Appeal No. _____
HIGH COURT CL-2014-000070

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
QUEEN'S BENCH DIVISION (COMMERCIAL COURT)
KNOWLES J

BETWEEN:

(1) ANATOLIE STATI
(2) GABRIEL STATI
(3) ASCOM GRUP S.A.
(4) TERRA RAF TRANS TRAIDING LTD

Claimants/Appellants

- and -

THE REPUBLIC OF KAZAKHSTAN

Defendant/Respondent

APPELLANTS' SKELETON ARGUMENT FOR PERMISSION TO APPEAL FROM THE ORDER OF MR JUSTICE KNOWLES DATED 27 JUNE 2017

18 July 2017

Estimated Reading Time: 4 hours

Time Estimate for Hearing [if permission is granted]: 1 day

I. INTRODUCTION

1. This is the Appellants' Skeleton Argument in support of their application (the "**Application**") for permission to appeal the Order of Mr Justice Knowles dated 27 June 2017 (the "**Order**") **[CB/4]** directing, *inter alia*, that (i) a trial be held with respect to the Respondent's fraud allegations relating to an arbitral award in favour

of the Appellants, and that (ii) enforcement of the award should not take place without examination of the said fraud allegations at a trial.[1]

2. Unless otherwise stated, defined terms and paragraph references in this Skeleton Argument have the meaning given to them in the Appellants' Grounds of Appeal **[CB/1]**, which the Court is invited to read in conjunction with this Skeleton Argument.

3. The Court is also invited to read the following documents in addition to this Skeleton Argument and the Grounds of Appeal:

   3.1 Judgment of Mr Justice Knowles dated 6 June 2017 (the "**Judgment**") **[CB/5]**;

   3.2 Certain excerpts from the Award dated 19 December 2013 (¶¶1085-1095 & ¶¶1693-1748) (the "**Award**") **[SB/1/228-231/¶¶1085-1095] [SB/1/368-382/¶¶1693-1748]**;

   3.3 Judgment of the Svea Court of Appeal dated 9 December 2016 (sections 3.1.1, 3.1.2.1, 3.2.1, 3.2.2.1, 5.1, 5.2.1, 5.3.1 and 5.5) **[SB/3]**;

   3.4 First Witness Statement of Egishe Dzhazoyan dated 23 January 2017 ("**Dzhazoyan 1**"), including Annex 1 **[SB/5]**;

   3.5 First Witness Statement of Bo G.H. Nilsson dated 23 January 2017 ("**Nilsson 1**") **[SB/6]**;

   3.6 The Claimants' skeleton argument for the hearing before Mr Justice Knowles dated 1 February 2017 **[SB/7]**.

4. The structure of this Skeleton Argument is as follows:

   4.1 **Section II** contains a brief summary of the Appellants' case;

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[1] The Appellants reserve their right to submit a further appeal skeleton argument (if permission to appeal is granted), as permitted by Practice Direction 52CPD.31(3).

4.2 **Section III** sets forth a brief summary of the factual background to the underlying dispute;

4.3 **Section IV** deals with the relevant procedural background to this Application;

4.4 **Section V** sets out the applicable legal test in relation to applications for permission to appeal and substantive appeals respectively;

4.5 **Sections VI-X** addresses each of the grounds of appeal relied on by the Appellants; and

4.6 **Section XI** contains a brief conclusion.

II. SUMMARY OF THE APPELLANTS' CASE

5. The Appellants' case may be summarised as follows:

5.1 the Appellants are entitled to have the Award recognised and enforced in this jurisdiction in accordance with the New York Convention 1958, as implemented by the Arbitration Act 1996 (the "**Arbitration Act**"), and in line with the pro-enforcement policy embodied by both instruments;

5.2 The Appellants' entitlement is ever more apparent given that they have already prevailed in hard fought and protracted set aside proceedings in the jurisdiction of the seat of the underlying arbitration (Sweden), where exactly the same allegations (and, crucially, the same evidence) which are now before the English Court have already been fully ventilated, and the subject of conclusive determinations, by the competent Swedish Court.

5.3 In this case, the learned Judge erred, in that:

5.3.1 *Ground I:* The learned Judge was dealing with what was analogous to a summary judgment application by the Appellants to enforce the Award, such that all key findings by the Judge were (or should have been) necessarily made on a *prima facie* basis only. But the Judge proceeded to make final findings of fact on key elements

without due regard to the evidence before the Court, and/or based upon evidence that has yet to be tested.

5.3.2 *Ground II:* The learned Judge wrongly acceded to the Respondent's application in circumstances where, *inter alia*, (i) the proceedings before the Swedish Court were exhaustive on all of the fraud allegations; (ii) the Swedish Court conclusively decided the fraud issue both in terms of direct and indirect causation (as explained in detail in paragraphs 36-47 below); (iii) there is no basis, as a matter of English law, to criticise or dissect the detailed reasoning of the Swedish Court; and (iv) it is common ground that the Swedish Court's decision is final and binding on the parties.

5.3.3 *Ground III:* In the alternative, all of the fraud allegations now advanced were available to the Respondent before the Swedish Court, and their pursuance before this Court now constitutes an abuse of process;

5.3.4 *Ground IV:* The learned Judge wrongly swept aside the doctrines of issue estoppel and abuse of process on the basis that the matter involves English public policy, when any ruling on public policy necessarily depends upon prior constituent findings that must themselves be subject to these doctrines;

5.3.5 *Ground V:* The learned Judge failed to identify, and make relevant findings with respect to, the actual fraud alleged.

6. In the circumstances and as will be elaborated further below, the Judge failed to pay due deference to the Swedish Court, being a competent foreign court, to make a proper evaluation of the alleged fraud, thus effectively exercising an extra-curial appeal against the foreign judgment.

7. Against this background and for the reasons set forth in the Grounds of Appeal, it is respectfully submitted that the Appellants ought to be given permission to proceed

with the enforcement of the Award in this jurisdiction (something which they have been trying to do since February 2014).

