CA on appeal from QBD High Court (HHJ Jack QC) before Phillips LJ; Waller LJ. Chadwick LJ. 30th September 1996.

LORD JUSTICE CHADWICK:
On 31 May 1996 the Arbitral Tribunal of the Zurich Chamber of Commerce made an award of US$19,543,003 on a claim brought by Soinco SACI ("Soinco") and Eural KFT ("Eural") against Novokuznetsk Aluminium Plant ("NKAP"), an enterprise established in the Russian Federation. On 30 September 1996 Rix J gave leave, pursuant to Section 3(1)(a) of the Arbitration Act 1975, to enforce that award and to enter judgment. Judgment was entered by Soinco and Eural (together "the claimants") against NKAP on 6 January 1997 in the amount of US$10,476,379 (with interests and costs), the balance having been satisfied by way of set off.

In the meantime, on 20 December 1996, Langley J had made a garnishee order *nisi* attaching all debts owed to NKAP by a Guernsey company, Base Metal Trading Limited ("BMTG"). On 23 July 1997 the garnishee order was made absolute by His Honour Judge Jack QC, sitting as a Judge of the Commercial Court. BMTG now appeals to this Court against that Order.

The power of the court to make a garnishee order is conferred by Order 49 rule 1 of the Rules of the Supreme Court 1965:

1 (1) `Where a person (in this Order referred to as "the judgment creditor") has obtained a judgment or order for the payment by some other person (in this Order referred to as the "judgment debtor") of a sum of money . . . and any other person within the jurisdiction (in this Order referred to as "the garnishee") is indebted to the judgment debtor, the court may, subject to the provisions of this Order and of any enactment, order the garnishee to pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.

In the present case there is no dispute that the claimants are judgment creditors of NKAP. Nor is there any dispute that BMTG is a person within the jurisdiction who is indebted to NKAP in an amount of US$10,600,000 and was so indebted at the time of the service of the garnishee order *nisi* upon it - that was conceded for the purposes of these proceedings by undertakings recorded in a consent order made by Colman J on 13 February 1997. It follows that the jurisdiction of the English court to make a garnishee order under Order 49 rule 1 RSC is not in issue in these proceedings.

The amount of BMTG's admitted debt to NKAP (US$10.6 million) has been paid into a London bank account in the joint names of solicitors pursuant to a further undertaking recorded in the consent order of 13 February 1997. The garnishee order of 23 July 1997 requires BMTG to pay the monies standing to the credit of that account to the claimants.

It is common ground that the power of the Court to make a garnishee order, in circumstances in which it has jurisdiction to do so, remains discretionary. It is also common ground that the principles upon which that discretion should be exercised - at least for the purposes of the present proceedings - were considered exhaustively by the House of Lords in Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.H. v Shell International Petroleum Co Ltd [1990] 1 AC 295 ("the DST case"); and that it is unnecessary for this Court to look beyond that case in order to identify those principles. In short, the Court, in the exercise of its discretion, should not make a garnishee order in circumstances in which it would be inequitable to expose the garnishee to the risk of being compelled to pay the attached debt twice over - the risk of "double jeopardy".

NKAP is a company which carries on business in the Russian Federation. It is said that the order of 23 July 1997 exposes BMTG to the risk of double jeopardy in that, notwithstanding the attachment of the debt of US$10.6 million by the English Court, BMTG may be compelled to pay that debt to NKAP by some order yet to be made in the Russian courts; alternatively that, under the law which would be applied in those courts, BMTG would not be able to take credit for the payment to the claimants on its trading account with NKAP; in the further alternative that, under that law, BMTG would have no remedy if NKAP were to retain assets of BMTG in Russia in satisfaction of the attached debt. In order to understand and evaluate these contentions it is necessary to set out (i) the background to the dispute between the claimants and NKAP which was the subject of the arbitration award, (ii) the trading and other relationships between NKAP and BMTG and (iii) the evidence as to Russian law.

The background to the dispute.
NKAP was formerly a state enterprise in the Soviet Union. At all material times it has carried on business as a smelter and refiner of alumina at a plant in the region of Kemerevo in Southern Siberia. It is said to be one of the largest producers of aluminium ingots in the Russian Federation. On 6 July 1992 it entered into a contract with Eural, a company incorporated under the laws of Hungary, for the delivery of 15,000 tonnes of aluminium ingots to Eural over a ten year period. It was a term of that contract that, in consideration for a cash payment of US$2,865,000 by NKAP, NKAP was to acquire a 15% shareholding in Eural. On 3 July 1993 NKAP entered into a similar contract with Soinco, a company incorporated under the law of Argentina, under which NKAP was to take a 20% shareholding in Arkuz SA, a subsidiary of Soinco. There were other trading contracts between NKAP, Eural and Soinco in the period 1991 and 1994 for the supply of aluminium.

In on about December 1994 NKAP was privatised. It is now a Russian joint-stock society of the open-type. The new owners of NKAP stopped all deliveries to the claimants. The position was set out in a telex sent by Mr Kadrichev, the new director-general of NKAP, on 20 January 1995: *". . . [I] report to you such information: the extraordinary meeting of joint stock "Novokuznetsk Aluminium Plant" have taken place on January, 20th. The new staff of the directors' council was elected. My authorities as general-director are confirmed. The new staff of the directors' council have taken a decision to examine all contracts and agreements and not to carry them out without the directors' council approval*."

