

# OPUS 2

## INTERNATIONAL

Anatolie Stati & Ors v The Republic of Kazakstan

Day 1

July 31, 2018

Opus 2 International - Official Court Reporters

Phone: 0203 008 6619

Email: [transcripts@opus2.com](mailto:transcripts@opus2.com)

Website: <https://www.opus2.com>

1 Tuesday, 31 July 2018  
 2 (10.30 am)  
 3 Submissions by MR FOXTON  
 4 MR FOXTON: May it please the court. I appear  
 5 with Mr Sprange QC and Mr Bhalla for the appellants, who  
 6 I shall refer to as the Statis. My learned friends  
 7 Mr Smouha QC, Mr Harris and Mr Kennelly appear for the  
 8 respondent, Kazakhstan.  
 9 As the court knows, we are here pursuant to a  
 10 permission of my Lord, Lord Justice Leggatt, on three  
 11 grounds of appeal; and, in addition, there is the grounds  
 12 raised by the respondent's notice.  
 13 Subject to the court, we propose to split the time  
 14 evenly; and I would hope to sit down in about two hours and  
 15 have a little time left by Mr Smouha in reply to allow a  
 16 4.15 or shortly thereafter completion.  
 17 LORD JUSTICE PATTEN: Good. Well, we thought you  
 18 would be able to resolve it between yourselves as to the  
 19 order in which you take things and so on. But, clearly, we  
 20 have to finish today. And quite where we are at the end of  
 21 the day, we shall see.  
 22 MR FOXTON: My Lord, quite. I think the  
 23 determination to finish today is held universally  
 24 throughout.  
 25 LORD JUSTICE PATTEN: It's an absolute

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1 requirement, I'm afraid. The trial is for which date  
 2 in October?  
 3 MR FOXTON: It's November, my Lord.  
 4 LORD JUSTICE DAVID RICHARDS: We were told it was  
 5 30 October.  
 6 MR FOXTON: 30 October. I do apologise.  
 7 LORD JUSTICE PATTEN: What is the position about  
 8 disclosure? Is it still the position it hasn't taken place  
 9 or what?  
 10 MR FOXTON: I'm told disclosure has taken place,  
 11 my Lord.  
 12 LORD JUSTICE PATTEN: It has taken place. Okay.  
 13 Thank you.  
 14 LORD JUSTICE DAVID RICHARDS: Mr Foxton, can  
 15 I just interrupt you to say that we have these splendid  
 16 screens in front of us; but mine, I'm afraid, needs to have  
 17 a password put in it, I think, before I can get in and see  
 18 on the screen what you're all saying. Can someone help on  
 19 that? Answer: no.  
 20 MR FOXTON: My Lord, I hope that the query has  
 21 been heard and will be responded to. Would it be --  
 22 LORD JUSTICE PATTEN: Mine seems to be working.  
 23 LORD JUSTICE LEGGATT: Mine requires a password.  
 24 LORD JUSTICE PATTEN: Right.  
 25 MR FOXTON: I'm in your hands. My Lords, I was

2

1 going to make submissions under --  
 2 LORD JUSTICE PATTEN: Sorry. Just a minute.  
 3 (Discussion with court usher)  
 4 LORD JUSTICE PATTEN: Well, that's not acceptable.  
 5 Just get somebody here. I mean, there must be somebody in  
 6 this court who can contact the people and get them here.  
 7 I mean, this is absolutely ridiculous.  
 8 MR FOXTON: My Lord, I hope that is being done;  
 9 indeed, I am told it is being done.  
 10 LORD JUSTICE PATTEN: All right. Thank you.  
 11 MR FOXTON: So, my Lord, as I was saying, I've got  
 12 six heads of submissions, but, like a Russian doll, they are  
 13 reducing in size as you get to the next layer.  
 14 LORD JUSTICE PATTEN: Yes.  
 15 MR FOXTON: I was going to begin with a brief  
 16 review of the procedural history of the litigation, but, in  
 17 doing that, pick up the points that I'm going to be making  
 18 under substantive heads of submissions later on.  
 19 I'm then going to address what is clearly a  
 20 recurring theme of our case in relation to both the  
 21 appellant's notice and the respondent's notice issues, to  
 22 set that procedural history in the context of the  
 23 enforcement of New York Convention arbitration awards, which  
 24 we say provides the answer to both what went wrong with the  
 25 judge's order and why the respondent's notice issues are

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1 equally unavailing.  
 2 I'm then going to turn to what Mr Smouha has  
 3 described as his primary position, which is the suggestion  
 4 that there is a freestanding counterclaim for declaratory  
 5 relief, which would survive discontinuance.  
 6 I'm then going to address the Statis' first and  
 7 second grounds of appeal.  
 8 Penultimately the Notice of Discontinuance ground,  
 9 whether the overriding objective provides the appropriate  
 10 test. And, lastly, there is some brief points outstanding  
 11 from the Kazakhstan respondent's notice that I will pick up.  
 12 Turning first to the procedural history. The  
 13 court knows that these proceedings began with an application  
 14 to enforce an arbitration award made in Sweden. That was an  
 15 arbitration award made in respect of claims brought to  
 16 enforce rights arising under international law through the  
 17 Energy Charter Treaty.  
 18 We have spared this court that award, which runs  
 19 to 414 pages. In the way of things, 100 of those are  
 20 recitals of the procedural history. But there was a finding  
 21 that Kazakhstan had breached an obligation of fair and  
 22 equitable treatment through what was found to be a string of  
 23 measures of coordinated harassment.  
 24 Now, it's common ground that, as an award made in  
 25 Sweden, that is a New York Convention award. And, because

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1 of that, it was open to the Statist to seek leave of the  
2 English court to enforce that award in the same manner or  
3 judgment as an order of the English court.

4 Now, we have given effect to the New York  
5 Convention enforcement mechanism in the provisions of the  
6 Arbitration Act. We've got those in the authorities bundle  
7 at tab 1.

8 LORD JUSTICE PATTEN: Yes. Yes.

9 MR FOXTON: My Lord, it is the very first page.  
10 Section 100, subsection (1) is the definition. And its "an  
11 award made in the territory of a State other than the  
12 United Kingdom which is party to the Convention".

13 101 over the page. It is 101 subsection (2) which  
14 provides for leave to be given to enforce a New York  
15 Convention award in the same manner as a judgment or order  
16 of the court.

17 While we're here at 102, note the very limited  
18 procedural demands on the award creditor in order to make  
19 that application:

20 "the duly authenticated original award or a duly  
21 certified copy of it".

22 And then 103 sets out what are the limited grounds  
23 on which the English court can refuse recognition or  
24 enforcement. That provision is prescriptive under 103(1),  
25 in the sense that other grounds not set out in 103 are not

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1 permitted. And whilst 103(2) uses the language of "may", in  
2 this jurisdiction at least the circumstances in which a  
3 party would establish one of those matters and yet,  
4 nonetheless, the award would be enforced are probably  
5 limited to cases where conduct post the award has given rise  
6 to a waiver or estoppel type argument. It would be a very  
7 exceptional case here that someone who establishes a  
8 section 103(2) ground would nonetheless have the award  
9 enforced.

10 Now, the very last of those grounds at (f) deals  
11 with the position where the award has been set aside or  
12 suspended by a competent authority of the court of the  
13 country in which the arbitration took place. That is a  
14 provision reflecting the special position of the supervisory  
15 or curial court and if it sets aside an award that of itself  
16 provides a ground for any enforcing court not to enforce the  
17 award.

18 Subsection (3) deals with public policy as a  
19 separate defence. That is also recognised in the New York  
20 Convention; and it is under 103(3) that the allegation that  
21 an award has been obtained by fraud falls to be addressed  
22 within the New York Convention framework.

23 Now, in accordance with the procedural position,  
24 the Statist's application for enforcement of the award under  
25 102 was made by an arbitration claim form. We don't need to

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1 turn that up. But it would be helpful, I think, just to  
2 look at the provision of the CPR setting out the procedural  
3 framework for that application, which we've got in this  
4 bundle at tab 25.

5 Now, CPR 62 on arbitration claims is divided into  
6 three sections. The third of those sections is enforcement,  
7 beginning at CPR 62.17. Page 725 at the bottom of the page.

8 The court will see that 67.18(b) is addressing  
9 section 101 of the 1996 Arbitration Act, that is to say an  
10 application to enforce a New York Convention arbitration  
11 award.

12 If one looks at subsection (2):

13 "The court to whom such an application is made  
14 may specify parties to the arbitration on whom the  
15 arbitration claim form must be served" — and that mandatory  
16 language signals the fact that the application to whom the  
17 application to enforce is made has two choices.

18 One choice would simply be to treat the  
19 application as one where the court would require the  
20 application to be served, would then not make any order by  
21 way of enforcement until the matter had come back before the  
22 court in the conventional way. That is one choice.

23 The other choice is the court makes a without  
24 notice order for enforcement, but that order is then served  
25 out of the — or served on the other parties, if necessary

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1 out of the jurisdiction, but on terms that the order remains  
2 provisional, that is to say it cannot, in fact, be enforced  
3 until either the time for an application to set it aside has  
4 elapsed without such an application being made or, if an  
5 application is made in time, the application has been  
6 determined.

7 And one can see that at — a little bit over the  
8 page, beginning at sub-paragraphs 7 and 8.

9 LORD JUSTICE PATTEN: Yes.

10 MR FOXTON: Providing for the order giving  
11 permission to be drawn up and served; and 8(b), the order  
12 can be served outside of the jurisdiction as if it's a claim  
13 form.

14 And if one looks at 9 and 10, that addresses the  
15 provisional nature of an order if made without notice in  
16 those circumstances.

17 LORD JUSTICE PATTEN: Yes.

18 MR FOXTON: Now, here Mr Justice Burton, to whom  
19 the application came, went for the second option, the  
20 provisional order option.

21 LORD JUSTICE LEGGATT: That is the usual one, in  
22 my experience.

23 MR FOXTON: Almost overwhelmingly, I think it is.  
24 And we would say that reflects what Lord Justice Rix  
25 described as the — at least in its initial stages — quasi

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1 administrative nature of an order to enforce a New York  
2 Convention award.  
3 Kazakhstan applied to set aside Mr Justice  
4 Burton's order within time. That application to set aside  
5 has yet to be determined, such that this order has never  
6 reached the stage of moving beyond provisional enforcement  
7 to enforcement.

8 Although initially various grounds of set aside  
9 were advanced, the only one which remains live and the one  
10 which, of course, is central to the proceedings before this  
11 court today is the 103(3) public policy ground on the basis  
12 it is that that the award was obtained by fraud.

13 Just pausing there, and anticipating points to  
14 come, we say that the procedural context in which this  
15 matter was before the court at all material times was an  
16 outstanding application made by Kazakhstan within time to  
17 set aside Mr Justice Burton's provisional order of  
18 enforcement, which order never reached the stage of becoming  
19 an actual order of enforcement.

20 LORD JUSTICE PATTEN: Yes.

21 MR FOXTON: Now, prior to the service of  
22 Mr Justice Burton's order Kazakhstan had also commenced  
23 proceedings to set aside the award before the Swedish  
24 supervisory court. The English proceedings were adjourned,  
25 the opposition to enforcement, until that challenge had been

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1 determined.

2 As this court, I think, knows from the chronology  
3 there was a hearing before the Swedish court over some 13  
4 sitting days in September and October 2016, which led to the  
5 conclusion that the threshold for setting aside that award  
6 on the grounds of fraud applied by Sweden, as the  
7 supervisory court, was not met.

8 Now, we put, I think, the relevant pages of the  
9 Svea Court of Appeal decision on the court's reading list.  
10 We're, in fact, only concerned with a very short passage  
11 from it, which I'm very happy to take the court to or at  
12 least perhaps give the court a chance to remind itself of.

13 LORD JUSTICE PATTEN: Yes.

14 MR FOXTON: That is in the supplemental bundle at  
15 tab 22. And we're really only concerned with the first two  
16 paragraphs on page 267, which contain the core of the  
17 court's reasoning.

18 LORD JUSTICE PATTEN: Yes.

19 MR FOXTON: And obviously inherent in any  
20 challenge to an arbitration award, including one that the  
21 award was obtained by fraud, is a tension between finality  
22 that the arbitration process is intended to bring and the  
23 undoubted power of review that the court has in respect of  
24 its own public policy. And certainly the decision of Mr  
25 Justice Knowles in the 2017 judgment is that that tension

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1 between those two competing revisions is resolved in  
2 different ways between Swedish and English public policy.  
3 And one can see that, in its nature, it is a matter of high  
4 policy, on which it is open to different jurisdictions to  
5 take different views.

6 Now, that judgment was in play, had been handed  
7 down, when the matter came before Mr Justice Knowles in the  
8 hearing that led to his 2017 --

9 LORD JUSTICE PATTEN: Have I got this right: he  
10 took the view that the Swedish Court of Appeal had not  
11 determined the issue of indirect effect.

12 MR FOXTON: My Lord, he did.

13 LORD JUSTICE DAVID RICHARDS: And had not done so  
14 as a matter of Swedish law, I think you put it a moment ago,  
15 on the grounds it did not meet the threshold test for  
16 setting aside the arbitration award. It is not that they  
17 ignored the point, but they said, presumably, in a sense,  
18 even if established as a matter of fact it doesn't provide a  
19 ground for setting aside the award.

20 MR FOXTON: My Lord, whether one so characterises  
21 it or characterises it that, in the case of indirect effect,  
22 the threshold before the court would engage in the inquiry  
23 is a higher one that was not met may not matter.

24 LORD JUSTICE DAVID RICHARDS: I see.

25 MR FOXTON: What I think is not said by Mr Justice

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1 Knowles is that the Swedish could did not apply Swedish law  
2 properly. And one can see that one --

3 LORD JUSTICE PATTEN: Yes. Quite.

4 MR FOXTON: He says the issue is a different  
5 issue.

6 LORD JUSTICE PATTEN: It's got -- where you're  
7 going down the sort of indirect influence route you've got  
8 to find that it's been of decisive importance for the  
9 outcome of the case, whatever that may mean.

10 MR FOXTON: My Lord, that appears to be the  
11 position as the Svea Court of Appeal summarised it.

12 LORD JUSTICE PATTEN: Yes. Right.

13 MR FOXTON: My Lords, not surprisingly there was  
14 argument before Mr Justice Knowles as to what preclusive  
15 effect the Swedish judgment had. He ruled: none. And our  
16 application to appeal his ruling was not brought within time  
17 and was dismissed by Lord Justice Lewison on that basis.

18 Now, Mr Smouha has set out his summary of that  
19 judgment in paragraph 12 of his skeleton. And it is a fair  
20 summary of what was decided in the judgment. And I am  
21 content to invite the court to treat that as what the 2017  
22 judgment decided.

23 LORD JUSTICE PATTEN: Yes. sorry. You -- just --  
24 it is paragraph 12, you say.

25 MR FOXTON: Paragraph 12.

12

1 LORD JUSTICE PATTEN: Yes.

2 MR FOXTON: Obviously he comes back a little later  
3 on with a list of 16 points, a super Wilsonian 16 points of  
4 points he says that high bound my room for manoeuvre on this  
5 appeal, where I fear there is a bit of forensic overreach.  
6 But, in terms of paragraph 12, I accept that is an entirely  
7 fair summary of what the 2017 judgment decided.

8 LORD JUSTICE PATTEN: Yes. Yes.

9 MR FOXTON: Now, my Lords, I'm going to ask  
10 your Lordships to turn the judgment up, not to backtrack on  
11 that agreement I've just offered, but just to pick up a  
12 couple of points I think are relevant to later matters.

13 LORD JUSTICE LEGGATT: The first judgment you're  
14 talking about now?

15 MR FOXTON: The first judgment, yes. We have that  
16 in the authorities bundle rather than in the appeal bundles.  
17 It's at tab 2.

18 LORD JUSTICE PATTEN: Yes.

19 MR FOXTON: If one goes just to page 203 in  
20 Lloyd's Reports.

21 LORD JUSTICE PATTEN: Which paragraph? Got it  
22 loose but which paragraph?

23 MR FOXTON: It is really for the court to just  
24 remind itself of paragraphs 5, 6 and 10, because they, we  
25 submit, very properly characterise the procedural context of

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1 the application that was before Mr Justice Knowles.

2 LORD JUSTICE PATTEN: Yes.

3 MR FOXTON: In short, we are still within the  
4 context of the application to set aside Mr Justice Burton's  
5 without notice order of provisional enforcement. The Statis  
6 have attempted to have that application dismissed, on the  
7 basis of either the Westacre standard necessary to bring a  
8 section 103(3) ground of resistance not being met or issue  
9 estoppel of the judgment of the supervisory court. Those  
10 attempts to have the set aside application dismissed are  
11 rejected. And the matter has to proceed to trial.

12 But what is proceeding to trial is the set aside  
13 application. And, my Lords, while we are here, if one can  
14 just look, briefly, at paragraphs 89 and 93 on page 213.

15 LORD JUSTICE PATTEN: Yes.

16 MR FOXTON: They are paragraphs obviously relied  
17 upon now as, in effect, determinations by the judge relevant  
18 to the issue before this court; but, with respect, the  
19 target which the judge is aiming at there is in the context  
20 of live enforcement — an attempt to enforce in this  
21 jurisdiction, a submission by the award creditor that there  
22 is not sufficient material, as it were, for the  
23 section 103(3) ground of resistance to be determined and  
24 he's saying: no, these issues can and should be determined  
25 at a trial.

14

1 It does not, we submit, provide any guidance at  
2 all as to the correct approach in what is the very different  
3 context in which the enforcement attempt in this  
4 jurisdiction was abandoned.

5 My Lords, I mentioned moments ago —

6 LORD JUSTICE LEGGATT: Since the attempt is  
7 abandoned, shouldn't it follow that the provisional order is  
8 set aside?

9 MR FOXTON: My Lord, yes.

10 LORD JUSTICE LEGGATT: You accept that?

11 MR FOXTON: Yes.

12 LORD JUSTICE LEGGATT: Thank you.

13 MR FOXTON: My Lords, I mentioned moments ago  
14 Mr Smouha's 16 points in paragraph 28 of his skeleton.  
15 I wanted to, as it were, clear the ground on those as  
16 quickly as I can.

17 Points 1 to 6 are all correct. These are all  
18 findings which have been made —

19 LORD JUSTICE DAVID RICHARDS: Sorry, which  
20 paragraph did you say?

21 MR FOXTON: Paragraph 28.

22 LORD JUSTICE DAVID RICHARDS: 28. Thank you.

23 MR FOXTON: Point 7 is the paragraph I've just  
24 taken you to. But that is not a finding made in the context  
25 of an abandonment of enforcement but a finding made in the

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1 context of an ongoing and active attempt to enforce.

2 Paragraph 8 is not a determination at all, but  
3 certainly correctly records the terms of the court's order  
4 that the issue was proceeding as if commenced under part 7.  
5 And I will come back to address what that means in a moment.

6 Paragraph 9 is factually correct, without  
7 question. I accept that 10 is a finding. And, for the  
8 purposes of my appeal, it is no part of my submission to  
9 your Lordships that you should approach this matter on a  
10 basis other than that a reason for discontinuance was the  
11 Statis not being willing to take the risk of losing. There  
12 was a ground of appeal for which we did not get permission  
13 which would have brought that issue into play.

14 We say that it is irrelevant to the issues before  
15 the court.

16 11, we have no dispute on.

17 Paragraph 12, the question of whether an interest  
18 is legitimate and, in particular, whether it is sufficient  
19 to require proceedings to continue when the decision has  
20 been taken to abandon enforcement is very much in issue in  
21 this appeal. And legitimacy is a legal characterisation.  
22 And if we are right that the judge failed properly to have  
23 regard to the structure of the Convention it is one which it  
24 is open to this court to reach its own view on. We do say  
25 that that is in play.

16

1 Paragraph 13 deals with a summary of the judge's  
2 earlier findings as to what impact a decision of the English  
3 court may have on other courts.

4 It is worth just looking, briefly, at that issue  
5 in the judgment, if we may. Tab 7 of the core bundle. It  
6 is page 95 of this bundle.

7 Now, it is certainly the case that when, with what  
8 we would submit is a summary of his views, the judge says  
9 that he respectfully takes the view that the decision of the  
10 English court will not be without use to courts of at least  
11 some other countries.

12 LORD JUSTICE LEGGATT: Which paragraph are you  
13 looking at?

14 MR FOXTON: My Lord, it is paragraph 63 of the  
15 2018 judgment. And it is that paragraph to which Mr Smouha  
16 is cross-referring.

17 Now, as the double negative in that, with respect,  
18 far from ringing conclusion evidences, the paragraphs he's  
19 summarising are expressed in wholly tentative terms.

20 So if one goes back to paragraph 56.

21 We have, first of all, a possibility that an  
22 English judgment could be available before or on a decision  
23 relevant to Belgian enforcement proceedings and enforcement  
24 proceedings in Luxembourg and the Netherlands.

25 LORD JUSTICE PATTEN: Yes.

17

1 MR FOXTON: Paragraph 57. It is possible that  
2 they will follow the same view or take the same view as the  
3 Swedish court, but that is not certain.

4 It's possible that it will be of assistance; and  
5 possible some weight or evidential value will be given to  
6 it.

7 LORD JUSTICE PATTEN: I mean, what -- how do you  
8 say we should interpret the -- what the judge is saying in  
9 63, in terms of not without use? I mean, it doesn't look as  
10 if, in terms, that what he has in mind is that it will  
11 create some kind of estoppel -- issue estoppel or  
12 whatever -- that would effectively shut down further  
13 argument on the fraud issue in other jurisdictions.

14 MR FOXTON: My Lord, we would say he certainly has  
15 not made a finding that this would be preclusive or  
16 determinative.

17 LORD JUSTICE LEGGATT: Was there any evidence  
18 before him on these matters? Or is it just essentially  
19 speculation, you say, on his part?

20 MR FOXTON: My Lord, there was evidence. And the  
21 evidence, as your Lordship won't be surprised to hear,  
22 differed, I think, in many respects, as between the parties,  
23 save as to the Netherlands where it is right I should show  
24 the court paragraph 58 of the judgment, where it is common  
25 ground that an English judgment would be given some weight;

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1 although, on our case, less weight than a decision of the  
2 Swedish court. And the Dutch court had said it was not  
3 going to stay its proceedings until the determination here.  
4 But the reality is there are not findings of any preclusive  
5 or determinative effect. The matter is put with respect at  
6 a somewhat speculative level. And we would say that  
7 probably reflected the inherent degree of uncertainty in the  
8 position as it appeared before the judge.

9 LORD JUSTICE DAVID RICHARDS: And there are  
10 enforcement proceedings in the US District Court for the  
11 District of Columbia, as I understand it. And am I right in  
12 thinking that that court refused permission to amend by  
13 adding the fraud basis?

14 MR FOXTON: My Lord, that is what I am told, yes.

15 LORD JUSTICE DAVID RICHARDS: But is that under  
16 appeal in the United States?

17 MR FOXTON: It is, my Lord.

18 LORD JUSTICE DAVID RICHARDS: It is under appeal.

19 MR FOXTON: And, my Lord, just briefly in relation  
20 to the other matters on Mr Smouha's paragraph 28, back at  
21 page 59. Paragraph 14, it is certainly the case that the  
22 Statis submitted to this jurisdiction in terms of commencing  
23 a New York Convention enforcement application here. When  
24 the judge said the decision would not be limited solely to  
25 English public policy and provide an answer to the question

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1 of whether there was a fraud alleged, I understand him to be  
2 saying, at paragraph 64, that the utility that he saw a  
3 judgment here would offer would not be enlightening other  
4 courts as to the English public policy, but enlightening  
5 other courts as to the factual findings the English court  
6 had made.

7 LORD JUSTICE PATTEN: Yes.

8 MR FOXTON: Paragraph 15, the first sentence is  
9 correct. The second sentence appears to be an observation  
10 that disclosure and a full hearing will assist the interests  
11 of finality.

12 Now, I may be doing the judge an injustice. There  
13 appears to be a slight sense there that somehow the  
14 thoroughness of English procedure will add to the weight of  
15 the judgment when looked at from the perspective of foreign  
16 courts but that, perhaps, may not be a fair observation.

17 And then the last paragraph, 16, the question of  
18 whether the resources are reasonable obviously depends upon  
19 the legitimacy of having a process in which the court has an  
20 eight day trial on whether the English public policy for  
21 refusing enforcement has been made out against the context  
22 in which the enforcement effort has been abandoned. And  
23 that is, with respect, again the very issue in the appeal.

24 LORD JUSTICE PATTEN: What do your clients intend  
25 to do in the event that the appeal is unsuccessful, in

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1 relation to the trial ?

2 MR FOXTON: My Lord, forgive me.

3 (Pause). My Lord, I'm told that the position is  
4 they will participate as litigants in person, or that is  
5 their intention .

6 LORD JUSTICE PATTEN: Right.

7 MR FOXTON: Now, the court's order following the  
8 2017 judgment is in the supplemental bundle at tab 3,  
9 page 12.

10 LORD JUSTICE PATTEN: Yes.

11 MR FOXTON: And this may be significant because  
12 I think it is suggested that, at this stage, the legal  
13 character of the proceedings before the court changed. We  
14 can see that the first recital notes that we are within the  
15 context of the application to set aside the order of  
16 Mr Justice Burton.

17 The fifth recital notes that what I might call the  
18 two preliminary objections to the set aside application  
19 brought by the Statis did not succeed.

20 And, obviously, great emphasis is laid on  
21 paragraph 2, that the claim would proceed as it commenced  
22 under CPR part 7.

23 Now, my Lords, with respect, the suggestion that  
24 that somehow brought into life an independent action,  
25 capable of surviving discontinuance or abandonment of the

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1 enforcement attempt is, with respect, unreal. Plainly,  
2 Mr Malek QC wanted that issue determined with what I would  
3 call all the conventional elements of the full factual  
4 investigation of a trial : disclosure, witness statements,  
5 cross-examination. And, therefore, when looking for a  
6 procedural parallel, one can see that part 7, rather than  
7 part 8, was much more appealing.

8 But we do submit that that is all this paragraph 2  
9 was doing. It was making it clear that the determination,  
10 within the set aside application, of the fraud allegations  
11 would follow the same procedural path as a claim form  
12 action. And nothing has been put forward to suggest that  
13 the court was, in any way, alerted, when making this order  
14 to a suggestion that it was bringing an independent action  
15 to life .

16 LORD JUSTICE PATTEN: And the judge rejected that.

17 MR FOXTON: He did. And he was well placed to  
18 know what he was being asked to do and what he thought he  
19 was doing when he made that order.

20 LORD JUSTICE PATTEN: Yes.

21 MR FOXTON: Now, pleadings were served, as one  
22 would expect. And we've got, at tab 11 of the core bundle,  
23 I think, Kazakhstan's pleading.

24 LORD JUSTICE PATTEN: Yes.

25 MR FOXTON: And this still represents the case

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1 that, on the current order, is moving forward to the eight  
2 day trial . And if one looks at it, it begins on page 104,  
3 paragraph 2 pleads that the award was obtained by fraud.

4 For what legal purpose is that pleaded? Enforcement of the  
5 award in whole or part would be contrary to English public  
6 policy . So that is clearly the legal context in which this  
7 fraud issue is being determined, whether enforcement will be  
8 contrary to English public policy .

9 If one looks at paragraph 3, where the three  
10 grounds for explanation of reliance are put forward. The  
11 last sentence of each of them ties the question back to  
12 enforcement being contrary to English public policy .

13 And if one shoots forward to page 127, where the  
14 declaratory relief appears. Once again in each formulation  
15 what is sought includes or, indeed, has, as the legal  
16 consequence of what the court is being asked to find,  
17 enforcement in this jurisdiction would be contrary to  
18 English public policy .

19 LORD JUSTICE PATTEN: Yes.

20 MR FOXTON: So, my Lords, pausing there, and just  
21 anticipating our submissions to come, I can well understand  
22 that few lawyers ever settle anything in the nature of  
23 appealing without putting some form of prayer on the end.  
24 It is somewhat intrinsic to our drafting mentality. But the  
25 suggestion that this constitutes an independent freestanding

23

1 action, that continue notwithstanding Notice of  
2 Discontinuance of enforcement, we would submit is  
3 unsustainable.

4 This is not a counterclaim; it is a pleading which  
5 arises in the procedural context of an argument that the  
6 order giving permission provisionally to enforce should be  
7 set aside.

8 Now, in circumstances in which the Statis have  
9 offered an undertaking never, in any circumstances, to seek  
10 to enforce the award in this jurisdiction, we submit that  
11 there could be no tenable basis on which it would be  
12 appropriate for the English court to give declarations of  
13 this kind, still less to keep an action ending in an eight  
14 day trial in being for that purpose.

15 And, my Lords, thirdly, and coming back to the  
16 recurrent coda of our submissions, in effect what that  
17 amounts to is the English court giving this ruling not for  
18 the purposes of enforcement here but to assist and enlighten  
19 other courts in respect of enforcement processes there.

20 And we do submit that is contrary to the structure  
21 of the New York Convention and, indeed, contrary to the  
22 structure of the English Arbitration Act which has a power  
23 of review for courts where cases where England is the  
24 supervisory court, but, with enforcement, is simply  
25 concerned with permitting the passive remedy of resisting

24

1 enforcement here.

2 We do not favour, as we shall see, applications by  
3 award debtors to courts with a view to getting them to cast  
4 or reach decisions or pass comment on the process by which  
5 an award has come to pass when they are neither the  
6 supervisory court nor a court addressing an issue of  
7 enforcement in their own jurisdiction.

8 LORD JUSTICE PATTEN: And do you make that  
9 submission regardless of what the legal consequences would  
10 be of -- of the defendant succeeding in the Commercial Court  
11 proceedings here? In other words, do you -- is your  
12 argument the same regardless of whether there -- it would  
13 give rise to some form of issue estoppel adverse to your  
14 clients?

15 MR FOXTON: My Lord, I would say that would even  
16 be an a fortiori case because that would be the English  
17 court, when neither a supervisory court nor a court engaged  
18 in resisting active enforcement, not only offering its own  
19 unsolicited decision on the facts to assist foreign courts,  
20 but seeking, in effect, to predetermine their own  
21 determination of whether the public policy exception in  
22 their jurisdiction has or has not been met.

23 Now, my Lords, it is in that context that the  
24 Notice of Discontinuance is -- is served. And the position  
25 of the action then and subsequently is accurately set out at

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1 paragraphs 15 and 16 of Mr Smouha's skeleton. And I do  
2 invite the court to read those.

3 LORD JUSTICE PATTEN: Yes.

4 MR FOXTON: And equally to read paragraph 19 which  
5 is the point that my learned friend asked me to draw to the  
6 court's attention. Certainly it is factually correct that  
7 the Statis have informed Kazakhstan that they will not be  
8 filing witness statements.

9 LORD JUSTICE PATTEN: So you want us to look at  
10 15 -- did you say 15 and 16?

11 MR FOXTON: My Lord, as a way of attempting to  
12 identify the common ground that the court can sort of take  
13 as read.

14 LORD JUSTICE PATTEN: Yes.

15 MR FOXTON: Paragraphs 15 and 16 summarise, as it  
16 were, the procedural position up to the date of the notice.

17 LORD JUSTICE PATTEN: Yes. Yes.

18 MR FOXTON: And paragraph 19 addresses what has  
19 happened thereafter.

20 LORD JUSTICE PATTEN: Yes. But what is the up to  
21 date position? Because I think you said at the start that  
22 there has now been disclosure.

23 MR FOXTON: My Lord, there's been disclosure, but  
24 not witness statements.

25 LORD JUSTICE PATTEN: But not witness statements.

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1 MR FOXTON: And indeed there has been  
2 communication of an intention -- sorry, witness statements  
3 from the Statis -- sorry, by Kazakhstan but not by the  
4 Statis.

5 MR SMOUHA: Paragraph 19.

6 LORD JUSTICE PATTEN: Not by your clients. Yes.  
7 But the disclosure isn't actually covered in this  
8 description. I mean the disclosure on your clients' part.

9 MR FOXTON: My Lord, that is something I should  
10 have picked up. There has been disclosure from the Statis,  
11 I'm told of about some 75,000 documents. I'm also told  
12 there's an outstanding application by Kazakhstan on a  
13 specific disclosure issue.

14 MR SMOUHA: My Lord, there was an application.  
15 That's been dealt with because there was a CMC in front of  
16 Mr Justice Knowles on 20 July; and he has made orders on  
17 that. Your Lordship hasn't got the order in the bundles,  
18 but we can provide it to your Lordship. And the position on  
19 witness statements is that it's not that witness statements  
20 from the Statis are outstanding. They've indicated that  
21 they are not intending to rely on -- call any evidence or  
22 rely on any witness statement evidence at the trial. So the  
23 witness statement direction has been completed.

24 MR FOXTON: My Lord, that is what paragraph 19  
25 says; and that's why I took your Lordships to that as a

27

1 statement of the agreement.

2 LORD JUSTICE PATTEN: So that's been formalised,  
3 has it, now, at a CMC, in terms of the -- I mean, because  
4 you -- the judge would obviously give directions about a  
5 timetable for witness statements. But your -- your clients'  
6 position, assuming the thing goes ahead is that there won't  
7 be any witness statements from them and they will not be  
8 giving evidence, is -- that's the position?

9 MR FOXTON: My Lord, yes. That is the position.

10 LORD JUSTICE PATTEN: Thank you.

11 LORD JUSTICE LEGGATT: And Kazakhstan has served  
12 some witness statements, has it?

13 MR FOXTON: They have.

14 Now, my Lords, that brings me to the submissions  
15 as to the scheme, as it were, of enforcement of  
16 international arbitration awards. I suspect the points I am  
17 about to make are largely uncontroversial as to content but  
18 probably deeply controversial as to relevance.

19 I've anticipated these to some degree. But the  
20 New York Convention, as I've indicated, recognises two very  
21 different roles for courts: the supervisory court where the  
22 arbitration takes place has a power to set aside an award.  
23 And the reasons on which it may do so are not themselves  
24 circumscribed by the New York Convention. That is left as a  
25 matter of domestic law, I suppose on the basis that when

28



1 parties choose the seat of their arbitration they are opting  
2 into whatever the relevant powers of review are in that  
3 jurisdiction .

4 We've seen that if the supervisory court sets an  
5 award aside that, in itself , provides a basis for an  
6 enforcement court to refuse to enforce which, certainly in  
7 this jurisdiction , is going to follow, as night follows day,  
8 I think in almost all cases.

9 By contrast with the enforcement court, it does  
10 not get to set aside awards. It has a limitation on the  
11 grounds on which it can refuse to set aside awards to those  
12 limited grounds we've seen reflected in sections 103(2) and  
13 (3); and it might be worth just briefly looking at the  
14 New York Convention on that last point in legal  
15 authorities -- I think it's at tab 27. I'm grateful.

16 If I can show your Lordships article 5.2.

17 LORD JUSTICE PATTEN: Yes.

18 MR FOXTON: Because, in contrast to a decision of  
19 the supervisory court setting aside an award, which can  
20 fairly be described as having an erga omnes effect, it is  
21 something that is capable of being deployed to resist the  
22 award in any enforcement court, one sees, so far as public  
23 policy is concerned, recognition or enforcement may also be  
24 refused if the competent authority in the country where  
25 recognition and enforcement is sought finds that -- and just

29

1 dropping down:

2 "The recognition or enforcement would be contrary  
3 to the public policy of that country."

4 So what is contemplated there is a localised  
5 inquiry by an enforcement court saying: would enforcement in  
6 this jurisdiction be contrary to the policy of this  
7 jurisdiction ?

8 And the other point to note is that the Convention  
9 does not, in any way, seek to prevent an award creditor  
10 launching multiple attempts to enforce an award. The only  
11 provision within the New York Convention that contemplates  
12 *lis alibi pendens* type considerations is in article 6, which  
13 expressly contemplates if there is an application to set  
14 aside before the supervisory court, an enforcement court may  
15 decide to stay its decision and adjourn the decision on  
16 enforcement until that has been determined.

17 That apart, we would say that it is absolutely  
18 standard to -- for an award creditor to seek multiple  
19 enforcement attempts in multiple jurisdictions . And, of  
20 course, the award debtor gets to argue out his public policy  
21 defence time and again, by reference to the public policy of  
22 the particular jurisdiction in question.

23 LORD JUSTICE PATTEN: And I suppose,  
24 theoretically , it might vary from jurisdiction to  
25 jurisdiction , even though one would always be concerned with

30

1 the same award.

2 MR FOXTON: My Lord, exactly so. And here  
3 practically because plainly if an attempt was made to  
4 enforce this award in Sweden we know that public policy in  
5 Sweden involves the application of a different test to the  
6 public policy here.

7 So, my Lords, just pulling that --

8 LORD JUSTICE PATTEN: It seems in Sweden -- not  
9 necessarily to go into -- that it's not so much that public  
10 policy doesn't prevent the enforcement of an award that's  
11 been obtained in some material way by fraud, but it's rather  
12 that it's what -- what types of fraud are relevant for the  
13 purpose of considering the effectiveness of the award.

14 MR FOXTON: And, my Lord, certainly one sees  
15 references to direct and indirect .

16 LORD JUSTICE PATTEN: Yes.

17 MR FOXTON: And a suggestion that a different  
18 approach --

19 LORD JUSTICE PATTEN: Yes.

20 MR FOXTON: -- should be adopted in relation to  
21 those two categories .

22 But, my Lord, what we say follows from this is  
23 that the interests or the legitimate interests of an  
24 enforcement court are limited and localised . And what it is  
25 able to do is allow resistance to an active attempt to

31

1 enforce and reach the determinations necessary for that  
2 purpose. But it is -- has no wider role of offering , as it  
3 were, its own views on the circumstances in which the award  
4 have been obtained, not for that purpose but for the  
5 purposes of assisting courts dealing with their own  
6 localised enforcement issues and their own public policy .

7 And, my Lord, to put the point another way, one  
8 sometimes sees the language of active and passive remedies.  
9 The active remedy for the award debtor is to seek to set  
10 aside the award before the supervisory court. The passive  
11 remedy is to wait for enforcement, jurisdiction by  
12 jurisdiction , and resist enforcement there on the basis of  
13 whatever grounds are open to it . But inherent in those  
14 descriptions are the fact that the role in the enforcement  
15 context is limited to defeating the active attempt to  
16 enforce the award and, we would say, falls away when that  
17 attempt is abandoned.

18 LORD JUSTICE PATTEN: Well, I mean, you -- I mean,  
19 I imagine in many of these cases you'll be doing both, won't  
20 you? I mean the defendant will be doing both. I mean,  
21 you'll be trying to -- to unseat the award itself and if  
22 unsuccessful may still have a secondary argument, depending  
23 on what the issue is, which will be sufficient to prevent  
24 enforcement on a jurisdiction by jurisdiction basis .

25 MR FOXTON: My Lord, yes. That's exactly

32

1 obviously what happened here where the attempt to unseat the  
2 award in Sweden failed and the award is being resisted  
3 jurisdiction by jurisdiction on an enforcement basis.

4 LORD JUSTICE PATTEN: Yes. But you say that  
5 Mr Justice Knowles was wrong to -- to offer his services for  
6 the benefit of other jurisdictions .

7 MR FOXTON: My Lord, I do, within a New York  
8 Convention framework, because that was actually the English  
9 court doing something that the Convention does not  
10 contemplate will be done and it sort of erodes the  
11 distinction between the courts.

12 LORD JUSTICE PATTEN: Yes.

13 MR FOXTON: Now, my Lords, it is interesting to  
14 note how, in respect of English seated awards, the courts of  
15 this jurisdiction have reacted when an unhappy award debtor  
16 tries to engage a court other than the supervisory court or  
17 other than in the context of enforcement to provide, as it  
18 were, its own review of the merits of the arbitration  
19 decision. And I was going to ask the court to look at the  
20 decision of this court in C v D in the authorities bundle at  
21 tab 3.

22 LORD JUSTICE PATTEN: Yes.

23 MR FOXTON: My Lords, that was a case where there  
24 was a London seated arbitration, under an insurance policy  
25 governed by New York law. And the unhappy unsuccessful

33

1 party sought assistance from the New York courts to provide,  
2 as it were, a -- a review of and vacation of the arbitration  
3 award.

4 And one can see the submission they made in  
5 paragraph 7 of Lord Justice Longmore's judgment of the  
6 court. That was the position that was taken. The  
7 suggestion is that they were able to invoke a power of  
8 review arising under US Federal law because there was  
9 territorial jurisdiction, US Federal courts had jurisdiction  
10 over the parties under the general Federal venue statute.

11 The argument was: there's territorial  
12 jurisdiction. There's the US court. The Federal Court is  
13 going to be able to opine on the application or  
14 non-application of New York law by the arbitrators.

15 And one can see the claimant's response to that at  
16 paragraph 9, which is to say: unless not permissible,  
17 because if you agree London as the seat of the arbitration,  
18 then the only court with a power of supervision and, as we  
19 would submit, a power of review, is the English court.

20 LORD JUSTICE LEGGATT: It wasn't a case, was it,  
21 where the claimant was trying to enforce the award in the  
22 United States or in New York?

23 MR FOXTON: My Lord, it was not. And I would  
24 accept that, plainly, if one looks at the court's primary  
25 conclusion at paragraph 16, it was not, in any way,

34

1 foreclosing that a court, where enforcement is sought, is  
2 able, within this framework, to opine on whether the grounds  
3 for resisting enforcement in that jurisdiction are made out.  
4 I --

5 LORD JUSTICE LEGGATT: What it shows is that  
6 Kazakhstan can't turn up in London and just make a free  
7 floating challenge to the award, which is definitely -- must  
8 definitely be correct. But it's a different question  
9 whether, when you choose to come here, they can maintain  
10 their claim off the back of that, so to speak.

11 MR FOXTON: But, my Lord, if one asks what in  
12 substance is happening in that scenario, it is the English  
13 court giving a ruling, not because it is necessary to  
14 resolve active enforcement here, but, in reality, as an  
15 attack on the award for use in other jurisdictions. I quite  
16 agree the run up to those two points of delivery differs  
17 between the two cases; but we do submit that, in practice,  
18 what the court would then be doing is the same and we would  
19 say equally impermissible in both cases.

20 And, my Lord, just on the declaratory relief  
21 argument: that, in effect, is an argument that territorial  
22 jurisdiction having been established this court can give  
23 declaratory relief as to whether an award was obtained by  
24 fraud when this court is neither, on that hypothesis, the  
25 curial court, nor are there any enforcement proceedings

35

1 underway. And we would say C v D, as well as, frankly, any  
2 a priori analysis, strongly suggests that that is not a  
3 permissible option.

4 LORD JUSTICE LEGGATT: Well, the declaration, if  
5 there was one, would be that -- that it was obtained by  
6 fraud, which meant that it would be contrary to English  
7 public policy to enforce it, which may or may not have any  
8 consequences elsewhere; but, presumably, your clients are  
9 concerned that it might, which is why they're keen not to go  
10 to trial.

11 MR FOXTON: No. Well, clearly each party's its  
12 own interest as following from the position it adopts. But  
13 if one tests, as a matter of substance, what is a court --  
14 what would a court be doing, giving that declaration? It  
15 would be a court which fell within neither of the two  
16 categories ruling on an award.

17 LORD JUSTICE PATTEN: But is this -- I mean, I'm  
18 not quite clear where you're putting it, Mr Foxton. I mean,  
19 I understand the point that you're making, but, I mean, the  
20 scenario we're concerned with is where the English court  
21 currently is seized of a set aside application in  
22 circumstances where the party seeking to enforce the award  
23 in this jurisdiction no longer wishes to do that and is  
24 prepared, I think, given what you've said this morning, even  
25 to have the provisional leave set aside, so that the

36

1 enforcement proceedings are gone here.

2 The question is whether, in those circumstances,  
3 the English court should embark on a determination of the  
4 issue, not for the purposes of resolving the proceedings  
5 within this jurisdiction, because enforcement is no longer  
6 sought, but for the purpose — because it may have some  
7 external effect that may be of value or importance to the —  
8 to the parties or have an effect on the parties in other  
9 jurisdictions.

10 Now, I mean, are you saying that where — where,  
11 if you like, the rug is pulled, as in this case, it somehow  
12 affects jurisdiction of this court? Or are you simply  
13 saying that it's an overwhelming factor in — in the  
14 exercise of the court's discretion?

15 MR FOXTON: My Lord, we say it gives rise to what  
16 is sometimes described as an higher order principle, in the  
17 discretionary context, by which I mean one that, save  
18 possibly — and the court does not need to decide this —  
19 for some extreme scenario that one cannot always contemplate  
20 in advance, it's a principle that is determinative of the  
21 issue of whether the proceedings should continue here  
22 because, we say, the only legitimate interest of this court  
23 is to determine whether or not there are grounds to resist  
24 active enforcement —

25 LORD JUSTICE PATTEN: Yes.

37

1 MR FOXTON: — and once that ceases — indeed,  
2 once it ceases, such that, as an undertaking, it can never  
3 take place, that interest ends. And the Convention does not  
4 contemplate courts carrying on a function of opining on  
5 whether an award was obtained by fraud not for a section 103  
6 or an article 5 purpose, but for the purpose of assisting  
7 others.

8 LORD JUSTICE DAVID RICHARDS: A very tiny point.  
9 The report we have of C v D, is that — the index tells us  
10 it — it just gives us the Bailii the neutral citation.  
11 This is reported in something called Con LR. What are they?  
12 The report we have got here.

13 MR FOXTON: I mean, I must immediately concede it  
14 does not look like an official report, my Lord.

15 LORD JUSTICE DAVID RICHARDS: Well, it looks  
16 like — I mean, I just — I just was wondering —  
17 Construction Law Reports, are they? It seems a bit unlikely  
18 for an arbitration on the Bermuda Form. Don't worry. Don't  
19 take up time; just let us know at some point.

20 MR FOXTON: It might have been a thin volume  
21 that month, my Lord; one has got to keep the punters.

22 LORD JUSTICE DAVID RICHARDS: I mean, it's a full  
23 report; but, anyway, there we go.

24 MR FOXTON: My Lord, that takes me to Kazakhstan's  
25 counterclaim argument. Although I've anticipated, frankly,

38

1 a lot of what I plan to say in relation to that. We say the  
2 argument fails for a number of reasons. The two that I have  
3 effectively picked up already are that this could never be  
4 an appropriate subject for a declaratory relief, on a  
5 freestanding basis; and that at no stage in this case did  
6 Kazakhstan bring a counterclaim. If one reviews the  
7 procedural history of it, all that has ever happened is a  
8 particular procedural framework was set up for the  
9 determination of its application to set aside Mr Justice  
10 Burton's order.

11 And I hope I've sort of covered those points with  
12 submissions along the way through the procedural history.

13 There is an anterior and slightly more technical  
14 issue raised in our skeleton, which is a question of whether  
15 the Civil Procedure Rules permit counterclaims against  
16 applications to enforce New York Convention awards.  
17 I showed the court CPR part 62.

18 LORD JUSTICE PATTEN: I mean, would it — before  
19 we do it, I mean, would it make any difference to your  
20 argument even if it — even if the right view of the  
21 proceedings was that there was some sort of counterclaim  
22 which had an independent existence? Because, I mean, in  
23 circumstances where you're not seeking to enforce here,  
24 you — the court, even if — even if Kazakhstan took  
25 proceedings seeking a declaratory relief that the award —

39

1 the Swedish award was — its enforcement here would be  
2 contrary to public policy, I mean, it would raise, wouldn't  
3 it, precisely the same issue of discretion? I mean, any  
4 declaration the court makes is a matter of discretion for  
5 the court. The court decides whether it is appropriate to  
6 grant a declaration. No party has a right to a declaration.

7 MR FOXTON: My Lord is absolutely right, in terms  
8 of our case. We say grounds 1 and 2 of our appeal are, in  
9 fact, the answer to why you would never get a declaration.  
10 My Lord, with this interesting twist that on the declaration  
11 issue the judge was with us.

12 LORD JUSTICE PATTEN: Yes, I follow that.

13 MR FOXTON: And, indeed, the reasons he gave for  
14 being us, namely we're not the supervisory court if there's  
15 no enforcement here. I'm paraphrasing. I hope not  
16 inaccurately. I will go to the paragraph. We shouldn't be  
17 doing this.

18 And we respond, respectfully: quite, but, in  
19 effect, if you maintain the enforcement action in being, in  
20 circumstances when the judgment — the award creditor is  
21 abandoning enforcement, you are asking the English court to  
22 do exactly that which you recognised it would be  
23 inappropriate for it to do, viewed at in terms of the  
24 argument that there was an independent claim for declaratory  
25 relief.

40

1 LORD JUSTICE LEGGATT: Well, that seems  
2 inconsistent. And isn't asking whether the court could  
3 reasonably grant a declaration a way of testing your case?  
4 Because if it could then there's probably a good reason not  
5 to allow you to discontinue. But if it couldn't then the  
6 opposite is so. I mean, it can't turn on the sort of  
7 niceties whether it's a part 7 claim or there has formally  
8 been a counterclaim, could it? You have to look at whether  
9 the action is serving any useful purpose or legitimate  
10 purpose or whether it is isn't.

11 LORD JUSTICE DAVID RICHARDS: I suppose  
12 technically you would be applying to strike out the  
13 counterclaim. If it has an independent life then the --  
14 procedurally it's a different approach. Although, in  
15 keeping with my Lord, I think it probably boils down to the  
16 same question really as a matter of substance.

17 MR FOXTON: My Lord, the answer may be that we  
18 have, we say, two preliminary hurdles on the counterclaim  
19 argument that they need to get over, namely: can you do it?  
20 And was it done? But if we are wrong about those, we are  
21 deploying exactly the same arguments as to why this court  
22 could never give declaratory relief, in these circumstances,  
23 as we say what made it inappropriate to continue what in  
24 effect became an application in which Kazakhstan were  
25 seeking declaratory findings to use elsewhere by refusing

41

1 to -- well, by setting aside the Notice of Discontinuance.

2 But, my Lord, the additional technical arguments  
3 remain. One of them is a factual one of: was it done? And  
4 I've said all I want to say about that. There is the  
5 question of: can you do it?

6 And it's a question, perhaps, not without interest  
7 on the wider point because it does bring one quite close to  
8 the issue about what is the court process of enforcing  
9 New York Convention awards all about? And is it really a  
10 conventional set of civil proceedings in which there is  
11 scope for counterclaims and so forth? Or is it, as we  
12 submit, something close, at least, to a quasi administrative  
13 process, which is: so long as you're seeking to enforce  
14 here, this is the procedural that follows?

15 LORD JUSTICE PATTEN: Hmm.

16 MR FOXTON: I want to look at the Gater Assets  
17 decision on that point, which is in the authorities bundle  
18 at tab 9.