III. FACTUAL BACKGROUND TO THE DISPUTE

8. The parties' underlying dispute arose out of Kazakhstan's seizure of the Appellants' petroleum operations and nearly-completed liquefied petroleum gas plant ("**LPG Plant**") in 2010.

9. The Claimants acquired two companies in 1999 that held idle licenses in the Borankol and Tolkyn fields in Kazakhstan. They invested hundreds of millions of dollars over the ensuing decade to turn the companies into successful exploration and production businesses.

10. In late 2008, after the businesses had become profitable, more than half a dozen government agencies carried out a number of unnecessary, onerous and tactical inspections and audits of the companies' businesses that resulted in false accusations of illegal conduct directed at the Appellants and their Kazakh companies, including a criminal prosecution of their general manager on false pretences, described by the Tribunal itself as a "*string of measures of a coordinated harassment by various institutions of Respondent*" (Award, ¶1086) **[SB/1/228/¶1086]**.

11. The Appellants commenced international arbitration proceedings against the Respondent under the investor-State provisions of the Energy Charter Treaty (the "**ECT**"). The arbitration was seated in Stockholm.

12. In the course of the arbitration, the Appellants were successful in proving that Kazakhstan's actions challenged the Appellants' title to their investments, subjected them to millions of dollars in unwarranted tax assessments and criminal penalties and ultimately led to the seizure of their investments by Kazakh authorities in July 2010 (Award, ¶1092) **[SB/1/230/¶1092]**. In the event, the Tribunal (comprising three pre-eminent arbitrators, namely Professor Karl-Heinz Böckstiegel as chairman, and co-arbitrators David R. Haigh QC and Professor Sergei Lebedev respectively) concluded that the above mentioned measures by the Respondent "*must be*

considered as a breach of the obligation to treat investors fairly and equitably, as required by Art. 10(1) ECT" (Award, ¶1095) **[SB/1/231/¶1095]** and awarded the Claimants damages accordingly.

13. By the Award, dated 19 December 2013, the Tribunal awarded the Appellants damages in excess of US$ 500 million. The latter included the sum of US$ 199 million with respect to the loss of the LPG Plant located near Borankol.

IV. PROCEDURAL BACKGROUND TO THE APPLICATION

14. This can be stated briefly for present purposes, and the Court is respectfully referred to paragraphs 2-10 of the Grounds of Appeal for further detail **[CB/1/10-13/¶¶2-10]**.

15. By an order dated 28 February 2014, Mr Justice Burton gave permission for the enforcement of the Award in this jurisdiction, pursuant to the New York Convention **[SB/2]**.

16. The Respondent then applied on 7 April 2015 for that order to be set aside on a number of grounds, but not fraud. Very shortly prior to the hearing of that application on 27 August 2015, the Respondent applied to amend its application to add as a new ground that the Award had been procured by fraud. This allegation concerned one portion of the damages awarded (with respect to one LPG Plant), and evidence it said was newly obtained and could not have been obtained earlier (the **"Evidence"**).

17. The Evidence addressed the construction costs of the LPG Plant and the involvement of an entity, Perkwood Investment Limited (**"Perkwood"**), and a contract that it had entered into regarding the construction of the LPG Plant (the **"Perkwood Agreement"**). The Respondent alleged that the involvement of Perkwood and other actions of the Appellants led to an inflation of the construction costs which were then relied upon in the making of an indicative offer by a third party for the purchase of the LPG Plant. This indicative offer was adopted by the Tribunal as the best

evidence of the value of the LPG Plant (which comprised about 40% of the total quantum of damages awarded under the Award).

18. In March 2014, the Respondent commenced challenge proceedings against the Award at the seat in Sweden. This entailed, *inter alia*, the same allegations of fraud, and the same Evidence, as now deployed before the English Court. Given the pendency of these proceedings, the English proceedings were then stayed by Mr Justice Popplewell in September 2015. Subsequently, by a judgment dated 9 December 2016 (the "**Swedish Judgment**"), the Svea Court of Appeal (the **"Swedish Court"**), having the benefit of the Evidence, rejected all of the Respondent's challenges to the Award, including the fraud allegations **[SB/3]**.

19. Following a 2-day hearing in February 2017 before Mr Justice Knowles, it was ordered that the Respondent have permission to amend its application to set aside the order of Mr Justice Burton and that there should be a trial in this jurisdiction of the Respondent's allegation that the Award, in so far as it related to the LPG Plant, had been procured by fraud.

20. The Appellants then applied to Mr Justice Knowles for permission to appeal his judgment, which permission was refused by the learned Judge on 27 June 2017 **[CB/6]**.

V. APPLICABLE LEGAL TEST

A. Permission to Appeal

21. The court has discretion, to be exercised in accordance with the overriding objective, to grant permission to appeal only where (a) the appeal appears to have a real prospect of success or (b) there is some other compelling reason why the appeal should be heard.[2]

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[2] CPR 52.3(6).

22. It is uncontroversial that the first ground embodies the same test as that applicable to a summary judgment application, *i.e.* the court has to decide whether there is a *"realistic, as opposed to a fanciful, prospect of success".*[3]

23. The second alternative ground is generally acknowledged to be a valuable reserve power to permit certain appeals to proceed, even if it is not possible to say that there is a real prospect of success. This may arise, for example, where there is a public interest in the examination of a particular point.[4] The Appellants' primary position is that, for the reasons set forth in **Sections VI-X** below, they satisfy the first ground and there is accordingly no need to consider this second ground. In any event, the Appellants respectfully submit that they satisfy the second ground, given the matters discussed in paragraph 58 below, and the public interest in establishing clear guidance on the principles of finality of litigation, and comity, in the context of enforcement of arbitral awards under the New York Convention, particularly where allegations have already been determined, and the award has already been upheld, at the arbitral seat.

B. Substantive Appeal

24. The general principle under CPR 52.21(3) is that an appeal will be allowed where the lower court's decision was either wrong or unjust because of a serious procedural or other irregularity in the lower court.