No further aluminium was supplied to the claimants under the existing contracts. On 24 April 1995 Soinco and Eural filed their request for arbitration in Zurich. Amongst other points taken on behalf of NKAP before the arbitral tribunal it was contended that the contractual obligations to purchase minority shareholdings in Arkuz and Eural were in contravention of Russian exchange control regulations and were accordingly invalid. Further, that the invalidity of the obligations to purchase shares infected all other obligations of NKAP under all the contracts between NKAP and the claimants; so that all the trading contracts were void and of no effect. The arbitral tribunal decided that, while it might be prepared to take into account Russian exchange control regulations in relation to the obligations to participate in Arkuz and Eural, it was not "*ready to extend the nullity effect to the main obligation to supply raw aluminium if indeed Russian exchange control law purports to have that effect, which remains doubtful*" . The tribunal went on to hold that, although it was unclear whether proper exchange control consent was given by the appropriate authorities, this was not a matter which concerned the claimants. NKAP had confirmed to the claimants that there was no exchange control difficulty; and it could not invoke its own its own failure to obtain the necessary consent as an excuse to invalidate the agreement - see article 80 of the Vienna Convention. All other defences were rejected as being without merit.

The tribunal held NKAP to be in fundamental breach of its delivery obligations. On 31 May 1996 the tribunal made a final award in the amount of US$19,643,003. On 16 July 1996 NKAP appealed against that award to the Swiss Federal Tribunal. On 30 August 1996 that appeal was refused on the ground that it was out of time.

In the meantime two events had occurred: (i) on 6 August 1996 the award of the arbitral tribunal was converted into a final Swiss judgment by order of the Zurich Cantonal Court; and (ii) on 19 August 1996 civil proceedings were instituted by the Procurator for the Kemerovo Region of the Russian Federation in the arbitral court of Kemerovo. The proceedings in the Kemerovo Court were brought by the Procurator "*in the defence of state and social (public) interests*" against NKAP in relation to the Eural contract of 6 July 1992. The stated purpose of the proceedings in Kemerovo was to obtain a judgment in a Russian court to the effect that the contract of 6 July 1992 was invalid *ab initio* by reason of the contravention of Russian exchange control provisions. That objective was assisted by NKAP's acknowledgement that the contract was in contravention of the currency regulations; in that NKAP did not have the appropriate licence at the time when it was entered into. By its decision the Court declared that the contract of 6 July 1992 was invalid (void) and did not give rise to legal consequences except for those incidental to its invalidity.

The trading and other relationships between NKAP and BMTG.

His Honour Judge Jack QC was taken through a considerable volume of evidence adduced by the claimants in order to establish that BMTG and NKAP were managed by the same individuals and could not (nor cannot) be expected to deal with each other at arms' length. The Judge reviewed that evidence, carefully and in detail, at pages 8 - 14 in the transcript of his judgment. The conclusions which he reached have not been challenged on this appeal; and it will, I think, be sufficient if I summarise them:

(1) The management of NKAP is controlled, under a management agreement, by a Russian company, Metallurgical Investment Company ("MICOM"). MICOM is itself controlled by Mr Mikhail Zhivilo and his associates. Mr Mikhail Zhivilo is president of MICOM and also chairman of the Board of Directors of NKAP.

(2) BMTG was incorporated in Guernsey on 4 December 1992. Its present directors, and the holders of the only two shares which have been issued, are Mr Mikhail Zhivilo and his brother Mr Yuri Zhivilo. BMTG is a trader in metals and appears, from its accounts, to conduct business on a substantial scale. The turnover for 1995 was in excess of US$198 million. Shareholders' funds as at 31 December 1995 appear in its draft accounts at US$6,134,311. The issued share capital of BMTG is £2. Much of NKAP's production passes through BMTG under the provisions of long term "tolling" contracts. The form of those contracts required BMTG to supply alumina which, in consideration for a fee payable by BMTG to NKAP, was smelted and refined by NKAP and returned to BMTG or its consignees in the form of aluminium ingots.

(3) On the termination of the trading contracts between NKAP and the claimants in January 1995 the trade under those contracts were immediately replaced by trading with BMTG.

The Judge summarised his conclusions in the following paragraph:

It is clear from what I have set out that following the reconstitution of the Board of Directors of NKAP in January 1995 Mikhail Zhivilo was able to procure that the greater part and possibly all of NKAP's export business, whether through tolling contracts or otherwise, was with BMTG. He was able to procure that the greater part of NKAP's production was exported in this way. The only explanation for doing so must be that the business passed through a company outside Russia over which his brother and he had complete control. I reject the suggestion made on behalf of BMTG that the decision by NKAP to trade with BMTG was made on objective commercial grounds: I do not find it credible. As part of this scheme business was taken from the plaintiffs - contract 60-47, given apparently to TransWorld Metals and in fact taken over in some way by BMTG. It is probable also that the further production of aluminium by NKAP which would otherwise have gone to the plaintiffs under the contracts which were repudiated by NKAP and formed the subject of arbitration, has also been sold through BMTG.