19 My Lords, it's a case with some parallels to the  
20 present. It was a case where the judge, in that case  
21 Mr Justice Colman, granted the ex parte order for  
22 provisional enforcement of the award. The award debtor  
23 sought to resist that enforcement on grounds of fraud under  
24 section 103(3) of the New York Convention. And the  
25 particular context in which the issue came before the Court

42

1 of Appeal is: well, can you apply CPR 25 and security for  
2 costs to that procedural framework? And the judge at first  
3 instance said: yes, you could. And made an order for  
4 security for costs in favour of the party seeking to resist  
5 enforcement.

6 Now, if one moves to paragraph 46, one sees the  
7 nature of the submission put forward, which is:

8 Application to enforce an award is a claim. As  
9 such it is a claim for the purposes of the security for  
10 costs provision. And we know that's right because part 58,  
11 which is the provision of the Civil Procedure Rules dealing  
12 with the Commercial Court, tells you that the rules and  
13 practice directions apply unless otherwise stated. And an  
14 arbitration claim form brought under part 62, it is said, is  
15 necessarily subject to the same rules and procedures.

16 The discussion in Lord Justice Rix's judgment  
17 begins at paragraph 71. And he picks up the language of CPR  
18 62.18 that I showed the court earlier on in the course of  
19 the submissions, and summarises, as it were, the argument  
20 put that the ordinary rules of the CPR apply, and describes  
21 it as a strong "even formidable" argument but then, I think  
22 it is fair to say, subjects it to close forensic scrutiny.

23 And notes at paragraph 72 that the CPR 62  
24 provisions are complex and not without their mystery, for  
25 present purposes. No express provision of security.

43

1 And a little further on in that paragraph notes:

2 "There is something counter-intuitive about an  
3 award debtor being able to obtain security for costs in  
4 order to challenge the formal or public policy validity of  
5 an award in what are clearly intended to be, in the absence  
6 of a challenge by the award debtor, highly summary and  
7 essentially quasi administrative proceedings."

8 Dropping a little further down to 73.

9 LORD JUSTICE DAVID RICHARDS: You would think that  
10 the order for security might go the other way.

11 MR FOXTON: Well, my Lord, there is a big debate  
12 about that as well. There not being world enough and time,  
13 I was going to --

14 LORD JUSTICE DAVID RICHARDS: No, no. We don't  
15 want to go into that.

16 MR FOXTON: Yes. Paragraph 73. Lord Justice Rix  
17 is of the view that if there is going to be a provision for  
18 security for costs or at least a route through to a  
19 provision for security for costs in enforcement, you've got  
20 to find something in section 3 of part 62 itself that gets  
21 you there. That being the third section I showed the court,  
22 dealing with enforcement.

23 And at 74, he picks up the language I showed you  
24 earlier on, that the court has a power to direct that an  
25 arbitration claim form must be served on someone, in

44

1 contradistinction to a permissible power to allow it to be  
 2 done, reflecting the two choices that I mentioned the judge  
 3 in receipt of such an application has of: do nothing but  
 4 simply start the process or make the provisional order for  
 5 enforcement and give the award debtor the relevant period of  
 6 time to apply to set it aside. And Lord Justice Rix takes  
 7 the view that rules 18.2 and 3 are addressing option 1,  
 8 where the court doesn't make provisional enforcement order;  
 9 and, over the page, notes that if the court does make the  
 10 provisional enforcement order, it's the enforcement order  
 11 which is assimilated to an arbitration claim form. And the  
 12 court may remember I showed them the wording that the order  
 13 can be served out of the jurisdiction as if it is an  
 14 arbitration claim form.

15 And between B and D Lord Justice Rix debates why  
 16 we see this distinction in the provisions and offers, as one  
 17 possible answer, that enforcement in 101 is intended to be  
 18 mechanistic and it is only where the judge feels unable, on  
 19 the evidence before him, to enforce summarily that he will  
 20 direct service and decline to make any enforcement order.

21 And where that leads the judge, in his view on  
 22 security for costs, is at paragraph 75, between -- halfway  
 23 between letter E and F that he was prepared to assume, but  
 24 not decide, that there was technical jurisdiction to order  
 25 security for costs against an award creditor, but said a

45

1 distinction had to be made between cases where the judge was  
 2 prepared to order provisional enforcement and where the  
 3 judge was not.

4 And said where there was summary, albeit  
 5 provisional, enforcement, the enforcement proceedings remain  
 6 outside the ordinary CPR regime. And it is that reasoning  
 7 and that conclusion that we rely upon to say that,  
 8 similarly, they remain outside the ordinary CPR regime for  
 9 counterclaims.

10 And there is good reason for that in a New York  
 11 Convention context, because were the position otherwise then  
 12 the active enforcement in a particular jurisdiction could  
 13 carry with it the procedural disadvantage of exposure to a  
 14 counterclaim there. The existence of the counterclaim would  
 15 certainly allow for the potential of making the process of  
 16 enforcement more complex. And we would submit that at least  
 17 in cases of provisional enforcement the answer is that the  
 18 process remains one in Lord Justice Rix's word outside the  
 19 ordinary CPR and in which a counterclaim is not possible or  
 20 appropriate.

21 LORD JUSTICE LEGGATT: Is there no case in which  
 22 anybody has ever tried to make a counterclaim and that  
 23 question has directly arisen? Presumably not, otherwise you  
 24 would not be only showing us this one.

25 MR FOXTON: My Lord, I'm not aware of. I would

46

1 suggest it is counter-intuitive to think that there might  
 2 be, but that might be of little assistance to the court.

3 LORD JUSTICE DAVID RICHARDS: You would accept  
 4 that a counterclaim was possible if the judge -- in this  
 5 case Mr Justice Burton -- had directed service of the claim  
 6 form on Kazakhstan?

7 MR FOXTON: My Lord, if we were in that territory  
 8 a further issue would open up, on which there is commentary  
 9 but no decision, as to whether that would be compatible with  
 10 the article 3 provision of the New York Convention to  
 11 recognise and enforce awards. And I'm afraid I've rather  
 12 fought shy of --

13 LORD JUSTICE DAVID RICHARDS: But, in terms of the  
 14 way Lord Justice Rix was analysing it here, it seemed to  
 15 turn on the fact that there wasn't that order for service;  
 16 is that a fair way of reading his judgment?

17 MR FOXTON: My Lord, I accept that.

18 LORD JUSTICE DAVID RICHARDS: I see. Thank you.

19 LORD JUSTICE LEGGATT: But that makes it rather a  
 20 narrow procedural question, whereas your submission is  
 21 really a broader one, isn't it? That the nature of a  
 22 proceeding to enforce an award -- this is what you're  
 23 saying -- isn't the kind of proceeding, which if you bring  
 24 it somewhere, exposes you to retaliation of any kind that  
 25 the defendant might want to make by way of counterclaim.

47

1 MR FOXTON: My Lord, that is right.

2 I've shown the court Lord Justice Rix. In  
 3 fairness and, for completion, obviously there are two other  
 4 judgments. Lord Justice Moses deals with the issue,  
 5 I think, first of all, at paragraph 92 where, certainly as  
 6 I understand the judgment, he accepts that the jurisdiction  
 7 to award security is not available where you have followed  
 8 the provisional enforcement by the ordinary route.

9 LORD JUSTICE DAVID RICHARDS: He's firmer in his  
 10 view than Lord Justice Rix, I think, isn't he? Seems to be,  
 11 anyway, in this paragraph.

12 MR FOXTON: The reasons he gives for that are at  
 13 paragraph 95, I think, that, again, language of matter of  
 14 machinery; and, I think the -- if it doesn't sound too much  
 15 like a vibe argument, the spirit of the Convention at  
 16 paragraph 95.

17 Lord Justice Buxton disagreed; and, it's right to  
 18 say, at paragraph 110, rejects the distinction between  
 19 provisional enforcement and simply allowing an attempted  
 20 enforcement process to begin and clearly didn't regard those  
 21 differences the wording of CPR 62.18 as significant.

22 My Lord, that is all I wanted to say on the  
 23 counterclaim issue, but my Lord, Lord Justice Leggatt, is  
 24 quite right that the issue that I think is close to the  
 25 heart of the entire appeal is, in truth, whether this is

48

1 something that it is appropriate for the English court to  
2 do.

3 Now, my Lords, that brings me to --

4 LORD JUSTICE LEGGATT: Although you said you  
5 didn't want to go to the commentary on the wider question,  
6 what form does that take?

7 MR FOXTON: My Lord, the context in which I have  
8 found it was in a book of essays on the New York Convention  
9 edited by Dr Reinmar Wolff, which I am quite happy to make  
10 available, in which he notes there is dispute on this issue.  
11 And I think in Germany it has been held that you can  
12 counterclaim. And he expresses the view that allowing  
13 counterclaims may unduly delay the mechanism of enforcement.  
14 Therefore the better view is that admitting counterclaims is  
15 contrary to articles 3 and 5. The footnote is replete with  
16 the type of references it is not easy to track down and  
17 I suspect that they're not in English. Therefore, I don't  
18 suggest that this court is -- I'm certainly not asking you  
19 to reach any view on that question at all.

20 LORD JUSTICE PATTEN: Right.

21 MR FOXTON: But if the court, for its own  
22 interest, wishes to have a copy of that reference, it can  
23 certainly be provided.

24 Now, my Lords, the -- that brings me, then, to our  
25 first and second grounds of appeal. I think -- I hope,

49

1 having said most of what I want to say, effectively it is  
2 the structural argument we have put as to the distinction  
3 between the supervisory and the enforcement court.

4 LORD JUSTICE PATTEN: Yes.

5 MR FOXTON: The fact that once the attempt to  
6 enforce is abandoned the interest of the English court and  
7 the role of the English court is at an end. And were  
8 matters otherwise it would allow Kazakhstan to use what is  
9 meant to be the passive remedy of resisting enforcement and  
10 turned it into an active means of seeking to improve its  
11 position vis a vis enforcement elsewhere.

12 And we do say that that is exactly the point the  
13 judge himself recognised on the declaratory relief point  
14 when rejecting Mr Smouha's argument. You've got that in  
15 bundle 7, the core bundle.

16 LORD JUSTICE PATTEN: Oh, we're looking at the  
17 judgment, are we?

18 MR FOXTON: My Lord, I am.

19 LORD JUSTICE PATTEN: Which paragraph?

20 LORD JUSTICE DAVID RICHARDS: 32, is it?

21 MR FOXTON: I'm grateful. My Lord is absolutely  
22 right. It is paragraph 32.

23 LORD JUSTICE PATTEN: Right.

24 MR FOXTON: Now, Mr Smouha interprets that as a --  
25 the judge making an error as to whether territorial

50

1 jurisdiction is made out; and says: well, if you look at  
2 The Gladys, look at the Glencore case, if you counterclaim,  
3 you expose yourself to counterclaims.

4 We would respectfully submit he's not doing that.  
5 He's making a rather more fundamental point, quite rightly,  
6 that it is not -- it would not be for this court, outside  
7 enforcement and as a supervisory court, to be giving  
8 declarations of that kind. We submit he was absolutely  
9 right in that. But unfortunately he failed to reflect on  
10 the significance that that had for his decision on the  
11 setting aside issue.

12 Now, there is a sort of I suppose a sub-theme to  
13 these grounds which perhaps looks generally at the  
14 appropriateness of the English court hearing issues and  
15 deciding them for the benefit not of the proceedings before  
16 it but proceedings elsewhere. And we have obviously  
17 referred to some cases where courts have looked askance at  
18 that. And Mr Smouha has referred to a case, I think  
19 possibly including one from my Lord, Lord Justice  
20 David Richards, which decided it was appropriate.

21 The cases in which it is both done and sought to  
22 be done, I have to say almost invariably involve asking the  
23 English court to rule on an issue of English law. And, in  
24 insurance contexts, not surprisingly the insurers tend to be  
25 rather keen on the English court ruling on questions of

51

1 English law than perhaps a judge in a US court in which an  
2 issue of coverage has arisen.

3 None of those -- obviously we're not here with the  
4 court being asked to rule on a question of English law, at  
5 least the benefit of the ruling is not said to lie in the  
6 court's decision on a question of English law. And  
7 therefore we submit those questions really -- those other  
8 cases on construction of the ISDA form or matters of that  
9 nature don't really assist.

10 What is being said is the English court will rule  
11 on questions of fact and that those questions may then  
12 inform other courts when applying their own public policy in  
13 relation to enforcement attempts in their jurisdiction.

14 And we do respectfully submit that the warnings  
15 about not appearing condescending and not offering  
16 unsolicited opinions and the risk that the judgment may be  
17 perceived as patronising do have real weight in that  
18 context.

19 So we've referred, I think, to the Howden  
20 North America decision, which was one of the cases in which  
21 this issue surfaced. Perhaps we can look briefly at that in  
22 the authorities bundle at tab 13.

23 LORD JUSTICE PATTEN: Yes.

24 MR FOXTON: Now, that was a case in which there  
25 were proceedings, I think in Pennsylvania from recollection,

52

1 as to an insurance policy which the insurer said was  
 2 governed by English law. I don't think the insured shared  
 3 that view. And I think the preliminary view of the  
 4 Pennsylvania judge had been to doubt that English law would  
 5 apply. And proceedings had, in effect, been commenced here  
 6 because there was territorial jurisdiction, for declaratory  
 7 relief, in the hope that both that those -- that relief  
 8 could be deployed in Pennsylvania and, in due course,  
 9 provide a basis for resisting any inconsistent judgment by  
 10 the Pennsylvania court here.

11 And the judge at first instance had -- Mr Justice  
 12 Field -- had allowed the proceedings to continue. And if  
 13 one looks at paragraph 25, one sees similar sort of hopeful,  
 14 but rather uncertain, language as to what the utility of the  
 15 proceedings would be, namely a real prospect that English  
 16 law will be held to be the governing law in which event it  
 17 is reasonable to assume that the Pennsylvania court, at the  
 18 very least, would find the judgment to be of considerable  
 19 assistance.

20 Now, slightly meatier terms there than  
 21 Mr Justice Knowles felt able to describe the prospect of  
 22 assistance here, but all rather uncertain. And at  
 23 paragraphs 37 and 39, which I do invite the court to read,  
 24 Lord Justice Aikens, I think, it is fair to say, rather  
 25 disapproves the idea of this unsolicited advisory opinion

53

1 being offered up for the enlightenment or perhaps education  
 2 of the Pennsylvania judge.

3 (Pause). So, my Lords, even without our New York  
 4 Convention structure points, we would suggest that this  
 5 would be an unwelcome and unnecessary and inappropriate  
 6 intervention. But when one places what is happening here in  
 7 the context of the different roles of different courts, we  
 8 say the position becomes one where it is overwhelmingly  
 9 inappropriate to have an eight day trial for the purposes of  
 10 this potential or possible assistance.

11 LORD JUSTICE LEGGATT: I entirely see your point  
 12 that it is not the business of the English court to be  
 13 offering unsolicited opinions for other courts, but the more  
 14 substantial question, as I see it, is whether the Kazakhstan  
 15 has any proper interest in seeking such a determination,  
 16 which is the other way the judge put it.

17 MR FOXTON: And, my Lord, our answer to that is  
 18 this: that the legitimate interest that Kazakhstan has in  
 19 the English enforcement proceedings is to defeat enforcement  
 20 here. It has benefited from that sort of localised nature  
 21 of enforcement interest itself, by being able to re-open or  
 22 argue again the public policy issues on which it failed in  
 23 Sweden, precisely because each enforcement court gets to  
 24 decide its own public policy. That's the basis upon which  
 25 the judge -- sorry, one of the bases on which the judge

54

1 rejected the argument that the Swedish court decision was  
 2 preclusive. But that carries with it, we say inevitably,  
 3 the consequence that what it can ask the English court to do  
 4 or what it is legitimately entitled to ask the English court  
 5 to do is itself circumscribed by that localised question.  
 6 And once that has become entirely moot, we would submit that  
 7 it is then seeking to use this court for an impermissible  
 8 purpose.

9 LORD JUSTICE LEGGATT: Well, that's the crux of  
 10 your argument, isn't it?

11 MR FOXTON: That's the crux of the argument.

12 LORD JUSTICE LEGGATT: Yes.

13 MR FOXTON: Now, my Lord --

14 LORD JUSTICE LEGGATT: Are there any commentaries  
 15 on the Convention that have looked at it at all? The essays  
 16 that you're talking about ...

17 MR FOXTON: My Lord, I have not found anything for  
 18 or against my position. I don't pretend to have -- as  
 19 your Lordship knows the arbitration publishing scene is  
 20 surprisingly active and I haven't begun to crawl through all  
 21 of it.

22 LORD JUSTICE LEGGATT: No. No. Right.

23 MR FOXTON: Now, my Lord, just a few subsidiary  
 24 points on this issue before I get to ground 3. There is  
 25 some suggestion the point wasn't argued below.

55

1 Now, as with most appeals, I quite accept that it  
 2 has been buffed up and has become rather more exclusive  
 3 point of focus on this appeal. But it undoubtedly is there.  
 4 I can give the court the references or take the court to  
 5 them. I don't think Mr Smouha is suggesting that the point  
 6 should not be open to me so it maybe it is a purely forensic  
 7 point.

8 My Lord, our skeleton at first instance makes  
 9 exactly this point. That's in supplemental bundle, tab 9,  
 10 page 51, at paragraphs 3.4, 3.8 and 3.3. And Mr Sprange QC  
 11 also made the point at the hearing, transcript is  
 12 supplemental bundle, tab 11, page 106. I would invite the  
 13 court to look at pages 59 and 119 to 120 of the transcript.  
 14 So, for what it's worth, we say it's there.

15 Secondly, it is said this is a collateral attack  
 16 on the 2017 judgment. It is nothing of the kind. On the  
 17 contrary, it's picking up on the logic of the 2017 judgment,  
 18 which is that we get to say what public policy is for the  
 19 purposes of enforcing here, to reach the conclusion that  
 20 once that process is abandoned or at an end, you do not or  
 21 it would not be appropriate to make findings of fact for the  
 22 purposes of other courts' determination of what their public  
 23 policy applies.

24 And then I've referred a moment ago to the judge's  
 25 finding on Kazakhstan's legitimate interest. And the court

56

1 has the crux of our answer on that, which won't improve  
2 by -- by repetition.

3 Now, my Lords, that brings me to the third ground  
4 of appeal, the one that my Lord, Lord Justice Leggatt,  
5 I think, regarded as unpromising, it's fair to say, when  
6 giving permission to appeal.

7 It's a point that I will deal with, I hope, in a  
8 manner appropriate to that preliminary view; but there is a  
9 short, but important, point.

10 First instance authority has held that the  
11 decision whether or not to set aside a Notice of  
12 Discontinuance is a decision that falls to be made in  
13 accordance with the application of the overriding objective,  
14 looking at interests of both parties, interests of justice  
15 generally, requirements of other court users.

16 Mr Justice Henderson in the High Commissioner of  
17 Pakistan case uses that test. I accept that it also  
18 features in Mr Justice Aikens judgment in Sheltam Rail. The  
19 court will have seen a joint note from Mr Smouha and  
20 I yesterday which, in fairness, Mr Smouha's personal  
21 diligence had found two other cases in which the test used  
22 had been that test; and that's the approach the judge  
23 followed. We're not aware of any appellate court that's  
24 looked at that.

25 And our submission on this follows along the

57

1 following we would submit correct lines: there are certain  
2 steps in litigation where the court accords and respect are  
3 a high degree of autonomy on the part of those -- the entity  
4 deciding will or not to do them. The classic example would  
5 be the decision to commence proceedings. The court does not  
6 order that to be done, in the vast majority of cases does  
7 not order applications to be brought. It may make an order  
8 that if an application is to be brought, it must be brought  
9 by a certain time; but it respects and reflects a degree of  
10 autonomy on the part of a party, within that sphere, as to  
11 what it can do.

12 And we say, albeit I accept with slightly reduced  
13 force, that the decision to stop proceedings, to stop an  
14 application, provided a party is prepared to pick up the  
15 costs consequences that flow from that, is also one where  
16 the court should accord a high degree of autonomy to the  
17 party taking that decision. Otherwise you are in effect  
18 requiring a party to carry on with some form of active  
19 process in circumstances in which they have decided they no  
20 longer wish to do so.

21 And we say that that autonomy but not wholly  
22 uncircumscribed autonomy is reflected in the structure of  
23 part 38, which uses the language of right in 38.4 -- sorry,  
24 38.2, describing the discontinuance. It is fair to say it  
25 uses the language of right in describing the application to

58

1 set aside the Notice of Discontinuance in 38.4.

2 But, plainly, the discontinuance is a legal act  
3 that has legal significance unless and until the court makes  
4 an order otherwise under CPR 38.4.

5 And our position in short is if you simply treat  
6 that as any other procedural discretion to which the  
7 overriding objective governs, that insufficiently recognises  
8 the area of autonomy that should apply to a decision not to  
9 proceed with something; and that what is necessary to  
10 trigger the exercise of the setting aside must focus on  
11 something impermissible or illegitimate on the part of the  
12 claimant.

13 LORD JUSTICE LEGGATT: There are two ways of  
14 approaching it though, aren't they? One is to say that the  
15 test is different, which is what you're seeking to submit.  
16 But the other is simply to say it's a factor of great weight  
17 that ordinarily is probably going to be decisive, unless  
18 there's a good reason otherwise, that you've chosen not to  
19 go on with the proceedings. And that, therefore, the other  
20 party is going to have to serve some good reason why they  
21 should continue.

22 But why should the test be, as it were, channelled  
23 into abuse of process or something of that sort, rather than  
24 simply being the discretionary test of what's in the  
25 interests of justice?

59

1 MR FOXTON: My Lord, we would say the benefit of  
2 the approach for which we contend is that if we are right  
3 that stopping something you've started ought to benefit from  
4 a certain degree of autonomy, then conduct by the person  
5 seeking to do that ought to be the touchstone as to when  
6 they lose their area of autonomy. I submit that our  
7 achieves that. Rather than if everything is put into the  
8 mix, as it were, that will unduly dilute what ought to be  
9 some area, at least, of freedom of action on the part of the  
10 party serving the notice.

11 LORD JUSTICE PATTEN: But, I mean, the rules  
12 don't -- the rules, as you point out yourself in your  
13 skeleton, do contain certain inhibitions on the process  
14 where, in the sense of requiring the court's consent to  
15 discontinue where -- where, for example, an injunction has  
16 been granted order undertakings have been given to the  
17 court.

18 But the rules don't prescribe, in any way, the  
19 basis on which, if the defendant applies to have the Notice  
20 of Discontinuance set aside, the court should exercise what  
21 must, I would have thought, be a discretion as to whether or  
22 not to -- to accede to that application.

23 So that in the authorities you are referring to,  
24 all that the judges have been trying to do is set out a  
25 range of factors which will be relevant, broadly speaking,

60



1 in most of the cases, although inevitably depending on the  
2 circumstances of the case, some will be more relevant than  
3 others. I mean, it's -- it's a broad discretion, isn't it,  
4 that's -- that has to be exercised, having regard to the --  
5 the nature of the proceedings in which discontinuance is  
6 sought and so on? The effect on other parties and so on.

7 MR FOXTON: Well, my Lord, our submission, which  
8 I have made, is that there is, as it were, more of a focus  
9 on --

10 LORD JUSTICE PATTEN: But is this submission being  
11 made as one that -- that has a particular application in --  
12 in an arbitration context? Or are you making this  
13 submission as a more general one?

14 MR FOXTON: My Lord, I'm afraid it's made at two  
15 levels.

16 LORD JUSTICE PATTEN: Right.

17 MR FOXTON: We do make it as a general submission.  
18 But in the arbitration context there is this interesting, we  
19 would submit, add-on, because one of the ways in which the  
20 courts have approached CPR 38.4 is to say: if you had needed  
21 permission, what would we have asked of you before we gave  
22 it? And there are cases, Sheltam Rail is one, where a party  
23 brings a challenge before the English court in arbitration,  
24 as the supervisory court, and then, perhaps running -- you  
25 know, aware of a risk of failure to adopt the finding the

61

1 judge made here, then seeks to pull that application. And  
2 Mr Justice Aikens, in that case, said: only on terms that  
3 you never raise these points in enforcement courts.

4 And one can see why that was entirely appropriate  
5 with a supervisory court, because under the Convention  
6 setting aside by the supervisory court is one of the very  
7 few grounds of resistance. In most jurisdictions it is  
8 determinative. And, therefore, the English court was  
9 legitimately entitled, as part of the CPR 38.4 process, to  
10 look to matters elsewhere.

11 If one says: what could the court legitimately  
12 have asked of the Stasis if this was a leave to discontinue  
13 position? We say all it could have asked is undertake  
14 never, ever to try and enforce this award in this  
15 jurisdiction again. And that was offered.

16 The court could -- what the court could not have  
17 done is to say: never try and enforce it anywhere, even in  
18 Sweden, which has already reached its view on Swedish public  
19 policy.

20 LORD JUSTICE LEGGATT: But these are just really  
21 arguments as to why, in this particular context, you say it  
22 shouldn't -- you should be allowed to discontinue. I mean,  
23 they don't justify building into the rule, so to speak, some  
24 different test in a special case, where it is a New York  
25 Convention award and so forth. Or you say it does, do you?

62

1 MR FOXTON: Well, my Lord, it's the phrase one  
2 always is horrified to read on the transcript when one said  
3 it afterwards, but: there it is, comes to mind.

4 LORD JUSTICE DAVID RICHARDS: What it does is to  
5 focus attention on this particular case, in accordance with  
6 the general rules in which this provision is expressed which  
7 does, to an extent, undermine the general point you're  
8 making, that there is some overarching restriction. But the  
9 problem, as my Lords has pointed out, is that that  
10 overriding restriction is not to be found in the words --  
11 the language of the rule.

12 MR FOXTON: My Lords, I'm going to then move to my  
13 final point. I think we are, just about, on track.

14 LORD JUSTICE PATTEN: Right. Good.

15 MR FOXTON: I think, as an alternative submission  
16 to the judge's view, Mr Smouha says: well, look -- he  
17 doesn't put it in quite these terms and I hope he will  
18 forgive me for forensic paraphrase but: leave aside the  
19 question of providing assistance to other enforcement  
20 courts, the English court has its own legitimate interest in  
21 determining whether the order granted by Mr Justice Burton  
22 ex parte was granted without full and frank disclosure  
23 and/or whether this was an attempt to enforce what, as a  
24 matter of English public policy at least, but not as a  
25 matter of Swedish public policy, would constitute an attempt

63

1 to enforce a fraudulent arbitration award.

2 And, in that context, understandably, he relies  
3 heavily on his own forensic triumph in re Dalnyaya. I've  
4 probably mangled that wrong but I did want to make some  
5 submissions on that case.

6 The first issue is this: that whatever  
7 justification is now offered for the eight day trial, it is  
8 quite clear that what Kazakhstan is looking for from it --  
9 to get from it is assistance in the context of enforcement  
10 or legal proceedings elsewhere. We do submit that the idea  
11 that one has an eight day trial to determine whether or not  
12 there is full and frank disclosure, of an order which never  
13 got beyond the provisional stage, is one that is entirely  
14 without merit.

15 The alternative argument, which is that we should  
16 have an eight day trial, effectively forcing the enforcement  
17 proceedings to continue, for the purpose of determining  
18 whether the continuance of the enforcement proceedings  
19 involves a fraud on the English court, is, itself, quite a  
20 remarkable submission.

21 LORD JUSTICE LEGGATT: Well, it might be different  
22 if, for example, if you went through the trial and said: we  
23 want to give up now at the end, after the court had heard  
24 all the evidence, and the judge had thought there was a  
25 fraud, and might feel was going to give judgment anyway; but

64

1 that would be rather a different case from when you are a  
2 lot less far down the line.  
3 MR FOXTON: My Lord, one of the reasons I sort of  
4 characterised it as a higher order principle is to allow  
5 myself forensic wriggle room for more extreme examples. And  
6 it may be that that is one.

7 But we do submit that the Dalnyaya case, which  
8 I think the court was invited to pre-read, is really a very  
9 different case. It's a case in which, as you've seen, a  
10 receiver of a Russian company received recognition under the  
11 cross-border insolvency regulations, under an order in  
12 which, effectively, the receiver was then acting as an  
13 officer of the English court for a period of 16 months. And  
14 the question was then: could the receiver come along and  
15 simply ask that order to be terminated as to the future,  
16 without the court ruling upon whether there had been  
17 compliance with the duty of full and frank disclosure in  
18 obtaining it in the first place?

19 Now, the case is in the authorities bundle at  
20 tab 4. And if one goes forward to, I think, paragraph 77,  
21 one has the Chancellor's first answer to this point, that  
22 terminating it, if there had been a breach of full and frank  
23 disclosure, and it -- when it should have been set aside  
24 would not be satisfactory because there's a distinction --  
25 LORD JUSTICE DAVID RICHARDS: Sorry, which tab are

65

1 we at?

2 MR FOXTON: Tab 4 of the authorities bundle.  
3 Paragraph 77.

4 LORD JUSTICE DAVID RICHARDS: Yes.

5 MR FOXTON: We do submit there is the real  
6 difference here, that, first of all, the order for  
7 provisional enforcement remained inchoate and unenforceable  
8 at all times. And, therefore, this was not a case where  
9 there had, in fact, been an order in place for a substantial  
10 period which the court was simply being asked to terminate  
11 as to the future.

12 Secondly, I've accepted that discontinuance  
13 carries with it the setting aside of that order. So that  
14 is, with respect, completely different.

15 Secondly, the court itself stressed the wholly  
16 exceptional, as the Chancellor put it, nature of that case,  
17 where there had been an attempt to use neutral language of  
18 repeated attempts by the Russian Government to engage the  
19 involvement of UK institutions in the ongoing dispute with  
20 the Hermitage parties. And I think, as the court put it, a  
21 refusal by the Russian State to take "no" for an answer.  
22 And that's summarised at paragraphs 78 to 80. The wholly  
23 exceptional case language is in paragraph 81 of the  
24 Chancellor's judgment.

25 So we have none of that ongoing and persistent

66

1 attempts to use English process or English legal  
2 institutions.

3 The issue of non-disclosure there was not an issue  
4 the court was resolving for the purposes of assisting  
5 others, but because of the risk of the Russian State coming  
6 back to English courts again and needing, as it were, to be  
7 made absolutely clear to it what the obligations were in the  
8 context of prospective future proceedings here. So the  
9 court found the interest to be a legitimate English interest  
10 in relation to future proceedings here. By contrast, there  
11 is no prospect of future enforcement proceedings here, given  
12 the undertaking offered.

13 None of the New York Convention structural issues  
14 that I've raised arose. And, of course, that was a scenario  
15 in which, at the very hearing at which whether termination  
16 should be allowed or not, the court heard, and was in a  
17 position to determine, and did determine, the issues of  
18 non-disclosure. It wasn't a case in which it was  
19 contemplated that when the court had issued its ruling you  
20 would then have an eight day trial.

21 It's in the nature of questions of non-disclosure  
22 that they don't ordinarily involve findings of fact as to  
23 the substance or the merits, which is why they're capable of  
24 being dealt with by the court in interim hearings. It's  
25 also in the nature of those points that they never come

67

1 back, as it were, once you've got beyond that stage to  
2 trial.

3 And we do submit one is in a fundamentally  
4 different context here, where it's not suggested that the  
5 judge could or should decide the issues before him. It was  
6 suggested that a trial should -- or the process should  
7 continue through the remaining steps to an eight day trial.

8 So, my Lords, for all those reasons, we do submit  
9 that the -- yes, and as Mr Sprange reminds me, for  
10 declaratory relief. So we do submit it is a wholly  
11 exceptional case and a case that offers very little  
12 assistance to this court in terms of the issues before it.

13 My Lords, unless there are any further questions,  
14 I think that takes me to my allotted time.

15 LORD JUSTICE PATTEN: No. Thank you very much,  
16 Mr Foxtton.

17 Mr Sprange, I assume you don't wish to follow on.  
18 No. Mr Smouha.

19 Submissions by MR SMOUHA

20 MR SMOUHA: My Lords, there are two points upon  
21 which, in our submission, this appeal flounders.

22 First, the judge's decision that the fraud issue,  
23 namely whether the arbitration award had been obtained by  
24 the fraud of the Statis, should be tried by the English  
25 courts, despite the attempt by the Statis, by Notice of

68

1 Discontinuance, to remove that question from being examined  
2 by the English court. That decision had no impact  
3 whatsoever on the supervisory court, the Swedish court. Nor  
4 did it have any impact whatsoever on the relationship  
5 between the supervisory court and the enforcing court. And  
6 it will have no impact even after trial on that court or  
7 that relationship.

8 In short, there is no point in issue in this  
9 appeal or at least no point open to the appellant to advance  
10 that the judge's judgment, that is the judgment under  
11 appeal, has moved outwith the parameters laid down by the  
12 same judge in his first judgment, which did consider what  
13 the Swedish courts had and had not decided, and which  
14 findings bind the Statis, however much they protest or  
15 wriggle.

16 This court is not concerned with how the Statis  
17 came to seek permission to appeal against the 2017 judgment,  
18 Knowles 1, if I can call it that by way of shorthand. This  
19 court is not concerned with how they came to seek permission  
20 to appeal that judgment out of time or why they did not, as  
21 Lord Justice Lewison pointed out in refusing permission,  
22 possibly deliberately, for their own reasons, did not make  
23 any application for an extension of time for permission to  
24 appeal.

25 That is the first point.

69

1 Second, the learned judge's decision that the  
2 English court should proceed to trial is, essentially, based  
3 on three findings.

4 First, that Kazakhstan had a legitimate interest  
5 in pursuing its fraud claim and obtaining the judgment of  
6 the English court on the fraud issues, even if the  
7 enforcement claim is not pursued by the Statis in England.

8 Second, that a judgment of the English court on  
9 those issues will at least assist the courts of the several  
10 jurisdictions which are seized of effectively identical  
11 issues as to whether to recognise and enforce the award, all  
12 being New York Convention countries.

13 And, third -- the third finding of the judge --  
14 that, having regard to factors such as the need for  
15 finality, proportionality of cost and resources, that it  
16 would further the overriding objective to progress the case  
17 to the completion of the trial which is imminent.

18 The judge's findings in that regard are, in our  
19 submission, unimpeachable. The Statis either do not  
20 challenge those findings as findings as such or insofar as  
21 they sought to do so by ground 4 of their application for  
22 permission to appeal, permission has been refused.

23 In our submission, those two points present  
24 essentially insuperable obstacles to the appeal. There is  
25 the ground 3 challenge to the test that the judge applied,

70

1 the abuse of process point. I'm going to deal with that  
2 shortly to snuff out the glimmer that my Lord,  
3 Lord Justice Leggatt, allowed it.

4 But that apart, we submit that without having to  
5 address either the question of whether the Notice of  
6 Discontinuance, in any event, had any discontinuing effect  
7 on the fraud claims advanced in the points of claim, or  
8 whether, in any event, there is an abuse of process which  
9 satisfies even the test proposed by the Statis, the appeal  
10 is misconceived -- a rather overused word, in oral and  
11 written argument, in this court, but, in our submission,  
12 forensically accurate in this case.

13 Essentially, what you are looking at is a series  
14 of case management decisions which flowed on naturally from  
15 the decision the judge made in his 2017 judgment that there  
16 was a strong reason to believe that the Statis had  
17 perpetrated a very large and serious fraud on the Tribunal  
18 and on Kazakhstan, through deception of the Tribunal; and  
19 that the English court could and should determine whether  
20 that fraud had taken place; ultimately whether or not the  
21 Statis had ceased to be happy about that or not; and whether  
22 or not they regretted having seized the English court  
23 themselves of those issued and participated in the action to  
24 the brink of trial.

25 And they did not help the attempt to stop the

71

1 English court doing just that by giving reasons for their  
2 discontinuance which the judge found were not true. And  
3 they did tell the judge, as he recorded in his judgment,  
4 that they "would relish the opportunity to proceed to trial  
5 with respect to the fraud allegations".

6 The judge rejected the two reasons they gave for  
7 wanting to discontinue the proceedings. Apart from which,  
8 the Statis had said, apart from those reasons, they had  
9 "otherwise a strong desire to proceed to trial and defeat  
10 the fraud claims". The references to those quotations are  
11 paragraphs 3.5 and 3.6 of the Statis' skeleton below.  
12 Supplemental bundle, tab 9, page 52, and quoted in  
13 paragraph 19 of the judgment.

14 In those circumstances, and against that  
15 background, it is, in our submission, hardly surprising that  
16 the judge determined that the issues raised by the fraud  
17 points of claim and points of defence should proceed to  
18 trial. And your Lordships will have seen that  
19 Mr Justice Knowles said in paragraph 93 of his 2017 judgment  
20 that, again -- this is in the authorities bundle, tab 2,  
21 paragraph 93:

22 "It will do nothing for the integrity of  
23 arbitration as a process or its supervision by the Courts,  
24 or the New York Convention, or for the enforcement of  
25 arbitration awards in various countries, if the fraud

72

1 allegations in the present case are not examined at a trial  
2 and decided on their merits, including the question of the  
3 effect of the fraud where found. The interests of justice  
4 require that examination.”

5 In our submission, it would have been a travesty  
6 of justice, a gross manipulation of the procedures of the  
7 High Court, if the judge had made any other decision on the  
8 application to set aside the Notice of Discontinuance than  
9 the one he did. But, of course, I do not need to go nearly  
10 that far in showing your Lordships why the appeal should be  
11 given short shrift.

12 My Lords, turning to the issues on appeal in  
13 detail, one —

14 LORD JUSTICE DAVID RICHARDS: Paragraph 93 is a  
15 bit overblown, isn't it? I mean, the question before the  
16 court was whether the award should be enforced in England.  
17 I think 93 had a good blowing of the trumpet sound of it,  
18 but what is actually the judge saying in paragraph 93?

19 MR SMOUHA: He's saying in circumstances where the  
20 issue that he had to decide was whether the English court  
21 should — should — in the 2017 judgment is to proceed to  
22 order a trial of the — of the fraud issues and in  
23 circumstances where the Stasis were saying it should not,  
24 either because the — that had been decided in Sweden or, if  
25 not, in any event, it should not do so. And he's actually

73

1 saying: no, on the contrary —

2 LORD JUSTICE DAVID RICHARDS: So he's setting his  
3 face against the Swedish court there, isn't he, when he says  
4 saying the interests of justice require that examination?  
5 The Swedish courts have decided the interests of justice do  
6 not require that examination as a matter of Swedish law.

7 It just seems very — I mean, I understand the  
8 point if he's talking about enforcement of the award in this  
9 country. It's perfectly understandable. But is he going  
10 beyond that? That's what I didn't quite understand about  
11 this paragraph.

12 MR SMOUHA: Well, my Lord, I'm not —

13 LORD JUSTICE DAVID RICHARDS: Have you any — he's  
14 saying it in the context of enforcement here, rather than  
15 some more general proposition that — that it does nothing  
16 for the integrity of the New York Convention if this issue  
17 is not investigated.

18 MR SMOUHA: The interests of justice in this  
19 country.

20 LORD JUSTICE DAVID RICHARDS: In this country.  
21 It's all tied to this country.

22 MR SMOUHA: My Lord, yes.

23 LORD JUSTICE DAVID RICHARDS: It's expressed very  
24 generally or that's as I found — but, anyway, you read it  
25 as very much anchored to public policy in this country.

74

1 MR SMOUHA: Indeed.

2 LORD JUSTICE DAVID RICHARDS: All right.

3 I understand that.

4 MR SMOUHA: That's why I make the point that that  
5 interest — the interest of justice he has identified  
6 there —

7 LORD JUSTICE DAVID RICHARDS: Is one here. He's  
8 not seeking to make some more universal declaration here.

9 MR SMOUHA: No; and I'm not relying on that. What  
10 I say, my Lord, is that the interests of justice that he  
11 identified there, justice in this country in relation to the  
12 determination of that issue, carries on — flows through to,  
13 and one sees it in his decision in relation to his  
14 reasons — one of his reasons for finding that —

15 LORD JUSTICE PATTEN: Well, all he was concerned  
16 about in the first of his two judgments was whether there  
17 should be a determination of the question of enforcement  
18 short of a full trial. I mean, the — the — the claimants  
19 have been — have been saying: well, effectively, this had  
20 all been decided elsewhere, and there was either an issue  
21 estoppel and so on. And the — the set aside application  
22 could be just simply pushed aside and the — and the  
23 conditional order become unconditional. I mean, it's  
24 perfectly — one perfectly well understands why the judge  
25 has decided, then, that (a) those arguments didn't carry the

75

1 day; and it was important that there should be a proper  
2 trial of the — of the fraud issue, in this jurisdiction, to  
3 decide the question of enforcement. But that's all he  
4 decided.

5 MR SMOUHA: My Lord, that — that is what he  
6 decided.

7 LORD JUSTICE PATTEN: Yes.

8 MR SMOUHA: But —

9 LORD JUSTICE PATTEN: But he's faced with a  
10 completely different scenario now because the enforcement  
11 isn't sought in this jurisdiction any more.

12 MR SMOUHA: Well, my Lord, that then raises the  
13 question — in relation to the appeal under the judgment,  
14 that raises, obviously, two questions. One is: what is the  
15 appropriate test in relation to considering whether to set  
16 aside a Notice of Discontinuance? And, secondly, did the  
17 judge make some error in relation to a principle which —  
18 and this is the only scope of the appeal — the appellants  
19 have to say to — to this court that by reference to their  
20 suggestion in grounds 1 and 2 that the decision subverts the  
21 relationship between the — the — an enforcing court and  
22 the supervisory court that the judge was bound — bound —  
23 in these circumstances, to allow the discontinuance — the  
24 Notice of Discontinuance to stand.

25 And the only point I'm making —

76

1 LORD JUSTICE PATTEN: Well, I mean, what point are  
2 you making? That there isn't -- that they can't demonstrate  
3 an error of principle. Is that what you're saying?

4 MR SMOUHA: No, my Lord, I say that the error of  
5 principle they identify -- that the principle they identify  
6 is -- two points: one is: there is no such principle. And,  
7 secondly, that the attempt to say that at the heart of the  
8 error that the judge made was some trespassing -- the word  
9 they use, I think, in their grounds of appeal is subversion  
10 of the relationship between the supervisory court and the  
11 enforcing court is quite wrong, because any question about  
12 the relationship between the Swedish proceedings and the  
13 English proceedings had already been decided, done and  
14 dusted by the judge's 2017 judgment.

15 LORD JUSTICE PATTEN: Well, what you mean --  
16 I mean, when you say subversion, you mean by way of some  
17 sort of collateral attack on the -- you don't mean that?

18 MR SMOUHA: Subversion is their word, my Lord.

19 LORD JUSTICE PATTEN: Right. Okay.

20 MR SMOUHA: Their formula in the ground of appeal  
21 is that:

22 "The judge's finding was a subversion of the  
23 distinction in international arbitration law, including  
24 under the New York Convention, between the role of courts of  
25 the country of enforcement and a competent authority of the

77

1 country in which or under which the award is made."

2 And what --

3 LORD JUSTICE PATTEN: But, at heart, that point is  
4 simply stressing what is evident from the terms of the  
5 Convention itself, and so on, and the Arbitration Act, that  
6 the focus of the -- of the proceedings in this jurisdiction  
7 are on enforcement of the award in this jurisdiction.

8 MR SMOUHA: My Lord, yes.

9 LORD JUSTICE PATTEN: So if -- absent that  
10 component, what -- why are we having a trial here?

11 MR SMOUHA: Because -- well, first of all,  
12 because, in terms of why is the court seized? Because the  
13 court has been seized of the issues by the Statis.

14 LORD JUSTICE PATTEN: Yes. Well, we understand  
15 all that.

16 MR SMOUHA: Secondly, because, my Lord, while it  
17 is, of course, correct that, under the New York Convention,  
18 a -- an award creditor can start multiple enforcement  
19 proceedings, there is, obviously, the recognition that there  
20 can be overlapping issues between the issues that arise in  
21 different enforcement proceedings. And, having got as far  
22 as this, there are, for the reasons -- the findings that the  
23 judge made, good reasons to allow the or not to allow the  
24 Statis to terminate those proceedings and to preclude the  
25 English court from determining them.

78

1 And, my Lord, that's why the -- that's why the  
2 C v D case doesn't assist my learned friends, because -- for  
3 the two reasons -- one of which he identified and one of  
4 which my Lord, Lord Justice Leggatt, identified, it is not  
5 an enforcement case; and, in any event, as he recognised,  
6 there is always the possibility of there being issues which  
7 arise in the context of an enforcement proceeding which may  
8 overlap with issues that will or may have been looked at by  
9 the supervisory court, fraud being -- fraud in the obtaining  
10 of the award being one of those.

11 LORD JUSTICE LEGGATT: That's a question, isn't  
12 it, whether that is an issue or whether the only issue in  
13 these proceedings is whether it is contrary to English  
14 public policy?

15 MR SMOUHA: Well, my Lord, in relation to that, it  
16 is -- it is critically important that the judge made a --  
17 and he dealt with exactly that point.

18 LORD JUSTICE LEGGATT: Hmm.

19 MR SMOUHA: In answer to an argument that had been  
20 made to him, that that was not the only issue and that  
21 wasn't the reason why he was saying that the determination  
22 of the fraud questions would be of -- of assistance to other  
23 courts. And he deals with that at paragraph 64, referring  
24 back to his judgment. He says in the second sentence:

25 "The context of the utility of an answer includes

79

1 the fact, as I respectfully concluded in my judgment dated 6  
2 June 2017, that the Swedish Courts, as courts of the seat,  
3 have not determined the question of fraud discussed in that  
4 judgment. I add that the important, and relevant, thing is  
5 not an answer to a question of English public policy but an  
6 answer to the question whether there was the fraud  
7 described."

8 LORD JUSTICE LEGGATT: But would an English court  
9 be bound by a factual finding of fraud by the Swedish court.

10 MR SMOUHA: No, that's not the point he's making,  
11 my Lord. He's making the point the Swedish court did not  
12 decide the questions of fraud.

13 LORD JUSTICE LEGGATT: I know.

14 MR SMOUHA: And what he is saying is that what  
15 would be of utility is the English court's findings of fact  
16 in relation to fraud.

17 LORD JUSTICE PATTEN: Well, who says it will be of  
18 utility?

19 MR SMOUHA: Sorry, my Lord?

20 LORD JUSTICE PATTEN: Who says it will be of  
21 utility?

22 MR SMOUHA: That was the question that was dealt  
23 with -- my Lord, Lord Justice Leggatt asked whether there  
24 was evidence underlying the findings of the judge? And the  
25 answer is: yes, that was addressed extensively and debated

80

1 before the judge. And your Lordship will get some  
2 indication of the extent of the material in relation to  
3 that -- and I'm certainly not going to go through this  
4 because, in my submission -- in my submission, it is not  
5 open to the appellants to challenge, in this appeal, the  
6 judge's findings in relation to the utility that will be  
7 given to the other courts.

8 LORD JUSTICE DAVID RICHARDS: But, I mean, the  
9 finding -- his review or conclusions on this, I take it, are  
10 in paragraphs 57 to 59 and again in 63.

11 MR SMOUHA: Yes. Exactly so.

12 LORD JUSTICE DAVID RICHARDS: But, as has already  
13 been said, it's not terribly ringing. It is all it's  
14 possible. And then we've got the double negative of it will  
15 not be without use. Anyway, those are the -- both sides are  
16 stuck with his findings on that, aren't they? So it is  
17 possible it will be of some use.

18 MR SMOUHA: But the findings are in the terms they  
19 are.

20 LORD JUSTICE DAVID RICHARDS: Precisely. Yes.

21 MR SMOUHA: The parties are stuck with that. All  
22 I was going to your Lordships is, as I say, by way of  
23 indication of the material.

24 LORD JUSTICE DAVID RICHARDS: Yes, I understand.

25 MR SMOUHA: Tab 10 of the supplemental bundle and

81

1 tab 12 were tables that each side provided the judge with  
2 their skeletons, summarising their submissions on the  
3 material in relation to the various jurisdictions. And,  
4 my Lord, what -- what I -- what I do say is that it would be  
5 entirely inappropriate, and not for this court to make some  
6 determination in relation to the judge's exercise of  
7 discretion by reference to how high that level of utility  
8 was pitched.

9 LORD JUSTICE PATTEN: Well, we're not really doing  
10 that. What we're trying to do is to understand what the  
11 judge was saying. I mean, where he says in 63:

12 "I respectfully take the view it will not be  
13 without use".

14 I mean ... I mean, we just need to make sure that  
15 we've understood what he was actually meaning by those  
16 words.

17 MR SMOUHA: Yes.

18 LORD JUSTICE PATTEN: Because, as I put -- as you  
19 will have heard I put to Mr Foxton it doesn't look as if the  
20 judge was necessarily saying that there would be any form of  
21 issue estoppel as a result of this. So, presumably, the  
22 highest it's going to be put is that a judge in London,  
23 having heard the evidence, and seen the disclosure, has  
24 formed the view that there was fraud. I mean, that's -- so  
25 that's what we're talking about, is it?

82

1 MR SMOUHA: My Lord, there --

2 LORD JUSTICE PATTEN: Make of it what you will  
3 elsewhere.

4 MR SMOUHA: Well, two points, my Lord. First, as  
5 to what the judge has actually found. The actual findings  
6 by reference to the jurisdictions are in relation to  
7 Belgium, Luxembourg and the Netherlands in paragraph 57 in  
8 the last sentence.

9 LORD JUSTICE PATTEN: Yes. I see that. Yes.

10 MR SMOUHA: In relation to the United States,  
11 paragraph 59, the last sentence. Netherlands, sorry.  
12 Forgive me. Netherlands he says something further in  
13 paragraph 58. Then in relation to the United States,  
14 paragraph 59.

15 LORD JUSTICE DAVID RICHARDS: But that depends on  
16 whether this fraud claim is permitted to be brought in at  
17 all in the United States.

18 MR SMOUHA: My Lord, yes.

19 LORD JUSTICE DAVID RICHARDS: But in paragraph 58  
20 it seems to be common ground that an English judgment would  
21 be given some weight but less weight than the decision of  
22 the Swedish court. But, I mean, your point is, of course,  
23 the Swedish court did not reach a conclusion on the factual  
24 allegation of fraud.

25 MR SMOUHA: Yes. And my point is also that

83

1 the degrees of this evidence and the level at which the  
2 judge puts it is not -- is not material on this -- on this  
3 appeal. This is not a complete statement of the position.  
4 There are, for example, now, Italian proceedings. The  
5 issue -- for the appellants to succeed, they have to be able  
6 to say that even if a judgment of the English court would --  
7 would be of assistance to these courts, nevertheless the  
8 English court could not proceed to decide them -- decide  
9 those issues at a trial once the Statis decided to terminate  
10 those proceedings.

11 And that comes back, my Lord, to my Lord,  
12 Lord Justice Patten's question to my learned friend, about:  
13 would it be different if an estoppel -- an issue estoppel  
14 would be created? And my learned friend accepts that he has  
15 to say -- in relation to his identification of a principle  
16 at stake in this case, that he has to say that the position  
17 would have been the same even if a determination of the  
18 English court would create a binding issue estoppel which  
19 would operate in one or other proceedings in the enforcement  
20 proceedings. And, my Lords, in my submission, that proves  
21 why it cannot be the case that there is some such principle.