25. The former will be engaged where the court below has (a) erred in law, (b) erred in fact or (c) erred in the exercise of its discretion. There are important distinctions in the approach to be taken to these different kinds of error, in particular with respect to (b) and (c):

25.1 With respect to findings of fact, the approach on appeal will depend on the

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3 *Tanfern Ltd v Cameron-MacDonald* [2000] 1 W.L.R. 1311 at ¶21 **[LA-23]**.

4 As the Court of Appeal held in *Smith v Cosworth Casting Processes Ltd* [1997] 1 W.L.R. 1538 **[LA-21]**: *"[t]here can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court..."*.

degree of deference due to the findings of the court below which in turn depends on the nature and circumstances of the case. The greater the advantage of the judge at first instance (*e.g.* because he/she had the advantage of oral testimony) the more reluctant an appeal court will be to interfere with the judge's findings of fact.[5] The Appellants respectfully submit that where, as here, Mr Justice Knowles had a series of witness statements and documents before him on what was essentially a summary judgment application to enforce a foreign arbitral award,[6] none of which was the subject of oral testimony or cross-examination, the appeal court is in as good a position as the learned Judge to evaluate the facts;[7]

25.2 With respect to questions of discretion, two well-known formulations for the applicable test are whether: (a) *"the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the [appeal court] might or would have adopted, but has exceed the generous ambit within which a reasonable disagreement is possible"*,[8] or (b) *"the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly."*[9]

26. The remainder of this Skeleton Argument addresses the Appellants' five grounds of appeal in turn.

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5 *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 W.L.R. 577 at ¶¶6-23 and ¶¶193-197 per Clarke and Ward LJJ **[LA-2]**.

6 *H J Heinz Co Ltd v EFL Inc* [2010] 2 Lloyd's Rep 727 (Burton J) **[LA-8]**.

7 *Manning v Stylianou* [2007] EWCA Civ 1655 per Waller LJ at ¶19 **[LA-12]**.

8 *Tanfern Ltd v Cameron MacDonald* [2000] 1 WLR 1311 per Brooke LJ at ¶32 **[LA-23]**.

9 *Phonographic Performance Ltd v AEI Rediffusion Music Ltd* [1999] 1 W.L.R. 1507 per Lord Woolf M.R. at 1523 **[LA-18]**.

VI. GROUND I

27. The Appellants repeat the points made at paragraphs 13-15 of the Grounds of Appeal **[CB/1/13-15/¶¶13-15]**. The learned Judge's finding that the Respondent could not have discovered the Evidence prior to the Award (¶79) **[CB/5/77/¶79]** was wrong and procedurally unfair.

28. *Incorrect Approach:* The Court proceeded on the basis that because the case involved allegations of fraud, the onus *per se* was on the Appellants positively to prove that the Respondent did not and could not have discovered the alleged fraud: *"In the present case the Claimants, if dishonest, are not to escape if the right stone was not turned over by the State"* (¶73) **[CB/5/76/¶73]**.

29. It is respectfully submitted that the Judge fell into error in this approach, in paying insufficient regard to the parallel principle of non-intervention in this context.

30. It is well-settled that the English Court should be slow to intervene where the policy of finality of awards is also engaged, given the danger of a re-hearing that might usurp the supervisory functions of the curial courts. This was made clear, notably, in *Westacre Investments Inc v Jugoimport-SDPR Ltd.*[10] In that case, it was asserted in English enforcement proceedings that a Swiss ICC award had been obtained by means of perjured evidence. Permission of the English court was sought for the introduction of evidence that the successful party's witness had been guilty of perjury in the underlying arbitration, in order to engage the public policy exception to enforcement in the New York's Convention.

31. At first instance, Colman J held that the English Courts should not hear fresh evidence at the enforcement stage to the effect that an award was procured by fraud unless:

> *"the evidence was not available or reasonably obtainable either (a) at the time of the hearing of the arbitration; or (b) at such time as would*

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10 *Westacre Investments Inc v Jugoimport-SDPR Ltd* [2000] QB 288 at 316-317 **[LA-25]**.

have enabled the party concerned to have adduced it in the court of supervisory jurisdiction to support an application to reverse the arbitrators' award if such procedure were available. Where the additional evidence has already been deployed before the court of supervisory jurisdiction for the purpose of an application for the setting aside or remission of the award but the application has failed, the public policy of finality would normally require that the English courts should not permit that further evidence to be adduced at the stage of enforcement"[11] *(emphasis added).*

32. In delivering one of the majority judgments in the Court of Appeal (which upheld Colman J's judgment), Mantell LJ was concerned as to how an inquiry into the underlying facts by the court would work in practice (whilst questioning the approach taken by Waller LJ in *Soleimany v Soleimany*),[12] and considered that *"... the attempt to reopen the facts should be rebuffed."*[13]

33. In Nomihold Securities Inc v Mobile Telesystems Finance SA,[14] Burton J framed the issue in the following way:

"I am satisfied that the question is whether, on the balance of probabilities (Rosseel at 628), the defendant has shown a real ground

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11 *Westacre Investments Inc v Jugoimport-SPDR Holding Co Limited* [1999] QB 740 at 784 **[LA-26]**.

12 *Soleimany v Soleimany* [1999] QB 785 **[LA-22]**. In *Soleimany*, a father and son fell out after starting a business together to smuggle carpets out of Iran illegally. The two submitted their dispute to the Beth Din (domestic arbitration) in London. Under Jewish law, the illegal purpose of the contract had no effect on the rights of the parties, and an award was rendered accordingly. The Court of Appeal (overturning the judge at first instance) took a different approach to the tribunal and unanimously declined to make the order sought enforcing the award, with Waller LJ making *obiter* comments at pp. 10-11 to the effect that *"It may, however, also be in the public interest that this court should express some view on a point which has been fully argued and which is likely to arise again. In our view, an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should enquire further to some extent... . The judge has to decide whether it is proper to give full faith and credit to the arbitrator's award. Only if he decides at the preliminary stage that he should not take that course does he need to embark on a more elaborate enquiry into the issue of illegality."* It is submitted that this statement goes too far in the light of the subsequent majority decision in *Westacre*.