On 27 January 1995 BMTG entered into a contract (a tolling contract) with NKAP for the refining of 80,000 tonnes of alumina. A second tolling contract, for the refining of 200,000 tonnes over a three year period, was entered into on 25 September 1995. The alumina is to be supplied over the period 1996 - 1998 in accordance with an annual timetable to be agreed by the parties. The amounts of the monthly deliveries are also to be agreed from time to time. For every two tonnes of alumina supplied by BMTG one tonne of aluminium ingots is to be returned by NKAP. In addition, BMTG is pay to NKAP the cost of refining the aluminium calculated as a percentage of the average of the London Metal Exchange

sellers' quotations for high grade aluminium for the relevant period. Clause 4.5 of the tolling contract of 25 September 1995 provides that payment for refining is to be made by BMTG in US Dollars (as to 90%) by telegraphic transfer to NKAP's account in the month of despatch of the aluminium from the NKAP's plant; and as to the balance of 10% on agreement of a quarterly operating balance between the parties. As the Judge pointed out there is no evidence as to the position between BMTG and NKAP in relation to payments made, or not made, under the tolling contract or as to the state of account between them. *Prima facie,* if the terms as to payment in the tolling contract have been adhered to, there should be little or no balance outstanding either way at any given time. But there may expected to be, from time to time, stocks of unprocessed alumina supplied by BMTG and on consignment to or held at NKAP's plant; and stocks of processed aluminium ingots held at the plant to the order of BMTG for despatch to its consignees.

The relationship between BMTG and NKAP is described by Mr Yuri Zhivilov in his second affidavit, sworn on 20 December 1996, at paragraphs 66 - 69:

66. BMTG now obtains its aluminium from NKAP as a result of the processing contract [dated 25 September 1995].

67. At present, BMTG obtains aluminium from no one other than NKAP. However, BMTG does not have an exclusive contract with NKAP. BMTG is free to acquire aluminium from others and NKAP is free to sell aluminium to others; but it makes sense for BMTG to have a long term contract with one of the largest producers of aluminium in the world, so that it can ensure that all the alumina it obtains is processed by a high quality factory.

68. BMTG sells the aluminium made by NKAP to whoever it can on the open market and keeps the sale proceeds itself. . . .

69. About 30% of all BMTG's present payments are made to NKAP in respect of aluminium obtained from NKAP.

There is no evidence that the admitted debt of US$10.6 million, the subject of the garnishee order, is a debt which has accrued under the tolling agreement of 25 September 1995. The probability, as it seems to me, is that the debt has been admitted by BMTG, with the concurrence of NKAP, in order to forestall further investigation into the claim that BMTG holds all its assets as nominee for NKAP: a claim raised in the present proceedings - see the originating summons issued on 1 October 1996 as varied by the order of Rix J. made on 1 November 1996.

The evidence as to Russian law.

The Kemerovo decision - to which, of course, neither BMTG nor Soinco, nor Eural (save under protest), were party - is relied upon by BMTG to support the contention that the contracts underlying the arbitral award of 31 May 1996 would be treated as void under Russian law; and that, accordingly, Russian law would not recognise either (i) the arbitral award itself or (ii) the English judgment entered on 6 January 1997 or (iii) the garnishee order of 23 July 1997.

Evidence as to Russian law is contained in three affidavits of Professor William Butler, Professor of Comparative Law in the University of London, sworn respectively on 14 December 1996 ("Butler 1"), 21 March 1997 ("Butler 3") and 23 June 1997 ("Butler 4") and filed on behalf of BMTG; and in the affidavit of Dr Constantin Razumov, formerly a Professor of International Private and Comparative Law at the Institute of International Relations in Moscow and latterly Director of the Arbitration Department at the USSR Chamber of Commerce and Industry, sworn on 9 April 1997 and filed on behalf of the claimants, supplemented by his letter dated 27 June 1997 in response to Butler 4. It has not been suggested that either Professor Butler or Dr Razumov are not well qualified to give evidence as to Russian law. But the task of resolving the issues in dispute on their affidavit evidence is made difficult by the fact that that evidence has not been tested by cross-examination. His Honour Judge Jack, following directions given by Colman J on 24 January 1997 as varied on 28 February 1997, was invited to determine issues of fact (including issues of Russian law) on the basis of affidavit evidence alone. That course, agreed between the parties, presents problems both for the trial judge and for this court in circumstances where, as it has turned out, there is an acute difference of view between these distinguished experts as to the effect of Russian law.

At the risk of doing injustice to the extensive evidence of Professor Butler, I think it may fairly be summarised as follows:

(1) The contracts for the purchase by NKAP of shares in Eural and Arkuz, if made without a prior exchange control licence, would be regarded as invalid under the laws of Russia.

(2) By virtue of the Kemerovo judgment (if not independently) *"there is not and never has been any obligation in Russian law for NKAP to supply any aluminium"* under the trading contracts with Soinco or Eural.

