, was in three parts. I note that Prof. Vogenauer in his Report makes clear that he is not commenting on any questions of jurisdiction.

28. First, Mr Kimbell KC relied on Article 24 of the Brussels Regulation:

> "The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:
>
> (1) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated".

29. However, I consider Mr Robins KC is right to argue that Article 24 does not assist. An action will not fall within this provision unless it is "based on, as opposed to having a link or connection with, rights in rem or a tenancy". see Jarrett v Barclays Bank plc [1999] QB 1 per Morritt LJ at 16G-H (considering Article 16 of the Brussels Convention which was in the same terms as Article 24 of the Brussels Regulation). In my judgment, in the present case, Nova is not bringing any claim against GFL on the Lease between Nova and Gravity Leipzig. GFL is not a party to the Lease. Rather, Nova is bringing a claim against GFL under the Parent Guarantee. The claim against GFL is a claim against a surety under a separate agreement. The claim is plainly not an action which seeks to "… determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein…": see Reichert v Dresdner Bank (Case C-115/88) [1990] E.C.R. 1-27, cited in Jarrett at 16A.

30. In my judgment, in order to bring itself within Article 24, GFL has to mischaracterise the nature of the dispute. I note that Dr Jankowski says that this is "*a dispute not over a guarantee but over a lease agreement*" and that it "*relates to the construction of the lease agreement*". I do not agree. GFL is not a party to the Lease and there is no dispute about the Lease. Nova's claim against GFL is a claim under the Parent Guarantee.

31. I turn to the second way in which GFL's case was put. Although EU law would prevail in German Courts on issues of jurisdiction (as it did in our courts pre-BREXIT), Mr Kimbell KC's second argument relied on section 29a of the German Civil Procedure Code (the "ZPO"):

> "For disputes concerning claims under tenancy or lease relationships regarding spaces, or disputes regarding the existence of such relationships, the court in the jurisdiction of which the spaces are situate shall have exclusive competence".

32. Again, I do not consider section 29a of the ZPO assists GFL:

(1) Section 29a applies to disputes "*concerning claims under tenancy or lease relationships … or disputes regarding the existence of such relationships*".
(2) But Nova's claim against GFL is plainly not such a dispute. I repeat, GFL was not a party to the Lease. There has never been a landlord-tenant relationship between Nova and GFL.
(3) Rather, Nova's claim against GFL is a claim under a separate guarantee. The relevant relationship is the creditor-debtor relationship between Nova and GFL pursuant to that guarantee. A claim under the guarantee does not fall within section 29a.

33. As Ms Bäsler explains in her witness statement, and as I accept, the German courts "have decided that claims made pursuant to a guarantee relating to obligations under a lease ('rental guarantees') do not constitute 'claims from the lease agreement' within

the meaning of this jurisdiction rule, because the claims from the guarantee are based on an independent legal agreement, i.e. the rental guarantee itself". In support of this, I was taken to the decision of the German Federal Court of Justice ("the BGH") dated 16 December 2003, in which the BGH held that the claims of the landlord based on an independent guarantee against a third party who was not a party to the lease were not covered by section 29a of the ZPO.

34. I note that Dr Jankowski accepts that section 29a "*does not cover claims of the landlord under an independent warranty, guarantee or surety agreement against a third party who is not a party to a rental or lease agreement for premises*". Mr Kimbell KC relied strongly on a decision of the Bavarian Supreme Court dated 19 November 2019, but as I read that case it merely confirms the correctness of what Ms Bäsler has said. I note that the "headnote" states: "*Third parties are included in the scope of application of Section 29a ZPO if they are obliged under the tenancy agreement and not under an independent contract relating to the tenancy*". In that case, there was no separate guarantee. The tenant was a partnership. The partners were directly liable to the landlord under the lease: see paragraph 10b of the decision.

35. Mr Kimbell KC's third way of putting the case was only in the written arguments (and was not made orally). It relied on Section 29 of the ZPO:

> "For any disputes arising from a contractual relationship and disputes regarding its existence, the court of that location shall have jurisdiction at which the obligation is to be performed that is at issue".