13 [2000] QB 288 at 316-317 **[LA-25]**. Importantly, Mantell LJ also noted at p. 317 that *"the seriousness of the alleged illegality"* (to which Waller LJ gave weight in *Soleimany*) was not *"a factor to be considered at the stage of deciding whether or not to mount a full-scale inquiry"*. His Lordship went on to say that *"It is something to be taken into account as part of the balancing exercise between the competing public policy considerations of finality and illegality which can only be performed in response to the second question, if it arises, namely, should the award be enforced?"* This approach was later followed by Steel J in *R v V* [2009] 1 Lloyd's Rep 97 at [31] **[LA-19]**.

14 *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2011] EWHC 2143 (Comm) at [71] **[LA-15]**.

> *for challenging the validity of the award (Sovarex) by reference to cogent evidence (Double K), which passes the Ladd v Marshall test, such that I can either set aside the award (Double K) or refuse its enforcement, or order a full hearing of the issue or issues to be effected by oral evidence and disclosure as appropriate, and relying upon such fresh evidence. It is quite clear that it is not a matter to take lightly, the possibility of rehearing issues which have been resolved by a distinguished tribunal, after four hearings and legal representations and a plethora of documents and submissions, resulting in a final and binding decision" (emphasis added).*[15]

34. *Error of Fact*: For the reasons set out in paragraph 13 of the Grounds of Appeal, it is respectfully submitted that the learned Judge wrongly ignored and/or failed to give sufficient weight to evidence from the underlying arbitration that demonstrates that the Respondent was aware and/or should have been aware on the basis of reasonable diligence of the matters upon which it now relies. This evidence was summarised in paragraphs 51-52 of the Appellants' skeleton argument for the hearing before Mr Justice Knowles **[SB/7/712-718/¶¶51-52]**, which are reproduced in **Annex I** to this Skeleton Argument.

35. *Lack of Due Process:* Further or alternatively, for the reasons set out in paragraphs 14-15 of the Grounds of Appeal **[CB/1/15/¶¶14-15]**, the learned Judge's findings of fact in this regard are procedurally irregular and unfair.

VII. GROUND II

36. The Appellants repeat the points made at paragraphs 16-19 of the Grounds of Appeal **[CB/1/15-18/¶¶16-19]**, namely that the Judge fell into a serious error when finding that no court had decided the question of whether there had been a fraud

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15 This statement of the principle was echoed by Ramsey J in *Honeywell International Middle East Ltd v Meydan Group LLC* [2014] 2 Lloyd's Rep. 133 at [71] **[LA-9]**: *"Given the limited grounds upon which the court may refuse to enforce a New York Convention award then, in applying the principles relevant to summary judgment and striking out, the court needs to assess what is put before it with a critical eye. In particular where a party has not raised a matter which they could have raised before the arbitral tribunal or where they have taken inconsistent positions to those they now urge upon the court, the court should not lightly accede to a submission that the matter needs to be determined at a trial where the underlying reason is often to cause further delay and costs in the hope that something may turn up either to strengthen an existing ground or to establish a new ground"* (emphasis added).

with an "indirect" causative effect (¶¶58, 80) **[CB/5/72/¶58] [CB/5/77/¶80]**, and therefore that there can be no estoppel in this jurisdiction.

37. With respect to the learned Judge, his analysis of the contents of the Swedish Judgment was simply incorrect. In Section 5.3.1 of the Swedish Judgment, the Swedish Court held as follows **[SB/3/530-532/§5.3.1]**:

> *"In the Court of Appeal's opinion, it is also not obvious that this evidence, through indirect influence on the arbitration tribunal, was decisive for the outcome of the case"* (emphasis added)

38. This error in analysis was compounded by the fact that Judge misquoted this passage in the relevant portion of his Judgment (¶60) **[CB/5/74/¶60]**, by excluding the word *"also"* - which makes it clear that the Swedish Court conclusively decided both the direct and indirect decisive impact points.[16]

39. Further or alternatively, for the reasons set out in paragraph 17.3 of the Grounds of Appeal, in circumstances where the learned Judge found that the Swedish Court had concluded that the Indicative Bid was not false evidence (¶66) **[CB/5/74-75/¶66]**, his finding that there had been no relevant determination on the fraud allegation was not open to him.

40. *Finality:* It is submitted that the fraud allegation *"was made, entertained and rejected"* by the competent foreign court (*per* Mantell LJ in *Westacre*), and so any factual inquiry should necessarily stop there.

41. *Issue Estoppel:* Further, the finding in question by the Swedish Court gives rise to an issue estoppel as a matter of English law.

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[16] As the Judge noted in ¶56 of the Judgment, the parties presented two different translations of the Swedish Judgment which are not materially different (in the event, the Judge proceeded to take the translation offered by the Defendant as that was referred to most often). For the sake of completeness, the relevant passage of Section 5.3.1 of the Swedish Judgment in the Claimants' translation reads as follows: *"Neither is it obvious, according to the Court, that this [fraud related] evidence, through an indirect influence on the tribunal, was of decisive importance for the outcome of the case"* (emphasis added) **[SB/3/530-532/§5.3.1]**.

42. Issue estoppel can arise in the context of enforcement of foreign arbitral awards.[17]

43. Where a challenge to an arbitral award for fraud has been rejected at the seat, this may also result in issue estoppel. As recognised by the Court of Appeal in the *Westacre* case: "*It is clear that if an application is made to the local court and fails* [*i.e.* to set aside an award because it was procured by fraud] *the result may be an estoppel as per House of Spring Gardens v Waite*" (emphasis added).[18]

44. As for the operation of issue estoppel with respect to foreign judgments, this was helpfully summarised by Clarke LJ in *The "Good Challenger"* [19]as follows:

44.1 It is irrelevant that the English court may form the view that the decision of the foreign court was wrong either on the facts or as a matter of English law.