(3) The Russian Federation, as successor to the Soviet Union, is party to the 1958 New York Convention on the Mutual Recognition and Enforcement of Arbitral Awards; *"accordingly, arbitral awards issued by a foreign arbitration courts are subject to be enforced by the courts of the Russian Federation"* - Butler 1 paragraph 45. Nevertheless the claimants would not be able to enforce the award of 31 May 1996 in Russia. The 1958 Convention provides that recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country. . . . *"a Russian court is unlikely to enforce an award arising under contracts that are invalid and unenforceable under Russian law"* - Butler 1 paragraph 49; and . . . *"it is inconceivable that a foreign arbitral award in which the applicable law was Russian law and which did not correctly apply Russian currency legislation in assessing the validity of the transaction could now be successfully recognised and executed in a court of the Russian federation"* - Butler 3 paragraph 6(v).

(4) *"As the Award would not be recognised or enforceable in Russia, the Judgment entered by the English Courts on 6th January 1997 would equally not be recognised or enforceable in Russia"* - Butler 3 paragraph 7. Nor would the garnishee order absolute of 23 July 1997 be recognised. " *As Russian law does not accept that there is any debt due from NKAP to the Plaintiffs either under the various contracts between them or pursuant to the Award, it will not accept any order of a foreign court which seizes assets in satisfaction of a non-existent debt"* - (*ibid*).

(5) A payment by BMTG to the claimants pursuant to the garnishee order of 23 July 1997 would not be recognised under Russian law as a discharge of BMTG's liability to NKAP. *"Russian law has no concept of garnishee proceedings or the attachment by a judgment creditor of a debt due to the judgment debtor in satisfaction of an unpaid judgment"* - Butler 3 paragraph 4. The only basis on which Russian law would recognise that a payment by BMTG to the claimants would discharge BMTG's liability to NKAP would be if such payment were made with the express consent in writing of NKAP. NKAP could not give such consent because, by virtue of the invalidity of the underlying contracts with Soinco and Eural and (I think) the Kemerovo judgment, it cannot recognise any liability to the claimants.

(6) *"If, therefore, BMTG is ordered by the English court to pay US$10.6 million to the claimants pursuant to a garnishee order absolute, NKAP would be entitled to proceed against BMTG for the payment of the same amount; leaving BMTG having to pay the same debt twice over"* - Butler 3 paragraph 8. Further, *"NKAP would be able to successfully defend any proceedings brought by BMTG in Russia requiring NKAP to deliver aluminium to the value of any payment made under a Garnishee Order Absolute"* - Butler 3 paragraph 9.

Dr Razumov, on the other hand, expresses the clear view that there is no risk that, as a matter of Russian law, BMTG would be exposed to double jeopardy. His evidence may be summarised as follows:

(1) Russian law is well familiar with the concept of garnishment. In support of that proposition Dr Razumov refers to the English Language Treatise "The Law of the Union of Soviet Socialist Republics" (as applied to civil law and procedure relations in foreign trade) by Lebedev, Rozenberg and Pozdniakov which includes, at chapter 12, a summary of the procedure for attachment and garnishment under Russian law. He refers, also, to Article 358(3) of the Code of Civil Procedure:

358 The measures of compulsory execution shall be:

(3) levy of execution on monetary amounts and property of the debtor situated with other persons:

(2) There are no grounds, in Russian law, to assert that a third party holding monies due to the judgment debtor, who transfers such monies to the judgment creditor pursuant to a court ordered garnishment, can then be obliged to pay the monies again on the basis of a contract with the judgment debtor. The consent or lack of consent of NKAP to the payment by BMTG is irrelevant.

(3) In any event the relevant garnishment in the present case is that of England and not that of Russia. Payment by BMTG pursuant to the judgment of an English court would be recognised as valid payment and discharge under Russian law irrespective of the correctness or validity in Russia of the underlying arbitration award. *"Simply put, whether the arbitration award creating the original debt from NKAP to the plaintiffs is or is not enforceable in Russia is a wholly separate issue, which is entirely irrelevant for the above analysis and its conclusion"* - Razumov paragraph 10. *"As concerns the substantive Russian law, BMTG's payment on NKAP's behalf due to garnishment in England would, under chapter 26 of the new Civil Code and other applicable principles, clearly preclude BMTG from having to pay NKAP the same sum again"* - Razumov paragraph 11.

(4) Neither NKAP or its directors would be liable to fines or other sanctions as a result of the garnishment. *"The garnishment, if it occurs, will be pursuant to an order of an English court and will presumably have been opposed by BMTG and NKAP, both of whom are before that Court. It is not some ultra vires act or omission by NKAP or BMTG"* - Razumov paragraph 13.

(5) It was not within the competence of the Kemerovo court to make any declaration as to the retro-active invalidity of the underlying contract between Eural and NKAP. The Court is empowered to hear complaints against NKAP for alleged violations of Russian exchange control rules; but *"the civil or contractual consequences, if any, of such violations are matters of no concern to the [Procurator] or to the [Kemerovo] Arbitrazh Court, they are a matter between the parties to the contract, which contract was here submitted to an international arbitration in Zurich"* - Razumov paragraph 15.