22 And, my Lords, there are -- in relation to this  
23 point there can be common issues between proceedings --  
24 enforcement proceedings that are taking place in different  
25 jurisdictions, there are situations in which issue

84

1 estoppel -- it can be very important that issue estoppels  
2 arise .

3           There is one -- one case in -- as an example,  
4 where this -- that this question was -- arose, namely  
5 whether an issue estoppel can arise by reason of the  
6 determination in one enforcement proceeding binding in  
7 another.

8           In the authorities bundle, tab 5, the judgment of  
9 Mr Justice Eder in *Diag Human v the Czech Republic*, where  
10 there had been a determination of issues in the context of  
11 enforcement -- of one set of enforcement proceedings. And  
12 the question arose whether they created an issue estoppel in  
13 English enforcement proceedings. At page 298.

14           LORD JUSTICE PATTEN: Yes.

15           MR SMOUHA: At paragraph 55.

16           LORD JUSTICE PATTEN: Yes.

17           MR SMOUHA: Where the judge who was dealing with  
18 an argument:

19           "However, I should mention that Mr Cox originally  
20 advanced a very broad proposition that in proceedings to  
21 enforce under the New York Convention issue estoppel cannot  
22 arise from decisions in other states on enforcement itself."

23           And then he summarises further the -- that  
24 submission.

25           Then if your Lordships would then read

85

1 paragraphs 58 and 59.

2           (Pause).

3           LORD JUSTICE PATTEN: Yes.

4           MR SMOUHA: And, my Lords, there is nothing in the  
5 New York Convention that says that it is not a good thing  
6 if, where there are multiple enforcement proceedings, there  
7 can be, effectively, an orderly determination of issues in  
8 one jurisdiction -- one enforcing jurisdiction, which is the  
9 first to consider them, before the same issues are  
10 considered in other jurisdictions. And, in our submission,  
11 it is positively a good thing if issue estoppels are created  
12 or if there can be assistance from one court to another, in  
13 order to avoid the multiplication of time and cost and the  
14 risk of inconsistent decisions in relation to factual  
15 matters, if judgment is -- if a judgment can be of  
16 assistance to other courts.

17           LORD JUSTICE DAVID RICHARDS: So the -- what  
18 Mr Justice Eder was considering there was whether an award  
19 was binding. What was meant by that, in that context?  
20 I mean, an award might not be binding for a whole variety of  
21 reasons.

22           MR SMOUHA: My Lord, yes. That is a reference --

23           LORD JUSTICE DAVID RICHARDS: Many of which are  
24 listed in the relevant article of the New York Convention.  
25 I'm not sure what he was focusing on. Normally whether

86

1 something is binding or not would be a matter for the curial  
2 law, wouldn't it?

3           MR SMOUHA: But, my Lord, the -- as your Lordship  
4 says the question as to whether the award is binding can  
5 arise under --

6           LORD JUSTICE DAVID RICHARDS: What was the context  
7 here? Why was this a matter of -- why was this -- I mean,  
8 was the -- was the enforcement court applying the curial law  
9 to whether the award was binding? Or was it applying its  
10 own law? And, if so, on what basis?

11           MR SMOUHA: The issue -- the issue was in relation  
12 to the question whether a review process of the award had --  
13 your Lordship can see this most easily in the headnote at  
14 page 283.

15           LORD JUSTICE DAVID RICHARDS: Yes. Yes.

16           MR SMOUHA: Column 2, penultimate paragraph:

17           "Following an attempt to enforce the final award  
18 in Austria by *Diag Human*, the Supreme Court of Austria  
19 delivered a judgment on 16 April 2013 which held that the  
20 award could not be enforced as it was not binding within the  
21 meaning of article 1.8 of the New York Convention" --

22           LORD JUSTICE DAVID RICHARDS: I see.

23           MR SMOUHA: -- "in that review proceedings had not  
24 been determined."

25           LORD JUSTICE DAVID RICHARDS: I see.

87

1           MR SMOUHA: So the question was whether that  
2 determination by the Austrian court created an issue  
3 estoppel in relation to the same ground of opposition to  
4 enforcement in the English court.

5           LORD JUSTICE LEGGATT: And did it?

6           MR SMOUHA: It did.

7           LORD JUSTICE DAVID RICHARDS: Thank you.

8           MR SMOUHA: And, my Lords, I take two points --  
9 two points from that. First of all, therefore, the -- the  
10 judge's examination of whether the determination of the  
11 fraud questions would be of assistance to other enforcing  
12 courts is nothing to do with the relationship between the  
13 supervisory court and the English court. In fact, it's  
14 premised on the judge's earlier judgment that the Swedish  
15 court had not decided that question.

16           Secondly, that on -- not only are there no  
17 challenge -- no possible challenge to those findings on --  
18 on this appeal. The way in which the appellant has to put  
19 their case is that whatever the level of that assistance,  
20 and even if it would have amounted to an issue estoppel  
21 which would -- in -- for the purpose of the other  
22 proceedings, which would have determined the issue, one way  
23 or the other, and once for all, nevertheless the Statis were  
24 able to remove that issue from determination by -- by the  
25 English court, at whatever stage of the proceedings they

88

1 have chosen to do so. In other words, it makes no  
 2 difference whether the assistance that would be provided  
 3 would create an issue estoppel or just, as the judge found,  
 4 be of weight and evidential value to the other proceedings.  
 5 And, to pick up on the point my Lord,  
 6 Lord Justice Leggatt, gave as an example, if their principle  
 7 is correct, it would make no difference on their case --  
 8 would have to make no difference if they had served the  
 9 Notice of Discontinuance at the conclusion of the trial  
 10 before the judge had given even a draft judgment to the  
 11 court. Their -- their principle is they say that simply  
 12 because the proceedings were commenced as an enforcement  
 13 proceeding, if they stop trying to enforce the judgment in  
 14 England, they have complete control over the question  
 15 whether the English court can decide the fraud question,  
 16 regardless of the progress and regardless of the -- of the  
 17 case; and regardless of the fact that the case was pleaded  
 18 out in the way -- in the way it was.  
 19 My Lord, I will come back to that point after the  
 20 short adjournment.  
 21 LORD JUSTICE PATTEN: Well, is that going to be a  
 22 convenient moment?  
 23 MR SMOUHA: Certainly, my Lord.  
 24 LORD JUSTICE PATTEN: 2 o'clock.  
 25 (1.04 pm)

89

1 (The luncheon adjournment)  
 2 (2.00 pm)  
 3 LORD JUSTICE PATTEN: Yes Mr Smouha.  
 4 MR SMOUHA: My Lord, your Lordship asked this  
 5 morning just for a little fuller information on the state of  
 6 play in relation to the preparation for trial.  
 7 LORD JUSTICE PATTEN: Oh yes.  
 8 MR SMOUHA: Can I just add a little more  
 9 information to that that my learned friend gave you this  
 10 morning.  
 11 LORD JUSTICE PATTEN: Right.  
 12 MR SMOUHA: To go back -- if your Lordships would  
 13 go back to supplemental bundle--tab 3.  
 14 LORD JUSTICE PATTEN: Yes.  
 15 MR SMOUHA: This is Mr Justice Knowles' order  
 16 following the 2017 judgment, where, as well as the direction  
 17 in paragraph 2 that the defendant's claim that the award was  
 18 obtained by fraud should proceed to trial as if commenced  
 19 under CPR part 7, in accordance with the following  
 20 directions; he then gave directions, as you see, right the  
 21 way down to trial.  
 22 As I'm sure your Lordships appreciate, in a  
 23 typical enforcement claim -- a typical arbitration claim,  
 24 one would not have directions for pleadings or down to trial  
 25 in this way.

90

1 LORD JUSTICE PATTEN: No.  
 2 MR SMOUHA: One has standard directions,  
 3 essentially normally procedures, by way of exchange of  
 4 evidence.  
 5 LORD JUSTICE PATTEN: But this is a propos of the  
 6 set aside application; no?  
 7 MR SMOUHA: No, this is following the 2017  
 8 judgment.  
 9 LORD JUSTICE PATTEN: Yes. But the reason this is  
 10 like it is because of your resistance to enforcement.  
 11 MR SMOUHA: My Lord, yes. But -- but -- as  
 12 your Lordship sees, the --  
 13 LORD JUSTICE LEGGATT: So because of the nature of  
 14 the argument about the fraud, it is being dealt with in a  
 15 more formal or fuller procedural way than might often be the  
 16 case, if there's a challenge to enforcement. It might  
 17 simply be like a sort of jurisdictional challenge normally  
 18 and you have some evidence on each side and a hearing; and  
 19 that's it.  
 20 MR SMOUHA: Exactly so. But going further --  
 21 going further than normal, in terms of the direction that's  
 22 made in paragraph 2. That is certainly -- in other words,  
 23 the direction -- the reference to the defendant's claim is  
 24 obviously more than -- I'll come back to the question of  
 25 what the effect of this is; but, in terms of what the judge

91

1 was doing, this was different than simply a situation where  
 2 a judge says it will be appropriate to have pleadings in  
 3 relation to an arbitration claim, because there's no reason  
 4 why a direction for pleadings within an arbitration claim  
 5 could not be made on a particular issue.  
 6 This was going further, in terms of directing that  
 7 something that is actually described as the "defendant's  
 8 claim", should proceed as if it had been commenced under  
 9 part 7; and then the directions for statements of case,  
 10 disclosure and so on, down to trial.  
 11 There was a consent order of 30 January 2018, by  
 12 which the parties consented, and the judge approved,  
 13 variations of the dates of some of those directions. And  
 14 then, as I mentioned, there was a CMC in front of the judge  
 15 on 20 July. So that's the Friday ten days ago. And can  
 16 I just hand up copies of the order the judge made which, as  
 17 I say, was is most up to date -- your Lordships will be able  
 18 to see the most up to date position. Thank you. (Handed).  
 19 LORD JUSTICE PATTEN: Yes.  
 20 MR SMOUHA: And your Lordships will see that the  
 21 judge dealt with a specific disclosure application that  
 22 followed on from the disclosure that had been made by the  
 23 parties pursuant to the judge's order. There was some  
 24 variation of the directions in relation to expert evidence,  
 25 which you see at paragraphs 8 and 9. And then some

92



1 additional directions for the run up to trial , including  
2 dates for the service of the skeleton arguments for the  
3 trial , in paragraph 12 and 14.

4 So all on course for the trial . And that is why,  
5 my Lord, we say that the position that the judge was  
6 considering, and the position now, is that the case has  
7 progressed very substantially towards trial ; and one can  
8 see, therefore, the basis for the judge's finding in  
9 relation to the comparison of progress to date and what  
10 remained to be done.

11 LORD JUSTICE PATTEN: Yes.

12 MR SMOUHA: My Lords, before -- before the short  
13 adjournment, and before I started going into the detail of  
14 our submissions on the particular grounds, my Lords, I had  
15 made the point that it is key to the consideration of the  
16 appeal to understand that the appellant is making an  
17 argument of principle and is confined to making an argument  
18 of principle that, in effect , the judge had to dismiss the  
19 application to set aside the Notice of Discontinuance in the  
20 context -- in the particular context of the nature of the  
21 proceeding that he was considering and in circumstances  
22 where the Statis wished to end it .

23 And, my Lord, that is important because -- and  
24 I do say, again, that it is not within the scope of the  
25 appeal for the appellant to invite this court to consider

93

1 the particular factors that the learned judge weighed in the  
2 exercise of his discretion , and consider whether some  
3 different decision might have been made if, for example, the  
4 level of assistance and utility for other courts had been of  
5 a different kind.

6 And, my Lords, it is , perhaps, worth just going  
7 back to the grounds of appeal to be clear as to what is and  
8 is not in play. The core bundle, tab 1, page 15.

9 As your Lordships see, in relation to ground 1, as  
10 I mentioned, that the principle identified and the language  
11 of "subversion" of the distinction in international  
12 arbitration law between the Royal courts of the country of  
13 enforcement or competent authority. That's the appellants  
14 language, in terms of the formulation of their issue of  
15 principle .

16 Ground 2, again, saying that there could be no --  
17 that Kazakhstan could have no legitimate interest in the  
18 continuation of the proceedings.

19 Ground 3 is the question of the test and whether  
20 CPR 38.4 has some threshold or limitation by reference to  
21 abuse.

22 But can I ask your Lordships to note, in ground 4,  
23 which was the ground in which -- in respect of which  
24 permission was sought, in relation to challenges to the  
25 judge's decision -- to the exercise of his discretion -- and

94

1 your Lordship will see what 17.1 and 17.2 and 17.3 said.  
2 And that is the ground in respect of which permission was  
3 refused by my Lord, Lord Justice Leggatt.

4 So this court is not concerned with a  
5 reconsideration or assessment of the different elements and  
6 bases of the findings that the learned judge made which then  
7 led him to exercise his discretion in the way he did.

8 And, my Lord, then turning, then, to grounds 1 and  
9 2. My Lord, we do say that the construct in that  
10 formulation of grounds 1 and 2 is founded on a suggested  
11 issue of principle at stake in this appeal, said to be  
12 around the proper relationship between the courts of the  
13 seat of the arbitration and the courts of a jurisdiction in  
14 which the award creditor seeks to enforce the award.

15 But there is and was no such issue. There was no  
16 such issue for the judge. You will not find -- and  
17 your Lordships should certainly look at the references that  
18 my learned friend gave you this morning to the skeleton  
19 below -- you will not find any reference to an issue of that  
20 kind being formulated in the Statis' skeleton below. And it  
21 is for that reason that your Lordships do not find in the  
22 judgment below either an identification of that as an issue  
23 or the learned judge dealing with the suggestion that there  
24 was such a principle .

25 In other words, that, regardless of all the other

95

1 matters, the judge was constrained and bound to dismiss the  
2 application to set aside the Notice of Discontinuance simply  
3 because it was an enforcement proceeding which was a special  
4 sort of proceeding and that it would be contrary to the  
5 New York Convention not to allow the Statis to discontinue  
6 it .

7 And no such argument, I should also add, was  
8 raised in the draft grounds of appeal that were put before  
9 the judge when permission was sought from him. They're at  
10 supplemental bundle, tab 14. And they concentrated, almost  
11 exclusively , and at great length, on the question of the  
12 correct test Mr Justice Henderson's decision, in the High  
13 Commissioner of Pakistan case and were suggesting to  
14 Mr Justice Knowles that that point was of such importance  
15 that it would be appropriate to give permission for a  
16 leapfrog appeal to the Supreme Court.

17 That explains the absence of the identification of  
18 this principle , which is now said to be at stake, explains  
19 why the judge's reasons for refusing permission for appeal  
20 at core bundle--tab 8, page 98, again, do not give any hint  
21 that there was some large question about the application of  
22 the New York Convention and some issue of principle about  
23 arbitration cases.

24 And the truth, of course, is that the considerable  
25 arguments about the relationship between the supervisory

96

1 court -- the Swedish court -- and the English court as an  
 2 enforcing court had already been made and decided by  
 3 Mr Justice Knowles in his 2017 judgment. They had argued,  
 4 unsuccessfully, that the fraud claims should not be  
 5 permitted to be advanced in England because they had been  
 6 advanced, and so it was argued, decided in Sweden, creating  
 7 an issue estoppel. And Mr Justice Knowles rejected those  
 8 arguments.

9 It was -- as I said before the short adjournment,  
 10 it was on the basis of that decision, that they had not been  
 11 decided, that he ordered the claims to be pleaded and to be  
 12 deemed -- and that Kazakhstan's claim be deemed to have been  
 13 commenced as a part 7 claim. That is not a matter -- those  
 14 directions were not a matter that the Statis complained  
 15 about or sought to appeal. Indeed, as you know, they fully  
 16 participated in them, pleading a defence to the points of  
 17 claim that had been served, setting out claims and their  
 18 answer to relief which was pleaded and claimed by Kazakhstan  
 19 in its points of claim.

20 That means that the application to set aside the  
 21 Notice of Discontinuance, therefore, had to be considered by  
 22 Mr Justice Knowles in the context of what he had previously  
 23 decided. And it is for that reason that he sets out that  
 24 history and the framework that he thereby had for the issues  
 25 he had to consider in paragraphs 1 to 17 of his judgment.

97

1 And, in particular, in paragraph 16 where he summarises what  
 2 his conclusions were in his 2017 judgment and then says,  
 3 towards the end of that paragraph, that, as he respectfully  
 4 saw the position:

5 "... the State's fraud claim (as described and  
 6 examined in my judgment) had not been concluded by what had  
 7 been decided by the Swedish Court. That remains the case  
 8 notwithstanding that matters have since been considered at a  
 9 higher level in Sweden."

10 Of course Mr Justice Knowles could not go back in  
 11 his previous decision in approaching the application to set  
 12 aside the Notice of Discontinuance; and it was not suggested  
 13 to him that he could or should.

14 So that was the platform on which the judge stood  
 15 on when considering the application to set aside the Notice  
 16 of Discontinuance and the arguments and issues were actually  
 17 in relatively narrow compass.

18 The findings that the judge made, which then led  
 19 to his decision, findings which -- none of which, as  
 20 findings, are challenged on this appeal or can be  
 21 challenged -- are these -- and let me just identify them to  
 22 you.

23 First of all, in paragraph 22, that the two  
 24 reasons that the Statis gave for having served a Notice of  
 25 Discontinuance were not explanations that the judge accepted

98

1 on the material put before him.

2 Next -- and this is paragraphs 19 and also 62 --  
 3 that those reasons apart the Statis would relish the  
 4 opportunity to proceed to trial with respect to the fraud  
 5 allegations and had otherwise -- an otherwise strong desire  
 6 to proceed to trial and defeat the fraud claim.

7 And if you go on to paragraph 62, the judge comes  
 8 back to that point, referring to his not having accepted  
 9 those reasons and then says, in the sixth line of that  
 10 paragraph:

11 "Among other things I do not accept that they are  
 12 unable to afford to answer the allegations of fraud made  
 13 against them. This is therefore no obstacle to the  
 14 opportunity that the Statis have told this Court they would  
 15 'relish'."

16 Plainly a matter the judge was entitled to take  
 17 into account in the exercise of his discretion.

18 LORD JUSTICE PATTEN: But, I mean, while you've  
 19 been addressing us, I mean, I'm -- I was just going through  
 20 the -- the judgment under appeal. I mean, it's perfectly  
 21 true that they -- they took a position on -- on -- on  
 22 discontinuance, as they continue to do, to the effect that,  
 23 absent extraordinary circumstances, it was for the party who  
 24 discontinues, basically, to have the right to discontinue;  
 25 and the court shouldn't compel them to continue absent some

99

1 abuse of process argument.

2 MR SMOUHA: Yes. Absolutely. That's ground 3.

3 LORD JUSTICE PATTEN: Yes. Sure. But, I mean, if  
 4 you look at paragraph 50 of the -- of the judgment under  
 5 appeal, I mean, as the judge records, it was submitted to  
 6 him, on behalf of the claimants that a decision would be  
 7 "confined to questions of English public policy, and that  
 8 would involve taking time to determine what he described as  
 9 'a dead issue'. There should be no question of proceeding to  
 10 'an unsolicited advisory judgment' ... Other jurisdictions,  
 11 he argues, have already shown they see public policy  
 12 differently".

13 So -- and he says it will compel -- "a trial  
 14 would be to elevate the English Court, which is not the  
 15 court of the seat, to an international arbitration policeman  
 16 or Court".

17 I mean, that is the point, if you say of  
 18 principle, that's being run on this appeal.

19 MR SMOUHA: Well, my Lord, that might be half the  
 20 point, in this sense: that it's -- that the two answers that  
 21 the -- the two findings the judge makes in relation to  
 22 those -- those aspects are, first, that it -- that the  
 23 judgment may be of assistance to other courts. That's the  
 24 first.

25 LORD JUSTICE PATTEN: Yes.

100

1 MR SMOUHA: And, secondly, that it's not -- a  
2 judgment of the English court would not be confined to the  
3 question of English public policy, because it would also  
4 provide an answer to the question whether there was the  
5 fraud described. That's which he finds in paragraph 64.

6 What he does not address, and what was not argued,  
7 was that, because it was an enforcement proceeding,  
8 regardless of whether it would provide assistance or create  
9 an issue estoppel, that the English court could not -- could  
10 not proceed to decide those issues -- could not set aside  
11 the Notice of Discontinuance simply because that would  
12 somehow cut across the scheme of the New York Convention and  
13 subvert the relationship between the enforcing court and the  
14 supervisory -- and the supervisory court.

15 In other words, my Lord, that the argument as put  
16 there, that the judge records and deals with, was very much  
17 directed towards (1) a question of the evidence before him,  
18 as to the extent to which the proceeding would be of  
19 assistance; and (2) as to whether what the English court  
20 would be determining would be confined to a judgment on  
21 whether the recognition of a New York Convention award is  
22 consistent with English public policy, which the judge said  
23 it would not be so confined.

24 LORD JUSTICE PATTEN: Right.

25 MR SMOUHA: My Lords, the short -- the short and

101

1 nub answer to the point as now argued on this appeal, in  
2 relation to this suggestion that there is something special  
3 about an enforcement proceeding which meant that the judge,  
4 in fact, was bound to leave the Notice of Discontinuance in  
5 place, is that there is nothing -- there is nothing in the  
6 New York Convention which dictates what a national court  
7 should do if the enforcing claimant wants to end the  
8 domestic process that it has commenced.

9 On the contrary, the procedures in relation to the  
10 commencement of an enforcement proceeding in relation to an  
11 award are entirely a matter for national courts. And,  
12 therefore, the question for the judge was simply one for the  
13 exercise of his CPR 38.4 discretion; and into the mix of the  
14 factors that he was asked to consider, and did consider, and  
15 which cannot be challenged, were factors including question  
16 whether a judgment of the English court would, if the Stasis  
17 no longer wished to seek enforcement in England -- whether a  
18 judgment of the English court would be of utility to other  
19 enforcing courts; and as to whether such a judgment would be  
20 confined to saying whether or not enforcement would be  
21 consistent with English public policy or would go further  
22 and, in the judge's words, answer the question whether there  
23 was the fraud described.

24 That was simply part of, as I say, the mix of  
25 factors, as to which there were others, which I'll come to

102

1 in a moment, which the judge had to consider within the  
2 exercise of his discretion.

3 My Lord, Lord Justice Patten, asked my learned  
4 friend whether he was saying that his submission in relation  
5 to the scheme of the New York Convention meant that the  
6 judge, in fact, had no -- no jurisdiction to set aside the  
7 Notice of Discontinuance, and my learned friend said: no, he  
8 wasn't saying that. But he was saying that the principle  
9 that he was suggesting arose from the New York Convention  
10 was some higher order of principle.

11 There is -- quite apart from the fact that there  
12 is no such higher order of principle, the effect is exactly  
13 the same. He has to -- he has to say that, in effect,  
14 regardless of whether the -- a judgment of the English court  
15 would create an English estoppel, regardless of the stage in  
16 the proceedings at which the Stasis sought to discontinue,  
17 the position, in fact, was, by reason of the terms of the  
18 New York Convention, that the judge was always bound to say  
19 that he could not set aside the Notice of Discontinuance and  
20 that the entire proceedings have to come to an end.

21 LORD JUSTICE DAVID RICHARDS: I mean, I don't  
22 quite get that out of the grounds of appeal which you took  
23 us to, because that -- what grounds 11 and 2 judge is to  
24 challenge the judge's decision as to your client's  
25 legitimate interest in continuing. And, in ground 2 it's

103

1 put on the basis that that legitimate interest couldn't be  
2 constituted by the possibility that a judgment would not be  
3 without use.

4 So, in terms of the grounds of appeal, I don't  
5 think it's elevated quite to the level that you're  
6 suggesting.

7 MR SMOUHA: My Lord, I was trying to summarise  
8 what I understood my learned friend was saying this morning.

9 LORD JUSTICE DAVID RICHARDS: Well, I didn't  
10 understand him to be completely departing from his grounds  
11 of appeal. Because, as you say, he didn't actually go so  
12 far as to say "yes" to my Lord's question about  
13 jurisdiction.

14 MR SMOUHA: No, but if -- if what your Lordship is  
15 saying to me is if --

16 LORD JUSTICE DAVID RICHARDS: What he's saying is  
17 on the facts of this case -- I think this is his case: on  
18 the facts of this case, your client does not have a  
19 legitimate interest, contrary to the judge's decision on  
20 that.

21 MR SMOUHA: I had not read it that way, my Lord.

22 LORD JUSTICE DAVID RICHARDS: I see.

23 MR SMOUHA: Nor had I understood it that way from  
24 the skeleton. My understanding is that paragraph -- ground  
25 2, paragraph 15.2, is not saying on the facts as in that the

104

1 judge's finding didn't provide enough, that more was needed.  
 2 But he's challenging the possibility that it could be a  
 3 legitimate interest of Kazakhstan at all that the judgment  
 4 of the English court, regardless of how much use it would  
 5 be, whether it would be not without some use or, as my  
 6 learned friend addressed this morning, even if it went  
 7 further and was of positive utility or created an issue  
 8 estoppel, in none of those cases as I understand it is he  
 9 saying could that be a legitimate reason for Kazakhstan  
 10 wanting the issue to be determined.

11 LORD JUSTICE LEGGATT: Your argument is once it  
 12 comes down to the degree of utility, well, that was within  
 13 the judge's discretion which can't be challenged.

14 MR SMOUHA: Yes. Exactly.

15 LORD JUSTICE LEGGATT: So it's got to be an error  
 16 of principle in the exercise of his discretion. And that  
 17 means that, however much use it is, that is not a relevant  
 18 consideration for the English judge, because the English is  
 19 fulfilling an administrative enforcement function; it's not  
 20 in the business of helping courts elsewhere. That's his  
 21 argument.

22 MR SMOUHA: And that, therefore, taking -- there's  
 23 not a question of taking it to the extreme -- taking that  
 24 argument to what is a perfectly realistically possible  
 25 situation, where you have a case where there are a number of

105

1 enforcement proceedings; that the ground of objection under  
 2 the New York Convention in all of those enforcement  
 3 proceedings is the same; and that you have one of those  
 4 proceedings which is ahead of the others. And it may even  
 5 be by agreement and cooperation between the parties and with  
 6 a view to the progress being made in the other courts, that  
 7 it can be seen that the key issue is going to be decided in  
 8 the courts of -- of courts -- courts no. 1, which may be  
 9 England and may be somewhere else. And it may be that it is  
 10 appreciated that it would be a good thing for there to be a  
 11 determination in that court, which may then create issue  
 12 estoppels or may be of assistance to other courts, in an  
 13 orderly way. But nevertheless it was still being said that  
 14 the enforcing party, though, still has the -- the gift of  
 15 being able to end those proceedings; and, I should say, end  
 16 those proceedings in whichever court it is. Because if my  
 17 learned friend's argument is right that this flows from the  
 18 scheme of the New York Convention, it must apply in every  
 19 single jurisdiction. As soon as he says this is something  
 20 which is particular to England, the answer must be: well,  
 21 then the question must be what is the scope of CPR 38.4.

22 So he says that however well organised the global  
 23 enforcing system is, even if there was cooperation between  
 24 courts, even if there were stays in some courts pending the  
 25 determination of some key decision in the proceedings that

106

1 are most progressed, nevertheless, at any time, the  
 2 enforcing party can say: I don't like how things are going  
 3 in jurisdiction no. 1. I'm ending those proceedings. I'm  
 4 now going to turn my attention to no. 2.

5 And, my Lords, there I say, first of all, that's  
 6 contrary to commonsense that that could be the case.

7 Secondly, there's nothing in the New York  
 8 Convention that says that. Precisely because the New York  
 9 Convention does not concern itself with the mechanics and  
 10 the domestic procedures that national courts have in  
 11 relation to how they allow an award creditor to commence and  
 12 pursue process in relation to enforcement.

13 My Lords, I was showing you the other findings on  
 14 factors that the judge took into account in reaching the  
 15 conclusion he did. Paragraph 25. The --

16 LORD JUSTICE LEGGATT: I mean, your case is that  
 17 once you've engaged the jurisdiction of the English court  
 18 then you're in England, in the normal sort of way, governed  
 19 by Civil Procedure Rules. The argument against you is: no,  
 20 the court is addressing a more administrative function. Are  
 21 you going to address the decision of Lord Justice Rix or the  
 22 one where there are different views in the Court of Appeal  
 23 about that, because I thought that was quite an interesting  
 24 discussion on that point.

25 I know it's not directly our point here, but it

107

1 goes to what the nature is of the -- of these proceedings.

2 MR SMOUHA: My Lord, yes. So let me deal with  
 3 that in two ways. First of all, as to the administrative,  
 4 mechanistic approach, of course that is true, in a general  
 5 case, in which there is then no issue in relation to  
 6 enforcement. As soon as there is an application to set  
 7 aside there is, of course, a transformation of the position.  
 8 One is no longer in the administrative and mechanistic  
 9 procedure. So simply to say -- one can't say that the  
 10 answer to what the judge had to decide can be considered by  
 11 reference to the fact that, in most cases, the position is  
 12 supposed to be that enforcement is mechanistic. Because the  
 13 answer is: yes, it is supposed to be, except in those cases  
 14 where the very limited, but very important and very serious  
 15 exceptions to enforcement arise under the New York  
 16 Convention, where the courts then have to grapple, and  
 17 grapple properly, with the procedures that are appropriate.

18 Secondly, my Lord, in relation to Lord Justice Rix  
 19 in Gater, one -- one has to, with respect, have a little  
 20 care in trying to read across and apply Lord Justice  
 21 Rix's -- and it's not -- it's not part of his decision --  
 22 his -- but his comments on what the analysis of the position  
 23 is, in relation to the rules.

24 Of course the decision in that case was in  
 25 relation to the question as to whether security for costs

108

1 should be ordered, which is quite different from the issue  
2 that arises in this case.

3 That -- the one part of -- the one part of  
4 Lord Justice Rix's comments which might suggest that  
5 enforcement proceedings are different is at page 232, in  
6 paragraph 75, where, at -- where he's saying, at letter G:

7 "Where, however, as here, there is summary, albeit  
8 provisional enforcement, the enforcement proceedings remain  
9 outside the ordinary CPR regime."

10 LORD JUSTICE PATTEN: Yes.

11 MR SMOUHA: Of course, first of all, one has to  
12 bear in mind Lord Justice Rix was not considering some  
13 general question as to whether part 62 sec -- section 3 of  
14 part 62, enforcement claim, was or was not subject to other  
15 provisions in the CPR. There is nothing in part 62 which  
16 says that -- which -- that there are whole parts of the CPR  
17 that don't apply.

18 And, of course, the Statis were treating the --  
19 their enforcement proceeding as within the ordinary CPR  
20 regime because they served a Notice of Discontinuance under  
21 CPR 38. So they regarded -- and that the proceedings have  
22 gone on, on that basis -- that CPR 38 applies to that  
23 proceeding.

24 My Lords, that was not -- that analysis and that  
25 comment was not what Lord Justice Moses or Lord Justice

109

1 Buxton considered to be the position. And they were, as  
2 I say -- the court was just considering the question as to  
3 how to apply the security for costs jurisdiction in relation  
4 to a part 62 enforcement claim.

5 But, my Lords, whatever the position, it is clear,  
6 when one goes back to Mr Justice Knowles' order of 28 June  
7 2017 -- supplemental bundle -- sorry, 27 June 2017 --  
8 supplemental bundle, tab 3 -- that whatever the position had  
9 been before, on any view, he was bringing the entire  
10 proceeding within and fully within the scope of the CPR.  
11 And I say -- I say that putting on one side our -- our  
12 argument about paragraph 2 creating a freestanding claim at  
13 least. On any view, these directions and that order  
14 proceeded on the basis that the CPR applied in full to these  
15 proceedings. And, as I say, the Statis sought to -- the  
16 Statis proceeded on that basis and sought to take advantage  
17 of it by serving a Notice of Discontinuance under a  
18 provision of the CPR which they say created some right with  
19 very limited qualifications and which we say the judge  
20 therefore accordingly also had the right to set aside and  
21 the discretion to consider, in full width, whether it should  
22 be set aside.

23 LORD JUSTICE LEGGATT: But your case, basically,  
24 is there is no difference, in principle, between New York  
25 Convention proceedings and any other proceedings. They

110

1 just -- that just defines the issues in the proceedings; but  
2 it would be just the same question if they was enforcing a  
3 judgment of another country, at common law here; and there  
4 were questions -- if the party enforcing it wanted to give  
5 up and the other party wanted to carry on; perhaps there  
6 were some other proceedings elsewhere. The court would just  
7 consider it as a general matter of all the relevant factors.  
8 But there's nothing special, you say, about the Convention  
9 context; is that right?

10 MR SMOUHA: That's absolutely right, my Lord. And  
11 I say that on the basis that one can see that there could --  
12 in a particular case, there could be considerations as to  
13 whether a court should allow a particular kind of  
14 counterclaim, say, bearing in mind the nature of the  
15 proceeding that had been commenced. But that wouldn't be a  
16 matter of some special rule; and that wouldn't be -- suggest  
17 some limitation on CPR 38.4. That would be a matter -- as  
18 my Lord, Lord Justice David Richards, indicated that would  
19 be a matter procedurally of either a strike out application,  
20 a stay application, or some other application where  
21 procedurally, just like any other proceeding, the court  
22 considers whether it is appropriate to allow a counterclaim  
23 to go forward, bearing in mind the relationship between the  
24 counterclaim and the claim.

25 And, my Lord, one can think of an example where

111

1 the position might be more closely analogous to a -- a  
2 conventional claim and counterclaim circumstance. Suppose  
3 that you have a -- an arbitration claimant seeking to  
4 enforce an award, the respondent to that claim resisting  
5 enforcement on the grounds that the award has been obtained  
6 by fraud; and says that, in fact, the award is part of a  
7 wider fraudulent scheme; and that it has suffered loss as a  
8 result of that fraudulent scheme beyond the consequences of  
9 the award and, therefore, makes a claim not only for  
10 declarations that the award has been obtained by fraud but  
11 also for damages for that same fraud.

12 The question whether the court should allow --  
13 well, the only way in which the claimant could stop that  
14 counterclaim would be by application to strike it out. In  
15 other words, there wouldn't be any basis for doing so. But  
16 that's nothing to do with some special nature of an  
17 enforcement proceeding. And that would be entirely a matter  
18 for the usual case management powers of the court. And in  
19 relation -- and if the claimant attempted to discontinue its  
20 claim, again, the position would come back to the  
21 consideration of its discretion under CPR 38.4.

22 LORD JUSTICE PATTEN: Hmm.

23 MR SMOUHA: My Lord, so paragraph 25, the judge's  
24 finding that the real reason for the Notice of  
25 Discontinuance was that the Statis did not wish to take the

112

1 risk that the trial may lead to findings against them and in  
2 favour of the State.

3 Then the utility to the courts findings, which  
4 I've already taken your Lordships to. You've looked at that  
5 several times, in paragraphs 57, 58, 59 and 63.

6 Then, my Lords, paragraph 61, the independent  
7 ground that the State had a legitimate interest in pursuing  
8 the fraud claims in order to have set aside, on the merits,  
9 the ex parte order of Mr Justice Burton, which had given  
10 permission to enforce.

11 My Lords, I'm going to come back to deal with the  
12 concession made today, for the first time, which, as  
13 I understood it, in answer to my Lord,  
14 Lord Justice Leggatt's question, was the suggestion that  
15 the -- well, the acceptance that Mr Justice Burton's order  
16 should be set aside but without explanation as to how that's  
17 actually achieved.

18 I'm going to come back to that. It's an important  
19 concession that's made. But what I just emphasise at this  
20 stage, that the finding that the judge is making, in  
21 relation to Kazakhstan's legitimate interest, is in seeking  
22 to have the order of Mr Justice Burton set aside on the  
23 merits.

24 Then paragraphs 64 and 65. That since the English  
25 court would -- would be not just answering a question of

113

1 English public policy but also answering the question  
2 whether there had been the fraud described, it would be in  
3 the interest of finality for that question to be determined  
4 after full trial.

5 And then, paragraph 66, substantial progress had  
6 been made towards that decision. Substantial investment  
7 made by both sides in the proceedings. And that that  
8 progress would be wasted if one side was permitted to  
9 discontinue without concession or conclusion on the matters.

10 And then, finally, in paragraph 67, that  
11 progression to trial would not be disproportionate,  
12 considering the substantial sums involved -- an award of  
13 0.5 billion -- the resources already reduced, the importance  
14 of the case to the parties, and the fact that the  
15 arrangements for the trial already made would ensure that  
16 the matter would be dealt with expeditiously and fairly.

17 All the factors identified by the judge pointed in  
18 favour of setting aside the notice. The only reasons being  
19 advanced by the Statis for not setting aside the notice were  
20 rejected as not made out on the evidence. And there was, in  
21 our submission, simply nothing there on which the Statis  
22 could begin to mount an argument that there was some issue  
23 of principle around the New York Convention which was  
24 engaged.

25 As to the appellants' characterisation of findings

114

1 that an English court would make as the giving of an  
2 advisory opinion, that is not at all what the judge was  
3 suggesting. This wasn't a proceeding which would be  
4 considering some abstract question of an English law,  
5 because Kazakhstan's claims, if tried, require the  
6 determination of whether there has been a fraud --  
7 essentially factual questions; and, in a proceeding which is  
8 two months from trial, and following disclosure and witness  
9 statements -- although the Statis have said they will fight  
10 the trial without calling any witnesses.

11 The parties are the same in various proceedings  
12 around the world. And, in our submission, Kazakhstan has a  
13 legitimate interest in obtaining the determination of its  
14 claim. And the fact, of course, that the Statis are  
15 fighting so hard to try and stop the English court  
16 determining the claims, rather than simply ignoring these  
17 proceedings, shows that they consider that an English court  
18 determination of the fraud issues could be significant for  
19 them.

20 There is simply no hard or bright line principle  
21 in play here which says that because the Statis turned on  
22 the tap of the English court's administration of justice for  
23 their ends that they have the unfettered right to turn it  
24 off when the administration of justice does not look, any  
25 longer, as though it will suit their ends.

115

1 My learned friend referred to the Howden case as  
2 supporting the -- the argument that the court would not or  
3 should not proceed to consider whether to give declarations  
4 or make findings which would be of assistance to the foreign  
5 courts. That's at authorities bundle, tab 13.

6 That is not a case which gives the appellants any  
7 assistance and is not going to, in our submission, give  
8 your Lordships much assistance for a few reasons.

9 First -- first of all, if you would go to  
10 page 981, paragraph 34, you will see that the court's  
11 judgment as to lack of utility was entirely based on the  
12 court's assessment that the first instance judge had gone  
13 wrong on the facts. Paragraph 34, Lord Justice Aikens says:

14 "In these circumstances, it seems to me that we  
15 are not bound to approach the issue of 'utility' in the same  
16 way as this court in Faraday, because the question of  
17 'utility' can only be judged against all the facts as they  
18 now appear. So the question remains: did Field J reach the  
19 correct conclusion on this point?"

20 "35. In my view, with great respect to Field J,  
21 he did not. On the principal ground, which was that the  
22 English court's judgment on applicable law and principles of  
23 liability would be, 'at the very least .. of considerable  
24 assistance' there are several reasons why I think that the  
25 judge erred."

116

1 Then he goes on to consider those by reference to  
2 the evidence in that case.

3 His second reason, paragraph 36, likewise a  
4 failure to give proper attention to the finding of the US  
5 judge, Judge Conti. Likewise paragraph 37, a point on the  
6 facts. And, at the top of the next page, he says:

7 "There is no other evidence that Judge Conti  
8 wishes to be assisted by the English court's views."

9 Then if you go -- I think the last paragraph my  
10 learned friend referred to in paragraph 39, where, right at  
11 the end, Lord Justice Aikens says that:

12 "... At least on the facts of this case, not a  
13 "useful" exercise of the English court's jurisdiction."

14 There is no general principle that can be  
15 extracted from Howden which says that an English court  
16 cannot or should not proceed to determine issues where they  
17 may be of utility.

18 Indeed, it's interesting to note that the Faraday  
19 litigation, which this case discusses, where the English  
20 court had considered that it should proceed, if you go to  
21 page 976, you will see at the end of the first paragraph on  
22 that page:

23 "[In the Faraday litigation] Beatson J also held  
24 that the proceedings in respect of policy No 7 in the  
25 Schedule had sufficient 'utility' to be allowed to proceed

117

1 because the answers given by the English court could assist  
2 Judge Conti."

3 There is no distinction that is made in  
4 considerations of this kind between cases where an issue  
5 estoppel would be created or where there's been some special  
6 request from the other court. It is simply a question, on  
7 the particular facts, as happened here, for the court to  
8 consider the evidence and to make a determination, as  
9 Mr Justice Knowles did, as to whether a judgment could have  
10 utility for the foreign proceedings.

11 LORD JUSTICE LEGGATT: The reason for asking that  
12 question is not because the English court is offering some  
13 sort of international public service and thinks it might be  
14 useful for other courts in that regard; the real utility or  
15 otherwise is for the litigant, isn't it? And the question  
16 is: is it useful -- does it serve a useful purpose for  
17 Kazakhstan to go ahead and serve the judgment, which, in  
18 turn, leads you on to whether a judgment would be something  
19 that would be taken into account by other courts.

20 MR SMOUHA: Absolutely so, my Lord. And as to why  
21 it is legitimate, a party that is on the receiving end of  
22 multiple enforcement proceedings, where it says that the  
23 underlying award, which is the basis of the enforcement  
24 proceedings, has been obtained by fraud, has, we would say,  
25 obviously, a legitimate interest in those proceedings being

118

1 progressed in a way which will, if possible, avoid the same  
2 issue being litigated in full again and again, and seeking  
3 to have, in the proceedings that are most progressed and  
4 close to that determination, a resolution of that issue.

5 And it's difficult to see why it can be said that that  
6 interest in having it done in that way is not legitimate.

7 We would say that the contrary position, a party  
8 who is bringing those proceedings but seeks then, by using  
9 discontinuance, when proceedings have progressed, to stop a  
10 court determining that issue, because it's concerned that  
11 that may have an impact in other proceedings, that that is  
12 what is not legitimate.

13 My Lords, can I then just spend a moment on the  
14 independent basis that the learned judge found for  
15 Kazakhstan having a legitimate interest in pursuing the  
16 proceedings, namely to have Mr Justice Burton's order set  
17 aside on the merits.

18 Now, first of all, considering the position apart  
19 from the concession made this morning, but just considering  
20 it by reference to what the judge had to consider, would  
21 your Lordships, first of all, look at Mr Justice Burton's  
22 order at supplemental bundle, tab 1.

23 It is interesting that my learned friend  
24 characterised this order a number of times this morning as  
25 provisional.

119

1 Have I given you the wrong reference? Tab 1.

2 Sorry. My Lord.

3 LORD JUSTICE LEGGATT: I think he meant capable of  
4 being set aside, didn't he? That's what he means by  
5 provisional order.

6 MR SMOUHA: That would be accurate. But what, of  
7 course, is important is that the structure of this order, in  
8 the usual way, is that -- paragraph 1:

9 "The claimants have permission to enforce the  
10 final arbitral award."

11 That -- that -- as -- in enforcement terms, as in  
12 terms of permission, is unqualified.

13 Paragraph 5 of the order:

14 "The award must not be enforced until the end of  
15 that period or until any application made by the defendant  
16 within that 21 day period has finally been disposed of."

17 LORD JUSTICE PATTEN: That's under 4.

18 MR SMOUHA: Exactly so.

19 LORD JUSTICE PATTEN: You need both, don't you,  
20 because if there's no such application then the --  
21 paragraph 1 has to contain what would then become an  
22 unqualified permission?

23 MR SMOUHA: Exactly so, my Lord. And the  
24 important of that is now your Lordships will therefore  
25 appreciate why, first of all, it -- it is critical that

120

1 Kazakhstan had its application to set aside; and, secondly,  
2 why the Notice of Discontinuance did not have any effect in  
3 relation to this order.

4 In other words, since -- under -- and this is  
5 expressly the case under CPR 38.5 -- the effect of a Notice  
6 of Discontinuance is, if there's no application to set it  
7 aside, to bring the proceedings to an end, when proceedings  
8 come to an end on a discontinuance there is no impact on  
9 orders that have been made during the course of those  
10 proceedings. They're not -- orders aren't undone.

11 And since that is a notice -- since the  
12 discontinuance is achieved by a notice which doesn't require  
13 permission, there was nothing that the Statis were doing, in  
14 terms of trying to bring the proceedings to an end, which  
15 would have any effect on this order which, as I say, the --  
16 the provisional aspect of it is only in relation to what --  
17 in relation to paragraphs 4 and 5, something which operates  
18 effectively as a sort of stay. But the decision -- the  
19 decision in this order is the claimants having permission to  
20 enforce the final arbitral award.

21 And one can see that if things had stayed as they  
22 were, with the Notice of Discontinuance, the Statis would be  
23 able to say, all around the world, that the English court  
24 had given permission to enforce -- though it had stayed that  
25 order and had never resolved any issues as to fraud. And

121

1 one might question whether a foreign court would necessarily  
2 understand the subtleties of English procedure in  
3 considering what the effect was of this order, made ex parte  
4 but left undisturbed, following a discontinuance by the  
5 claimants.

6 That is why Kazakhstan said to the judge below and  
7 the judge accepted and found that Kazakhstan had a  
8 legitimate interest in wanting -- in needing the disposition  
9 of the issue as to whether that permission was rightly  
10 granted. It is, in that respect, entirely analogous to --  
11 that's in a different sort of proceeding, but still  
12 analogous to the position the Chancellor was considering in  
13 the Cherkasov case, where there was there an ex parte  
14 recognition order of a foreign liquidator, where the  
15 liquidator himself applied for termination of the  
16 cross-border insolvency recognition proceedings. And the  
17 Chancellor gave as his first reason at page 811B. If I can  
18 just perhaps give the court the reference -- that he gave as  
19 his first reason the reason for deciding to proceed to  
20 determine the issue as to whether the ex parte order had  
21 been properly granted that there was --

22 Actually, I will turn it up, if I may. Sorry.  
23 It's authorities bundle, tab 4, at page 811, paragraph 76:

24 "In my judgment, there is a number of reasons why,  
25 on the particular facts of this case, I ought to determine

122

1 the FFD issue.

2 "First, I do not think it would be satisfactory to  
3 terminate the Recognition Order on the basis of  
4 Mr Nogotkov's application if, in reality, he has been in  
5 breach of his duty of full and frank disclosure and if,  
6 contrary to his submissions, the order would have been set  
7 aside rather than continued had full and frank disclosure  
8 been made (as to which, see National Bank v. Yurov [2016]  
9 EWHC 1991 (Comm) per Males J at paragraphs 18 and 85). There  
10 is a material, if not critical, difference between an order  
11 setting aside a recognition order ab initio, and terminating  
12 such an order at the office holder's own request some  
13 seventeen months after it took effect."

14 And, of course, it's proceedings -- a different  
15 kind of proceeding in that case; but the point that the  
16 Chancellor is making there applies -- applies here as well.  
17 This is not -- this is not about full and frank disclosure  
18 on the application to Mr Justice Burton. This is the point  
19 that the claimants obtained an order which is unaffected by  
20 their Notice of Discontinuance, whereby they were granted  
21 permission to enforce the final arbitral award. And there  
22 is a difference between these proceedings being brought to  
23 an end and there being a determination that the award is not  
24 enforceable. And Kazakhstan has a legitimate interest in  
25 having that determination.

123

1 LORD JUSTICE PATTEN: But can I just be -- make  
2 sure I've understood that.

3 The -- the -- following the earlier hearing, the  
4 2017 hearing, the judge, as we know, made an order, which  
5 you showed us, that the defendant's claim, that's the set  
6 aside application, should proceed by way of part 7 claim.  
7 That's right, isn't it?

8 MR SMOUHA: Well --

9 LORD JUSTICE PATTEN: I mean, or isn't it right?

10 MR SMOUHA: The direction he made is that the  
11 claim that the award was obtained by fraud shall proceed to  
12 trial.

13 LORD JUSTICE PATTEN: Yes, but that's your claim.  
14 That's your application to set aside Mr Justice Burton's  
15 order.

16 MR SMOUHA: My Lord, his direction was not in  
17 relation to the application. That claim is what also  
18 underlies the basis of the application to set aside.

19 LORD JUSTICE PATTEN: Well, I'm not sure  
20 I understand that.

21 MR SMOUHA: The distinction may not matter.

22 LORD JUSTICE PATTEN: He applied ex parte to  
23 enforce the award. And they got the order of Mr Justice  
24 Burton that we've just been looking at. So they got the  
25 relief -- and the point you make, they got the relief --

124



1 they got all the relief they were asking for but subject, as  
2 required under the rules and under the Convention, to the  
3 right of the -- of the -- the paying party under the award  
4 to -- to have it set aside on one of the available grounds,  
5 which is what you then applied to do.

6 MR SMOUHA: My Lord, yes.

7 LORD JUSTICE PATTEN: Now, once -- when you  
8 applied, was your application treated in the Commercial  
9 Court as a separate claim?

10 MR SMOUHA: No.

11 LORD JUSTICE PATTEN: Or merely -- or an  
12 application in -- in claim 2014 --

13 MR SMOUHA: The latter?

14 LORD JUSTICE PATTEN: -- folio 204.

15 MR SMOUHA: The latter. Your Lordship has the  
16 application at tab 1A.

17 LORD JUSTICE PATTEN: Yes.

18 MR SMOUHA: Your Lordship will see, first of all,  
19 that it -- the application is made in 2014 folio 204. So it  
20 is made in the claimant's arbitration claim, that  
21 proceeding.

22 LORD JUSTICE PATTEN: Right.

23 MR SMOUHA: Your Lordship will see under  
24 paragraph 2.1 of the application that --

25 "Intends to apply for an order, a draft of which

125

1 is attached, that an order pursuant to CPR 62.89 that the  
2 order of Mr Justice Burton be set aside".

3 So it is an app -- it's actually -- in that sense,  
4 it is an interlocutory application --

5 LORD JUSTICE PATTEN: In those proceedings.

6 MR SMOUHA: In the part 62 arbitration claim  
7 proceedings.

8 LORD JUSTICE PATTEN: Right. Now, when the judge  
9 directed that that application -- because that's the only --  
10 only matter that gave rise to the directions he made -- I'm  
11 talking about Mr Justice Knowles now -- should -- should --  
12 to proceed as a part 7 claim, you -- you -- as if commenced  
13 under part 7, now, you've made the point that that brought  
14 in all the relevant provisions of the CPR. But -- but did  
15 it also mean that your claim, rather than simply being an  
16 interlocutory application in their existing claim, took on  
17 the form of a separate action?