44.2 The courts must be cautious before concluding that the foreign court made a clear decision on the relevant issue because the procedures of the court may be different and it may not be easy to determine the precise identity of the issues being determined.

44.3 The decision of the court must be necessary for its decision.

44.4 The application of the principles of issue estoppel is subject to the overriding consideration that it must work justice and not injustice.

45. It is respectfully submitted that the learned Judge fell into error and/or failed properly to exercise his discretion by failing to apply the above criteria in their entirety to the facts of the present case. This is perhaps best illustrated in ¶¶65-66 of the Judgment **[CB/5/74-75/¶¶65-66]** where the Judge appears to be criticising

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17 *Diag Human SE v Czech Republic* [2014] 2 Lloyd's Rep. 283 at [58]-[62] (Eder J) **[LA-4]**.

18 [2000] QB 288 per Waller LJ at 309H **[LA-25]**. In *House of Spring Gardens Ltd v. Waite and Others* [1991] 1 QB 241 **[LA-10]**, fraud allegations that had been ventilated at first instance and on appeal in a foreign (Irish) court were considered to amount to issue estoppel and/or an abuse when brought in this jurisdiction. Notably, the judgment in *House of Spring Gardens* was not referred to once in the Judgment, despite featuring heavily in the Appellants' skeleton argument.

19 *Good Challenger Navegante SA v MetalExportImport SA* (The "Good Challenger") [2004] 1 Lloyd's Rep. 67 at [54] **[LA-7]**.

the Swedish Court's evaluation of certain aspects of the case, namely (i) the disclosure procedure in the international arbitration context, and (ii) the false nature of the Indicative Bid. Leaving to one side for the moment the fact that the Swedish Court made its evaluations (as it was perfectly entitled to) in its capacity as the supervisory court and as a matter of curial (Swedish) law, the Judge's findings are inconsistent with the cautionary approach urged by the authorities as to importing rules of English civil procedure into a foreign legal proceeding.[20]

46. Further, the Judge failed to take into account that it was the Respondent itself who made a free and unconstrained election to raise the fraud issue and have it resolved before the Swedish Court as the supervisory court. It should not be now allowed simply to walk away from the judgment of the court *it* chose. Neither is there any suggestion that the Swedish Court was not impartial or has treated the Respondent unfairly in relation to its ability to adduce (and make submissions on) the fraud evidence.[21]

47. In the light of the above, the learned Judge should have found that (i) the Swedish Court did decide that there was no causative impact (whether direct or indirect) between the alleged fraud and the outcome of the arbitration; and (ii) that the Swedish Judgment therefore gave rise to issue estoppel such that the Respondent was not entitled to re-litigate the fraud issue before the English Court.[22] Instead, the

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20 As noted by Flaux J in *Chantiers De L'Atlantique S.A. v Gaztransport & Technigaz S.A.S* [2011] EWHC 3383 (Comm) at [213] **[LA-3]**: *"Before considering the history of document requests and responses in the arbitration, it is important to have in mind that the ICC arbitration in this case was conducted in accordance with civil law arbitration procedure. In particular the rules for disclosure of documents were based on the IBA Rules. There was no duty to disclose relevant documents, akin to CPR Part 31, such as would be the case with London arbitration, conducted in accordance with English procedure. In these circumstances, the court must be careful not to import into its assessment of GTT's conduct and the serious allegations of concealment made by CAT English law concepts of the duty of disclosure"*(emphasis added). There are evident parallels with the present case, where the underlying arbitration was also conducted under civil law arbitration rules (the SCC Arbitration Rules) and in accordance with the IBA Rules on document production (Award, ¶¶47&132 **[SB/1/29-31/¶47] [SB/1/60/¶132]**).

21 These were among the factors considered by the Court of Appeal in the *Westacre* case [2000] QB 288 per Waller LJ at 309 **[LA-25]**.

22 This was the main theme in Mantel LJ's speech in *Westacre*: *"It is of crucial importance to evaluate both the majority decision in the arbitration and the ruling of the Swiss Federal Tribunal, Swiss Law being both the proper law of the contract and the curial law of the arbitration and Switzerland, like*

erroneous findings made by the learned Judge caused him (wrongly) to distinguish Colman J's judgment in *Minmetals Germany GmbH v Ferco Steel Ltd*[23] (¶89) **[CB/5/78-79/¶89]** because of the perceived *"limits"* on the powers of the Swedish Court. Given Section 5.3.1 of the Swedish Judgment, it is respectfully submitted that the Swedish Court never considered itself to be constrained with respect to its powers in the manner described by the Judge.

VIII. GROUND III

48. The Appellants repeat the points made at paragraphs 20-21 of the Grounds of Appeal **[CB/1/18-19/¶¶20-21]**. In particular, the detail and extent of the Swedish challenge process is to be emphasised here.

49. The learned Judge was wrong to determine, summarily, that the Respondent's pursuit of its fraud allegations in this jurisdiction was not an abuse of process *"for the same reasons"* as the dismissal of the Appellants' estoppel argument (¶90) **[CB/5/79/¶90]**.

50. Further, the learned Judge did not engage in any analysis of the authorities on abuse of process. As a matter of English law, this principle is a flexible one,[24] the difference with issue estoppel being that the latter is part of the traditional *res judicata* doctrine which *"is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers".*[25] Importantly for present purposes, the two principles are said to share *"the common underlying*

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the United Kingdom, being a party to the New York Convention. From the award itself it is clear that bribery was a central issue. Had it not been rejected the claim would have failed, Swiss and English public policy being indistinguishable in this respect. Authority apart, in those circumstances and without fresh evidence I would have thought that there could be no justification for refusing to enforce the award" (emphasis added) [2000] QB 288 at 316 **[LA-25]**.

23 *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 at 331 **[LA-13]**. Notably, the example mentioned by Colman J in that case, namely *"obvious and serious disregard for basic principles of justice by the arbitrators"* is nowhere near the alleged shortcoming of the Swedish Judgment.