By way of further support for its contentions, BMTG relies on correspondence, exhanged shortly after directions had been given for the hearing of the application to make the garnishee order absolute, between NKAP and the Procurator General of the Russian Federation. By a letter dated 6 March 1997 NKAP sought an explanation on four points which, as it said, were a matter of concern. In summary those points were: (i) is NKAP entitled under Russian law to give BMTG official permission to pay part of its debt to the claimants in accordance with the arbitral award; (ii) will NKAP be liable in any way under current Russian law if it does give BMTG its official permission to pay part of BMTG's debt to the claimants; (iii) what action should NKAP take if BMTG does pay part of the money it owes to the claimants under the arbitral award without NKAP's official permission; and (iv) will NKAP be liable to a fine - and will its management be criminally liable - if it does give official consent to the payment of the monies due under the award. In reply to that request, by a letter dated 28 March 1997, the Procurator General confirmed: (i) that NKAP was not entitled to give official consent to payment of the debt owed to it by BMTG to the claimants; (ii) that, if NKAP were to give official permission for the payment of that debt, that would be regarded as a failure to repay foreign currency which is subject to obligatory remittance to the Russian Federation, NKAP would be liable to a fine and its management would be criminally liable under Article 193 of the Russian Federation's Criminal Code; (iii) that in the event that BMTG does not pay NKAP what it owes, but independently pays the sum of US$ 10.6 million to the claimants under the award, NKAP will have the right to recover that amount from BMTG in court proceedings.

It may be noted that, in answer to question 3 in the letter of 6 March 1997 - *"what action should NKAP take if BMTG pays money without NKAP's official permission?"* - the Procurator General did not advise that NKAP was required to take any particular steps (or that he, the Procurator General, would take any steps) to recover the amount. He confined his

reply to the assertion that NKAP *"will have the right to recover this amount"* without indicating whether that was a right which NKAP was obliged to enforce; or whether, if it did not choose to enforce that right, NKAP or its management would be liable to state or other penalties.

The principles to be derived from the DST case.

The facts in the DST case, as they appear from the headnote and in the judgment of Lord Templeman, may be summarised as follows.

Shell International Petroleum Co Ltd ("Sitco"), a company registered in England, was indebted to R'As al-Khaimah National Oil Co ("Rakoil") in the amount of US$4.8 million and interest for oil supplied by Rakoil to Sitco in the state of R'As al-Khaimah ("the State"). Rakoil was incorporated and resident in the State. Under English private international law rules the debt admitted to be due from Sitco to Rakoil was situated in England. The plaintiff, Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.H. ("DST"), had the benefit of an arbitration award, obtained in Geneva, in relation to a dispute with Rakoil under an oil exploration agreement of 1 September 1976. On 2 July 1986 DST obtained leave to enforce the Geneva award in England pursuant to section 3 (1) (a) of the Arbitration Act 1975. The amount of the award with interest exceeded US$4.8 million. On 24 July 1986 DST obtained an injunction restraining Rakoil from accepting payment of debts due from Sitco. That, clearly, was a prelude to garnishee proceedings to be brought by DST against Sitco. On 30 March 1987, before any garnishee order had been made in England, the State began proceedings in its own Civil Court against Sitco claiming the debt of US$4.8 million on the basis that Rakoil, in selling oil to Sitco, had been acting as agent of the State. On 12 April 1987 the Civil Court gave judgment against Sitco for the amount claimed by the State with interest and costs. On 14 April 1987 the State advised Sitco that it was not prepared to consider any further dealings with Sitco until Sitco honoured its obligation to pay under that judgment. On 12 August 1997 the vessel "New London", then under charter to Shell Trading (Middle East) Limited, an associate of Sitco, was arrested in the State.

In the meantime, on 7 July 1987, Hobhouse J had made a garnishee order directing Sitco to discharge its debt to Rakoil by making payment to DST in part satisfaction of the judgment debt due from Rakoil to DST. An appeal against that order was dismissed by the Court of Appeal on 29 October 1987. The position, therefore, at the time of the appeal to the House of Lords against the making of the garnishee order was as described by Lord Templeman, at [1990] 1 AC 295, 335H:

The present position is that Sitco have been ordered by the English court to pay DST and Sitco have been ordered by the Civil Court to pay the State. If neither the English court nor the Civil Court gives way Sitco must either pay twice voluntarily or run the risk of both the English court and the Civil Court enforcing payment.

Lord Oliver accepted that there was some risk of double jeopardy in the following passage of his speech, at page 341E - F: *"The critical issue identified by Hobhouse J [1988] 2 Lloyds Rep. 294 in the garnishee proceedings was whether there was a real and substantial risk that Sitco might, if the garnishee order were to be made absolute, be compelled to pay the same debt a second time. As a matter of fact, it is beyond doubt that there is some risk. Whether rightly or wrongly as a matter of the comity of nations, the courts of the State quite clearly do not and will not recognise that the debt which is due to Rakoil and which the State claims is due to it is capable of discharge of payment under a garnishee order made in this country. Whether rightly or wrongly as a matter of internationally recognised maritime law and practice, the State has taken and continues to take steps by way of arrest in aid of the judgment which it has obtained against Sitco in its own court. This is not a matter of theory or speculation. The risk has to this extent materialised.* "

That passage identifies two significant factual elements in the DST case: (i) there was already a judgment of the Civil Court which made it clear that payment under the English garnishee order would not be recognised in that court; and (ii) the State was actively seeking to take steps to execute the judgment which it had obtained against Sitco in the Civil Court. Further, the State was also seeking to exert commercial pressure. There was no doubt that, in so far as Sitco had assets capable of being seized, the State would attempt to seize them. Further there was evidence to suggest that courts in other Gulf states might recognise the judgment of the Civil Court. There was a third feature of significance in the present context. There was nothing in the DST case to suggest that there was any connection between Sitco and the dispute between DST and the State; and both Lord Oliver, at page 343D, and Lord Goff, at 355G, accepted that there was not.