18 LORD JUSTICE LEGGATT: Which it's up to you to  
19 discontinue and not up to the other side to discontinue?

20 MR SMOUHA: Exactly so. Exactly so. And that is  
21 our point. That's exactly our point under the respondent's  
22 notice. What we say is -- what we say is that, whatever the  
23 position in relation to the Notice of Discontinuance and in  
24 relation to the arbitration -- the part 62 arbitration  
25 claim, which is a proceeding, by the judge's order,

126

1 paragraph 2, he constituted what was deemed to be a new -- a  
2 freestanding proceeding, a freestanding claim deemed to be  
3 as if it was made under CPR part 7 which therefore was --  
4 could not be affected by the Notice of Discontinuance.

5 LORD JUSTICE PATTEN: And does that mean, then,  
6 that their Notice of Discontinuance could only apply to  
7 their application in respect of which Mr Justice Burton made  
8 the order, the 204 application.

9 MR SMOUHA: Exactly.

10 LORD JUSTICE PATTEN: Now, you don't -- this is my  
11 other question, I -- I take it -- or do you -- you don't  
12 take any point they're too late in respect of those  
13 proceedings to apply to discontinue because they've got an  
14 order from -- for the relief sought on -- in those  
15 proceedings, in the form of Mr Justice Burton's order.

16 You accept that that -- that in 38.2, where it  
17 talks about "may discontinue all or a part of the claim at  
18 any time", that that means it was still open to them to  
19 discontinue at the time they served the notice?

20 MR SMOUHA: My Lord, yes. That's correct. And so  
21 that -- that is why -- that is why we say, and we said in  
22 our skeleton, that if that is correct then the -- in a  
23 sense, the shortest answer to the appeal is: Notice of  
24 Discontinuance makes no difference, because what is  
25 proceeding to trial is the freestanding claim, directed by

127

1 the judge, deemed to be a part 7 claim, which the Statis  
2 could do nothing about.

3 We do say, in our skeleton, that it doesn't  
4 matter, procedurally, whether one characterizes it as a  
5 freestanding claim or sees it as a counterclaim to the  
6 arbitration claim. It makes no difference because as is --  
7 as was conceded below and is conceded before your Lordships,  
8 a Notice of Discontinuance does not operate to terminate a  
9 counterclaim.

10 LORD JUSTICE PATTEN: But, I mean, help me on  
11 this, would you: has the -- has -- has the part 7 claim been  
12 given a separate action number? Because I was looking at  
13 the order which you handed up, but, unfortunately, the court  
14 stamp has sort of obscured the -- but it looks as if it's  
15 2014/70. Now, is that -- is that a separate action number  
16 that it's been given or what?

17 MR SMOUHA: Might I just check that, my Lord?

18 LORD JUSTICE PATTEN: Yes.

19 MR SMOUHA: (Pause). I'm -- I'm told, my Lord,  
20 that, yes, you can see the number more clearly at the top of  
21 the points of claim.

22 LORD JUSTICE PATTEN: Yes.

23 MR SMOUHA: Core bundle, tab 11. But I --

24 MR FOXTON: My Lord, I think when the business of  
25 property courts came into being and the Commercial Court

128

1 became part of that structure, all the numbering of existing  
2 Commercial Court actions were renumbered in accordance with  
3 the new rubric.

4 LORD JUSTICE PATTEN: Right.

5 MR SMOUHA: So the answer to your Lordship is: no,  
6 no new action number given in response to the judge's --

7 LORD JUSTICE PATTEN: Right.

8 MR SMOUHA: But, my Lord, I would say that that  
9 doesn't matter, in the sense that the judge's direction was  
10 not that the defendant's claim shall be commenced under part  
11 7 but it should proceed to trial as if commenced under CPR  
12 part 7, which wouldn't require it then to be given a --

13 LORD JUSTICE PATTEN: Yes. But the point is  
14 whether he was making that direction because he talks about  
15 your claim, whether he was making that direction by, if you  
16 like, separating your claim from -- from their -- their --  
17 their earlier application, or whether he was treating the  
18 whole thing, including the action, that they had commenced,  
19 as, now, a part 7 claim. And it does look, certainly in  
20 terms of the way that the -- I mean, if the action numbers  
21 are anything to go by, as if it is still being treated in  
22 the Commercial Court as if it is one entire -- one entire  
23 action.

24 MR SMOUHA: One proceeding.

25 LORD JUSTICE PATTEN: Yes, one proceeding, which

129

1 now is being treated as a part 7 claim.

2 MR SMOUHA: My Lord, yes. Exactly so. And --  
3 and -- with this -- in a sense, this is the proof -- the  
4 proof of that pudding as to what it is that is the nature of  
5 the proceeding is that the points of claim claims relief.  
6 My learned friend says: oh, well, that's just there because  
7 pleaders put prayers at the end of pleadings. But the  
8 proceeding that is going to trial and what the trial judge  
9 will be doing is determining the claim made by the  
10 defendant -- core bundle, tab 11 -- in the defendant's  
11 points of claim -- that's what has been directed to go to  
12 trial -- including the determination as to whether  
13 declarations should be made as claimed by Kazakhstan in  
14 paragraph 50.

15 And, as to those -- as to that claim, my learned  
16 friend says, reading paragraph 50: oh well, you'll note that  
17 the claims for declarations all end with "would be contrary  
18 to English public policy". But, of course, as is clear,  
19 what is Kazakhstan interested in? It is declarations that  
20 the award, as a whole, was obtained by fraud or,  
21 alternatively, was obtained in part by fraud.

22 LORD JUSTICE LEGGATT: The relief sought doesn't  
23 seem to include setting aside the order of Mr Justice  
24 Burton.

25 MR SMOUHA: It doesn't --

130

1 LORD JUSTICE DAVID RICHARDS: Isn't that  
2 because --

3 MR SMOUHA: There's an application.

4 LORD JUSTICE DAVID RICHARDS: -- this is all in  
5 your application to set aside? Isn't that the point of the  
6 judge's order of 27 June? It begins reciting that this is  
7 upon your application to set aside the order. So this is  
8 all in the -- this is the way I appreciate that it was put  
9 to us this morning -- this is in the context of your  
10 application. So you don't need to ask, in your particulars  
11 of claim, for an order setting aside the order because  
12 you've already asked for that.

13 MR SMOUHA: No, my Lord, we hadn't already asked  
14 for that:

15 LORD JUSTICE DAVID RICHARDS: You had. Had you  
16 not? I thought you had in your application of 7 April.

17 MR SMOUHA: The application is an application to  
18 set aside the order. If that was disposed of, even after a  
19 trial, all that the judge --

20 LORD JUSTICE DAVID RICHARDS: Well, that's what  
21 the judge was doing on 27 June. You had a live application  
22 to set aside the enforcement order. This was all still a  
23 live issue, remember, at that time. The judge directed the  
24 trial of an issue and nominated you, the claimant, on that  
25 issue, namely whether the award was obtained by fraud. If

131

1 it went to trial, you would ask the court to make those  
2 declarations in paragraph 50. And then, on your application  
3 dated 7 April, to which you had annexed aid draft order, you  
4 had asked for an order in the terms, in part of that order,  
5 that Mr Justice Burton's order be set aside.

6 MR SMOUHA: My Lord, yes.

7 LORD JUSTICE DAVID RICHARDS: Isn't that's what  
8 has happened here? In other words, this is no different  
9 from cases, which we're all familiar with, where issues  
10 arise and the court directs the trial of an issue and  
11 nominates the third defendant as claimant on the issue.

12 MR SMOUHA: My Lord, it is not the same as that,  
13 with respect.

14 LORD JUSTICE DAVID RICHARDS: Why not?

15 MR SMOUHA: Because of the claim for declarations.

16 LORD JUSTICE DAVID RICHARDS: Why? Because you  
17 could -- there's no reason why you shouldn't have a claim  
18 for a declaration in circumstances like that, but all  
19 within -- because your declarations only have any meaning if  
20 there is a live application -- if there is still a live  
21 enforcement order, because the whole thing is -- is anchored  
22 to the enforcement order being contrary to English public  
23 policy.

24 MR SMOUHA: But, with respect, my Lord --

25 LORD JUSTICE DAVID RICHARDS: That's no longer a

132

1 live issue.  
 2 MR SMOUHA: With respect that begs the question.  
 3 LORD JUSTICE DAVID RICHARDS: Well..  
 4 MR SMOUHA: To say they only have meaning --  
 5 LORD JUSTICE DAVID RICHARDS: But they're anchored  
 6 in terms.  
 7 MR SMOUHA: But, my Lord, to say they only have  
 8 meaning is the same as saying they only have utility . And  
 9 that is --  
 10 LORD JUSTICE DAVID RICHARDS: No, but if one looks  
 11 at your particulars of claim in the context of the situation  
 12 existing at the time you served them, the whole point was  
 13 you wanted those orders set aside so that the claimants  
 14 couldn't enforce the award in this country, which is what  
 15 they were otherwise proposing to do.  
 16 MR SMOUHA: My Lord, yes.  
 17 LORD JUSTICE DAVID RICHARDS: So we're in a  
 18 different world now.  
 19 MR SMOUHA: My Lord, yes again. So, yes, that was  
 20 the reason then, but, my Lord --  
 21 LORD JUSTICE DAVID RICHARDS: The declarations  
 22 you're after now would actually exclude part of the wording  
 23 in reality , wouldn't they? I mean, what you're wanting is a  
 24 declaration that the award, as a whole, was obtained by  
 25 fraud. The result that it would be contrary to public

133

1 policy in England is really neither here nor there.  
 2 MR SMOUHA: Well, my Lord, I -- I would go part of  
 3 the way with your Lordship on that.  
 4 LORD JUSTICE DAVID RICHARDS: Right.  
 5 MR SMOUHA: Okay. Can I -- your Lordship, there  
 6 were about four or five points that arise from that. Let me  
 7 just try and tackle them.  
 8 LORD JUSTICE DAVID RICHARDS: Right.  
 9 MR SMOUHA: I'm going to do so in reverse order.  
 10 First of all -- first of all -- as to the position now would  
 11 a declaration that the award, as a whole, has been obtained  
 12 by fraud have meaning, be of utility and so on, answer:  
 13 definitely yes, for the reasons the judge has found.  
 14 Secondly, would a declaration that the enforcement  
 15 of any part of the award in this jurisdiction be contrary to  
 16 English public policy? Would that be of utility or value?  
 17 Potentially , yes. Of course each enforcing court is  
 18 considering whether enforcement of the award would be  
 19 contrary to its public policy, but fraud is fraud; and  
 20 the -- it would, I would suggest, be of -- still of some  
 21 obvious value for a court to understand and see that the  
 22 English court has determined that enforcement would be  
 23 contrary to English public policy, even when considering its  
 24 own public policy, but that -- that's a lesser --  
 25 LORD JUSTICE DAVID RICHARDS: I must say, I don't

134

1 really follow that, but anyway go on.  
 2 LORD JUSTICE LEGGATT: That might depend on what  
 3 its public policy is, I suppose, and whether it's the same  
 4 as English --  
 5 LORD JUSTICE DAVID RICHARDS: Yes, I mean, it may  
 6 or may not gain warm comfort from the fact that its public  
 7 policy is the same as England.  
 8 MR SMOUHA: No, I didn't mean that. I meant, my  
 9 Lord, because it is a fraud case. In other words,  
 10 therefore, that one is talking about an area which is likely  
 11 to be -- in some way the tests may differ, but is likely to  
 12 engage the public policy of any civilised legal system.  
 13 LORD JUSTICE DAVID RICHARDS: Except Sweden.  
 14 Except Sweden.  
 15 MR SMOUHA: No, my Lord.  
 16 LORD JUSTICE DAVID RICHARDS: As I understand it,  
 17 they don't regard your case of fraud as getting them through  
 18 the door.  
 19 MR SMOUHA: Different test. Applying a different  
 20 test. Fraud --  
 21 LORD JUSTICE DAVID RICHARDS: Different test. All  
 22 right.  
 23 MR SMOUHA: That's the point. It is not that  
 24 fraud is not contrary to public policy in Sweden; it is just  
 25 on an enforcement they apply a different test in determining

135

1 whether -- this rather narrow test that -- it appears, as to  
 2 whether fraud has an effect in relation to the award.  
 3 So, my Lord, that's the first point.  
 4 Secondly -- secondly -- in relation to these  
 5 declarations, the question whether the court should make  
 6 these declarations and, if so, in what form, is a matter for  
 7 the trial judge at the end of the trial. That is not, in my  
 8 submission, an approach question, as it were, to be  
 9 prejudged at the stage of a Notice of Discontinuance.  
 10 Coming back, then, to my Lord's point about: is  
 11 this -- is this points of claim made in the application to  
 12 set aside? In my submission, my Lord, no, it's not made in  
 13 it. The point your Lordship made was that the reason why  
 14 the judge directed pleadings and so on was, as may happen in  
 15 many cases, that within an interlocutory application there  
 16 may be a question of fact that has to be resolved and there  
 17 may be directions for pleadings.  
 18 But in that typical case, there may be pleadings,  
 19 but you wouldn't normally have a situation where, within an  
 20 interlocutory application, the respondent to the proceedings  
 21 or the defendant to the proceedings, who is making an  
 22 interlocutory application then makes a claim for substantive  
 23 relief in the application. That is the difference.  
 24 In addition to -- in addition to the application  
 25 to set aside, which is still there, you have here what is

136

1 deemed to be a part 7 claim, made by Kazakhstan; therefore,  
2 deemed to create a separate proceeding with a substantive  
3 claim for relief in it -- added to it. That is not  
4 something -- that claim for relief is not made in the  
5 interlocutory application; it's made in this deemed part 7  
6 claim by this points of claim.

7 And then, lastly, your Lordship said: well, at the  
8 time when the judge ordered this, this was with a view to  
9 defeating the enforcement proceeding. Yes, it's a different  
10 world now. Yes, but the fact that it's a different world  
11 now doesn't mean that there may not now be very good  
12 reasons, a legitimate interest, in pursuing this claim,  
13 despite the termination of the enforcement proceeding.

14 In fact, there are even stronger reasons for doing  
15 so, precisely because of the tactical way in which what --  
16 and the identification of what it is the Statis are trying  
17 to stop happening.

18 The fact that it was -- that was how it was done  
19 then actually emphasises the change of circumstances is the  
20 reason, as the judge has found, that actually gives the  
21 reason for the English court determining that it should  
22 continue.

23 And, my Lord, that -- that point brings me to the  
24 one -- the judge has found that Kazakhstan has a legitimate  
25 interest in pursuing it. My Lord, we -- we go further. And

137

1 we say that there is a further reason which the judge didn't  
2 deal with that we raised by a respondent's notice, which is  
3 not only that Kazakhstan has a legitimate interest, but that  
4 there is a public interest in resolving the question whether  
5 the appellants by seeking to enforce an award obtained by  
6 fraud, commenced process here which sought to perpetrate a  
7 fraud on the English court.

8 If -- if -- if the fraud was obtained -- sorry, if  
9 the award was obtained by fraud then the process seeking to  
10 enforce the award was a process seeking to perpetrate the  
11 fraud, because -- because -- the enforcement process -- the  
12 application is seeking -- was seeking to -- asking that the  
13 English courts permit the Statis to enforce the award as if  
14 it were a judgment of this court.

15 In other words, the nature of an enforcement  
16 application is, in effect, the seeking of the -- the making  
17 available to the arbitration claimant the enforcement  
18 procedures of the English court, to put it in the position  
19 as if it had obtained a judgment of the English court.

20 An application for permission to enforce a  
21 New York Convention award under section 101(2) of the  
22 Arbitration Act, is, essentially, asking for a domestication  
23 of the award. The award creditor asks the English court to  
24 give him access to the English court's enforcement process  
25 and remedies that he would have obtained if he had obtained

138

1 a judgment in ordinary domestic process. If the award has  
2 been obtained by fraud then seeking to obtain the equivalent  
3 of an English judgment in the same terms, and on the basis  
4 of the award itself, is itself fraudulent. This is quite  
5 apart from the question as to the obtaining of the original  
6 order ex parte.

7 And, in our submission, there is a strong public  
8 interest in not permitting that party then to be able to  
9 remove from the English court the ability to determine  
10 whether there has been that fraud committed, that abuse of  
11 process effected on the court.

12 Does it make any difference then --

13 LORD JUSTICE LEGGATT: But then if an English --  
14 if a claim is brought, which turns out to be fraudulent and  
15 then it's abandoned, the English doesn't normally make the  
16 claimant carry on, just so that it can be demonstrated  
17 publicly that it was a fraudulent claim.

18 MR SMOUHA: My Lord, I agree. I don't say always;  
19 I don't need to say always.

20 LORD JUSTICE LEGGATT: Well, I put it -- normally  
21 is the way I have raised it.

22 MR SMOUHA: I don't even need to say normally.  
23 The judge said below, quite rightly, this is an exceptional  
24 case.

25 LORD JUSTICE LEGGATT: But not on this particular

139

1 ground, did he? This is a ground that you're introducing  
2 now.

3 MR SMOUHA: My Lord, it was raised with the judge,  
4 but he didn't deal with it.

5 LORD JUSTICE LEGGATT: Right.

6 MR SMOUHA: My Lord, all I'm identifying is that  
7 there is a public interest. That is not to say that a judge  
8 should always do so. But it comes back to the point,  
9 your Lordship will remember, again, all I am meeting is a  
10 suggestion -- an argument that there is some principle which  
11 means that -- that the English courts -- that the judge  
12 below could not do what he did.

13 LORD JUSTICE DAVID RICHARDS: Did he, himself, in  
14 his judgment, rely on any such point? No, you say -- you  
15 introduce this as a respondent's notice point. Yes, I see.

16 LORD JUSTICE LEGGATT: It was argued and he didn't  
17 decide it, you say.

18 LORD JUSTICE DAVID RICHARDS: But it was argued.

19 MR SMOUHA: It is respondent's notice, core  
20 bundle, tab 3, page 42, paragraph 3. That -- my Lords, that  
21 then --

22 LORD JUSTICE DAVID RICHARDS: But, just so I can  
23 understand this, it's a slightly odd way of putting it --  
24 I'm trying to grapple with the idea of a fraud on the  
25 English courts. You accept this isn't a full and frank

140

1 disclosure case, unlike the Chancellor's case.  
 2 You're saying where enforcement of a valid Swedish  
 3 award would be contrary to English public policy on grounds  
 4 that it was obtained by fraud, that makes the application to  
 5 enforce the valid Swedish award a fraud on the English  
 6 court.

7 MR SMOUHA: The judgment that -- the judgment that  
 8 would be obtained --

9 LORD JUSTICE DAVID RICHARDS: Do you obtain a  
 10 judgment?

11 MR SMOUHA: Yes, so -- what -- what you -- what  
 12 you obtain is -- is a judgment --

13 LORD JUSTICE DAVID RICHARDS: You get -- if leave  
 14 is given judgment may be entered in terms of the award.

15 MR SMOUHA: Yes. And one of interesting questions  
 16 that sometimes arising is it can sometimes be difficult to  
 17 translate the dispositive of the award into the appropriate  
 18 form.

19 LORD JUSTICE DAVID RICHARDS: You don't need that,  
 20 do you? Or do you?

21 MR SMOUHA: No, you don't.

22 LORD JUSTICE DAVID RICHARDS: You can just enforce  
 23 in the same manner as if there was a judgment of the court  
 24 to the same effect.

25 MR SMOUHA: Yes; but, certainly in my experience,

141

1 invariably what the enforcing party for and gets, where they  
 2 get permission, is then a judgment which then tracks the --  
 3 the award.

4 LORD JUSTICE DAVID RICHARDS: But not --

5 LORD JUSTICE LEGGATT: Sorry. As my Lord says,  
 6 all it really amounts to is the argument that enforcement  
 7 would be contrary to public policy. You could have, for  
 8 example, an ICSID award to which the fact that it was  
 9 obtained by fraud is not a ground on which enforcement can  
 10 be resisted in this country. That is not -- that is not --  
 11 there's no defence that it's contrary to English public  
 12 policy to enforce.

13 MR SMOUHA: No.

14 LORD JUSTICE LEGGATT: So it just depends, your  
 15 argument -- all the argument just comes back to the point  
 16 that this is a ground on which enforcement is resisted.

17 MR SMOUHA: My Lord, I agree. All I'm -- all I'm  
 18 translating is that factor translates not only into a  
 19 Kazakhstan's private legitimate interest, but there is also  
 20 a public interest in relation to the same aspect.

21 LORD JUSTICE LEGGATT: So the English court has an  
 22 interesting in vindicating its own public policy, as it  
 23 were, over and beyond whether the parties want it to?

24 MR SMOUHA: No, the -- I wouldn't put it that way,  
 25 my Lord. I would put it that the English court has a public

142

1 interest where it has decided to determine whether there has  
 2 been a fraud, which, of necessity, would feed through to its  
 3 own process -- has a public interest in not -- not allowing  
 4 the claimant who has sought to do that to simply terminate  
 5 proceedings in order to avoid the determination of that  
 6 question, bearing in mind that that is the -- the judge's  
 7 finding as to the Statist's true reasons.

8 My Lord, my Lord Lord Justice David Richards said  
 9 to me that I don't say it's a full and frank situation.

10 LORD JUSTICE DAVID RICHARDS: Yes.

11 MR SMOUHA: My point about -- just to be clear, my  
 12 point about was not -- I'm not saying that there is or was  
 13 no issue about whether the ex parte application was made  
 14 without full and frank disclosure.

15 LORD JUSTICE DAVID RICHARDS: You're saying  
 16 nothing about that, one way or the other.

17 MR SMOUHA: That's a smaller point. It is the  
 18 bigger point --

19 LORD JUSTICE DAVID RICHARDS: It is not a part of  
 20 this appeal.

21 MR SMOUHA: The point being that what the judge  
 22 found what we were saying the bigger point, which is the  
 23 determination -- the determination of whether that order  
 24 should have been granted on the merits.

25 LORD JUSTICE DAVID RICHARDS: Exactly. Yes.

143

1 LORD JUSTICE LEGGATT: Did you want to say  
 2 anything else about the acceptance that the order should be  
 3 set aside or have you dealt with that?

4 MR SMOUHA: No, my Lord. That was where I was  
 5 just about to come back to.

6 I think the way your Lordship put it to my learned  
 7 friend was: do you accept that it should be set aside? And  
 8 my learned friend said: yes. And the interesting is: but  
 9 how? How, within the scheme of what the appellant is  
 10 arguing, does that -- do they say that result would be  
 11 achieved? Because that could only be achieved by an order;  
 12 but the whole premise of their case, on appeal, is that they  
 13 could serve the Notice of Discontinuance and bring the  
 14 proceedings to an end without there being any order.

15 So that the concession that that is what ought to  
 16 happen is actually a concession that the -- that the --  
 17 their Notice of Discontinuance would, if left in place, as  
 18 they say it should have been, have left the order of  
 19 Mr Justice Burton in place, without having been set aside,  
 20 when it should have been set aside. And the way in which --  
 21 and that's why the argument -- the concession is new today.

22 There was -- there was nothing that the Statist did  
 23 at the time of their Notice of Discontinuance or in the  
 24 argument below which said that -- that they had an  
 25 alternative position that their discontinuance should be

144

1 allowed if -- upon the making of an order setting aside the  
2 order of Mr Justice Burton.

3 LORD JUSTICE PATTEN: Could -- if you -- if, for  
4 example, there had been orders made -- interlocutory orders  
5 in an action which is discontinued, let's say an order for  
6 an injunction, the -- the discontinuance of the proceedings,  
7 I think, would bring those to an end, wouldn't they --  
8 because -- because -- I mean -- those are in any event one  
9 of the special situations where the court's consent is  
10 required. But I assume that the court, in giving its  
11 consent, would -- would discharge the injunction, because it  
12 would only be granted until trial or further order?

13 MR SMOUHA: That's the point. That's exactly the  
14 point, my Lord. In other words, in those cases, like an  
15 injunction, where there has been an order for an injunction,  
16 where it is essential that there is a further order of the  
17 court to deal with the previous orders, discontinuance can  
18 only be obtained by application for permission.

19 LORD JUSTICE PATTEN: But, I mean, where you --  
20 where you -- where you've sought and obtained an order of  
21 the kind that Mr Justice Burton made for -- giving  
22 permission to enforce, and you then discontinue those  
23 proceedings -- I mean, let's assume, for the moment, we  
24 didn't have the complication of -- of your application to  
25 set aside. What are you saying? That the -- that there's

145

1 no way of getting rid of that order, even if you don't want  
2 to rely on it?

3 MR SMOUHA: Without -- without making -- there  
4 would have to be an application to set aside the Notice of  
5 Discontinuance, in order to re-engage -- the court to be  
6 re-engaged --

7 LORD JUSTICE PATTEN: But, I mean, I'm the  
8 enforcing party. I'm the claimant in the arbitration. I've  
9 got my award. I apply in England to enforce it. I get the  
10 order. Let's assume there isn't any application to set it  
11 aside for the moment, within the 21 days. But then  
12 I decide, for whatever reason, I don't want to enforce it.  
13 And the -- and the -- yes, the counterparty says: well,  
14 that's fine, but we'd just like it cleared off. I mean,  
15 if -- what do I do? If I discontinue, you say that doesn't  
16 get rid of it?

17 MR SMOUHA: Not as an order.

18 LORD JUSTICE PATTEN: No. So what have I got to  
19 do to get rid of it?

20 MR SMOUHA: Remember, my Lord, that our point --  
21 our point is -- I mean, our point is that what did not  
22 happen and that we have a legitimate interest in happening  
23 is a determination that the order of Mr Justice Burton  
24 should be set aside on the merits. It should be determined.  
25 But as to the -- as to the procedural position, all that --

146

1 all that CPR 38.5.2 provides is -- this is page 1219:

2 "Subject to rule 38.4 the proceedings are brought  
3 to an end as against him on that date" -- that date being  
4 the date that the Notice of Discontinuance is served, that's  
5 when it takes effect.

6 LORD JUSTICE PATTEN: Yes.

7 MR SMOUHA: So there is no provision in the CPR  
8 that there is any automatic order that sets aside orders  
9 that have been made in the --

10 LORD JUSTICE DAVID RICHARDS: No, but the court,  
11 on the application under 38.4, can impose terms. And, in  
12 effect, that is what happened below; except that, of course,  
13 the terms offered were not good enough so far as  
14 Mr Justice Knowles was concerned. So he -- that's what the  
15 claimants did. They offered the undertaking which was  
16 beefed up in the course of the hearing, and said: well, on  
17 those terms, please dismiss the application or make no order  
18 on the application for the Notice of Discontinuance.

19 I mean, as a procedural matter, it would be no  
20 difficulty at all, would it, for the court to impose that as  
21 an additional term, that Mr Justice Burton's order is set  
22 aside --

23 MR SMOUHA: My Lord, yes. But my Lord's question  
24 was specifically what happens on the discontinuance if there  
25 is no application.

147

1 LORD JUSTICE DAVID RICHARDS: So your point then  
2 is well, the order -- of course the order is -- doesn't  
3 achieve anything but it's still there on the record. And  
4 you made the point earlier: well, the claimants might make  
5 use of the continuing existence of that order around the  
6 world. Quite leaving aside your on the merits point, that  
7 of itself there was a vice in that. Yes, I understand.

8 MR SMOUHA: Yes. But that, my Lord, is -- of  
9 course that can't be an answer to the appeal because --

10 LORD JUSTICE DAVID RICHARDS: No, I appreciate  
11 your case is you should have set aside on the merits rather  
12 than just set aside. But there's no procedural difficulty,  
13 is there, in setting aside the order?

14 MR SMOUHA: No, my Lord. But, as your Lordship  
15 says, the way in which that would have to happen could only  
16 be by the defendant making the application to set aside the  
17 notice.

18 LORD JUSTICE DAVID RICHARDS: Indeed, that  
19 I understand. I do understand that, yes.

20 MR SMOUHA: Which I hope answers my Lord,  
21 Lord Justice Patten's question.

22 LORD JUSTICE PATTEN: Well, sort of, I suppose.  
23 I mean, you're not -- I mean, the court can -- the court can  
24 set aside an order it's made, can't it?

25 MR SMOUHA: Yes. But the whole point about

148

1 notices of discontinuance without permission is that the  
2 court is not engaged in that process. So a discontinuing  
3 party in those circumstances -- put injunctions on one side,  
4 undertakings, those are different. The CPR is identifying  
5 types of orders where it is saying: you can't leave a  
6 claimant to discontinue because the court will need to look  
7 at the orders that have been made.

8 Apart from those cases -- apart from those cases,  
9 the court is not engaged with the Notice of Discontinuance.  
10 The Notice of Discontinuance is served and the proceedings  
11 end.

12 LORD JUSTICE PATTEN: So that, absent any  
13 involvement by you, if they simply serve a Notice of  
14 Discontinuance it doesn't -- it doesn't dispose of the order  
15 is what you're saying.

16 MR SMOUHA: Exactly so. That is what -- that is  
17 what happened.

18 LORD JUSTICE PATTEN: And therefore -- and there  
19 would have to be, presumably by a consent or something, an  
20 application under 3.1.7 for the court to -- to revoke the  
21 previous order?

22 MR SMOUHA: Or, perhaps more -- more easily, as  
23 my Lord, Lord Justice David Richards, suggested an  
24 application under CPR 38.4 to set aside the Notice of  
25 Discontinuance. And the way that would be put is that the

149

1 discontinuance should not be allowed to stay in place  
2 because of this order, but, if that order is set aside --

3 LORD JUSTICE PATTEN: Except on terms maybe.

4 MR SMOUHA: Except on terms. If that order is set  
5 aside. Exactly.

6 LORD JUSTICE PATTEN: Right. But absent  
7 cooperation from your side, the order remains, is what  
8 you're saying?

9 MR SMOUHA: Yes. And that was the position that  
10 the Statis sought to achieve by serving their Notice of  
11 Discontinuance without doing anything vis a vis the court  
12 to -- to effect those orders. They tried to bring the  
13 proceedings to an end, leaving in place the -- the order of  
14 Mr Justice Burton. And, until today, were not saying that  
15 that could be objectionable.

16 LORD JUSTICE PATTEN: It's a slightly bizarre  
17 situation though, isn't it? Because you're -- on the basis  
18 that they're willing to have the order revoked, you're not  
19 willing to have it revoked because you want to rely on it,  
20 in a sense, as part of your argument for saying that the --  
21 the proceedings should continue, so that if you have it  
22 revoked you should be on the merits.

23 MR SMOUHA: My Lord, it's not that they're now  
24 willing to have it revoked; and it's not that we're saying  
25 it shouldn't be. We are in the position where we're going

150

1 forward to trial. The issue doesn't arise.

2 LORD JUSTICE PATTEN: No, I understand that.

3 MR SMOUHA: What they're now saying -- it is a  
4 forensic manoeuvre and of course one understands why my  
5 learned friend makes it. What he is, in effect, now saying  
6 is, though this is not spelt out in their appeal and though  
7 this is not spelt out in their skeleton argument, they  
8 recognise that if the court were to allow the appeal it  
9 should be on terms not previously offered.

10 LORD JUSTICE DAVID RICHARDS: Was there any  
11 discussion below --

12 MR SMOUHA: Yes.

13 LORD JUSTICE DAVID RICHARDS: -- do you know,  
14 about setting aside the order in this sort of way without  
15 any ruling on the merits?

16 MR SMOUHA: No, as I understand it, they put the  
17 point differently. Below they argued that the effect of the  
18 discontinuance was to make Mr Justice Burton's order void.

19 LORD JUSTICE DAVID RICHARDS: Oh, I see. So their  
20 argument below was it would have the effect of getting rid  
21 of that order but by a different route.

22 MR SMOUHA: Well, "void" was the word used. We  
23 don't really understand. We don't really understand --  
24 didn't understand; but obviously they were not saying --  
25 they were not accepting that there would need to be some

151

1 further order to achieve that. And they were not offering  
2 any explanation as to how that would work.

3 My Lords, that was all I wanted to say on grounds  
4 2 and 3.

5 The next point is -- sorry, 1 and 2. Forgive me.  
6 The next point is ground 3, which is the suggestion that  
7 there is effectively a threshold that must be established  
8 before the court has a discretion to set aside a Notice of  
9 Discontinuance, namely that an abuse of process must be  
10 shown. That argument being made, as we understand it from  
11 the grounds of appeal, on the suggestion that the pre-CPR  
12 authorities in relation to strike out of a Notice of  
13 Discontinuance, there not having been any power under the  
14 rules of the Supreme Court to -- to set aside a Notice of  
15 Discontinuance, should be applied now under the CPR and read  
16 in.

17 My Lords, I can deal with this shortly, depending  
18 on what -- what is going to best assist your Lordships. The  
19 bottom line, we say, as you will have seen from our  
20 skeleton, is that the pre-CPR cases, Castanho v  
21 Brown & Root, have no application. The reason why, in that  
22 case, abuse of process was referred to at all was that the  
23 court found that, under the rules of the Supreme Court, all  
24 that could be done --

25 LORD JUSTICE PATTEN: Well, we're not very

152

1 interested in those cases. I mean, the fact is that it's  
2 for us to decide what -- what the right test is under the  
3 CPR. There have been a series of first instance decisions.  
4 They're not binding on us of course. But there is a  
5 consistent line of authority. The question for us is  
6 whether it's right.

7 MR SMOUHA: And, my Lord, as to that, we say  
8 perhaps the shortest and simplest point is there is nothing  
9 in the language of the rule itself which indicates any  
10 limitation on the discretion. And the appellants don't  
11 suggest there is such limitation. Nor have they actually  
12 given you any considered reason why there should be such a  
13 limitation.

14 We say, in those circumstances, the position is  
15 clear, that those first instance authorities are, plainly,  
16 correct. The court has a broad discretion to consider all  
17 relevant factors.

18 Abuse of process will always be a strong factor,  
19 but it is not a necessary factor. It is not a necessary  
20 precondition to the exercise of the discretion.

21 And the appellants' argument that what makes a  
22 difference and why this is special is because of the  
23 reference to the right to discontinue --

24 LORD JUSTICE PATTEN: Yes.

25 MR SMOUHA: -- is a complete non-point, for the

153

1 simple reason that the word "right" does not appear in the  
2 rule; it is the heading, "Right to discontinue a claim".  
3 And the same word appears in relation to 38.4, "Right to  
4 apply to have Notice of Discontinuance set aside". And when  
5 one reads 38.2 with 38.4, the language of the rules is  
6 entirely neutral as to the position of the discontinuing  
7 party and of the party that applies to set aside a Notice of  
8 Discontinuance.

9 There is nothing there to indicate, and there is  
10 no reason why the claimant should be treated as having --  
11 having some priority over the position of the defendant.

12 LORD JUSTICE PATTEN: I mean, it depends a bit  
13 what you mean by "right" if you look at the note at 38.2.1,  
14 as we can, it says effect of rule is general; it gives a  
15 claimant a right to discontinue at any time. But I think  
16 what you say is that that doesn't mean any more than that  
17 he's not subject to any prior constraint in serving his  
18 notice. But, of course, the -- the -- his ability or right,  
19 if you want to put it in those terms, to serve a notice  
20 under 38.2 is qualified by the countervailing jurisdiction  
21 under 38.4 to set it aside, which can be invoked by the  
22 counterparty.

23 MR SMOUHA: Exactly so. These are procedural --  
24 if it is right to use the word "right", these are procedural  
25 rights. This is not creating some substantive right of the

154

1 claimant in relation to his proceedings to bring them to an  
2 end.

3 And the notes -- just so your Lordships know, the  
4 notes in the White Book, the High Commissioner of Pakistan  
5 case is noted in the supplement to the White Book. And, my  
6 Lords, the -- bearing in mind that the ground of appeal, in  
7 respect of which permission has been obtained, is limited to  
8 this particular point, the suggestion that there is an abuse  
9 of process as a precondition to the exercise of the -- the  
10 power. My Lords, we say that is obviously wrong; that there  
11 is no basis for it in the language of the rules. There's no  
12 reason to limit the court's power in that way. And that  
13 ground should be rejected.

14 My Lords, then the only other point -- but, in  
15 fact, I've said a fair amount of this already -- is our  
16 respondent's notice point in relation to the freestanding  
17 claim or counterclaim point.

18 My Lord, Lord Justice Patten, asked me some  
19 questions about that. I think I've said what I need to say  
20 in relation to how we base that on the order the judge made.

21 LORD JUSTICE PATTEN: Yes.

22 MR SMOUHA: We do say that it doesn't matter -- it  
23 doesn't matter whether one characterises it as a  
24 freestanding claim or a counterclaim; it must be one or the  
25 other.

155

1 My Lords, can I -- can I just mention the relevant  
2 authorities in relation to the counterclaim point and give  
3 you the references. But the position is well-established  
4 that a defendant to an arbitration claim can make a  
5 counterclaim. That was the position before the CPR under  
6 the RSC. That's the -- the decision of the House of Lords  
7 in *The Gladys*, which is at tab 17, and which has been  
8 followed and applied by the Court of Appeal under the CPR in  
9 *Glencore v Exter*, which is at tab 10.

10 And the proposition that is established by those  
11 cases is that where a defendant to an arbitration claim  
12 wishes itself to make a claim, it is free to make any claim  
13 against the claimant that it wishes. It does not need to  
14 obtain permission to serve out of the jurisdiction or  
15 permission of the court or even to show that, had it been  
16 commencing original process against the claimant, that the  
17 English court would have had jurisdiction in respect of that  
18 claim. And that is because the claimant has, by commencing  
19 its arbitration claim, submitted to the jurisdiction of the  
20 English court without limitation. And the relevant part of  
21 the -- and it may be this is not contentious, but the  
22 relevant parts of the authorities are in *The Gladys* the  
23 speech of Lord Bridge at page 117F to H and in the speech of  
24 Lord Brandon at 128D to 130D.

25 And in *Glencore v Exter* in the first instance

156



1 judgment of Mr Justice Moore—Bick at paragraphs 17 to 19.  
 2 And then in the Court of Appeal at page 1111, paragraph 45  
 3 of the judgment of Lord Justice Rix, with whom Lord Justice  
 4 Robert Walker and Lord Justice Morritt agreed.

5 As so what it is that amounts to a counterclaim,  
 6 some formality is required, but we have here a pleading  
 7 claiming relief. So if the points of claim are not a  
 8 freestanding claim they are, on any view, a counterclaim.

9 In our submission, the judge made an error in  
 10 rejecting this argument because the judge asked himself the  
 11 wrong question. The judge asked the question: who is the  
 12 effective claimant? Now, that is the correct question to  
 13 ask when one is considering a security for costs issue,  
 14 where you have claim and counterclaim defendant. You have  
 15 to identify one effective claimant. But to ask the question  
 16 whether there is a counterclaim doesn't require asking the  
 17 question who is the effective claimant, because, by  
 18 definition, all that one is looking for is a claim made by  
 19 a — someone who starts out as a defendant or a  
 20 respondent —

21 LORD JUSTICE PATTEN: Well, they can't be  
 22 freestanding claims, can they, unless there's — unless  
 23 your — your application, your claim has — is a separate  
 24 action.

25 MR SMOUHA: Agreed. So it's either one. It's

157

1 either the formulation your Lordship put to me.

2 LORD JUSTICE PATTEN: Yes.

3 MR SMOUHA: It's —

4 LORD JUSTICE PATTEN: And if the right way of  
 5 looking at them is that they're counterclaims then, just  
 6 let's be clear, the Notice of Discontinuance of the claim  
 7 doesn't destroy the counterclaim, does it?

8 MR SMOUHA: Correct. And that's common ground.  
 9 Exactly so.

10 LORD JUSTICE PATTEN: So really it all comes down  
 11 to paragraph 36 of the judgment, where he says that  
 12 paragraph 2 of the 27 June order, as he puts it, simply sets  
 13 out the framework under which the parties' contentions will  
 14 be set out.

15 MR SMOUHA: Yes.

16 LORD JUSTICE PATTEN: In other words, it — he  
 17 says that the — the pleadings and so on don't do any more  
 18 than — than specify what the issues are really, on your  
 19 side, by way of defence to the claim.

20 MR SMOUHA: Yes, we — but we say that they —  
 21 that formulation — asking the question whether it sets out  
 22 the framework doesn't answer the question whether there is a  
 23 freestanding claim or a counterclaim.

24 LORD JUSTICE PATTEN: Yes.

25 MR SMOUHA: Would your Lordships just give me one

158

1 moment?

2 LORD JUSTICE PATTEN: Of course.

3 MR SMOUHA: (Pause). My Lords, I should just,  
 4 formally, indicate that, as your Lordships will have seen,  
 5 we also have a respondent's notice point that if the court  
 6 acceded to the appellants' arguments on 38.4 that abuse of  
 7 process was a precondition then, by respondent's notice, we  
 8 say even that necessary precondition would be satisfied on  
 9 the facts. But I don't need to develop that. That's in our  
 10 skeleton.

11 Unless I can assist your Lordships further, those  
 12 are our submissions.

13 LORD JUSTICE PATTEN: No. Thank you very much  
 14 Mr Smouha. Yes.

15 Submissions by MR FOXTON

16 MR FOXTON: My Lords, obviously one of Mr Smouha's  
 17 main responses — and I entirely understand why — is to  
 18 seek to say that there is no territory left for an argument  
 19 of principle in the light of the judge's findings or, if  
 20 there is, it is one that has to apply in any set of  
 21 circumstances, however extreme they might be. Anything less  
 22 than that, he would say, is an attempt to simply reopen the  
 23 discretion —

24 LORD JUSTICE PATTEN: Attack the discretion, yes.

25 MR FOXTON: I had thought at one stage in

159

1 Mr Smouha's submissions we might be heading towards  
 2 Hohfeld's Fundamental Legal Conceptions; but there are  
 3 occasions when I know Dworkin makes his presence felt in  
 4 these courts; and he does have an absolute contrast between  
 5 rules, that have all or nothing effect, and principles that  
 6 have weight.

7 The rule of civil procedure is not so hidebound.  
 8 Courts are understandably reluctant to formulate principles  
 9 in absolute terms because of the risk that there may be some  
 10 unforeseen category of case which might require a separate  
 11 result, but nonetheless formulate what I think Lord Justice  
 12 Moses and the argument in Gater referred to as higher order  
 13 principles, namely those that, save in the most exceptional  
 14 circumstances, will carry the day. In Gilbert and Sullivan  
 15 terms we're saying if not never than hardly ever.

16 The difficulty that my learned friend faces with  
 17 the judge's judgment is he did not acknowledge that he was  
 18 in the presence of an higher order principle, an argument  
 19 which we say was of such overwhelming force in relation to  
 20 the proper role of this court once the enforcement was no  
 21 longer a live issue, that factor is nowhere brought to bear  
 22 in his ruling on CPR 38.4.

23 And what is absolutely striking, and has managed  
 24 to escape submission by the respondents, is he does  
 25 acknowledge that in paragraph 32, when explaining why the

160

1 English court could not be an appropriate court to give  
2 declaratory relief absent ongoing enforcement.

3 And so we say the procedural trap that Mr Smouha  
4 seeks to lay cannot be sprung because both of the internal  
5 inconsistency within the judgment in that respect and  
6 because even if there are some extreme cases, in which it  
7 may be that the court would nonetheless go ahead and  
8 determine the enforcement issue, notwithstanding that  
9 perhaps between the handing down of a draft and a hearing, a  
10 claimant said: I no longer wish to enforce. We are nowhere  
11 near any of them.

12 Now, we do say that principle would apply even if  
13 there were evidence that the English court's decision would  
14 have preclusive effect elsewhere. But we do have the  
15 alternative argument that, in any event, to overcome it,  
16 something very much more than the thin gruel the judge  
17 offered in the form of "not without use" and "possible" is  
18 going to be necessary to overcome the argument.

19 And, my Lords, we don't accept that that argument  
20 is not raised by our notice of appeal. I think my Lord,  
21 Lord Justice David Richards, had referred to the formulation  
22 of our ground 1 and 2.

23 And ground 2 — this is in core bundle, tab 1,  
24 page 15 — asked this court to overturn the judge because  
25 the judge erred in holding a legitimate interest could be

161

1 constituted by a possibility that a judgment of the English  
2 court would not be without use.

3 So we were, plainly, advancing our principle that  
4 the structure of the New York Convention and the role of the  
5 court required, in almost, save exceptional circumstances,  
6 that this court cease, once the active enforcement had  
7 ceased, its legitimate interest was exhausted. But, in the  
8 alternative, if there were circumstances in which that could  
9 be overcome, the very luke-warm findings that the judge was  
10 persuaded to make in terms of the utility of the judgment,  
11 would not begin to achieve that end.

12 My learned friend referred to Mr Justice Eder's  
13 judgment in *Diag* in which he held that the English court, as  
14 an enforcement court, could find that one of the issues  
15 before it was the subject of an issue estoppel arising from  
16 a decision of another enforcement court — the Austrian  
17 court.

18 That is not a decision without its critics; and  
19 I suspect that different national jurisdictions may take  
20 different views on whether issues of — by other enforcement  
21 courts will give rise to preclusion or not.

22 But, with respect, there are two very significant  
23 differences here, even leaving aside the question of  
24 principle. There is all the difference in the world between  
25 a decision of a court fulfilling its New York Convention

162

1 function of deciding whether live enforcement should be  
2 permitted, having a binding effect in another court  
3 fulfilling its New York Convention function of determining  
4 whether enforcement should be permitted, and what is  
5 contemplated here, which is a decision of a court where  
6 enforcement is no longer a live issue and can never be a  
7 live issue if the undertakings offered are accepted, itself  
8 reaching a decision — conducting an eight day trial and  
9 reaching a decision for the purpose of assisting and  
10 informing those courts where enforcement does remain a live  
11 issue.

12 And we would say that is a fortiori when the issue  
13 the English court is offering its opinion on is, in New York  
14 Convention rubric, a question of public policy. Because, as  
15 we saw under article 5 — or section 103(3) but article,  
16 I think, 5.3 in particular, the Convention expressly  
17 recognises that it is the enforcement court's own public  
18 policy that it is free to refuse enforcement on; and,  
19 therefore, the very terms of the Convention envisage a  
20 localised effect.

21 Now, up to a point Mr Smouha is correct that the  
22 New York Convention does not purport to control procedure.  
23 There are limits to that. For example, you can't treat  
24 awards from other Convention States any less favourably in  
25 enforcement terms than you treat domestic arbitration

163

1 awards. And anything the court does has to be consistent  
2 with the article 3 obligation to recognise and enforce. But  
3 that whole argument proceeds upon the basis that the  
4 procedure is being applied by a court still acting as an  
5 enforcement court — a court where enforcement is sought.  
6 And our complaint is, as a matter of substance, once the  
7 undertaking is offered no longer to enforce and never to  
8 enforce in this jurisdiction, this court is not  
9 substantively acting as an enforcement court any more; and,  
10 therefore, in purporting to issue rulings to assist others,  
11 it is doing something that the Convention simply does not  
12 provide for or envisage.

13 Mr Smouha posited the example of: oh well, what if  
14 the parties have reached a coordinated staging of  
15 enforcement procedures in various jurisdictions? Does that  
16 make any difference?

17 Now, of course, it is entirely possible that  
18 agreement between the parties that effectively brings  
19 together what, under the Convention, are the separate and  
20 independent activities of enforcement States, might itself  
21 provide some basis for an outcome that involves holding one  
22 party to what they have agreed. But that is of no  
23 assistance in relation to the position here or we would say  
24 in relation to the vast majority of cases in which the  
25 New York Convention enforcement issues come before different

164

1 courts. That is a rare occurrence. I don't know if it has  
2 ever happened; but, if it has, it is the parties' agreement  
3 that is, in effect, being enforced there.

4 Now, much debate upon what was described as my  
5 concession about the order being set aside. In fact, that  
6 did feature at first instance. If we can go to the  
7 transcript in the supplemental bundle at tab 11.

8 LORD JUSTICE PATTEN: Yes.

9 MR FOXTON: My Lord it is page 127 of the bundle  
10 pagination. Mr Sprange QC's submissions to the judge,  
11 beginning at the very last line of that page.

12 LORD JUSTICE PATTEN: Which of the mini pages is  
13 it?

14 MR FOXTON: Page 144 of the mini pages, my Lord.

15 LORD JUSTICE PATTEN: Right. Thank you.

16 MR FOXTON: One begins on line 25 -- I should  
17 begin on line 20, because I think this is the passage that  
18 Mr Smouha was remembering. So the judge has asked:

19 "What happens to the 2014 order that you got from  
20 Mr Justice Burton?"

21 And the answer:

22 "As a technical matter, it is void" -- and that is  
23 the passage my learned friend recalled -- "it doesn't exist  
24 any more because the proceedings don't exist. So when an  
25 order was made the proceedings were brought to an end. So

165

1 it has no legal life, no legal substance. I also say this,  
2 my Lord: if that was the only issue left, if that was the  
3 only point of concern, it would be very easy for there to be  
4 an order made that dismissed or set aside that order."

5 But, of course, we're here not because of some  
6 obstacle raised by the issue of whether or not  
7 discontinuance should be on terms that the order of  
8 Mr Justice Burton was set aside; and I indicated to my Lord,  
9 Lord Justice Leggatt, we're very happy to say that is what  
10 should happen now, just as Mr Sprange QC was happy to tell  
11 the judge that's what happened.

12 The reality is it is the word "on the merits" that  
13 are the key to what Kazakhstan are seeking to achieve, not  
14 any concern that Mr Justice Burton's order may somehow  
15 mislead the court. And if there is any such concern we of  
16 course accept that the order should be set aside.

17 The separate action point. It is helpful to look  
18 at how Mr Malek QC, in his skeleton argument, introduced  
19 that draft order. The wording came from the parties and not  
20 from the court. And that is in supplemental bundle, tab 2.

21 My Lord, it's a document where each side has their  
22 favourite paragraphs. Therefore, it is right that I show  
23 you both.

24 Paragraph 1, we say, is absolutely spot on as to  
25 what the court is being asked to give directions in.

166

1 "Kazakhstan has permission to pursue its  
2 contention that the court should refuse to enforce the award  
3 because it was procured by fraud", ie it's the set aside  
4 application.

5 In his skeleton Mr Smouha referred to, and  
6 therefore it's right that I should refer you to, paragraph 4  
7 over the page, which we say adds nothing to what the judge  
8 understood the position would be. And we'd -- that the --  
9 as if reference to CPR part 7 was providing a framework to  
10 reflect the fact that this was going to be an evidence heavy  
11 hearing, with disclosure and so forth.

12 And if independent claims are being made, it is  
13 rather important that that is -- emerges with clarity. One  
14 of the reasons why counterclaims require formality, we would  
15 submit, is exactly that. It clearly escaped the judge that  
16 when being asked to approve an order in these terms he was  
17 being asked to give life to an independent claim.

18 Independent claims raise issues of security for  
19 costs. They raise, per Mr Smouha's Gladys point, the  
20 ability of a party to bring a counterclaim to a  
21 counterclaim, opening up the territorial jurisdiction of the  
22 court.

23 And in this context, had the issue surfaced  
24 clearly, it would have raised the issue about whether a  
25 counterclaim was permissible under the New York Convention;

167

1 and the judge might have been some of the doctrine and  
2 foreign case law on that point.