36. This argument was not ultimately pursued by Mr Kimbell KC but I consider that it would have failed when one considers the relevant German case law. In the BGH's decision of 21 November 1996 it was held that "*the payment obligation of a guarantor … is to be fulfilled at the guarantor's place of residence*". In the decision of the Higher Regional Court of Bavaria dated 13 June 2023 it was held that "*the place of performance of the guarantee obligation is generally the place of residence (or registered office) of the guarantor at the time the obligation arises*". In this case the place is Yorkshire.

37. It follows from my brief reasons above, that if it had been necessary for me decide the Available Forum Issue, I would have held that GFL has failed to discharge the burden. It was common ground that nothing I have said can affect the decision the Halle Regional Court may make in due course if its jurisdiction is challenged.

38. For completeness, I should also record that Mr Kimbell KC gave a further undertaking that his clients would submit to jurisdiction were Nova to bring a counterclaim in the Halle Regional Court. There was an evidential dispute between the parties as to whether this argument (and some late served evidence) could be relied upon by GFL, but I do not need to resolve it given the Available Forum Issue has been resolved in another way. I turn then to the main issue in dispute.

VI. The More Appropriate Forum Issue

39. GFL has to discharge the burden of showing that the German court is clearly or distinctly more appropriate than the English court for the trial of Nova's claim against

GFL under the Parent Guarantee. This requires the court to look at the connecting factors to determine with which forum the action has the most real and substantial connection. Each side took the relevant points in a different order and indeed as I said in argument some of the points seemed to me not to be connecting factors at all, but general points about matters such as costs, speed and prejudice which do not go to the issue of real and substantial connection. In order to keep this judgment within a reasonable length I will not set out all of the submissions but will generally proceed straight to my conclusions. I turn to the connecting factors relied upon.

(1) GFL is incorporated in England

40. In my judgment, this is a connecting factor of substantial significance in Nova's favour. I start by noting that I was taken to cases which pre-date Limbu, in which it had been suggested (but not always clearly) that the defendant's incorporation in England and Wales had a limited function in the FNC debate; and that it served only to place the burden on the defendant, rather than on the claimant, but had no further relevance and so should not form part of the court's analysis of the connecting factors. These cases included Performing Right Society Ltd v Qatar Airways Group QCSC [2020] EWHC 1872 (Ch), [2021] FSR 8 at [36]; Al Assam v Tsouvelekakis [2022] EWHC 451 (Ch) at [38]; and Nokia Technologies Oy v Oneplus Technology (Shenzen) Co Ltd [2022] EWCA Civ 947; [2023] FSR 11 ("Nokia") at [52].

41. Mr Kimbell KC accepted however that I was bound by the approach mandated by the Court of Appeal in Limbu where the position has been clarified. The Court of Appeal held that the defendant's incorporation in England does not merely result in the burden being placed on the defendant. So, Popplewell LJ explained at [34] (with my underlined emphasis):

> "I would accept … that the Judge failed to take any account of the important connecting feature that D1 and D2 are domiciled in England and have been served here as of right. The domicile of the parties was not one of the Judge's headings and did not feature in his conclusory paragraphs. It is, however, an important factor. The reason it is an important connecting factor in relation to jurisdiction is because presence here is the basis for establishing the court's jurisdiction, and domicile here connotes a degree of permanence and allegiance to the country's institutions, including its courts, which means that the party can reasonably expect, and be expected, to meet claims against it in such courts in the absence of sufficient countervailing factors. That is why within the EU domicile remains the foundational factor for allocating jurisdiction in civil and commercial matters, subject to derogations. The importance of presence or domicile is at the heart of the difference in the burden of proof between service in and service out cases. In the latter case the assertion of jurisdiction is prima facie 'exorbitant', whereas in the latter it is prima facie 'as of right'. That is why, as Lord Goff emphasised in Spiliada at pp. 476F, 477E, the burden in a service in case is on the defendant to point to a distinctly and clearly more appropriate forum, because the advantage to a claimant of

> pursuing a defendant in his place of domicile will not lightly be *disturbed*." (emphasis added)