Lord Goff identified the question at issue in these terms at page 353 C-D: *"Whether it would be inequitable in the circumstances to make a garnishee order absolute, and that it is generally considered inequitable so to do if the garnishee would, in the circumstances, be compelled to pay the relevant debt twice over. So we can see, in the cases, the question being posed whether there is any real or substantial risk that the garnishee, having paid the judgment creditor under a garnishee order absolute in this country, would be required to pay the amount over again in proceedings in a foreign country.* "

In order to answer that question - is there any real and substantial risk of double jeopardy - the English courts must act on the basis of some assumption as to how the foreign court will proceed - per Lord Goff at page 353G. The English court must have in mind the criteria that must be fulfilled before the English judgment can be regarded as one to which foreign courts of justice may be expected to give effect. Lord Goff identified those criteria at page 354A-B: *"These appear to be threefold: (1) The underlying judgment entered by the English court in favour of the judgment creditor against the judgment debtor has been entered by a court which is, by generally accepted principles of international law, a court of competent jurisdiction. (2) The situs of the attached debt, owing by the garnishee to the judgment debtor, is England. (3) Payment of the attached debt by the garnishee pursuant to a garnishee order absolute has the effect of discharging that debt.* "

The third of those criteria is satisfied by virtue of the provisions of Order 49 RSC.

There was no doubt that in the DST case - as in the present case - those three criteria were satisfied. It followed that in that case - as in the present case - the English judgment was one to which a foreign court might be expected to give effect. The problem, in the DST case, was that that expectation was inconsistent with what, in reality, the Civil Court in the State would be likely to do, having regard to the judgment which it had already given on 12 April 1987. So it was necessary to consider whether the English court should act solely on the assumption that the foreign court would give effect to the English judgments; an assumption based on the fulfilment of the three criteria on which the expectation of recognition is founded. Lord Goff identified that question at 354G - H: *"Let it be supposed that [the] criteria are fulfilled. Will any English court, in such circumstances, make a garnishee order absolute in accordance with the assumption, and exclude as irrelevant and inadmissible any evidence that a foreign court will nevertheless not recognise payment under the English order as effective to discharge the attached debt? "*

He answered that question at pages 355D - 356A:

"*Having considered this question with care, I doubt whether it is susceptible of a logical answer. Powerful arguments of policy can be advanced in favour of either solution - the one favouring the interests of the garnishor in levying lawful execution upon the property of the judgment debtor and the other favouring the interests of the garnishee. On the one hand, it can be said that the garnishee must ordinarily have to bear the consequences of any commercial pressure which may be inflicted upon him by a powerful judgment debtor, which may have serious financial consequences for him; it is not unreasonable, it may be argued, that he should likewise bear the consequences of action by some foreign court, invoked by the judgment debtor, which departs from the accepted norms of private international law. On the other hand, it can be said that the principle which is here being applied is that a garnishee order absolute should not be made where it is inequitable to do so, and further that it is accepted in the authorities that is inequitable so to do where the payment by the garnishee under the order absolute will not necessarily discharge his liability under the attached debt, there being a real risk that he may be held liable in some foreign court to pay a second time. To deprive the garnishee of the benefit of this equity merely because the court which may hold him liable a second time is not acting in accordance with accepted principles of international law would not be right, especially bearing in mind that the garnishee is a wholly innocent party who has been dragged into someone else's dispute and that the judgment creditor has the opportunity of seeking elsewhere for assets of the judgment debtor which he may seize in satisfaction of the judgment debt.*

Faced with such nicely balanced arguments, the guidance of authority is especially helpful. Now it is true that the question has not arisen in earlier cases in the stark form which it has taken in the present case: and it is also true that the judgments in the cases (perhaps for that very reason) do not appear to speak with a united voice on the point. But having read and re-read them, I have come to the conclusion that they favour the second solution that I have mentioned, i.e. that which favours the garnishee and so does not require an automatic application of the assumption. . . . The propositions which I derive from the authorities are these. First, if it appears that there is a real risk that the garnishee will be compelled by some other court to pay the attached debt a second time, it will generally be inequitable to expose him to that risk by making the garnishee order absolute. But, second, in the absence of evidence establishing such a real risk, the assumption I have referred to will be applied. "

He went on, at pages 356G-357B:

"*It follows that, in the present case, the crucial question is whether it appears that there is a real risk that the appellants, Sitco, may, if the garnishee order is made absolute, be required to pay the debt twice over. This was the question which the judge identified in his judgment as being the crucial question which he had to decide.*

Here it is asserted by Sitco that there is indeed a real risk that they will be required, by execution upon their assets pursuant to the judgment in the Civil Court, to pay the debt a second time. We are not, of course, here concerned with the question of risk whether a judgment may be entered by a foreign court requiring the debt to be paid; that has already been done, and indeed was done on 12 April 1987, before the garnishee order nisi was made on 14 May 1987. . . . The relevant risk which has to be evaluated is therefore the risk of execution upon the assets of Sitco pursuant to the judgment of the Civil Court. "

"*If the garnishee can show that he is in fact exposed to a real risk of being required by a foreign court to pay the debt a second time, it does not of itself matter that the risk which the garnishee shows to exist is one of being so required by a foreign court which does not have, by English law, or by generally accepted rules of international law, jurisdiction to make such order. This is because the crucial feature is the reality of the risk. But the absence of such jurisdiction in the foreign court is not necessarily irrelevant. It may go to the reality of the risk; in the sense that it may, for example, reduce the likelihood of such judgment being executed upon assets of the garnishee*" - *ibid*, at pages 357H-358B.