3 The short answer is that the judge in paragraph 36  
4 was absolutely right as to what was intended and what was  
5 ordered.

6 Penultimately, I think, on my part, enforcement as  
7 a fraud on the English court. We have here an award that is  
8 and remains valid under the law of its seat. The highest  
9 court in Sweden has rejected the challenge to this award  
10 under curial law.

11 It cannot be said, I think, by Mr Smouha, that,  
12 therefore, the action to enforce the award in Sweden -- and  
13 that is happening -- is a fraud on the Swedish court. And  
14 yet it is said that the action to enforce the very same  
15 award here is a fraud on the English court.

16 The reason that those two irreconcilable  
17 statements cannot stand together is that the action to  
18 enforce a valid award is not a fraud on the court. Fraud,  
19 through the medium of public policy, may provide a defence  
20 to that action. It provides a purely localised defence, but  
21 it does not make the application itself a fraudulent action.  
22 If it were, it is impossible to see how it could be  
23 fraudulent in some jurisdictions and not in others.

24 And, from a practical perspective, the idea of the  
25 eight day trial to determine -- require proceedings to

168

1 continue to determine if the pursuit of those proceedings is  
2 a fraud on the court is a rather startling notion.

3 LORD JUSTICE PATTEN: I mean, is it -- I mean,  
4 does -- I think on their -- on their case, you approach the  
5 point you've just made on the basis that the judge, I think,  
6 in his earlier decision -- the 2017 decision -- concluded  
7 that the Swedish appeal court had not decided this question  
8 of fraud, at least as a factual issue in relation to this  
9 indirect fraud. I mean, if I've understood it all correct,  
10 that the real issue is not -- not whether the money was  
11 spent but what impact all of that had, assuming that was  
12 right, on the -- on the offer that was made. Whether  
13 there's -- whether there's a connect or a disconnect between  
14 those two things in terms -- because all this goes to the  
15 valuation question.

16 MR FOXTON: Of the LPG plant, yes, which is part  
17 of the --

18 LORD JUSTICE PATTEN: Exactly. I mean, it is not  
19 enough to show that you perhaps didn't -- the real question  
20 is: what was the basis of the valuation which the Tribunal  
21 adopted in -- in assessing the quantum of the award?

22 Now -- but, anyway, never mind the detail of it.

23 MR FOXTON: Yes.

24 LORD JUSTICE PATTEN: I mean, the premise for all  
25 this is that, according to the 2017 order, is that somehow

169

1 there's a sort of -- there's a bit missing from the --  
2 I mean, I'm not proposing, at this point in the proceedings  
3 to start re-opening that. I mean, I find that -- I'm not  
4 sure I quite follow that; but, anyway, I mean, that's  
5 clearly what the judge has decided and -- and there's been  
6 no appeal from --

7 MR FOXTON: My Lord, that ship has sailed so far  
8 as this jurisdiction is concerned.

9 LORD JUSTICE PATTEN: Yes, quite.

10 MR FOXTON: But the Swedish court is also saying  
11 that, whatever was produced, was not enough to render that  
12 an award that can be invalidated on grounds of fraud in  
13 Sweden, being the supervisory court. And, given that,  
14 whilst an application to enforce that award might fail in  
15 some jurisdictions and succeed in others, depending upon,  
16 first of all, what their own approach to those issues is;  
17 and, secondly, what deference they offered Sweden, it cannot  
18 be described as a fraud on the court.

19 LORD JUSTICE PATTEN: No.

20 LORD JUSTICE LEGGATT: There's also my example of  
21 an ICSID award, which might have been fraudulently obtained,  
22 but that's no -- the fact it is contrary to English public  
23 policy is no defence. But if the respondent's reasoning  
24 were right, a defence would pop up after all because it  
25 would be a fraud on the English court.

170

1 MR FOXTON: My Lord, we of course forensically  
2 adopt the argument. But it is a useful way of testing. The  
3 phrase "fraud on the court" has a certain ring to it, but it  
4 is always worth drilling down and seeing quite what does it  
5 entail.

6 Finally -- and Mr Smouha began by producing the  
7 most recent case management order. It is correct, of  
8 course, that attempts have been made to move the case on, in  
9 accordance with existing timetables. And that is absolutely  
10 as it should be unless and until we persuade this court that  
11 the order that started this process running or at least the  
12 order that was under appeal was not rightly made.

13 We do submit that the position doesn't get any  
14 better simply -- if it's wrong, simply because it was acted  
15 on in the meantime.

16 I do note from that order that we now have,  
17 I think, three different categories of expert evidence at  
18 this fraud trial.

19 Now, the judge thought this was a reasonable use  
20 of court resource, for the purposes of providing material  
21 that might not be without assistance, or whatever the phrase  
22 was, to other courts. It is certainly, at a time of  
23 shortage of judicial person power, quite a striking use of  
24 judicial resource. And we do invite the court, given the  
25 various matters that we've raised, to conclude it was an

171

1 entirely inappropriate use of resource; and that the  
2 legitimate interest of this court, in this process, came to  
3 an end at the stage when the prospect of enforcement came to  
4 an end.

5 My Lords, unless I can assist further.

6 LORD JUSTICE PATTEN: No. Thank you very much,  
7 Mr Foxton.

8 We're going to rise for five minutes.

9 (4.17 pm)

(Short Break)

10 (4.22 pm)

11 LORD JUSTICE PATTEN: Mr Foxton and Mr Smouha,  
12 I am afraid we are not in the position to give you an answer  
13 this afternoon. I mean, the case is not without some  
14 complexity on both sides. We do understand the urgency of  
15 it, in terms of the trial in October; and we will obviously  
16 endeavour to produce our judgments as soon as we are able  
17 to, notwithstanding that we're now into the vacation. But,  
18 at the moment, as I say, I'm not -- we're not able to give  
19 you a decision this afternoon. And we will consider our  
20 judgments, but with a view to producing them, as I say, as  
21 soon as we can.

22 MR FOXTON: We are extremely grateful, my Lord.

23 LORD JUSTICE PATTEN: Thank you very much.

24 (4.20 pm)

172

1 (Hearing concluded) 175  
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 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25

173

1 INDEX PAGE  
 2  
 3 Submissions by MR FOXTON .....1  
 4 Submissions by MR SMOUHA .....68  
 5 Submissions by MR FOXTON .....159  
 6  
 7  
 8  
 9  
 10  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25

174

A							
<b>ab (1)</b> 123:11	<b>acting (3)</b> 65:12 164:4,9	<b>again (17)</b> 20:23 23:14	139:18,19 140:8	161:20 169:7 170:6	60:2 108:4 116:15	<b>arises (2)</b> 24:5 109:2	
<b>abandon (1)</b> 16:20	<b>action (25)</b> 21:24	30:21 48:13 54:22	153:18 171:4	171:12	136:8 169:4 170:16	<b>arising (4)</b> 4:16 34:8	
<b>abandoned (7)</b> 15:4,7	22:12,14 24:1,13	62:15 67:6 72:20	<b>amend (1)</b> 19:12	<b>appealing (2)</b> 22:7	<b>approached (1)</b> 61:20	141:16 162:15	
20:22 32:17 50:6	25:25 40:19 41:9 60:9	81:10 93:24 94:16	<b>america (1)</b> 52:20	23:23	<b>approaching (2)</b> 59:14	<b>arose (4)</b> 67:14 85:4,12	
56:20 139:15	71:23 126:17	96:20 112:20 119:2,2	<b>among (1)</b> 99:11	<b>appeals (1)</b> 56:1	98:11	103:9	
<b>abandonment (1)</b> 40:21	128:12,15	133:19 140:9	<b>amount (1)</b> 155:15	<b>appear (4)</b> 1:4,7 116:18	<b>appropriate (17)</b> 4:9	<b>around (5)</b> 95:12 114:23	
<b>abandonment (2)</b> 15:25	129:6,18,20,23 145:5	<b>against (14)</b> 20:21	<b>amounted (1)</b> 88:20	154:1	24:12 39:4 40:5 46:20	115:12 121:23 148:5	
<b>ability (3)</b> 139:9 154:18	157:24 166:17	39:15 45:25 55:18	<b>amounts (3)</b> 24:17	<b>appeared (1)</b> 19:8	49:1 51:20 56:21 57:8	<b>arrangements (1)</b>	
167:20	168:12,14,17,20,21	69:17 72:14 74:3	142:6 157:5	<b>appearing (1)</b> 52:15	62:4 76:15 92:2 96:15	114:15	
<b>able (16)</b> 1:18 31:25	<b>actions (1)</b> 129:2	99:13 107:19 113:1	<b>analogous (3)</b> 112:1	<b>appears (6)</b> 12:10	108:17 111:22 141:17	<b>article (9)</b> 29:16 30:12	
34:7,13 35:2 44:3	<b>active (13)</b> 16:1 25:18	116:17 147:3	122:10,12	20:9,13 23:14 136:1	161:1	38:6 47:10 86:24	
53:21 54:21 84:5	31:25 32:8,9,15 35:14	156:13,16	<b>analysing (1)</b> 47:14	154:3	<b>appropriateness (1)</b>	87:21 163:15,15 164:2	
88:24 92:17 106:15	37:24 46:12 50:10	<b>ago (5)</b> 11:14 15:5,13	<b>analysis (3)</b> 36:2 108:22	<b>appellant (5)</b> 69:9	51:14	<b>articles (1)</b> 49:15	
121:23 139:8	55:20 58:18 162:6	56:24 92:15	109:24	88:18 93:16,25 144:9	<b>approve (1)</b> 167:16	<b>aside (114)</b> 6:11,15 8:3	
172:17,19	<b>activities (1)</b> 164:20	<b>agree (4)</b> 34:17 35:16	<b>anchored (3)</b> 74:25	<b>appellants (12)</b> 1:5 3:21	<b>approved (1)</b> 92:12	9:3,4,8,17,23 10:5	
<b>absence (2)</b> 44:5 96:17	<b>actual (2)</b> 9:19 83:5	139:18 142:17	132:21 133:5	76:18 81:5 84:5 94:13	<b>april (3)</b> 87:19 131:16	11:16,19 14:4,10,12	
<b>absent (6)</b> 78:9	<b>actually (17)</b> 27:7 33:8	<b>agreed (3)</b> 157:4,25	<b>andor (1)</b> 63:23	114:25 116:6 138:5	132:3	15:8 21:15,18 22:10	
99:23,25 149:12 150:6	73:18,25 82:15 83:5	164:22	<b>annexed (1)</b> 132:3	153:10,21 159:6	<b>arbitrary (3)</b> 120:10	24:7 28:22	
161:2	92:7 98:16 104:11	<b>agreement (5)</b> 13:11	<b>another (6)</b> 32:7 85:7	<b>appellate (1)</b> 57:23	121:20 123:21	29:5,10,11,19 30:14	
<b>absolute (3)</b> 1:25	113:17 122:22 126:3	28:1 106:5 164:18	86:12 111:3 162:16	<b>applicable (1)</b> 116:22	<b>arbitration (57)</b> 3:23	32:10 36:21,25 39:9	
160:4,9	133:22 137:19,20	165:2	163:2	<b>application (120)</b> 4:13	4:14,15 5:6 6:13,25	42:1 45:6 51:11 57:11	
<b>absolutely (13)</b> 3:7	144:16 153:11	<b>ahead (4)</b> 28:6 106:4	<b>answer (33)</b> 2:19 3:24	5:19 6:24	7:5,9,10,14,15	59:1,10 60:20 62:6	
30:17 40:7 50:21 51:8	<b>add (4)</b> 20:14 80:4 90:8	118:17 161:7	19:25 40:9 41:17	7:3,10,13,16,17,19,20	10:20,22 11:16 24:22	63:18 65:23 66:13	
67:7 100:2 111:10	96:7	<b>aid (1)</b> 132:3	45:17 46:17 54:17	8:3,4,5,19 9:4,16	28:16,22 29:1	73:8 75:21,22 76:16	
118:20 160:23 166:24	<b>added (1)</b> 137:3	<b>aikens (5)</b> 53:24 57:18	57:1 65:21 66:21	12:16 14:1,4,6,10,13	33:18,24 34:2,17	91:6 93:19 96:2 97:20	
168:4 171:9	<b>adding (1)</b> 19:13	62:2 116:13 117:11	79:19,25 80:5,6,25	19:23 21:15,18 22:10	38:18 43:14 44:25	98:12,15 101:10	
<b>abstract (1)</b> 115:4	<b>addition (3)</b> 1:11	<b>aiming (1)</b> 14:19	97:18 99:12 101:4	27:12,14 30:13 31:5	45:11,14 55:19	103:6,19 108:7	
<b>abuse (11)</b> 59:23 71:1,8	136:24,24	<b>albeit (3)</b> 46:4 58:12	102:1,22 106:20	34:13 36:21 39:9	61:12,18,23 64:1	110:20,22 113:8,16,22	
94:21 100:1 139:10	<b>additional (3)</b> 42:2 93:1	109:7	108:10,13 113:13	41:24 43:8 45:3 57:13	68:23 72:23,25 77:23	114:18,19 119:17	
152:9,22 153:18 155:8	147:21	<b>alerted (1)</b> 22:13	127:23 129:5 134:12	58:8,14,25 60:22	78:5 90:23 92:3,4	120:4 121:1,7	
159:6	<b>address (1)</b> 61:19	<b>alibi (1)</b> 30:12	148:9 158:22 165:21	61:11 62:1 69:23	94:12 95:13 96:23	123:7,11 124:6,14,18	
<b>accede (1)</b> 60:22	<b>address (6)</b> 3:19 4:6	<b>allegation (2)</b> 6:20	168:3 172:13	70:21 73:8 75:21 91:6	100:15 112:3 125:20	125:4 126:2 130:23	
<b>acceded (1)</b> 159:6	16:5 71:5 101:6	83:24	<b>answering (2)</b> 113:25	97:20 98:11,15 108:6	126:6,24,24 128:6	131:5,7,11,18,22	
<b>accept (15)</b> 13:6 15:10	107:21	<b>allegations (5)</b> 22:10	114:1	111:19,20,20 112:14	138:17,22 146:8	132:5 133:13	
16:7 34:24 47:3,17	<b>addressed (3)</b> 6:21	72:5 73:1 99:5,12	<b>answers (3)</b> 100:20	120:15,20 121:1,6	156:4,11,19 163:25	136:12,25	
56:1 57:17 58:12	80:25 105:6	<b>alleged (1)</b> 20:1	118:1 148:20	123:4,18	<b>arbitrators (1)</b> 34:14	144:3,7,19,20	
99:11 127:16 140:25	<b>addresses (2)</b> 8:14	41:5 45:1 46:15 50:8	<b>anterior (1)</b> 39:13	124:6,14,17,18	<b>area (4)</b> 59:8 60:6,9	145:1,25 146:4,11,24	
144:7 161:19 166:16	26:18	65:4 76:23 78:23,23	<b>anticipated (2)</b> 28:19	125:8,12,16,19,24	135:10	147:8,22	
<b>acceptable (1)</b> 3:4	<b>addressing (5)</b> 7:8 25:6	96:5 107:11 111:13,22	38:25	126:4,9,16 127:7,8	<b>arent (3)</b> 59:14 81:16	148:6,11,12,13,16,24	
<b>acceptance (2)</b> 113:15	45:7 99:19 107:20	112:12 151:8	<b>anticipating (2)</b> 9:13	129:17	121:10	149:24 150:2,5 151:14	
144:2	<b>adds (1)</b> 167:7	<b>allowed (7)</b> 53:12 62:22	23:21	131:3,5,7,10,16,17,17,21	<b>argue (2)</b> 30:20 54:22	152:8,14 154:4,7,21	
<b>accepted (5)</b> 66:12	<b>adjourn (1)</b> 30:15	67:16 71:3 117:25	<b>anybody (1)</b> 46:22	132:2,20	<b>argued (8)</b> 55:25 97:3,6	162:23 165:5	
98:25 99:8 122:7	<b>adjourned (1)</b> 9:24	145:1 150:1	<b>anything (8)</b> 23:22	136:11,15,20,22,23,24	101:6 102:1 140:16,18	166:4,8,16 167:3	
163:7	<b>adjournment (4)</b> 89:20	<b>allowing (3)</b> 48:19	55:17 129:21 144:2	137:5 138:12,16,20	151:17	<b>ask (10)</b> 13:9 33:19	
<b>accepting (1)</b> 151:25	90:1 93:13 97:9	49:12 143:3	148:3 150:11 159:21	141:4 143:13	<b>argues (1)</b> 100:11	55:3,4 65:15 94:22	
<b>accepts (2)</b> 48:6 84:14	<b>administration (2)</b>	<b>almost (5)</b> 8:23 29:8	164:1	145:18,24 146:4,10	<b>arguing (1)</b> 144:10	131:10 132:1	
<b>access (1)</b> 138:24	115:22,24	51:22 96:10 162:5	<b>anyway (8)</b> 38:23 48:11	147:11,17,18,25	<b>argument (61)</b> 6:6	157:13,15	
<b>accord (1)</b> 58:16	<b>administrative (7)</b> 9:1	65:14	64:25 74:24 81:15	148:16 149:20,24	12:14 18:13 24:5	<b>askance (1)</b> 51:17	
<b>accordance (6)</b> 6:23	42:12 44:7 105:19	<b>along (3)</b> 39:12 57:25	135:1 169:22 170:4	152:21 157:23 167:4	25:12 32:22 34:11	<b>asked (23)</b> 22:18 23:16	
57:13 63:5 90:19	107:20 108:3,8	65:14	<b>anywhere (1)</b> 62:17	168:21 170:14	35:21,21 38:25	26:5 52:4 61:21	
129:2 171:9	<b>admitting (1)</b> 49:14	<b>already (12)</b> 39:3 62:18	<b>apart (10)</b> 30:17 71:4	<b>applications (3)</b> 25:2	39:2,20 40:24 41:19	62:12,13 66:10 80:23	
<b>according (1)</b> 169:25	<b>adopt (2)</b> 61:25 171:2	77:13 81:12 97:2	72:7,8 99:3 103:11	39:16 58:7	43:19,21 48:15	90:4 102:14 103:3	
<b>accordingly (1)</b> 110:20	<b>adopted (2)</b> 31:20	100:11 113:4	119:18 139:5 149:8,8	<b>applied (11)</b> 9:3 10:6	50:2,14 55:1,10,11	131:12,13 132:4	
<b>accords (1)</b> 58:2	169:21	155:15	<b>apologise (1)</b> 2:6	70:25 110:14 122:15	64:15 71:11 79:19	155:18 157:10,11	
<b>account (3)</b> 99:17	<b>adopts (1)</b> 36:12	<b>also (23)</b> 6:19 9:22	<b>app (1)</b> 126:3	124:22 125:5,8 152:15	85:18 91:14 93:17,17	161:24 165:18 166:25	
107:14 118:19	<b>advance (2)</b> 37:20 69:9	27:11 29:23 56:11	<b>appeal (71)</b> 1:11 4:7	156:8 164:4	96:7 100:1 101:15	167:16,17	
<b>accurate (2)</b> 71:12	<b>advanced (6)</b> 9:9 71:7	57:17 58:15 67:25	10:9 11:10 12:11,16	<b>applies (6)</b> 56:23 60:19	105:11,21,24 106:17	<b>asking (10)</b> 40:21 41:2	
120:6	85:20 97:5,6 114:19	83:25 96:7 99:2 101:3	13:5,16 16:8,12,21	109:22 123:16,16	107:19 110:12 114:22	49:18 51:22 118:11	
<b>accurately (1)</b> 25:25	<b>advancing (1)</b> 162:3	110:20 112:11 114:1	19:16,18 20:23,25	154:7	116:2 140:10	125:1 138:12,22	
<b>achieve (5)</b> 148:3	<b>advantage (1)</b> 110:16	117:23 124:17 126:15	40:8 43:1 48:25 49:25	<b>apply (19)</b> 12:1	142:6,15,15 144:21,24	157:16 158:21	
150:10 152:1 162:11	<b>adverse (1)</b> 25:13	142:19 159:5 166:1	56:3 57:4,6 68:21	43:1,13,20 45:6 53:5	150:20 151:7,20	<b>asks (2)</b> 35:11 138:23	
166:13	<b>advisory (3)</b> 53:25	<b>alternative (5)</b> 63:15	69:9,11,17,20,24	59:8 106:18 108:20	152:10 153:21 157:10	<b>aspect (2)</b> 121:16	
<b>achieved (4)</b> 113:17	100:10 115:2	64:15 144:25 161:15	70:22,24 71:9	109:17 110:3 125:25	159:18 160:12,18	142:20	
121:12 144:11,11	<b>affected (1)</b> 127:4	162:8	73:10,12 76:13,18	127:6,13 135:25 146:9	161:15,18,19 164:3	<b>aspects (1)</b> 100:22	
<b>achievers (1)</b> 60:7	<b>affects (1)</b> 37:12	<b>alternatively (1)</b> 130:21	77:9,20 81:5 84:3	154:4 159:20 161:12	166:18 171:2	<b>assessing (1)</b> 169:21	
<b>acknowledge (2)</b>	<b>afford (1)</b> 99:12	<b>although (7)</b> 9:8 19:1	88:18 93:16,25 94:7	<b>appreciated (1)</b> 106:10	<b>arguments (9)</b> 41:21	<b>assessment (2)</b> 95:5	
160:17,25	<b>afraid (5)</b> 2:1,16 47:11	38:25 41:14 49:4 61:1	95:11 96:8,16,19	31:18 41:14 57:22	42:2 62:21 75:25 93:2	116:12	
<b>across (2)</b> 101:12	61:14 172:13	115:9	97:15 98:20 99:20		96:25 97:8 98:16	<b>assets (1)</b> 42:16	
108:20	<b>after (8)</b> 64:23 69:6	<b>always (10)</b> 30:25 37:19	100:5,18 102:1 103:22		159:6	<b>assimilated (1)</b> 45:11	
<b>acted (1)</b> 171:14	89:19 114:4 123:13	63:2 79:6 103:18	104:4,11 107:22		<b>arise (10)</b> 78:20 79:7	<b>assist (11)</b> 20:10 24:18	
	131:18 133:22 170:24		127:23 143:20 144:12		85:2,5,22 87:5 108:15	25:19 52:9 70:9 79:2	
	<b>afternoon (2)</b> 172:14,20		148:9 151:6,8 152:11		132:10 134:6 151:1	118:1 152:18 159:11	
	<b>afterwards (1)</b> 63:3		155:6 156:8 157:2		<b>arisen (2)</b> 46:23 52:2	164:10 172:5	

<p><b>assistance (27)</b> 18:4 34:1 47:2 53:19,22 54:10 63:19 64:9 68:12 79:22 84:7 86:12,16 88:11,19 89:2 94:4 100:23 101:8,19 106:12 116:4,7,8,24 164:23 171:21</p> <p><b>assisted (1)</b> 117:8</p> <p><b>assisting (4)</b> 32:5 38:6 67:4 163:9</p> <p><b>assume (6)</b> 45:23 53:17 68:17 145:10,23 146:10</p> <p><b>assuming (2)</b> 28:6 169:11</p> <p><b>attached (1)</b> 126:1</p> <p><b>attack (4)</b> 35:15 56:15 77:17 159:24</p> <p><b>attempt (19)</b> 14:20 15:3,6 16:1 22:1 31:3,25 32:15,17 33:1 50:5 63:23,25 66:17 68:25 71:25 77:7 87:17 159:22</p> <p><b>attempted (3)</b> 14:6 48:19 112:19</p> <p><b>attempting (1)</b> 26:11</p> <p><b>attempts (7)</b> 14:10 30:10,19 52:13 66:18 67:1 171:8</p> <p><b>attention (4)</b> 26:6 63:5 107:4 117:4</p> <p><b>austria (2)</b> 87:18,18</p> <p><b>austrian (2)</b> 88:2 162:16</p> <p><b>authenticated (1)</b> 5:20</p> <p><b>authorities (17)</b> 5:6 13:16 29:15 33:20 42:17 52:22 60:23 65:19 66:2 72:20 85:8 116:5 122:23 152:12 153:15 156:2,22</p> <p><b>authority (6)</b> 6:12 29:24 57:10 77:25 94:13 153:5</p> <p><b>automatic (1)</b> 147:8</p> <p><b>autonomy (8)</b> 58:3,10,16,21,22 59:8 60:4,6 <b>available (5)</b> 17:22 48:7 49:10 125:4 138:17</p> <p><b>avoid (3)</b> 86:13 119:1 143:5</p> <p><b>award (147)</b> 4:14,15,18,24,25 5:2,11,15,18,20 6:4,5,8,11,15,17,21,24 7:11 9:2,12,23 10:5,20,21 11:16,19 14:21 23:3,5 24:10 25:3,5 28:22 29:5,19,22 30:9,10,18,20 31:1,4,10,13 32:3,9,10,16,21 33:2,2,15 34:3,21 35:7,15,23 36:16,22 38:5 39:25 40:1,20 42:22,22 43:8 44:3,5,6 45:5,25 47:22 48:7 62:14,25 64:1 68:23 70:11 73:16 74:8</p>	<p>78:1,7,18 79:10 86:18,20 87:4,9,12,17,20 90:17 95:14,14 101:21 102:11 107:11 112:4,5,6,9,10 114:12 118:23 120:10,14 121:20 123:21,23 124:11,23 125:3 130:20 131:25 133:14,24 134:11,15,18 136:2 138:5,9,10,13,21,23,23 139:1,4 141:3,5,14,17 142:3,8 146:9 167:2 168:7,9,12,15,18 169:21 170:12,14,21</p> <p><b>awards (11)</b> 3:23 28:16 29:10,11 33:14 39:16 42:9 47:11 72:25 163:24 164:1</p> <p><b>aware (3)</b> 46:25 57:23 61:25</p> <p><b>away (1)</b> 32:16</p> <hr/> <p style="text-align: center;"><b>B</b></p> <hr/> <p><b>b (1)</b> 45:15</p> <p><b>back (27)</b> 7:21 13:2 16:5 17:20 19:20 23:11 24:15 35:10 67:6 68:1 79:24 84:11 89:19 90:12,13 91:24 94:7 98:10 99:8 110:6 112:20 113:11,18 136:10 140:8 142:15 144:5</p> <p><b>background (1)</b> 72:15</p> <p><b>backtrack (1)</b> 13:10</p> <p><b>baillii (1)</b> 38:10</p> <p><b>bank (1)</b> 123:8</p> <p><b>base (1)</b> 155:20</p> <p><b>based (2)</b> 70:2 116:11</p> <p><b>bases (2)</b> 54:25 95:6</p> <p><b>basically (2)</b> 99:24 110:23</p> <p><b>basis (35)</b> 9:11 12:17 14:7 16:10 19:13 24:11 28:25 29:5 32:12,24 33:3 39:5 53:9 54:24 60:19 87:10 93:8 97:10 104:1 109:22 110:14,16 111:11 112:15 118:23 119:14 123:3 124:18 139:3 150:17 155:11 164:3,21 169:5,20</p> <p><b>bear (2)</b> 109:12 160:21</p> <p><b>bearing (4)</b> 111:14,23 143:6 155:6</p> <p><b>beatson (1)</b> 117:23</p> <p><b>became (2)</b> 41:24 129:1</p> <p><b>become (4)</b> 55:6 56:2 75:23 120:21</p> <p><b>becomes (1)</b> 54:8</p> <p><b>becoming (1)</b> 9:18</p> <p><b>beefed (1)</b> 147:16</p> <p><b>before (44)</b> 2:17 7:21 9:10,15,23 10:3 11:7,22 12:14 14:1,18 16:14 17:22 18:18 19:8 21:13 30:14 32:10 39:18 42:25</p>	<p>45:19 51:15 55:24 61:21,23 68:5,12 73:15 81:1 86:9 89:10 93:12,12,13 96:8 97:9 99:1 101:17 110:9 128:7 152:8 156:5 162:15 164:25</p> <p><b>began (2)</b> 4:13 171:6</p> <p><b>begin (5)</b> 3:15 48:20 114:22 162:11 165:17</p> <p><b>beginning (3)</b> 7:7 8:8 165:11</p> <p><b>begins (4)</b> 23:2 43:17 131:6 165:16</p> <p><b>begs (1)</b> 133:2</p> <p><b>begun (1)</b> 55:20</p> <p><b>behalf (1)</b> 100:6</p> <p><b>being (59)</b> 3:8,9 8:4 14:8 16:11 22:18 23:7,12,16 24:14 29:21 33:2 40:14,19 44:3,12,21 52:4,10 54:1,21 59:24 61:10 66:10 67:24 69:1 70:12 79:6,9,10 91:14 95:20 100:18 106:6,13,15 114:18 118:25 119:2 120:4 123:22,23 126:15 128:25 129:21 130:1 132:22 143:21 144:14 147:3 152:10 164:4 165:3,5 166:25 167:12,16,17 170:13</p> <p><b>belgian (1)</b> 17:23</p> <p><b>belgium (1)</b> 83:7</p> <p><b>believe (1)</b> 71:16</p> <p><b>below (14)</b> 55:25 72:11 95:19,20,22 122:6 128:7 139:23 140:12 144:24 147:12 151:11,17,20</p> <p><b>benefit (5)</b> 33:6 51:15 52:5 60:1,3</p> <p><b>benefited (1)</b> 54:20</p> <p><b>bermuda (1)</b> 38:18</p> <p><b>best (1)</b> 152:18</p> <p><b>better (2)</b> 49:14 171:14</p> <p><b>between (37)</b> 1:18 10:21 11:1,2 18:22 33:11 35:17 45:15,22,23 46:1 48:18 50:3 69:5 76:21 77:10,12,24 78:20 84:23 88:12 94:12 95:12 96:25 101:13 106:5,23 110:24 111:23 118:4 123:10,22 160:4 161:9 162:24 164:18 169:13</p> <p><b>beyond (6)</b> 9:6 64:13 68:1 74:10 112:8 142:23</p> <p><b>bhalla (1)</b> 1:5</p> <p><b>big (1)</b> 44:11</p> <p><b>bigger (2)</b> 143:18,22</p> <p><b>billion (1)</b> 114:13</p> <p><b>bind (1)</b> 69:14</p> <p><b>binding (10)</b> 84:18 85:6 86:19,20 87:1,4,9,20 153:4 163:2</p> <p><b>bit (6)</b> 8:7 13:5 38:17 73:15 154:12 170:1</p>	<p><b>bizarre (1)</b> 150:16</p> <p><b>blowing (1)</b> 73:17</p> <p><b>boils (1)</b> 41:15</p> <p><b>book (3)</b> 49:8 155:4,5</p> <p><b>both (14)</b> 3:20,24 32:19,20 35:19 51:21 53:7 57:14 81:15 114:7 120:19 161:4 166:23 172:15</p> <p><b>bottom (2)</b> 7:7 152:19</p> <p><b>bound (8)</b> 13:4 76:22,22 80:9 96:1 102:4 103:18 116:15</p> <p><b>brandon (1)</b> 156:24</p> <p><b>breach (2)</b> 65:22 123:5</p> <p><b>breached (1)</b> 4:21</p> <p><b>break (1)</b> 172:10</p> <p><b>bridge (1)</b> 156:23</p> <p><b>brief (2)</b> 3:15 4:10</p> <p><b>briefly (5)</b> 14:14 17:4 19:19 29:13 52:21</p> <p><b>bright (1)</b> 115:20</p> <p><b>bring (12)</b> 10:22 14:7 39:6 42:7 47:23 121:7,14 144:13 145:7 150:12 155:1 167:20</p> <p><b>bringing (3)</b> 22:14 110:9 119:8</p> <p><b>brings (7)</b> 28:14 49:3,24 57:3 61:23 137:23 164:18</p> <p><b>brink (1)</b> 71:24</p> <p><b>broad (3)</b> 61:3 85:20 153:16</p> <p><b>broader (1)</b> 47:21</p> <p><b>broadly (1)</b> 60:25</p> <p><b>brought (16)</b> 4:15 12:16 16:13 21:19,24 43:14 58:7,8,8 83:16 123:22 126:13 139:14 147:2 160:21 165:25</p> <p><b>brown (1)</b> 152:21</p> <p><b>buffed (1)</b> 56:2</p> <p><b>building (1)</b> 62:23</p> <p><b>bundle (35)</b> 5:6 7:4 10:14 13:16 17:5,6 21:8 22:22 33:20 42:17 50:15,15 52:22 56:9,12 65:19 66:2 72:12,20 81:25 85:8 94:8 96:10 110:7,8 116:5 119:22 122:23 128:23 130:10 140:20 161:23 165:7,9 166:20</p> <p><b>bundles (2)</b> 13:16 27:17</p> <p><b>bundletab (2)</b> 90:13 96:20</p> <p><b>burton (18)</b> 8:18 21:16 47:5 63:21 113:9,22 123:18 124:24 126:2 127:7 130:24 144:19 145:2,21 146:23 150:14 165:20 166:8</p> <p><b>burtons (14)</b> 9:4,17,22 14:4 39:10 113:15 119:16,21 124:14 127:15 132:5 147:21 151:18 166:14</p> <p><b>business (3)</b> 54:12 105:20 128:24</p> <p><b>buxton (2)</b> 48:17 110:1</p>	<p><b>c (4)</b> 33:20 36:1 38:9 79:2</p> <p><b>call (4)</b> 21:17 22:3 27:21 69:18</p> <p><b>called (1)</b> 38:11</p> <p><b>calling (1)</b> 115:10</p> <p><b>came (9)</b> 8:19 11:7 42:25 69:17,19 128:25 166:19 172:2,3</p> <p><b>cannot (10)</b> 8:2 37:19 84:21 85:21 102:15 117:16 161:4 168:11,17 170:17</p> <p><b>cant (10)</b> 35:6 41:6 77:2 105:13 108:9 148:9,24 149:5 157:21 163:23</p> <p><b>capable (4)</b> 21:25 29:21 67:23 120:3</p> <p><b>care (1)</b> 108:20</p> <p><b>carries (3)</b> 55:2 66:13 75:12</p> <p><b>carry (6)</b> 46:13 58:18 75:25 111:5 139:16 160:14</p> <p><b>carrying (1)</b> 38:4</p> <p><b>cases (31)</b> 6:5 24:23 29:8 32:19 35:17,19 46:1,17 51:17,21 52:8,20 57:21 58:6 61:1,22 96:23 105:8 108:11,13 118:4 132:9 136:15 145:14 149:8,8 152:20 153:1 156:11 161:6 164:24</p> <p><b>cast (1)</b> 25:3</p> <p><b>castanho (1)</b> 152:20</p> <p><b>categories (3)</b> 31:21 36:16 171:17</p> <p><b>category (1)</b> 160:10</p> <p><b>cease (1)</b> 162:6</p> <p><b>ceased (2)</b> 71:21 162:7</p> <p><b>ceases (2)</b> 38:1,2</p> <p><b>central (1)</b> 9:10</p> <p><b>certain (6)</b> 18:3 58:1,9 60:4,13 171:3</p> <p><b>certified (1)</b> 5:21</p> <p><b>challenge (15)</b> 9:25 10:20 35:7 44:4,6 61:23 70:20,25 81:5 88:17,17 91:16,17 103:24 168:9</p> <p><b>challenged (4)</b> 98:20,21 102:15 105:13</p> <p><b>challenges (1)</b> 94:24</p> <p><b>challenging (1)</b> 105:2</p> <p><b>challenge (1)</b> 10:12</p> <p><b>chancellor (4)</b> 66:16 122:12,17 123:16</p> <p><b>chancellors (3)</b> 65:21 66:24 141:1</p> <p><b>change (1)</b> 137:19</p> <p><b>changed (1)</b> 21:13</p> <p><b>channelled (1)</b> 59:22</p> <p><b>character (1)</b> 21:13</p> <p><b>characterisation (2)</b> 16:21 114:25</p> <p><b>characterise (1)</b> 13:25</p> <p><b>characterised (2)</b> 65:4 119:24</p> <p><b>characterises (3)</b> 11:20,21 155:23</p> <p><b>characters (1)</b> 128:4</p> <p><b>charter (1)</b> 4:17</p>	<p><b>check (1)</b> 128:17</p> <p><b>cherkasov (1)</b> 122:13</p> <p><b>choice (3)</b> 7:18,22,23</p> <p><b>choices (2)</b> 7:17 45:2</p> <p><b>choose (2)</b> 29:1 35:9</p> <p><b>chosen (2)</b> 59:18 89:1</p> <p><b>chronology (1)</b> 10:2</p> <p><b>circumscribed (2)</b> 28:24 55:5</p> <p><b>circumstance (1)</b> 112:2</p> <p><b>circumstances (27)</b> 6:2 8:16 24:8,9 32:3 36:22 37:2 39:23 40:20 41:22 58:19 61:2 72:14 73:19,23 76:23 93:21 99:23 116:14 132:18 137:19 149:3 153:14 159:21 160:14 162:5,8</p> <p><b>citation (1)</b> 38:10</p> <p><b>civil (5)</b> 39:15 42:10 43:11 107:19 160:7</p> <p><b>civilised (1)</b> 135:12</p> <p><b>claimant (23)</b> 34:21 59:12 102:7 112:3,13,19 131:24 132:11 138:17 139:16 143:4 146:8 149:6 154:10,15 155:1 156:13,16,18 157:12,15,17 161:10</p> <p><b>claimants (11)</b> 34:15 75:18 100:6 120:9 121:19 122:5 123:19 125:20 133:13 147:15 148:4</p> <p><b>claimed (2)</b> 97:18 130:13</p> <p><b>claiming (1)</b> 157:7</p> <p><b>claims (15)</b> 4:15 7:5 71:7 72:10 97:4,11,17 113:8 115:5,16 130:5,17 157:22 167:12,18</p> <p><b>clarity (1)</b> 167:13</p> <p><b>clarity (1)</b> 58:4</p> <p><b>clear (11)</b> 15:15 22:9 36:18 64:8 67:7 94:7 110:5 130:18 143:11 153:15 158:6</p> <p><b>cleared (1)</b> 146:14</p> <p><b>clearly (10)</b> 1:19 3:19 23:6 36:11 44:5 48:20 128:20 167:15,24 170:5</p> <p><b>client (1)</b> 104:18</p> <p><b>clients (7)</b> 20:24 25:14 27:6,8 28:5 36:8 103:24</p> <p><b>close (5)</b> 42:7,12 43:22 48:24 119:4</p> <p><b>closely (1)</b> 112:1</p> <p><b>cmc (3)</b> 27:15 28:3 92:14</p> <p><b>coda (1)</b> 24:16</p> <p><b>collateral (2)</b> 56:15 77:17</p> <p><b>colman (1)</b> 42:21</p> <p><b>columbia (1)</b> 19:11</p> <p><b>column (1)</b> 87:16</p> <p><b>come (18)</b> 7:21 9:14 16:5 23:21 25:5 35:9 65:14 67:25 89:19</p>	<p>91:24 102:25 103:20 112:20 113:11,18 121:8 144:5 164:25</p> <p><b>comes (8)</b> 13:2 63:3 84:11 99:7 105:12 140:8 142:15 158:10</p> <p><b>comfort (1)</b> 135:6</p> <p><b>coming (3)</b> 24:15 67:5 136:10</p> <p><b>comm (1)</b> 123:9</p> <p><b>commence (2)</b> 58:5 107:11</p> <p><b>commenced (15)</b> 9:22 16:4 21:21 53:5 89:12 90:18 92:8 97:13 102:8 111:15 126:12 129:10,11,18 138:6</p> <p><b>commencement (1)</b> 102:10</p> <p><b>commencing (3)</b> 19:22 156:16,18</p> <p><b>comment (2)</b> 25:4 109:25</p> <p><b>commentaries (1)</b> 55:14</p> <p><b>commentary (2)</b> 47:8 49:5</p> <p><b>comments (2)</b> 108:22 109:4</p> <p><b>commercial (6)</b> 25:10 43:12 125:8 128:25 129:2,22</p> <p><b>commissioner (3)</b> 57:16 96:13 155:4</p> <p><b>committed (1)</b> 139:10</p> <p><b>common (7)</b> 4:24 18:24 26:12 83:20 84:23 111:3 158:8</p> <p><b>commonsense (1)</b> 107:6</p> <p><b>communication (1)</b> 27:2</p> <p><b>company (1)</b> 65:10</p> <p><b>comparison (1)</b> 93:9</p> <p><b>compass (1)</b> 98:17</p> <p><b>compatible (1)</b> 47:9</p> <p><b>compel (2)</b> 99:25 100:13</p> <p><b>competent (4)</b> 6:12 29:24 77:25 94:13</p> <p><b>competing (1)</b> 11:1</p> <p><b>complained (1)</b> 97:14</p> <p><b>complaint (1)</b> 164:6</p> <p><b>complete (3)</b> 84:3 89:14 153:25</p> <p><b>completed (1)</b> 27:23</p> <p><b>completely (3)</b> 66:14 76:10 104:10</p> <p><b>completion (3)</b> 1:16 48:3 70:17</p> <p><b>complex (2)</b> 43:24 46:16</p> <p><b>complexity (1)</b> 172:15</p> <p><b>compliance (1)</b> 65:17</p> <p><b>complication (1)</b> 145:24</p> <p><b>component (1)</b> 78:10</p> <p><b>con (1)</b> 38:11</p> <p><b>concede (1)</b> 38:13</p> <p><b>conceded (2)</b> 128:7,7</p> <p><b>concentrated (1)</b> 96:10</p> <p><b>conceptions (1)</b> 160:2</p> <p><b>concern (4)</b> 107:9 166:3,14,15</p> <p><b>concerned (14)</b> 10:10,15 24:25 29:23 30:25 36:9,20</p>
--	--	---	--	--	---	--

69:16,19 75:15 95:4  
 119:10 147:14 170:8  
**concession (8)**  
 113:12,19 114:9  
 119:19 144:15,16,21  
 165:5  
**conclude (1)** 171:25  
**concluded (4)** 80:1 98:6  
 169:6 173:1  
**conclusion (10)** 10:5  
 17:18 34:25 46:7  
 56:19 83:23 89:9  
 107:15 114:9 116:19  
**conclusions (2)** 81:9  
 98:2  
**condescending (1)**  
 52:15  
**conditional (1)** 75:23  
**conduct (2)** 6:5 60:4  
**conducting (1)** 163:8  
**confined (6)** 93:17  
 100:7 101:2,20,23  
 102:20  
**connect (1)** 169:13  
**consent (5)** 60:14 92:11  
 145:9,11 149:19  
**consented (1)** 92:12  
**consequence (2)** 23:16  
 55:3  
**consequences (4)** 25:9  
 36:8 58:15 112:8  
**consider (17)** 69:12  
 86:9 93:25 94:2 97:25  
 102:14,14 103:1  
 110:21 111:7 115:17  
 116:3 117:1 118:8  
 119:20 153:16 172:20  
**considerable (3)** 53:18  
 96:24 116:23  
**consideration (3)** 93:15  
 105:18 112:21  
**considerations (3)**  
 30:12 111:12 118:4  
**considered (7)** 86:10  
 97:21 98:8 108:10  
 110:1 117:20 153:12  
**considering (17)** 31:13  
 76:15 86:18 93:6,21  
 98:15 109:12 110:2  
 114:12 115:4  
 119:18,19 122:3,12  
 134:18,23 157:13  
**considers (1)** 111:22  
**consistent (4)** 101:22  
 102:21 153:5 164:1  
**constitute (1)** 63:25  
**constituted (3)** 104:2  
 127:1 162:1  
**constitutes (1)** 23:25  
**constrained (1)** 96:1  
**constraint (1)** 154:17  
**construct (1)** 95:9  
**construction (2)** 38:17  
 52:8  
**contact (1)** 3:6  
**contain (3)** 10:16 60:13  
 120:21  
**contemplate (3)** 33:10  
 37:19 38:4  
**contemplated (3)** 30:4  
 67:19 163:5  
**contemplates (2)**  
 30:11,13

**contend (1)** 60:2  
**content (2)** 12:21 28:17  
**contention (1)** 167:2  
**contentions (1)** 158:13  
**contentious (1)** 156:21  
**context (41)** 3:22 9:14  
 13:25 14:4,19 15:3,24  
 16:1 20:21 21:15 23:6  
 24:5 25:23 32:15  
 33:17 37:17 42:25  
 46:11 49:7 52:18 54:7  
 61:12,18 62:21 64:2,9  
 67:8 68:4 74:14  
 79:7,25 85:10 86:19  
 87:6 93:20,20 97:22  
 111:9 131:9 133:11  
 167:23  
**contexts (1)** 51:24  
**conti (3)** 117:5,7 118:2  
**continuance (1)** 64:18  
**continuation (1)** 94:18  
**continue (13)** 16:19  
 24:1 37:21 41:23  
 53:12 59:21 64:17  
 68:7 99:22,25 137:22  
 150:21 169:1  
**continued (1)** 123:7  
**continuing (2)** 103:25  
 148:5  
**contradistinction (1)**  
 45:1  
**contrary (31)**  
 23:5,8,12,17 24:20,21  
 30:2,6 36:6 40:2 49:15  
 56:17 74:1 79:13 96:4  
 102:9 104:19 107:6  
 119:7 123:6 130:17  
 132:22 133:25  
 134:15,19,23 135:24  
 141:3 142:7,11 170:22  
**contrast (4)** 29:9,18  
 67:10 160:4  
**control (2)** 89:14  
 163:22  
**controversial (1)** 28:18  
**convenient (1)** 89:22  
**convention (7)** 3:23  
 4:25 5:5,12,15 6:20,22  
 7:10 9:2 16:23 19:23  
 24:21 28:20,24 29:14  
 30:8,11 33:8,9 38:3  
 39:16 42:9,24 46:11  
 47:10 48:15 49:8 54:4  
 55:15 62:5,25 67:13  
 70:12 72:24 74:16  
 77:24 78:5,17 85:21  
 86:5,24 87:21 96:5,22  
 101:12,21 102:6  
 103:5,9,18 106:2,18  
 107:8,9 108:16 110:25  
 111:8 114:23 125:2  
 138:21 162:4,25  
 163:3,14,16,19,22,24  
 164:11,19,25 167:25  
**conventional (4)** 7:22  
 22:3 42:10 112:2  
**cooperation (3)**  
 106:5,23 150:7  
**coordinated (2)** 4:23  
 164:14  
**copies (1)** 92:16  
**copy (2)** 5:21 49:22  
**core (10)** 10:16 17:5

22:22 50:15 94:8  
 96:20 128:23 130:10  
 140:19 161:23  
**correct (19)** 15:2,17  
 16:6 20:9 26:6 35:8  
 58:1 78:17 89:7 96:12  
 116:19 127:20,22  
 153:16 157:12 158:8  
 163:21 169:9 171:7  
**correctly (1)** 16:3  
**cost (2)** 70:15 86:13  
**costs (13)** 43:2,4,10  
 44:3,18,19 45:22,25  
 58:15 108:25 110:3  
 157:13 167:19  
**couldnt (3)** 41:5 104:1  
 133:14  
**counterclaim (37)** 4:4  
 24:4 38:25 39:6,21  
 41:8,13,18  
 46:14,14,19,22  
 47:4,25 48:23 49:12  
 51:2 111:14,22,24  
 112:2,14 128:5,9  
 155:17,24 156:2,5  
 157:5,8,14,16  
 158:7,23 167:20,21,25  
**counterclaims (8)** 39:15  
 42:11 46:9 49:13,14  
 51:3 158:5 167:14  
**counterintuitive (2)**  
 44:2 47:1  
**counterparty (2)** 146:13  
 154:22  
**countervailing (1)**  
 154:20  
**countries (3)** 17:11  
 70:12 72:25  
**country (15)** 6:13 29:24  
 30:3 74:9,19,20,21,25  
 75:11 77:25 78:1  
 94:12 111:3 133:14  
 142:10  
**couple (1)** 13:12  
**course (35)** 9:10 30:20  
 43:18 53:8 67:14 73:9  
 78:17 83:22 93:4  
 96:24 98:10  
 108:4,7,24 109:11,18  
 115:14 120:7 121:9  
 123:14 130:18 134:17  
 147:12,16 148:2,9  
 151:4 153:4 154:18  
 159:2 164:17 166:5,16  
 171:1,8  
**courts (90)** 10:9,17 16:3  
 17:3,10 20:4,5,16 21:7  
 24:19,23 25:3,19 26:6  
 28:21 32:5 33:11,14  
 34:1,9,24 37:14 38:4  
 51:17 52:6,12 54:7,13  
 56:22 60:14 61:20  
 62:3 63:20 67:6 68:25  
 69:13 70:9 72:23 74:5  
 77:24 79:23 80:2,2,15  
 81:7 84:7 86:16 88:12  
 94:4,12 95:12,13  
 100:23 102:11,19  
 105:20  
 106:6,8,8,8,12,24,24  
 107:10 108:16 113:3  
 115:22 116:5,10,12,22  
 117:8,13 118:14,19

128:25 138:13,24  
 140:11,25 145:9  
 155:12 160:4,8 161:13  
 162:21 163:10,17  
 165:1 171:22  
**coverage (1)** 52:2  
**covered (2)** 27:7 39:11  
**cox (1)** 85:19  
**cpr (46)** 7:2,5,7 21:22  
 39:17 43:1,17,20,23  
 46:6,8,19 48:21 59:4  
 61:20 62:9 90:19  
 94:20 102:13 106:21  
 109:9,15,16,19,21,22  
 110:10,14,18 111:17  
 112:21 121:5 126:1,14  
 127:3 129:11 147:1,7  
 149:4,24 152:15 153:3  
 156:5,8 160:22 167:9  
**crawl (1)** 55:20  
**create (7)** 18:11 84:18  
 89:3 101:8 103:15  
 106:11 137:2  
**created (7)** 84:14 85:12  
 86:11 88:2 105:7  
 110:18 118:5  
**creating (3)** 97:6  
 110:12 154:25  
**creditor (10)** 5:18 14:21  
 30:9,18 40:20 45:25  
 78:18 95:14 107:11  
 138:23  
**critical (2)** 120:25  
 123:10  
**critically (1)** 79:16  
**critics (1)** 162:18  
**crossborder (2)** 65:11  
 122:16  
**crossexamination (1)**  
 22:5  
**crossreferring (1)** 17:16  
**crux (3)** 55:9,11 57:1  
**curial (5)** 6:15 35:25  
 87:1,8 168:10  
**current (1)** 23:1  
**currently (1)** 36:21  
**cut (1)** 101:12  
**czech (1)** 85:9

**D**

**d (5)** 33:20 36:1 38:9  
 45:15 79:2  
**dalnyaya (2)** 64:3 65:7  
**damages (1)** 112:11  
**date (9)** 2:1 26:16,21  
 92:17,18 93:9  
 147:3,3,4  
**dated (2)** 80:1 132:3  
**dates (2)** 92:13 93:2  
**david (91)** 2:4,14  
 11:13,24 15:19,22  
 19:9,15,18 38:8,15,22  
 41:11 44:9,14  
 47:3,13,18 48:9 50:20  
 51:20 63:4 65:25 66:4  
 73:14 74:2,13,20,23  
 75:2,7 81:8,12,20,24  
 83:15,19 86:17,23  
 87:6,15,22,25 88:7  
 103:21 104:9,16,22  
 111:18 131:1,4,15,20  
 132:7,14,16,25  
 133:3,5,10,17,21