42. Mr Kimbell KC fairly and properly accepted this was part of the ratio of Limbu. As I see the position, the fact of the defendant's domicile in England performs two jobs in an FNC application:

    (1) First, it serves to impose the burden of showing that the foreign court is clearly or distinctly the more appropriate forum than the English court on the defendant. Earlier case law suggested that the force of English domicile of the defendant was effectively "spent" once it had done the job of allocating burdens; and
    (2) The second job it performs, as clarified by Limbu, is that it enters the overall analysis of the more appropriate forum as a powerful connecting factor in favour of the proceedings remaining in England, given that it is the place the defendant should normally be expected to meet claims.

43. In the present case, GFL is incorporated in England. As noted above, its registered office is in Wakefield in West Yorkshire. Further, Mr Robins KC was right to argue that England is no mere 'flag of convenience'. To the contrary, GFL is based in and run from England in a very real and substantial sense. Its shareholders are English. Its directors are resident in England. It owns and/or operates trampolining parks and/or leisure facilities in London (Stratford and Wandsworth), Kent (Dartford and Maidstone), Buckinghamshire (Milton Keynes), Northamptonshire (Northampton and Corby), Yorkshire (Leeds, Hull and Castleford), Norfolk (Norwich) and the North West (Liverpool and Warrington). Its bank is located in England. It holds substantial assets in England.

44. Absent some strong countervailing factors, I approach the FNC issue on the basis that GFL is to be expected to meet claims made against it in England and Wales, its home jurisdiction. I turn next to Mr Kimbell KC's strongest countervailing factor, the fact that the claims are governed by German law.

(2) German law applies

45. I was taken by Mr Kimbell KC to *Dicey at* §12.034 and *Briggs*, Civil Jurisdiction and Judgments (7th ed. 2021) at pp. 423 – 424. I accept that if the legal issues are complex, or the competing legal systems very different, there is a working rule (but no more than a working rule), based on the commonsense principle that a court generally applies its own law more reliably than does a foreign court. That may help to point to the more appropriate forum, whether English or foreign. Mr Kimbell KC's case was that the German law issues are at the very heart of the dispute and the German law issues are complex. He relied on the unchallenged evidence of Prof. Vogenauer that the dispute gives rise to "difficult issues of German law" (Report at §93). Mr Kimbell KC submitted that this is not surprising as the issues between the parties are at the intersection of real property, suretyship law and the law of mistake. He argued that the relevant German law is substantially different to English law; that German law adopts a fundamentally "subjective" approach to contract formation and suretyship; that the doctrine of mistake is much broader than in England **(**in particular, a unilateral mistake may make a contract voidable); and that a German court would take into account a much broader range of evidence in relation to the interpretation and validity of the Parent Guarantee (including the negotiations and the subjective intentions of the

parties). I refer to the Report at §§44-45**.** Mr Kimbell KC persuasively argued that a German court would be in a far better position to assess this broader range of evidence. It was also said that there is a real risk that follow up issues of substantive law might arise during trial as the evidence emerges. Emphasis was placed in particular by Mr Kimbell KC on the fact that the Lease and the Parent Guarantee contain express German law choice of law clauses.

46. Having considered Prof. Vogenauer's clear and well-structured Report, I was not persuaded on two points which are the focus of GFL's case in relation to the importance of German law in this claim: (1) first, that in relation to contract formation and interpretation, the relevant German law principles are in fact that different to English law; and (2) second, that the issues which arise were of such complexity that a judge of the Commercial Court would not be able deal with them in an optimal fashion. I will briefly deal with each of these matters.