On the facts in the DST case both Lord Oliver and Lord Goff (with whom Lord Keith and Lord Brandon agreed) reached the conclusion that a real and substantial risk of double jeopardy had been established. At page 344B-C Lord Oliver said this: *". . . in these circumstances the critical consideration, as it seems to me, is that there is and remains a serious risk that the legal process, whether legitimate or not, will be recognised and given effect to in other states in the Gulf where Sitco carries on its business and that it will result in its property being subjected to process of execution there. If that occurs, then D.S.T. will have satisfied its judgment at the expense of Sitco, an innocent third party which has absolutely no connection with the dispute between D.S.T. and Rakoil and whose only involvement results from the accident that it happens to have traded with Rakoil and is resident here. "*

Identifying and evaluating the risk in the present case.

Lord Goff was careful to stress, at page 359B-C in the DST case, that the garnishee does not have to establish a certainty, or a very high degree of risk, of being compelled to pay the debt twice over; he has only to establish a real risk of being required to do so.

In the present case there are, as it seems to me, three elements to be considered in evaluating the risk that BMTG might be required to pay to NKAP the US$10.6 million which, by the garnishee order of 23 July 1997, it has been ordered to pay to the claimants. First, what is the true position under Russian law. Second, will NKAP or any one else -and, in particular, the Procurator of the Kemerevo region - take any steps to obtain an order from the Russian courts requiring BMTG to pay twice over. Third, if such an order were made, would BMTG have any assets within the jurisdiction of the Russian courts against which execution of a judgment could be levied.

In the present case there is no judgment of a Russian court which requires BMTG to pay the admitted debt of US$10.6 million to NKAP. Nor is there any judgment in which a Russian court has refused to recognise the English judgment of 6 January 1997 or the garnishee order of 23 July 1997. The Kemerovo decision, on which BMTG places such reliance, precedes the English judgments and so does not address them; but neither does that decision - as I read it - address the question whether the award of 31 May 1996 would be recognised or enforced in Russia. In relation to the award, the Kemerovo court was concerned only with the question whether the submission to arbitration in Zurich precluded that court from assuming jurisdiction over Eural in relation to what it described as a *"case in defence of State and social (public) interests"* - that is to say, the alleged contravention of exchange control regulations. It was not concerned with the enforceability of the award itself. If it had been, the court would have found it necessary to consider whether NKAP's own contravention of exchange control in relation to the share purchase relieved it of any obligation to supply aluminium under the contract of 6 July 1992 or under the other trading contracts between Eural and NKAP. It did not consider that question. The position in the present case, therefore, differs from that in the DST case in this respect: it is necessary, in the present case, to form a view on the question whether a Russian court, applying its own rules of law (including the relevant principles of its private international law) would recognise the English judgment of 6 January 1997 and the garnishee order of 23 July 1997.

The English judgment and the garnishee order are judicial acts which, applying what Lord Goff described as the generally accepted principles of international law, can be regarded as deserving of recognition in a foreign court. The enforcement of the Zurich award by entry of a judgment under the Arbitration Act 1975 conforms with the 1958 Convention. The Russian Federation is party to that Convention and - whether or not it would enforce the award in its own courts - might be expected to recognise the jurisdiction of the English court when acting under the Convention. The English court made the garnishee order of 23 July 1997 on the agreed basis that BMTG had submitted to its jurisdiction and that situs of BMTG's debt to NKAP was England. The criteria necessary to found the assumption that the judgment and the garnishee order will be recognised in a foreign court are present.

The question, therefore, is whether there is evidence to displace the assumption; that is to say, evidence which establishes a real risk that a Russian court would act contrary to the accepted norms of private international law. The evidence relied upon by BMTG is to be found in (i) the affidavits of Professor Butler and (ii) the self serving correspondence between NKAP and the Procurator-General. His Honour Judge Jack QC found Professor Butler's evidence unconvincing - for the reasons set out at pages 16-17 of the transcript of his judgment. He preferred the evidence of Dr Razumov. I agree. Professor Butler does not, as it seems to me, explain why the arbitral tribunal was not entitled to reach the conclusion that the alleged illegality in respect of the share participation could be severed from the obligations to supply aluminium. Nor why it should be regarded as contrary to public policy for a Russian court to recognise an award which, itself, was concerned only with the failure to supply aluminium and not with any obligation in alleged breach of exchange control. Nor why a Russian court would be prepared to depart from the accepted norms of private international law so as to refuse recognition to an English judgment which, applying the provisions of the 1958 Convention to which the Russian Federation was itself party, enforced that award in England in circumstances that, as we have already decided in this court, involved no breach of any provision of Russian exchange control. Nor do I find it easy to accept - despite the assertions in Butler 4 - that Article 358(3) of the Code of Civil Procedure does not provide for a form of execution which is indistinguishable from garnishment: or that a Russian court would not recognise that the effect of payment under the English order of 23 July 1997 would be to discharge NKAP's liability under the English judgment debt of 6 January 1997. I do not think that the bare assertion in the letter of 28 March 1997 from the Procurator General - that NKAP will have the right to recover US$10.6 million from BMTG in court proceedings - adds any weight to Professor Butler's contentions.