134:4,8,25  
 135:5,13,16,21  
 140:13,18,22  
 141:9,13,19,22 142:4  
 143:8,10,15,19,25  
 147:10 148:1,10,18  
 149:23 151:10,13,19  
 161:21  
**day (16)** 1:21 20:20  
 23:2 24:14 29:7 54:9  
 64:7,11,16 67:20 68:7  
 76:1 120:16 160:14  
 163:8 168:25  
**days (3)** 10:4 92:15  
 146:11  
**dead (1)** 100:9  
**deal (8)** 57:7 71:1 108:2  
 113:11 138:2 140:4  
 145:17 152:17  
**dealing (5)** 32:5 43:11  
 44:22 85:17 95:23  
**deals (6)** 6:10,18 17:1  
 48:4 79:23 101:16  
**dealt (8)** 27:15 67:24  
 79:17 80:22 91:14  
 92:21 114:16 144:3  
**debate (2)** 44:11 165:4  
**debated (1)** 80:25  
**debates (1)** 45:15  
**debtor (7)** 30:20 32:9  
 33:15 42:22 44:3,6  
 45:5  
**debtors (1)** 25:3  
**deception (1)** 71:18  
**decide (16)** 30:15 37:18  
 45:24 54:24 68:5  
 73:20 76:3 80:12  
 84:8,8 89:15 101:10  
 108:10 140:17 146:12  
 153:2  
**decided (25)** 12:20,22  
 13:7 51:20 58:19  
 69:13 73:2,24 74:5  
 75:20,25 76:4,6 77:13  
 84:9 88:15  
 92:7,6,11,23 98:7  
 106:7 143:1 169:7  
 170:5  
**decides (1)** 40:5  
**deciding (4)** 51:15 58:4  
 122:19 163:1  
**decision (61)** 10:9,24  
 16:19 17:2,9,22  
 19:1,24 25:19 29:18  
 30:15,15 33:19,20  
 42:17 47:9 51:10  
 52:6,20 55:1 57:11,12  
 58:5,13,17 59:8 68:22  
 69:2 70:1 71:15 73:7  
 75:13 76:20 83:21  
 94:3,25 96:12 97:10  
 98:11,19 100:6 103:24  
 104:19 106:25 107:21  
 108:21,24 114:6  
 121:18,19 156:6  
 161:13 162:16,18,25  
 163:5,8,9 169:6,6  
 172:20  
**decisions (5)** 25:4 71:14  
 85:22 86:14 153:3  
**decisive (2)** 12:8 59:17  
**declaration (13)** 36:4,14  
 40:4,6,6,9,10 41:3

75:8 132:18 133:24  
 134:11,14  
**declarations (13)** 24:12  
 51:8 112:10 116:3  
 130:13,17,19  
 132:2,15,19 133:21  
 136:5,6  
**declaratory (13)** 4:4  
 23:14 35:20,23  
 39:4,25 40:24  
 41:22,25 50:13 53:6  
 68:10 161:2  
**decline (1)** 45:20  
**deemed (8)** 97:12,12  
 127:1,2 128:1  
 137:1,2,5  
**deeply (1)** 28:18  
**defeat (3)** 54:19 72:9  
 99:6  
**defeating (2)** 32:15  
 137:9  
**defendant (14)** 25:10  
 32:20 47:25 60:19  
 120:15 130:10 132:11  
 136:21 148:16 154:11  
 156:4,11 157:14,19  
**defendants (6)** 90:17  
 91:23 92:7 124:5  
 129:10 130:10  
**deference (1)** 170:17  
**defines (1)** 111:1  
**definitely (3)** 35:7,8  
 134:13  
**definition (2)** 5:10  
 157:18  
**degree (7)** 19:7 28:19  
 58:3,9,16 60:4 105:12  
**degrees (1)** 84:1  
**delay (1)** 49:13  
**deliberately (1)** 69:22  
**delivered (1)** 87:19  
**delivery (1)** 35:16  
**demands (1)** 5:18  
**demonstrate (1)** 77:2  
**demonstrated (1)**  
 139:16  
**departing (1)** 104:10  
**depend (1)** 135:2  
**depending (4)** 32:22  
 61:1 152:17 170:15  
**depends (4)** 20:18  
 83:15 142:14 154:12  
**deployed (2)** 29:21 53:8  
**deploying (1)** 41:21  
**describe (1)** 53:21  
**described (13)** 4:3 8:25  
 29:20 37:16 80:7 92:7  
 98:5 100:8 101:5  
 102:23 114:2 165:4  
 170:18  
**describes (1)** 43:20  
**describing (2)** 58:24,25  
**description (1)** 27:8  
**descriptions (1)** 32:14  
**desire (2)** 72:9 99:5  
**despite (2)** 68:25  
 137:13  
**destroy (1)** 158:7  
**detail (3)** 73:13 93:13  
 169:22  
**determination (34)** 1:23  
 16:2 19:3 22:9 25:21  
 37:3 39:9 54:15 56:22

75:12,17 79:21 82:6  
 84:17 85:6,10 86:7  
 88:2,10,24 106:11,25  
 115:6,13,18 118:8  
 119:4 123:23,25  
 130:12 143:5,23,23  
 146:23  
**determinations (2)**  
 14:17 32:1  
**determinative (4)** 18:16  
 19:5 37:20 62:8  
**determine (14)** 37:23  
 64:11 67:17,17 71:19  
 100:8 117:16  
 122:20,25 139:9 143:1  
 161:8 168:25 169:1  
**determined (17)** 8:6 9:5  
 10:1 11:11 14:23,24  
 22:2 23:7 30:16 72:16  
 80:3 87:24 88:22  
 105:10 114:3 134:22  
 146:24  
**determining (10)** 63:21  
 64:17 78:25 101:20  
 115:16 119:10 130:9  
 135:25 137:21 163:3  
**develop (1)** 159:9  
**diag (3)** 85:9 87:18  
 162:13  
**dictates (1)** 102:6  
**didnt (15)** 48:20 49:5  
 74:10 75:25 104:9,11  
 105:1 120:4 135:8  
 138:1 140:4,16 145:24  
 151:24 169:19  
**differ (1)** 135:11  
**differed (1)** 18:22  
**difference (15)** 39:19  
 66:6 89:2,7,8 110:24  
 123:10,22 127:24  
 128:6 136:23 139:12  
 153:22 162:24 164:16  
**differences (2)** 48:21  
 162:23  
**differer (46)** 11:2,4,5  
 12:4 15:2 28:21  
 31:5,17 35:8 41:14  
 54:7,7 59:15 62:24  
 64:21 65:1,9 66:14  
 68:4 76:10 78:21  
 84:13,24 92:1 94:3,5  
 95:5 107:22 109:1,5  
 122:11 123:14 132:8  
 133:18  
 135:19,19,21,25  
 137:9,10 149:4 151:21  
 162:19,20 164:25  
 171:17  
**differently (2)** 100:12  
 151:17  
**differs (1)** 35:16  
**difficult (2)** 119:5  
 141:16  
**difficulty (3)** 147:20  
 148:12 160:16  
**diligence (1)** 57:21  
**dilute (1)** 60:8  
**direct (3)** 31:15 44:24  
 45:20  
**directed (7)** 47:5  
 101:17 126:9 127:25  
 130:11 131:23 136:14  
**directing (1)** 92:6



**direction (10)** 27:23  
90:16 91:21,23 92:4  
124:10,16 129:9,14,15  
**directions (15)** 28:4  
43:13 90:20,20,24  
91:2 92:9,13,24 93:1  
97:14 110:13 126:10  
136:17 166:25  
**directly (2)** 46:23  
107:25  
**directs (1)** 132:10  
**disadvantage (1)** 46:13  
**disagreed (1)** 48:17  
**disapproves (1)** 53:25  
**discharge (1)** 145:11  
**disclosure (25)** 2:8,10  
20:10 22:4 26:22,23  
27:7,8,10,13 63:22  
64:12 65:17,23 82:23  
92:10,21,22 115:8  
123:5,7,17 141:1  
143:14 167:11  
**disconnect (1)** 169:13  
**discontinuance (75)**  
4:5,8 16:10 21:25 24:2  
25:24 42:1 57:12  
58:24 59:1,2 60:20  
61:5 66:12 69:1 71:6  
72:2 73:8 76:16,23,24  
89:9 93:19 96:2 97:21  
98:12,16,25 99:22  
101:11 102:4 103:7,19  
109:20 110:17 112:25  
119:9 121:2,6,8,12,22  
122:4 123:20 126:23  
127:4,6,24 128:8  
136:9 144:13,17,23,25  
145:6,17 146:5  
147:4,18,24  
149:1,9,10,14,25  
150:1,11 151:18  
152:9,13,15 154:4,8  
158:6 166:7  
**discontinue (21)** 41:5  
60:15 62:12,22 72:7  
96:5 99:24 103:16  
112:19 114:9  
126:19,19  
127:13,17,19 145:22  
146:15 149:6 153:23  
154:2,15  
**discontinued (1)** 145:5  
**discontinues (1)** 99:24  
**discontinuing (3)** 71:6  
149:2 154:6  
**discretion (23)** 37:14  
40:3,4 59:6 60:21 61:3  
82:7 94:2,25 95:7  
99:17 102:13 103:2  
105:13,16 110:21  
112:21 152:8  
153:10,16,20  
159:23,24  
**discretionary (2)** 37:17  
59:24  
**discussed (1)** 80:3  
**discusses (1)** 117:19  
**discussion (4)** 3:3 43:16  
107:24 151:11  
**dismiss (3)** 93:18 96:1  
147:17  
**dismissed (4)** 12:17  
14:6,10 166:4

**dispose (1)** 149:14  
**disposed (2)** 120:16  
131:18  
**disposition (1)** 122:8  
**dispositive (1)** 141:17  
**disproportionate (1)**  
114:11  
**dispute (3)** 16:16 49:10  
66:19  
**distinction (10)** 33:11  
45:16 46:1 48:18 50:2  
65:24 77:23 94:11  
118:3 124:21  
**district (2)** 19:10,11  
**divided (1)** 7:5  
**doctrine (1)** 168:1  
**document (1)** 166:21  
**documents (1)** 27:11  
**does (39)** 15:1 29:9  
30:9 33:9 37:18  
38:3,14 42:7 45:9 49:6  
58:5,6 62:25 63:4,7  
74:15 101:6 104:18  
107:9 115:24 118:16  
127:5 128:8 129:19  
139:12 144:10 154:1  
156:13 158:7 160:4,24  
163:10,22 164:1,11,15  
168:21 169:4 171:4  
**doesn't (28)** 11:18 18:9  
31:10 45:8 48:14  
63:17 79:2 82:19  
121:12 128:3 129:9  
130:22,25 137:11  
139:15 146:15 148:2  
149:14,14 151:1  
154:16 155:22,23  
157:16 158:7,22  
165:23 171:13  
**doing (21)** 3:17 20:12  
22:9,19 32:19,20 33:9  
35:18 36:14 40:17  
51:4 72:1 82:9 92:1  
112:15 121:13 130:9  
131:21 137:14 150:11  
164:11  
**doll (1)** 3:12  
**domestic (5)** 28:25  
102:8 107:10 139:1  
163:25  
**domestication (1)**  
138:22  
**done (16)** 3:8,9 11:13  
33:10 41:20 42:3 45:2  
51:21,22 58:6 62:17  
77:13 93:10 119:6  
137:18 152:24  
**dont (41)** 6:25 38:18,18  
44:14 49:17 52:9 53:2  
55:18 56:5 60:12,18  
62:23 67:22 68:17  
77:17 103:21 104:4  
107:2 109:17 120:19  
127:10,11 131:10  
134:25 135:17  
139:18,19,22  
141:19,21 143:9  
146:1,12 151:23,23  
153:10 158:17 159:9  
161:19 165:1,24  
**door (1)** 135:18  
**double (2)** 17:17 81:14  
**doubt (1)** 53:4

**down (17)** 1:14 11:7  
12:7 18:12 30:1 41:15  
44:8 49:16 65:2 69:11  
90:21,24 92:10 105:12  
158:10 161:9 171:4  
**dr (1)** 49:9  
**draft (6)** 89:10 96:8  
125:25 132:3 161:9  
166:19  
**drafting (1)** 23:24  
**draw (1)** 26:5  
**drawn (1)** 8:11  
**drilling (1)** 171:4  
**dropping (2)** 30:1 44:8  
**due (1)** 53:8  
**duly (2)** 5:20,20  
**during (1)** 121:9  
**dusted (1)** 77:14  
**dutch (1)** 19:2  
**duty (2)** 65:17 123:5  
**dworkin (1)** 160:3

---

**E**

**e (1)** 45:23  
**earlier (8)** 17:2 43:18  
44:24 88:14 124:3  
129:17 148:4 169:6  
**easily (2)** 87:13 149:22  
**easy (2)** 49:16 166:3  
**eder (2)** 85:9 86:18  
**eders (1)** 162:12  
**edited (1)** 49:9  
**education (1)** 54:1  
**effect (44)** 5:4 11:11,21  
12:15 14:17 19:5  
24:16 25:20 29:20  
35:21 37:7,8 40:19  
41:24 53:5 58:17 61:6  
71:6 73:3 91:25 93:18  
99:22 103:12,13  
121:2,5,15 122:3  
123:13 136:2 138:16  
141:24 147:5,12  
150:12 151:5,17,20  
154:14 160:5 161:14  
163:2,20 165:3  
**effected (1)** 139:11  
**effective (3)**  
157:12,15,17  
**effectively (11)** 18:12  
39:3 50:1 64:16 65:12  
70:10 75:19 86:7  
121:18 152:7 164:18  
**effectiveness (1)** 31:13  
**effort (1)** 20:22  
**eight (11)** 20:20 23:1  
24:13 54:9 64:7,11,16  
67:20 68:7 163:8  
168:25  
**either (10)** 8:3 14:7  
70:19 71:5 73:24  
75:20 95:22 111:19  
157:25 158:1  
**elapsed (1)** 8:4  
**elements (2)** 22:3 95:5  
**elevate (1)** 100:14  
**elevated (1)** 104:5  
**else (2)** 106:9 144:2  
**elsewhere (11)** 36:8  
41:25 50:11 51:16  
62:10 64:10 75:20  
83:3 105:20 111:6  
161:14

**embark (1)** 37:3  
**emerges (1)** 167:13  
**emphasis (1)** 21:20  
**emphasise (1)** 113:19  
**emphases (1)** 137:19  
**end (32)** 1:20 23:23  
50:7 56:20 64:23  
93:22 98:3 102:7  
103:20 106:15,15  
117:11,21 118:21  
120:14 121:7,8,14  
123:23 130:7,17 136:7  
144:14 145:7 147:3  
149:11 150:13 155:2  
162:11 165:25 172:3,4  
**endeavour (1)** 172:17  
**ending (2)** 24:13 107:3  
**ends (3)** 38:3 115:23,25  
**energy (1)** 4:17  
**enforce (64)** 4:14,16  
5:2,14 6:16 7:10,17  
9:1 14:20 16:1 24:6,10  
29:6 30:10 31:4  
32:1,16 34:21 36:7,22  
39:16,23 42:13 43:8  
45:19 47:11,22 50:6  
62:14,17 63:23 64:1  
70:11 85:21 87:17  
89:13 95:14 112:4  
113:10 120:9  
121:20,24 123:21  
124:23 133:14  
138:5,10,13,20  
141:5,22 142:12  
145:22 146:9,12  
161:10 164:2,7,8  
167:2 168:12,14,18  
170:14  
**enforceable (1)** 123:24  
**enforced (7)** 6:4,9 8:2  
73:16 87:20 120:14  
165:3  
**enforcement (195)** 3:23  
5:5,24 6:24 7:6,21,24  
9:6,7,18,19,25 14:5,20  
15:3,25 16:20  
17:23,23 19:10,23  
20:21,22 22:1  
23:4,7,12,17  
24:2,18,19,24  
25:1,7,18 28:15  
29:6,9,22,23,25  
30:2,5,5,14,16,19  
31:10,24  
32:6,11,12,14,24  
33:3,17 35:1,3,14,25  
37:1,5,24  
40:1,15,19,21  
42:22,23 43:5  
44:19,22  
45:5,8,10,10,17,20  
46:2,5,5,12,16,17  
48:8,19,20 49:13  
50:3,9,11 51:7 52:13  
54:19,19,21,23 62:3  
63:19 64:9,16,18 66:7  
67:11 70:7 72:24  
74:8,14 75:17 76:3,10  
77:25 78:7,18,21  
79:5,7 84:19,24  
85:6,11,11,13,22 86:6  
87:8 88:4 89:12 90:23  
91:10,16 94:13 96:3

101:7 102:3,10,17,20  
105:19 106:1,2 107:12  
108:6,12,15  
109:5,8,8,14,19 110:4  
112:5,17 118:22,23  
120:11 131:22  
132:21,22  
134:14,18,22 135:25  
137:9,13  
138:11,15,17,24 141:2  
142:6,9,16 160:20  
161:2,8  
162:6,14,16,20  
163:1,4,6,10,17,18,25  
164:5,5,9,15,20,25  
168:6 172:3  
**enforcing (20)** 6:16  
42:8 56:19 69:5 76:21  
77:11 86:8 88:11 97:2  
101:13 102:7,19  
106:14,23 107:2  
111:2,4 134:17 142:1  
146:8  
**engage (4)** 11:22 33:16  
66:18 135:12  
**engaged (5)** 25:17  
107:17 114:24 149:2,9  
**england (12)** 24:23 70:7  
73:16 89:14 97:5  
102:17 106:9,20  
107:18 134:1 135:7  
146:9  
**english (151)** 5:2,3,23  
9:24 11:2 17:2,10,22  
18:25 19:25  
20:4,5,14,20  
23:5,8,12,18  
24:12,17,22 25:16  
33:8,14 34:19 35:12  
36:6,20 37:3 40:21  
49:1,17 50:6,7  
51:14,23,23,25  
52:1,4,6,10 53:2,4,15  
54:12,19 55:3,4 61:23  
62:8 63:20,24 64:19  
65:13 67:1,1,6,9 68:24  
69:2 70:2,6,8 71:19,22  
72:1 73:20 77:13  
78:25 79:13 80:5,8,15  
83:20 84:6,8,18 85:13  
88:4,13,25 89:15 97:1  
100:7,14  
101:2,3,9,19,22  
102:16,18,21  
103:14,15 105:4,18,18  
107:17 113:24 114:1  
115:1,4,15,17,22  
116:22 117:8,13,15,19  
118:1,12 121:23 122:2  
130:18 132:22  
134:16,22,23 135:4  
137:21  
138:7,13,18,19,23,24  
139:3,9,13,15  
140:11,25 141:3,5  
142:11,21,25  
156:17,20 161:1,13  
162:1,13 163:13  
168:7,15 170:22,25  
**enlighten (1)** 24:18  
**enlightening (2)** 20:3,4  
**enlightenment (1)** 54:1  
**enough (5)** 44:12 105:1

147:13 169:19 170:11  
**ensure (1)** 114:15  
**entail (1)** 171:5  
**entered (1)** 141:14  
**entire (5)** 48:25 103:20  
110:9 129:22,22  
**entirely (14)** 13:6 54:11  
55:6 62:4 64:13 82:5  
102:11 112:17 116:11  
122:10 154:6 159:17  
164:17 172:1  
**entitled (3)** 55:4 62:9  
99:16  
**entity (1)** 58:3  
**envisage (2)** 163:19  
164:12  
**equally (3)** 4:1 26:4  
35:19  
**equitable (1)** 4:22  
**equivalent (1)** 139:2  
**erga (1)** 29:20  
**erodes (1)** 33:10  
**erred (2)** 116:25 161:25  
**error (7)** 50:25 76:17  
77:3,4,8 105:15 157:9  
**escape (1)** 160:24  
**escaped (1)** 167:15  
**essays (2)** 49:8 55:15  
**essential (1)** 145:16  
**essentially (8)** 18:18  
44:7 70:2,24 71:13  
91:3 115:7 138:22  
**establish (1)** 6:3  
**established (4)** 11:18  
35:22 152:7 156:10  
**establishes (1)** 6:7  
**estoppel (23)** 6:6 14:9  
18:11,11 25:13 75:21  
82:21 84:13,13,18  
85:1,5,12,21 88:3,20  
89:3 97:7 101:9  
103:15 105:8 118:5  
162:15  
**estoppels (3)** 85:1  
86:11 106:12  
**even (32)** 11:18 25:15  
30:25 36:24  
39:20,20,24,24 43:21  
54:3 62:17 69:6 70:6  
71:9 84:6,17 88:20  
89:10 105:6  
106:4,23,24 131:18  
134:23 137:14 139:22  
146:1 156:15 159:8  
161:6,12 162:23  
**evenly (1)** 1:14  
**event (8)** 20:25 53:16  
71:6,8 73:25 79:5  
145:8 161:15  
**ever (6)** 23:22 39:7  
46:22 62:14 160:15  
165:2  
**every (1)** 106:18  
**everything (1)** 60:7  
**evidence (22)**  
18:17,20,21 27:21,22  
28:8 45:19 64:24  
80:24 82:23 84:1  
91:4,18 92:24 101:17  
114:20 117:2,7 118:8  
161:13 167:10 171:17  
**evidences (1)** 17:18  
**evident (1)** 78:4

**evidential (2)** 18:5 89:4  
**ewhc (1)** 123:9  
**ex (9)** 42:21 63:22  
113:9 122:3,13,20  
124:22 139:6 143:13  
**exactly (26)** 31:2 32:25  
40:22 41:21 50:12  
56:9 79:17 81:11  
91:20 103:12 105:14  
120:18,23  
126:20,20,21 127:9  
130:2 143:25 145:13  
149:16 150:5 154:23  
158:9 167:15 169:18  
**examination (4)** 73:4  
74:4,6 88:10  
**examined (3)** 69:1 73:1  
98:6  
**example (13)** 58:4  
60:15 64:22 84:4 85:3  
89:6 94:3 111:25  
142:8 145:4 163:23  
164:13 170:20  
**examples (1)** 65:5  
**except (6)** 108:13  
135:13,14 147:12  
150:3,4  
**exception (1)** 25:21  
**exceptional (7)** 6:7  
66:16,23 68:11 139:23  
160:13 162:5  
**exceptions (1)** 108:15  
**exchange (1)** 91:3  
**exclude (1)** 133:22  
**exclusive (1)** 56:2  
**exclusively (1)** 96:11  
**exercise (14)** 37:14  
59:10 60:20 82:6  
94:2,25 95:7 99:17  
102:13 103:2 105:16  
117:13 153:20 155:9  
**exercised (1)** 61:4  
**exhausted (1)** 162:7  
**exist (2)** 165:23,24  
**existence (3)** 39:22  
46:14 148:5  
**existing (4)** 126:16  
129:1 133:12 171:9  
**expect (1)** 22:22  
**expeditiously (1)** 114:16  
**experience (2)** 8:22  
141:25  
**expert (2)** 92:24 171:17  
**explaining (1)** 160:25  
**explains (2)** 96:17,18  
**explanation (3)** 23:10  
113:16 152:2  
**explanations (1)** 98:25  
**expose (1)** 51:3  
**exposes (1)** 47:24  
**exposure (1)** 46:13  
**express (1)** 43:25  
**expressed (3)** 17:19  
63:6 74:23  
**expresses (1)** 49:12  
**expressly (3)** 30:13  
121:5 163:16  
**extension (1)** 69:23  
**extensively (1)** 80:25  
**extent (3)** 63:7 81:2  
101:18  
**exter (2)** 156:9,25  
**external (1)** 37:7

extracted (1) 117:15  
 extraordinary (1) 99:23  
 extreme (5) 37:19 65:5  
 105:23 159:21 161:6  
 extremely (1) 172:23

**F**

f (2) 6:10 45:23  
 face (1) 74:3  
 faced (1) 76:9  
 faces (1) 160:16  
 factor (6) 37:13 59:16  
 142:18 153:18,19  
 160:21  
 factors (10) 60:25 70:14  
 94:1 102:14,15,25  
 107:14 111:7 114:17  
 153:17  
 factual (8) 20:5 22:3  
 42:3 80:9 83:23 86:14  
 115:7 169:8  
 factually (2) 16:6 26:6  
 fail (1) 170:14  
 failed (4) 16:22 33:2  
 51:9 54:22  
 fails (1) 39:2  
 failure (2) 61:25 117:4  
 fair (10) 4:21 12:19  
 13:7 20:16 43:22  
 47:16 53:24 57:5  
 58:24 155:15  
 fairly (2) 29:20 114:16  
 fairness (2) 48:3 57:20  
 falls (3) 6:21 32:16  
 57:12  
 familiar (1) 132:9  
 far (8) 17:18 29:22 65:2  
 73:10 78:21 104:12  
 147:13 170:7  
 faraday (3) 116:16  
 117:18,23  
 favour (4) 25:2 43:4  
 113:2 114:18  
 favourably (1) 163:24  
 favourite (1) 166:22  
 fear (1) 13:5  
 feature (1) 165:6  
 features (1) 57:18  
 federal (4) 34:8,9,10,12  
 feed (1) 143:2  
 feel (1) 64:25  
 feels (1) 45:18  
 fell (1) 36:15  
 felt (2) 53:21 160:3  
 few (4) 23:22 55:23  
 62:7 116:8  
 ffd (1) 123:1  
 field (3) 53:12  
 116:18,20  
 fifth (1) 21:17  
 fight (1) 115:9  
 fighting (1) 115:15  
 filing (1) 26:8  
 final (5) 63:13 87:17  
 120:10 121:20 123:21  
 finality (4) 10:21 20:11  
 70:15 114:3  
 finally (3) 114:10  
 120:16 171:6  
 find (9) 12:8 23:16  
 44:20 53:18  
 95:16,19,21 162:14  
 170:3

finding (18) 4:20  
 15:24,25 16:7 18:15  
 56:25 61:25 70:13  
 75:14 77:22 80:9 81:9  
 93:8 105:1 112:24  
 113:20 117:4 143:7  
 findings (32) 15:18 17:2  
 19:4 20:5 41:25 56:21  
 67:22 69:14  
 70:3,18,20,20 78:22  
 80:15,24 81:6,16,18  
 83:5 88:17 95:6  
 98:18,19,20 100:21  
 107:13 113:1,3 114:25  
 116:4 159:19 162:9  
 finds (2) 29:25 101:5  
 fine (1) 146:14  
 finish (2) 1:20,23  
 firmer (1) 48:9  
 first (54) 4:6,12 5:9  
 10:15 13:13,15 17:21  
 20:8 21:14 43:2 48:5  
 49:25 53:11 56:8  
 57:10 64:6 65:18,21  
 66:6 68:22 69:12,25  
 70:4 75:16 78:11 83:4  
 86:9 88:9 98:23  
 100:22,24 107:5 108:3  
 109:11 113:12  
 116:9,9,12 117:21  
 119:18,21 120:25  
 122:17,19 123:2  
 125:18 134:10,10  
 136:3 153:3,15 156:25  
 165:6 170:16  
 five (2) 134:6 172:8  
 floating (1) 35:7  
 flounders (1) 68:21  
 flow (1) 58:15  
 flowed (1) 71:14  
 flows (2) 75:12 106:17  
 focus (5) 56:3 59:10  
 61:8 63:5 78:6  
 focusing (1) 86:25  
 folio (2) 125:14,19  
 follow (8) 15:7 18:2  
 22:11 29:7 40:12  
 68:17 135:1 170:4  
 followed (4) 48:7 57:23  
 92:22 156:8  
 following (10) 21:7  
 36:12 58:1 87:17  
 90:16,19 91:7 115:8  
 122:4 124:3  
 follows (4) 29:7 31:22  
 42:14 57:25  
 footnote (1) 49:15  
 force (2) 58:13 160:19  
 forcing (1) 64:16  
 foreclosing (1) 35:1  
 foreign (7) 20:15 25:19  
 116:4 118:10 122:1,14  
 168:2  
 forensic (7) 13:5 43:22  
 56:6 63:18 64:3 65:5  
 151:4  
 forensically (2) 71:12  
 171:1  
 forgive (4) 21:2 63:18  
 83:12 152:5  
 form (21) 6:25 7:15  
 8:13 22:11 23:23  
 25:13 38:18 43:14

44:25 45:11,14 47:6  
 49:6 52:8 58:18 82:20  
 126:17 127:15 136:6  
 141:18 161:17  
 formal (2) 44:4 91:15  
 formalised (1) 28:2  
 formality (2) 157:6  
 167:14  
 formally (2) 41:7 159:4  
 formed (1) 82:24  
 formidable (1) 43:21  
 formula (1) 77:20  
 formulate (2) 160:8,11  
 formulated (1) 95:20  
 formulation (6) 23:14  
 94:14 95:10 158:1,21  
 161:21  
 forth (3) 42:11 62:25  
 167:11  
 fortiori (2) 25:16 163:12  
 forward (8) 22:12  
 23:1,10,13 43:7 65:20  
 111:23 151:1  
 fought (1) 47:12  
 found (18) 4:22 49:8  
 55:17 57:21 63:10  
 67:9 72:2 73:3 74:24  
 83:5 89:3 119:14  
 122:7 134:13  
 137:20,24 143:22  
 152:23  
 founded (1) 95:10  
 four (1) 134:6  
 foxton (134) 1:3,4,22  
 2:3,6,10,14,20,25  
 3:8,11,15 5:9  
 8:10,18,23 9:21  
 10:14,19 11:12,20,25  
 12:4,10,13,25  
 13:2,9,15,19,23  
 14:3,16  
 15:9,11,13,21,23  
 17:14 18:1,14,20  
 19:14,17,19 20:8  
 21:2,7,11 22:17,21,25  
 23:20 25:15  
 26:4,11,15,18,23  
 27:1,9,24 28:9,13  
 29:18 31:2,14,17,20  
 32:25 33:7,13,23  
 34:23 35:11 36:11,18  
 37:15 38:1,13,20,24  
 40:7,13 41:17 42:16  
 44:11,16 46:25  
 47:7,17 48:1,12  
 49:7,21 50:5,18,21,24  
 52:24 54:17  
 55:11,13,17,23 60:1  
 61:7,14,17 63:1,12,15  
 65:3 66:2,5 68:16  
 82:19 128:24  
 159:15,16,25  
 165:9,14,16 169:16,23  
 170:7,10 171:1  
 172:7,12,23 174:3,5  
 framework (10) 6:22  
 7:3 33:8 35:2 39:8  
 43:2 97:24 158:13,22  
 167:9  
 frank (10) 63:22 64:12  
 65:17,22 123:5,7,17  
 140:25 143:9,14  
 frankly (2) 36:1 38:25

fraud (102) 6:21 9:12  
 10:6,21 18:13 19:13  
 20:1 22:10 23:3,7  
 31:11,12 35:24 36:6  
 38:5 42:23 64:19,25  
 68:22,24 70:5,6  
 71:7,17,20  
 72:5,10,16,25 73:3,22  
 76:2 79:9,9,22  
 80:3,6,9,12,16 82:24  
 83:16,24 88:11 89:15  
 90:18 91:14 97:4 98:5  
 99:4,6,12 101:5  
 102:23 112:6,10,11  
 113:8 114:2 115:6,18  
 118:24 121:25 124:11  
 130:20,21 131:25  
 133:25 134:12,19,19  
 135:9,17,20,24 136:2  
 138:6,7,8,9,11  
 139:2,10 140:24  
 141:4,5 142:9 143:2  
 167:3  
 168:7,13,15,18,18  
 169:2,8,9  
 170:12,18,25 171:3,18  
 fraudulent (8) 64:1  
 112:7,8 139:4,14,17  
 168:21,23  
 fraudulently (1) 170:21  
 free (3) 35:6 156:12  
 163:18  
 freedom (1) 60:9  
 freestanding (13) 4:4  
 23:25 39:5 110:12  
 127:2,2,25 128:5  
 155:16,24 157:8,22  
 158:23  
 friday (1) 92:15  
 friends (3) 1:6 79:2  
 106:17  
 front (3) 2:16 27:15  
 92:14  
 fulfilling (3) 105:19  
 162:25 163:3  
 full (18) 20:10 22:3  
 38:22 63:22 64:12  
 65:17,22 75:18  
 110:14,21 114:4 119:2  
 123:5,7,17 140:25  
 143:9,14  
 fuller (2) 90:5 91:15  
 fully (2) 97:15 110:10  
 function (5) 38:4  
 105:19 107:20 163:1,3  
 fundamental (2) 51:5  
 160:2  
 fundamentally (1) 68:3  
 further (20) 18:12  
 44:1,8 47:8 68:13  
 70:16 83:12 85:23  
 91:20,21 92:6 102:21  
 105:7 137:25 138:1  
 145:12,16 152:1  
 159:11 172:5  
 future (5) 65:15 66:11  
 67:8,10,11

**G**

g (1) 109:6  
 gain (1) 135:6  
 gater (3) 42:16 108:19  
 160:12

gave (11) 40:13 61:21  
 72:6 89:6 90:9,20  
 95:18 98:24 122:17,18  
 126:10  
 general (11) 34:10  
 61:13,17 63:6,7 74:15  
 108:4 109:13 111:7  
 117:14 154:14  
 generally (3) 51:13  
 57:15 74:24  
 germany (1) 49:11  
 get (19) 2:17 3:5,6,13  
 16:12 29:10 40:9  
 41:19 55:24 56:18  
 64:9 81:1 103:22  
 141:13 142:2  
 146:9,16,19 171:13  
 gets (4) 30:20 44:20  
 54:23 142:1  
 getting (4) 25:3 135:17  
 146:1 151:20  
 gift (1) 106:14  
 gilbert (1) 160:14  
 give (26) 10:12 24:12  
 25:13 28:4 35:22  
 41:22 45:5 56:4  
 64:23,25 96:15,20  
 111:4 116:3,7 117:4  
 122:18 138:24 156:2  
 158:25 161:1 162:21  
 166:25 167:17  
 172:13,19  
 given (24) 5:4,14 6:5  
 18:5,25 36:24 60:16  
 67:11 73:11 81:7  
 83:21 89:10 113:9  
 118:1 120:1 121:24  
 128:12,16 129:6,12  
 141:14 153:12 170:13  
 171:24  
 gives (6) 37:15 38:10  
 48:12 116:6 137:20  
 154:14  
 giving (12) 8:10 24:6,17  
 28:8 35:13 36:14 51:7  
 57:6 72:1 115:1  
 145:10,21  
 gladys (4) 51:2  
 156:7,22 167:19  
 glencore (3) 51:2  
 156:9,25  
 glimmer (1) 71:2  
 global (1) 106:22  
 goes (8) 13:19 17:20  
 28:6 65:20 108:1  
 110:6 117:1 169:14  
 going (44) 3:1,15,17,19  
 4:2,6 12:7 13:9 19:3  
 29:7 33:19 34:13  
 44:13,17 59:17,20  
 63:12 64:25 71:1 74:9  
 81:3,22 82:22 89:21  
 91:20,21 92:6 93:13  
 94:6 99:19 106:7  
 107:2,4,21 113:11,18  
 116:7 130:8 134:9  
 150:25 152:18 161:18  
 167:10 172:8  
 gone (3) 37:1 109:22  
 116:12  
 good (13) 1:17 41:4  
 46:10 59:18,20 63:14  
 73:17 78:23 86:5,11  
 160:12

106:10 137:11 147:13  
 governed (3) 33:25 53:2  
 107:18  
 governing (1) 53:16  
 government (1) 66:18  
 governs (1) 59:7  
 grant (2) 40:6 41:3  
 granted (9) 42:21 60:16  
 63:21,22 122:10,21  
 123:20 143:24 145:12  
 grapple (3) 108:16,17  
 140:24  
 grateful (3) 29:15 50:21  
 172:23  
 great (4) 21:20 59:16  
 96:11 116:20  
 gross (1) 73:6  
 ground (41) 4:8,24  
 6:8,16 9:11 11:19  
 14:8,23 15:15 16:12  
 18:25 26:12 55:24  
 57:3 70:21,25 77:20  
 83:20 88:3  
 94:9,16,19,22,23 95:2  
 100:2 103:25 104:24  
 106:1 113:7 116:21  
 140:1,1 142:9,16  
 152:6 155:6,13 158:8  
 161:22,23  
 grounds (37) 1:11,11  
 4:7 5:22,25 6:10 9:8  
 10:6 11:15 23:10  
 29:11,12 32:13 35:2  
 37:23 40:8 42:23  
 49:25 51:13 62:7  
 76:20 77:9 93:14 94:7  
 95:8,10 96:8  
 103:22,23 104:4,10  
 112:5 125:4 141:3  
 152:3,11 170:12  
 gruel (1) 161:16  
 guidance (1) 15:1

**H**

h (1) 156:23  
 hadnt (1) 131:13  
 half (1) 100:19  
 halfway (1) 45:22  
 hand (1) 92:16  
 handed (3) 11:6 92:18  
 128:13  
 handing (1) 161:9  
 hands (1) 2:25  
 happen (5) 136:14  
 144:16 146:22 148:15  
 166:10  
 happened (9) 26:19  
 33:1 39:7 118:7 132:8  
 147:12 149:17 165:2  
 166:11  
 happening (5) 35:12  
 54:6 137:17 146:22  
 168:13  
 happens (2) 147:24  
 165:19  
 happy (5) 10:11 49:9  
 71:21 166:9,10  
 harassment (1) 4:23  
 hard (2) 115:15,20  
 hardly (2) 72:15 160:15  
 harris (1) 1:7  
 hasnt (2) 2:8 27:17  
 havent (1) 55:20

having (22) 20:19 29:20  
 35:22 50:1 61:4 70:14  
 71:4,22 78:10,21  
 82:23 98:24 99:8  
 119:6,15 121:19  
 123:25 144:19 152:13  
 154:10,11 163:2  
 heading (2) 154:2 160:1  
 headnote (1) 87:13  
 heads (2) 3:12,18  
 hear (1) 18:21  
 heard (5) 2:21 64:23  
 67:16 82:19,23  
 hearing (13) 10:3 11:8  
 20:10 51:14 56:11  
 67:15 91:18 124:3,4  
 147:16 161:9 167:11  
 173:1  
 hearings (1) 67:24  
 heart (3) 48:25 77:7  
 78:3  
 heavily (1) 64:3  
 heavy (1) 167:10  
 held (7) 1:23 49:11  
 53:16 57:10 87:19  
 117:23 162:13  
 help (3) 2:18 71:25  
 128:10  
 helpful (2) 7:1 166:17  
 helping (1) 105:20  
 henderson (1) 57:16  
 hendersons (1) 96:12  
 here (61) 1:9 3:5,6 5:17  
 6:7 8:18 14:13 19:3,23  
 20:3 24:18 25:1,11  
 31:2,6 33:1 35:9,14  
 37:1,21 38:12 39:23  
 40:1,15 42:14 47:14  
 52:3 53:5,10,22  
 54:6,20 56:19 62:1  
 66:6 67:8,10,11 68:4  
 74:14 75:7,8 78:10  
 87:7 107:25 109:7  
 111:3 115:21 118:7  
 123:16 132:8 134:1  
 136:25 138:6 157:6  
 162:23 163:5 164:23  
 166:5 168:7,15  
 hermitage (1) 66:20  
 hes (18) 14:24 17:18  
 48:9 51:4,5 73:19,25  
 74:2,8,13 75:7 76:9  
 80:10,11 104:16 105:2  
 109:6 154:17  
 hidebound (1) 160:7  
 high (9) 11:3 13:4 57:16  
 58:3,16 73:7 82:7  
 96:12 155:4  
 higher (8) 11:23 37:16  
 65:4 98:9 103:10,12  
 160:12,18  
 highest (2) 82:22 168:8  
 highly (1) 44:6  
 himself (4) 50:13  
 122:15 140:13 157:10  
 hint (1) 96:20  
 history (7) 3:16,22  
 4:12,20 39:7,12 97:24  
 112:22  
 hohfelds (1) 160:2  
 holders (1) 123:12  
 holding (2) 161:25

164:21  
**hope (10)** 1:14 2:20 3:8  
 39:11 40:15 49:25  
 53:7 57:7 63:17  
 148:20  
**hopeful (1)** 53:13  
**horrified (1)** 63:2  
**hours (1)** 1:14  
**house (1)** 156:6  
**howden (3)** 52:19 116:1  
 117:15  
**however (6)** 69:14  
 85:19 105:17 106:22  
 109:7 159:21  
**human (2)** 85:9 87:18  
**hurdles (1)** 41:18  
**hypothesis (1)** 35:24

I

**icid (2)** 142:8 170:21  
**idea (4)** 53:25 64:10  
 140:24 168:24  
**identical (1)** 70:10  
**identification (4)** 84:15  
 95:22 96:17 137:16  
**identified (6)** 75:5,11  
 79:3,4 94:10 114:17  
**identify (5)** 26:12  
 77:5,5 98:21 157:15  
**identifying (2)** 140:6  
 149:4  
**ie (1)** 167:3  
**ignored (1)** 11:17  
**ignoring (1)** 115:16  
**ill (2)** 91:24 102:25  
**illegitimate (1)** 59:11  
**im (49)** 2:1,10,16,25  
 3:17,19 4:2,6 10:11  
 13:9 21:3 27:11,11  
 29:15 36:17 40:15  
 46:25 47:11 49:18  
 50:21 61:14 63:12  
 71:1 74:12 75:9 76:25  
 81:3 86:25 90:22  
 99:19 107:3,3  
 113:11,18 124:19  
 126:10 128:19,19  
 134:9 140:6,24  
 142:17,17 143:12  
 146:7,8 170:2,3  
 172:19  
**imagine (1)** 32:19  
**immediately (1)** 38:13  
**imminent (1)** 70:17  
**impact (7)** 17:2  
 69:2,4,6 119:11 121:8  
 169:11  
**impermissible (3)** 35:19  
 55:7 59:11  
**importance (4)** 12:8  
 37:7 96:14 114:13  
**important (11)** 57:9  
 76:1 79:16 80:4 85:1  
 93:23 108:14 113:18  
 120:7,24 167:13  
**impose (2)** 147:11,20  
**impossible (1)** 168:22  
**improve (2)** 50:10 57:1  
**inaccurately (1)** 40:16  
**inappropriate (6)** 40:23  
 41:23 54:5,9 82:5  
 172:1  
**inchoate (1)** 66:7

**include (1)** 130:23  
**includes (2)** 23:15 79:25  
**including (8)** 10:20  
 51:19 73:2 77:23 93:1  
 102:15 129:18 130:12  
**inconsistency (1)** 161:5  
**inconsistent (3)** 41:2  
 53:9 86:14  
**independent (12)** 21:24  
**indication (2)** 81:2,23  
 40:24 41:13 113:6  
 119:14 164:20  
 167:12,17,18  
**index (2)** 38:9 174:1  
**indicate (2)** 154:9 159:4  
**indicated (4)** 27:20  
 28:20 111:18 166:8  
**indicates (1)** 153:9  
**indication (2)** 81:2,23  
**indirect (5)** 11:11,21  
 12:7 31:15 169:9  
**inevitably (2)** 55:2 61:1  
**influence (1)** 12:7  
**inform (1)** 52:12  
**information (2)** 90:5,9  
**informed (1)** 26:7  
**informing (1)** 163:10  
**inherent (3)** 10:19 19:7  
 32:13  
**inhibitions (1)** 60:13  
**initial (1)** 8:25  
**initially (1)** 9:8  
**initio (1)** 123:11  
**injunction (5)** 60:15  
 145:6,11,15,15  
**injunctions (1)** 149:3  
**injustice (1)** 20:12  
**inquiry (2)** 11:22 30:5  
**insofar (1)** 70:20  
**insolvency (2)** 65:11  
 122:16  
**instance (9)** 43:3 53:11  
 56:8 57:10 116:12  
 153:3,15 156:25 165:6  
**institutions (2)** 66:19  
 99:19 107:3,3  
**insufficiently (1)** 59:7  
**insuperable (1)** 70:24  
**insurance (3)** 33:24  
 51:24 53:1  
**insured (1)** 53:2  
**insurer (1)** 53:1  
**insurers (1)** 51:24  
**integrity (2)** 72:22  
 74:16  
**intend (1)** 20:24  
**intended (4)** 10:22 44:5  
 45:17 168:4  
**intending (1)** 27:21  
**intends (1)** 125:25  
**intention (2)** 21:5 27:2  
**interest (45)** 16:17  
 36:12 37:22 38:3 42:6  
 49:22 50:6  
 54:15,18,21 56:25  
 63:20 67:9,9 70:4  
 75:5,5 94:17 103:25  
 104:1,19 105:3  
 113:7,21 114:3 115:13  
 118:25 119:6,15 122:8  
 123:24 137:12,25  
 138:3,4 139:8 140:7  
 142:19,20 143:1,3

146:22 161:25 162:7  
 172:2  
**interested (2)** 130:19  
 153:1  
**interesting (9)** 33:13  
 40:10 61:18 107:23  
 117:18 119:23 141:15  
 142:22 144:8  
**interests (11)** 20:10  
 31:23,23 57:14,14  
 59:25 73:3 74:4,5,18  
 75:10  
**interim (1)** 67:24  
**interlocutory (7)**  
 126:4,16 136:15,20,22  
 137:5 145:4  
**internal (1)** 161:4  
**international (6)** 4:16  
 28:16 77:23 94:11  
 100:15 118:13  
**interpret (1)** 18:8  
**interprets (1)** 50:24  
**interrupt (1)** 2:15  
**intervention (1)** 54:6  
**into (19)** 7:5 16:13  
 21:24 29:2 31:9 44:15  
 50:10 59:23 60:7  
 62:23 93:13 99:17  
 102:13 107:14 118:19  
 128:25 141:17 142:18  
 172:18  
**intrinsic (1)** 23:24  
**introduce (1)** 140:15  
**introduced (1)** 166:18  
**introducing (1)** 140:1  
**invalidated (1)** 170:12  
**invariably (2)** 51:22  
 142:1  
**investigated (1)** 74:17  
**investigation (1)** 22:4  
**investment (1)** 114:6  
**invite (6)** 12:21 26:2  
 53:23 56:12 93:25  
 171:24  
**invited (1)** 65:8  
**invoke (1)** 34:7  
**invoked (1)** 154:21  
**involve (3)** 51:22 67:22  
 100:8  
**involved (1)** 114:12  
**involvement (2)** 66:19  
 149:13  
**involves (3)** 31:5 64:19  
 164:21  
**irreconcilable (1)**  
 168:16  
**irrelevant (1)** 16:14  
**isda (1)** 52:8  
**isnt (22)** 27:7 41:2,10  
 47:21,23 48:10 55:10  
 61:3 73:15 74:3 76:11  
 77:2 79:11 118:15  
 124:7,9 131:1,5 132:7  
 140:25 146:10 150:17  
**issued (2)** 67:19 71:23  
**issues (41)** 3:21,25  
 14:24 16:14 32:6  
 51:14 54:22 67:13,17  
 68:5,12 70:6,9,11  
 72:16 73:12,22  
 78:13,20,20 79:6,8  
 84:9,23 85:10 86:7,9  
 97:24 98:16 101:10

111:1 115:18 117:16  
 121:25 132:9 158:18  
 162:14,20 164:25  
 167:18 170:16  
**italian (1)** 84:4  
**its (130)** 1:25 2:3 4:24  
 5:10 8:12,25 10:24  
 11:3 12:6,8 13:17  
 16:24 18:4 19:3 25:18  
 27:19 29:15 30:15  
 31:9,11,12 32:3 33:18  
 35:8 36:11 37:13,20  
 38:22 39:9 40:1  
 41:7,14 42:6,19 45:10  
 48:17 49:21 50:10  
 54:24 56:14,14,17  
 57:5,7 59:16 61:3,3,14  
 62:18 63:1,20 65:9  
 67:19,21,24 68:4 70:5  
 72:23 74:9,21,23  
 75:23 81:13,13 82:22  
 87:9 88:13 97:19  
 99:20 100:20 101:1  
 103:25 104:5  
 105:15,19 107:25  
 108:21,21 112:19,21  
 113:18 115:13 117:18  
 119:5,10 121:1 122:23  
 123:14 126:3,8  
 128:14,16 134:19,23  
 135:3,3,6 136:12  
 137:5,9,10 139:15  
 140:23 142:11,22  
 143:2,9 145:10  
 148:3,24 150:16,23,24  
 153:1,6 156:19  
 157:25,25 158:3  
 162:7,18,25 163:3,13  
 166:21 167:1,3,6  
 168:8 171:14  
**itself (21)** 6:15 10:12  
 13:24 29:5 32:21  
 44:20 54:21 55:5  
 64:19 66:15 78:5  
 85:22 107:9 139:4,4  
 148:7 153:9 156:12  
 163:7 164:20 168:21  
**ive (20)** 3:11 13:11  
 15:23 28:19,20 38:25  
 39:11 42:4 47:11 48:2  
 56:24 64:3 66:12  
 67:14 113:4 124:2  
 146:8 155:15,19 169:9

J

**j (4)** 116:18,20 117:23  
 123:9  
**january (1)** 92:11  
**joint (1)** 57:19  
**judge (142)** 14:17,19  
 16:22 17:8 18:8  
 19:8,24 20:12 22:16  
 28:4 40:11 42:20 43:2  
 45:2,18,21 46:1,3 47:4  
 50:13,25 52:1 53:4,11  
 54:2,16,25,25 57:22  
 62:1 64:24 68:5 69:12  
 70:13,25 71:15  
 72:2,3,6,16 73:7,18  
 75:24 76:17,22 77:8  
 78:23 79:16 80:24  
 81:1 82:1,11,20,22  
 83:5 84:2 85:17