47. As to the first point (German contract law is very different), the following was said in the Report by Prof. Vogenauer (with my underlined emphasis):

> "40. German law adopts a prima facie subjective approach to the formation of contract. It requires an agreement of the parties which amounts to a 'meeting of the minds'. As opposed to English law, where the test for the existence of a sufficient agreement is objective (what would a reasonable person have concluded that the parties had agreed with each other, based on the outward signs of their words and conduct?), the German test is subjective. It inquires what the parties actually intended and whether these intentions aligned.
>
> 41. However, the subjective approach under German law is strongly objectivized: the evidence of what the parties subjectively intended will usually be based mostly on what the parties said or did at the time of, before or after the making of the agreement. As a consequence, a German court assessing whether a (subjective) agreement has been reached will almost inevitably have to rely on the same 'objective' factors that would be considered by an English court (statements and conduct). The test under German law is indeed labeled the *objektiver Empfängerhorizont*, ie the understanding that a reasonable addressee of a statement (eg an offeree) must have had. This understanding is usually based not on the *real*, but on the *hypothetical* intentions of the parties.
>
> 42. The assessment of whether the parties have reached a contractual agreement under German law is therefore, in practice, very similar to the same exercise under English law. In theory, there is a major difference: the German court may also take evidence of subjective intentions of one of the parties that may have differed from what the other party might have reasonably understood (see above, para 32). These intentions, however, do not prevent the contract from coming into existence: the contract will then be made with the content that the other

> party could have reasonably understood the first party to have intended (test of the *objektiver Empfängerhorizont*).
>
> 43. Yet, in such a scenario, the subjective intentions of the first party may be relevant in order to assess whether the contract is voidable for mistake. This is the most important practical consequence of the subjective approach to German contract law. As a result, the doctrine of mistake in Germany is much broader than in England. It allows for the relevance of a unilateral mistake as to the terms or the subject-matter of the contract. Such mistakes make the contract voidable (sections 119 and 142(1) BGB)."

48. It appears therefore that in relation to formation and interpretation of contracts, German law adopts a strikingly similar approach to the common law. Mr Robins KC's junior, Mr Shaw, is to be credited in identifying through some assiduous research in advance of the hearing that Prof. Vogenauer's description of the German law approach in this regard bears a strong resemblance to Lord Steyn's summary of the English law position: see Sirius International Insurance Co (Publ) v FAI General Insurance Ltd and others [2004] 1 WLR 3251 (HL) at [18] in particular. The *objektiver Empfängerhorizont* test does not seem to me to be so different to our approach. I accept however that the German law governing unilateral mistake appears different to our law of mistake.

49. As to the second point (complexity), as I said to Mr Kimbell KC during the hearing, and which he accepted as accurate, the position seemed to me that the *content* of the relevant German law was not in dispute. So, unlike some cases where what is said to be the law is contested, the real battle in this case is the *application* of what appear to be undisputed legal principles of German law against a narrow factual background surrounding the signature of the Parent Guarantee. Had the content of German law been contested, I am confident Prof. Vogenauer would have said this in his Report given his duties of independence. So, unlike some cases involving foreign law where the experts cannot even agree on what the foreign law is (let alone how it applies) this is a more straightforward case.

50. Although the facts were different, in Limbu it was observed at [71] that a foreign governing law will have "*little significance*" if and to the extent that the content of the relevant foreign law is undisputed or if the disputes between the parties about the content of the relevant foreign law are "*relatively narrow*".

51. Mr Robins KC argued, with some justification, that GFL's arguments on occasion wrongly elevate the German governing law clause to bestow it with the same function as a German exclusive jurisdiction clause, i.e. to ensure that any disputes are decided in Germany. However, the Parent Guarantee does not contain any exclusive (or even non-exclusive) jurisdiction clause in favour of Germany. The parties' agreement not to include any jurisdiction clause in favour of Germany should be respected and given effect. The fact that they chose German governing law does not indicate that they wished to ensure that any disputes would be decided in Germany.

52. For these reasons, I do not consider the fact that German law governs the dispute to be a substantial factor in GFL's favour. Our courts regularly deal with the application of foreign law with the claimed complexity of the German law principles said to be

applicable in this case. Indeed, the range of case law cited to me including recent decisions of this court applying German law show that much more complex applications of foreign law are regularly undertaken. See, for a relatively recent example, the decision of Cockerill J in Jaffe v GreyBull Capital LLP [2024] EWHC 2534 (Comm), a case which was concerned, in part, with disputed issues in relation to the German law about causation in a fraudulent misrepresentation case; and in which Cockerill J had to analyse a number of BGH decisions: see [310].