In my view, the evidence does not establish a real risk that the Russian court would act contrary to the accepted norms of private international law. The assumption that it would act in accordance with those norms is supported by the evidence of Dr Razumov; and is not displaced by the evidence of Professor Butler or by the letter from the Procurator General.

In the light of that conclusion it is, perhaps, unnecessary to consider the other two elements which bear on the reality of the risk that BMTG might be required to pay twice over. But, for completeness, I shall do so - albeit briefly. I am not persuaded that there is any likelihood that, for so long as NKAP remains under the control of Mr Mikhail Zhivilo and his associates (through their control of MICOM), NKAP will take any steps to obtain payment of US$10.6 million from BMTG once BMTG has paid that sum to the claimants under the garnishee order. His Honour Judge Jack, Q.C., by the analysis on page 11 of the transcript of his judgment, has shown that a very substantial part of NKAP's business is conducted through tolling contracts with BMTG. Whatever benefits there may be to NKAP in conducting its business in that way, there is clearly substantial benefit to Mr Mikhail Zhivilo and his brother. BMTG, a £2 Guernsey company in their ownership and under their control, has been enabled to amass very substantial shareholders' funds. I can see every reason why BMTG should strive to avoid paying NKAP's debts to the claimants out of its own funds under the garnishee order; but I can see no reason whatsoever why Mr Mikhail Zhivilo and his brother would wish to repatriate funds from BMTG to NKAP by paying that debt twice over once the garnishment has been effected. I have no doubt that, for so long as NKAP remains under the control of Mr Mikhail Zhivilo and his associates, there is no risk that NKAP will take

steps, in Russia or elsewhere, to obtain a second payment of US$10.6 million from BMTG; and so no risk that alumina or aluminium ingots in the ownership of BMTG will be seized by NKAP while in NKAP's possession.

It is said on behalf of BMTG that, whatever Mr Mikhail Zhivilo and his associates might wish to do in their own interests, they are bound to act in accordance with the wishes of the shareholders of NKAP (whoever they may be) or the directions of the Kemerevo court. I agree with His Honour Judge Jack, Q.C., that the history of trading between NKAP and BMTG does not lend credence to a submission that Mr Zhivilo will act in accordance with the wishes of the shareholders of NKAP if those wishes are not to the advantage of BMTG. I am not persuaded that the Procurator would, or could, take any step in the Kemerevo court to enforce payment of US$10.6 million by BMTG to NKAP - or to force NKAP to take any step to enforce payment of that sum - and I am satisfied that, if any such step was threatened or contemplated without the concurrence of Mr Mikhail Zhivilo, he would find no difficulty in so arranging matters under the tolling contracts that there were no assets of BMTG which could be seized by NKAP.

For the reasons set out in this judgment - which closely reflect the Judge's own reasons - I am left in no doubt that he was correct to reach the conclusion that BMTG had not shown that there was a real or substantial risk that it will be compelled to pay the garnished debt a second time. It follows that he was entitled to make the garnishee order absolute which he did. I would dismiss this appeal.

I should add that, if I had been persuaded that there was a risk - capable of being regarded as real or substantial - that NKAP, acting independently of MICOM and the Zhivilo interests, could take steps in Russia which would lead to the seizure of BMTG's assets in satisfaction of the debt of US$10.6 million notwithstanding payment under the garnishee order, I would not regard it as self-evident, in the circumstances of the present case, that there was any inequity in exposing BMTG to that risk. I think that there is considerable force in the Judge's view that the circumstances in which the decision was taken, in January 1995, to cease supplies of aluminium to the claimants but to supply instead to BMTG might lead to the conclusion that it was not inequitable that BMTG should be at risk of being compelled to pay twice over. But that question does not arise and I need express no concluded view upon it.

LORD JUSTICE WALLER: I agree.

LORD JUSTICE PHILLIPS: I also agree.

Order: Appeal dismissed with costs. Leave to appeal was refused. The monies in the joint account to be paid out unless application is made to House of Lords for leave to appeal within next 28 days. If such application is made monies to remain in joint account until either application is refused or the appeal fails. If no application made to House of Lords within 28 days then monies to be paid out. Minute of order to be prepared

MR PETER SHERIDAN QC and MR MAX MILLEN (Instructed by Allison & Humphreys of London) appeared on behalf of the Appellant
MR STANLEY BURNTON QC and MR RICHARD PERKOFF (Instructed by Rakisons of London) appeared on behalf of the Respondents
The First, Second, Third and Fourth Defendants were not represented