24 *Johnson v Gore Wood* [2002] 2 A.C. 1 at 332G-333C per Lord Bingham **[LA-11]**.

25 *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] A.C. 160 per Lord Sumption at [25] **[LA-24]**.

purpose of limiting abusive and duplicative litigation".[26] Yet, this is precisely the position here, where the Respondent has raised (and lost) in the Swedish proceedings all of the same points which it is now seeking to raise before the English Court.[27]

51. The interrelationship between fraud allegations and abuse of process was considered in *Owens Bank Ltd. v. Etoile Commerciale S.A.*,[28] where the Privy Council concluded that the local Court of Appeal had been entitled to view the allegation of fraud as so weak as to amount to an abuse of process.[29] In the words of Stuart-Smith LJ in *House of Spring Gardens, "public policy requires that there should be an end of litigation and that a litigant should not be vexed more than once in the same cause."*[30]

52. The Respondent was allowed one free, post-award bite at the cherry (namely, before the Swedish Court), but not, in the words of a renowned commentator, *"two bites, which would be greedy..."*[31] As stated, the principle of finality has a particular significance in the context of international arbitration, and the New York Convention. This all the more so when the forum which has already undertaken and completed the task of determining the relevant challenge is the arbitral seat.

IX. GROUND IV

53. The Appellants repeat the points made at paragraph 22 of the Grounds of Appeal **[CB/1/19-21/¶22]**.

54. The learned Judge erred in concluding that, even if there had been an estoppel/abuse, it would not preclude a trial of the fraud allegations in this

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26 *Ibid.*

27 Dzhazoyan 1 ¶¶12, 44 and Annex 1 **[SB/5/645/¶12] [SB/5/656-658/¶44] [SB/5/660-683/Annex I]**.

28 *Owens Bank Ltd. v. Etoile Commerciale S.A.* [1995] 1 W.L.R. 44 **[LA-17]**.

29 Notably, Lord Templeman said, at p. 50: "*Their Lordships do not regard the decision in Abouloff's case, 10 Q.B.D. 295, with enthusiasm, especially in its application to countries whose judgments the United Kingdom has agreed to register and enforce. In those cases the salutary rule which favours finality in litigation seems more appropriate.*"

30 [1991] 1 QB at 255D **[LA-10]**.

31 Adrian Briggs, *Civil Jurisdiction and Judgments*, 6th edn, at p. 732 **[LA-1]**.

jurisdiction. In making this finding, the Judge referred to Rix LJ's *obiter* observations in *Yukos Capital Sarl v. OJSC Rosneft Oil Co (No. 2)* in the context of the *"special circumstances"* exception to the issue estoppel rule.[32]

55. According to the learned Judge, this exception would have been invoked in this case to defeat the plea of issue estoppel because *"English public order must ultimately be a matter for the English Court"* (¶87) **[CB/5/78/¶87]**.

56. The Appellants fully accept that English public policy is a matter for the English court. However, this principle does not sweep away the doctrines of issue estoppel or abuse of process. Any determination as to whether English public policy has been offended will necessarily require prior findings of fact. In this case, the determination will depend upon the nature of the information said to have been concealed or misrepresented, and its significance for the Tribunal's determination. If the information was indeed false, and it was indeed the subject of a dishonest presentation by the award creditor, and it was indeed causative of the award, then the English Court will likely rule that English public policy is engaged. But whilst the latter determination remains for the English Court alone, there is no basis to insulate each of the prior constituent findings from issue estoppel or abuse of process.

57. Here, the learned Judge appears to have *"taken"* the Swedish Judgment on its face value as *"showing Swedish public policy in the context of this case"* (¶86) **[CB/5/78/¶86]**. Yet no further analysis was undertaken by the Judge, who simply proceeded to the conclusion that *"as a matter of law, English public policy is not the same [as Swedish public policy]"* (¶86) **[CB/5/78/¶86]**. Had the Judge conducted such an analysis, it would have been apparent that (a) each of the constituent elements of the allegation are no longer open to the Respondent to assert, and (b) whatever the nuanced differences between Swedish and English public policy, these made no difference at all with respect to the relevant individual findings of the

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[32] *Yukos Capital Sarl v. OJSC Rosneft Oil Co (No. 2)* [2012] 2 Lloyd's Rep. 208 at [147] **[LA-27]**. *See* also [158]-[160] of that judgment, where Rix LJ notes the *"amorphous"* nature of this exception.

Swedish Court. In particular, the finding that Indicative Bid did not have a direct or indirect impact on the Tribunal's Award.

58. Finally, in adopting the above approach to the authorities on public policy, the learned Judge also (once again) erred by failing to take due account of the public interest in the finality of litigation, especially in the context of the recognition and enforcement of an arbitration award. This all the more so where the determinative issues have already been decided as a matter of foreign law by the courts of the arbitral seat.

X. GROUND V

59. The Appellants repeat the points made at paragraphs 23-25 of the Grounds of Appeal **[CB/1/21-22/¶¶23-25]**.

60. The learned Judge erred by failing sufficiently to identify what the precise fraud actually was, and thus cannot be said to have determined that there was a relevant *prima facie* case that might lead to the Award being refused recognition.

61. In assessing an allegation that an award has been procured by fraud::

61.1 The starting point must obviously be the evaluation of the Award itself;[33]

61.2 Second, the party asserting the allegation "will have to demonstrate its case to a high standard of proof";[34]

61.3 Third, *"an award will only be "obtained by fraud" if the party which has deliberately concealed the document has, as a consequence of that concealment, obtained an award in its favour"*. The alleging party must therefore *"also prove a causative link between the deliberate concealment of*

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33 *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd's Rep. 222 at 148 (Walker J) **[LA-16]**.