89:3,10 91:25  
 92:2,12,14,16,21  
 93:5,18 94:1  
 95:6,16,23 96:1,9  
 98:14,18,25 99:7,16  
 100:5,21 101:16,22  
 102:3,12  
 103:1,6,18,23 105:18  
 107:14 108:10 110:19  
 113:20 114:17 115:2  
 116:12,25 117:5,5,7  
 118:2 119:14,20  
 122:6,7 124:4 126:8  
 128:1 130:8  
 131:19,21,23 134:13  
 136:7,14 137:8,20,24  
 138:1 139:23  
 140:3,7,11 143:21  
 155:20 157:9,10,11  
 161:16,24,25 162:9  
 165:10,18 166:11  
 167:7,15 168:1,3  
 169:5 170:5 171:19  
**judged (1)** 116:17  
**judges (32)** 3:25 17:1  
 56:24 60:24 63:16  
 68:22 69:10 70:1,18  
 77:14,22 81:6 82:6  
 88:10,14 92:23 93:8  
 94:25 96:19 102:22  
 103:24 104:19  
 105:1,13 112:23  
 126:25 129:6,9 131:6  
 143:6 159:19 160:17  
**judgment (107)** 5:3,15  
 10:25 11:6  
 12:15,19,20,22  
 13:7,10,13,15 14:9  
 17:5,15,22 18:24,25  
 20:3,15 21:8 34:5  
 40:20 43:16 47:16  
 48:6 50:17 52:16  
 53:9,18 56:16,17  
 57:18 64:25 66:24  
 69:10,10,12,17,20  
 70:5,8 71:15  
 72:3,13,19 73:21  
 76:13 77:14 79:24  
 80:1,4 83:20 84:6 85:8  
 86:15,15 87:19 88:14  
 89:10,13 90:16 91:8  
 95:22 97:3,25 98:2,6  
 99:20 100:4,10,23  
 101:2,20 102:16,18,19  
 103:14 104:2 105:3  
 111:3 116:11,22  
 118:9,17,18 122:24  
 138:14,19 139:1,3  
 140:14  
 141:7,7,10,12,14,23  
 142:2 157:1,3 158:11  
 160:17 161:5  
 162:1,10,13  
**judgments (4)** 48:4  
 75:16 172:17,21  
**judicial (2)** 171:23,24  
**july (3)** 1:1 27:16 92:15  
**june (6)** 80:2 110:6,7  
 131:6,21 158:12  
**jurisdiction (62)** 6:2  
 8:1,12 14:21 15:4  
 19:22 23:17 24:10  
 25:7,22 29:3,7

30:6,7,22,24,25  
 32:11,12,24,24  
 33:3,3,15 34:9,9,12  
 35:3,22 36:23 37:5,12  
 45:13,24 46:12 48:6  
 51:1 52:13 53:6 62:15  
 76:2,11 78:6,7 86:8,8  
 95:13 103:6 104:13  
 106:19 107:3,17 110:3  
 117:13 134:15 154:20  
 156:14,17,19 164:8  
 167:21 170:8  
**jurisdiction (1)** 91:17  
**jurisdictions (17)** 11:4  
 18:13 30:19 33:6  
 35:15 37:9 62:7 70:10  
 82:3 83:6 84:25 86:10  
 100:10 162:19 164:15  
 168:23 170:15  
**justification (1)** 64:7  
**justify (1)** 62:23

K

**kazakhstan (39)** 1:8  
 4:11,21 9:3,16,22 26:7  
 27:3,12 28:11 35:6  
 39:6,24 41:24 47:6  
 50:8 54:14,18 64:8  
 70:4 71:18 94:17  
 97:18 105:3,9 115:12  
 118:17 119:15 121:1  
 122:6,7 123:24  
 130:13,19 137:1,24  
 138:3 166:13 167:1  
**kazakhstans (7)** 22:23  
 38:24 56:25 97:12  
 113:21 115:5 142:19  
**keen (2)** 36:9 51:25  
**keep (2)** 24:13 38:21  
**keeping (1)** 41:15  
**kennelly (1)** 1:7  
**key (4)** 93:15 106:7,25  
 166:13  
**kind (12)** 18:11 24:13  
 47:23,24 51:8 56:16  
 94:5 95:20 111:13  
 118:4 123:15 145:21  
**kingdom (1)** 5:12  
**know (13)** 22:18 31:4  
 38:19 43:10 61:25  
 80:13 97:15 107:25  
 124:4 151:13 155:3  
 160:3 165:1  
**knowles (20)** 10:25 11:7  
 12:1,14 14:1 27:16  
 33:5 53:21 69:18  
 72:19 90:15 96:14  
 97:3,7,22 98:10 110:6  
 118:9 126:11 147:14  
**knows (4)** 1:9 4:13 10:2  
 55:19

L

**lack (1)** 116:11  
**laid (2)** 21:20 69:11  
**language (17)** 6:1 7:16  
 32:8 43:17 44:23  
 48:13 53:14 58:23,25  
 63:11 66:17,23  
 94:10,14 153:9 154:5  
 155:11  
**large (2)** 71:17 96:21

**largely (1)** 28:17  
**last (8)** 6:10 20:17  
 23:11 29:14 83:8,11  
 117:9 165:11  
**lastly (2)** 4:10 137:7  
**late (1)** 127:12  
**later (3)** 3:18 13:2,12  
**latter (2)** 125:13,15  
**launching (1)** 30:10  
**lawyers (1)** 23:22  
**lay (1)** 161:4  
**layer (1)** 3:13  
**lead (1)** 113:1  
**leads (2)** 45:21 118:18  
**leapfrog (1)** 96:16  
**learned (28)** 1:6 26:5  
 70:1 79:2 84:12,14  
 90:9 94:1 95:6,18,23  
 103:3,7 104:8 105:6  
 106:17 116:1 117:10  
 119:14,23 130:6,15  
 144:6,8 151:5 160:16  
 162:12 165:23  
**least (18)** 6:2 8:25  
 10:12 17:10 42:12  
 44:18 46:16 52:5  
 53:18 60:9 63:24 69:9  
 70:9 110:13 116:23  
 117:12 169:8 171:11  
**leave (8)** 5:1,14 36:25  
 62:12 63:18 102:4  
 141:13 149:5  
**leaving (3)** 148:6  
 150:13 162:23  
**led (4)** 10:4 11:8 95:7  
 98:18  
**left (7)** 1:15 28:24  
 122:4 144:17,18  
 159:18 166:2  
**legal (15)** 16:21 21:12  
 23:4,6,15 25:9 29:14  
 59:2,3 64:10 67:1  
 135:12 160:2 166:1,1  
**leggatt (58)** 1:10 2:23  
 8:21 13:13 15:6,10,12  
 17:12 18:17 28:11  
 34:20 35:5 36:4 41:1  
 46:21 47:19 48:23  
 49:4 54:11  
 55:9,12,14,22 57:4  
 59:13 62:20 64:21  
 71:3 79:4,11,18  
 80:8,13,23 88:5 89:6  
 91:13 95:3 105:11,15  
 107:16 110:23 118:11  
 120:3 126:18 130:22  
 135:2 139:13,20,25  
 140:5,16 142:5,14,21  
 144:1 166:9 170:20  
**leggatts (1)** 113:14  
**legitimacy (2)** 16:21  
 20:19  
**legitimate (33)** 16:18  
 31:23 37:22 41:9  
 54:18 56:25 63:20  
 67:9 70:4 94:17  
 103:25 104:1,19  
 105:3,9 113:7,21  
 115:13 118:21,25  
 119:6,12,15 122:8  
 123:24 137:12,24  
 138:3 142:19 146:22  
 161:25 162:7 172:2

legitimately (3) 55:4  
62:9,11  
length (1) 96:11  
less (6) 19:1 24:13 65:2  
83:21 159:21 163:24  
lesser (1) 134:24  
let (4) 38:19 98:21  
108:2 134:6  
lets (4) 145:5,23 146:10  
158:6  
letter (2) 45:23 109:6  
level (7) 19:6 82:7 84:1  
88:19 94:4 98:9 104:5  
levels (1) 61:15  
lewison (2) 12:17 69:21  
liability (1) 116:23  
lie (1) 52:5  
life (5) 21:24 22:15  
41:13 166:1 167:17  
light (1) 159:19  
like (13) 3:12 37:11  
38:14,16 48:15  
91:10,17 107:2 111:21  
129:16 132:18 145:14  
146:14  
likely (2) 135:10,11  
likewise (2) 117:3,5  
limit (1) 155:12  
limitation (7) 29:10  
94:20 111:17  
153:10,11,13 156:20  
limited (10) 5:17,22 6:5  
19:24 29:12 31:24  
32:15 108:14 110:19  
155:7  
limits (1) 163:23  
line (8) 65:2 99:9  
115:20 152:19 153:5  
165:11,16,17  
lines (1) 58:1  
liquidator (2) 122:14,15  
lis (1) 30:12  
list (2) 10:9 13:3  
listed (1) 86:24  
litigant (1) 118:15  
litigants (1) 21:4  
litigated (1) 119:2  
litigation (4) 3:16 58:2  
117:19,23  
little (10) 1:15 8:7 13:2  
44:1,8 47:2 68:11  
90:5,8 108:19  
live (12) 9:9 14:20  
131:21,23 132:20,20  
133:1 160:21  
163:1,6,7,10  
lloyds (1) 13:20  
localised (7) 30:4 31:24  
32:6 54:20 55:5  
163:20 168:20  
logic (1) 56:17  
london (4) 33:24 34:17  
35:6 82:22  
long (1) 42:13  
longer (11) 36:23 37:5  
58:20 102:17 108:8  
115:25 132:25 160:21  
161:10 163:6 164:7  
longmores (1) 34:5  
look (2) 7:2 14:14 18:9  
26:9 33:19 38:14 41:8  
42:16 51:1,2 52:21  
56:13 62:10 63:16

82:19 95:17 100:4  
115:24 119:21 129:19  
149:6 154:13 166:17  
looked (6) 20:15 51:17  
55:15 57:24 79:8  
113:4  
looking (12) 17:4,13  
22:5 29:13 50:16  
57:14 64:8 71:13  
124:24 128:12 157:18  
158:5  
looks (10) 7:12 8:14  
23:2,9 34:24 38:15  
51:13 53:13 128:14  
133:10  
loose (1) 13:22  
lords (55) 2:25 12:13  
13:9 14:13 15:5,13  
21:23 23:20 24:15  
25:23 28:14 31:7  
33:13,23 42:19  
49:3,24 54:3 57:3  
63:9,12 68:8,13,20  
73:12 84:20,22 86:4  
88:8 93:12,14 94:6  
101:25 104:12  
107:5,13 109:24 110:5  
113:6,11 119:13  
136:10 140:20 147:23  
152:3,17 155:6,10,14  
156:1,6 159:3,16  
161:19 172:5  
lordship (23) 18:21  
27:17,18 55:19 81:1  
87:3,13 90:4 91:12  
95:1 104:14  
125:15,18,23 129:5  
134:3,5 136:13 137:7  
140:9 144:6 148:14  
158:1  
lordships (26) 13:10  
16:9 27:25 29:16  
72:18 73:10 81:22  
85:25 90:12,22  
92:17,20 94:9,22  
95:17,21 113:4 116:8  
119:21 120:24 128:7  
152:18 155:3 158:25  
159:4,11  
lose (1) 60:6  
losing (1) 16:11  
loss (1) 112:7  
lot (2) 39:1 65:2  
lpg (1) 169:16  
lr (1) 38:11  
lukewarm (1) 162:9  
luncheon (1) 90:1  
luxembourg (2) 17:24  
83:7

M

machinery (1) 48:14  
main (1) 159:17  
maintain (2) 35:9 40:19  
majority (2) 58:6  
164:24  
makes (15) 7:23 40:4  
47:19 56:8 59:3 89:1  
100:21 112:9 127:24  
128:6 136:22 141:4  
151:5 153:21 160:3  
making (24) 3:17  
22:9,13 36:19 46:15

50:25 51:5 61:12 63:8  
76:25 77:2 80:10,11  
93:16,17 113:20  
123:16 129:14,15  
136:21 138:16 145:1  
146:3 148:16  
malek (2) 22:2 166:18  
males (1) 123:9  
managed (1) 160:23  
management (3) 71:14  
112:18 171:7  
mandatory (1) 7:15  
mangled (1) 64:4  
manipulation (1) 73:6  
manner (4) 5:2,15 57:8  
141:23  
manoeuvre (2) 13:4  
151:4  
many (4) 18:22 32:19  
86:23 136:15  
material (10) 9:15  
14:22 31:11 81:2,23  
82:3 84:2 99:1 123:10  
171:20  
matter (40) 7:21 9:15  
11:3,7,14,18,23 14:11  
16:9 19:5 28:25 36:13  
40:4 41:16 48:13  
63:24,25 74:6 87:1,7  
97:13,14 99:16 102:11  
111:7,16,17,19 112:17  
114:16 124:21 126:10  
128:4 129:9 136:6  
147:19 155:22,23  
164:6 165:22  
matters (12) 6:3 13:12  
18:18 19:20 50:8 52:8  
62:10 86:15 96:1 98:8  
114:9 171:25  
maybe (2) 56:6 150:3  
mean (84) 3:5,7 12:9  
18:7,9 27:8 28:3  
32:18,18,20,20  
36:17,18,19 37:10,17  
38:13,16,22  
39:18,19,22 40:2,3  
41:6 60:11 61:3 62:22  
73:15 74:7 75:18,23  
77:1,15,16,16,17 81:8  
82:11,14,14,24 83:22  
86:20 87:7  
99:18,19,20  
100:3,5,17 103:21  
107:16 124:9 126:15  
127:5 128:10 129:20  
133:23 135:5,8 137:11  
145:8,19,23  
146:7,14,21 147:19  
148:23,23 153:1  
154:12,13,16  
169:3,3,9,18,24  
170:2,3,4 172:14  
meaning (6) 82:15  
87:21 132:19 133:4,8  
134:12  
means (7) 16:5 50:10  
97:20 105:17 120:4  
127:18 140:11  
meant (7) 36:6 50:9  
86:19 102:3 103:5  
120:3 135:8  
meantime (1) 171:15  
measures (1) 4:23

meatier (1) 53:20  
mechanics (1) 107:9  
mechanism (2) 5:5  
49:13  
mechanistic (4) 45:18  
108:4,8,12  
medium (1) 168:19  
meet (1) 11:15  
meeting (1) 140:9  
mentality (1) 23:24  
mention (2) 85:19  
156:1  
mentioned (5) 15:5,13  
45:2 92:14 94:10  
merely (1) 125:11  
merit (1) 64:14  
merits (13) 33:18 67:23  
73:2 113:8,23 119:17  
143:24 146:24  
148:6,11 150:22  
151:15 166:12  
met (4) 10:7 11:23 14:8  
25:22  
might (31) 21:17 29:13  
30:24 36:9 38:20  
44:10 47:1,2,25  
64:21,25 86:20  
91:15,16 94:3 100:19  
109:4 112:1 118:13  
122:1 128:17 135:2  
148:4 159:21 160:1,10  
164:20 168:1  
170:14,21 171:21  
mind (8) 18:10 63:3  
109:12 111:14,23  
143:6 155:6 169:22  
mine (3) 2:16,22,23  
mini (2) 165:12,14  
minute (1) 3:2  
minutes (1) 172:8  
misconceived (1) 71:10  
mislead (1) 166:15  
missing (1) 170:1  
mix (3) 60:8 102:13,24  
moment (10) 11:14  
16:5 56:24 89:22  
103:1 119:13 145:23  
146:11 159:1 172:19  
moments (2) 15:5,13  
money (1) 169:10  
month (1) 38:21  
months (3) 65:13 115:8  
123:13  
moorebick (1) 157:1  
moot (1) 55:6  
more (27) 22:7 39:13  
46:16 51:5 54:13 56:2  
61:2,8,13 65:5 74:15  
75:8 76:11 90:8  
91:15,24 105:1 107:20  
112:1 128:20  
149:22,22 154:16  
158:17 161:16 164:9  
165:24  
morning (9) 36:24  
90:5,10 95:18 104:8  
105:6 119:19,24 131:9  
morritt (1) 157:4  
moses (3) 48:4 109:25  
160:12  
most (12) 50:1 56:1  
61:1 62:7 87:13  
92:17,18 107:1 108:11

119:3 160:13 171:7  
mount (1) 114:22  
move (2) 63:12 171:8  
moved (1) 69:11  
moves (1) 43:6  
moving (2) 9:6 23:1  
much (16) 16:20 22:7  
31:9 48:14 68:15  
69:14 74:25 101:16  
105:4,17 116:8 159:13  
161:16 165:4 172:6,24  
multiple (6) 30:10,18,19  
78:18 86:6 118:22  
multiplication (1) 86:13  
must (16) 3:5 7:15 35:7  
38:13 44:25 58:8  
59:10 60:21  
106:18,20,21 120:14  
134:25 152:7,9 155:24  
myself (1) 65:5  
mystery (1) 43:24

N

namely (9) 40:14 41:19  
53:15 68:23 85:4  
119:16 131:25 152:9  
160:13  
narrow (3) 47:20 98:17  
136:1  
national (5) 102:6,11  
107:10 123:8 162:19  
naturally (1) 71:14  
nature (19) 8:15 9:1  
11:3 23:22 43:7 47:21  
52:9 54:20 61:5 66:16  
67:21,25 91:13 93:20  
108:1 111:14 112:16  
130:4 138:15  
near (1) 161:11  
nearly (1) 73:9  
necessarily (4) 31:9  
43:15 82:20 122:1  
necessary (9) 7:25 14:7  
32:1 35:13 59:9  
153:19,19 159:8  
161:18  
necessity (1) 143:2  
need (16) 6:25 37:18  
41:19 70:14 73:9  
82:14 120:19 131:10  
139:19,22 141:19  
149:6 151:25 155:19  
156:13 159:9  
needed (2) 61:20 105:1  
needing (2) 67:6 122:8  
needs (1) 2:16  
negative (2) 17:17  
81:14  
neither (5) 25:5,17  
35:24 36:15 134:1  
netherlands (5) 17:24  
18:23 83:7,11,12  
neutral (3) 38:10 66:17  
154:6  
never (17) 9:5,18 24:9  
38:2 39:3 40:9 41:22  
62:3,14,17 64:12  
67:25 121:25 160:15  
163:6 164:7 169:22  
nevertheless (4) 84:7  
88:23 106:13 107:1  
next (5) 3:13 99:2  
117:6 152:5,6

niceties (1) 41:7  
night (1) 29:7  
nogotkovs (1) 123:4  
nominated (1) 131:24  
nominates (1) 132:11  
nonapplication (1)  
34:14  
nondisclosure (3)  
67:3,18,21  
none (6) 12:15 52:3  
66:25 67:13 98:19  
105:8  
nonetheless (4) 6:4,8  
160:11 161:7  
nonpoint (1) 153:25  
nor (7) 25:6,17 35:25  
69:3 104:23 134:1  
153:11  
normal (2) 91:21 107:18  
normally (7) 86:25  
91:3,17 136:19  
139:15,20,22  
north (1) 52:20  
note (9) 5:17 30:8  
33:14 57:19 94:22  
117:18 130:16 154:13  
171:16  
noted (1) 155:5  
notes (8) 21:14,17  
43:23 44:1 45:9 49:10  
155:3,4  
nothing (22) 22:12 45:3  
56:16 72:22 74:15  
86:4 88:12 102:5,5  
107:7 109:15 111:8  
112:16 114:21 121:13  
128:2 143:16 144:22  
153:8 154:9 160:5  
167:7  
notice (79) 1:12  
3:21,21,25 4:8,11 7:24  
8:15 14:5 24:1 25:24  
26:16 42:1 57:11 59:1  
60:10,19 68:25 71:5  
73:8 76:16,24 89:9  
93:19 96:2 97:21  
98:12,15,24 101:11  
102:4 103:7,19 109:20  
110:17 112:24  
114:18,19  
121:2,5,11,12,22  
123:20 126:22,23  
127:4,6,19,23 128:8  
136:9 138:2 140:15,19  
144:13,17,23 146:4  
147:4,18 148:17  
149:9,10,13,24 150:10  
152:8,12,14  
154:4,7,18,19 155:16  
158:6 159:5,7 161:20  
notices (1) 149:1  
notion (1) 169:2  
notwithstanding (4)  
24:1 98:8 161:8  
172:18  
november (1) 2:3  
nowhere (2) 160:21  
161:10  
nub (1) 102:1  
number (8) 39:2 105:25  
119:24 122:24  
128:12,15,20 129:6  
numbering (1) 129:1

numbers (1) 129:20

---

O

objection (1) 106:1  
objectionable (1)  
150:15  
objections (1) 21:18  
objective (4) 4:9 57:13  
59:7 70:16  
obligation (2) 4:21  
164:2  
obligations (1) 67:7  
obscured (1) 128:14  
observation (2) 20:9,16  
obstacle (2) 99:13  
166:6  
obstacles (1) 70:24  
obtain (5) 44:3 139:2  
141:9,12 156:14  
obtained (35) 6:21 9:12  
10:21 23:3 31:11 32:4  
35:23 36:5 38:5 68:23  
90:18 112:5,10 118:24  
123:19 124:11  
130:20,21 131:25  
133:24 134:11  
138:5,8,9,19,25,25  
139:2 141:4,8 142:9  
145:18,20 155:7  
170:21  
obtaining (5) 65:18  
70:5 79:9 115:13  
139:5  
obvious (1) 134:21  
obviously (18) 10:19  
13:2 14:16 20:18  
21:20 28:4 33:1 48:3  
51:16 52:3 76:14  
78:19 91:24 118:25  
151:24 155:10 159:16  
172:16  
occasions (1) 160:3  
occurrence (1) 165:1  
oclock (1) 89:24  
october (5) 2:2,5,6 10:4  
172:16  
odd (1) 140:23  
offer (3) 20:3 33:5  
169:12  
offered (13) 13:11 24:9  
54:1 62:15 64:7 67:12  
147:13,15 151:9  
161:17 163:7 164:7  
170:17  
offering (7) 25:18 32:2  
52:15 54:13 118:12  
152:1 163:13  
offers (2) 45:16 68:11  
office (1) 123:12  
officer (1) 65:13  
official (1) 38:14  
often (1) 91:15  
oh (6) 50:16 90:7  
130:6,16 151:19  
164:13  
okay (3) 2:12 77:19  
134:5  
omnes (1) 29:20  
once (15) 23:14 38:1,2  
50:5 55:6 56:20 68:1  
84:9 88:23 105:11  
107:17 125:7 160:20  
162:6 164:6

ongoing (4) 16:1  
66:19,25 161:2  
open (9) 5:1 11:4 16:24  
32:13 47:8 56:6 69:9  
81:5 127:18  
opening (1) 167:21  
operate (2) 84:19 128:8  
operates (1) 121:17  
opine (2) 34:13 35:2  
opining (1) 38:4  
opinion (3) 53:25 115:2  
163:13  
opinions (2) 52:16  
54:13  
opportunity (3) 72:4  
99:4,14  
opposite (1) 41:6  
opposition (2) 9:25 88:3  
opting (1) 29:1  
option (4) 8:19,20 36:3  
45:7  
oral (1) 71:10  
order (175) 1:19 3:25  
5:3,13,18 7:20,24,24  
8:1,10,11,15,20  
9:1,4,5,17,18,19,22  
14:5 15:7 16:3 21:7,15  
22:13,19 23:1 24:6  
27:17 37:16 39:10  
42:21 43:3 44:4,10  
45:4,8,10,10,12,20,24  
46:2 47:15 58:6,7,7  
59:4 60:16 63:21  
64:12 65:4,11,15  
66:6,9,13 73:22 75:23  
86:13 90:15  
92:11,16,23 103:10,12  
110:6,13  
113:8,9,15,22  
119:16,22,24  
120:5,7,13  
121:3,15,19,25  
122:3,14,20  
123:3,6,10,11,12,19  
124:4,15,23 125:25  
126:1,2,25  
127:8,14,15 128:13  
130:23  
131:6,7,11,11,18,22  
132:3,4,4,5,21,22  
134:9 139:6 143:5,23  
144:2,11,14,18  
145:1,2,5,12,15,16,20  
146:1,5,10,17,23  
147:8,17,21  
148:2,2,5,13,24  
149:14,21  
150:2,2,4,7,13,18  
151:14,18,21 152:1  
155:20 158:12  
160:12,18 165:5,19,25  
166:4,4,7,14,16,19  
167:16 169:25  
171:7,11,12,16  
ordered (4) 97:11 109:1  
137:8 168:5  
orderly (2) 86:7 106:13  
orders (11) 27:16  
121:9,10 133:13  
145:4,4,17 147:8  
149:5,7 150:12  
ordinarily (2) 59:17  
67:22

ordinary (8) 43:20  
46:6,8,19 48:8  
109:9,19 139:1  
organised (1) 106:22  
original (3) 5:20 139:5  
156:16  
originally (1) 85:19  
others (8) 38:7 61:3  
67:5 102:25 106:4  
164:10 168:23 170:15  
otherwise (12) 43:13  
46:11,23 50:8 58:17  
59:4,18 72:9 99:5,5  
118:15 133:15  
ought (5) 60:3,5,8  
122:25 144:15  
outcome (2) 12:9  
164:21  
outside (6) 8:12  
46:6,8,18 51:6 109:9  
outstanding (4) 4:10  
9:16 27:12,20  
outwith (1) 69:11  
over (10) 5:13 8:7 10:3  
34:10 41:19 45:9  
89:14 142:23 154:11  
167:7  
overarching (1) 63:8  
overblown (1) 73:15  
overcome (3) 161:15,18  
162:9  
overlap (1) 79:8  
overlapping (1) 78:20  
overreach (1) 13:5  
overriding (5) 4:9 57:13  
59:7 63:10 70:16  
overturn (1) 161:24  
overused (1) 71:10  
overwhelming (2) 37:13  
160:19  
overwhelmingly (2)  
8:23 54:8  
own (23) 10:24 16:24  
25:7,18,20 32:3,5,6  
33:18 36:12 49:21  
52:12 54:24 63:20  
64:3 69:22 87:10  
123:12 134:24 142:22  
143:3 163:17 170:16

P

pages (5) 4:19 10:8  
56:13 165:12,14  
pagination (1) 165:10  
pakistan (3) 57:17  
96:13 155:4  
paragraph (111)  
12:19,24,25  
13:6,21,22  
15:14,20,21,23  
16:2,6,17  
17:1,12,14,15,20  
18:1,24 19:20,21  
20:2,8,17 21:21 22:8  
23:3,9 26:4,18 27:5,24  
34:5,16,25 40:16  
43:6,17,23 44:1,16  
45:22  
48:5,11,13,16,18  
50:19,22 53:13 65:20  
66:3,23 72:13,19,21  
73:14,18 74:11 79:23  
83:7,11,13,14,19

85:15 87:16 90:17  
91:22 93:3 98:1,3,23  
99:7,10 100:4 101:5  
104:24,25 107:15  
109:6 110:12 112:23  
113:6 114:5,10  
116:10,13  
117:3,5,9,10,21  
120:8,13,21 122:23  
125:24 127:1  
130:14,16 132:2  
140:20 157:2  
158:11,12 160:25  
166:24 167:6 168:3  
paragraphs (22) 10:16  
13:24 14:14,16 17:18  
26:1,15 53:23 56:10  
66:22 72:11 81:10  
86:1 92:25 97:25 99:2  
113:5,24 121:17 123:9  
157:1 166:22  
parallel (1) 22:6  
parallels (1) 42:19  
parameters (1) 69:11  
paraphrase (1) 63:18  
paraphrasing (1) 40:15  
part (58) 16:4,8 18:19  
21:22 22:6,7 23:5 27:8  
39:17 41:7 43:10,14  
44:20 58:3,10,23  
59:11 60:9 62:9 90:19  
92:9 97:13 102:24  
108:21  
109:3,3,13,14,15  
110:4 112:6 124:6  
126:6,12,13,24  
127:3,17 128:1,11  
129:1,10,12,19  
130:1,21 132:4 133:22  
134:2,15 137:1,5  
143:19 150:20 156:20  
167:9 168:6 169:16  
parte (9) 42:21 63:22  
113:9 122:3,13,20  
124:22 139:6 143:13  
participate (1) 21:4  
participated (2) 71:23  
97:16  
particular (21) 16:18  
30:22 39:8 42:25  
46:12 61:11 62:21  
63:5 92:5 93:14,20  
94:1 98:1 106:20  
111:12,13 118:7  
122:25 139:25 155:8  
163:16  
particulars (2) 131:10  
133:11  
parties (22) 7:14,25  
18:22 29:1 34:10  
37:8,8 57:14 61:6  
66:20 81:21 92:12,23  
106:5 114:14 115:11  
142:23 158:13  
164:14,18 165:2  
166:19  
parts (2) 109:16 156:22  
party (29) 5:12 6:3 34:1  
36:22 40:6 43:4  
58:10,14,17,18 59:20  
60:10 61:22 99:23  
106:14 107:2 111:4,5  
118:21 119:7 125:3

139:8 142:1 146:8  
149:3 154:7,7 164:22  
167:20  
party (1) 36:11  
pass (2) 25:4,5  
passage (3) 10:10  
165:17,23  
passive (4) 24:25  
32:8,10 50:9  
password (2) 2:17,23  
path (1) 22:11  
patronising (1) 52:17  
patten (168) 1:17,25  
2:7,12,22,24  
3:2,4,10,14 5:8 8:9,17  
9:20 10:13,18 11:9  
12:3,6,12,23  
13:1,8,18,21 14:2,15  
17:25 18:7 20:7,24  
21:6,10 22:16,20,24  
23:19 25:8  
26:3,9,14,17,20,25  
27:6 28:2,10 29:17  
30:23 31:8,16,19  
32:18 33:4,12,22  
36:17 37:25 39:18  
40:12 42:15 49:20  
50:4,16,19,23 52:23  
60:11 61:10,16 63:14  
68:15 75:15 76:7,9  
77:1,15,19 78:3,9,14  
80:17,20 82:9,18  
83:2,9 85:14,16 86:3  
89:21,24 90:3,7,11,14  
91:1,5,9 92:19 93:11  
99:18 100:3,25 101:24  
103:3 109:10 112:22  
120:17,19  
124:1,9,13,19,22  
125:7,11,14,17,22  
126:5,8 127:5,10  
128:10,18,22  
129:4,7,13,25  
145:3,19 146:7,18  
147:6 148:22  
149:12,18 150:3,6,16  
151:2 152:25 153:24  
154:12 155:18,21  
157:21  
158:2,4,10,16,24  
159:2,13,24  
165:8,12,15  
169:3,18,24 170:9,19  
172:6,12,24  
pattens (2) 84:12  
148:21  
pause (5) 21:3 54:3  
86:2 128:19 159:3  
pausing (2) 9:13 23:20  
paying (1) 125:3  
pendens (1) 30:12  
pending (1) 106:24  
pennsylvania (6) 52:25  
53:4,8,10,17 54:2  
penultimate (1) 87:16  
penultimately (2) 4:8  
168:6  
people (1) 3:6  
per (2) 123:9 167:19  
perceived (1) 52:17  
perfectly (5) 74:9  
75:24,24 99:20 105:24  
perhaps (15) 10:12

20:16 42:6 51:13  
52:1,21 54:1 61:24  
94:6 111:5 122:18  
149:22 153:8 161:9  
169:19  
period (5) 45:5 65:13  
66:10 120:15,16  
permissible (4) 34:16  
36:3 45:1 167:25  
permission (36) 1:10  
8:11 16:12 19:12 24:6  
57:6 61:21  
69:17,19,21,23  
70:22,22 94:24 95:2  
96:9,15,19 113:10  
120:9,12,22  
121:13,19,24 122:9  
123:21 138:20 142:2  
145:18,22 149:1 155:7  
156:14,15 167:1  
permit (2) 39:15 138:13  
permitted (6) 6:1 83:16  
97:5 114:8 163:2,4  
permitting (2) 24:25  
139:8  
perpetrate (2) 138:6,10  
perpetrated (1) 71:17  
perpetrator (1) 66:25  
person (3) 21:4 60:4  
171:23  
personal (1) 57:20  
perspective (2) 20:15  
168:24  
persuade (1) 171:10  
persuaded (1) 162:10  
phrase (3) 63:1  
171:3,21  
pick (5) 3:17 4:11 13:11  
58:14 89:5  
picked (2) 27:10 39:3  
picking (1) 56:17  
picks (2) 43:17 44:23  
pitched (1) 82:8  
place (15) 2:8,10,12  
6:13 28:22 38:3 65:18  
66:9 71:20 84:24  
102:5 144:17,19  
150:1,13  
placed (1) 22:17  
places (1) 54:6  
plainly (7) 22:1 31:3  
34:24 59:2 99:16  
153:15 162:3  
plan (1) 39:1  
plant (1) 169:16  
platform (1) 98:14  
play (6) 11:6 16:13,25  
90:6 94:8 115:21  
pleaded (4) 23:4 89:17  
97:11,18  
pleaders (1) 130:7  
pleading (4) 22:23 24:4  
97:16 157:6  
pleadings (9) 22:21  
90:24 92:2,4 130:7  
136:14,17,18 158:17  
pleads (1) 23:3  
please (2) 1:4 147:17  
pm (5) 89:25 90:2  
172:9,11,25  
pointed (3) 63:9 69:21  
114:17  
points (34) 3:17 4:10

9:13 13:3,3,4,12  
15:14,17 28:16 35:16  
39:11 54:4 55:24 62:3  
67:25 68:20 70:23  
71:7 72:17,17 77:6  
83:4 88:8,9 97:16,19  
128:21 130:5,11 134:6  
136:11 137:6 157:7  
policeman (1) 100:15  
policy (64) 6:18 9:11  
10:24 11:2,4 19:25  
20:4,20 23:6,8,12,18  
25:21 29:23  
30:3,6,20,21 31:4,6,10  
32:6 33:24 36:7 40:2  
44:4 52:12 53:1  
54:22,24 56:18,23  
62:19 63:24,25 74:25  
79:14 80:5 100:7,11  
101:3,22 102:21 114:1  
117:24 130:18 132:23  
134:1,16,19,23,24  
135:3,7,12,24 141:3  
142:7,12,22 163:14,18  
168:19 170:23  
pop (1) 170:24  
posited (1) 164:13  
position (60) 2:7,8 4:3  
6:11,14,23 12:11 19:8  
21:3 25:24 26:16,21  
27:18 28:6,8,9 34:6  
36:12 46:11 50:11  
54:8 55:18 59:5 62:13  
67:17 84:3,16 92:18  
93:5,6 98:4 99:21  
103:17 108:7,11,22  
110:1,5,8 112:1,20  
119:7,18 122:12  
126:23 134:10 138:18  
144:25 146:25  
150:9,25 153:14  
154:6,11 156:3,5  
164:23 167:8 171:13  
172:13  
positive (1) 105:7  
positively (1) 86:11  
possibility (5) 17:21  
79:6 104:2 105:2  
162:1  
possible (14) 18:1,4,5  
45:17 46:19 47:4  
54:10 81:14,17 88:17  
105:24 119:1 161:17  
164:17  
possibly (3) 37:18 51:19  
69:22  
post (1) 6:5  
potential (2) 46:15  
54:10  
potentially (1) 134:17  
power (12) 10:23 24:22  
28:22 34:7,18,19  
44:24 45:1 152:13  
155:10,12 171:23  
powers (2) 29:2 112:18  
practical (1) 168:24  
practically (1) 31:3  
practice (2) 35:17 43:13  
prayer (1) 23:23  
prayers (1) 130:7  
precisely (5) 40:3 54:23  
81:20 107:8 137:15  
preclude (1) 78:24

preclusion (1) 162:21  
preclusive (5) 12:14  
18:15 19:4 55:2  
161:14  
precondition (4) 153:20  
155:9 159:7,8  
precrp (2) 152:11,20  
predetermine (1) 25:20  
prejudged (1) 136:9  
preliminary (4) 21:18  
41:18 53:3 57:8  
premise (2) 144:12  
169:24  
premised (1) 88:14  
preparation (1) 90:6  
prepared (4) 36:24  
45:23 46:2 58:14  
preread (1) 65:8  
prescribe (1) 60:18  
prescriptive (1) 5:24  
presence (2) 160:3,18  
present (4) 42:20 43:25  
70:23 73:1  
presumably (5) 11:17  
36:8 46:23 82:21  
149:19  
pretend (1) 55:18  
prevent (3) 30:9 31:10  
32:23  
previous (3) 98:11  
145:17 149:21  
previously (2) 97:22  
151:9  
primary (2) 4:3 34:24  
principal (1) 116:21  
principle (35) 37:16,20  
65:4 76:17 77:3,5,5,6  
84:15,21 89:6,11  
93:17,18 94:10,15  
95:11,24 96:18,22  
100:18 103:8,10,12  
105:16 110:24 114:23  
115:20 117:14 140:10  
159:19 160:18 161:12  
162:3,24  
principles (4) 116:22  
160:5,8,13  
prior (2) 9:21 154:17  
priori (1) 36:2  
priority (1) 154:11  
private (1) 142:19  
probably (7) 6:4 19:7  
28:18 41:4,15 59:17  
64:4  
problem (1) 63:9  
procedural (28) 3:16,22  
4:12,20 5:18 6:23 7:2  
9:14 13:25 22:6,11  
24:5 26:16 39:7,8,12  
42:14 43:2 46:13  
47:20 59:6 91:15  
146:25 147:19 148:12  
154:23,24 161:3  
procedurally (4) 41:14  
111:19,21 128:4  
procedure (9) 20:14  
39:15 43:11 107:19  
108:9 122:2 160:7  
163:22 164:4  
procedures (8) 43:15  
73:6 91:3 102:9  
107:10 108:17 138:18  
164:15

**proceed (23)** 14:11  
 21:21 59:9 70:2  
 72:4,9,17 73:21 84:8  
 90:18 92:8 99:4,6  
 101:10 116:3  
 117:16,20,25 122:19  
 124:6,11 126:12  
 129:11  
**proceeded (2)**  
 110:14,16  
**proceeding (36)** 14:12  
 16:4 47:22,23 79:7  
 85:6 89:13 93:21  
 96:3,4 100:9 101:7,18  
 102:3,10 109:19,23  
 110:10 111:15,21  
 112:17 115:3,7 122:11  
 123:15 125:21 126:25  
 127:2,25 129:24,25  
 130:5,8 137:2,9,13  
**proceedings (119)** 4:13  
 9:10,23,24 16:19  
 17:23,24 19:3,10  
 21:13 25:11 35:25  
 37:1,4,21 39:21,25  
 42:10 44:7 46:5  
 51:15,16 52:25  
 53:5,12,15 54:19  
 58:5,13 59:19 61:5  
 64:10,17,18  
 67:8,10,11 72:7  
 77:12,13  
 78:6,19,21,24 79:13  
 84:4,10,19,20,23,24  
 85:11,13,20 86:6  
 87:23 88:22,25  
 89:4,12 94:18  
 103:16,20  
 106:1,3,4,15,16,25  
 107:3 108:1  
 109:5,8,21  
 110:15,25,25 111:1,6  
 114:7 115:11,17  
 117:24  
 118:10,22,24,25  
 119:3,8,9,11,16  
 121:7,7,10,14 122:16  
 123:14,22 126:5,7  
 127:13,15 136:20,21  
 143:5 144:14 145:6,23  
 147:2 149:10  
 150:13,21 155:1  
 165:24,25 168:25  
 169:1 170:2  
**proceeds (1)** 164:3  
**process (40)** 10:22  
 20:19 25:4 42:8,13  
 45:4 46:15,18 48:20  
 56:20 58:19 59:23  
 60:13 62:9 67:1 68:6  
 71:1,8 72:23 87:12  
 100:1 102:8 107:12  
 138:6,9,10,11,24  
 139:1,11 143:3 149:2  
 152:9,22 153:18 155:9  
 156:16 159:7 171:11  
 172:2  
**processes (1)** 24:19  
**procured (1)** 167:3  
**produce (1)** 172:17  
**produced (1)** 170:11  
**producing (2)** 171:6  
 172:21

**progress (6)** 70:16  
 89:16 93:9 106:6  
 114:5,8  
**progressed (5)** 93:7  
 107:1 119:1,3,9  
**progression (1)** 114:11  
**proof (2)** 130:3,4  
**proper (5)** 54:15 76:1  
 95:12 117:4 160:20  
**properly (5)** 12:2 13:25  
 16:22 108:17 122:21  
**property (1)** 128:25  
**proportionality (1)**  
 70:15  
**propos (1)** 91:5  
**propose (1)** 1:13  
**proposed (1)** 71:9  
**proposing (2)** 133:15  
 170:2  
**proposition (3)** 74:15  
 85:20 156:10  
**prospect (4)** 53:15,21  
 67:11 172:3  
**prospective (1)** 67:8  
**protest (1)** 69:14  
**proves (1)** 84:20  
**provide (13)** 11:18 15:1  
 19:25 27:18 33:17  
 34:1 53:9 101:4,8  
 105:1 164:12,21  
 168:19  
**provided (4)** 49:23  
 58:14 82:1 89:2  
**provides (7)** 3:24 4:9  
 5:14 6:16 29:5 147:1  
 168:20  
**proving (4)** 8:10 63:19  
 167:9 171:20  
**provision (13)** 5:24 6:14  
 7:2 30:11 43:10,11,25  
 44:17,19 47:10 63:6  
 110:18 147:7  
**provisional (23)**  
 8:2,15,20 9:6,17 14:5  
 15:7 36:25 42:22  
 45:4,8,10 46:2,5,17  
 48:8,19 64:13 66:7  
 109:8 119:25 120:5  
 121:16  
**provisionally (1)** 24:6  
**provisions (5)** 5:5 43:24  
 45:16 109:15 126:14  
**public (66)** 6:18 9:11  
 10:24 11:2 19:25  
 20:4,20 23:5,8,12,18  
 25:21 29:22  
 30:3,20,21 31:4,6,9  
 32:6 36:7 40:2 44:4  
 52:12 54:22,24  
 56:18,22 62:18  
 63:24,25 74:25 79:14  
 80:5 100:7,11  
 101:3,22 102:21 114:1  
 118:13 130:18 132:22  
 133:25  
 134:16,19,23,24  
 135:3,6,12,24 138:4  
 139:7 140:7 141:3  
 142:7,11,20,22,25  
 143:3 163:14,17  
 168:19 170:22  
**publicly (1)** 139:17  
**publishing (1)** 55:19

**pudding (1)** 130:4  
**pull (1)** 62:1  
**pulled (1)** 37:11  
**pulling (1)** 31:7  
**punters (1)** 38:21  
**purely (2)** 56:6 168:20  
**purport (1)** 163:22  
**purporting (1)** 164:10  
**purpose (15)** 23:4 24:14  
 31:13 32:2,4 37:6  
 38:6,6 41:9,10 55:8  
 64:17 88:21 118:16  
 163:9  
**purposes (11)** 16:8  
 24:18 32:5 37:4  
 43:9,25 54:9 56:19,22  
 67:4 171:20  
**pursuant (3)** 1:9 92:23  
 126:1  
**pursue (2)** 107:12 167:1  
**pursued (1)** 70:7  
**pursuing (5)** 70:5 113:7  
 119:15 137:12,25  
**pursuit (1)** 169:1  
**pushed (1)** 75:22  
**puts (2)** 84:2 158:12  
**putting (4)** 23:23 36:18  
 110:11 140:23

**Q**

**qc (6)** 1:5,7 22:2 56:10  
 166:10,18  
**qcs (1)** 165:10  
**qualifications (1)**  
 110:19  
**qualified (1)** 154:20  
**quantum (1)** 169:21  
**quasi (3)** 8:25 42:12  
 44:7  
**query (1)** 2:20  
**question (97)** 16:7,17  
 19:25 20:17 23:11  
 30:22 35:8 37:2 39:14  
 41:16 42:5,6 46:23  
 47:20 49:5,19 52:4,6  
 54:14 55:5 63:19  
 65:14 69:1 71:5  
 73:2,15 75:17 76:3,13  
 77:11 79:11  
 80:3,5,6,22 84:12  
 85:4,12 87:4,12  
 88:1,15 89:14,15  
 91:24 94:19 96:11,21  
 100:9 101:3,4,17  
 102:12,15,22 104:12  
 105:23 106:21 108:25  
 109:13 110:2 111:2  
 112:12 113:14,25  
 114:1,3 115:4  
 116:16,18 118:6,12,15  
 122:1 127:11 133:2  
 136:5,8,16 138:4  
 139:5 143:6 147:23  
 148:21 153:5  
 157:11,11,12,15,17  
 158:21,22 162:23  
 163:14 169:7,15,19  
**questions (15)** 51:25  
 52:7,11,11 67:21  
 68:13 76:14 79:22  
 80:12 88:11 100:7  
 111:4 115:7 141:15  
 155:19

**quickly (1)** 15:16  
**quite (28)** 1:20,22 12:3  
 35:15 36:18 40:18  
 42:7 48:24 49:9 51:5  
 56:1 63:17 64:8,19  
 74:10 77:11 103:11,22  
 104:5 107:23 109:1  
 139:4,23 148:6  
 170:4,9 171:4,23  
**quotations (1)** 72:10  
**quoted (1)** 72:12

**R**

**rail (2)** 57:18 61:22  
**raise (4)** 40:2 62:3  
 167:18,19  
**raised (12)** 1:12 39:14  
 67:14 72:16 96:8  
 138:2 139:21 140:3  
 161:20 166:6 167:24  
 171:25  
**raises (2)** 76:12,14  
**range (1)** 60:25  
**rare (1)** 165:1  
**rather (23)** 13:16 22:6  
 31:11 47:11,19  
 51:5,25 53:14,22,24  
 56:2 59:23 60:7 65:1  
 71:10 74:14 115:16  
 123:7 126:15 136:1  
 148:11 167:13 169:2  
**re (1)** 64:3  
**reach (7)** 16:24 25:4  
 32:1 49:19 56:19  
 83:23 116:18  
**reached (4)** 9:6,18  
 62:18 164:14  
**reaching (3)** 107:14  
 163:8,9  
**reacted (1)** 33:15  
**read (10)** 26:2,4,13  
 53:23 63:2 74:24  
 85:25 104:21 108:20  
 152:15  
**reading (3)** 10:9 47:16  
 130:16  
**reads (1)** 154:5  
**real (7)** 52:17 53:15  
 66:5 112:24 118:14  
 169:10,19  
**realistically (1)** 105:24  
**reality (5)** 19:4 35:14  
 123:4 133:23 166:12  
**really (17)** 10:15 13:23  
 41:16 42:9 47:21  
 52:7,9 62:20 65:8 82:9  
 134:1 135:1 142:6  
 151:23,23 158:10,18  
**reason (33)** 16:10 41:4  
 46:10 59:18,20 71:16  
 79:21 85:5 91:9 92:3  
 95:21 97:23 103:17  
 105:9 112:24 117:3  
 118:11 122:17,19,19  
 132:17 133:20 136:13  
 137:20,21 138:1  
 146:12 152:21 153:12  
 154:1,10 155:12  
 168:16  
**reasonable (3)** 20:18  
 53:17 171:19  
**reasonably (1)** 41:3

**reasoning (3)** 10:17  
 46:6 170:23  
**reasons (29)** 28:23 39:2  
 40:13 48:12 65:3 68:8  
 69:22 72:1,6,8  
 75:14,14 78:22,23  
 79:3 86:21 96:19  
 98:24 99:3,9 114:18  
 116:8,24 122:24  
 134:13 137:12,14  
 143:7 167:14  
**recalled (1)** 165:23  
**receipt (1)** 45:3  
**received (1)** 65:10  
**receiver (3)** 65:10,12,14  
**receiving (1)** 118:21  
**recent (1)** 171:7  
**recital (2)** 21:14,17  
**recitals (1)** 4:20  
**reciting (1)** 131:6  
**recognise (4)** 47:11  
 70:11 151:8 164:2  
**recognised (4)** 6:19  
 40:22 50:13 79:5  
**recognises (3)** 28:20  
 59:7 163:17  
**recognition (11)** 5:23  
 29:23,25 30:2 65:10  
 78:19 101:21  
 122:14,16 123:3,11  
**recollection (1)** 52:25  
**reconsideration (1)** 95:5  
**record (1)** 148:3  
**recorded (1)** 72:3  
**records (3)** 16:3 100:5  
 101:16  
**recurrent (1)** 24:16  
**recurring (1)** 3:20  
**reduced (2)** 58:12  
 114:13  
**reducing (1)** 3:13  
**reengage (1)** 146:5  
**reengaged (1)** 146:6  
**refer (2)** 1:6 167:6  
**reference (16)** 30:21  
 49:22 76:19 82:7 83:6  
 86:22 91:23 94:20  
 95:19 108:11 117:1  
 119:20 120:1 122:18  
 153:23 167:9  
**references (6)** 31:15  
 49:16 56:4 72:10  
 95:17 156:3  
**referred (11)** 51:17,18  
 52:19 56:24 116:1  
 117:10 152:22 160:12  
 161:21 162:12 167:5  
**referring (3)** 60:23  
 79:23 99:8  
**reflect (2)** 51:9 167:10  
**reflected (3)** 19:7 29:12  
 58:22  
**reflecting (2)** 6:14 45:2  
**reflects (2)** 8:24 58:9  
**refusal (1)** 66:21  
**refuse (5)** 5:23 29:6,11  
 163:18 167:2  
**refused (4)** 19:12 29:24  
 70:22 95:3  
**refusing (4)** 20:21 41:25  
 69:21 96:19  
**regard (7)** 16:23 48:20  
 61:4 70:14,18 118:14

135:17  
**regarded (2)** 57:5  
 109:21  
**regardless (10)** 25:9,12  
 89:16,16,17 95:25  
 101:8 103:14,15 105:4  
**regime (4)** 46:6,8  
 109:9,20  
**regretted (1)** 71:22  
**regulations (1)** 65:11  
**reinmar (1)** 49:9  
**rejected (8)** 14:11  
 22:16 55:1 72:6 97:7  
 114:20 155:13 168:9  
**rejecting (2)** 50:14  
 157:10  
**rejects (1)** 48:18  
**relation (65)** 3:20 19:19  
 21:1 31:20 39:1 52:13  
 67:10 75:11,13  
 76:13,15,17 79:15  
 80:16 81:2,6 82:3,6  
 83:6,10,13 84:15,22  
 86:14 87:11 88:3 90:6  
 92:3,24 93:9 94:9,24  
 100:21 102:2,9,10  
 103:4 107:11,12  
 108:5,18,23,25 110:3  
 112:19 113:21  
 121:3,16,17 124:17  
 126:23,24 136:2,4  
 142:20 152:12 154:3  
 155:1,16,20 156:2  
 160:19 164:23,24  
 169:8  
**relationship (10)** 69:4,7  
 76:21 77:10,12 88:12  
 95:12 96:25 101:13  
 111:23  
**relatively (1)** 98:17  
**relevance (1)** 28:18  
**relevant (18)** 10:8  
 13:12 14:17 17:23  
 29:2 31:12 45:5 60:25  
 61:2 80:4 86:24  
 105:17 111:7 126:14  
 153:17 156:1,20,22  
**reliance (1)** 23:10  
**relief (1)** 14:16  
**relief (4)** 2:5 23:14  
 35:20,23 39:4,25  
 40:25 41:22 50:13  
 53:7,7 68:10 97:18  
 124:25,25 125:1  
 127:14 130:5,22  
 136:23 137:3,4 157:7  
 161:2  
**relies (1)** 64:2  
**relish (3)** 72:4 99:3,15  
**reluctant (1)** 160:8  
**rely (6)** 27:21,22 46:7  
 140:14 146:2 150:19  
**relying (1)** 75:9  
**remain (5)** 42:3 46:5,8  
 109:8 163:10  
**remained (2)** 66:7 93:10  
**remaining (1)** 68:7  
**remains (7)** 8:1 9:9  
 46:18 98:7 116:18  
 150:7 168:8  
**remarkable (1)** 64:20  
**remedies (2)** 32:8  
 138:25