(3) Where will GFL's defence be coordinated and conducted from?

53. This factor was relied upon by Mr Robins KC and I agree it is in favour of Nova. In Limbu it was concluded that the judge had "erroneously failed to have any regard to the uncontested fact that the defendants' defence of the claims would be coordinated and conducted from England by English employees and officers of D1 and D2". Popplewell LJ explained at [47]: "The fact that litigation will be coordinated and conducted from one of the two rival fora, irrespective of the forum in which the litigation takes place, is a significant connecting factor with that forum". This is not just a matter of practical convenience: ibid, [47], [69]. Rather, it is a "significant connecting factor".

54. In the present case, it is common ground that GFL is managed and controlled from England. That includes its management and control of the litigation. The individuals who give instructions to GFL's solicitors are the directors of GFL who all live in England.

(4) Where will Nova's claim be coordinated and conducted from?

55. I am satisfied that the evidence shows that Nova's claim against GFL will be coordinated and conducted from England. It is not in dispute that the relevant people who work for the joint owners of Nova (Ares and Alterx) are based in London. The two individuals providing instructions in respect of these proceedings on behalf of Ares (Janine Schumann) and Alterx (James Smith) are also based in London.

(*5) Does the cause of action have significant connections with England?*

56. As explained in Limbu at [37]-[40], the relationship between the cause of action and England is relevant. In the present case, the claim is contractual. The two individuals who signed the Parent Guarantee are directors of GFL, who are resident in England and who were physically located in England when they signed that document. As explained above, GFL's defence under German law relates to the state of mind of those two individuals at the time when they signed the Parent Guarantee. At its heart, therefore, this case involves a dispute about an act which occurred in England and the mental state of the two individuals who carried out that act in England. In my judgment, such circumstances amount to a clear and significant connection with England.

(6) Location and languages of witnesses

(i) Mr Jenkinson and Mr Harrison

57. On GFL's side the key witnesses are Mr Jenkinson and Mr Harrison. In light of GFL's claimed defence, a key issue in the case relates to their states of mind at the time when they signed the guarantee. Mr Jenkinson and Mr Harrison both speak English and will

be giving their evidence in English. There is no evidence to suggest that either of them is fluent in German.

58. Given the importance of assessing their subjective states of mind, there is force in Mr Robins KC's argument that it may be necessary for significant parts of the trial to take place in the English language before a trial judge who is fluent in English and who can assess the subtlety and nuance of their oral evidence at trial. I consider that a trial in Germany, conducted in the German language, with evidence being given by Mr Jenkinson and Mr Harrison through interpreters, would be far from ideal.

59. I note that in its evidence GFL contended that it would be "*not at all convenient*" for Mr Jenkinson and Mr Harrison to travel from Yorkshire to London. Perhaps not the strongest point given that these directors would, on GFL's own case, need to travel to Halle, Germany to give evidence.

(ii) Nova's factual witnesses

60. In his Report, Prof Vogenauer explains that what Nova reasonably understood may be relevant and therefore Nova's witnesses' evidence is also of some significance. Nova's factual witnesses are all based in England. They will give evidence in English.

(iii) Ms Bäsler and Dr Jankowski

61. As I have explained above, the parties' German lawyers, Ms Bäsler and Dr Jankowski, handled the drawing up of the parties' agreements. Whilst they are resident in Germany, it will be very easy for them to travel to London. They are both fluent in English and will have no difficulty in giving evidence in English at the trial. Further, it appears to me that Ms Bäsler and Dr Jankowski are less important factual witnesses than Mr Jenkinson and Mr Harrison, because Ms Bäsler and Dr Jankowski did not sign the Parent Guarantee and their subjective intentions are therefore not centre stage. The evidence before me suggests that they were both acting on instructions given by lay clients physically located in England.