34 *Elektrim SA v Vivendi Universal SA and others* [2007] 1 Lloyd's Rep. 693 at [81] (Aikens J) **[LA-6]**. This case involved an application under Section 68(2)(g) of the Arbitration Act in the context of serious procedural irregularity (award obtained by fraud), but this is immaterial for present purposes for the reasons stated by the Judge at [86]-[87] of the same Judgment.

the document and the decision in the award in favour of the other, successful, party";[35] and

61.4 Fourth, *"if there has been a failure to disclose a document as a result of either negligence, or an error of judgment, concerning the interpretation of an order for production or the scope of the obligation to search for a document following an order of the tribunal, that is not 'fraud'."*[36]

62. It is submitted that the Respondent has not satisfied the above criteria and the Judge fell into error by holding that it did so. Specifically, there was no evidence before the Judge that the Appellants deliberately and/or dishonestly concealed the Perkwood Agreement in the arbitration from the Respondent and/or Tribunal.[37] Indeed, this would have been obvious already from the fact that both (i) the existence and (ii) value of the Perkwood Agreement *were* in fact disclosed to the Respondent in the arbitration, as explained in Annex I.

63. Further, the only relevant fraud actually alleged is that the Appellants knowingly misled the Tribunal by relying on the Indicative Bid (¶34) **[CB/5/67/¶34]**, which is said to have been tainted by virtue of containing fraudulently inflated construction costs with respect to the LPG Plant (¶¶40-44) **[CB/5/68-70/¶¶40-44]**. However, it does not necessarily follow that if the underlying material was fraudulent, the Tribunal was knowingly misled.[38] Instead, the circumstances surrounding the deployment of the Indicative Bid before the Tribunal required a proper analysis. The Judgment contains no such analysis, and the learned Judge's reasoning in this regard appears as a *non-sequitur* (¶¶45-48) **[CB/5/70/¶¶45-48]**.

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35 *Ibid.*, at [82] **[LA-6]**. *See* also *Chantiers De L'Atlantique S.A. v Gaztransport & Technigaz S.A.S* [2011] EWHC 3383 (Comm) at [292] (Flaux J) **[LA-3]**.

36 *Elektrim SA v Vivendi Universal SA and others* [2007] 1 Lloyd's Rep. 693 at [83] **[LA-6]**.

37 Or, put differently, that their conduct in this regard amounted to *"some form of reprehensible or unconscionable conduct" – see Double K Oil Products 1996 Ltd v Neste Oil OYJ* [2010] 1 Lloyd's Rep. 141 at [33] (Blair J) **[LA-5]**.

38 In this regard, the learned Judge also fell in error by wrongly interpreting paragraphs 1696 and 1707 of the Award in ¶¶45-46 of the Judgment to the extent that he found that the Appellants affirmatively asked the Tribunal to rely on (or have regard to) the Indicative Bid.

64. In fact, it is clear from the arbitration record that the Appellants did not invoke the Indicative Bid as an alternative basis for its claim for damages with respect to the LPG Plant. Rather, the Appellants provided information on eight different indicative bids (including the bid in question) in response to the Respondent's challenge to the Appellants' valuation methods (Award, ¶649) **[SB/1/133/¶649]**.[39] This was also the conclusion reached by the Swedish and US courts, as reflected in the Judgment (¶¶50-52, 60 & 62) **[CB/5/71/¶¶50-52] [CB/5/74/¶¶60&62]**.

65. As the authorities make clear, an unspecific and indirect "tainting" of an award is not enough to ground a public policy defence.[40] With respect, the learned Judge should have so held.

XI. CONCLUSION

66. In the light of the foregoing, the Appellants respectfully submit that the Order and Judgment of Mr Justice Knowles ought to be overturned and the Appellants allowed to enforce the Award in this jurisdiction, pursuant to the terms of the original recognition Order made by Mr Justice Burton.

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Essex Court Chambers

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Ruth M D Byrne
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18 July 2017

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39 The Tribunal noted in this context that *"of particular relevance"* was the fact that an offer was made for the LPG Plant by state–owned KMG at that time for US$ 199 million, and it was against this background that it found the Indicative Bid to be *"the relatively best source of information for the valuation of the LPG Plant among the various sources of information submitted by the Parties regarding the valuation for the LPG Plant"* (Award ¶1747) **[SB/1/382/¶1747]**.

40 *Sinocore International Co Ltd v RBRG Trading (UK) Ltd* [2017] 1 Lloyd's Rep. 375 at [46] (Phillips J) **[LA-20]**. *See* also Burton J's observations in *National Iranian Oil Company v Crescent Petroleum Company International Ltd and another* [2016] 2 Lloyd's Rep. 146 at [49] in the context of allegations of illegality affecting the underlying contract which gave rise to the award **[LA-14]**: *"There is certainly no English public policy to refuse to enforce a contract which has been preceded, and is unaffected, by a failed attempt to bribe, on the basis that such contract, or one or more of the parties to it, have allegedly been tainted by the precedent conduct... But to introduce a concept of tainting of an otherwise legal contract would create uncertainty, and in any event wholly undermines party autonomy..."*.

Annex I
Summary of paragraphs 51-52 of the Claimants' Skeleton Argument for the hearing before Mr Justice Knowles

The underlying facts and matters relating to the alleged fraud were (or should have been) known to the Republic of Kazakhstan (the "**ROK**") at the relevant times, as evidenced by the following:

1. The ROK was in possession or control of all TNG documents, including those relating to the LPG Plant, by virtue of having seized TNG's corporate documents and various other documents regarding its contracts with third parties in December 2008 and March 2009 respectively.[41] Considering this and the extent and number of countless investigations, unplanned inspections, raids and seizures of documents carried out by the ROK throughout 2008-2010, it cannot seriously contend that reasonable diligence would not have lead it to the allegations it now makes.