**remedy (4)** 24:25  
 32:9,11 50:9  
**remember (4)** 45:12  
 131:23 140:9 146:20  
**remembering (1)**  
 165:18  
**remind (2)** 10:12 13:24  
**reminds (1)** 68:9  
**remove (3)** 69:1 88:24  
 139:9  
**render (1)** 170:11  
**renumbered (1)** 129:2  
**reopen (2)** 54:21 159:22  
**reopening (1)** 170:3  
**repeated (1)** 66:18  
**repetition (1)** 57:2  
**replete (1)** 49:15  
**reply (1)** 1:15  
**report (4)** 38:9,12,14,23  
**reported (1)** 38:11  
**reports (2)** 13:20 38:17  
**represents (1)** 22:25  
**republic (1)** 85:9  
**request (2)** 118:6  
 123:12  
**require (12)** 7:19 16:19  
 73:4 74:4,6 115:5  
 121:12 129:12 157:16  
 160:10 167:14 168:25  
**required (4)** 125:2  
 145:10 157:6 162:5  
**requirement (1)** 2:1  
**requirements (1)** 57:15  
**requires (1)** 2:23  
**requiring (2)** 58:18  
 60:14  
**resist (5)** 29:21 32:12  
 37:23 42:23 43:4  
**resistance (5)** 14:8,23  
 31:25 62:7 91:10  
**resisted (3)** 33:2  
 142:10,16  
**resisting (6)** 24:25  
 25:18 35:3 50:9 53:9  
 112:4  
**resolution (1)** 119:4  
**resolve (2)** 1:18 35:14  
**resolved (3)** 11:1  
 121:25 136:16  
**resolving (3)** 37:4 67:4  
 138:4  
**resource (3)** 171:20,24  
 172:1  
**resources (3)** 20:18  
 70:15 114:13  
**respect (29)** 4:15 10:23  
 14:18 17:17 19:5  
 20:23 21:23 22:1  
 24:19 33:14 58:2  
 66:14 72:5 94:23 95:2  
 99:4 108:19 116:20  
 117:24 122:10  
 127:7,12 132:13,24  
 133:2 155:7 156:17  
 161:5 162:22  
**respectfully (7)** 17:9  
 40:18 51:4 52:14 80:1  
 82:12 98:3  
**respects (2)** 18:22 58:9  
**respond (1)** 40:18  
**responded (1)** 2:21  
**respondent (4)** 1:8  
 112:4 136:20 157:20

<p><b>respondents (13)</b> 1:12 3:21,25 4:11 126:21 138:2 140:15,19 155:16 159:5,7 160:24 170:23</p> <p><b>response (2)</b> 34:15 129:6</p> <p><b>responses (1)</b> 159:17</p> <p><b>restriction (2)</b> 63:8,10</p> <p><b>result (5)</b> 82:21 112:8 133:25 144:10 160:11</p> <p><b>retaliation (1)</b> 47:24</p> <p><b>reverse (1)</b> 134:9</p> <p><b>review (11)</b> 3:16 10:23 24:23 29:2 33:18 34:2,8,19 81:9 87:12,23</p> <p><b>reviews (1)</b> 39:6</p> <p><b>revisions (1)</b> 11:1</p> <p><b>revoke (1)</b> 149:20</p> <p><b>revoked (4)</b> 150:18,19,22,24</p> <p><b>richards (91)</b> 2:4,14 11:13,24 15:19,22 19:9,15,18 38:8,15,22 41:11 44:9,14 47:3,13,18 48:9 50:20 51:20 63:4 65:25 66:4 73:14 74:2,13,20,23 75:2,7 81:8,12,20,24 83:15,19 86:17,23 87:6,15,22,25 88:7 103:21 104:9,16,22 111:18 131:1,4,15,20 132:7,14,16,25 133:3,5,10,17,21 134:4,8,25 135:5,13,16,21 140:13,18,22 141:9,13,19,22 142:4 143:8,10,15,19,25 147:10 148:1,10,18 149:23 151:10,13,19 161:21</p> <p><b>rid (4)</b> 146:1,16,19 151:20</p> <p><b>ridiculous (1)</b> 3:7</p> <p><b>rightly (4)</b> 51:5 122:9 139:23 171:12</p> <p><b>rights (2)</b> 4:16 154:25</p> <p><b>ring (1)</b> 171:3</p> <p><b>ringing (2)</b> 17:18 81:13</p> <p><b>rise (6)</b> 6:5 25:13 37:15 126:10 162:21 172:8</p> <p><b>risk (7)</b> 16:11 52:16 61:25 67:5 86:14 113:1 160:9</p> <p><b>rix (11)</b> 8:24 44:16 45:6,15 47:14 48:2,10 107:21 108:18 109:12 157:3</p> <p><b>rixs (4)</b> 43:16 46:18 108:21 109:4</p> <p><b>robert (1)</b> 157:4</p> <p><b>role (6)</b> 32:2,14 50:7 77:24 160:20 162:4</p> <p><b>roles (2)</b> 28:21 54:7</p> <p><b>room (2)</b> 13:4 65:5</p> <p><b>root (1)</b> 152:21</p> <p><b>route (4)</b> 12:7 44:18 48:8 151:21</p> <p><b>royal (1)</b> 94:12</p> <p><b>rsc (1)</b> 156:6</p>	<p><b>rubric (2)</b> 129:3 163:14</p> <p><b>rug (1)</b> 37:11</p> <p><b>ruled (1)</b> 12:15</p> <p><b>rules (18)</b> 39:15 43:11,12,15,20 45:7 60:11,12,18 63:6 107:19 108:23 125:2 152:14,23 154:5 155:11 160:5</p> <p><b>ruling (10)</b> 12:16 24:17 35:13 36:16 51:25 52:5 65:16 67:19 151:15 160:22</p> <p><b>rulings (1)</b> 164:10</p> <p><b>run (3)</b> 35:16 93:1 100:18</p> <p><b>running (2)</b> 61:24 171:11</p> <p><b>runs (1)</b> 4:18</p> <p><b>russian (5)</b> 3:12 65:10 66:18,21 67:5</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>sailed (1)</b> 170:7</p> <p><b>same (33)</b> 5:2,15 18:2,2 22:11 25:12 31:1 35:18 40:3 41:16,21 43:15 69:12 84:17 86:9 88:3 103:13 106:3 111:2 112:11 115:11 116:15 119:1 132:12 133:8 135:3,7 139:3 141:23,24 142:20 154:3 168:14</p> <p><b>satisfactory (2)</b> 65:24 123:2</p> <p><b>satisfied (1)</b> 159:8</p> <p><b>satisfies (1)</b> 71:9</p> <p><b>save (4)</b> 18:23 37:17 160:13 162:5</p> <p><b>saw (3)</b> 20:2 98:4 163:15</p> <p><b>saying (49)</b> 2:18 3:11 14:24 18:8 20:2 30:5 37:10,13 47:23 73:18,19,23 74:1,4,14 75:19 77:3 79:21 80:14 82:11,20 94:16 102:20 103:4,8,8 104:8,15,16,25 105:9 109:6 133:8 141:2 143:12,15,22 145:25 149:5,15 150:8,14,20,24 151:3,5,24 160:15 170:10</p> <p><b>scenario (5)</b> 35:12 36:20 37:19 67:14 76:10</p> <p><b>scene (1)</b> 55:19</p> <p><b>schedule (1)</b> 117:25</p> <p><b>scheme (7)</b> 28:15 101:12 103:5 106:18 112:7,8 144:9</p> <p><b>scope (5)</b> 42:11 76:18 93:24 106:21 110:10</p> <p><b>screen (1)</b> 2:18</p> <p><b>screens (1)</b> 2:16</p> <p><b>scrutiny (1)</b> 43:22</p> <p><b>seat (6)</b> 29:1 34:17 80:2 95:13 100:15 168:8</p> <p><b>seated (2)</b> 33:14,24</p> <p><b>sec (1)</b> 109:13</p>	<p><b>second (8)</b> 4:7 8:19 20:9 49:25 70:1,8 79:24 117:3</p> <p><b>secondary (1)</b> 32:22</p> <p><b>secondly (15)</b> 56:15 66:12,15 76:16 77:7 78:16 88:16 101:1 107:7 108:18 121:1 134:14 136:4,4 170:17</p> <p><b>section (12)</b> 5:10 6:8 7:9 14:8,23 38:5 42:24 44:20,21 109:13 138:21 163:15</p> <p><b>sections (3)</b> 7:6,6 29:12</p> <p><b>security (15)</b> 43:1,4,9,25 44:3,10,18,19 45:22,25 48:7 108:25 110:3 157:13 167:18</p> <p><b>see (43)</b> 1:21 2:17 7:8 8:7 11:3,24 12:2 21:14 22:6 25:2 34:4,15 45:16 47:18 54:11,14 62:4 83:9 87:13,22,25 90:20 92:18,20,25 93:8 94:9 95:1 100:11 104:22 111:11 116:10 117:21 119:5 121:21 123:8 125:18,23 128:20 134:21 140:15 151:19 168:22</p> <p><b>seeing (1)</b> 171:4</p> <p><b>seek (9)</b> 5:1 24:9 30:9,18 32:9 69:17,19 102:17 159:18</p> <p><b>seeking (24)</b> 25:20 36:22 39:23,25 41:25 42:13 43:4 50:10 54:15 55:7 59:15 60:5 75:8 112:3 113:21 119:2 138:5,9,10,12,12,16 139:2 166:13</p> <p><b>seeks (4)</b> 62:1 95:14 119:8 161:4</p> <p><b>seem (1)</b> 130:23</p> <p><b>seemed (1)</b> 47:14</p> <p><b>seems (8)</b> 2:22 31:8 38:17 41:1 48:10 74:7 83:20 116:14</p> <p><b>seen (9)</b> 29:4,12 57:19 65:9 72:18 82:23 106:7 152:19 159:4</p> <p><b>sees (8)</b> 29:22 31:14 32:8 43:6 53:13 75:13 91:12 128:5</p> <p><b>seized (5)</b> 36:21 70:10 71:22 78:12,13</p> <p><b>sense (10)</b> 5:25 11:17 20:13 60:14 100:20 126:3 127:23 129:9 130:3 150:20</p> <p><b>sentence (6)</b> 20:8,9 23:11 79:24 83:8,11 112:7,8 144:9</p> <p><b>separate (10)</b> 6:19 125:9 126:17 128:12,15 137:2 157:23 160:10 164:19 166:17</p> <p><b>separating (1)</b> 129:16</p> <p><b>september (1)</b> 10:4</p> <p><b>series (2)</b> 71:13 153:3</p> <p><b>serious (2)</b> 71:17 108:14</p>	<p><b>serve (7)</b> 59:20 118:16,17 144:13 149:13 154:19 156:14</p> <p><b>served (19)</b> 7:15,20,24,25 8:11,12 22:21 25:24 28:11 44:25 45:13 89:8 97:17 98:24 109:20 127:19 133:12 147:4 149:10</p> <p><b>service (6)</b> 9:21 45:20 47:5,15 93:2 118:13</p> <p><b>services (1)</b> 33:5</p> <p><b>servicing (5)</b> 41:9 60:10 110:17 150:10 154:17</p> <p><b>set (100)</b> 3:22 5:25 6:11 8:3 9:3,4,8,17,23 12:18 14:4,10,12 15:8 21:15,18 22:10 24:7 25:25 28:22 29:10,11 30:13 32:9 36:21,25 39:8,9 42:10 45:6 57:11 59:1 60:20,24 65:23 73:8 75:21 76:15 85:11 91:6 93:19 96:2 97:20 98:11,15 101:10 103:6,19 108:6 110:20,22 113:8,16,22 119:16 120:4 121:1,6 123:6 124:5,14,18 125:4 126:2 131:5,7,18,22 132:5 133:13 136:12,25 144:3,7,19,20 145:25 146:4,10,24 147:21 148:11,12,16,24 149:24 150:2,4 152:8,14 154:4,7,21 158:14 159:20 165:5 166:4,8,16 167:3</p> <p><b>sets (7)</b> 5:22 6:15 29:4 97:23 147:8 158:12,21</p> <p><b>setting (20)</b> 7:2 10:5 11:16,19 29:19 42:1 51:11 59:10 62:6 66:13 74:2 97:17 114:18,19 123:11 130:23 131:11 145:1 148:13 151:14</p> <p><b>settle (1)</b> 23:22</p> <p><b>seventeen (1)</b> 123:13</p> <p><b>several (3)</b> 70:9 113:5 116:24</p> <p><b>shall (5)</b> 1:6,21 25:2 124:11 129:10</p> <p><b>shared (1)</b> 53:2</p> <p><b>sheltam (2)</b> 57:18 61:22</p> <p><b>ship (1)</b> 170:7</p> <p><b>shoots (1)</b> 23:13</p> <p><b>short (14)</b> 10:10 14:3 57:9 59:5 69:8 73:11 75:18 89:20 93:12 97:9 101:25,25 168:3 172:10</p> <p><b>shortage (1)</b> 171:23</p> <p><b>shortest (2)</b> 127:23 153:8</p> <p><b>shorthand (1)</b> 69:18</p> <p><b>shortly (3)</b> 1:16 71:2 152:17</p> <p><b>should (87)</b> 14:24 16:9 18:8,23 24:6 27:9</p>	<p>31:20 37:3,21 56:6 58:16 59:8,21,22 60:20 62:22 64:15 65:23 67:16 68:5,6,6,24 70:2 71:19 72:17 73:10,16,21,21,23,25 75:17 76:1 85:19 90:18 92:8 95:17 96:7 97:4 98:13 100:9 102:7 106:15 109:1 110:21 111:13 112:12 113:16 116:3 117:16,20 124:6 126:11,11 129:11 130:13 136:5 137:21 140:8 143:24 144:2,7,18,20,25 146:24,24 148:11 150:1,21,22 151:9 152:15 153:12 154:10 155:13 159:3 163:1,4 165:16 166:7,10,16 167:2,6 171:10</p> <p><b>shouldnt (6)</b> 15:7 40:16 62:22 99:25 132:17 150:25</p> <p><b>show (5)</b> 18:23 29:16 156:15 166:22 169:19</p> <p><b>showed (6)</b> 39:17 43:18 44:21,23 45:12 124:5</p> <p><b>showing (3)</b> 46:24 73:10 107:13</p> <p><b>shown (3)</b> 48:2 100:11 152:10</p> <p><b>shows (2)</b> 35:5 115:17</p> <p><b>shrif (1)</b> 73:11</p> <p><b>shut (1)</b> 18:12</p> <p><b>shy (1)</b> 47:12</p> <p><b>side (9)</b> 82:1 91:18 110:11 114:8 126:19 149:3 150:7 158:19 166:21</p> <p><b>sides (3)</b> 81:15 114:7 172:15</p> <p><b>signals (1)</b> 7:16</p> <p><b>significance (2)</b> 51:10 59:3</p> <p><b>significant (4)</b> 21:11 48:21 115:18 162:22</p> <p><b>similar (1)</b> 53:13</p> <p><b>similarly (1)</b> 46:8</p> <p><b>simple (1)</b> 154:1</p> <p><b>simplest (1)</b> 153:8</p> <p><b>since (6)</b> 15:6 98:8 113:24 121:4,11,11</p> <p><b>single (1)</b> 106:19</p> <p><b>sit (1)</b> 1:14</p> <p><b>situation (1)</b> 10:4</p> <p><b>situation (6)</b> 92:1 105:25 133:11 136:19 143:9 150:17</p> <p><b>situations (2)</b> 84:25 145:9</p> <p><b>six (1)</b> 3:12</p> <p><b>sixth (1)</b> 99:9</p> <p><b>size (1)</b> 3:13</p> <p><b>skeleton (18)</b> 12:19 15:14 26:1 39:14 56:8 60:13 72:11 93:2 95:18,20 104:24 127:22 128:3 151:7 152:20 159:10 166:18</p>	<p>167:5</p> <p><b>skeletons (1)</b> 82:2</p> <p><b>slight (1)</b> 20:13</p> <p><b>slightly (5)</b> 39:13 53:20 58:12 140:23 150:16</p> <p><b>smaller (1)</b> 143:17</p> <p><b>smouha (186)</b> 1:7,15 4:2 12:18 17:15 27:5,14 50:24 51:18 56:5 57:19 63:16 68:18,19,20 73:19 74:12,18,22 75:1,4,9 76:5,8,12 77:4,18,20 78:8,11,16 79:15,19 80:10,14,16,21 81:11,18,21,25 82:17 83:1,4,10,18,25 85:15,17 86:4,22 87:3,11,16,23 88:1,6,8 89:23 90:3,4,8,12,15 91:2,7,11,20 92:20 93:12 100:2,19 101:1,25 104:7,14,21,23 105:14,22 108:2 109:11 111:10 112:23 118:20 120:6,18,23 124:8,10,16,21 125:6,10,13,15,18,23 126:6,20 127:9,20 128:17,19,23 129:5,8,24 130:2,25 131:3,13,17 132:6,12,15,24 133:2,4,7,16,19 134:2,5,9 135:8,15,19,23 139:18,22 140:3,6,19 141:7,11,15,21,25 142:13,17,24 143:11,17,21 144:4 145:13 146:3,17,20 147:7,23 148:8,14,20,25 149:16,22 150:4,9,23 151:3,12,16,22 153:7,15 154:23 155:22 157:25 158:3,8,15,20,25 159:3,14 161:3 163:21 164:13 165:18 167:5 168:11 171:6 172:12 174:4</p> <p><b>smouhas (8)</b> 15:14 19:20 26:1 50:14 57:20 159:16 160:1 167:19</p> <p><b>snuff (1)</b> 71:2</p> <p><b>solely (1)</b> 19:24</p> <p><b>somebody (2)</b> 3:5,5</p> <p><b>somehow (6)</b> 20:13 21:24 37:11 101:12 166:14 169:25</p> <p><b>someone (4)</b> 2:18 6:7 44:25 157:19</p> <p><b>something (23)</b> 27:9 29:21 33:9 38:11 42:12 44:2,20 49:1 59:9,11,23 60:3 83:12 87:1 92:7 102:2 106:19 118:18 121:17 137:4 149:19 161:16 164:11</p>	<p><b>sometimes (4)</b> 32:8 37:16 141:16,16</p> <p><b>somewhat (2)</b> 19:6 23:24</p> <p><b>somewhere (2)</b> 47:24 106:9</p> <p><b>soon (4)</b> 106:19 108:6 172:17,22</p> <p><b>sort (22)</b> 12:7 26:12 33:10 39:11,21 41:6 51:12 53:13 54:20 59:23 65:3 77:17 91:17 96:4 107:18 118:13 121:18 122:11 128:14 148:22 151:14 170:1</p> <p><b>sought (23)</b> 23:15 29:25 34:1 35:1 37:6 42:23 51:21 61:6 70:21 76:11 94:24 96:9 97:15 103:16 110:15,16 127:14 130:22 138:6 143:4 145:20 150:10 164:5</p> <p><b>sound (2)</b> 48:14 73:17</p> <p><b>spared (1)</b> 4:18</p> <p><b>spcak (2)</b> 35:10 62:23</p> <p><b>speaking (1)</b> 60:25</p> <p><b>special (10)</b> 6:14 62:24 96:3 102:2 111:8,16 112:16 118:5 145:9 153:22</p> <p><b>specific (2)</b> 27:13 92:21</p> <p><b>specifically (1)</b> 147:24</p> <p><b>specify (2)</b> 7:14 158:18</p> <p><b>speculation (1)</b> 18:19</p> <p><b>speculative (1)</b> 19:6</p> <p><b>speech (2)</b> 156:23,23</p> <p><b>spelt (2)</b> 151:6,7</p> <p><b>spend (1)</b> 119:13</p> <p><b>spent (1)</b> 169:11</p> <p><b>sphere (1)</b> 58:10</p> <p><b>spirit (1)</b> 48:15</p> <p><b>splendid (1)</b> 2:15</p> <p><b>split (1)</b> 1:13</p> <p><b>spot (1)</b> 166:24</p> <p><b>sprange (6)</b> 1:5 56:10 68:9,17 165:10 166:10</p> <p><b>sprung (1)</b> 161:4</p> <p><b>stage (12)</b> 9:6,18 21:12 39:5 64:13 68:1 88:25 103:15 113:20 136:9 159:25 172:3</p> <p><b>stages (1)</b> 8:25</p> <p><b>staging (1)</b> 164:14</p> <p><b>stake (3)</b> 84:16 95:11 96:18</p> <p><b>stamp (1)</b> 128:14</p> <p><b>stand (2)</b> 76:24 168:17</p> <p><b>standard (3)</b> 14:7 30:18 91:2</p> <p><b>start (4)</b> 26:21 45:4 78:18 170:3</p> <p><b>started (3)</b> 60:3 93:13 171:11</p> <p><b>startling (1)</b> 169:2</p> <p><b>starts (1)</b> 157:19</p> <p><b>stated (1)</b> 43:13</p> <p><b>statement (4)</b> 27:22,23 28:1 84:3</p> <p><b>statements (13)</b> 22:4 26:8,24,25 27:2,19,19 28:5,7,12 92:9 115:9</p>
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168:17  
**states (9)** 19:16 34:22  
 83:10,13,17 85:22  
 98:5 163:24 164:20  
**statis (57)** 1:6 4:6 5:1  
 6:24 14:5 16:11 19:22  
 21:19 24:8 26:7  
 27:3,4,10,20 62:12  
 68:24,25 69:14,16  
 70:7,19 71:9,16,21  
 72:8,11 73:23  
 78:13,24 84:9 88:23  
 93:22 95:20 96:5  
 97:14 98:24 99:3,14  
 102:16 103:16 109:18  
 110:15,16 112:25  
 114:19,21 115:9,14,21  
 121:13,22 128:1  
 137:16 138:13 143:7  
 144:22 150:10  
**statute (1)** 34:10  
**stay (5)** 19:3 30:15  
 111:20 121:18 150:1  
**stayed (2)** 121:21,24  
**stays (1)** 106:24  
**steps (2)** 58:2 68:7  
**still (16)** 2:8 14:3 22:25  
 24:13 32:22 106:13,14  
 122:11 127:18 129:21  
 131:22 132:20 134:20  
 136:25 148:3 164:4  
**stood (1)** 98:14  
**stop (8)** 58:13,13 71:25  
 89:13 112:13 115:15  
 119:9 137:17  
**stopping (1)** 60:3  
**stressed (1)** 66:15  
**stressing (1)** 78:4  
**strike (4)** 41:12 111:19  
 112:14 152:12  
**striking (2)** 160:23  
 171:23  
**string (1)** 4:22  
**strong (6)** 43:21 71:16  
 72:9 99:5 139:7  
 153:18  
**stronger (1)** 137:14  
**strongly (1)** 36:2  
**structural (2)** 50:2  
 67:13  
**structure (8)** 16:23  
 24:20,22 54:4 58:22  
 120:7 129:1 162:4  
**stuck (2)** 81:16,21  
**subject (8)** 1:13 39:4  
 43:15 109:14 125:1  
 147:2 154:17 162:15  
**subjects (1)** 43:22  
**submit (29)** 13:25 15:1  
 17:8 22:8 24:2,10,20  
 34:19 35:17 42:12  
 46:16 51:4,8 52:7,14  
 55:6 58:1 59:15 60:6  
 61:19 64:10 65:7 66:5  
 68:3,8,10 71:4 167:15  
 171:13  
**submitted (3)** 19:22  
 100:5 156:19  
**subparagraphs (1)** 8:8  
**subsection (4)** 5:10,13  
 6:18 7:12  
**subsequently (1)** 25:25  
**subsidiary (1)** 55:23

**substance (6)** 35:12  
 36:13 41:16 67:23  
 164:6 166:1  
**substantial (5)** 54:14  
 66:9 114:5,6,12  
**substantially (1)** 93:7  
**substantive (4)** 3:18  
 136:22 137:2 154:25  
**substantively (1)** 164:9  
**subtheme (1)** 51:12  
**subtleties (1)** 122:2  
**subversion (5)**  
 77:9,16,18,22 94:11  
**subvert (1)** 101:13  
**subverts (1)** 76:20  
**succeed (3)** 21:19 84:5  
 170:15  
**succeeding (1)** 25:10  
**suffered (1)** 112:7  
**sufficient (4)** 14:22  
 16:18 32:23 117:25  
**suggest (8)** 22:12 47:1  
 49:18 54:4 109:4  
 111:16 134:20 153:11  
**suggested (6)** 21:12  
 68:4,6 95:10 98:12  
 149:23  
**suggesting (5)** 56:5  
 96:13 103:9 104:6  
 115:3  
**suggestion (15)** 4:3  
 21:23 22:14 23:25  
 31:17 34:7 55:25  
 76:20 95:23 102:2  
 113:14 140:10  
 152:6,11 155:8  
**suggests (1)** 36:2  
**suit (1)** 115:25  
**sullivan (1)** 160:14  
**summarily (1)** 45:19  
**summarise (2)** 26:15  
 104:7  
**summarised (2)** 12:11  
 66:22  
**summarises (3)** 43:19  
 85:23 98:1  
**summarising (2)** 17:19  
 82:2  
**summary (8)** 12:18,20  
 13:7 17:1,8 44:6 46:4  
 109:7  
**sums (1)** 114:12  
**super (1)** 13:3  
**supervision (2)** 34:18  
 72:23  
**supervisory (29)** 6:14  
 9:24 10:7 14:9 24:24  
 25:6,17 28:21 29:4,19  
 30:14 32:10 33:16  
 40:14 50:3 51:7 61:24  
 62:5,6 69:3,5 76:22  
 77:10 79:9 88:13  
 96:25 101:14,14  
 170:13  
**supplement (1)** 155:5  
**supplemental (13)**  
 10:14 21:8 56:9,12  
 72:12 81:25 90:13  
 96:10 110:7,8 119:22  
 165:7 166:20  
**supporting (1)** 116:2  
**suppose (7)** 28:25 30:23  
 41:11 51:12 112:2

135:3 148:22  
**supposed (2)** 108:12,13  
**supreme (4)** 87:18  
 96:16 152:14,23  
**sure (7)** 82:14 86:25  
 90:22 100:3 124:2,19  
 170:4  
**surfaced (2)** 52:21  
 167:23  
**surprised (1)** 18:21  
**surprising (1)** 72:15  
**surprisingly (3)** 12:13  
 51:24 55:20  
**survive (1)** 4:5  
**surviving (1)** 21:25  
**suspect (3)** 28:16 49:17  
 162:19  
**suspended (1)** 6:12  
**svea (2)** 10:9 12:11  
**sweden (19)** 4:14,25  
 10:6 31:4,5,8 33:2  
 54:23 62:18 73:24  
 97:6 98:9  
 135:13,14,24 168:9,12  
 170:13,17  
**swedish (33)** 9:23 10:3  
 11:2,10,14 12:1,1,15  
 18:3 19:2 40:1 55:1  
 62:18 63:25 69:3,13  
 74:3,5,6 77:12  
 80:2,9,11 83:22,23  
 88:14 97:1 98:7  
 141:2,5 168:13 169:7  
 170:10  
**system (2)** 106:23  
 135:12

**T**

**tab (37)** 5:7 7:4 10:15  
 13:17 17:5 21:8 22:22  
 29:15 33:21 42:18  
 52:22 56:9,12  
 65:20,25 66:2  
 72:12,20 81:25 82:1  
 85:8 94:8 96:10 110:8  
 116:5 119:22 120:1  
 122:23 125:16 128:23  
 130:10 140:20 156:7,9  
 161:23 165:7 166:20  
**tables (1)** 82:1  
**tackle (1)** 134:7  
**tactical (1)** 137:15  
**taken (9)** 2:8,10,12  
 15:24 16:20 34:6  
 71:20 113:4 118:19  
**takes (6)** 17:9 28:22  
 38:24 45:6 68:14  
 147:5  
**taking (6)** 58:17 84:24  
 100:8 105:22,23,23  
**talking (6)** 13:14 55:16  
 74:8 82:25 126:11  
 135:10  
**talks (2)** 127:17 129:14  
**tap (1)** 115:22  
**target (1)** 14:19  
**technical (4)** 39:13 42:2  
 45:24 165:22  
**technically (1)** 41:12  
**tells (2)** 38:9 43:12  
**ten (1)** 92:15  
**tenable (1)** 24:11  
**tend (1)** 51:24

**tension (2)** 10:21,25  
**tentative (1)** 17:19  
**term (1)** 147:21  
**terminate (6)** 66:10  
 78:24 84:9 123:3  
 128:8 143:4  
**terminated (1)** 65:15  
**terminating (2)** 65:22  
 123:11  
**termination (3)** 67:15  
 122:15 137:13  
**terms (48)** 8:1 13:6  
 16:3 17:19 18:9,10  
 19:22 28:3 40:7,23  
 47:13 53:20 62:2  
 63:17 68:12 78:4,12  
 81:18 91:21,25 92:6  
 94:14 103:17 104:4  
 120:11,12 121:14  
 129:20 132:4 133:6  
 139:3 141:14  
 147:11,13,17 150:3,4  
 151:9 154:19 160:9,15  
 162:10 163:19,25  
 166:7 167:16 169:14  
 172:16  
**terribly (1)** 81:13  
**territorial (6)** 34:9,11  
 35:21 50:25 53:6  
 167:21  
**territory (3)** 5:11 47:7  
 159:18  
**test (21)** 4:10 11:15  
 31:5 57:17,21,22  
 59:15,22,24 62:24  
 70:25 71:9 76:15  
 94:19 96:12  
 135:19,20,21,25 136:1  
 153:2  
**testing (2)** 41:3 171:2  
**tests (2)** 36:13 135:11  
**thank (13)** 2:13 3:10  
 15:12,22 28:10 47:18  
 68:15 88:7 92:18  
 159:13 165:15  
 172:6,24  
**thats (72)** 3:4 27:15,25  
 28:2,8 31:10 32:25  
 43:10 54:24 55:9,11  
 56:9 57:22,23 61:4  
 66:22 74:10,24 75:4  
 76:3 79:1,1,11 80:10  
 82:24,25 91:19,21  
 92:15 94:13  
 100:2,18,23 101:5  
 105:20 107:5 111:10  
 112:16 113:16,19  
 116:5 120:4,17 122:11  
 124:5,7,13,14  
 126:9,21 127:20  
 130:6,11 131:20  
 132:7,25 134:24  
 135:23 136:3 143:17  
 144:21 145:13,13  
 146:14 147:4,14 156:6  
 158:8 159:9 166:11  
 170:4,22  
**theme (1)** 3:20  
**themselves (2)** 28:23  
 71:23  
**theoretically (1)** 30:24  
**thereafter (2)** 1:16  
 26:19

**thereby (1)** 97:24  
**therefore (25)** 22:5  
 49:14,17 52:7 59:19  
 62:8 66:8 88:9 93:8  
 97:21 99:13 102:12  
 105:22 110:20 112:9  
 120:24 127:3 135:10  
 137:1 149:18 163:19  
 164:10 166:22 167:6  
 168:12  
**theres (29)** 26:23 27:12  
 34:11,12 40:14 41:4  
 59:18 65:24 91:16  
 92:3 105:22 107:7  
 111:8 118:5 120:20  
 121:6 131:3 132:17  
 142:11 145:25 148:12  
 155:11 157:22  
 169:13,13  
 170:1,1,5,20  
**theyre (12)** 36:9 49:17  
 67:23 96:9 121:10  
 127:12 133:5  
 150:18,23 151:3 153:4  
 158:5  
**theyve (2)** 27:20 127:13  
**thin (2)** 38:20 161:16  
**thing (7)** 28:6 80:4  
 86:5,11 106:10 129:18  
 132:21  
**thinking (1)** 19:12  
**thinks (1)** 118:13  
**third (6)** 7:6 44:21 57:3  
 70:13,13 132:11  
**thirdly (1)** 24:15  
**thoroughness (1)** 20:14  
**though (8)** 30:25 59:14  
 106:14 115:25 121:24  
 150:17 151:6,6  
**thought (8)** 1:17 22:18  
 60:21 64:24 107:23  
 131:16 159:25 171:19  
**three (5)** 1:10 7:6 23:9  
 70:3 171:17  
**threshold (5)** 10:5  
 11:15,22 94:20 152:7  
**through (14)** 4:16,22  
 39:12 44:18 55:20  
 64:22 68:7 71:18  
 75:12 81:3 99:19  
 135:17 143:2 168:19  
**throughout (1)** 1:24  
**tied (1)** 74:21  
**ties (1)** 23:11  
**time (27)** 1:13,15 8:3,5  
 9:4,16 12:16 30:21  
 38:19 44:12 45:6 58:9  
 68:14 69:20,23 86:13  
 100:8 107:1 113:12  
 127:18,19 131:23  
 133:12 137:8 144:23  
 154:15 171:22  
**times (4)** 9:15 66:8  
 113:5 119:24  
**timetable (1)** 28:5  
**timetables (1)** 171:9  
**tiny (1)** 38:8  
**today (6)** 1:20,23 9:11  
 113:12 144:21 150:14  
**together (2)** 164:19  
 168:17  
**told (9)** 2:4,10 3:9  
 19:14 21:3 27:11,11

99:14 128:19  
**too (2)** 48:14 127:12  
**took (9)** 6:13 11:10  
 27:25 39:24 99:21  
 103:22 107:14 123:13  
 126:16  
**touchstone (1)** 60:5  
**towards (5)** 93:7 98:3  
 101:17 114:6 160:1  
**track (2)** 49:16 63:13  
**tracks (1)** 142:2  
**transcript (4)** 56:11,13  
 63:2 165:7  
**transformation (1)**  
 108:7  
**translate (1)** 141:17  
**translates (1)** 142:18  
**translating (1)** 142:18  
**trap (1)** 161:3  
**travesty (1)** 73:5  
**treat (5)** 7:18 12:21  
 59:5 163:23,25  
**treated (4)** 125:8  
 129:21 130:1 154:10  
**treating (2)** 109:18  
 129:17  
**treatment (1)** 4:22  
**treaty (1)** 4:17  
**trespassing (1)** 77:8  
**trial (70)** 2:1  
 14:11,12,25 20:20  
 21:1 22:4 23:2 24:14  
 27:22 36:10 54:9  
 64:7,11,16,22 67:20  
 68:2,6,7 69:6 70:2,17  
 71:24 72:4,9,18  
 73:1,22 75:18 76:2  
 78:10 84:9 89:9  
 90:6,18,21,24 92:10  
 93:1,3,4,7 99:4,6  
 100:13 113:1  
 114:4,11,15 115:8,10  
 124:12 127:25 129:11  
 130:8,8,12 131:19,24  
 132:1,10 136:7,7  
 145:12 151:1 163:8  
 168:25 171:18 172:16  
**tribunal (3)** 71:17,18  
 169:20  
**tried (4)** 46:22 68:24  
 115:5 150:12  
**tries (1)** 33:16  
**trigger (1)** 59:10  
**triumph (1)** 64:3  
**true (4)** 72:2 99:21  
 108:4 143:7  
**trumpet (1)** 73:17  
**truth (2)** 48:25 96:24  
**try (4)** 62:14,17 115:15  
 134:7  
**trying (10)** 32:21 34:21  
 60:24 82:10 89:13  
 104:7 108:20 121:14  
 137:16 140:24  
**tuesday (1)** 1:1  
**turn (10)** 4:2 7:1 13:10  
 35:6 41:6 47:15 107:4  
 115:23 118:18 122:22  
**turned (2)** 50:10 115:21  
**turning (3)** 4:12 73:12  
 95:8  
**turns (1)** 139:14  
**twist (1)** 40:10

**type (3)** 6:6 30:12 49:16  
**types (2)** 31:12 149:5  
**typical (3)** 90:23,23  
 136:18

---

**U**

**uk (1)** 66:19  
**ultimately (1)** 71:20  
**unable (2)** 45:18 99:12  
**unaffected (1)** 123:19  
**unavailing (1)** 4:1  
**uncertain (2)** 53:14,22  
**uncertainty (1)** 19:7  
**uncircumscribed (1)**  
 58:22  
**unconditional (1)** 75:23  
**uncontroversial (1)**  
 28:17  
**underlies (1)** 124:18  
**underlying (2)** 80:24  
 118:23  
**undermine (1)** 63:7  
**understand (30)** 19:11  
 20:1 23:21 36:19 48:6  
 74:7,10 75:3 78:14  
 81:24 82:10 93:16  
 104:10 105:8 122:2  
 124:20 134:21 135:16  
 140:23 148:7,19,19  
 151:2,16,23,23,24  
 152:10 159:17 172:15  
**understandable (1)** 74:9  
**understandably (2)** 64:2  
 160:8  
**understanding (1)**  
 104:24  
**understands (2)** 75:24  
 151:4  
**understood (7)** 82:15  
 104:8,23 113:13 124:2  
 167:8 169:9  
**undertake (1)** 62:13  
**undertaking (5)** 24:9  
 38:2 67:12 147:15  
 164:7  
**undertakings (3)** 60:16  
 149:4 163:7  
**underway (1)** 36:1  
**undisturbed (1)** 122:4  
**undone (1)** 121:10  
**undoubted (1)** 10:23  
**undoubtedly (1)** 56:3  
**unduly (2)** 49:13 60:8  
**unenforceable (1)** 66:7  
**unfettered (1)** 115:23  
**unforeseen (1)** 160:10  
**unfortunately (2)** 51:9  
 128:13  
**unhappy (2)** 33:15,25  
**unimpeachable (1)**  
 70:19  
**united (6)** 5:12 19:16  
 34:22 83:10,13,17  
**universal (1)** 75:8  
**universally (1)** 1:23  
**unless (10)** 34:16 43:13  
 59:3,17 68:13  
 157:22,22 159:11  
 171:10 172:5  
**unlike (1)** 141:1  
**unlikely (1)** 38:17  
**unnecessary (1)** 54:5  
**unpromising (1)** 57:5



unqualified (2)  
120:12,22  
unreal (1) 22:1  
unseat (2) 32:21 33:1  
unsolicited (5) 25:19  
52:16 53:25 54:13  
100:10  
unsuccessful (3) 20:25  
32:22 33:25  
unsuccessfully (1) 97:4  
unsustainable (1) 24:3  
until (11) 7:21 8:3 9:25  
19:3 30:16 59:3  
120:14,15 145:12  
150:14 171:10  
unwelcome (1) 54:5  
upon (11) 14:17 20:18  
46:7 54:24 65:16  
68:20 131:7 145:1  
164:3 165:4 170:15  
urgency (1) 172:15  
used (2) 57:21 151:22  
useful (6) 41:9 117:13  
118:14,16,16 171:2  
users (1) 57:15  
uses (4) 6:1 57:17  
58:23,25  
usher (1) 3:3  
using (1) 119:8  
usual (3) 8:21 112:18  
120:8  
utility (24) 20:2 53:14  
79:25 80:15,18,21  
81:6 82:7 94:4 102:18  
105:7,12 113:3  
116:11,15,17  
117:17,25 118:10,14  
133:8 134:12,16  
162:10

---

**V**

---

v (9) 33:20 36:1 38:9  
79:2 85:9 123:8  
152:20 156:9,25  
vacation (2) 34:2  
172:18  
valid (4) 141:2,5  
168:8,18  
validity (1) 44:4  
valuation (2) 169:15,20  
value (5) 18:5 37:7 89:4  
134:16,21  
variation (1) 92:24  
variations (1) 92:13  
variety (1) 86:20  
various (6) 9:8 72:25  
82:3 115:11 164:15  
171:25  
vary (1) 30:24  
vast (2) 58:6 164:24  
venue (1) 34:10  
vibe (1) 48:15  
vice (1) 148:7  
viewed (1) 40:23  
views (6) 11:5 17:8 32:3  
107:22 117:8 162:20  
vindicating (1) 142:22  
vis (4) 50:11,11  
150:11,11  
void (3) 151:18,22  
165:22  
volume (1) 38:20

---

**W**

---

wait (1) 32:11  
waiver (1) 6:6  
walker (1) 157:4  
wanting (4) 72:7 105:10  
122:8 133:23  
wants (1) 102:7  
warm (1) 135:6  
warnings (1) 52:14  
wasnt (7) 34:20 47:15  
55:25 67:18 79:21  
103:8 115:3  
wasted (1) 114:8  
way (58) 4:19 7:21,22  
22:13 26:11 30:9  
31:11 32:7 34:25  
39:12 41:3 44:10  
47:14,16,25 54:16  
60:18 69:18 77:16  
81:22 88:18,22  
89:18,18 90:21,25  
91:3,15 95:7  
104:21,23 106:13  
107:18 112:13 116:16  
119:1,6 120:8 124:6  
129:20 131:8 134:3  
135:11 137:15 139:21  
140:23 142:24 143:16  
144:6,20 146:1 148:15  
149:25 151:14 155:12  
158:4,19 171:2  
ways (4) 11:2 59:13  
61:19 108:3  
wed (2) 146:14 167:8  
weighed (1) 94:1  
weight (10) 18:5,25  
19:1 20:14 52:17  
59:16 83:21,21 89:4  
160:6  
wellestablished (1)  
156:3  
went (5) 3:24 8:19  
64:22 105:6 132:1  
westacre (1) 14:7  
weve (10) 5:6 7:3 22:22  
29:4,12 52:19 81:14  
82:15 124:24 171:25  
whatever (13) 12:9  
18:12 29:2 32:13 64:6  
88:19,25 110:5,8  
126:22 146:12 170:11  
171:21  
whats (1) 59:24  
whatsoever (2) 69:3,4  
whereas (1) 47:20  
whereby (1) 123:20  
whichever (1) 106:16  
whilst (2) 6:1 170:14  
white (2) 155:4,5  
whole (12) 23:5 86:20  
109:16 129:18 130:20  
132:21 133:12,24  
134:11 144:12 148:25  
164:3  
wholly (5) 17:19 58:21  
66:15,22 68:10  
whom (5) 7:13,14,16  
8:18 157:3  
wider (4) 32:2 42:7 49:5  
112:7  
width (1) 110:21  
willing (4) 16:11  
150:18,19,24  
wilsonian (1) 13:3

wish (4) 58:20 68:17  
112:25 161:10  
wished (2) 93:22 102:17  
wishes (5) 36:23 49:22  
117:8 156:12,13  
witness (13) 22:4  
26:8,24,25  
27:2,19,19,22,23  
28:5,7,12 115:8  
witnesses (1) 115:10  
wolff (1) 49:9  
wondering (1) 38:16  
wont (4) 18:21 28:6  
32:19 57:1  
wording (4) 45:12 48:21  
133:22 166:19  
work (1) 152:2  
working (1) 2:22  
world (8) 44:12 115:12  
121:23 133:18  
137:10,10 148:6  
162:24  
worry (1) 38:18  
worth (5) 17:4 29:13  
56:14 94:6 171:4  
wouldnt (10) 40:2 87:2  
111:15,16 112:15  
129:12 133:23 136:19  
142:24 145:7  
wriggle (2) 65:5 69:15  
written (1) 71:11  
wrong (10) 3:24 33:5  
41:20 64:4 77:11  
116:13 120:1 155:10  
157:11 171:14

---

**Y**

---

yessorry (1) 12:23  
yesterday (1) 57:20  
yet (3) 6:3 9:5 168:14  
york (60) 3:23 4:25  
5:4,14 6:19,22 7:10  
9:1 19:23 24:21  
28:20,24 29:14 30:11  
33:7,25 34:1,14,22  
39:16 42:9,24 46:10  
47:10 49:8 54:3 62:24  
67:13 70:12 72:24  
74:16 77:24 78:17  
85:21 86:5,24 87:21  
96:5,22 101:12,21  
102:6 103:5,9,18  
106:2,18 107:7,8  
108:15 110:24 114:23  
138:21 162:4,25  
163:3,13,22 164:25  
167:25  
youll (3) 32:19,21  
130:16  
youre (24) 2:18 12:6  
13:13 36:18,19 39:23  
42:13 47:22 55:16  
59:15 63:7 77:3 104:5  
107:18 133:22,23  
140:1 141:2 143:15  
148:23 149:15  
150:8,17,18  
yourself (2) 51:3 60:12  
yourselves (1) 1:18  
youve (15) 12:7 36:24  
44:19 50:14 59:18  
60:3 65:9 68:1 99:18  
107:17 113:4 126:13  
131:12 145:20 169:5

yurov (1) 123:8

---

**0**

---

05 (1) 114:13

---

**1**

---

1 (24) 5:7,10 15:17 40:8  
45:7 69:18 76:20  
94:8,9 95:8,10 97:25  
101:17 106:8 107:3  
119:22 120:1,8,21  
152:5 161:22,23  
166:24 174:3  
10 (5) 8:14 13:24 16:7  
81:25 156:9  
100 (2) 4:19 5:10  
101 (4) 5:13,13 7:9  
45:17  
1012 (1) 138:21  
102 (2) 5:17 6:25  
103 (3) 5:22,25 38:5  
1030 (1) 1:2  
1031 (1) 5:24  
1032 (3) 6:1,8 29:12  
1033 (6) 6:20 9:11  
14:8,23 42:24 163:15  
104 (2) 23:2 89:25  
106 (1) 56:12  
11 (7) 16:16 22:22  
56:12 103:23 128:23  
130:10 165:7  
110 (1) 48:18  
1111 (1) 157:2  
117f (1) 156:23  
119 (1) 56:13  
12 (8) 12:19,24,25 13:6  
16:17 21:9 82:1 93:3  
120 (1) 56:13  
1219 (1) 147:1  
127 (2) 23:13 165:9  
128d (1) 156:24  
13 (4) 10:3 17:1 52:22  
116:5  
130d (1) 156:24  
14 (3) 19:21 93:3 96:10  
144 (1) 165:14  
15 (7) 20:8  
26:1,10,10,15 94:8  
161:24  
152 (1) 104:25  
159 (1) 174:5  
16 (11) 13:3,3 15:14  
20:17 26:1,10,15  
34:25 65:13 87:19  
98:1  
17 (3) 97:25 156:7  
157:1  
171 (1) 95:1  
172 (1) 95:1  
173 (1) 95:1  
18 (2) 87:21 123:9  
182 (1) 45:7  
19 (7) 26:4,18 27:5,24  
72:13 99:2 157:1  
1991 (1) 123:9  
1996 (1) 7:9  
1a (1) 125:16

---

**2**

---

2 (29) 5:13 7:12 13:17  
21:21 22:8 23:3 40:8  
72:20 76:20 87:16  
89:24 90:17 91:22  
94:16 95:9,10 101:19  
103:23,25 104:25  
107:4 110:12 127:1  
152:4,5 158:12  
161:22,23 166:20  
20 (3) 27:16 92:15  
165:17  
200 (1) 90:2  
2013 (1) 87:19  
2014 (3) 125:12,19  
165:19  
201470 (1) 128:15  
2016 (2) 10:4 123:8  
2017 (22) 10:25 11:8  
12:21 13:7 21:8  
56:16,17 69:17 71:15  
72:19 73:21 77:14  
80:2 90:16 91:7 97:3  
98:2 110:7,7 124:4  
169:6,25  
2018 (3) 1:1 17:15  
92:11  
203 (1) 13:19  
204 (3) 125:14,19 127:8  
21 (3) 120:16 125:24  
146:11  
213 (1) 14:14  
22 (2) 10:15 98:23  
232 (1) 109:5  
25 (6) 7:4 43:1 53:13  
107:15 112:23 165:16  
267 (1) 10:16  
27 (5) 29:15 110:7  
131:6,21 158:12  
28 (5) 15:14,21,22  
19:20 110:6  
283 (1) 87:14  
298 (1) 85:13

---

**3**

---

3 (21) 6:18 21:8 23:9  
29:13 33:21 44:20  
45:7 47:10 49:15  
55:24 70:25 90:13  
94:19 100:2 109:13  
110:8 140:20,20  
152:4,6 164:2  
30 (3) 2:5,6 92:11  
31 (1) 1:1  
317 (1) 149:20  
32 (3) 50:20,22 160:25  
33 (1) 56:10  
34 (3) 56:10 116:10,13  
35 (2) 72:11 116:20  
36 (4) 72:11 117:3  
158:11 168:3  
37 (2) 53:23 117:5  
38 (4) 56:10 58:23  
109:21,22  
382 (4) 58:24 127:16  
154:5,20  
3821 (1) 154:13  
384 (18) 58:23 59:1,4  
61:20 62:9 94:20  
102:13 106:21 111:17  
112:21 147:2,11  
149:24 154:3,5,21  
159:6 160:22  
385 (1) 121:5

3852 (1) 147:1  
39 (2) 53:23 117:10

---

**4**

---

4 (8) 65:20 66:2 70:21  
94:22 120:17 121:17  
122:23 167:6  
414 (1) 4:19  
415 (1) 1:16  
417 (1) 172:9  
42 (1) 140:20  
420 (1) 172:25  
422 (1) 172:11  
45 (1) 157:2  
46 (1) 43:6

---

**5**

---

5 (7) 13:24 38:6 49:15  
85:8 120:13 121:17  
163:15  
50 (4) 100:4 130:14,16  
132:2  
51 (1) 56:10  
52 (2) 29:16 72:12  
53 (1) 163:16  
55 (1) 85:15  
56 (1) 17:20  
57 (4) 18:1 81:10 83:7  
113:5  
58 (6) 18:24 43:10  
83:13,19 86:1 113:5  
59 (7) 19:21 56:13  
81:10 83:11,14 86:1  
113:5

---

**6**

---

6 (4) 13:24 15:17 30:12  
80:1  
61 (1) 113:6  
62 (13) 7:5 39:17  
43:14,23 44:20 99:2,7  
109:13,14,15 110:4  
126:6,24  
6217 (1) 7:7  
6218 (2) 43:18 48:21  
6289 (1) 126:1  
63 (5) 17:14 18:9 81:10  
82:11 113:5  
64 (4) 20:2 79:23 101:5  
113:24  
65 (1) 113:24  
66 (1) 114:5  
67 (1) 114:10  
6718b (1) 7:8  
68 (1) 174:4

---

**7**

---

7 (28) 8:8 15:23 16:4  
17:5 21:22 22:6 34:5  
41:7 50:15 90:19 92:9  
97:13 117:24 124:6  
126:12,13 127:3  
128:1,11 129:11,12,19  
130:1 131:16 132:3  
137:1,5 167:9  
71 (1) 43:17  
72 (1) 43:23  
725 (1) 7:7  
73 (2) 44:8,16  
74 (1) 44:23

75 (2) 45:22 109:6  
75000 (1) 27:11  
76 (1) 122:23  
77 (2) 65:20 66:3  
78 (1) 66:22

---

**8**

---

8 (5) 8:8 16:2 22:7  
92:25 96:20  
80 (1) 66:22  
81 (1) 66:23  
811 (1) 122:23  
811b (1) 122:17  
85 (1) 123:9  
89 (1) 14:14  
8b (1) 8:11

---

**9**

---

9 (7) 8:14 16:6 34:16  
42:18 56:9 72:12  
92:25  
92 (1) 48:5  
93 (6) 14:14 72:19,21  
73:14,17,18  
95 (3) 17:6 48:13,16  
976 (1) 117:21  
98 (1) 96:20  
981 (1) 116:10