Overall assessment of location and language of witnesses

62. GFL argues that both the location and "*mother tongue*" of the witnesses are factors which are "*evenly split*" between England and Germany. Mr Robins KC was right to challenge this. First, the two most important witnesses (Mr Jenkinson and Mr Harrison) are based in England. Secondly, the "*mother tongue*" of the witnesses is a red herring. The key fact is that they all speak fluent English whilst only three of them speak fluent German. A trial in Germany would involve potentially as many as five factual witnesses giving evidence through interpreters. Thirdly, the comment about the witnesses being "*evenly split*" ignores Nova's witnesses. The reality is that there are six potential factual witnesses in England and only two in Germany.

(7) Location and language of documents

63. It is common ground that the documents are in electronic form and that the location of the documents is therefore not a factor which carries any weight. GFL seeks to rely on the fact that the Lease is a bilingual document which states in clause 30.8 that the German text prevails over the English text. But the key document is the Parent

Guarantee, not the Lease. Further, whilst the Parent Guarantee is also a bilingual document, it does not provide that the German wording prevails over the English wording. Significantly, the Parent Guarantee contains nothing equivalent to clause 30.8 of the Lease. The pre-contractual negotiations were conducted in English. In circumstances where German law requires the court to consider the subjective intentions of the parties, the fact that the negotiations took place in English is material.

64. The language of the documents is not a factor that enables GFL to say that Germany is clearly or distinctly the more appropriate forum for the trial.

VI. Conclusion on FNC

65. Drawing the threads together, in my judgment, this is not a close case. GFL has not discharged the burden on the More Appropriate Forum Issue. Mr Kimbell KC's best point, the applicability of German law, is not sufficient to persuade me that Germany is the forum in which the case may be tried more suitably than England for the interests of all the parties and the interests of justice.

66. For completeness, I should record that in the written arguments for GFL reliance was placed on a number of other matters which did not appear to me to be relevant as connecting factors. They included the fact that some months after this claim was issued by Nova GFL issued its own claim in Halle (which is not relevant, see Nokia at [53]); cost and speed with which cases are dealt with in Germany and England; and a claimed lack of prejudice to Nova. Taken together, these points do not in my judgment assist in displacing England as the appropriate forum.

VII. Case Management Stay

67. In the alternative to its principal application, GFL seeks a case management stay pending the German court's decision in its own claim in Halle. This basis for a stay was not referred to in the Application Notice and Mr Kimbell KC expressed surprise that it had been omitted. But Nova takes no point on this and was content for the point to be advanced. I was referred to Reichhold Norway ASA v Goldman Sachs International [2000] 1 WLR 173 and Athena Capital Fund SICAV-FIS SCA v Secretariat of State for the Holy See [2022] EWCA Civ 1051, [2022] 1 WLR 4570. The general principle is summarised in *Dicey* at §12-018.

68. I can deal with this issue shortly. In my judgment, it cannot be in the interests of justice to stay the case on case management grounds pending a judgment in Germany when I have concluded Germany is not the more appropriate forum. Precisely the same point was rejected by the Court of Appeal in Nokia, in which OPPO had responded to the proceedings in England by commencing rival proceedings in China. Arnold LJ explained at [78]: "The reality is that OPPO are not concerned to save time or legal costs, they just want the … issues to be determined in the forum of their choice having commenced duplicative proceedings there after the commencement of the present claim. That is not a good reason for a case management stay". The same applies here.

69. Mr Kimbell KC argued that the German proceedings in the Halle Regional Court would continue and there would be a risk of irreconcilable judgments if the same issues were determined in the Commercial Court. I was not persuaded by that submission. There may well in due course be irreconcilable judgments but that does not on the facts before

me justify a case management stay as being in the interests of justice. What matters to my mind is that GFL, an English registered holding company, served as of right in its home jurisdiction in respect of a claim made under a Parent Guarantee given in support of its own English registered subsidiary company, will be bound by the outcome of the proceedings in the Commercial Court, whatever happens in the Halle Regional Court. Overall, I am not impressed by a submission that because there is a risk of irreconcilable judgments, this court should await the decision in Germany. That risk comes with the territory when the English court retains jurisdiction and a defendant nevertheless insists on starting, and continuing to judgment, proceedings in another jurisdiction.

70. The Application is dismissed.