2. The ROK made numerous references to Perkwood in the context of "*opaque service agreements*" and the "*opaque financing structure*" in its submissions in the ECT arbitration which were recorded by the ECT Tribunal in its Award in the context of broad allegations of siphoning of money by the Claimants.[42]

3. The TNG-Perkwood agreement was mentioned in the due diligence report prepared by the law firm Squire Sanders for KMG in July 2009 and submitted by the ROK to the ECT Tribunal in March 2013 (the purpose of the report was to provide information about legal risk in relation to KMG's contemplated acquisition of TNG, KPM and Tristan Oil);[43]

4. Perkwood is mentioned on a number of occasions in KPMG's Vendor Due Diligence Report titled "Project Zenith" which was disclosed by the Claimants in the ECT arbitration. Notably, the said report (i) refers to Perkwood as a "*related*" party; (ii)

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41 ECT Award, ¶¶358, 408, 601 and 1139 **[SB/1/98/¶358], [SB/1/102/¶408], [SB/1/124/¶601] and [SB/1/244/¶1139]**.

42 ECT Award, ¶1450 **[SB/1/312/¶1450]**.

43 ECT Award, ¶172 **[SB/1/375-376/¶172]**.

lists Perkwood as the largest supplier of the equipment for the LPG Plant, and (iii) was relied on by the ROK's counsel during the cross-examination of Anatolie Stati and Artur Lungu in the ECT arbitration.[44]

5. In the JOA, a copy of which was disclosed by the Claimants during the ECT arbitration, Perkwood is mentioned twice as a company (i) whose "*actual expenses*" formed part of the Real Net Value of the LPG Plant and (ii) to which TNG has significant existing financial commitments related to the LPG plant (*see* Schedule 1 and Annex 2 to the JOA respectively).[45]

6. Vitol agreed in the JOA arbitration to exclude the value of Perkwood's management fee for the Real Net Value calculation purposes. Thus, as noted by Vitol's own expert, David Stern, the fee was formed by way of a "*mark-up*" charged by Perkwood on third party construction costs, and it was therefore "*logical*" to exclude the said fee as otherwise "*Ascom would be claiming damages in respect of Vitol FSU's alleged share of costs paid to a party that is actually part of the network of Ascom affiliated companies.*"

7. Vitol's own witness in the JOA arbitration, Ray Martin, testified in paragraphs 30-31 of his Witness Statement that the parties' discussions of the LPG Plant project were affected by Ascom's "*Kazakh tax planning strategy*" and that, crucially, Vitol was not against this arrangement "*as long as Vitol did not have to bear any extra costs arising from such structure in the form of higher construction costs. Accordingly Vitol wanted to ensure that any anomalies arising from Ascom's tax planning strategy were properly identified and excluded from any calculation of shared profit*". This was also echoed in the LPG Plant Business Plan prepared by Vitol and submitted by the ROK as evidence in the ECT arbitration, which refers to Ascom trying to

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44 ECT Award, ¶1716 **[SB/1/374-375/¶1716]**.

45 ECT Award, ¶¶1539, 1702, 1738-1741 **[SB/1/331/¶1539]**, **[SB/1/371/¶1702]**, **[SB/1/380/¶¶1738-1741]**.

"minimise their tax commitments ... through reinvestment and take money out through internal transfer pricing and external funding from Vitol".[46]

8. The TNG-Perkwood agreement (and its associated value/costs) was explicitly mentioned in two spreadsheets reflecting the LPG Plant construction costs disclosed by the Claimants during the ECT arbitration as part of the document disclosure procedure, titled "List of Suppliers for the LPG Plant" (where Perkwood's role is mentioned under the description "*Main Equipment*") and "Account of TNG's Turnover for the LPG Project" (where the allegedly "fraudulent" TNG-Perkwood contract is mentioned), respectively.

9. Perkwood declared approximately US$ 138 million worth of equipment which it imported into Kazakhstan for the LPG Plant construction purposes and paid VAT and customs duties in an amount of approximately US$ 24.7 million in relation to the same (note that the TNG-Perkwood agreement is referenced in each of the relevant customs declarations).

10. The ROK's customs authorities investigated TNG in October 2008 and found no violations of local laws in relation to its specific dealings with Perkwood relating to the very equipment, the value of which the ROK now says was grossly inflated by the Claimants. Notably, the ROK specifically audited declaration No 50715/28J27/0000365 (worth *circa* US$ 69.6 million) and did not find any irregularity in relation to the same.

11. Likewise, the ROK's Ministry of Energy and Mineral Resources (MEMR) carried detailed and unscheduled (*i.e.* without prior warning) audits of the Claimants' business dealings in Kazakhstan (including in relation to the LPG Plant) which found, *inter alia*, that the costs of the uninstalled equipment and materials in relation to the LPG Plant to be 8,826 billion Kazakh tenge (*circa* US$ 60 million at the time).[47]

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[46] ECT Award, ¶¶1709, 1716, 1718 and 1733 **[SB/1/373/¶1709]**, **[SB/1/374-375/¶1716]**, **[SB/1/375/¶1718] and [SB/1/379/¶1733]**.

[47] ECT Award, ¶1744 **[SB/1/381/¶1744]**.

12. In the ECT Arbitration, the ROK's arguments were all about diminishing the value of the LPG plant and it therefore fiercely attacked any valuation based on the investment cost method. Thus, the ROK stated that the LPG Plant was a *"failed project"* and that *"a hypothetical buyer will not be interested in how much cash was invested in the business, but only in the cash he or she would get out of the business in the future. The investment value (USD 245 million) is irrelevant and, indeed, the investment value and the FMV [Fair Market Value] are utterly disproportionate to each other... The investment itself was a black hole for Claimants' investments and, in the end, Claimants invested USD 245 million for the unfinished LPG Plant."*[48]

13. In the course of the ECT arbitration, the ROK argued that the LPG Plant investment cost probably was even greater than what the Claimants had reported. For example, Gaffney, Cline & Associates (GCA), the ROK's geological expert, opined that US$ 320 million was a reasonable cost and that a further US$ 100 million was needed for completion of the Plant.[49]

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48 ECT Award, ¶¶1712 and 1724 **[SB/1/373/¶1712] and [SB/1/377/¶1724]**.

49 ECT Award, ¶¶1715-1718 **[SB/1/374-375/¶¶1715-1718]**.